



Promoting Conservation, Stewardship and Restoration of
Deep Creek Lake and its watershed since 2008

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To: John Grace, Chief of Source Protection and Appropriations Division, Water Supply Program, Maryland Department of Environment

From: Friends of Deep Creek Lake Board of Directors

RE: Water Appropriation and Use Permit Application GA 1992S009/09
For Deep Creek Hydroelectric Station

Date: May 9, 2019

MDE is currently undertaking review of a Water Appropriations Permit application submitted by Brookfield Renewal for Deep Creek. Friends of Deep Creek Lake has appreciated the opportunity to participate in Stakeholder meetings and to provide comments on the application.

Below we provide our comments on three broader areas which Friends of Deep Creek Lake believe should have been addressed and resolved prior to review of the permit relicensing process and decision.

Broader related policy issues should have been addressed before initiation of Deep Creek Hydro permit relicensing.

ITEM # 1: Policy of relicensing for Deep Creek Hydro should have been consistent with the State policy and actions for the Conowingo Dam.

The policy framework and approach articulated by MDE should have applied to the Deep Creek Hydro permit review as well:

“Maryland’s holistic strategy on the Conowingo Dam is a smart way to restore the Chesapeake Bay . . . With a cleanup plan specific to the Conowingo Dam, dredging that provides materials for beneficial reuse, and an environmental plan for the dam’s relicensing that includes stringent environment conditions, we have help launch a restoration economy and restore the Bay” (MDE Secretary Ben Grumbles)

The Exelon Power Corporation holds the operating permit for the Conowingo Dam and began power generation in the late 1920s. This dam is licensed under the Federal Energy Regulatory Commission (FERC). The dam license is up for renewal. For the past 4 years, the State has battled with the corporation and in the courts to force Exelon to pay for the costs of sediment and attached pollutants which have accumulated behind the dam.

These two dams are the only hydroelectric power dams in the State of Maryland and should be reviewed through the same policy and approach.

1. Both dams were built and began operating 9 decades ago.
2. Both operating permits are under relicensing review.
3. Both dams have created sediment accumulation.
4. Sediment accumulated is now a substantial threat at both dams, decline in water quality, the natural and recreational resource and grave negative economic impacts.
5. The current operators have not operated the dams during the entire period of sediment accumulation.

MDE should have used the precedent set on the Conowingo Dam review and goals for dredging, adoption of stringent environment conditions” and holistic strategy to use this process to launch a restoration approach for Deep Creek Lake and the local economy.

ITEM #2: Sediment removal would resolve competition for water uses.

At Deep Creek Lake, dredging of the sediment filled coves in the lake would provide for substantial reduction in conflict among the dam operator, downstream users and recreational user. In fact, the Permit Amendment in 2011 was an effort to mitigate reduced water depths in certain areas of the lake caused by sediment accumulation by adjusting the Upper Rule Band to hold water levels higher through the month of July.

Lake dredging is a best management practice accepted throughout the world and should be undertaken at Deep Creek Lake for many reasons, including easing of dam operations and water releases. Delay in dredging will only serve to increase pressures on water uses by all stakeholders, as sediment will continue to accumulate and recreational uses will decline, along with negative impacts on the ecological balance of the lake and the local resort-based economy.

Issue #3. Maryland or FERC permit? The other hydroelectric dam, Conowingo Dam, has a FERC license. Further of the 70+ operating permits Brookfield Renewal has in the United State all are under FERC, except Deep Creek Hydro. Prior to proceeding on the Deep Creek application for another 12 years permit, DME should have undertaken an in-depth assessment on the costs and benefits.

- What would be costs and benefits to the State, Deep Creek Lake and the Deep Creek watershed to shift this license to FERC?
- If State choses to holding the licensing function, what components of a standard FERC license should incorporate into a State permit?
- What are the administrative costs to the State for permit management? Why doesn't the State charge an administrative fee instead of allowing the dam operator to operate at no charge.

Details of this policy question in Appendix A.

Item #4: Apparent conflicts exist between two sections of the Code of Maryland which set forth regulatory framework for Deep Creek Lake management. Chapter 26. 17.06.06 guides water appropriation releases and is implemented by MDE; and 08.08.01 guides lake management and purposes and is implemented by DNR.

