STATE OF MARYLAND
MARYLAND DEPARTMENT OF THE ENVIRONMENT
Ben Grumbles, Secretary

BILL NO: **House Bill 1465**

COMMITTEE: **Environment and Transportation**

POSITION: **Oppose**

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 § 401 of the federal Clean Water Act as part of exercising the State's 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 D.C. 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 (2011). 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. & 0. 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 a 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.
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> *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 HB 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. Envtl. Prat. 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."); Envtl. 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 ofthis 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.

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