

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF  
COLUMBIA CIRCUIT

No. 21-1139 and 21-1186 (consolidated)

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WATERKEEPERS CHESAPEAKE, *et al.*,

*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,

*Respondent,*

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**BRIEF OF NATIONAL WILDLIFE FEDERATION AS AMICUS CURIAE  
IN SUPPORT OF PETITIONERS AND SEEKING TO SET ASIDE FERC'S  
2021 ORDER GRANTING A LICENSE TO EXELON POWER  
GENERATION COMPANY, LLC, FOR THE CONOWINGO DAM, 174  
FERC ¶ 61,2179 (MARCH 19, 2021)**

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**DATED: February 4, 2022**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**  
D.C Cir. R 29

Pursuant to D.C. Circuit Rule 29, National Wildlife Federation, *Amicus Curiae*, submits this Certificate as to parties, rulings, and related cases.

**(A) Parties and Amici**

**National Wildlife Federation** (NWF) is America's largest and most trusted conservation organization. NWF works across the country to unite Americans from all walks of life in giving wildlife a voice. NWF's ability to help wildlife is inextricably linked to the diverse efforts of the individuals and groups that support their mission. Across the country NWF engages with communities, schools, governments, and other organizations to build and nurture a common commitment to conservation.

**(B) Ruling Under Review**

The Ruling Under Review is the Federal Energy Regulatory Commission's March 19, 2021 Order issuing a new license to Exelon Power Generation Company, LLC, for the Conowingo Hydroelectric Project. *Exelon Generation Co., LLC.*, 174 FERC ¶ 61,217 (March 19, 2021) (Order Issuing New License). This brief of *amicus curiae* supports petitioners' request that FERC's Order granting a license to Exelon be set aside.

**(C) Related Cases**

As far as counsel is aware, there is no related case currently pending in this Court or in any other court.

**RULE 26.1 DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the National Wildlife Foundation makes the following disclosures:

Non-Governmental Corporate Party to this Action: National Wildlife Federation

Parent Corporation: None

Publicly Held Company that Owns 10% of More of Party's Stock: None

Party's General Nature and Purpose: National Wildlife Foundation works with a broad spectrum of stakeholders to build and nurture a common commitment to conservation.

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## GLOSSARY

Pursuant to D.C. Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief.

- CWA            Clean Water Act, 33 U.S.C. § 1341(a)(1) – Section 401 of the Clean Water Act provides the opportunity for States to certify whether a federally-issued license or permit conforms to the State’s water quality standards and, once a State issues a certification pursuant to its Section 401 authority, FERC is obligated to incorporate the State’s water quality standards as a condition of the license.
- FERC            The Federal Power Act, 16 U.S.C. ch. 12, gives the Federal Energy Regulatory Commission authority to issue licenses for hydroelectric power facilities such as the Conowingo Dam on the lower Susquehanna River in Maryland.
- MDE            Maryland Department of the Environment is the agency of State government charged with protecting and restoring the environment for the health and well-being of all Marylanders.
- WQC            Water Quality Certification, pursuant to Section 401 of the Clean Water Act, *supra*, is the vehicle for a State to assure that any federally-permitted or licensed facility conforms to the water quality standards of the State.



## **IDENTITY, INTEREST, AND SOURCE OF AUTHORITY**

This brief was prepared by the Environmental Advocacy Clinic at Vermont Law School on behalf of the National Wildlife Federation whose interest is protecting the water quality of US waters. Authority for this amicus brief resides in Fed. R. App. P. 29.

## **STATEMENT OF AUTHOR AND FUNDING**

This Amicus Brief is the product of work done on a *pro bono* basis by the Staff Attorneys and Students in the Environmental Advocacy Clinic at Vermont Law School.

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Acknowledgment is given to Joseph Coffey, Student Clinician at Vermont Law School's Environmental Advocacy Clinic, for the work he has done on this brief.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

The Federal Energy Regulatory Commission improperly granted a license to Exelon Power Generation Company to operate the Conowingo Dam on the lower Susquehanna River in Maryland. FERC issued the license without incorporating the water quality standards that Maryland's Department of the Environment determined are necessary to protect the quality of Maryland's water resources. Furthermore, FERC did not comply with the National Environmental Policy Act by not considering the environmental impacts of issuing a license that contained no water quality criteria before renewing it.

