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January 6, 2015

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

*Re: Conowingo Hydroelectric Project, FERC Project No. P-405-106
Muddy Run Hydroelectric Project, FERC Project No. P-2355-018
York Haven Hydroelectric Project, FERC Project No. P-1888-030
Opposition to EPA's request to have the Draft Lower Susquehanna River
Watershed Assessment included in the Administrative Record*

Dear Secretary Bose:

By letter dated December 29, 2014 from John R. Pompomo, the Director of the Environmental Assessment and Innovation Division of the U.S. Environmental Protection Agency ("EPA") Region III to you, Mr. Pompomo apparently submitted a copy of the recently released Draft Lower Susquehanna River Watershed Assessment ("DLSRWA") to you for incorporation into the administrative record.¹ The local government members of the Clean Chesapeake Coalition ("Coalition") object to inclusion of the DLSRWA into the administrative record underpinning the environmental impact statement ("EIS") that the Federal Energy Regulatory Commission ("FERC") is required to prepare as part of the National Environmental Policy Act² ("NEPA") process before issuing a license.

The DLSRWA is not a NEPA or Federal Advisory Committee Act³ ("FACA") compliant study and report. FERC, therefore, should not give the document any weight in its decision making process. Please keep in mind that the public comment period on the DLSRWA ends on January 9, 2015. The DLSRWA is not even a final report or study. According to the December 4, 2014 media release by the U.S. Army Corps of Engineers ("USACE") announcing the release of the DLSRWA "a final report is anticipated for release in summer 2015."

Preliminarily, the Coalition counties agree with EPA's assessment that the Conowingo Dam no longer serves as a sediment trap. The Coalition observes that reports prepared by the Susquehanna River Basin Commission for the Maryland Department of the Environment ("MDE") establish that the sediments accumulated in Conowingo Pond contain:

¹ See Submittal 20141231-0015, dated December 29, 2014 and filed December 31, 2014, FERC Docket No.: P-405-106.

² Public Law 91-190, Sec. 2, Jan. 1, 1970, 83 Stat. 852, 42 U.S.C. §§ 4321 et seq.

³ Public Law 92-463, Sec. 1, Oct. 6, 1972, 86 Stat. 770, 5 U.S.C. App. §§ 1-16.

1. Acid mine drainage and sulfur;
2. Coal;
3. Polychlorinated biphenyls (PCBs);
4. Pesticides;
5. Herbicides;
6. Phosphorus; and
7. Nitrogen.

The Coalition counties agree with EPA's assessment that such constituents are harmful to the Chesapeake Bay estuary. The sediments also are harmful because they destroy the habitat required to support bivalves (*e.g.*, oysters and clams) and blue crabs. The Coalition counties further agree with EPA's assessment that accumulated sediments behind the Conowingo Dam and the other hydroelectric dams in the lower Susquehanna River need to be addressed in order to obtain a comprehensive solution to restoring the Chesapeake Bay and its tributaries.

The below facts affirm that Exelon performed inadequate studies and compiled insufficient information to determine the environmental impact of the proposed license renewal on the Chesapeake Bay, including Bay flora and fauna, marine life and habitat, and the cultural and economic impacts of the project on Maryland counties and marine dependent industries:

- A. MDE has determined that the sediment study and other information submitted by Exelon as part of its water quality certification ("WQC") is deficient and does not provide adequate and sufficient information to assess the impact of the hydroelectric project on the water quality of the Bay;
- B. Exelon has agreed with MDE's interpretation, thereby withdrawing its WQC application and agreeing to conduct additional studies and obtain additional information necessary to properly assess the impact of its operations on the water quality of the Bay;
- C. FERC has agreed that Exelon has submitted inadequate sediment studies to enable an assessment of Exelon's Conowingo Dam operations on the Bay by approving a one year license while additional and necessary studies are conducted and information is compiled; and
- D. FERC has suspended further work on the EIS.



The DLSRWA is meaningless by itself, as it cannot be assessed without the numerous appendices that attempt to explain some of the underpinning of the report. Review of the EPA's filing in FERC's eLibrary establishes that EPA did not incorporate the entire DLSRWA and appendices but rather only included the DLSRWA. Therefore, the document filed by EPA is not complete.

