



January 20, 2021

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Re: Chesapeake Bay Program Solicitation for Draft Conowingo Implementation Plan (“CWIP”) Comments

These comments are submitted by Waterkeepers Chesapeake, the Lower Susquehanna Riverkeeper, and Earthjustice. All three organizations have been involved with relicensing of the Conowingo Dam (“the Dam”) for more than ten years. This relicensing should have required the Dam operator, Exelon Corporation, to either clean up the pollution and contamination of the Susquehanna River and the Chesapeake Bay that result from its operation of the Dam or to pay for such a cleanup. Indeed, Maryland issued a certification for the relicensing that included conditions that, while inadequate, would have helped to ensure this happened. In 2019, however, the state of Maryland entered into a private proposed settlement agreement with Exelon, not including any other parties, that relieves Exelon from cleaning up the pollution and contamination caused by its Dam or paying a fair share of the cleanup costs.¹ This settlement agreement is not final. It was proposed on October 30, 2019 and remains a proposed agreement before the Federal Energy Regulatory Commission. As such, it can be rejected by FERC and it can be withdrawn and renegotiated at any time by Maryland.

We do not believe the Conowingo pollution load, the Susquehanna River, or the Chesapeake Bay can possibly be cleaned up unless the proposed settlement agreement is withdrawn and Exelon is required to shoulder its fair share of the costs of cleaning up the pollution and contamination that its Dam causes.

The draft Conowingo Watershed Implementation Plan (“CWIP”) as released on October 14th, 2020, presents significant concerns for our organizations and our members throughout the entire Chesapeake Bay watershed. First, the CWIP framework, approach and drafts were approved by an EPA with appointed officials holding anti-environmental bias that is antithetical to EPA’s core values and mission and directly at odds with the values expressed by President Biden. Second, the CWIP fails to address one of the three primary TMDL pollutants—sediment. Third,

¹ See MD. DEP’T OF THE ENV’T, JOINT OFFER OF SETTLEMENT AND EXPLANATORY STATEMENT OF EXELON GENERATION COMPANY, LLC AND THE MARYLAND DEPARTMENT OF THE ENVIRONMENT (2019) (“Settlement Agreement”), https://mde.maryland.gov/programs/Water/WetlandsandWaterways/Documents/Conowingo_Settlement.pdf (last visited Jan. 17, 2021).

the CWIP includes no plan for adequate financing and thus no assurance that even the inadequate cleanup measures it contains will ever be implemented. As such, the draft CWIP is not a plan at all, but an exercise in wishful thinking. Fourth, the draft CWIP focuses solely on best management practices (“BMPs”), outside of any urban areas in the watershed, effectively favoring predominantly white communities rather than those with significant black, indigenous, people of color (“BIPOC communities”). Finally, by allowing Exelon to avoid paying its fair share of the pollution mitigation costs, the CWIP places the costs of cleanup up the Conowingo pollution load on the Bay Partnership states, effectively forcing the taxpayers in these states to pick up the costs of Exelon’s pollution and subsidize Exelon’s profits.

1. The incoming EPA should weigh in on the CWIP framework and funding

The CWIP framework, approach and drafts were approved by political appointees at EPA whose goals are very different from those of the incoming administration. These differences are significant on matters that are integral to the foundation and completion of the draft CWIP, such as corporate responsibility, climate change and its impacts to the Bay and the authority of the states under the Clean Water Act Section 401.² Major changes of note in the incoming administration are, the intended appointments of a White House climate leader (and a global climate envoy) and a full-throated embrace of climate and environmental science.³ With a renewed interest in climate science, the incoming EPA should have a chance to assess whether the CWIP drafting process was adequate, incorporated appropriate best management practices and science, and did not sacrifice necessary cleanup for cost.

The planning and meeting materials for the CWIP demonstrate the influence that the outgoing EPA had on the CWIP planning and drafting process. In a December 2017 draft letter from Principals’ Staff Committee (“PSC”) chair and the MDE Secretary, Ben Grumbles, to Exelon Corporation, Secretary Grumbles wrote, “It is the PSC’s expectation that, as owner and operator of the Conowingo Dam, Exelon will also share in the responsibility for achieving the additional phosphorus load reductions that are now necessary due to the current “in filled” condition of the Conowingo Reservoir”.⁴ Consistent with the letter, in the early edition of the Framework for the Conowingo Watershed Implementation Plan document (“Framework”), the PSC stated that “[e]ven with full implementation of the seven Bay jurisdictions’ WIPs, this additional pollutant loading from Conowingo reservoir reaching dynamic equilibrium will cause or contribute to

² Compare The Biden Plan for a Clean Energy Revolution and Environmental Justice, JoeBiden.com, <https://joebiden.com/climate-plan/> (last visited Jan. 17, 2021) with Scott Dance, *Maryland Gov. Hogan seeks lawsuit against Pennsylvania, EPA over lagging Chesapeake Bay cleanup efforts*, BALT. SUN (Jan. 8, 2020) <https://www.baltimoresun.com/news/environment/bs-md-chesapeake-epa-enforcement-lawsuit-20200108-td2bhcbkvanvdwo4azqv6mey-story.html>.

