

## ORAL ARGUMENT NOT YET SCHEDULED

Case Nos. 21-1139 and 21-1186 (consolidated)

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WATERKEEPERS CHESAPEAKE, ET AL.  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

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On Petitions for Review of Order of the  
Federal Energy Regulatory Commission, 174 FERC ¶61,217 (Mar. 19, 2021)

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**FINAL BRIEF OF *AMICUS CURIAE* MARYLAND CHARTER BOAT  
ASSOCIATION, INC. IN SUPPORT OF PETITIONERS**

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Dated: June 21, 2022

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), *Amicus Curiae* Maryland Charter Boat Association, Inc. provides the following list of parties to this case, rulings under review, and related cases:

A. Parties, Intervenors, and Amici

These consolidated cases involve petitions for review of final agency action by the Federal Energy Regulatory Commission. There was no action in the district court, and so there were no parties in the district court.

Parties, intervenors and *amici* appearing in this Court are as follows:

Petitioners: Waterkeepers Chesapeake, Lower Susquehanna Riverkeeper Association, ShoreRivers, and Chesapeake Bay Foundation, Inc.

Respondent: Federal Energy Regulatory Commission.

Respondent-Intervenors: Constellation Energy Generation, LLC, U.S. Department of the Interior on behalf of the U.S. Fish and Wildlife Service, and Maryland Department of the Environment.

Amicus Curiae for Petitioners: Maryland Charter Boat Association, Inc.; Maryland State Delegates Jay A. Jacobs, Dana C. Jones and Vaughn M. Stewart; and National Wildlife Federation.

## B. Rulings Under Review

References to the rulings at issue appear in the Brief for Petitioners Waterkeepers Chesapeake, Lower Susquehanna Riverkeeper Association, ShoreRivers, and Chesapeake Bay Foundation, Inc.

## C. Related Cases

To the knowledge of *Amicus Curiae*, the agency action challenged in these consolidated cases has not been before this Court or any other court.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *Amicus Curiae* Maryland Charter Boat Association, Inc. provides the following corporate disclosure statement:

Maryland Charter Boat Association, Inc. is a trade association comprised of the largest group of professional Charter Boat Captains on the Chesapeake Bay. It operates to promote sportfishing, sightseeing and cruising throughout the Maryland Chesapeake Bay area to the Atlantic Coast and the common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

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## GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

Exelon	Exelon Power Generation Company, LLC (now known as Constellation Energy Generation, LLC)
FERC	Federal Energy Regulatory Commission
Petitioners	Waterkeepers Chesapeake, Lower Susquehanna Riverkeeper Association, ShoreRivers, and Chesapeake Bay Foundation, Inc.
Project	Conowingo Hydroelectric Project No. 405

## STATUTES AND REGULATIONS

Applicable statutes and regulations are contained in the Brief for Petitioners Waterkeepers Chesapeake, Lower Susquehanna Riverkeeper Association, ShoreRivers, and Chesapeake Bay Foundation, Inc. (collectively, “Petitioners”).

## INTERESTS OF *AMICUS CURIAE*

This action involves challenges by Petitioners to the approval of a new 50-year license issued by the Federal Energy Regulatory Commission (“FERC”) to Exelon Power Generation Company, LLC (now known as Constellation Energy Generation, LLC) (“Exelon”) for the continued operation of the Conowingo Hydroelectric Project No. 405 (“Project”), 174 FERC ¶61,217, Accession #20210319-3034, Record #1256-1257 (JA1-JA145). The new 50-year license was issued on March 19, 2021 without including the water quality certification issued by the Maryland Department of the Environment in April of 2018 as a condition of that license as required by the Clean Water Act. *See* 33 U.S.C. §1341. Instead, FERC included provisions from a Settlement Agreement entered in October 2019 between Maryland and Exelon that does not certify and, indeed, fails to ensure that water quality standards are being met and designated uses are being protected. 174 FERC ¶61,217 at 24-26 (JA24-JA26). FERC did so despite the known hazards posed by the Project’s operations to the Susquehanna River and the Chesapeake

Bay, to aquatic resources that once flowed freely in these waters, and to the recreational uses that make the Bay a popular and unique destination spot.

*Amicus Curiae* Maryland Charter Boat Association, Inc. is the largest group of professional Charter Boat Captains on the Chesapeake Bay, promoting sportfishing, sightseeing and cruising throughout the Maryland Chesapeake Bay area. Its members have a significant interest in this case, as they have been directly impacted by the debris and pollution that is released from the Project's reservoir by the Project's dam that pose dangers to the waters they sail, adversely impacting their businesses and livelihoods. Because of the significant sediments in the Project's reservoir, a strong storm and even a couple of days of rain can overwhelm the reservoir, resulting in contaminated sediments and debris collecting in the reservoir to flow downstream. This causes damage to boats, scattering fish which could destroy fishing grounds for whole seasons, and spoiling shorelines, has prevented boats from being able to leave the docks resulting in lost business, and risks harms to those using the waters, such as charter boat passengers.

