

Ridgway M. Hall, Jr.



July 25, 2023

Via Email:

Conowingo.mde@maryland.gov
Conowingo Work Group

danielle.spendiff1@maryland.gov
Ms. Danielle Spendiff, Chief
Regulatory and Customer Service Division
Wetlands and Waterways Protection Program
Water and Science Administration
Maryland Department of the Environment
1800 Washington Blvd., Suite 430
Baltimore, MD 21230

Attn: Conowingo Dam WQC

Dear MDE Conowingo Dam Water Quality Certification Personnel and Ms. Spendiff:

These comments are submitted in response to MDE's public notice published on or about June 30, 2023, soliciting comments on the Clean Water Act Section 401 water quality certification, 17-WQC-02, issued on April 18, 2018 (the "WQC"), to Constellation Power Generation, LLC (formerly Exelon, hereinafter referred to as "Constellation"), for the Conowingo Hydroelectric Project.

By way of introduction, I have been practicing environmental law for over 40 years. For 30 of these I was a founding partner in the Washington, D.C., law firm Crowell & Moring, where I started that firm's environmental practice. In addition, I am a former Associate General Counsel for Water at EPA, a former officer of the Environmental Law Institute, a life member of the American Law Institute, and a former Regent in the American College of Environmental Lawyers, and recently retired Vice Chair of the Chesapeake Legal Alliance, on whose Board of Directors I serve. However, these comments are submitted on my own behalf, and not on behalf of any of those or any other organizations. For the past 13 years I have been interested in finding cost-effective ways to achieve the goals of the Chesapeake Bay TMDL, including protection and restoration of the water quality. I have written and spoken widely on all aspects of environmental law and policy, including specifically matters relating to the Chesapeake Bay and its watershed.

In addition, I have spent much of the past 45 years sailing, kayaking, and otherwise enjoying the recreational and aesthetic features of the Chesapeake Bay and its watershed. Restoring

the quality and health of the waters of the Bay and its tributaries is vital to my and many others' ability to enjoy this extraordinary natural resource and national treasure.

The decision by the U.S. Court of Appeals for the D.C. Circuit in *Waterkeepers Chesapeake, et al v. FERC et al*, on December 20, 2022, vacating the license that FERC had issued to Constellation, including the settlement that had been previously reached with MDE which had been incorporated into that license, provides MDE with a unique opportunity and obligation to revisit its WQC of April 27, 2018, and to make sure that it will provide the compliance with applicable water quality standards and any other relevant Clean Water Act provisions that CWA Section 401 requires.

1. MDE's 2018 WQC Remains Valid and Should be Reaffirmed.

The law and the relevant science have not changed since MDE issued its 2018 WQC. I urge MDE therefore to reaffirm it for inclusion in any future FERC license. If anything, the reasons for doing so are even more compelling today than they were five years ago. Since 1983 the states in the Chesapeake Bay watershed, with active support from the U.S. Environmental Protection Agency ("EPA"), have been working hard to reduce nutrient and sediment pollution to the Bay, to achieve compliance with water quality standards, and to restore and protect fisheries, wildlife, habitat, and all of the features of the Bay watershed that have made it a unique source of recreational enjoyment and a multi-billion dollar economic driver for the mid-Atlantic.

In 2009, President Obama issued Executive Order No. 13508, *Chesapeake Bay Restoration and Protection*, calling on seven federal agencies to work together with the six Bay States, the District of Columbia and the public to restore the health of the Chesapeake Bay and its watershed. In 2010, EPA, in consultation with the Bay states, issued a total maximum daily load ("TMDL") for the Bay, requiring the states to take rigorous measures so as to have in place by 2025 all of the practices, programs and requirements needed to achieve major reductions of nitrogen, phosphorus and sediment in order to comply with applicable water quality standards.

