

BEFORE THE MARYLAND DEPARTMENT OF THE ENVIRONMENT

STEWARDS OF THE LOWER SUSQUEHANNA,)
d/b/a LOWER SUSQUEHANNA RIVERKEEPER)
ASSOCIATION, and) FERC Project No. P-405
) MDE WSA App. No.17-WQC-02
WATERKEEPERS CHESAPEAKE)
)

RESPONSE OF THE LOWER SUSQUEHANNA RIVERKEEPER, ET AL.
IN OPPOSITION TO EXELON GENERATION COMPANY, LLC'S
RENEWED REQUEST TO DISMISS APPEAL

Stewards of the Lower Susquehanna, d/b/a Lower Susquehanna Riverkeeper Association (hereafter "Lower Susquehanna Riverkeeper") and Waterkeepers Chesapeake (collectively, the "Waterkeeper Groups" or "Groups") provide the following response in opposition to Exelon Generation Company, LLC's ("Exelon's") "Renewed Request to Dismiss Appeal of Stewards of the Lower Susquehanna, d/b/a Lower Susquehanna Riverkeeper Association, and Waterkeepers Chesapeake for Lack of Standing" (hereafter "Request"). For purposes of this Response, the Waterkeeper Groups assume without conceding that the Maryland Department of the Environment ("MDE") is obligated to take up Exelon's Request to dismiss the Groups' appeal.¹

INTRODUCTION

The Waterkeeper Groups have specific interests in the water quality certification here at issue, and those interests are such that the Groups are personally and specially affected in ways that differ from those of the general public. In particular, the Groups have made material investments aimed at addressing the threat posed by discharges from Exelon's Conowingo Hydroelectric Project. These investments include nearly a decade worth of participation by the Groups in proceedings formally or informally tied to the relicensing of Exelon's Project by the Federal Energy Regulatory Commission ("FERC"), and the use of substantial funds raised by the Groups to obtain an independent evaluation of a major intergovernmental report. *See* sec. II.A, below. The Groups' interests are not premised on the generalized right of the public to access or to navigate waters. Rather, they stem from the Groups' and their members' concrete interest in achieving their organizational missions, by preventing catastrophic harm to the Lower Susquehanna River, the Susquehanna Flats, and the entire Chesapeake Bay from the "scouring" and discharge of millions of tons of materials that have accumulated in the reservoir that forms part of Exelon's facility.

¹ That assumption is at least questionable, because Exelon is not a party to the Groups' appeal, nor does it argue that MDE's regulations entitle it to submit requests to dismiss another's appeal. *Cf.* COMAR § 26.08.02.10(F)(4)(a) (stating only that "[a] person aggrieved by the Department's decision concerning a water quality certification may appeal the decision of the Department").

The fatal flaw of Exelon’s standing argument stems from its attempt to shoehorn this matter into an ill-fitting mold that was developed in the specialized context of local government zoning and land use decisions. Such decisions by definition involve intensely local issues tied to a particular parcel of real property. *See* sec. I.B.2, below. Although judicial common law and statutory interpretations involving the term “aggrieved” offer broad principles to guide MDE’s implementation of its own regulation, MDE is only bound by those rulings to the extent they are relevant to the distinct setting at hand: MDE’s regulations for the issuance and administrative appeal of its Clean Water Act § 401 certifications. The host of zoning cases on which Exelon relies provide little useful guidance for this matter beyond their affirmation of well-established principles of administrative standing.

The Waterkeeper Groups’ status as Intervenors in the FERC relicensing, their substantial material investments in that proceeding and related ones, and the specific personal and professional interests of their members, mean that the Groups and their members are personally and specially affected in a way different from the public generally. MDE should therefore decline Exelon’s Request.

I. LEGAL STANDARD

A. MDE’s “Person Aggrieved” Regulation And Relevant Considerations

MDE’s regulation provides that “[a] person aggrieved by the Department’s decision concerning a water quality certification may appeal the decision of the Department.” COMAR § 26.08.02.10(F)(4)(a). Because there is no further definition or elaboration of this requirement in the regulation, MDE may look to case law interpreting analogous requirements for administrative appeals for guidance.