The lack of adequate protections in the Settlement Agreement, and thereby the new 50-year license, to address these dangers will continue to allow these events to occur on a more frequent basis, adversely impacting uses of the waters, such as fishing and recreational uses. This affects the ability of charter boats to operate safely, if at all, and protect their passengers. Thus, *Amicus Curiae* and its

members have a strong interest in ensuring FERC complies with its obligations under the Clean Water Act, the Federal Power Act, and the National Environmental Policy Act. These interests are distinct from those of the parties to the case, and *Amicus Curiae* can provide a different perspective to the Court regarding the impacts of FERC's decision to forgo the water quality certification requirements in this case.

All parties have consented to the filing of this *amicus* brief. No party or party's counsel authored the brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No other person, other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

### **SUMMARY OF ARGUMENT**

It cannot be disputed that the aquatic resources and recreational uses of the Chesapeake Bay must be protected under state water quality standards. These resources are part of the identity of the area and an important part of the local economy. Maryland has acknowledged that the "Chesapeake Bay continues to be a focal point for Maryland, both culturally and economically," and that "[a] healthier Bay not only serves to provide beauty and opportunity to explore nature, but has

the ability to add billions of dollars to Maryland's economy."<sup>1</sup> Toward those ends, Maryland issued a water quality certification for the Project in 2018 including provisions that it determined were needed to ensure the water quality standards are met, which includes protecting the impacted waters' designated uses.

In issuing the new 50-year license, however, FERC contends that Maryland abdicated its responsibilities to take a significant and major step to restoring and protecting the Bay by "conditionally" waiving the water quality certification if FERC included provisions from a Settlement Agreement in lieu thereof. 174 FERC ¶61,217 at 25-26 (JA25-JA26). Rather than include provisions that Maryland determined would protect aquatic resources and designated uses, FERC weighed the different interests and concluded it was requiring those measures it deemed necessary to protect aquatic resources. *Id.* But Maryland's claimed interest in avoiding litigation delays does not authorize it to revoke or change the certification it has issued and allowing a "waiver" in this case would circumvent the Clean Water Act's requirements, removing the safeguards Congress imposed to ensure state water quality standards are not overlooked. Even if it properly found a waiver by Maryland, FERC tipped the scales in favor of the Project's operations over the

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<sup>1</sup> Maryland, *Maryland's 2020 Chesapeake Bay Annual Progress* (Dec. 13, 2021), <https://storymaps.arcgis.com/stories/234759335b7249d88442a7bff53a8784/print>. References are provided as background for the Court to understand the issues before it and whether the agency considered all relevant factors.

public's interests in meeting water quality standards and protecting designated uses. This was arbitrary.

## ARGUMENT

### **I. CLEAR AND ENFORCEABLE ACTIONS ARE NEEDED TO ADDRESS THE ADVERSE IMPACTS THE PROJECT HAS ON AQUATIC RESOURCES AND RECREATIONAL USES IN THE CHESAPEAKE BAY WATERSHED.**

The Chesapeake Bay, deemed a “national treasure,” is the largest and once most productive estuary in the United States. Executive Order 13508, 74 Fed. Reg. 23,099, 23,099 (May 15, 2009). Due to the significant damage to the Bay watershed from human activities, federal and state agencies have engaged in substantial efforts to restore and protect the Bay and its watershed. *Id.*

Unfortunately, the Bay has not attained State water quality standards or “the ‘fishable and swimmable’ goals of the Clean Water Act.” *Id.*

The need for taking clear and enforceable action to address the harms stemming from the continued operation of the Project is clearly illustrated by the impacts being felt by the commercial fishing industry and recreational users of the Chesapeake Bay. As Maryland itself found, the water quality certification it issued for the Project under the Clean Water Act, 33 U.S.C. §1341(a), is a necessary and important part of the efforts to meet state water quality standards and “the ‘fishable and swimmable’ goals of the Clean Water Act.”

**A. Commercial Fishing and Recreational Uses are Vital to the Chesapeake Bay Area.**

Economists have valued the Chesapeake Bay at over one trillion dollars related to fishing, tourism, property values, and shipping activities.<sup>2</sup> The majority of the commercial and recreational saltwater landings in the Mid-Atlantic region come from the Chesapeake Bay.<sup>3</sup> Fishing and other recreational uses of the Bay provide substantial benefits to the local economies.

Commercial fisheries are an important part of the Bay's economy and identity. "The Chesapeake Bay's watermen have been a mainstay of the Mid-Atlantic economy for generations."<sup>4</sup> In Maryland, the commercial seafood industry, excluding imports, contributes over \$302 million in sales and 4,910 jobs

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<sup>2</sup> Chesapeake Bay Foundation, *The Economic Argument for Cleaning Up the Chesapeake Bay and its Rivers*, at 1 (2012), available at <https://www.cbf.org/document-library/cbf-reports/2012-Economic-Report3788.pdf> ("2012 Economic Study").

<sup>3</sup> *Id.* at 5.

<sup>4</sup> Environment Maryland Research & Policy Center, *Watermen Blues: Economic, Cultural and Community Impacts of Poor Water Quality in the Chesapeake Bay*, at 4 (2009), available at <https://environmentmaryland.org/sites/environment/files/reports/Watermen-Blues--Environment-Maryland.pdf> ("Watermen Blues").



to the economy.<sup>5</sup> The “skills, customs, and lore, along with the fish and shellfish they provide, are fundamental to the Chesapeake Bay region’s identity.”<sup>6</sup>

Recreational uses also contribute greatly to the region’s economy.