³ See Coral Davenport & Lisa Friedman, *Biden’s Twin Climate Chiefs, McCarthy and Kerry, Face a Monumental Task*, N.Y. TIMES (Dec. 16, 2020) <https://www.nytimes.com/2020/12/16/climate/gina-mccarthy-john-kerry-climate-adviser.html>.

⁴ Chesapeake Bay Program, PSC Letter to Exelon (DRAFT) (Dec. 15, 2017) https://www.chesapeakebay.net/channel_files/25523/revised_draft_psc_letter_to_exelon_conowingo_171215_draft_2.pdf.

water quality standards exceedances in the upper Bay.”⁵ Furthermore, the PSC stated that “[t]his additional pollutant load must be addressed if the Bay’s water quality standards, as they are currently written and implemented, are to be met.”⁶ With this goal in mind, the PSC laid out options to be considered as “innovative components” of the CWIP. Acknowledging Exelon’s application for 401 Water Quality Certification and related public comments, at the outset of the CWIP planning process, the PSC recognized that Exelon, owner and operator of Conowingo bears the need of being a “key partner in addressing the downstream water quality impacts”.⁷ The PSC also acknowledged that the Chesapeake Bay Program partnership has “signaled that Exelon should be held responsible for some portion of the [pollutant load] reduction.”⁸

In the Framework for the Conowingo Watershed Implementation Plan agreed to in the March 2018 meeting, the PSC agreed to take the following actions over the year to support the development and implementation of the CWIP;

1. Establishing the Conowingo WIP Steering Committee as a subcommittee of the PSC;
2. Creating a fund that members of the Conowingo WIP Steering Committee can use to work with the third-party awardee and install the most cost-effective practices in the most effective locations;
3. **Incorporating the outcome of the Exelon CWA S. 401 water quality certification;**
4. **Developing a financing strategy to support development and implementation of the Conowingo WIP;**
5. Developing a process by which preferred practices, targeted geographic locations and implementation projects will be selected and deployed;
6. **Managing reservoir sediment through dredging and innovative and/or beneficial re-use based upon information from the Maryland pilot project; and**
7. Determining achievability and in what timeframe the needed load reductions will occur.⁹

It is clear from this draft edition of the Framework document that dredging and possible financial outcomes of the Exelon CWA 401 certification were—from the outset of this process, envisioned

⁵ Chesapeake Bay Program, Framework for the Conowingo Watershed Implementation Program at 1 (Feb. 16, 2018) (“CWIP Framework”)

https://www.chesapeakebay.net/channel_files/26045/iv.b._conowingo_draft_framework_.pdf.

⁶ *Id.* at 1.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Id.* at 3-4.

by the PSC to be integrated into the development and implementation of the CWIP. However, all sections of the Framework addressing Exelon remained intact up until the January 31st, 2019 PSC Committee Meeting. Meeting materials from the PSC show that all mentions of Exelon and the 401 certification were stricken from the Framework document.¹⁰ A Summary of CWIP Framework Edits to Address EPA Comments, presented to the Principals' Staff Committee by Matt Rowe at MDE, indicate that removal of the language related to Exelon was influenced by comments from the Trump EPA, with the CWIP Request for Application ("RFA") in the balance.¹¹ These changes were significant, and had a great impact on the CWIP and its financing strategy. Given the gravity and impact of the Trump EPA's input on the CWIP process, the incoming administration should have ample opportunity to weigh in on the draft CWIP and the settlement between MDE and Exelon.