### **ARGUMENT**

#### **I. THE LOWER SUSQUEHANNA RIVER AND CHESAPEAKE BAY ARE HIGH-VALUE RESOURCES.**

##### **A. The Chesapeake Bay has a great variety of high-value uses.**

The Chesapeake Bay is the largest estuary in the United States and the third largest in the world. The Bay begins at the confluence of the Susquehanna River at Havre de Grace, Maryland, and extends for 200 miles to Virginia Beach, Virginia. Its many uses include habitat for aquatic life, spawning grounds and nursery for migratory fish, habitat for seasonal submerged aquatic vegetation, harvesting resource for shellfish and deep-water fish, and a refuge for deep-channel species.

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 10.

**B. The Lower Susquehanna River is a Class II-P water.**

The Lower Susquehanna River extends from the Conowingo Dam to the confluence with the Chesapeake Bay. The River is a Class II-P water. Its uses include a public water supply, water-contact recreation, habitat for warmwater aquatic life, habitat for estuarine and marine aquatic life, and habitat for seasonal shallow water submerged aquatic vegetation. The Lower Susquehanna River is a spawning ground and nursery for migratory fish species, as well as a harvesting source for shellfish and open-water fish. *Id.* at 8.

**C. The Conowingo Reservoir is a Class I-P water.**

The Conowingo Reservoir is a Class I-P water. Its uses include a public water supply, water-contact recreation, and habitat for non-tidal warmwater aquatic life. *Id.*

**II. THE CONOWINGO DAM THREATENS THE LOWER SUSQUEHANNA RIVER AND CHESAPEAKE BAY AND HINDERS CLEANUP EFFORTS.**

**A. The Dam poses a variety of threats to the Lower Susquehanna River and Upper Chesapeake Bay.**

As the Maryland Department of the Environment (MDE) has noted, “[The Conowingo Dam] adversely impacts water quality in the State of Maryland.” *Id.* at 11.

The Dam “has significantly and adversely impacted biota in the Lower River and northern Bay over the past 90 years of operation.” *Id.*

The Dam contributes much of the nutrient and fine sediment pollution that degrades water quality in the lower Susquehanna River and Chesapeake Bay. *See* Chesapeake Bay Foundation, Inc., Comments on Offer of Settlement (January 17, 2020) (“CBF Comments”) at 4-6, JA \_\_\_-\_\_\_; Waterkeepers Chesapeake and Lower Susquehanna Riverkeeper Association, Comments on Proposed Settlement Agreement (January 17, 2020) (“Waterkeepers Comments”) at 4-7, JA\_\_\_-\_\_\_.

Due to the highly unnatural flow regime that the Dam has imposed on the River, the Dam is a barrier to the upstream passage of fish and interferes with the natural movement of coarse-grained sediment. The Dam creates excessive turbulence in water from the Dam’s discharge and reduces the amount of lower-river habitat; this alteration of stream flow threatens shad, herring, sturgeon, eels, turtles, freshwater mussels, shallow-water submerged aquatic vegetation, and macro-invertebrate communities. Certification at 11.

**B. Current Operation of the Dam Interferes with Cleanup and Resource Management Efforts.**

Today, the flow regime experiences drastic hourly changes in flow velocity of discharge water and daily changes in water depth below the dam. These drastic changes in flow:

- Cause fish kills by stranding fish in shallow pools,

- Delay movement of migratory fish species, and
- Have deleterious effects on the health of aquatic systems.

Despite the development of a variety of plans and water quality standards, without a Section 401 Certification, the new license imposes no obligation on Exelon to operate the Dam according to the water quality requirements that would assure the cleanup of 90 years of damage. Accordingly, lack of a Section 401 Water Quality Certification hinders the implementation of the following remediation plans or criteria:

- Fish Passage – flow rates that need to be maintained to allow the passage of 5 million shad and twelve million herring;
- Adaptive Management Flow Plan to assure the viability of aquatic life;
- Dissolved Oxygen levels that need to assure the viability of aquatic life in the Chesapeake Bay;
- Removal of Floating Debris;
- Monitoring to assure that the levels of Chlorophyll-A are not permitted to exceed water quality standards;
- Monitoring to assure that PCBs are not permitted to cause or contribute to excessive PCB levels in fish tissue;
- Assurances that operation of the Dam will not interfere with Maryland’s Shoreline Management Plan;
- Assurances that operation of the Dam will conform to plans for:
  - Turtle Management
  - Waterfowl Nesting Protection
  - Stream Flows in the Tailrace
  - Sturgeon Protection,
  - Habitat Improvement Projects,
  - Fish Protection, and
  - Minimizing Fish Stranding.