Recreational fishing contributes another \$839 million in sales and 7,692 jobs in Maryland.<sup>7</sup> Recreational boating has been estimated to have a \$3.5 billion annual economic impact in Maryland, supporting 17,793 jobs.<sup>8</sup>

But the Chesapeake Bay has long been in trouble due to pollution and other manmade impacts on the watershed. In particular, the area has suffered substantial economic losses associated with the decline in fisheries resources. “Between 1994 and 2004, the value of Virginia’s seafood harvest decreased by 30 percent with Maryland’s commercial landings exhibiting a similar decline during that time.”<sup>9</sup> Even the Bay’s well-known crab industry has suffered from declines, resulting in a cumulative loss to Maryland and Virginia of about \$640 million between 1998 and

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<sup>5</sup> National Oceanic and Atmospheric Administration, *Fisheries Economics of the United States 2018: Economics and Sociocultural Status and Trends Series*, at 120 (2021), available at <https://www.fisheries.noaa.gov/resource/document/fisheries-economics-united-states-report-2018> (“2018 Fisheries Economics Report”).

<sup>6</sup> Watermen Blues, *supra* n.4, at 4.

<sup>7</sup> 2018 Fisheries Economics Report, *supra* n.5, at 121.

<sup>8</sup> National Marine Manufacturers Association Infographic, Recreational Boating Impact in Maryland, available at <https://www.nmma.org/statistics/publications/economic-impact-infographics> (last visited Feb. 3, 2022).

<sup>9</sup> 2012 Economic Study, *supra* n.2, at 5.

2006.<sup>10</sup> With the decline of commercial harvests, people and communities suffer economic hardship, social upheaval, and the loss of traditions.<sup>11</sup> It is in the public interest that all is done to restore water quality and, in turn, protect fishing resources and recreational uses in the Bay.

**B. The Project's Operations are a Significant Source of the Harms to Designated Uses of the Bay.**

The Susquehanna River forms in central New York and flows over 400 miles through central Pennsylvania to Maryland. 174 FERC ¶61,217 at 5 (JA5). It is the greatest contributor of fresh water to the Chesapeake Bay. The Project, which includes a dam and an approximately 8,500-acre, 14-mile-long reservoir, was built in 1928 on the Lower Susquehanna River about 10 miles upstream from where it flows into the Chesapeake Bay at Havre De Grace, Maryland. *Id.* Since the dam was built, its impacts on the Susquehanna River have been significant, affecting water quality, depleting migratory fish and their habitat, and altering recreational uses. These impacts are only expected to worsen with climate change.

**1. The Project contributes to the impairment of the Susquehanna River.**

In 2018, Maryland reported on the current status of water quality of the Susquehanna River by identifying it as impaired waters based on “the most

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<sup>10</sup> *Id.* at 6.

<sup>11</sup> *See* Watermen Blues, *supra* n.4, at 9-11.

comprehensive dataset ever assembled for the Lower Susquehanna River in Maryland, in both the portion upstream of the Conowingo Dam (also known as the Conowingo Reservoir) and immediately downstream of the Dam.” Maryland 2018 Impairment Report at 11 (JA1227).<sup>12</sup> A water body is considered “impaired” when it does not support a designated use. *Id.* at 26 (citing Code of Maryland Regulations §26.08.02.02) (JA1233). The water quality impacts associated with the Project were attributed to pollution from nutrients (*e.g.*, phosphorus), debris, and flow alteration. The data reviewed underscored “the importance of managing dam operations in a way that supports not only the creation of carbon-free energy but also aquatic life and recreational uses of the Susquehanna River as well.” *Id.* at 11 (JA1227).

The Project’s reservoir was to provide some benefits for water quality and to meet the needs of fishing and recreational uses. It had captured sediment—and the often attached nutrients—flowing down the Susquehanna River, reducing the amount of sand, silt, nitrogen, and phosphorus pollution entering the Chesapeake

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<sup>12</sup> Maryland Department of the Environment, *Maryland’s Final 2018 Integrated Report of Surface Water Quality* (2018), available at [https://mde.maryland.gov/programs/Water/TMDL/Integrated303dReports/Documents/Integrated\\_Report\\_Section\\_PDFs/IR\\_2018/2018IR\\_Parts\\_A-E\\_Final.pdf](https://mde.maryland.gov/programs/Water/TMDL/Integrated303dReports/Documents/Integrated_Report_Section_PDFs/IR_2018/2018IR_Parts_A-E_Final.pdf), cited in Petition for Rehearing of FERC’s Order Issuing New License, Apr. 19, 2021, at 6, Accession #20210419-5251, Record #1262-1263 (“Rehearing Petition”) (JA1143).

Bay. But Maryland found the reservoir was “full,” noting “no efforts have been undertaken over the life of the Project, such as routine dredging, to maintain the trapping function.” Maryland Department of the Environment, Clean Water Act Section 401 Certification for the Conowingo Hydroelectric Project, Apr. 27, 2018, at 12, Accession # 20180508-5125, Record #972 (“Certification”) (JA471).

