Testimony in Support of House Bill 427 – Federal Clean Water Act – Authority of State ('Emergency Conowingo Dam Legislation') – Delegate Jacobs

February 20, 2021

Dear Chairman Pinsky and Members the Committee:

Thank you for this opportunity to submit testimony in support of Senate Bill 540 on behalf of Waterkeepers Chesapeake. Waterkeepers Chesapeake is committed to ensuring a healthy Chesapeake Bay watershed, which includes the rivers and streams that feed into the Bay. You can also find an organizational sign-on letter and a watermen sign-on letter in support of this bill.

Maryland Waterkeepers work on measures that safeguard our waterways, protect drinking water sources, and ensure aquatic habitat health of the Chesapeake Bay—and this means ensuring that owner of Conowingo Dam, Exelon Corporation, plays its fair share in the cleanup efforts around the dam's reservoir. The state does not have enough resources to tackle this problem on its own, and the health of the Chesapeake Bay depends upon it.

1. **Background & Need for Emergency Legislation**

    a. **Background**

Conowingo Dam requires a federal license that needs to be renewed every 50 years. The Dam's license was up for renewal in 2014. As a part of the federal re-licensing process, Maryland had the opportunity to issue a Water Quality Certification (WQC) for the Dam—with new conditions that would put the owner, Exelon Corporation, on the hook for a number of clean up requirements. Exelon applied for a WQC from Maryland in 2014. The application was deficient and the state notified Exelon that the application would be denied, if it was not withdrawn. This happened three more times - when finally in 2018 MDE issued the final WQC for Conowingo Dam, with robust conditions that would require Exelon to play a fair share in the clean up around the Dam. It held Exelon responsible for the removal of 6 million pounds of nitrogen and 260,000 pounds of phosphorus every year for the next 50 years. Exelon subsequently sued the state. After the lawsuit was filed, Maryland proposed to settle with Exelon. The Proposed Settlement agreement was submitted to FERC on October 31, 2019, and the comment period ended on January 19, 2020. FERC has not approved this settlement despite having it in front of them for more than one year. MDE has the ability to withdraw the Proposed Settlement agreement before FERC makes a final determination on it.

The Proposed Settlement agreement between Maryland & Exelon on Conowingo Dam would require Maryland to waive its clean water rights over the next 50 years. The agreement would only require Exelon to pay $1.2 million a year, whereas the Maryland-issued Water Quality Certification would have required $172 million a year in cleanup costs. **This would forfeit over $8.5 billion from Exelon over the next fifty years.** Meaning, the state and the public would have absolutely no opportunity to put any new obligations on Exelon until the year 2070; and the clean-up burden of Conowingo Dam will be placed on taxpayers. The Proposed Settlement is currently under consideration by the Federal Energy Regulatory Commission (FERC), but the state has the ability to withdraw the Proposed Settlement prior to FERC's determination.

b. Why Senate Bill 540 is Needed

By preventing Maryland from waiving the Water Quality Certification it issued to Exelon for Conowingo Dam in 2018, the state would have to withdraw the settlement agreement to remove the waiver of the WQC. If the state moves forward on the settlement agreement without this change, Maryland will be losing out on billions of dollars of cleanup support from Exelon over the next 50 years and there will be no public accountability measures to ensure Exelon meets the clean up terms under the settlement.

Millions of pounds of sediment & nutrient pollution (including nitrogen & phosphorus), along with trash and debris, will continue to flow down the Susquehanna River from Conowingo Dam, into the Chesapeake Bay and local rivers and streams. Many of the impacted waterways are drinking water sources for Maryland residents, including the City of Baltimore. The nutrients and sediments from the Dam kill off aquatic species, such as crabs, fish and oysters, that are an essential part of Maryland's seafood economy.

2. Water Quality Impacts of the Conowingo Dam

The Conowingo Hydroelectric Project is a 100-foot concrete dam and integrated power plant that traverses the Susquehanna River in Maryland, approximately 10 miles north of its confluence with the Chesapeake Bay. It has been in operation for almost 100 years and brings 40% of the nitrogen, 25% of the phosphorus, and 27% of the sediment load to the Chesapeake Bay.