Certification at 11-13.

**III. THE VALUE OF THE CHESAPEAKE BAY IS BEING JEOPARDIZED BY OPERATION OF THE CONOWINGO DAM PURSUANT TO THE NEW LICENSE ISSUED TO EXELON.**

**A. The New License's Lack of Water Quality Standards Harms the Water Quality of the Lower Susquehanna River and the Chesapeake Bay.**

The Susquehanna River is the largest tributary to the Chesapeake Bay. It is approximately 444 miles long, beginning near Cooperstown, New York, at Otsego Lake, and flowing into the Chesapeake Bay at Havre de Grace, Maryland. The Susquehanna River Basin drains approximately 27,510 square miles in New York, Pennsylvania, and Maryland, encompassing 43% of the Chesapeake Bay's drainage area. FERC Order Addressing Arguments Raised in Rehearing, 176 FERC ¶ 61,029 (July 15, 2019) (Rehearing Order) at 2. Accordingly, everything that enters the Susquehanna River from New York to Pennsylvania is trapped by the Dam including all of the trash, sediment, and toxic materials that flow downriver. When the dam's floodgates are opened, all of these materials flow freely downstream into the Bay. Certification at 11.

The Dam hinders the Chesapeake Bay cleanup plan. The license issued by FERC to Exelon is grossly insufficient in protecting the water quality of the River and Bay because it lacks any provision for nitrogen and phosphorus reductions; has no significant provision for the restoration of mussels, shad, and other aquatic

species; and contains no plan for addressing 200 million tons of sediment that are stored behind the dam.

**B. The Conflict Between Water Quality and The Desire for Energy is resolved by the Federal Power Act.**

Exelon profits from the dam by using a public natural resource, and is therefore obligated to contribute to the cleanup costs. By failing to impose CWA Section 401 water quality requirements on the operation of the dam, FERC has put the interests of Exelon before the health and welfare of citizens and this public resource.

The Federal Power Act provides that “[i]n deciding whether to issue any license” for a dam, FERC must “give equal consideration to the purpose of ... 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). By omitting MDE’s water quality standards, FERC has failed to comply with this requirement.

**IV. OPERATING THE DAM PURSUANT TO THE NEW LICENSE HARMS PUBLIC RESOURCES.**

FERC’s March 19, 2021 Order granting a license to Exelon will have profound negative impacts in Maryland and across the country. FERC and Exelon have a responsibility to ensure that the operation of Conowingo Dam does not

harm the quality of water used by downstream communities. However, the license issued by FERC to Exelon absolves the company from responsibility for maintaining water quality because it contains none of the water quality standards contained in the Certification.

Furthermore, the closed-door settlement between MDE and Exelon pursuant to which MDE purportedly waived its responsibility to impose water quality standards on Exelon could have a profound negative effect on federally licensed projects across the country by establishing a bad precedent.

Accordingly, unless FERC's Order granting Exelon's license renewal is set aside, and any subsequent license is required to incorporate MDE's WQC standards, the negative consequences and bad precedent will leave citizens in the Susquehanna River watershed, in particular, as well as citizens in watersheds across the country, with responsibility for cleaning up environmental harm in waters affected by dams.

**V. FERC FAILED TO INCORPORATE IN THE LICENSE RENEWAL ANY OF THE WATER QUALITY STANDARDS REQUIRED BY THE MARYLAND DEPARTMENT OF THE ENVIRONMENT.**

**A. Legal Framework**

**1. Clean Water Act Section 401 Certification applies to the licensing of a hydroelectric project.**



Under Section 401(a)(1) of the Clean Water Act and Section 797(e) of the Federal Power Act, the Federal Energy Regulatory Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency has either issued a water quality certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year. 33 U.S.C. § 1341(a)(1). Section 401(d) of the Clean Water Act provides that the certification shall become a condition of any federal license that authorizes construction or operation of the project. 33 U.S.C. § 1341(d).