The standing analysis begins with “the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute ... in question.” *Chesapeake Bay Found., Inc. v. Clickner*, 192 Md. App. 172, 191 (2010) (citing *Sugarloaf Citizens’ Ass’n v. Dep’t of Env’t*, 344 Md. 271, 295 (1996)² and quoting *Ass’n of Data Processing Service Org. v. Camp*, 397 U.S. 150, 153 (1970)). Here, the relevant zone of interests is quite broad as it encompasses interests protected under the Clean Water Act and Maryland’s water quality standards, 33 U.S.C. § 1251 *et seq.* and Md. Code Ann., Envir. § 9-302.^{3,4} The zone of interests in this matter is also geographically broad, because sediment

² *Sugarloaf Citizens’ Ass’n* was partially abrogated by statute, Md. Code (1982, 2013 Repl.Vol.), § 5–204(f) of the Environment Article, as stated in *Patuxent Riverkeeper v. Maryland Department of Environment*, 422 Md. 294, 298 (2011).

³ The objective of the Clean Water Act is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” in order to achieve the statutory goal of “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.” 33 U.S.C. § 1251(a).

⁴ Maryland’s statutes embrace a Statewide policy to “protect, maintain, and improve the quality of water for public supplies, propagation of wildlife, fish, and aquatic life, and domestic,

and nutrients discharged from the Conowingo Hydroelectric Project continuously flow downstream where they cause or contribute to diminished water quality, degraded substrate conditions, and harm to aquatic vegetation and wildlife. *See, e.g.*, Waterkeeper Groups' Administrative Appeal at 12, n.38 (June 8, 2018); MDE, Clean Water Act Section 401 Certification For the Conowingo Hydroelectric Project at 8, FERC Project No. P-405, MDE WSA Application No.17-WQC-02 (discussing water quality effects of discharges from the Conowingo Hydroelectric Project downstream in the Lower Susquehanna River and in Chesapeake Bay).

Thus, at a minimum the zone of interests encompasses organizations and their members who use and enjoy the waters, underwater habitats, and aquatic life that may be harmed by discharges from Exelon's Project.

For those within this zone of interests, one satisfies the test for administrative standing if the agency's decision may "affect a matter in which the protestant has a specific interest or property right [and] his interest therein [is] such that he is personally and specially affected in a way different from ... the public generally," and this must be determined "on a case by case basis." *Sugarloaf Citizens' Ass'n*, 344 Md. at 288 (citation and quotation marks omitted); *Bryniarski v. Montgomery Cty. Bd. of Appeals*, 247 Md. 137, 144 (1967). The special interests at stake may overlap somewhat with the general public's interests, but this does not negate one's standing. For example, "[t]hat the public generally has an interest in minimizing or avoiding sediment or other run-off in the State's waters is not, by itself, dispositive." *Chesapeake Bay Found., Inc. v. Clickner*, 192 Md. App. at 190-91 (remanding for consideration of whether the Foundation's interests stemming from its "investments of time and money and the [habitat monitoring] permits [they] hold" may be such that they are "affected differently than the general public").

As noted above, the Waterkeeper Groups are not aware of any controlling precedent interpreting the "person aggrieved" requirement under COMAR § 26.08.02.10(F)(4)(a). Because this regulatory requirement was established by MDE under its own authority to grant or deny water quality certifications, and its authority to hear administrative appeals of such decisions, MDE has broad discretion to interpret its standing requirements within the context of Maryland's water quality laws and policies; absent legal error, that determination must be accorded broad deference by any future reviewing court. *People's Counsel for Baltimore Cty. v. Maryland Marine Mfg. Co.*, 316 Md. 491, 496-97 (1989) (noting that "the order of an administrative agency must be upheld on judicial review if it is not based on an error of law, and if the agency's conclusions reasonably may be based upon the facts proven.").

B. Considerations That Are Not Relevant To This Standing Inquiry

1. Property generally

In an administrative appeal of a § 401 water quality certification, the possession of an ownership interest in real property confers no privileges over any other specific interest. Not

agricultural, industrial, recreational, and other legitimate beneficial uses." Md. Code Ann., Envir. § 9-302(b)(2).

only is “property ownership ... not an absolute requirement for standing” —as Exelon necessarily concedes, *see* Request at 6 (emphasis omitted)—it is not a requirement for aggrievement at all. *Chesapeake Bay Found., Inc. v. Clickner*, 192 Md. App. at 189 (confirming that “property ownership is not a prerequisite to aggrievement”). Nor is there a supposed “stern burden of proof” that applies to non-property owners under MDE’s regulations that govern this appeal. Rather, the ownership of property is nothing more than a “shortcut” that applies specifically in a request for “judicial review of administrative land use decisions.” *Sugarloaf Citizens’ Ass’n*, 344 Md. at 297 (emphasis added).