In 2014, the Bay States, EPA and the Chesapeake Bay Commission entered into the latest in a series of "watershed agreements" designed to achieve compliance with the TMDL and the protection and restoration of other important environmental features. However, despite extraordinary efforts by the Bay states and the private sector and stakeholders across the watershed, we are not on track to achieve compliance with water quality standards by 2025. Among the problems, as MDE knows, has been the fact that the trapping capacity behind the Conowingo Dam was used up soon after 2010, resulting in an estimated 6 million pounds per year of nitrogen entering the Chesapeake Bay on top of the 2010 estimates. In addition, the effects of climate change are adding another 5 million pounds of nitrogen annually.

In the face of these developments, the case for not relaxing any provision in the 2018 WQC is stronger than ever. To do otherwise would violate the law by not adequately protecting water quality, and would be indefensible from a policy standpoint. Protections for downstream residents and users would be adversely affected throughout the Bay, causing economic injury and recreational and other losses. Probably no single action is as important to the future water quality in the Bay as MDE's decision regarding whether to reaffirm or modify its 2018 certification for the Conowingo Dam.

The only aspect of the 2018 WQC that MDE might want to revisit is the annual cash payment alternative to the compliance measures, under which Constellation could pay a fee in lieu of adopting the prescribed water quality protection measures. The amount required under the 2018 WQC may be excessive, and it would seem reasonable for MDE to take a fresh look at whether that amount or some other amount is reasonable.

2. Strong Science and Policy Reasons Support a WQC at Least as Protective as the 2018 WQC.

MDE has asked for any new scientific information relevant to the WQC. One important scientific development is the increasingly severe impacts of climate change. These impacts strongly suggest that any water quality protection requirements that are expected to be effective throughout the 50 year term of the license that FERC intends to issue to Constellation should err on the side of more protection rather than less. MDE issued 17-WQC-02 on April 27, 2018. One month later, eight inches of rain fell on Central Maryland, raising the Patapsco River to heights never previously recorded, devastating homes and businesses and overwhelming municipal infrastructure along the Frederick Avenue corridor of Baltimore City and in Ellicott City, Maryland. Less than two months later, the flood gauge for the Lower Susquehanna registered more than 17 feet, the highest level since Tropical Storm Lee in 2011. These were not isolated incidents. These storms were exactly what leading climate scientists from around the globe had been warning would occur in the Mid-Atlantic region.

Today we see that our climate is continuing to destabilize at a more rapid rate. Indeed, the flood gauge at Harrisburg has exceeded the 11-foot action level 15 more times since 17-WQC-02 was issued. At the same time that Maryland is experiencing one of the driest years on record, elsewhere in the Mid-Atlantic and Northeast this month's weather has provided a stark and tragic reminder of the type of rainfall we know is in our long-term forecast. Montpelier, Vermont experienced eight inches of rain over several days in July, while West Point New York was inundated with seven inches of rain in only four hours; both storms were echoes of the multiple thousand-year storms that communities in Central Maryland and Southeastern Pennsylvania have faced over the last five years.

For additional information, please visit the most recent annual report from the First Street Foundation, *The Eighth National Risk Assessment: The Precipitation Problem* (2023, available on the foundation's web site), which clearly shows that Southeast Pennsylvania is among the national epicenters of flood risk, consistent with the prior findings from the National Oceanic and Atmospheric Administration and other state, federal, private, and academic researchers. When heavy rains hit the ground, they wash off high volumes of contaminated soil and other pollutants into the tributaries that comprise the watershed and feed into the Bay.

It is not a matter of if we will have another massive flood event on the Susquehanna River, but when, how often, and how severe the impact of scour events from a reservoir which has no further trapping capacity will be on downstream communities and the water quality of the Chesapeake Bay. This is among the many reasons that it is critical that the Department issue a certification with conditions that are *at least* as strong and protective as those found in 17-WQC-02. Any other outcome would be tantamount to ignoring the latest science and

the recent lived experience of thousands of Marylanders and other watershed residents in recent years.