Maryland also identified issues with excessive debris collecting upstream of the Project’s dam and being distributed downstream in the upper Chesapeake Bay during high flow events. *See* Maryland 2018 Impairment Report at 38 (JA1235). As a result of the buildup of sediments, the reservoir now averages 15 feet or less in depth, rather than 120 feet when the Project was built. Pet’rs Br. at 9 (citing Comments of the Local Government Members of the Clean Chesapeake Coalition Regarding the Joint Offer of Settlement, Jan. 17, 2020, at 13, Accession #20200117-5236, Record #1142 (“Local Government Comments”) (JA764)). Potential overflows from a rise in the water level, then, are likely to occur more often. As Charter Boat Captains in the Bay, members of *Amicus Curiae* have experienced the effects of these overflows. “Exelon had to open the Conowingo Dam flood gates multiple times, allowing a deluge of water carrying sediment and trash to pour into the upper bay, clogging harbors and coloring the water murky

brown.”<sup>13</sup> The lost capacity of the Project’s reservoir “threatens the ability of both the State and the region to meet their Chesapeake Bay clean up goals.” Watershed Implementation Plan at 40.<sup>14</sup>

## **2. The Project has depleted fisheries throughout the Bay.**

The Susquehanna River once supported large numbers of migratory fish, including the American shad, river herring such as the blueback herring and alewife, hickory shad, striped bass, Atlantic sturgeon, and shortnose sturgeon, and had an abundance of American eel.<sup>15</sup> “These fish played a vital role in the Chesapeake region’s history, supporting one of the most valuable finfish fisheries

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<sup>13</sup> Jenna Miller, *Frustration builds against Conowingo Dam after season of releases, progress in 2019?*, The Daily Times, Updated Jan. 18, 2019, <https://www.delmarvanow.com/story/news/local/maryland/2019/01/17/conowingo-frustration-builds-after-releases-looking-progress-2019/2578380002/>.

<sup>14</sup> Maryland Department of the Environment, *et al.*, *Maryland’s Phase III Watershed Implementation Plan to Restore Chesapeake Bay by 2025* (2019), available at [https://mde.maryland.gov/programs/water/TMDL/TMDLImplementation/Documents/Phase-III-WIP-Report/Final%20Phase%20III%20WIP%20Package/Phase%20III%20WIP%20Document/Phase%20III%20WIP-Final\\_Maryland\\_8.23.2019.pdf](https://mde.maryland.gov/programs/water/TMDL/TMDLImplementation/Documents/Phase-III-WIP-Report/Final%20Phase%20III%20WIP%20Package/Phase%20III%20WIP%20Document/Phase%20III%20WIP-Final_Maryland_8.23.2019.pdf), cited in Rehearing Petition at 7-8 (JA1144-JA1145).

<sup>15</sup> Susquehanna River Anadromous Fish Restoration Cooperative, *Migratory Fish Management and Restoration Plan for the Susquehanna River Basin*, at 5, 9 (2010), available at <https://www.fishandboat.com/Fish/PennsylvaniaFishes/FishSpecies/Documents/shadDocs/SRAFRC-RestorationPlan.pdf> (“Susquehanna River 2010 Plan”).

in the region.”<sup>16</sup> “Populations of American shad, alewife, blueback herring, and American eel were reduced or essentially eliminated in the Susquehanna River and other Chesapeake Bay tributaries by dams.”<sup>17</sup> While there are other dams upstream, the Project’s dam is the first one encountered when migratory fish begin their journey upstream to their natural spawning habitats and nurseries. The Maryland Department of the Environment found that the Project’s dam “has significantly and adversely impacted biota in the Lower River and the northern Bay over the past 90 years of operation.” Certification at 11 (JA470). The Project’s dam causes adverse impacts on aquatic resources because it is an obstacle to fish passage, degrades habitat, and disrupts the natural flow of the river. *Id.*

Testimony before Congress described the impacts of dams.<sup>18</sup> Because hydroelectric dams resulted in the loss of miles of migratory fish runs, dam owners needed to provide access for migratory fish and began to capture, transport, and stock fish in quality spawning and nursery habitat in the upper Susquehanna River upstream of the lower river dams. It was not until 1972 that construction of the

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<sup>16</sup> Testimony of Genevieve Larouche, Field Office Supervisor, Chesapeake Bay Field Office U.S. Fish and Wildlife Service, U.S. Department of the Interior Before the Senate Environment and Public Works Subcommittee on Water and Wildlife, May 5, 2014, <https://www.fws.gov/testimony/oversight-hearing-conowingo-dam> (“Larouche Testimony”).

<sup>17</sup> *Id.*; see also Susquehanna River 2010 Plan, *supra* n.15, at 5.