Exelon incorrectly claims that the Conowingo Dam Project has functioned as a "best management practice" for the Chesapeake Bay, but this is an overly simplistic portrayal of the Project's effects. While the dam historically trapped an average of 50-67% of the annual sediment load (1.5 to 2 million tons, with nitrogen and phosphorus attached to it), the close to 14-mile long reservoir is now full after close to a century in operation, with no adequate action taken to remedy the hundreds of millions of pounds of trapped debris and sediment. If not for the Conowingo Dam,

this load would have been delivered to the Lower Susquehanna River and Chesapeake Bay at normal rates.

Indeed, the Conowingo Dam has profoundly altered the Lower Susquehanna River system. The reservoir has produced an enormous artificial repository of sediment and associated nutrients that can be scoured by high flow events, re-mobilized, and delivered downstream by large storm-induced flows. The process of "scouring" the sediment and debris in the reservoir occurs when there are high flow conditions (caused by storms or when snow melts). When reservoir is scoured, all the debris and sediment are dumped all at once into the Lower Susquehanna River, the Susquehanna Flats (the shallow underwater delta of the Susquehanna River), and the upper Chesapeake Bay.[1] These scoured loads add pollutant loads at times when the downstream receiving waters are already vulnerable, receiving their heaviest loads of suspended pollution from the Susquehanna River Watershed. What this all means is that **scoured loads deliver much greater quantities of sediment and nutrients to the Lower Susquehanna River and Chesapeake Bay than the natural loading that would have occurred during the same flow events had the Dam not been in place.** The resulting excessive concentrations of sediment and nutrients impair aquatic wildlife habitat by fueling excessive algae growth, blocking light penetration that is critical to underwater life, and physically smothering sensitive aquatic life, including underwater vegetation and oyster beds.[2] Particularly in the case of very large storms, scouring of the Dam's sediment accumulation could overwhelm pollution reduction efforts undertaken upstream in the Lower Susquehanna River watershed, and set water quality and the growth of underwater grasses in the Susquehanna Flats and Chesapeake Bay back for decades. This is particularly true during very large storms, such as 25-year, 50-year, 75-year, and 100-year return interval flow events, for which there is a substantial likelihood of repeated occurrence during the requested license period. This risk only increases as we continue to face greater storm frequency and intensity. Indeed, the effects of climate change will likely lead to more frequent and severe scouring events at Conowingo.

3. The 2018 Water Quality Certification for Conowingo Dam

Clean Water Act § 401 requires Exelon to obtain a certification from MDE that "any discharge" from the Conowingo Dam "will comply with the applicable provisions of" Clean Water Act §§ 301, 302, 303, 306, and 307. 33 U.S.C. § 1341(a)(1). It requires that all conditions "necessary to assure" compliance with these provisions become conditions on the Conowingo Dam's license. *Id.* § 1341(d). On April 27, 2018, MDE issued a § 401 Certification for the Conowingo Dam. Clean Water Act Certification for the Conowingo Hydroelectric Project. That certification was

[1] Lower Susquehanna Riverkeeper *et al*., *Comments Re: Conowingo Hydroelectric Project, Application for Water Quality Certification, Application # 17-WQC-02* at 7-8 (Sept. 11, 2017), Ex. B hereto.

[2] *Id*.; Ex. B at 12-13, ¶ 6.G-J.

opened for public comments and the public comment period was then extended to allow more stakeholder input as well as a public hearing, as there were many concerns expressed about the Project.

In its Certification, Maryland found that operations of Conowingo Dam had the following impacts on water quality:

- Significant and adverse impacts on biota and fish due to both dam operations, restricting necessary water flow, and blocking fish passage;
- Decimated the previously vibrant Shad and Herring fisheries;
- Stopped the reproduction of mussels (by blocking eel passage), and loss of the important filtration of sediment and nutrient pollution;
- Loss of 14 miles of healthy flowing natural river;
- Loss of all trapping capacity for sediment and nutrients, resulting in pollution moving downstream, and significant releases of pollution during storm events;
- Reduction of dissolved oxygen (DO) levels and harm to aquatic life
- Increased velocity of water and unfavorable substrate conditions resulting in additional scour and movement of pollution downstream;
- Accumulation of trash and debris, which is then released in mass during storm events, adversely impacting recreation, water supply and aquatic life downstream; and
- Prevents the natural attenuation of sediment and nutrients and prevents growth of submersed aquatic vegetation (SAV).