2. Sediment is largely unaddressed in the CWIP

While the CWIP has a primary focus on nitrogen, it leaves sediments mostly unaddressed. Bay Program data estimates that 192 million tons of sediment are trapped behind the dam, and this number increases by roughly 3 tons each year. This amount of sediment is equivalent to three times the volume of the pyramid of Giza. Suspended sediments are one of the biggest impairments to water quality in the Chesapeake Bay. Sediment clouds water, blocks light from reaching SAV and smothers shellfish.¹² During strong storms and severe floods, particles of sediment are scoured from behind the Dam. These scoured sediments (which can carry attached nutrients) then flow into the Bay, impacting underwater grass beds and marine life. These scouring events will only continue to increase as the effects of climate change impact our region. If the CWIP as drafted is fully implemented it would *only* meet the nitrogen requirements, and would still fall short on meeting necessary phosphorus and sediment reductions. As addressed above, the CWIP Framework documents (in both draft and final edition) indicate that the WIP was supposed to include dredging as a component under consideration. The draft CWIP does not include a clear path forward for the dredging that is necessary to address the sediment that is built up behind the dam. Furthermore, no technical advisory was done in the CWIP drafting process to definitively rule out dredging. This is a fundamental flaw of the draft CWIP and chosen cleanup methods.

3. The released draft CWIP preceded the completion of a financing plan, rendering the draft CWIP incomplete and uncertain.

¹⁰ See Chesapeake Bay Program, Framework for the Conowingo Watershed Implementation Program RFA edits (Jan. 2019)

https://www.chesapeakebay.net/channel_files/32915/iv.b._cwip_framework_jan_2019_rfa_edits.pdf.

¹¹ See Chesapeake Bay Program, Summary of CWIP Framework Edits to Address EPA Comments For January 31, PSC Conference Call (Jan. 31, 2019)

https://www.chesapeakebay.net/channel_files/32915/iv.a._summary_of_proposed_cwip_framework_changes_related_to_rfa.pdf.

¹² See Chesapeake Bay Program, *Sediment*, <https://www.chesapeakebay.net/issues/sediment>, (last visited Jan. 17, 2021).

No financing strategy accompanied the draft CWIP, and the lack of a concurrently drafted financing strategy is a fundamental flaw of this draft. In fact, we understand that it was the intent of the Steering Committee to withhold release of the financing plan until *after* the final approval of the CWIP. This lack of transparency in developing plans that will ultimately result in the expenditure of billions of taxpayer dollars is simply unacceptable. Despite the withholding of the financing strategy from the public, what we know from circulated versions of the financial statement is grim for the Bay jurisdictions—the cost of cleanup will be passed onto the citizens of the region, if it happens at all.¹³ The Conowingo WIP differs significantly from the state WIPs in that the entire process—including funding, financing, and implementation—will presumably be implemented collectively among all the Bay jurisdictions.¹⁴ Additionally, suggestions that private sector philanthropy can fill the gap are similarly misguided as it is unlikely private entities will want to spend money in the form of donations just to relieve Exelon of its cleanup liability.

The goals of the CWIP can't be met without sufficient funding—between \$72¹⁵ and \$172 million per year—in perpetuity. We now know from available editions of the financing strategy the Bay Partner states will have to pay for these pollution reductions. Clear sources for funding (namely, Exelon Corporation, which generates \$34 billion dollars in annual profit and owns and operates Conowingo Dam¹⁶) are not named in the draft CWIP nor the financing statement. The CWIP calls for \$53 million per year, but the Water Quality Certification issued in 2018 required \$172 million per year to adequately clean up the dam.¹⁷ It is unclear to us how these vastly different costs could ever realistically lead to the same load reductions. The Water Quality Certification, issued by MDE on April 27th, 2018, notes that the nitrogen and phosphorus reductions cost \$17.00 and \$270.00 per pound, respectively;¹⁸ but in the draft CWIP, these same reductions were estimated at \$8.00 per pound. The cost of phosphorus and sediment reductions were not even addressed in the draft CWIP. This more-than-double cost differential lacks an explanation, and these costs will only increase every year. This highlights the problem with how the CWIP drafting process “put the cart before the horse”, straying from the initial framework of the CWIP—which called for the development of a financing strategy “to support *development* and implementation of the CWIP”.¹⁹

¹³ See Chesapeake Bay Program, Conowingo Watershed Implementation Plan Financing Strategy (Dec. 10, 2020) https://www.chesapeakebay.net/channel_files/42330/cwip_financing_structure_final.pdf. Stating “The Conowingo WIP differs significantly from the state WIPs in that the entire process—including funding, financing, and implementation—will presumably be implemented collectively among all the Bay jurisdictions.”

¹⁴ *Id.* at 10.

¹⁵ While the CWIP estimates the lowest potential costs at \$53 million per year, that is only the installation of the Best Management Practices and does not include costs of program management, outreach to landowners, technical guidance and a host of other costs that would substantially drive up this number.

¹⁶ See Fortune 500: Exelon Company Profile, fortune.com, <https://fortune.com/company/exelon/fortune500/> (last visited Jan. 17, 2021).