MDE issued the Certification it later claimed to have waived on April 27, 2018. The Certification required Exelon to: (1) implement and comply with all provisions of the MDE-Fish Passage Improvement Plan, the MDE-American Eel Passage Improvement Plan, and the MDE-Invasive Species Plan; (2) operate the project in accordance with an adaptive management plan; (3) remove floating and water surface trash and debris in the reservoir weekly; (4) ensure that project operations and discharges do not cause or contribute to polychlorinated biphenyl levels in fish tissue; and (5) comply with the Shoreline Management Plan.

Certification at 13-22.

The Certification further required Exelon to develop and implement plans to (1) annually reduce the amount of nitrogen and phosphorus from upstream sources,

(2) monitor Dissolved Oxygen (DO) levels in the tailrace, (3) monitor for Chlorophyll-A in the Maryland portion of the reservoir, (4) protect bog turtles, (5) protect nesting waterfowl, (6) gage the tailrace for the re-design, installation, and maintenance of best available real-time flow telemetry, (7) protect sturgeon, (8) implement habitat improvement projects downstream of the Dam, (9) monitor fish kills, and (10) minimize stranding and fish kills as water levels fluctuate. *Id.*

In the license issued by FERC, these requirements are not included.

**2. FERC’s Determination That It Could Issue a New License to Exelon Without a Section 401 Certification by MDE is Entitled to No Deference.**

Because FERC is not the agency charged with administering the Clean Water Act, FERC’s decision that MDE waived Section 401 Certification for its 2018 Water Quality Certification is subject to *de novo* review. *See Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1102 (D.C. Cir. 2019) (citing *Alcoa Power Generating, Inc. v. FERC*, 643 26 F.3d 963, 972 (D.C. Cir. 2011) (“Our review of the Commission’s interpretation of Section 401 is *de novo*.”)).

Additionally, Section 706(2) of the Administrative Procedure Act, provides the standard of review for “action, findings, and conclusions.” To satisfy that standard, there must be “a rational connection between the facts found and the choice made” by the Commission. 5 U.S.C. § 706(2); *see Missouri Public Service Comm’n v. FERC*, 37 F.3d 1066 (D.C. Cir. 2003). “FERC must articulate the

critical facts upon which it relies, and ... fully explain the assumptions it relied on to resolve unknowns and the public policies behind those assumptions.” Similarly, when “the Commission balances competing interests in arriving at its decision, it must explain on the record the policies which guide it.” The Commission's factual findings are “conclusive” if, but only if, they are “supported by substantial evidence” in the record. *See Missouri Public Service Comm’n*, 337 F.3d at 1070.

But FERC embraced an MDE-Exelon agreement that was done in secret.

**3. MDE’s Agreement with Exelon to Withdraw its Section 401 Certification After Closed-Door Settlement Discussions Has No Effect.**

Exelon first applied to the Federal Energy Regulatory Commission on August 31, 2012, to renew its license to operate the Conowingo Project. On January 31, 2014, Exelon filed an application with MDE for a water quality certification pursuant to CWA Section 401. Later, Exelon’s request was followed by three “withdraw-and-resubmit” cycles – March 3, 2015, April 25, 2016, and May 17, 2017. Approximately one year later, MDE issued a Water Quality Certification that met the requirements of CWA Section 401.

Exelon challenged MDE’s April 27, 2018 Certification: first, in an administrative appeal challenging all aspects of the Certification; second, by asking the Federal Energy Regulatory Commission on February 18, 2019, to waive MDE’s Section 401 Certification requirement; third, in Maryland State court

challenging the Certification; fourth, in US District Court based on a broader challenge to States' Section 401 authority; and fifth, in the instant case in the DC Circuit. Exelon, it is clear, challenged the WQC by every means available.