Of course, there are numerous types of administrative decisions that, like this one, have no particular connection to property. In these cases, the possession or non-possession of property interests is simply irrelevant. *See, e.g., Jordan Towing, Inc. v. Hebbville Auto Repair, Inc.*, 369 Md. 439, 442 (2002) (recognizing that persons holding towing licenses are aggrieved by county’s issuance of an additional towing license). Here, aggrievement should be measured in light of the administrative action at issue: MDE’s issuance of a water quality certification governing Exelon’s “activity [that] may result in any discharge into the navigable waters” of Maryland, and the effects of such discharge upon the recreational and aquatic habitat uses for which those waters are designated. 33 U.S.C. § 1341; Md. Code Ann., Envir. § 9-302, *et seq.*

Almost all of the cases on which Exelon relies are local zoning cases.⁵ As detailed further below, unlike the Clean Water Act § 401 water quality certification program and the Conowingo Hydroelectric Project at issue, zoning disputes by their very nature typically involve a narrow, localized zone of interest focused on specific parcels of property. One other cited case, *Becker v. Litty*, 318 Md. 76, 83, 566 A.2d 1101, 1104 (1989) arose from a private dispute filed directly in court involving two neighboring property owners. Because *Becker* did not involve a challenge to an administrative decision, it has nothing to say about administrative standing. *Id.* But it is very similar to the zoning cases, and very unlike the Waterkeeper Groups’ administrative appeal, because the plaintiff there explicitly based his legal claims on allegations that his riparian property rights were harmed and his property values diminished.

2. Zoning and land use and their often narrow zone of interests

While Exelon’s Request is based almost entirely on zoning cases, it offers no legal principle or controlling case law requiring MDE to shoehorn its own “aggrieved” requirement into a property-centric framework.

Although “the standing principles articulated in *Sugarloaf* and similar cases continue to apply to land use actions,” *Greater Towson Council of Cmty. Ass’ns v. DMS Dev., LLC*, 234 Md. App. 388, 407 n.5 (2017), *cert. denied sub nom.*, 457 Md. 406, 178 A.3d 1246 (2018), they do

⁵ *Chesapeake Bay Found., Inc. v. DCW Dutchship Island, LLC*, 439 Md. 588 (2014); *Chesapeake Bay Found., Inc. v. Clickner*, 192 Md. App. 172 (2010); *DiNapoli v. Bd. of Appeals of Queen’s Cty.*, 223 Md. App. 768, 2015 WL 5945343 (2015); *Greater Towson Council of Cmty. Ass’ns v. DMS Dev., LLC*, 234 Md. App. 388 (2017); *Comm. for Responsible Dev. on 25th St. v. Mayor & City Council of Baltimore*, 137 Md. App. 60 (2001); and *Ray v. Mayor & City Council of Baltimore*, 203 Md. App. 15, 30 (2012) (citing a list of “pre-Bryniarski opinions,” all of which were zoning cases), *aff’d*, 430 Md. 74, 59 A.3d 545 (2013).

not purport to impose the narrow zone of interest associated with such cases on non-zoning matters like this one. A quick review of the provenance of zoning and land use cases demonstrates why their relevance to this case is quite limited.

Zoning and land use cases by definition involve a narrow zone of interests because they typically involve the question of how changing the legal status of a particular parcel of real property may affect the interests of adjacent or neighboring property owners. The “primary objective” of zoning “is the immediate regulation of property use through the use of use classifications.” *Mayor & Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 530 (2002) (emphasis added). Land use planning “requir[es] that zoning or other land use decisions be consistent with a plan’s recommendations regarding land use and density or intensity.” *Id.* at 531. “[Z]oning necessarily impacts the economic uses to which land may be put, and thus impacts the economic return to the property owner.” *Id.* at 536 (emphasis added). To maximize fairness to property owners, zoning officials must ensure “that restrictions within a zone apply uniformly to all of the properties within that zone,” in order to “protect land owners from arbitrary use of zoning powers by zoning authorities.” *Id.* at 538 (emphasis added).