¹⁷ See MD. DEP'T OF THE ENV'T, CLEAN WATER ACT SECTION 401 CERTIFICATION FOR THE CONOWINGO HYDROELECTRIC PROJECT (2019) at 16, https://mde.maryland.gov/programs/Water/WetlandsandWaterways/Documents/ExelonMD/Conowingo_WQC_04-27-18.pdf (last visited Jan. 17, 2021).

¹⁸ *Ibid.*

¹⁹ See CWIP Framework, *supra* note 5, at 4.

4. The Draft CWIP in its current form presents great uncertainty and inequities regarding TMDL impacts.

Most Bay states are not on track to meet the TMDL timeline. The Susquehanna states—NY, PA and MD are currently in the worst shape in terms of meeting TMDL targets. The Northeast (including the Chesapeake Bay region) is experiencing 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.²⁰ Climate Change has added an additional pollutant load that all states now need to add into their Phase III WIPs. The impacts of climate change are already impacting the situation at the Dam as precipitation events and resulting scouring continue to increase in intensity and frequency.

As no politically palatable or feasible funding source was identified for the CWIP, the nitrogen, phosphorus, and sediment loads at the Dam will need to be allocated among the other states. (As explained by Bryan Seipp in the Dec. 4th CAC meeting.) This will stack yet another load on top of their current gaps, their Phase III requirements, and the climate loads. These additional loads could be catastrophic for the progress and success of the TMDL.

The first “guiding principle” in the draft CWIP is fairness—“fairness, equity, and feasibility among state, local, and federal and other partners participating in the CWIP regarding level of effort, financing, tracking, resource sharing, and third-party access.” We cannot square this admirable goal with the draft proposal and financing strategy before us. Most of the Bay partner states were not involved in processes with the Dam’s owner where funds for cleanup could have been secured. Because those funds were not obtained in those processes, there is a high likelihood that the other states (some of which have little to no connection to the Susquehanna) will be taking on these loads and bearing the costs of cleanup.

5. The draft CWIP raises equity concerns for urban residents

There are also really significant social and economic justice concerns related to the CWIP and the financing plan. This can be demonstrated by the choice the Principal Staff Committee made in selecting the proposed option, which was the 11th scenario for cleanup for Conowingo. This selected option, as opposed to some of the previous scenarios, focused almost exclusively on the installation of BMPs in rural, agricultural areas. This choice was based on these being the most cost-effective, i.e., the cheapest places for achieving nutrient reductions. So, there was an intentional choice *not* to have an equal distribution of pollution reductions across affected areas. And, the problems with this stand out much further when you attempt to consider the choices based on economic and social equity concerns.

²⁰ See NAT’L OCEANIC AND ATMOSPHERIC ADMIN, NOAA TECHNICAL REPORT NESDIS 142-9 (Jan. 2013) https://www.nesdis.noaa.gov/sites/default/files/asset/document/NOAA_NESDIS_Tech_Report_142-9-Climate_of_the_Contiguous_United_States.pdf.

The urban and suburban areas of Maryland provide the great majority of state tax revenue (as well as federal tax revenue).²¹ Likewise, the cost of living in the urban and suburban areas is significantly higher than in rural areas.²² This would suggest that these areas should warrant a higher cost BMPs in this jurisdiction to have some modicum of equity in application of state resources. Yet, the CWIP would direct that state resources are being spent to improve only "some" areas, those that are predominantly rural, agricultural and high majority white population areas. Rural agricultural areas do need assistance and funding, but it needs to be done in such a way that it doesn't shift the burden to other areas already struggling with their own pollution problems.

We urge the Bay Program and Principals' Staff Committee to consider these comments, consult with the incoming administration's EPA and climate officials, and release a final CWIP that addresses these concerns. Furthermore, urging MDE and Governor Hogan to withdraw from the proposed settlement is imperative. Maryland stakeholders and officials developing the CWIP should take note of these concerns—the financially insufficient proposed settlement poses a firm roadblock to any genuine path forward to the cleanup of the Conowingo Dam and assurance that Maryland can meet our TMDL and climate goals.

²¹ See MD. ASSN. OF COUNTIES, FY 2019 REPORT OF COUNTY BUDGETS, TAX RATES & SELECTED STATISTICS (2019) at 7 <https://www.mdcountries.org/DocumentCenter/View/3108/2019-BTRB>.

²² See BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, URBAN AND RURAL HOUSEHOLD SPENDING IN 2015 (Oct. 28, 2016) <https://www.bls.gov/opub/ted/2016/urban-and-rural-household-spending-in-2015.htm> (last visited Jan. 18, 2021).

Respectfully submitted,

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