While Exelon's challenges were working their way through the variety of legal forums, Exelon and MDE entered into closed-door settlement negotiations. On October 29, 2019, Exelon filed the Settlement, purporting to have resolved all issues between Exelon and MDE associated with MDE's issuance (and withdrawal) of its water quality certification. *See* Joint Offer of Settlement and Explanatory Statement of Exelon Generation Company, LLC, and the Maryland Department of the Environment, October 29, 2019.

The Settlement included a conditional waiver of MDE's certification as well as a conditional withdrawal of Exelon's petition for declaratory order, both of which were to become effective upon the Commission's approval of the settlement. FERC issued a renewal license to Exelon on March 19, 2021, declaring that MDE had waived its Certification. FERC License Order, 174 FERC ¶ 61,217 (March 19, 2021) at 24.

But MDE had no authority to waive a Certification it had already issued. First, because the purported waiver was the result of closed-door settlement discussions that circumvented the public participation requirements in Section 401(a). 33 U.S.C § 1341(a)(1). Second, because, MDE had no authority to waive

a Certification that it had already issued. Section 401 provides that a state can waive a certification requirement only by failing or refusing to act within the reasonable time (one-year) statutory time period; furthermore Section 401 provides no authority for a state to waive a certification, once issued. *Id.*

Furthermore, the testimony of MDE Secretary Grumbles before the House Environment and Transportation Committee on February 28, 2020, makes clear that MDE's attempt to waive its certification authority was the fear of lawsuits that Exelon would bring were MDE to insist that FERC include MDE's water quality standards in the license for the Dam. *See* Testimony of Ben Grumbles, Secretary, on House Bill 1465 (February 28, 2020) reproduced in the Appendix.

**B. There is an Insufficient Legal Basis for FERC's Decision to Issue a New License to Exelon.**

CWA Section 401(a)(1) provides only two situations where FERC has authority to issue a license for a dam. The first is where a certification has been obtained and the license contains the certification as a condition; the second is where a state has waived the certification requirements. 16 U.S.C. § 1341(a)(1). Neither situation occurred here.

FERC issued a new license to Exelon with none of the water quality standards that were contained in MDE's 2018 Certification, and, for the reasons *supra*, MDE did not waive – indeed *could not waive* – its Water Quality Certification.

The unfortunate result of MDE's WQC withdrawal and FERC's license is that Exelon has been able to dodge its responsibility for maintaining water quality and for cleaning up the waters of the Susquehanna River and Chesapeake Bay.

**C. Despite MDE's Stated Intention to Waive Its Section 401 Certification, the Agency's 2018 Water Quality Certification Remains in Effect Because MDE Never Withdrew It.**

That MDE never withdrew its 2018 Section 401 Water Quality Certification is manifested by Exelon's challenge to the Certification. Upon issuance of the Certification, Exelon requested reconsideration by MDE. Exelon, Protective Petition for Reconsideration and Administrative Appeal (May 15, 2018) at 2, JA\_\_\_-\_\_\_ (Md. Code Regs. 26.08.02.10(F)(4)). However, there would have been no reason for Exelon to object to the Certification had it not still been in effect.

**VI. Issuance of the License Violated Even the Most Basic Requirements of the National Environmental Policy Act to Consider a Project's the Environmental Impacts.**

The National Environmental Policy Act ("NEPA") requires that federal agencies give adequate consideration to the environmental impacts of major federal actions before taking the action. 42 U.S.C. § 4322.

In its Order Addressing Arguments Raised on Rehearing, FERC justified its circumvention of NEPA by explaining that it is not required to ensure compliance with a State's water quality standards when a State waives certification. This explanation is legally incorrect and misplaced because the legal question

associated with NEPA compliance is not enforcement of water quality standards; instead, it's examining the environmental consequences of an agency's decision *prior to taking the action*. FERC's explanation is, therefore, a boot-strap argument, and FERC's issuance of the license to Exelon without the required water quality standards does not absolve FERC, but *necessitates* NEPA compliance.

## CONCLUSION

The effect of FERC's order has been to remove from Exelon's license all the requirements MDE found necessary – and never withdrew – to assure that the Conowingo Dam complies with water quality standards. FERC's abrogation of responsibility assures that the Dam will not be operated in a manner that will assure compliance with the Clean Water Act. Therefore, the National Wildlife Federation supports the petitioners' contention that the FERC-issued license needs to be set aside. Therefore, for the reasons stated herein, the National Wildlife Federation supports the Petitioners' request that this Court set aside the license issued by FERC to Exelon.

