

BEFORE THE MARYLAND DEPARTMENT OF THE ENVIRONMENT

EXELON GENERATION COMPANY, LLC)
300 Exelon Way) FERC PROJECT No. P-405
Kennett Square, PA 19348) MDE WSA Application No. 17-WQC-02
_____)

**PROTECTIVE PETITION FOR RECONSIDERATION
AND ADMINISTRATIVE APPEAL**

On April 27, 2018, the Maryland Department of the Environment (“MDE”) issued a “Clean Water Act Section 401 Certification for the Conowingo Hydroelectric Project” (the “Certification”) in response to MDE WSA Application No. 17-WQC-02. *See* Certification at 1, *attached as* Exhibit A. The Certification declares: “This is a final decision on the Application.” *Id.* at 27. But it also recognizes that after “the Department’s decision on the request for reconsideration, a contested case hearing shall be available in accordance with the applicable provisions of State Government Article, § 10-201, et seq.” As explained below, while MDE purported to issue the Certification as a “final decision,” it could not lawfully be issued as a final decision under Maryland law. Nonetheless, on May 8, 2018, MDE filed the Certification with the Federal Energy Regulatory Commission (“FERC”). *See* Exhibit B, attached, at 1 (“As requested by the FERC Office of Energy Projects, enclosed please find a copy of the Water Quality Certification issued by the Maryland Department of the Environment (‘MDE’) pursuant to Section 401 of the Clean Water Act for the above-referenced project (the ‘WQC’).”). FERC could now, at any time, incorporate the Certification’s conditions into the Conowingo Project’s federal license.

Because of the harm that the unlawful Certification could imminently inflict, Exelon has filed a Complaint for Declaratory and Injunctive Relief, and in the Alternative, Petition for Judicial Review and Complaint for Mandamus in the Circuit Court for Baltimore City, Maryland. *See*

Exhibit C, attached. In that filing, Exelon seeks declaratory relief declaring that MDE could not lawfully issue the Certification as a “final decision” and that the Certification is void, invalid, and without effect, and an injunction enjoining MDE to notify FERC that it is withdrawing the Certification. To the extent the Certification is deemed final or otherwise subject to judicial review on the merits, Exelon also seeks the invalidation of the Certification. *See* COMAR 26.01.02.38 (a “request for reconsideration is not a prerequisite to judicial review”). Exelon has also requested a stay of the Certification.

Simultaneously, Exelon is also seeking federal-court review of certain threshold federal-law issues under the Clean Water Act, as well as consideration of other federal-law claims. *See* Exhibit D, attached.

In this filing, Exelon petitions for reconsideration and administrative appeal of the Certification pursuant to COMAR 26.08.02.10(F)(4), to the extent that MDE retains jurisdiction to reconsider its decision. *See* Certification at 27 (“Any person aggrieved by the Department’s decision to issue this Certification may appeal such decision in accordance with COMAR 26.08.02.10F(4).”); *cf. Friends of Croom Civic Ass’n v. Prince George’s Cty. Planning Bd. of Maryland-Nat’l Capital Park & Planning Comm’n*, No. 2177, Sept. Term 2015, 2017 WL 1833206, at *2 (Md. Ct. Spec. App. May 8, 2017) (“a petition for judicial review divests an administrative agency of jurisdiction to reconsider its decision”). This Petition is timely, as it is filed within 30 days of the Certification’s publication in the *Maryland Register*. COMAR 26.08.02.10(F)(4)(a). Exelon also asks MDE to stay the Certification while judicial review and/or MDE reconsideration are pending.

I. INTRODUCTION

The Chesapeake Bay is the largest estuary in the United States and a critical natural resource for the people of Maryland. Exelon, through its subsidiaries, delivers electricity to the overwhelming majority of Maryland homes and businesses, and Exelon strives to support the environmental goals of all its customers and the States in which the Company operates. Exelon also is the owner and operator of the Conowingo Hydroelectric Project (“Project”), a dam and hydroelectric facility on the lower Susquehanna River that generates more renewable electricity than all other facilities in the State of Maryland combined. Exelon has been, and remains, committed to operating the Project in a manner that is environmentally responsible in all respects.

Because the Project is seeking a new operating license from FERC, Exelon is required by Section 401 of the federal Clean Water Act (“CWA”) to obtain a certification from Maryland that the Project’s discharge will comply with applicable provisions of the CWA and state law. *See* 33 U.S.C. § 1341. MDE has purported to issue such a certification, but only upon conditions that are unlawful, unreasonable on their face, and unsupported by evidence. Among other things and as described more fully in this Petition, the Certification purports to impose a requirement that the Project “shall annually reduce” by millions of pounds the amount of nitrogen and phosphorus discharged into the Susquehanna River by upstream sources, even though these nutrients were not added to the river by the Conowingo Project, but already are present in the Susquehanna River before the river water reaches the Project. Similarly, the Certification requires the Project to remove “all” visible trash and debris from the Susquehanna River, regardless of where that trash entered the river along its 464-mile course, or who deposited it. The Certification requires the Project to take onerous measures to stop invasive species of fish from moving upstream, even

though the dam does not contribute to the upstream migration of invasive fish species, but instead helps block such migration.

