



Testimony in Support of Senate Bill 540 (Senator Hershey) Federal Clean Water Act - Authority of State

February 24th, 2021

Dear Chairman Pinsky and Members of the Committee:

We are writing in strong support of Senate Bill 540 on behalf of Waterkeepers Chesapeake, a coalition of seventeen Waterkeepers, Riverkeepers, and Coastkeepers working to make the waters of the Chesapeake and Coastal Bays swimmable and fishable. These comments are also submitted on behalf of Clean Water Action, Maryland Conservation Council, Maryland Campaign for Environmental Human Rights, Maryland Legislative Coalition, MOM's Organic Market, Preservation Maryland, ShoreRivers, Sierra Club, Unitarian Universalist Legislative Ministry of Maryland and Maryland WISE Women.

In October 2019, Maryland and Exelon reached a tentative settlement for the Conowingo Dam. The proposed settlement agreement would require Maryland to waive its clean water rights over the next 50 years and would require Exelon to pay less than 1% of the \$172 million in annual cleanup costs required under the Maryland-issued Water Quality Certification (WQC). **This settlement would forfeit over \$8.5 billion from Exelon over the next fifty years,**¹ placing the clean-up burden for Conowingo Dam onto the shoulders of taxpayers. In addition, the state and the public would have no opportunity to put any new obligations on Exelon until the year 2070.

This bi-partisan emergency bill (SB 540) will prevent Maryland from entering into such a problematic settlement agreement that waives the state's authority under Section 401 of the Clean Water Act.

Background

Conowingo Dam requires a federal license that must 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 ensure the owner, Exelon Corporation, is responsible for a number of clean up requirements. Exelon applied for a Water Quality Certification 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 The application was deficient and the state notified Exelon that the application would be denied, if it was not withdrawn.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, until finally, in 2018,

¹ Calculated from payment-in-lieu amounts from [Maryland's CWA Sec. 401 Water Quality Certification](#) for the Dam, over the 50 year life of the license.

MDE issued a final WQC for Conowingo Dam, with robust conditions that would require Exelon to pay a fair share for the cleanup around the Dam. The WQC 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 and, after the lawsuit was filed, Maryland proposed to settle with Exelon in a closed-door process that didn't include watermen, community stakeholders, or greater citizen input. The proposed settlement agreement was then submitted to FERC in October 2019, which has not yet approved the settlement.

MDE has the ability to withdraw the proposed settlement agreement before FERC makes a final determination on it. SB 540 allows the General Assembly to take swift action and withdraw Maryland from a deal that forces Maryland taxpayers to shoulder the burden of clean-up for a Fortune 100 Energy Company generating revenues of approximately \$33.5 billion. SB 540 will bring the settlement back to the negotiations table with all interested parties represented and provide a level playing field for a fair, sufficiently-funded and functional settlement.

Marylanders pay while Exelon walks away

While Exelon *claims* that the settlement is worth \$200 million, actual cash payments under the settlement are only \$61 million over the entire 50 years—much of that is focused on species and habitat restoration rather than water quality. In contrast, the Water Quality Certification issued in 2018 requires \$172 million per year just for nitrogen and phosphorus reductions. This financially-deficient settlement would only require Exelon to pay \$1.2 million a year, whereas the Maryland-issued Water Quality Certification (WQC) would have required \$172 million a year in cleanup costs.

As drafted, this settlement would forfeit over \$8.5 billion from Exelon over the next fifty years, as would be the “payment-in-lieu” cost outlined in the WQC. Conceivably, the only source of funding to cover this gap is Maryland taxpayers. This is clearly a bad deal for Maryland, and a bad deal for the Bay. By passing this bill, the General Assembly can help make sure Exelon pays its fair share.

The proposed settlement puts Maryland in an untenable position—waiving all Clean Water Act authority at the Dam for 50 years

By passing SB 540 and preventing Maryland from waiving the 2018 Water Quality Certification, 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 local rivers and streams, and the Chesapeake Bay. 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.

The CWIP is a pipe dream—not a plan

The Conowingo Watershed Implementation Plan (CWIP) released by the Bay Program in October of 2020 offers no clear plan to address sediments behind the Dam. At the start of the CWIP planning process, dredging analysis and planning was supposed to be a high priority in the final CWIP. The current draft makes very few references to dredging, and concludes only that “more study is needed.” Furthermore, the best management practices in the CWIP (selected to offset the pollutant load at Conowingo) will be mainly taking place upstream of the dam in Pennsylvania. Few, if any, best management practices will take place in urban areas of Maryland, yet these communities will ultimately foot the bill.

In addition, the CWIP does not hold Exelon financially accountable for the dam. Analyzing planning documents for the CWIP shows that the drafters' interest in holding Exelon accountable to the process waned over time with the burden falling to the Bay states and their respective taxpayers. Exelon has no definitive role, financial or otherwise, in the drafted CWIP. The financing plan for the CWIP paints a grimmer picture—all of the Bay states are expected to be the source of financial contribution for the plan.

The goals of the CWIP can't be met without sufficient funding—between \$72 and \$172 million per year—in perpetuity. Available editions of the financing strategy indicate that Bay Partner states will have to pay for these pollution reductions. Other clear sources for funding (namely, Exelon, which generates nearly \$34 billion dollars in annual revenue) are not named in the draft CWIP nor the financing statement. Finally, because no feasible funding source was identified for the CWIP, the nitrogen, phosphorus, and sediment loads at the Dam will need to be allocated among the other states if this plan falls through. In terms of both funding and additional loads, [officials from Bay Partner states have already sounded](#)

[concerns](#) over the inequity of this approach. SB 540 would keep Maryland from having to rely on vague cleanup plans and inequitable offsets.

We urge a favorable report.

Respectfully submitted,

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