DATED: February 4, 2022

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## **CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT**

Counsel hereby certifies, in accordance with Fed. R. App. P. 32(a)(7)(B) that the foregoing amicus brief contains 5,814 words, as counted by counsel's word processing system, and thus complies with the 6,500- word limit.

This document complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because this document has been prepared in a proportionally-spaced typeface using Microsoft Word 2019 using size 14 Times New Roman font.

DATED: February 4, 2022

/s/ Carl S. Pavetto  
Carl S. Pavetto



## **ENDORSEMENTS**

This Brief has the endorsement of:

American Canoe Association  
American Chestnut Land Trust  
Audubon Naturalist Society  
Baltimore Green Space  
Butternut Valley Alliance  
Conservation Voters of Pennsylvania  
Environeers, Inc.  
Friends of Quincy Run  
League of Women Voters of Pennsylvania  
Maryland Conservation Council  
Mountain Lakes Preservation Alliance  
Otsego County Conservation Association  
PennFuture  
Rachel Carson Council  
Sleepy Creek Watershed Association  
Southern Maryland Audubon Society  
Sparks-Glencoe Community Planning Council  
West Virginia Highlands Conservancy

## APPENDIX

Grumbles, Ben, MDE Secretary, Testimony Before the House Environment and Transportation Committee, February 28, 2020.

STATE OF MARYLAND

MARYLAND DEPARTMENT OF THE ENVIRONMENT

Ben Grumbles, Secretary

BILL NO: House Bill 1465

COMMITTEE: Environment and Transportation

POSITION: Oppose

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TITLE: Federal Clean Water Act – Authority of State

BILL ANALYSIS: Prohibiting the State from entering into an agreement that waives the State's authority under S 401 of the federal Clean Water Act as part of exercising the States authority and carrying out the State's duties under the federal Clean Water Act and State law, including the State's authority and duties related to the federal relicensing of the Conowingo Dam.

POSITION AND RATIONALE:

HB 1465 is problematic as it attempts to block the State of Maryland's efforts to resolve expensive and protracted litigation, amidst an uncertain and changing federal regulatory landscape. Federal courts and FERC have expressed opposition to states' rights under Section 401, and FERC has already used the reasoning of the DC. Circuit's decision in Hoopa Valley Tribe in several other licensing proceedings to find that states have waived their Section 401 authority. In the absence of a settlement agreement such an outcome could occur in the Conowingo relicensing as well, as Exelon has directly petitioned FERC to do so. If FERC were to find waiver, then Maryland would have no ability to impose environmental conditions on the operation of the dam for the next 50-year license term. By agreeing to a conditional waiver through the settlement, on the other

hand, MDE has ensured that critically necessary improvements will occur and that environmental benefits will promptly ensue.

Those groups expressing opposition to the settlement have taken the position that the agreement does not go far enough, and argue that MDE should have retained its water quality certification authority in order to address the dam's impacts by unilaterally imposing significant environmental mitigation burdens on Exelon. However, that approach would only have resulted in many more years of protracted litigation, during which time the environmental impacts of the dam would go unchecked, without any certain solutions.

By purporting to prohibit MDE from entering into the settlement agreement with Exelon, HB 1465 would throw the State back into a hostile litigation environment, without the prospect of resolving the complicated issues posed by Conowingo any time soon.

Maryland's citizens and the Chesapeake Bay are better served by the settlement, which allows environmental improvements to begin soon, and not by years of expensive, unnecessary, and highly uncertain litigation. To the extent HB 1465 also impacted future relicensing cases, it would also hamper the State's flexibility to settle complex litigation, when that would best serve the interest of the citizens of the State of Maryland.