<sup>18</sup> Larouche Testimony, *supra* n.16.

west fish lift and trap was completed at the Project's dam. The east fish lift was constructed in 1991. These lifts were intended to facilitate fish passage through the Project's dam. "However, recent studies found that 69 percent of shad attempting to pass were blocked at the Conowingo Dam and unable to reach their spawning grounds and the remaining 31 percent of shad took an average of 2 weeks to pass over the Conowingo Dam."<sup>19</sup> Because the spawning migration of coastal migratory fish is a time sensitive event, these blockages and delays have adverse impacts that can result including re-absorption of eggs, spawning in unsuitable areas, depletion of energy reserves, and fish mortality.<sup>20</sup>

In addition, the "day-to-day operation of the Conowingo Dam affects wildlife and habitat downstream" due to the creation of unnatural river conditions and degradation of downstream habitat.<sup>21</sup> Unnatural river conditions are created by the rapid cycling of rising water during power generation, followed by falling water levels after generation. "These unnaturally rapid changes in water levels impact migratory fish by interrupting migratory cues, lengthening migration times, stranding fish, and reducing suitable habitat."<sup>22</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

The depletion of American shad starkly illustrates the impact the Project's dam has had on fisheries in the Bay. "American shad once ruled the waters of the Susquehanna River and its tributaries," becoming one of the region's most valued commodities for commerce in the 1830s.<sup>23</sup> Shad also "form an important link in the Chesapeake Bay food web," including being a food source for bald eagles, ospreys, catfish, bluefish, and species emblematic of the Chesapeake Bay like striped bass—"which also support our watermen and their way of life."<sup>24</sup> The shad's natural migratory cycle was broken by the construction of dams.

While harvesting was relatively constant throughout the 1950s and 1960s, shad harvest declined precipitously through the 1970s to a statewide low of only 18,000 pounds in 1979, leading to restrictions on fishing for American and hickory shad in the 1980s in Maryland.<sup>25</sup> Alterations in the Project's dam operations (more frequent peaking and the ability to peak at higher flows) following the installation of additional generating units in the mid-1960s has been cited as a reason for this decline.<sup>26</sup> American shad seemed to be returning by 2001 when over 200,000 adult

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<sup>23</sup> Pennsylvania Fish and Boat Commission, *Migratory Fish Restoration and Passage on the Susquehanna River*, at 1, available at [https://www.fishandboat.com/Fish/PennsylvaniaFishes/FishSpecies/Documents/shadDocs/migratory\\_fish.pdf](https://www.fishandboat.com/Fish/PennsylvaniaFishes/FishSpecies/Documents/shadDocs/migratory_fish.pdf) (last visited Feb. 3, 2022).

<sup>24</sup> Larouche Testimony, *supra* n.16.

<sup>25</sup> Susquehanna River 2010 Plan, *supra* n.15, at 15-16.

<sup>26</sup> *Id.*



shad were counted at the Project's fish lifts,<sup>27</sup> but, since then, adult numbers have decreased to 4,787 in the east lift in 2019. Pet'rs Br. at 6 (citing Rehearing Petition at 3 (JA1140)). While it may be argued that overall shad populations have declined, "population estimates suggest American shad are present downstream of the dam and more fish would be passing upstream, if more suitable conditions were available to the fish."<sup>28</sup> "Safe, timely and effective fish passage at Conowingo is essential to the American shad restoration on the Susquehanna River."<sup>29</sup>

Restoring American shad stock in the Susquehanna River would provide substantial benefits. Economic benefits would be realized as commercial fisheries are reopened, "and even more so by the sport fishing industry in all three basin states as increased recreational fishing opportunities are realized."<sup>30</sup> A "fully restored Susquehanna River American shad run could produce 500,000 angler days valued at \$25 to \$37 million annually."<sup>31</sup> These benefits would be felt in the Chesapeake Bay but also throughout the Atlantic Coast where the shad migrate.

Other species that provide economic and ecological benefits to the region have been severely impacted by the construction and operation of the Project's

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<sup>27</sup> *Id.* at 5.

<sup>28</sup> Larouche Testimony, *supra* n.16.

<sup>29</sup> *Id.*

<sup>30</sup> Susquehanna River 2010 Plan, *supra* n.15, at 35.

<sup>31</sup> *Id.* (citation omitted).

dam, such as American eel and freshwater mussels. As further described below, high flow events can also significantly impact fisheries in the watershed, affecting the local economies and people's livelihoods. These are precisely the impacts that can, and must, be addressed through the state water quality certification process.

**3. Climate change impacts are expected to exacerbate the harms being caused by the Project's operations.**

High flow or "scour" events routinely send debris and pollution from the reservoir through the Project's dam and into the Bay. The Project "traps trash and debris behind the Dam, which accumulates over time, threatening recreational uses of the Reservoir and potentially concentrating pollutants, and if not removed regularly is vulnerable to downstream transport during moderate to large storm events." Certification at 13 (JA472). Climate change makes it all but inevitable that a major storm will cause a catastrophic scour event, doing permanent damage to the Bay and defeating all other cleanup efforts.

The worst storm to hit the Susquehanna River in recent history was Hurricane Agnes in 1972, which has been estimated to have added 20 million tons of sediment from the Project's reservoir. *See* Ex. G to Local Government Comments (JA791-JA794). The "river discharged more sediment than it had during the preceding decade," travelling as far as 100 miles down the Bay.<sup>32</sup>

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<sup>32</sup> Julia Rentsch, *Dammed if you dredge, dammed if you don't: Conowingo's toxic muck a vexing problem for bay*, Salisbury Daily Times, updated Mar. 25, 2021,

Accounts of the time indicated that there were “[b]oats everywhere, trees everywhere, flooding damage, debris, garbage, trash, and then after about four or five days, just loads of dead fish.”<sup>33</sup>

Several storm events have similarly impacted the Bay since then. Ex. G to Local Government Comments (JA791-JA794). In September 2021, Hurricane Ida dumped inches of rain and resulted in heavy river flow.<sup>34</sup> The Project “had to open an unusual number of floodgates,” pushing sediment and debris into the river and downstream.<sup>35</sup> Debris can threaten boaters and can make navigation in the area difficult to impossible, sometimes taking days to wash away and ending up on the shore.<sup>36</sup> A recent study suggests the 21st century will see an expansion of hurricanes and typhoons further North, as a result of climate change.<sup>37</sup>

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<https://www.delmarvanow.com/in-depth/news/2021/02/02/conowingo-dams-toxic-muck-vexing-problem-chesapeake-bay-susquehanna-river/3258294001/>.