Non-property owners may still be specially aggrieved by a zoning decision, but non-property owners must still contend with the property-specific nature of zoning cases. *Ray v. Mayor & City Council of Baltimore*, 203 Md. App. at 26, 35 (discussing the narrow interpretation of “nearby” property owner, and noting that a more distant rental occupant bears a “stern” but not impossible burden of proof). *See also Holland v. Woodhaven Bldg. & Dev., Inc.*, 113 Md. App. 274, 281–82, 687 A.2d 699, 703 (1996) (stating that a zoning decision that exacerbates overcrowding of the elementary school attended by complainants’ children could support a finding of special aggrievement but ultimately did not compel zoning board to make such finding), *abrogated on unrelated grounds by Layton v. Howard Cty. Bd. of Appeals*, 399 Md. 36, 922 A.2d 576 (2007).

Importantly, certain types of zoning actions have a broader zone of interests than typical cases, including zoning cases affecting the Chesapeake Bay Critical Area Protection Act. *See Chesapeake Bay Found., Inc. v. Clickner*, 192 Md. App. at 175 (“The Island is located within the Chesapeake Bay Critical Area and is subject to those provisions of the Anne Arundel County Zoning Ordinance that restrict development activities in the Critical Area.”); *Chesapeake Bay Found., Inc. v. DCW Dutchship Island, LLC*, 439 Md. at 592 (case involving Critical Area law); Md. Code Ann., Nat. Res. § 8-1801 (describing the legislative purpose of the Critical Area law as, among other things, “[t]o establish a Resource Protection Program for the Chesapeake and the Atlantic Coastal Bays and their tributaries by fostering more sensitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats.”).

Thus, other than the basic framework for aggrievement, (*i.e.*, demonstration of a specific interest or property right that may be affected in a way different from the public generally) the courts have never purported to establish a universal or limiting definition of the “aggrieved” requirement—much less have they suggested that a “comprehensive permitting relationship” with the State is the only cognizable interest other than a property right. *Contra* Request at 6-7 (quoting *Chesapeake Bay Found., Inc. v. Clickner*, 192 Md. App. at 190). Insofar as it is relevant to this matter, *Clickner* simply affirmed the longstanding general principles articulated in *Bryniarski* and *Sugarloaf*. *Id.* at 190. Significantly, the court affirmed that it is a legal error to

“focus[] exclusively on the question of property ownership,” and directed the board to “determine whether these investments of time and money and the permits the appellants hold are sufficient to satisfy the first prong of the test for aggrievement.” *Id.* (emphasis added).

II. THE WATERKEEPER GROUPS MEET MDE’S REGULATORY REQUIREMENTS FOR ADMINISTRATIVE APPEAL

A. The Waterkeeper Groups Fall Squarely Within The Relevant “Zone Of Interests,” And Are “Persons Aggrieved” In Their Own Right

The Waterkeeper Groups exist for the specific purpose of accelerating the recovery and preservation of water quality in the Lower Susquehanna River and Chesapeake Bay. *See* Declarations of Theodore Evgeniadis, Michael Helfrich, and Elizabeth Nicholas.⁶ The discharges governed by the water quality certification here at issue threaten to reverse the gains the Groups have worked for, and prevent attainment of their organizational missions. This places them well within the zone of interests relevant to MDE’s issuance of § 401 water quality certifications.

In order to advance and protect their organizational interests and those of their members, the Waterkeeper Groups have obtained legal status as Intervenors in the relicensing process for the Conowingo Hydroelectric Project before FERC, Project No. P-405. *See* Waterkeeper Groups’ Administrative Appeal at 2, n.2. Through the work of their staff and engineering consultants, the Waterkeeper Groups have made unique and important contributions to the understanding of how, over the course of the requested 50-year license and certification period, scouring and discharge of sediment, nutrients, and other material stockpiled behind Conowingo Dam threatens to devastate the Lower Susquehanna River and Chesapeake Bay. *Id.* at 4, n.3 (discussing Paul Frank, P.E., FlowWest, LSRWA Modeling Review Final Report (Aug. 25, 2017), a third-party evaluation of the report and recommendations produced by the Lower Susquehanna River Watershed Assessment). *See also* Decl. of Betsy Nicholas at ¶¶ 7-12 (discussing substantial material investment of funds raised to support the Lower Susquehanna River Watershed Assessment (“LSRWA”) Modeling Review Final Report). They have made these investments because they are seriously concerned that scoured discharges from the Project have not been adequately assessed or addressed in the water quality certification, and that consequently such discharges will preclude the Groups’ ability to achieve their organizational missions, and harm the personal and professional interests of their staff and members.