In sum, simply because Exelon's federal license was subject to renewal, the Certification imposes on Exelon the costs of cleaning up a watershed that Exelon did not pollute. In these and other ways described further below, Maryland has placed obligations on the Project that unlawfully exceed MDE's authority, are arbitrary and capricious, violate due process, and are inconsistent with basic common sense and fundamental fairness. Exelon shares Marylanders' concerns that pollution is jeopardizing the health of the Chesapeake Bay, and Exelon will continue to partner with state and local governments to protect this essential ecosystem. But it is unreasonable for the State of Maryland to expect Exelon to shoulder the entire burden of removing excess nutrients and all trash at the end of a 464-mile river.

The Certification's conditions are unlawful in multiple respects. First, they exceed the State's authority under the Clean Water Act. The Clean Water Act limits the introduction of pollutants into the navigable waters. It does not demand the removal of pollutants from the navigable waters. Or put differently, the Clean Water Act is a pollution-control statute, not a pollution-cleanup statute. So the Clean Water Act does not hold dam operators liable for cleaning up or removing pollutants that were added by upstream sources. Moreover, the plain text of Section 401 of the Clean Water Act shows that an applicant for a federal license cannot be held responsible for pollutants that it did not itself add to the navigable waters, for nonpoint-source pollution (as is the case here), or for problems that lack an adequate nexus to the activity of the applicant, as opposed to the activities of some third party. In all these respects, the Certification's conditions exceed the scope of state authority under Section 401. To be sure, Maryland legitimately can ensure that the Project's restrictions on *water flow* do not impair applicable water-

quality standards. *See S.D. Warren Co. v. Me. Bd. of Env'tl Protection*, 547 U.S. 370 (2006). But MDE significantly exceeds that authority in the Certification.

Second, the Certification is inconsistent with the comprehensive Chesapeake Bay ecosystem-restoration plan that is administered by the U.S. Environmental Protection Agency (“EPA”). In 2010, based on detailed studies and computer modeling, EPA identified the “total maximum daily load” (“TMDL”) required to implement the applicable water-quality standards for the Chesapeake Bay. 33 U.S.C. § 1313(d). Based on its computer models, EPA identified *reductions* in the amounts of nutrients (like nitrogen and phosphorus) reaching the Bay that needed to be achieved by 2025 to restore the health of the Bay. EPA then allocated these reductions equitably among the seven jurisdictions, including Maryland, that are responsible for the addition of nutrients into the waterways, including the Susquehanna River, that flow into the Bay. In 2017, at the mid-point of the 15-year target period between 2010 and 2025, newer computer models showed that EPA’s original estimate of the amount that nutrients needed to be reduced to restore the health of the Bay was insufficient, and additional reductions would be needed. EPA is in the process of determining how those additional reductions should be achieved.

However, in the Certification, MDE has determined that *the Conowingo Project* must bear responsibility to remove from the Susquehanna River all additional reductions that are needed to meet the TMDL. The Certification thus displaces EPA’s anticipated reallocation of those reductions among the seven jurisdictions, *including Maryland*, responsible for achieving the nutrient reductions needed to restore the health of the Bay. Maryland lacks authority to commandeer EPA’s comprehensive Chesapeake Bay ecosystem restoration plan and shift nutrient-reduction responsibility from *itself*, and other States, onto Exelon, simply because the Project happens to be in the process of seeking a FERC operating license.

The entire Certification is a classic example of State overreaching — and these are only some of the reasons why the Certification is unlawful. As described further below, the Certification is also unlawful because it is arbitrary and capricious, lacks support in the administrative record, and otherwise violates federal and state law.

MDE also should stay the unlawful Certification while it is being reconsidered. MDE should continue to work with Exelon, as Exelon is committed to do, to achieve a Certification that will advance the laudable goals of the people of Maryland and protect the vital Chesapeake Bay ecosystem in a manner that is lawful.

II. FACTUAL BACKGROUND

Through its issuance of the Certification, MDE is familiar with the Project and its need for a 401 certification. The following summary highlights certain key facts.

A. The Conowingo Hydroelectric Project

Exelon owns and operates the Conowingo Project, a 573-megawatt hydroelectric power plant located on the lower Susquehanna River in Maryland. The Susquehanna River flows for nearly 450 miles through New York and Pennsylvania and then through Maryland for about 15 miles before emptying into the Chesapeake Bay, North America's largest estuary. The Conowingo Project is located about ten miles upstream of where the Susquehanna River flows into the Chesapeake Bay. The watershed for the Susquehanna River drains a land area of more than 27,000 square miles and includes over 40,000 miles of waterways in New York, Pennsylvania, and Maryland upstream of the Conowingo Project.

Since its construction in 1928, the Conowingo Project has provided multiple benefits to the Chesapeake Bay, surrounding communities, and the State of Maryland. Though never required by

law to perform a pollution-reduction function, the Conowingo Project historically has protected the water quality of the lower Susquehanna River and the Chesapeake Bay by trapping some of the nutrient pollution introduced into the River by upstream sources in Pennsylvania and New York, reducing its potential to reach the Bay. Without the Conowingo Project, these pollutants would have entered the Bay years ago.