<sup>33</sup> *Id.*

<sup>34</sup> Meg Walburn Viviano, *Conowingo Floodgates Cause Flooded Roads and Bay Debris*, Chesapeake Bay Magazine, Sept. 3, 2021, <https://chesapeakebaymagazine.com/conowingo-floodgates-opened-causing-flooded-roads-and-bay-debris/>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Jim Shelton, *Future hurricanes will roam over more of the Earth*, Yale News, Jan. 3, 2022, <https://news.yale.edu/2022/01/03/future-hurricanes-will-roam-over-more-earth-study-predicts>.

Heavy rains can also trigger these events. “[T]he reservoir has grown more susceptible to storm-related scour, and it now shows signs of letting pollution move on to the bay even outside of major storms.”<sup>38</sup> Local fishermen in the area recount that: “[e]very time those gates would open, the flooding, the debris, the garbage—just time, and time, and time again.”<sup>39</sup>

Maryland “is one of the most vulnerable states in the nation to climate change.”<sup>40</sup> Among other impacts identified, Maryland is already experiencing “[m]ore frequent heavy rain and flooding events, which can devastate local communities.”<sup>41</sup> Maryland has recognized that climate change impacts will affect its efforts with respect to restoring the Bay; “one of the primary threats posed by climate change to meeting water quality goals for Chesapeake Bay is increased precipitation.”<sup>42</sup>

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<sup>38</sup> Rentsch, *supra* n.32.

<sup>39</sup> *Id.*

<sup>40</sup> Maryland Commission on Climate Change, *Maryland is Serious About Addressing Climate Change: How the Maryland Commission on Climate Change is preparing our state*, at 1, available at <https://mde.maryland.gov/programs/Air/ClimateChange/MCCC/Publications/FactSheet1Overview.pdf> (last visited Feb. 3, 2022).

<sup>41</sup> *Id.*

<sup>42</sup> Maryland Department of the Environment, *Report on Maryland Climate Change Accomplishments*, at A-3 (2021), available at [https://mde.maryland.gov/programs/water/TMDL/TMDLImplementation/Documents/Phase-III-WIP-Report/MD\\_Climate\\_Change\\_Addendum\\_2022.pdf](https://mde.maryland.gov/programs/water/TMDL/TMDLImplementation/Documents/Phase-III-WIP-Report/MD_Climate_Change_Addendum_2022.pdf).

**C. Maryland's Water Quality Certification, at a Minimum, is Necessary to Redress the Harms Stemming From the Project's Operations.**

The objective of the Clean Water Act “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. §1251(a). Water quality standards are to provide “for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water” and include designated uses of the waters. 40 C.F.R. §§131.2, 131.10. The federal relicensing process and the water quality certification for the Project was largely seen as “a critical opportunity to determine how best to deal with the water quality challenges presented by the dam.” Maryland’s 2018 Impairment Report at 11, 38 (JA1227, JA1235); *see also* Watershed Implementation Plan at 11, 29, 40-41. In 2018, the Maryland Department of Environment issued a Section 401 certification for the Project’s relicensing process. Enforcement of the requirements in the certification were found necessary to ensure compliance with applicable water quality standards and the Clean Water Act. Certification at 7 (JA466).

In discussing its efforts at restoring the Bay, Maryland cited the certification as a key component to address the State’s water quality issues. “Restoring water quality to the Chesapeake Bay requires action by entities across the watershed, including actions by Exelon to address nutrient pollution in discharges from the Conowingo Dam.” Maryland’s 2018 Impairment Report at 116 (JA1237). But the

license does not require actions that would address nutrient pollution as in the certification and, moreover, Maryland is restricted from requesting additional actions beyond what's in the Settlement Agreement. Conowingo Dam Water Quality Settlement Agreement, Oct. 29, 2019, at 12-13, Accession #20191029-5119, Record #1055-1056 ("Settlement Agreement") (JA625-JA626). This restriction also limits the "goal" to be reached under the new 50-year license with respect to fish passage, *id.*, where the certification gave Maryland authority to require "such actions as may be necessary to permit *at least* 5,000,000 Shad and *at least* 12,000,000 Herring." Certification at 13 (emphasis added) (JA472).