MDE should reject Exelon’s arguments about public access and public navigation because they are a red herring. The general public certainly has an interest in accessing and navigating Maryland waters, but neither of these general public rights have ever formed the basis for the Waterkeeper Groups’ assertion that they are aggrieved in this proceeding. Rather, like the Groups’ administrative appeal itself, their aggrievement is based on the threat that potentially-catastrophic scoured discharges will negate the Groups’ material investments aimed at addressing those discharges, and thereby render their organizational missions impossible to

⁶ The Waterkeeper Groups previously provided copies to MDE of the declarations submitted in the related U.S. District Court matter, along with a request that MDE include those in the record of this proceeding. The Groups submit herewith an updated declaration for Elizabeth Nicholas of Waterkeepers Chesapeake.

attain—potentially for many decades. *See* Waterkeeper Groups’ Administrative Appeal at 3 (stating that “[t]he quality and success of all [the Waterkeeper Groups’] programs depend[] in large part on having good water quality and a high degree of ecological integrity and excellent aquatic habitat in the Lower Susquehanna River and Chesapeake Bay.”). That the Groups have made material investments of time and resources, and have attained Intervenor status in the related FERC proceeding, sets their interests apart from the general public’s and satisfies the basic requirements for aggrievement to appeal an administrative decision.

B. The Waterkeeper Groups Are Aggrieved As Representatives Of Their Staff And Members

While the Waterkeeper Groups are aggrieved in their own right, MDE can and should also address the Waterkeeper Groups’ administrative appeal on the grounds that the Groups’ members are aggrieved. Members who count on the Waterkeeper Groups’ advocacy to advance their personal and professional interests will also be harmed by inadequately-controlled discharges from the Conowingo Hydroelectric Project.

Keith Williams is a board member of the Lower Susquehanna Riverkeeper, and is also Executive Director of NorthBay, an educational facility that sits on the Chesapeake Bay. *See* Decl. of Keith Williams. In his personal capacity Mr. Williams has enjoyed exploring the Susquehanna Flats, a vast underwater forest formed by submerged aquatic vegetation, and has written a book to promote snorkeling in this specific part of the Susquehanna and Chesapeake Bay ecosystem. In his role at NorthBay, he directs the facility’s integration of the Bay’s ecosystem into its educational programming. He counts on the Lower Susquehanna Riverkeeper to represent his interests in preserving and advancing the recovery and sustained health of the Bay’s underwater ecosystem, and is concerned that failure to protect that ecosystem in MDE’s water quality certification will harm his personal and professional interests. *Id.* ¶¶ 5-12. His personal and professional interests are such that they will be affected in a manner that is different from the general public.

Bruce Russell is a member of the Lower Susquehanna Riverkeeper. *See* Decl. of Bruce Russell, ¶ 2. In his professional capacity he is the President of the Board of Directors of the Havre de Grace Maritime Museum, which sits on the Chesapeake Bay and integrates the ecosystem of the Bay into its programming. *Id.* ¶¶ 4-11. In that role he has helped oversee the Museum’s collaboration with the city of Havre de Grace to work on planting an extensive 1.5 acre riparian buffer along the waterfront. The Museum aims to use the restored wetland and shoreline to create a “living classroom” for its educational programs. He is “concerned that the progress achieved with this project could be lost or substantially diminished due to increased discharges from the Conowingo Hydroelectric Project during storms.” *Id.* ¶ 11. To prevent such an outcome, he counts on the Groups’ advocacy in this proceeding and the related FERC proceeding for re-licensing the Conowingo Dam. *Id.* ¶ 16. Like Mr. Williams, his personal and professional interests are such that they will be affected in a manner that is different from the general public.

MDE has not interpreted its regulations to bar aggrievement based on the interests of an organization’s members, nor is it obligated to. MDE only needs to determine that the Waterkeeper Groups are aggrieved for purposes of this administrative appeal; it need not, and

cannot, address the hypothetical question of whether a court may later determine that the Groups have standing to obtain judicial review of MDE's final water quality certification decision. *See Sugarloaf Citizens' Ass'n*, 344 Md. at 289 (ruling that an administrative law judge acting under MDE's delegation "went beyond her proper role" by "rendering findings and conclusions on the plaintiffs' entitlement to maintain a judicial review action."). By the same token, MDE's standing determination in this proceeding is bound only by judicial interpretations of administrative "aggrieved" requirements, not by common law or statutory requirements that govern eligibility to bring an action in court. *Id.* at 289-90 (citing Md. Const. Decl. of Rts. Art. 8).