Friends of DCL does not accept the MDE assessment that water releases meet the “reasonableness” criteria set in the Code. Why? The fact is water releases at Deep Creek Lake are directly responsible for negative and “unreasonable” impacts on both the resource by contributing to decline in water quality as well as directly and substantially impairing recreational uses, particularly in the sediment impacted areas in the southern section of the lake.

We understand the AG staff for MDE has provided “client privileged” advice to staff on this matter but AG staff for DNR have not done so. And, neither agency has provided to the stakeholder group this advisement.

Friends of DCL requests that Finding from the AG’s Office to resolve this fundamental and apparent conflict between the 2 codes which guide Deep Creek Lake management. Failure to provide full assessment on this issue is not acceptable to Friends of Deep Creek Lake since this matter was core to the stakeholder discussion but left unresolved. This has been in place for 20 years, since the state purchase of DCL and now is the time to resolve the matter.

- a. Friends of DCL will make a formal request to the Secretaries of MDE and DNR for such Finding.
- b. No final decision on the Water Appropriations application should be made until such a Finding is released and until the following has occurred: stakeholders have 60 days to review such Finding and have the opportunity to request a hearing, if they so determine.

Details of this policy issue in Appendix B.

Friends of DCL Position on the Water Appropriation Application.

- A) **We oppose the applicant's request to increase in water amounts in wet seasons.** Our position is guided by our analysis and input from a survey we conducted with lake stakeholders. Friends of DCL has strong engagement from lake property owners and organizations in the southern section of the lake. We have surveyed our constituent group to get their opinion on this issue. Results of the survey are in Appendix C

Brookfield has managed in the recent “wet years” to deal with increase water flows. Our position is the permit should not be changed. Further, we are leery of approving substantial increases in water releases given the unreasonable and negative impacts to recreational uses during the season. If, on the other hand, the State of Maryland were to undertake a capital investment project to dredge the 10 sediment impacted coves, we would be open to expanding water releases.

- B) **We support the formation of an on-going working group** of stakeholder representatives, the dam operator and the two state agencies—MDE and DNR—as follow-up to the productive communications and information sharing which has taken place in our 3 stakeholder meetings.

The purpose of such a Working Group would be two-fold: 1) to increase public education and awareness of the challenges of dam operations; and 2) to address the difficult challenges experienced in the dry seasons and inform all stakeholder groups of efforts to balance water resources.

- C) **We oppose request to extend the TER process into September.**

- D) **Friends of Deep Creek Lake requests inclusion in the stakeholder group materials the following revisions.**

“1) MDE reports that the 1994 Support Document clearly identifies recreational boating as a project objective to be balanced with other objects and the need for reliable power generation” (Comment by MDE staff, Meeting #3.)

In 1994 PENNELEC still owned the lake and dam. When the State purchased Deep Creek Lake, a COMAR was passed for lake management listing **recreational use** as its highest usage. Recreational use includes: boating as well as swimming and fishing.

MDE should embrace all recreational uses “as project objectives” henceforth.

2) The Deep Creek Watershed Foundation report and the DCL POA referred only to boating uses and used 3 feet of depth as sufficient water level for boating use. While COMAR does not specify minimal water depth for recreational purposes.

Friends of DCL urges that MDE refer to the section in COMAR which mandates dock installation needs 4 feet of depth at 50 feet from the shoreline as the minimal water depth guidance for all studies and analysis. Further, we need to note that this depth varies over the recreational season as the water is released from the lake and docks are pushed out from the shoreline.

E) FoDCL position on consensus issues raised in Meeting #3

- 1) Approve change of April White Water Releases from Friday to Saturday.
- 2) Approve change of release times for Temperature Enhancement Releases (TERs) from 1100 to 1130 to support Friendsville White Water rafting businesses.
- 3) Approve keeping the 21-day drawdown requirement to get back to the Upper Rule Band if lake levels run above the URB. Though FoDCL does urge the dam operator to act as quickly as possible in instances where this does occur.
- 4) Approve maintenance of the current Upper and Lower Rule Bands.