Additionally, the certification requires improved management of debris that collects at the dam, requiring frequent trash and debris removal on a weekly and even daily basis. Certification at 17-18 (JA476-JA477).<sup>43</sup> It also requires prompt responses to complaints about trash and debris, including within 48 hours when they obstruct recreational uses during the recreational season, and a study regarding the feasibility of "trash wheel" technology to remove trash and debris

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<sup>43</sup> See also FERC, Final Multi-Project Environmental Impact Statement for Hydropower Licenses: Susquehanna River Hydroelectric Projects, at 426 (2015), Accession #20150311-4005, Record #722 ("Final Environmental Impact Statement") ("The State of Maryland, Broad Creek Civic Association, and public testimony provided during the draft EIS comment period recommended Exelon increase the use of its skimmer boat to increase debris removal from the pond to improve boater safety and opportunities (e.g., water skiing).") (JA443).

from the reservoir. *Id.* The new license, on the other hand, basically leaves it up to the Project operator when it clears out the trash, capping the total amount of trash it must remove annually based on the level it removed in 2018. 174 FERC ¶61,217 at 16, 99-100 (JA16, JA99-JA100). But leaving it to the Project operator has not been shown to be sufficient where trash and debris flowing downstream from the reservoir are a constant presence in the River and Bay. The failure of the new license to include dredging of the reservoir will not address the fact that the reservoir is full, raising the water line and increasingly allowing sediments, trash, and debris to flow downstream with any rain event that may raise water levels, not just major storms.

The certification carefully considered and addressed the impacts the Project's operations have on vulnerable waters in the State. It represents a significant and needed step towards meeting the water quality requirements of the State and would help restore and enhance impacted fisheries and recreational uses.

## **II. FINDING A WAIVER IN THIS CASE WOULD ELIMINATE AN IMPORTANT PATHWAY FOR DESIGNATED USES TO BE PROTECTED.**

In the Clean Water Act, Congress recognized and sought to protect the State's primary responsibilities "to prevent, reduce, and eliminate pollution" and "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. §1251(b). State certifications are "essential in the scheme to preserve state authority to address the

broad range of pollution.” *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 386 (2006). While a State may refuse to act on a request for certification, which would constitute a waiver of its rights, once certification is issued, FERC must defer to the State’s findings on water quality certification. *Sierra Club v. U.S. Army Corps of Eng’rs*, 909 F.3d 635, 646 (4th Cir. 2018).

FERC and Maryland assume some implied authority to waive a validly issued certification. But “under Section 1341(a)(1), ‘certification’ does not encompass ‘waiver,’ as the certification requirements do not even apply when a state has waived its certification authority.” *Sierra Club*, 909 F.3d at 652. Rather, the waiver provision was included to protect against State’s effectively vetoing a federal permit through inaction. *N.C. Dep’t of Env’tl. Quality v. FERC*, 3 F.4th 655, 670 (4th Cir. 2021) (citing *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011)). Maryland issued a certification. It decidedly acted. *See id.* (recognizing “Congress instead hinged waiver on the agency’s failure ‘to act’ on a certification request,” which included, but was not limited to, issuing certification).

Rather than constituting a waiver, the Settlement Agreement would revoke a validly issued certification. A state, however, cannot revoke a prior certification “at any time and for any (or no) reason.” *Keating v. FERC*, 927 F.2d 616, 623 (D.C. Cir. 1991). Here, the reason provided was to avoid protracted litigation regarding the certification, which is not among the reasons allowed under the Clean Water



Act. *See* Joint Offer of Settlement and Explanatory Statement of Exelon Generation Company, LLC and the Maryland Department of the Environment, at 1-2 (Oct. 29, 2019), Accession #20191029-5119, Record #1055-1056 (JA585-JA586). And, unlike the purpose of a water quality certification, the Settlement Agreement is intended to provide “measures that address ecological, recreation, and water quality resources affected by the Project, *while carefully balancing the need to maintain the Project as a source of low-cost and reliable power.*” *Id.* (emphasis added). Moreover, allowing a settlement agreement to replace the certification would make little sense as it would incentivize deferring to a project proponent that can afford to tie the certification up in courts, rather than to the State that must act to protect water quality and those who depend on the Chesapeake Bay for their livelihoods that cannot rely on half measures.

Even assuming this was a valid ground for a waiver, the so-called waiver fundamentally changes the conditions of a certification and, as such, the Clean Water Act requires a public participation process, including judicial review, which did not occur. *See Sierra Club*, 909 F.3d. at 639 (finding West Virginia’s attempt to waive requirement for individual certification as part of Nationwide Permit invalid for failing to provide notice-and-comment opportunity on waiver). Indeed, the certification has limited reopener provisions, which allow the certification to be reopened if any water quality requirements *are not being met*. Certification at 26-

27 (JA485-JA486). Instead, Maryland reached a Settlement Agreement conditionally waiving the certification if alternate provisions were included in the license that significantly differed from the certification, including removing provisions from being *enforceable* under the license. This, however, fundamentally changes the provisions in the certification. Allowing a “waiver” here “would constitute a back-door mechanism for a state to circumvent Congress’s intended notice-and-comment process: the state could issue certification conditions after engaging in the required notice-and-comment process but then refuse to apply those conditions in each case.” *Sierra Club*, 909 F.3d. at 654.