To address this wide array of water quality impacts, Maryland's Certification imposed a number of conditions intended to implement water quality criteria for dissolved oxygen and to support the related designated uses. The Certification states expressly: "**The Department hereby certifies that the Project's operations and discharge into navigable waters will comply with applicable effluent limitations, other limitations, and water quality standards and requirements issued or approved under Sections 301, 302, 303, 306, and 307 of the Clean Water Act or applicable State Law, provided that Licensee complies with all of the provisions, requirements, and conditions in this Certification**." (emphasis added). Thus, it confirms that "compli[ance] with all of the provisions, requirements and conditions" in the Certification is necessary to assure the Dam's compliance with the state's legally-binding water quality standards. The Certification states plainly that it is MDE's "final decision."[3]

One of the most significant provisions in the Certification relates to the sediment and nutrient pollution, requiring Exelon to "**annually reduce the amount of nitrogen included in the Project's discharges by six million (6,000,000) pounds and the amount of phosphorus in**

[3] Certification at 27.

the Project's discharges by two hundred sixty thousand (260,000) pounds (or such different amounts of phosphorus and nitrogen reductions as may be approved by [the Maryland Department of the Environment], provided that such different amounts of nitrogen and phosphorus reductions provide the equivalent protection of [dissolved oxygen] levels...) (emphasis added)."[4]

The Certification allows Exelon to propose to meet these reduction requirements through "any combination" of reduction strategies, including: payment of an in-lieu fee annually per pound of nitrogen and phosphorus removed; installation of a combination of best management practices and ecosystem restoration; or dredging the reservoir. If payment in-lieu were the sole strategy to meet this requirement, the payment schedule in the certification would result in a cost of $172 million per year. Over the life of the 50 year license period, this would amount to payment of $8.6 billion for nutrient reduction in the Susquehanna River and the Chesapeake Bay, with an adjusted present value of $4,977,295,606.00.

4. The Proposed Settlement between MDE and Exelon

On October 29, 2019, Maryland proposed to waive their authority under § 401 of the Clean Water Act in the Joint Offer of Settlement ("Proposed Settlement"), that was negotiated between MDE and Exelon, while excluding any other stakeholders, such as Waterkeepers, other environmental organizations, municipalities, and watermen who have all been involved in this process for many years. More specifically, the Proposed Settlement agreement would require Maryland to waive its clean water rights over the next 50 years, along with the billions of dollars in clean up that the Water Quality Certification would have had Exelon on the hook for. **The settlement states that MDE would "waive[] any and all rights it had or has to issue a water quality certification under Section 401 of the Clean Water Act" for the relicensing of the Conowingo Dam.** MDE fails to provide *any* explanation for how this incredibly weak Proposed Settlement can protect Maryland's water quality. It's also unclear how Maryland can simply wish away an already issued final Water Quality Certification.

While there is sparse information in the Proposed Settlement, it is clear that it rests on a payment in-lieu scheme for its substance. The total of *all* payments under the Proposed Settlement would yield only $107 million over the entire 50 year term of the permit. The

Proposed Settlement failed to adjust for the present value of the payments, as the environmental remediation is gauged at the present time. Adjusted for present value, **the total payments would yield only $61.6 million over the entire 50 year term.** Divided over the license term, that equals an average of only $1.2 million per year, as opposed to the $172 million per year that was *required* in order to protect Maryland's water quality.

[4] *Id*. at 15, ¶ 7.D.ii.

More specifically, the Proposed Settlement is flawed in a number of ways:

A. The Proposed Settlement provides grossly insufficient funds to deal with the risks that Conowingo operations pose to the Susquehanna River and Chesapeake Bay — primarily from the next large storm that will scour the millions of tons of sediment, nutrients, and debris currently trapped behind the Dam. **A mere $500,000 was dedicated to finding solutions for the hundreds of millions of tons of sediment in the Dam's reservoir, which will be wholly inadequate to addressing that problem and remains the biggest threat to the health of the Chesapeake Bay.**

B. The settlement includes statements of intent without assurances that the initiatives and actions

under the agreement will actually be fulfilled by Exelon; there are no stipulated timelines for completion of some of the work to be done by Exelon.

C. The settlement gives the public no enforcement power to make sure the terms of the settlement are fulfilled in a sufficient manner. It leaves oversight entirely up to the State of Maryland, giving no other parties standing to hold MDE or Exelon accountable.