The NEPA process affords the right of public participation from the scoping of the studies that underpin the EIS to the completion of the EIS by the lead federal agency, *e.g.*, FERC. The letter dated December 22, 2014 from Jay Ryan, Exelon's representative, to John B. Smith, the Chief of the Mid-Atlantic Branch of FERC's Division of Hydropower Licensing, evidences that the NEPA process is really at ground zero. The studies necessary to determine the impact of the dams in the lower Susquehanna River on the Bay are just being considered. Clearly, the scoping work performed in 2009-2010 failed to cover the work necessary to generate the data and information required to make a meaningful determination of their environmental impact. All new studies need to be scoped and performed.

The public must have an opportunity to participate fully in the entire NEPA process underpinning FERC's EIS. The process and decision making that underpinned the DLSRWA lacked transparency and thwarted the public's right to be heard. From its inception the DLSRWA intentionally disregarded federal laws under NEPA and FACA that safeguard public participation. Pursuant to FACA each federal agency that sponsors advisory committees must adhere to the requirements established by FACA.⁴ The membership of the advisory committee is required "to be fairly balanced in terms of the points of view represented and the functions to be performed."⁵ Moreover, FACA establishes that "[e]ach advisory committee meeting shall be *open to the public . . . timely notice* of each [] meeting shall be published in the Federal Register, and [] other types of public notice [shall be prescribed] to insure that all interested persons are *notified of such meeting prior thereto . . . [and that i]nterested persons shall be permitted* to attend, appear before, or file statements."⁶

The DLSRWA falls within the purview of FACA and its requirements, given that it was established/utilized by USACE and had members from the federal government, the State of Maryland and private sector. The DLSRWA failed to meet the demands of FACA for several reasons. Firstly, its membership was not comprised of fairly balanced perspectives.⁷ Coalition

⁴ Federal agencies that sponsor advisory committees must also adhere to the regulations promulgated by the U.S. General Services Administration's (GSA) Committee Management Secretariat. *See generally* the GSA's brochure on FACA for an overview. *See link:* <http://www.gsa.gov/portal/content/101010>.

⁵ 5 U.S.C. App. § 5(b)(2).

⁶ (Emphasis added.) *Id.* at § 10(a)(1)-(3).

⁷ LSRWA Draft Report Appendix I lists the LSRWA Team Members as follows:

- U.S. Army Corps of Engineers (federal sponsor);
- Maryland Department of the Environment (non-federal sponsor);
- Maryland Department of Natural resources, including Maryland Geological Survey (non-federal member);
- U.S. Geological Survey (federal member);



counties were not included in any shape or form. Meanwhile Exelon and various environmental/riverkeeper organizations had numerous representatives in attendance at the unpublicized meetings. Additionally, notices of the LSRWA quarterly meetings were only made after the fact (usually two months after the meeting date) so that participation by all interested parties was prevented except to those select parties receiving emails regarding meeting dates.

On March 23, 2013 the Coalition counties asked to attend meetings underpinning the preparation of the DLSRWA and to participate in the deliberations, yet no invitation was extended to the Coalition county members. (*See* enclosed correspondence.) Instead, the Coalition received email correspondence from the LSRWA Study Manager, Bruce Michael that stated: “We try to keep participation to those representing agencies, businesses or environmental groups.”⁸ (*Id.*) The LSRWA study group process clearly violated FACA by conducting meetings that were intentionally not open to the general public.

The Coalition counties had direct interests in the LSRWA and had a meaningful and an otherwise unrepresented perspective to offer to the LSRWA. Nonetheless, the LSRWA denied the Coalition’s ability to participate. FACA is clear that any advisory group established or utilized by a federal agency and that has at least one member who is not a federal employee must comply with its requirements. The LSRWA study group led by USACE since its inception and in producing the DLSRWA failed to satisfy the transparency and balancing demands established by FACA and NEPA.