Exelon seems to argue, erroneously, that Maryland courts have imposed upon administrative appeals the identical limits that courts have developed for obtaining judicial review, but Exelon cites no support for this assertion. Here again, it relies on cases discussing standing requirements applicable only to court actions. Request at 2 (citing *Voters Organized for the Integrity of City Elections v. Baltimore City Elections Bd.*, 451 Md. 377, 396 (2017); *see Voters Organized*, 451 Md. at 396-97 (discussing requirements "for an organization to have standing to bring a judicial action"); and citing *Greater Towson Council of Cmty. Ass'ns v. DMS Dev., LLC*, 234 Md. App. at 412 (2017); *see Greater Towson Council*, 234 Md. App. at 414 (discussing standing requirements "[b]efore the circuit court"). Nor does Exelon cite any relevant or compelling policy reason for MDE to refrain from recognizing the Groups' aggrievement based on the interests of their members. The policy underlying that limitation on court standing is, once again, specific to the zoning context: "an individual member of a neighborhood association is not 'aggrieved' for the purposes of standing before the circuit court simply because another member of the same neighborhood owns property" that is adjoining, confronting, or nearby. *Greater Towson Council*, 234 Md. App. at 413. At most the courts have stated that statutory requirements for judicial review mirror common law requirements for judicial review. *Sugarloaf Citizens' Ass'n*, 344 Md. at 288 (discussing Maryland's Administrative Procedure Act). Under the separation of powers principle embodied in Maryland's Constitution, that is the limit of the courts' jurisdiction.

As discussed above, the Waterkeeper Groups are aggrieved in their own right, given their legal status as Intervenors in the FERC licensing proceeding and their material investments toward addressing the issues they have raised there and before MDE. At the same time, MDE can and should recognize the Groups' standing on behalf of their members, whose specific interests in the habitats of the Lower Susquehanna River and Chesapeake Bay are such that they are affected differently from the general public.

III. TRACEABILITY AND REDRESSABILITY

Waterkeeper Groups next address Exelon's arguments regarding redressability and traceability, assuming without conceding that these limitations apply to administrative appeals. *See* Request at 7 (citing *Grueff v. Vito*, 229 Md. App. 353, 378, 145 A.3d 86, 100 (2016) (discussing Maryland common law requirements for "standing to sue"), *cert. granted*, 450 Md. 664, 150 A.3d 819 (2016), and *aff'd*, 453 Md. 88, 160 A.3d 592 (2017)).

The threatened harm to Waterkeeper Groups' interests discussed above are indisputably traceable to Exelon's activities involving discharges into the Lower Susquehanna River and

Chesapeake Bay, and those same discharges are the very subject of the water quality certification here at issue. Exelon's argument to the contrary rests on the notion that Exelon's discharges must constitute the only source of harm to the Groups' interests, but it cites no support for this novel idea. Moreover, scour from behind the Conowingo Dam can comprise a substantial portion of the total. The modeling completed in the LSRWA estimated that, "[f]or the entire time period of 2008-2011 under 2011 bathymetry, scour from the Conowingo Reservoir (estimated 3.0 million tons) comprised 13 percent of the total sediment load to the Chesapeake Bay (estimated 22.3 million tons)" LSRWA at 159 (May 2015). During large storms, scoured discharges from Conowingo Reservoir can contribute a greater percentage of the total; the same study estimated that, during Tropical Storm Lee, 20 percent of the total sediment load came from "scoured bed sediment" from behind the Dam. *Id.*

Exelon's argument regarding redressability fares no better. It rests entirely on its claim that FERC cannot incorporate any revised conditions MDE may include as a result of this administrative appeal. As an initial matter, Exelon appears to mischaracterize a statement made by counsel for MDE, in which counsel characterized FERC's position on a related legal question. Transcript of Sept. 6, 2018 Hr'g 20:22–21:1. Further, this argument goes to the merits of both Exelon's and the Waterkeeper Groups' administrative appeals, and is therefore irrelevant to the question of aggrievement. *Sugarloaf Citizens' Ass'n*, 344 Md. 271 at 294–95 ("The status of a person to [obtain judicial review] as a 'person aggrieved' is to be distinguished from the result on the merits of the case itself.... Because the result on the merits might be adverse, however, does not mean that the protestant would not have status to challenge the board's action." (citation and quotation marks omitted)). In any event, section 401 of the Clean Water Act states unambiguously that conditions included in Maryland's certification for the Conowingo facility "shall become a condition on any Federal license" issued to the facility. 33 U.S.C. § 1341(d). This is not the proper venue for Exelon to press arguments to the contrary, because such arguments are aimed at FERC's authority, and MDE has no jurisdiction over FERC's decisions.

