



# Maryland

## Department of the Environment

Larry Hogan, Governor  
Boyd K. Rutherford, Lt. Governor

Ben Crumbles, Secretary  
Horacio Tablada, Deputy Secretary

February 24, 2021

The Honorable Paul G. Pinsky, Chair  
Education, Health, and Environmental Affairs Committee  
2 West, Miller Senate Office Building  
Annapolis, Maryland 21401

### **Re: Senate Bill 540 – Federal Clean Water Act - Authority of State**

Dear Chairman Pinsky and Members of the Committee:

The Maryland Department of the Environment (MDE) has reviewed Senate Bill 540, entitled Federal Clean Water Act - Authority of State and would like to offer a letter of information regarding this legislation.

Senate Bill 540 prohibits 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.

SB 540 attempts to block the State of Maryland's efforts to resolve expensive and protracted litigation, amidst an uncertain and changing federal regulatory landscape. In recent years, Federal courts and FERC have expressed opposition to states' rights under Section 401, with FERC using the reasoning of the D.C. Circuit's decision in *Hoopa Valley Tribe* in several other licensing proceedings leading right up to our settlement in 2018 to find that states had 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 had 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 most likely 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, SB 540 could 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 SB 540 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.

MDE is as frustrated as anyone that FERC has not made a decision on the settlement, since we filed it 16 months ago. We will continue to press FERC on the need for a decision immediately to help inform the State, including this Committee, and the many citizens, stakeholders, and agencies on how to make the necessary progress in restoring the Susquehanna River and Chesapeake Bay, while holding Exelon responsible for its fair share.

Thank you for your consideration. We will continue to monitor Senate Bill 540 during the Committee's deliberations, and I am available to answer any questions you may have. Please feel free to contact me at 410-260-6301 or by e-mail at [tyler.abbott@maryland.gov](mailto:tyler.abbott@maryland.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Abbott", written over a horizontal line.

Tyler Abbott

cc: The Honorable Stephen S. Hershey, Jr.  
The Honorable Jason C. Gallion