The above mentioned shortcomings of the DLSRWA are especially troubling given that local governments are expressly identified by the draft as targeted stakeholders that will “most likely be interested in the contents and management recommendations of the LSRWA.”⁹ Yet the Coalition counties were denied the right to participate as a stakeholder in the LSRWA study. The Coalition has identified many significant concerns regarding the data, models, model runs, and assumptions made in the DLSRWA. The Coalition plans to submit formal written comments on the DLSRWA by the end of the week to USACE and plans to file those comments with FERC. If FERC strikes the DLSRWA from the administrative record it may strike such Coalition comments as well.

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- U.S. Army Corps of Engineers, Engineer Research and Development Center (federal member);
 - Susquehanna River Basin Commission (non-federal member);
 - The Nature Conservancy (TNC) (private member); and
 - U.S. Environmental Protection Agency – Chesapeake Bay Program (federal member).

See Appendix I-1: Stakeholder Outreach Plan, pg. 1. *See* link: <http://mddnr.chesapeakebay.net/lrwa/docs/report/appi1.pdf>.

⁸ Although Mr. Michaels allowed for the Coalition’s representatives to be added to the LSRWA’s stakeholder email distribution list, such an offer was largely immaterial and arguably disingenuous due to the fact that such an email distribution list only allowed for the notification to interested parties of the release of meeting minutes and related documents *after* such meetings had already been held.

⁹ *See, supra*, FN7 at pg. 1-2.



FERC Secretary Kimberly D. Bose
January 6, 2015
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Accordingly, the Coalition counties request that FERC deny EPA's request to include the DLSRWA as an EIS document and a part of FERC's administrative record in the above captioned proceedings. The Coalition counties request FERC to reinstitute the NEPA process for determining the impact of sediments and nutrients trapped by the dams in the lower Susquehanna River from its inception by conducting a scoping process that will underpin the study and ultimately the NEPA EIS process that FERC is currently conducting.

Very truly yours,



Ronald H. Fithian
Chairman and Kent County Commissioner

Enclosure

cc: Shawn M. Garvin, Regional Administrator, U.S. EPA Region III
William C. Early, Deputy Regional Administrator, U.S. EPA Region III
Governor-Elect Lawrence J. Hogan, Jr.
Robert M. Summers, Ph. D, Secretary, Maryland Department of the Environment
Shawn A. Seaman, Program Manager, MDNR Power Plant Research Program
Bruce D. Michael, Director, MDNR Resource Assessment Service
Clean Chesapeake Coalition



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THOMAS C. BRADSHAW
COUNTY COMMISSIONER



C. PAUL SMITH
COUNTY COMMISSIONER

March 26, 2013

Via Electronic and First Class Mail

Bruce D. Michael
Lower Susquehanna River Watershed Assessment
Maryland Department of Natural Resources
Tawes State Office Building
C-2, 580 Taylor Ave.
Annapolis, MD 21401-2397
bmichael@dnr.state.md.us

Re: LSRWA Stakeholder and Distribution Lists

Dear Mr. Michael:

I am writing on behalf of the Clean Chesapeake Coalition (“CCC”) – an organization of Maryland local governments whose objective is to improve the water quality of the Chesapeake Bay in a prudent and fiscally responsible manner. As Chairman of the CCC, I want to first express appreciation for the time and effort that the Lower Susquehanna River Watershed Assessment (“LSRWA”) team has invested thus far towards understanding and mitigating the impacts of the Conowingo Dam system on the Chesapeake Bay, especially now that for all intents and purposes the reservoirs above the dam are full. Our member counties located on the Bay have witnessed firsthand the devastating impacts that the nutrients and sediments from the Susquehanna River have on the overall health of the Chesapeake Bay.

The state of the Conowingo Dam system is a central focus for the CCC because of its overwhelming significance to Bay water quality, the ongoing Bay restoration efforts and the fact that the current federal license expires September 1, 2014. The financial expenditures being required of local governments to implement best management practices to improve the water quality of Bay are undermined by the adverse environmental impacts attributable to the loss of trapping capacity in the reservoirs above the dam. The CCC believes that the costs being pushed down on local governments in conjunction with the Bay TMDL and WIPs, although well intentioned, are prohibitively too high and inconsequential in regards to improving the water quality of the Bay given the increasing threat of high volume nutrient and sediment loadings at the Conowingo Dam. Our local government members are concerned that such expenditures will only result in taxpayers’ dissent to future Bay cleanup efforts since the vast amounts of nutrients and sediment flowing from the Susquehanna River interfere with local government plans and strategies for cleaning up the Bay. This issue as a whole is one that engages all levels of government, with potentially dire economic and environmental consequences.