F) On process:

1) The three stakeholder meetings led by Brookfield Renewable and MDE staff were open and informative, providing all with better understanding of the review process and insights into the challenges of operating the dam.

2) Friends of Deep Creek Lake is appreciative of the change in operating policy begun 6 years in which Brookfield in strives to operate near Upper Rule Band. Such action has eased the negative impacts of water releases in the southern section of the lake and the sediment and pollutant impacted coves.

3) MDE staff has done a thoughtful and thorough job leading the stakeholder meetings for review of the Water Appropriations application, circulating minutes and documents in a timely manner. MDE staff have also been available to questions between meetings, provide supplemental information and clarification.

4) Friends of Deep Creek Lake wants to acknowledge Brian Noonan from Brookfield Renewable and John Grace from MDE. Their leadership and style set the tone for a productive, collaborative process which is in stark contrast to previous community meetings on the "War over Waters". Thank you.

APPENDIX A: FERC OR MARYLAND LICENSE?

How did we get here: According to the MDE web site, "In 1968, the Federal Energy Regulatory Commission (FERC) issued a license for the power plant. In 1994, the FERC license was replaced by a State water appropriation permit."

Up to the 1990's, the dam operator, PENNELEC, owned both the lake bottom, the buffer strip as well as the hydro-electric dam. With federal utility deregulation, PennElec opted to concentrate on power distribution, informing the state of its intent to sell its lake property.

In 200, the result of the state purchase of the lake led to division, with a separate contract for operation of Deep Creek Hydro: 1) Water Appropriations Permit; and 2) another contract on dam and safety matters-- both under MDE. The State purchased the lake bottom and buffer strip and DNR was assigned as the lead state agency for lake management. (MDE web site states DNR role is for recreational uses.)

Comparing Lake Wallenpaupack with a FERC license to Deep Creek Lake with state license.

Lake Wallenpaupack and Deep Creek Lake are comparable-- about same age, size, heavily used recreational lake and now both have Brookfield Renewable as the dam operator. They differ in amount of power generated: DCL produces 19 megawatts annually; Lake Wallenpaupack generates 44 megawatts. This difference should be factored to any comparison of these two operations and financial requirements in the FERC license

Friends of Deep Creek Lake conducted a preliminary review of the FERC license for Lake Wallenpaupack using the "Order on Offer of Settlement and Issuing New License" for PPL, Holtwood LLC, the predecessor of Brookfield Renewable. Below are some of the permit components of the FERC license, listed in order of appearance in the license. We have placed an asterisk (*) beside ones we believe should be considered for a license for Deep Creek Lake.

*1) A protocol is set for operation in drought periods, under the Delaware River Basin Commission and must be in compliance with target elevations set by DRBC.

*2) Restrictions on dam operation during spring trout season;

3) Operator is required to reduce hydrogen sulfide odors;

*4) Operator is required to provide \$300,000 over an initial 10-year period for shoreline erosion control, water quality monitoring or assessment or to provide funding for the District. Further the operation must participate in lake shoreline management plan;

*5) Operator must provide \$500 per year for lake recreational management policies. Further, the operator must assume navigation marking responsibility in the lake. Further support for constructing accessibility enhancements and shoreline fishing improvements in certain sections of the lake along with new public beach, parking, mooring space and recreation plan;

6) Operator is required to provide \$200,000 in funding over 2 years for dwarf wedgemussel studies and in fifth year \$150,000 more for required for habitat restoration;

*7) "water quality and recreation are ultimately a licensee responsibility";

*8) Licensee is required to secure certification from state on water quality certification, unless it has been waived and further must develop a comprehensive water quality monitoring and reporting plan to implement all of the water quality and reporting requirement of the permit;

9) Operator must act to protect threatened and endangered species, including the endangered dwarf wedgemussel and bald eagle and along with preventing siting of recreational facilities near bald eagle nesting areas;

*10) Part if the water quality monitoring plan will determine whether releases in last summer and early fall could adversely affect Delaware River water quality;

11) Relicensing of the project is considered an undertaking within the scope of Section 106 of the Natural Historic Preservation Act;

*12) FERC collects annual charges from licensees for administration of the FPA;

*13) A whole section is included on "project economics", providing data on value of projected power generation and costs; and

*14) It appears that an Environmental Assessment was conducted prior to review of application for renewal;

In addition to the above items, Friends of DCL in its multiyear investigation on how other lakes are managed has learned:

- Brookfield is responsible for allocation and monitoring of all dock permits at Lake Wallenpaupack and has the capacity to remove offending docks from the lake if they threaten dam safety.
- *In conversation with Lake Manager at Smith Mountain Lake, we learned the FERC-licensed dam operator was required to be a member of the lake management policy board.

