



Maryland

Department of the Environment

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

Ben Crumbles, Secretary
Horacio Tablada, Deputy Secretary

February 3, 2021

The Honorable Kumar P. Barve
Environment and Transportation Committee
Room 251, House Office Building
Annapolis, Maryland 21401

Re: House Bill 427 – Federal Clean Water Act - Authority of State

Dear Chairman Barve and Members of the Committee:

The Maryland Department of the Environment (MDE) has reviewed House Bill 427, entitled Federal Clean Water Act - Authority of State and would like to offer a letter of information regarding this legislation.

House Bill 427 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.

HB 427 attempts to block the State of Maryland's efforts to resolve expensive and protracted litigation, amidst an uncertain and changing federal regulatory landscape. Federal courts and FERC have expressed opposition to states' rights under Section 401, and FERC has already used the reasoning of the D.C. Circuit's decision in *Hoopa Valley Tribe* in several other licensing proceedings to find that states have 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 has 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, HB 427 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 HB 427 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.

It is not clear why such a narrow prohibition on agreed-upon waiver serves the public interest. Rather, it is the preservation of the State's ability to settle complex litigation in appropriate circumstances that best serves the public interest.

Thank you for your consideration. We will continue to monitor House Bill 427 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.

Sincerely,

Tyler Abbott

cc: The Honorable Jay A. Jacobs