The objective of the Clean Chesapeake Coalition is to pursue improvement to the water quality of the Chesapeake Bay in a prudent and fiscally responsible manner.

Accordingly, the CCC is keenly interested in participating as a stakeholder in the LSRWA's ongoing deliberations. Given the amount of research we have conducted in furtherance of the Coalition's objective, we believe that our participation and input will be useful to the LSRWA. In addition to stakeholder status, we request that Charles D. MacLeod (cmacleod@fblaw.com), Michael V. Forlini (mforlini@fblaw.com) and Gordon P. Smith (gsmith@fblaw.com) be included in LSRWA's email distribution list.

Please feel free to contact me if you have any questions regarding this request. I can be reached at the Kent County Commissioners' Office (410-778-4600) or my Rock Hall office (410-639-7611). You may also contact Chip MacLeod at 410-810-1381 or cmacleod@fblaw.com.

Sincerely,



Ronald H. Fithian
Chair and Kent County Commissioner

Gordon P. Smith

From: Michael, Bruce <BMICHAEL@dnr.state.md.us>
Sent: Friday, April 05, 2013 2:48 PM
To: Charles D. MacLeod; Michael V. Forlini; Gordon P. Smith
Cc: 'kentcounty@kentgov.org.'; 'Compton, Anna M NAB'; O'Neill, Claire D NAB; Campbell, Olivia
Subject: Lower Susquehanna River Watershed Assessment Study

Mr. MacLeod, Mr. Forlini and Mr. Smith:

I am writing to inform you that we are including you on the Lower Susquehanna River Watershed Assessment e-mail distribution list per the request of Kent County Commissioner Ronald Fithian. DNR also manages a Lower Susquehanna River Watershed Assessment website <http://mddnr.chesapeakebay.net/LSRWA/index.cfm> that contains information on meeting agendas, minutes, presentations and relevant documents.

Although the Lower Susquehanna River Watershed Assessment study is project being conducted under a specific contract between the US Army Corps of Engineers and the State of Maryland, we welcome your input and interest in the project. Please let me know if you have any questions.

Bruce

Bruce Michael, Director
Resource Assessment Service
Maryland Department of Natural Resources
580 Taylor Ave., C-2
Annapolis, MD 21401
Phone: 410 260-8627
FAX: 410 260-8620

Gordon P. Smith

From: Gordon Smith <smit4904@gmail.com>
Sent: Wednesday, February 20, 2013 11:06 AM
To: Gordon P. Smith
Subject: Fwd: LSRWA

----- Forwarded message -----

From: Michael, Bruce <BMICHAEL@dnr.state.md.us>
Date: Wed, Feb 20, 2013 at 10:18 AM
Subject: RE: LSRWA
To: Gordon Smith <smit4904@gmail.com>

Gordon:

The next LSRWA quarterly meeting will be in May, but the exact date has not been selected. We try to keep participation to those representing agencies, businesses or environmental groups. All agendas, meeting materials and meeting minutes are posted on the LSRWA web site: <http://mddnr.chesapeakebay.net/LSRWA/index.cfm> . You can contact me if you have any questions about a meeting, the material or the process. Thank you for your interest in the LSRWA study.

Bruce

From: Gordon Smith [mailto:smit4904@gmail.com]
Sent: Wednesday, February 20, 2013 9:13 AM
To: Michael, Bruce
Subject: LSRWA

Mr. Michael,

I am curious about the public's ability to attend the LSRWA quarterly meetings- is that possible? Also, when will the next meeting occur? It looks like a meeting was just held last Monday (2/11).

Please let me know when you get the chance. Thanks.

Gordon P. Smith
smit4904@gmail.com