The importance of public participation in agency proceedings cannot be overstated. *See, e.g., Daimler Trucks N. Am. LLC v. EPA*, 737 F.3d 95, 100 (D.C. Cir. 2013); *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). Given the substantial public interest in the cleanup of the Bay and the role the state was expected to play in protecting water quality, public participation in the water quality certification process and judicial review here is particularly important. This process focusing on Maryland’s obligations and the applicable water quality standards cannot be replaced by the FERC balancing test, which took into

consideration costs over more restrictive conditions to further water quality. *See, e.g.,* Final Environmental Impact Statement at 439 (JA448).<sup>44</sup>

### **III. FERC CANNOT ABSOLVE ITSELF OF ITS DUTIES BY FINDING WAIVER OF THE SECTION 401 CERTIFICATION BY MARYLAND.**

The Federal Power Act places protection, mitigation of damage to and enhancement of fish and protection of recreational opportunities as equal considerations in issuing any license for a dam. 16 U.S.C. §797(e). In testimony before Congress, it was stated that the FERC relicensing process was “an opportunity to incorporate the best available science and engineering at the Conowingo Dam to maintain the energy it provides to our citizens, provide fish passage, and maintain sustainable populations of key ecosystem, recreational, and commercial fisheries.”<sup>45</sup> This opportunity was thrown away.

Instead, FERC argues that the provisions in the license are appropriate as the new conditions were an improvement over existing operations and that the costs to comply with the certification were too high. *See, e.g.,* Order Addressing Arguments on Rehearing, July 15, 2021, 176 FERC ¶61,029, at 16-17, 25-26, Accession #20210715-3033, Record #1285 (JA161-JA162, JA170-JA171). But FERC is not just simply to provide for mere improvements over prior terms,

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<sup>44</sup> FERC did so with a limited review of the socioeconomic impacts of the Project. Final Environmental Impact Statement at 336-340 (JA375-JA379).

<sup>45</sup> Larouche Testimony, *supra* n.16.

particularly from decades earlier or an outdated impact statement.<sup>46</sup> The certification was found to assist in meeting the water quality requirements of the Susquehanna River. The Settlement Agreement, on the other hand, is merely a “notable” action taken by Maryland as part of its efforts to restore the Bay.<sup>47</sup> Maryland acknowledges that with only the Settlement Agreement in hand that the “Conowingo Dam’s impacts on the water quality and flow along the Susquehanna River and the downstream Chesapeake Bay continue to be a concern for Maryland and the other Chesapeake Bay watershed states.”<sup>48</sup> This is a far cry from the concrete and meaningful obligations under the certification to move toward a cleaner and healthier Bay. Indeed, complaints were raised regarding the Project’s operator’s failure to follow through on its commitments, making enforcement a significant issue. *See, e.g.*, Protest of the Susquehanna River Boaters Association, Aug. 28, 2018, Accession #20180828-5100, Record #990 (discussing Project

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<sup>46</sup> The prior license had been granted to Exelon in 1980. Final Environmental Impact Statement at 1 n.22 (JA218).

<sup>47</sup> Maryland Department of the Environment, *Maryland’s Draft Combined 2020-2022 Integrated Report of Surface Water Quality*, at 15-16 (2021), available at [https://mde.maryland.gov/programs/Water/TMDL/Integrated303dReports/Documents/Integrated\\_Report\\_Section\\_PDFs/IR\\_2020\\_2022/2020\\_2022IR\\_Parts\\_A\\_E.pdf](https://mde.maryland.gov/programs/Water/TMDL/Integrated303dReports/Documents/Integrated_Report_Section_PDFs/IR_2020_2022/2020_2022IR_Parts_A_E.pdf)

<sup>48</sup> *Id.* at 40.

proponent's failure to dredge and maintain Peach Bottom Marina for recreational uses) (JA525-JA534).<sup>49</sup>

To support its claims that the conditions not incorporated into the license from the certification were unwarranted, FERC relies on an outdated Final Environmental Impact Statement that did not, among other things, include analysis of Maryland's water quality certification. Staff for FERC indicated it would choose its recommendations over that of Maryland, despite the requirements of the Clean Water Act. Final Environmental Impact Statement at 429, 439 (JA446, JA448). It is clear that FERC did not place the needs of the aquatic resources and designated uses on equal footing with the interest in ongoing operation of the Project. This was arbitrary.

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<sup>49</sup> See also Karl Blankenship, *Funding strategy to offset Conowingo pollution impacts proves elusive*, Bay Journal, Nov. 4, 2021, [https://www.bayjournal.com/news/policy/funding-strategy-to-offset-conowingo-pollution-impacts-proves-elusive/article\\_deb95204-3d95-11ec-8ef5-ff4929cba449.html](https://www.bayjournal.com/news/policy/funding-strategy-to-offset-conowingo-pollution-impacts-proves-elusive/article_deb95204-3d95-11ec-8ef5-ff4929cba449.html) (noting failure of project proponent to provide funding for plan to address pollutants in Conowingo reservoir).

## CONCLUSION

For the foregoing reasons, the Court must grant the petitions for review and vacate the 50-year license.

Dated: June 21, 2022

Respectfully submitted,

/s/ Sandra P. Franco

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## CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5766 words, exclusive of the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced typeface.

Dated: June 21, 2022

Respectfully submitted,

/s/ Sandra P. Franco

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Sandra P. Franco

**CERTIFICATE OF SERVICE**

I certify that on June 21, 2022, the foregoing document was filed with the Clerk of Court for the United States Court of Appeals for the D.C. Circuit using the Court's CM/ECF system for service on all registered counsel of record.

Dated: June 21, 2022

Respectfully submitted,

/s/ Sandra P. Franco

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Sandra P. Franco