



September 1, 2020

The Honorable Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Dear Secretary Bose:

On Monday, August 24, 2020, the Maryland Department of the Environment (MDE) wrote to you urging “immediate action” on its proposed settlement with Exelon Corporation for the 50-year relicensing of the Conowingo Dam. MDE claims FERC is placing it in an “untenable position,” “imped[ing] [its] progress” toward meeting the Chesapeake Bay Total Maximum Daily Load (“Bay TMDL”) targets by 2025, and “undermin[ing]” its collaborative work with other states and EPA. Although MDE’s letter provides little in the way of specifics, it implies that these complaints flow from MDE’s “uncertainty” about receiving \$200 million from Exelon under the settlement.

In no event should FERC rush to approve the proposed settlement. Giving the proposed settlement a thorough and considered evaluation will not cause any of the harms that MDE’s letter describes. Indeed, unless it is significantly revised, the proposed settlement will defeat the very goals MDE claims to care about. It will virtually guarantee that Maryland never meets the Bay TMDL targets, and will jeopardize the health of the Chesapeake Bay and the livelihoods of the fishermen and watermen who earn a living on the Bay.

To begin with, the proposed settlement will not begin to address the Conowingo Dam's contribution to the Bay's nutrient and sediment problems, as it must if the Bay TMDL goals are to be met. For decades, sediment and nutrients have accumulated behind the Conowingo Dam. Now, storms cause "scouring" events that wash these pollutants into the Susquehanna River and the Chesapeake Bay. There is simply no way to meet the Bay TMDL's targets – reductions of 25 percent, 24 percent and 20 percent respectively in nitrogen, phosphorous, and sediment respectively – without substantially reducing the vast reservoir of these pollutants behind the Dam. The proposed settlement provides, at best, less than \$30 million to address sediment and nutrient pollution over the entire 50-year license, with only \$500,000 for a study of dredging, but no actual dredging, mitigation, or remediation of the sediment.¹ The actual cost of meaningfully reducing the nutrients and sediment behind the dam has been estimated at approximately \$41 million *each year*.² By allowing Exelon to avoid paying its fair share of the costs of cleaning up the nutrient and sediment from the Dam it operates, the proposed settlement starves the Bay TMDL of funding and ensures its targets will not be met.

To make matters worse, the proposed settlement expressly precludes MDE from requiring Exelon to take any additional steps to control pollution from the Dam, even if such steps are necessary to meet the Bay TMDL targets. Indeed, it obliges MDE to represent that Exelon's compliance with the settlement satisfy its obligations under applicable water quality standards, regardless of whether that is actually true.

The inadequacy and lopsided nature of the proposed settlement are not surprising, given that the people who use the Bay for livelihoods and recreation were shut out of the negotiations that produced it. After MDE issued a Water Quality Certification in 2018 that would have yielded significant reductions in the sediment and nutrients, Exelon subjected MDE to lawsuits and threats of litigation. In response, MDE entered into the closed-door negotiations with Exelon that produced the proposed settlement.

Finally, it bears emphasis that the only way the proposed settlement could shield Exelon from its obligations to contribute to cleaning up the nutrients and sediment behind its Dam was to provide that MDE would retroactively "waive" its right to issue a Water Quality Certification for the Dam. Because

¹ See Exhibit M to the Comments of Waterkeepers *et. al.* on the proposed settlement (explaining this cost estimate).

² *Id.*

MDE already has issued a Water Quality Certification for the Dam, it cannot retroactively “waive” its right to do so now. As a result, the proposed settlement – which relies on this “waiver” – is unlawful. Far from promoting certainty for Conowingo Dam, approving such a settlement will simply lead to further litigation.

We urge you to give thorough and careful consideration to the proposed settlement and to the comments opposing it. Given the proposed settlement’s many serious defects, we respectfully request that you reject it so that the MDE, Exelon, and the other interested parties can negotiate a fair settlement that protects the Bay and the people who depend on it.

/s/ Betsy Nicholas

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