Regardless, for Exelon's redressability argument to succeed it would have to demonstrate that the relief the Waterkeeper Groups request is futile. But Exelon does not, and cannot, argue that FERC lacks discretion to incorporate Maryland's conditions. At a minimum, FERC retains discretion to incorporate any conditions that MDE includes in its water quality certification; any claim that FERC will refuse to do so is speculative. A revision of the certification to include conditions the Groups seek would provide the Groups with a legal tool they can use to ensure that the conditions are incorporated into the FERC license. This alone means that the threatened harm to the Waterkeeper Groups' interests is redressable by an MDE decision to revise the water quality certification as the Groups have requested.

CONCLUSION

For the foregoing reasons, the Waterkeeper Groups respectfully request that MDE deny Exelon's Request.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2018, that I have served the foregoing document upon counsel for MDE and Exelon via electronic mail:

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Jennifer C. Chavez

Attachment 1

BEFORE THE MARYLAND DEPARTMENT OF THE ENVIRONMENT

STEWARDS OF THE LOWER SUSQUEHANNA,)
d/b/a LOWER SUSQUEHANNA RIVERKEEPER)
ASSOCIATION, and) FERC Project No. P-405
WATERKEEPERS CHESAPEAKE) MDE WSA App. No.17-WQC-02
_____)

DECLARATION OF ELIZABETH NICHOLAS

I, Elizabeth Nicholas, declare as follows:

1. My name is Elizabeth Nicholas. I am over 18 years of age, and I am competent to give this declaration. The information in this declaration is based on my personal knowledge, information, and belief.

2. I reside in Washington, DC.

3. I am the Executive Director of Waterkeepers Chesapeake, Inc., d/b/a Waterkeepers Chesapeake (WKC), and have worked for the organization since December 1, 2012.

4. WKC has its offices at 6930 Carroll Avenue, Suite 820, Takoma Park, MD.

5. WKC is a nonprofit organization, founded in 2012, as coalition of eighteen independent, non-profit Waterkeeper organizations, united around a shared goal of swimmable, fishable, drinkable waters. Waterkeepers Chesapeake works on clean water issues that our members identify as consensus priorities. By sharing resources and drawing on individual strengths, the members of Waterkeepers Chesapeake can strategize and work regionally to fight for safe and healthy waterways.

6. WKC works throughout the 64,000 mile Chesapeake Bay watershed, which includes the full length of the Potomac, Susquehanna, and James Rivers, and encompasses

territory in Maryland, Virginia, West Virginia, Pennsylvania, Delaware and the District of Columbia. The Chesapeake Bay Watershed includes parts of New York, but none of our member organizations' watersheds extend into New York.

7. As part of its work, Waterkeepers Chesapeake has worked to help inform FERC, Exelon, Maryland and other Bay states, cooperating federal agencies, its members, and the public about the impending water quality issues associated with the changing circumstances at the Conowingo Hydroelectric Project.

8. In particular, WKC intervened in the FERC relicensing process, and provided numerous sets of comments through the subsequent study processes raising concerns about the bathymetry in Conowingo Reservoir and the increased accumulation of sediment and associated nutrients trapped by the Dam and Reservoir.

9. In my role as Executive Director of WKC, I reviewed and analyzed the conclusions of the Lower Susquehanna River Watershed Assessment (LSRWA) that were published in a final report in February of 2015, conducted by the U.S. Geological Survey the Army Corps of Engineers and numerous other stakeholder participants, including the Lower Susquehanna Riverkeeper (LSRK), Michael Helfrich, at the time. The report sought to analyze the impacts of sediment and nutrient transport through Conowingo Dam on the Chesapeake Bay.

10. Following publication of the final LSRWA, WKC and LSRK obtained grant funding to conduct an independent analysis of the LSRWA.