Among other things, the 2018 certification would significantly reduce nutrient and sediment pollution via upstream pollution controls and the propagation of filter feeders. It would also enhance biodiversity through greater fish and eel passage. It would result in removal of debris and trash impacting recreation in downstream communities, maintain flow sufficient to protect aquatic species, and build greater resilience throughout the estuary by fostering a return of more natural habitat in the Lower Susquehanna and Upper Bay. The conditions imposed by MDE in the 2018 WQC would help accomplish many of the goals in the 2014 Chesapeake Watershed Agreement and help the Bay finally achieve and maintain its water quality standards.

3. The Certification Should Be Reviewed Every Five Years To Ensure That its Terms Continue to be Appropriate for Then-Existing Conditions.

The FERC license, which will incorporate and require compliance with MDE's certification, is expected to be in effect for 50 years. During that period, ecological and water quality conditions could change, so that the terms of the certification might no longer be appropriate or as effective to ensure achievement of water quality standards. In addition, new remedial measures and technologies are likely to become available, and existing technologies or practices may become less expensive and therefore more cost-effective than they are today. MDE, FERC, Constellation and the public must not be frozen for the next half century with a certification reflecting today's science and on-the-ground conditions.

For this reason, the certification should be periodically reviewed by MDE and FERC, with opportunity for review and comment by Constellation and interested members of the public. In selecting an appropriate time period for such review, the 5-year life of an NPDES permit seems especially apt. After all, the Conowingo Dam is discharging water and pollutants to the downstream receiving water, which is exactly what is regulated under an NPDES permit. Congress in enacting the CWA determined that five years is an appropriate time for review and renewal of an NPDES permit to ensure that its terms continue to reflect the best science, most cost-effective protective measures, and the current conditions relating to the discharge and the receiving waters. This seems appropriate to the regulation of discharges from the Conowingo Dam. Therefore I urge MDE to include such a five-year review provision in its certification.

4. Implementation of the WQC should be Coordinated with the

Conowingo Watershed Implementation Plan.

As noted above, the loss of the trapping capacity for sediment, including nutrients that may be bound up with that sediment, has resulted in approximately an additional 6 million pounds of nitrogen released from the dam above what was initially anticipated when the Bay TMDL was set by EPA in 2010. To deal with this situation, the 3 states through which the Susquehanna River flows, New York, Pennsylvania and Maryland, have developed a "Conowingo Watershed Implementation Plan", or WIP, to provide the necessary response measures and secure the funding needed to implement them.

This is being done within the framework of the Chesapeake Bay Program Partnership. Achieving, and assuring continuing compliance with, the water quality standards for whose protection the 401 certification process was designed, is essential to achievement of the water quality goals of the 2014 Chesapeake Watershed Agreement executed by each of the Chesapeake Bay Program Partners. Collaboration between Constellation and the three states charged with implementing the Conowingo WIP will likely result in the most effective, and cost-effective, restoration and protection measures being taken for the protection of water quality. Therefore, to the extent that it is feasible, I recommend that either as part of the certification or a companion recommendation, MDE should facilitate coordination between Constellation and the three Conowingo WIP states.

5. Any Change to MDE's 2018 WQC Should be Subject to Public Notice and Comment

Because MDE's WQC will be incorporated into a 50-year FERC license, it will be of enormous significance to the long term efforts by to restore the water quality and health of the Chesapeake Bay and its watershed. Millions of people depend, in a variety of ways, on clean water in the Chesapeake for their livelihoods, for recreation and for aesthetic value. Therefore maintaining a protective WQC is a matter of widespread public interest. For this reason, if MDE determines that any changes should be made, or conditions added, to its 2018 WQC, the revised WQC should be subject to public notice and a comment period of at least 60 days.

Finally, as the D.C. Circuit made clear, any final WQC cannot be altered or waived in any settlement that MDE may enter with Constellation in the event that Constellation challenges the WQC.

I want to thank MDE for providing this opportunity to comment. If you have any questions or would like to discuss any aspect of the preceding comments, I would be happy to respond. My email and phone number are at the top of this letter.

Respectfully submitted,


Ridgway M. Hall, Jr.