

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 540 (Senators Hershey and Gallion)
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 significantly, 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: 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.

State Fiscal Effect: 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, as discussed below. Accordingly, 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. Based on estimates from MDE, annual State revenue losses would total more than \$12.5 million over the next five fiscal years. Additionally, to the extent the State withdraws from the settlement, litigation expenditures increase, likely for many years.

Additional Comments: 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 and the Governor's Office, 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.

Additional Information

Prior Introductions: HB 1465 of 2020 received a hearing in the House Environment and Transportation Committee, but no further action was taken. Its cross file, SB 955, received a hearing in the Senate Education, Health, and Environmental Affairs Committee, but no further action was taken.

Designated Cross File: HB 427 (Delegate Jacobs) - Environment and Transportation.

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

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