11. In my role as Executive Director of WKC, I authorized payment of \$15,000 for a professional hydrological engineer to analyze the LSRWA, focusing on the modeling inputs, data analysis and resulting conclusions. The engineering consultant, Paul Frank of Flow West, prepared a report providing an assessment that the LSRWA underestimated peak flows in storm

events modeled, failed to model storms that are likely to occur in the during the license period, didn't consider climate impacts, and used the wrong months to analyze impacts on submerged aquatic vegetation impacts.

12. In my role as Executive Director for WKC, I arranged meetings with MDE personnel to share the information from the independent assessment. I also raised these issues in comment letters and testimony in public hearings regarding the development of the 401 Water Quality Certification for Conowingo.

13. WKC regularly engages in advocacy work to ensure implementation and completion of the 2010 Chesapeake Bay TMDL, in order to improve water quality and restore healthy aquatic habitat in the Chesapeake Bay.

14. WKC has 18 member Waterkeeper organizations who collectively have tens of thousands of members who live and work in the Chesapeake Bay watershed. Members of these organizations regularly use and enjoy the natural resources of these waterways for fishing, swimming, boating, hunting, wildlife viewing, and other purposes.

15. WKC's members are adversely affected by pollution that hinders or negatively affects their ability to use and enjoy these resources.

16. I use and enjoy the Lower Susquehanna River, many sections of the Chesapeake Bay, as well as many other rivers and streams and rivers in the Chesapeake Bay for aquatic recreation, including kayaking, boating and rafting.

17. As Executive Director of Waterkeepers Chesapeake, I use the Chesapeake Bay and its rivers and stream to support my water-based organizational operations, including hosting regional retreats for all 18 Waterkeeper member organizations and engaging in on-the-water

activities throughout the basin, including in the Lower Susquehanna River. I plan to continue doing so to the greatest extent possible in the future.

18. In my role as Executive Director of WKC, I am aware that there are numerous tidal rivers and tributaries in Maryland that have been formally identified as impaired by nutrients (phosphorus, nitrogen) and sediment.

19. I am also aware that on May 11, 2018, MDE issued Exelon its Section 401 water quality certification for the Conowingo Dam without addressing significant concerns.

20. As Executive Director of WKC, I am also aware that Section 401 of the Clean Water Act gives states the authority to review any federally-permitted or licensed activity that may result in a discharge to navigable waters, and to condition the permit or license upon a certification that any discharge would comply with key provisions of the Clean Water Act and appropriate state laws. This expansive certification authority preserves a substantial role for the states in protecting water quality, even when permitting authority lies solely in federal hands.

21. The Chesapeake Bay TMDL did not include a wasteload or load allocation to accommodate discharges of sediment or nutrients scoured from behind the Dam, and did not purport to relieve Exelon of its responsibility for such discharges. MDE is therefore empowered to look beyond the Chesapeake Bay TMDL and independently ensure the Project's sediment discharges do not interfere with attainment of the TMDL, or with the designated uses, which ensure support of estuarine and marine aquatic life and shellfish harvesting.

22. I understand that over the past century, the Northeast (including the Chesapeake Bay region) has experienced increases in the average annual temperature, amount of precipitation, and amount of extreme precipitation events, and these trends are expected to continue and strengthen in the coming years due to climate change. This combination of factors

only furthers the problems associated with the Dam; when a large storm occurs, a large load of the trapped sediment and nutrients that have accumulated in the reservoir will be discharged by Exelon's operation – so much sediment that it will take years for the underwater plants, oysters, and other aquatic life to recover. This type of situation is virtually certain to happen again during the 50-year license period, and the results will be worse than ever since there is now more sediment than ever behind the dam.

23. I also understand that MDE cannot rely on the Chesapeake Bay TMDL to account for the effects of climate change, and must independently analyze the best available climate projections for the region in order to account for these additive impacts.

24. My harms would be redressed by a decision by MDE to reconsider and revise the Certification and undertake additional actions as necessary to ensure that the scouring and discharge of sediment and associated nutrients from the Project will not cause or contribute to violations of the applicable water quality standards for the Lower Susquehanna River and Chesapeake Bay.

25. My interests would be protected by a decision of this Court upholding Maryland's full authority and duty to protect water quality under its water quality certification authority in the Clean Water Act. Conversely, my interests would be harmed by an order denying or constricting Maryland's authority under the Act.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Executed on this 5th day of December 2018.



ELIZABETH NICHOLAS