

Department of Legislative Services
Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 955 (Senator Hershey, *et al.*)
Education, Health, and Environmental Affairs

Federal Clean Water Act - Authority of State

This emergency bill prohibits the State, as part of exercising the State's authority and carrying out the State's duties under the federal Clean Water Act (CWA) and State law, including the State's authority and duties related to the federal relicensing of the Conowingo Dam, from entering into an agreement that waives the State's authority under § 401 of CWA.

Fiscal Summary

State Effect: Because the Maryland Department of the Environment (MDE) has already signed a settlement agreement with Exelon under which the State conditionally waives authority under § 401 of CWA, it is unclear whether the bill has any immediate effect. To the extent that Maryland must withdraw from the agreement, State litigation expenditures increase, and State settlement revenues decrease by at least \$14.0 million over the five-year period from FY 2020 through 2024, as discussed below.

Local Effect: The bill does not directly affect local governments. However, if Maryland must withdraw from the Exelon settlement agreement, responsibility for some water quality improvement projects may shift to local jurisdictions.

Small Business Effect: None. The bill does not directly affect small businesses.

Analysis

Current Law/Background: CWA establishes the basic structure for regulating discharges of pollutants into the waters of the United States. Section 401 of CWA requires an applicant for a federal license or permit to conduct an activity, which may result in a discharge to navigable waters to provide a certification that the discharge will comply with CWA, including water quality standards established under state law. A state may grant, grant with conditions, deny, or waive certification. A state's determination is based on whether an activity complies with key provisions of CWA, including federal effluent limitations, federal new source performance standards, toxic and pretreatment effluent standards, and any other appropriate requirement of state law.

The Conowingo Dam is a peaking hydroelectric facility that uses reservoir storage to generate electricity during peak electricity demand periods on the Susquehanna River. The Conowingo Dam is in the midst of relicensing by the Federal Energy Regulatory Commission (FERC); its license expired on September 1, 2014, and it will receive automatic one-year renewals until it is relicensed. FERC cannot act on an application for licensing unless a CWA – § 401 water quality certification – is issued by MDE. MDE issued the water quality certification with special conditions on April 27, 2018, which required Exelon annually to reduce 6.0 million pounds of nitrogen and 260,000 pounds of phosphorus. Exelon filed an administrative appeal with MDE and lawsuits in federal and State court alleging that the water quality certification imposed on it the sole responsibility to remove from the Susquehanna River pollutants that Exelon did not introduce into the river but that flow through the Conowingo Dam.

On October 29, 2019, Exelon and MDE signed a settlement agreement to settle the ongoing litigation between the two parties. According to MDE, under the settlement agreement, Maryland agrees to conditionally waive § 401 authority. Pursuant to the settlement agreement, Exelon agrees to undertake and fund substantial protection, mitigation, and enhancement measures to improve conditions in the Susquehanna River basin. According to Exelon, the benefits to Maryland and the Chesapeake Bay are valued at more than \$200 million over the anticipated 50-year life of the license, which will be funded from the dam's earnings over that time period. FERC is still in the process of issuing a new license.

State Fiscal Effect: Since the State has already entered into a settlement agreement that conditionally waives the State's authority under § 401 of CWA as part of the ongoing licensing process for the Conowingo Dam, it is unclear whether the bill has any immediate effect. However, to the extent that the State must withdraw from the settlement agreement, the State loses significant settlement revenues that would otherwise be paid by Exelon in the near term and the long term.

In addition to implementing projects to protect and enhance the health of the bay, MDE advises that Exelon has agreed to make ongoing payments to the State under the settlement agreement. MDE estimates that settlement revenues for the department totals \$14.0 million over the next five years (\$5.4 million in fiscal 2020, \$5.1 million in fiscal 2021, \$1.3 million in fiscal 2022, and \$1.1 million annually in both fiscal 2023 and 2024). Most of the money will be deposited into MDE's Clean Water Fund, but MDE's Wetlands and Waterways Program will receive some of the money. MDE plans to use the settlement revenues to pay for water quality improvement projects that are required by federal law. Without the settlement funding, MDE reports that these responsibilities would fall on the State and local jurisdictions.

Additionally, MDE advises that the Department of Natural Resources is slated to receive \$1 million for eel passage research under the settlement agreement, although the Department of Legislative Services does not have information on the timing of that funding. Further, the settlement agreement specifies that the Maryland Geological Survey or the U.S. Geological Survey will continue to receive up to \$16,400 annually for the existing Tailrace gage, as specified.

Additionally, to the extent the State withdraws from the settlement, litigation expenditures increase, likely for many years.

Additional Information

Prior Introductions: None.

Designated Cross File: HB 1465 (Delegate Jacobs, *et al.*) - Environment and Transportation.

Information Source(s): Maryland Department of the Environment; Exelon Corporation; Department of Legislative Services

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