D. The settlement requires payments made by Exelon to go to the State's Clean Water Fund, which can be reallocated or raided by the Governor at any time over the next 50 years. As an example of how the funds can be used, in fiscal year 2017, salaries and wages accounted for roughly 78 percent of the Clean Water Fund's budget.

E. The settlement does not mention any appropriation of funding for upstream water quality improvements to combat sediment and nutrient load to the Dam's reservoir. Significant improvements must be made upstream, and those communities need support now as a part of this settlement.

F. The Proposed Settlement does away with the **Conowingo Dam Watershed Implementation Plan (WIP), threatening the viability of the Chesapeake Bay Total Maximum Daily Load (TMDL).** WIPs are plans for how states will achieve the TMDL, or the "pollution diet" determined by the EPA for any given waterway. WIPs are meant to be comprehensive efforts among private, local, state, and federal entities. Exelon has gone on the record to claim that any contribution to the clean-up of the Conowingo Dam would be an "unfair burden," even though they have profited off of the Dam's operation in the past and will continue to profit from it for the next 50 years.

5. MDE Did Not Waive It's WQC Rights in 2015, As Some Have Argued

Lastly, we'd like to address the issue of whether Maryland waived its rights to issue a WQC back in 2015. §401 of the Clean Water Act provides that a state may issue a WQC on a project that requires a federal license within one year after receiving the initial application; if the state does not act upon the WQC within a year, it thereby waives any right to issue a WQC. This is to ensure that states decide upon WQC applications within a timely manner. In 2019, the U.S. D.C. Circuit Court (*Hoopa Valley Tribe v. FERC)* found that a state had waived its authority to issue a WQC when an applicant submitted the same exact 401 WQC application for more than a decade, and the state failed to take any action on it. The D.C. Circuit Court expressly declined to rule on whether a State could waive its rights to issue a § 401 certification where an applicant withdraws its request and submits one that is either "wholly new" or substantially different, which is what happened with Exelon's application several times. Exelon's application was glaringly incomplete when it was submitted in 2014, and remained so until Exelon finally provided the Sediment Study in 2017. After the final 2017 application was submitted – the only application that was accompanied the Sediment Study and the only application that MDE deemed complete – MDE issued a final WQC for the Dam within a year in 2018.

Likewise, MDE has vigorously defended the fact that it did not waive its 2018 certification rights under the Clean Water Act:

> "Seizing on a recent D.C. Circuit ruling [Hoopa Valley Tribe v. FERC, 913 F.3d 1099 (D.C. Cir. 2019)] **that has nothing to do with the instant facts**, E xelon asks the Commission to find that Maryland waived its right to issue the Conowingo water quality certification. The basis for this claim is that the State did not act on Exelon's certification application until 2018, even though that application was first filed in January 2014. **What Exelon ignores is that in late 2014—and on three separate occasions thereafter—Exelon voluntarily withdrew and resubmitted its certification application to MDE.[8] Through its decision to withdraw, Exelon left Maryland with no certification "request" to address, and, as such, no one-year deadline against which to measure the State's fealty to its CWA obligation...**Exelon disagrees."—MDE Protest and Answer, p.3, *emphasis added.*
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> "In its [Exelon's] view, once a request is made, the State must act within a year apparently even if the request has been withdrawn. **If Exelon is right, it means that a licensee that suspects its certification request is going to be denied (on any basis) can preemptively withdraw its application, wait out the one-year clock, and claim that certification has been waived. An applicant could even submit a certification request on**

one day, withdraw it (on any basis) a day later, wait a year, and then announce that the certifying state has waived its rights. Exelon says this vision of how Section 401 is intended to operate "promotes the public interest," Petition at 18, **but it cannot be the law that a state waives its certification right where, as here, it fails to act on an incomplete and voluntarily withdrawn certification application…"** -- MDE Protest and Answer, p.3-4, *emphasis added.*

6. Conclusion

We urge the Committee to adopt a favorable report on this legislation to ensure that Exelon pays a fair share in the cleanup around the Dam. Watermen -- whose livelihoods are already being affected by Chesapeake Bay pollution – and Maryland taxpayers should not have to bear the financial responsibility for pollution from Conowingo Dam.

Sincerely,
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