APPENDIX B—CODE OF MARYLAND AND DCL MANAGEMENT

Deep Creek Lake was created to provide a water source for hydro-electric generation. Water Appropriations are guided under COMAR:

“The Department shall issue a permit only for beneficial appropriations or use under the following criteria:

- 1) *The amount of the water to be appropriated is reasonable in relation to the anticipated level of use during the permit period;*
- 2) *The requested appropriates or use does not have an unreasonable impact on*
 - a) *the waters of the State; and*
 - b) *Other uses of the waters of the State.” (COMAR 26.17.06.06)*

“Reasonableness Doctrine

1. The reasonableness of the requested quantity of water.
2. The reasonableness of the impact on the resource.
3. The reasonableness of the impact on other users of the resource.” (Statement by MDE at 1st Stakeholder meeting.)

When Deep Creek Lake was purchased by the State of Maryland in 2000 and code was expanded to guide lake management:

“Premises and Purpose. The primary purposes for the promulgation of regulations for Deep Creek Lake are the protection of the lake as a natural resource, the preservation of its ecological balance, and furtherance of its highest use as a recreational resource, recognizing that abuse of the lake by its overuse could jeopardize its well-being.”
(COMAR 08.08.01)

There exists a conflict between the two COMAR sections: the water releases have a negative impact on the resource (decline in water quality, impact on ecological balance) and on other users (particularly on recreational use in the southern section of the lake and in sediment impacted coves, and economy of the region). The current interpretation of COMAR sections by MDE and DNR do not produce a “balanced” guidance ensuring attainment of the highest purpose for DCL, which is for recreational uses.

MDE addressed the issue in the 3rd meeting of the stakeholder group:

“The 1994 Support Document clearly identified recreational boating as a project objective to be balanced with the other objectives and need for reliable power generation. The rule ban reflects the importance of recreational boating by stating the season at full elevation and limiting the rate of drawdown. The uses in Permit Condition 2 have always only limited uses associated with the withdrawal of the water from the lake but does not diminish the importance of management lake levels in accordance with the rule band.

Our understanding is that this regulation created a permitting scheme whereby DNR balances the quantity and quality of recreational use of DCL. This regulation acknowledges the importance of the hydroelectric project. Lake boating is an important recreational use and requires regulation. Regulations acknowledge the lake level fluctuations. Not in conflict with MDE Water Appropriations regulations. “

Friends of DCL reminds MDE that the highest use for DCL as determined in COMAR is for all recreational uses, boating, swimming and fishing, not just boating.

We are unclear about the MDE statement that is “requires regulation” and request clarification. By whom? For what purpose? What is role of MDE in such regulation?

APPENDIX C: FRIENDS OF DEEP CREEK LAKE SURVEY RESULTS

In April, 2019, Friends of Deep Creek Lake distributed a survey to readers of its electronic newsletter. We received 140 responses.

- **75% of respondents have property south of the Glendale Bridge, and of these, 51% of them have property in the sediment impacted coves.**
- **43% say they lose recreational use in their section of the lake by Labor Day week-end due to low water depths, resulting from water withdrawals, thereby showing the negative, unreasonable impact of dam operations.**
- **A total of 93% of all respondents oppose increase in water withdrawal. 37% say we should oppose any increase with water withdrawal while 56 % oppose any increase, even if Brookfield were to make a financial contribution to lake restoration, such as dredging.**
- **88 % believe that Brookfield should be making financial contribution to lake management, especially in light of the fact they do not pay anything for use of DCL waters.**
- **89% of the respondents support dredging of the sediment impacted coves, an action which ensure there would be sufficient water for the dam operator and recreational users of DCL.**