In addition to these policy concerns, HB 1465 is also legally problematic. First, MDE has already entered into the settlement agreement with Exelon, in which has agreed to conditionally waive its Section 401 authority. Thus, it is unclear how HB 1465 could apply to Conowingo retroactively. HB 1465 states that Maryland "may not enter into an agreement that waives" its authority, but that has already occurred here, when on October 29, 2019 the State entered into just such an agreement. And although the conditional waiver itself does not become effective until FERC has approved the settlement (that may occur at any time. Should that occur before HB 1465 passes, the legislation would be entirely moot, as it cannot retroactively apply after waiver has occurred. HB 1465 may also be practically moot in any event, in the sense that it may not even achieve its implicit goal of reviving the

State's ability to exact more concessions from Exelon-even if the State is prevented from waiving its authority on its own, whether a state has waived is primarily question of federal law, for federal courts and FERC to determine. Regardless of whether HB 1465 applied in the context of the Conowingo relicensing, FERC could still find that the State has waived its Section 401 authority, which would leave the State with no ability to secure commitments from Exelon beyond which it has already achieved in the settlement.

HB 1465 may also be unconstitutional; Article III, 33 of the Maryland Constitution prohibits certain special laws. "A special law is one that relates to particular persons or things of a class, as distinguished from a general law which applies to all persons or things of a class." Maryland Dept of Envi v. Days Cove Reclamation Co., 200 Md. App. 256, 265 (201 1). Such laws are "constitutionally impermissible under 33 if two conditions are met: (1) the law is a 'special law and (2) a 'general law' relating to the same subject matter already exists." Id. at 264-65 (quoting Prince George's County v. B. & O. R.R. Co., 113 Md. 179, 183 (1910)). To determine whether legislation is an impermissible special law, courts consider a variety of factors, including: whether [the legislation] was actually intended to benefit or burden a particular member or members of a class instead of an entire class; whether the legislation identifies particular individuals or entities; whether particular individual or business sought and received special advantages from the Legislature, or if other similar individuals or businesses were discriminated against by the legislation; whether the legislation's substantive and practical effect, and not merely its form, show that it singles out one individual or entity, from a general category, for special treatment; and whether the legislatively drawn distinctions are arbitrary and without any reasonable basis. One last pertinent consideration [ is the public interest underlying the enactment, and the inadequacy of the general law to serve that interest. . [id. at 265-66 (quotations and internal citations omitted).

HB 1465 potentially runs afoul of the prohibition against special laws. Although it is written broadly to apply to any instance in which the

State exercises its authority under the Clean Water Act and Section 401, and thus seems to be of general application, it specifically references only one individual or entity-Exelon, as the owner and operator of the Conowingo Dam. It is clearly intended as a legislative block to a specific transaction between the State and Exelon. Thus, it could be read to impermissibly single out Exelon and the Conowingo relicensing for special treatment.

As to the "... public interest underlying the enactment" of a potential special law, it is hard to see how HB 1465 would serve the broad public interest in cases beyond Conowingo, such that it may be permissible. Indeed, the practical effect of 1-1B 1465 at all is unclear. As noted above, whether a state has waived its authority under Section 401 is primarily a question of federal law, for federal agencies and federal courts to determine. It is not clear what legal effect a state law regarding the timing of waiver or the validity of an agreement to waive would even have, because under federal law affirmative or express waiver is permissible under Section 401. See, e.g., *City of Olmsted Falls, Ohio v. US. Env't'l. Protec. Agency*, 435 F.3d 632, 636 (6th Cir. 2006) ("It would also contravene the express language of the federal statute section which provides not only for express waivers by a state, but also for waivers by silence."); *Env't'l. Def Fund, Inc. v. Alexander*, 501 F. Supp. 742, 771 (N.D. Miss. 1980) ("We do not interpret this to mean that affirmative. waivers are not allowed. Such a construction would be illogical and inconsistent with the purpose of this legislation."); 40 C.F.R. 121.16.

Waiver is also automatic if a state fails or refuses to act on a request for a certification within the time frame set forth under Section 401 -regardless of whether a state law purported to prohibit waiver in certain circumstances. Thus, HB 1465 would apply in only narrow circumstances to prevent entry "into an agreement to waive." But nothing would ever prevent a State from simply delaying action-short of entering into an agreement to do so- on a request past the applicable federal timeframe; and if that occurred, a federal agency or reviewing court could find waiver anyway.

It is not clear why such a narrow prohibition on agreed-upon waiver serves the public interest. Rather, it is the preservation of the State's ability to settle

complex litigation in appropriate circumstances that best serves the public interest.