The pollutants at issue are generated upstream of the Project. The Project does not generate any nutrients (such as nitrogen or phosphorus). As with any dam, however, the Project's trapping capacity has been declining for many decades, as sediment flowing downstream was deposited in the Conowingo Reservoir, reducing its depth.

The Conowingo Project also provides benefits to wildlife. It provides breeding, nesting, and foraging grounds for the American Bald Eagle and helps migratory and native fish travel over the dam for spawning in the Susquehanna River, using multimillion-dollar fish lifts. For nearby residents as well as visitors, the Conowingo Project provides opportunities for educational programs and for recreation, including boating, hiking, fishing, and birdwatching. It provides 15 recreational facilities and public-access areas, including boat launches, marinas, and scenic overlooks.

The Conowingo Project generates approximately \$273 million in annual economic benefits to Maryland and its local communities by supporting full-time jobs, driving tourism in northeastern Maryland, and contributing to local and state tax revenues.

And the Conowingo Project is Maryland's largest source of renewable energy, producing more than 55% of Maryland's renewable energy. Compared to a coal facility of similar size, the Conowingo Project avoids the release of 6.5 million tons of greenhouse-gas emissions annually.

B. FERC Relicensing of the Conowingo Project

Exelon is seeking renewal by FERC of its operating license for the Conowingo Project for a term of 50 years. Exelon is pursuing the relicensing using FERC's integrated licensing process, which involves consultation with regulatory agencies and stakeholders on various issues, including fish passage, water quality, shoreline management, and recreational conditions.

In support of the integrated licensing process, Exelon developed a study plan during the pre-application stage, in or about 2009. Under that plan, Exelon performed more than 45 separate studies regarding various environmental issues, including fish passage, stream flow, the movement (transport) of sediment, and water temperature. Exelon also supported or cooperated with additional studies or evaluations by the United States Army Corps of Engineers (the "Army Corps") and EPA that extended beyond the Conowingo Project and more broadly concerned the Chesapeake Bay. Exelon completed these studies in 2012. On August 31, 2012, Exelon filed an application with FERC to renew its operating license for the Conowingo Project.

In 2015, FERC issued an Environmental Impact Statement ("EIS") for three hydroelectric projects on the lower Susquehanna River, including the Conowingo Project. *See FERC, EIS – Susquehanna River Hydroelectric Projects: York Haven Hydroelectric Project (P-1888-030), Muddy Run Pumped Storage Project (P-2355-018), and the Conowingo Hydroelectric Project (P-405-106)* (Mar. 11, 2015). FERC's EIS concluded that for dissolved oxygen, existing project operation generally does not exceed state water-quality standards. The EIS noted that the Susquehanna River is the largest source of freshwater to the Chesapeake Bay, contributing about 70% of the total nitrogen and 55% of the total phosphorus, and that the presence of these pollutants is a watershed-wide issue. The EIS stated that, if the reservoirs' capacity to store sediment and

other pollutants was reduced, then “governmental jurisdictions in the watershed might need to increase their ... nutrient-reduction efforts.” *Id.* at 138.

The EIS also considered whether dredging might be a reasonable way to increase the Conowingo Reservoir’s trapping capacity. Citing the Lower Susquehanna River Watershed Assessment (“LSRWA”), a joint effort of the Army Corps and MDE, FERC’s EIS reported “that operational changes at Conowingo would not address the sediment transport issue, and that dredging of Conowingo [Reservoir] would be cost prohibitive and ineffective.” *Id.* at 139.

As part of the relicensing process, Exelon engaged in detailed negotiations with the United States Department of the Interior and entered into a settlement. Maryland participated in this portion of the integrated process.¹ Exelon committed to enhancing fish passage by trapping and transporting fish to reduce the time it takes them to reach spawning locations. As part of the settlement, Exelon will haul the fish not just to the Conowingo Reservoir, but further upstream past three additional dams to ensure that a high percentage of fish successfully complete their journey. Exelon also committed to efficiency evaluations that will inform whether and when additional fish passage improvements are required. Exelon will perform enhancements to fish passage that are demonstrated to be necessary based on a data-driven Department of the Interior determination.

C. Section 401 of the Clean Water Act

As part of the relicensing process for federal hydroelectric facilities, applicants are required to seek a state certification under CWA Section 401. That statute provides States the opportunity to review requests by applicants for federal licenses and to certify whether the discharge associated

¹ In addition, prior to execution of the settlement agreement, Exelon requested that Maryland sign the settlement agreement. Although supportive of the settlement, Maryland indicated that it could not timely obtain the necessary internal approvals to sign on to the settlement.

with the activity being licensed will comply with specific CWA provisions. 33 U.S.C. § 1341(a)(1). A State may grant a certification under this Section (“a 401 certification”), either with or without conditions, deny a certification, or waive its power to grant or deny. 33 U.S.C. § 1341(a)(1).

In providing a conditional 401 certification, a State may “set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure” that the applicant “will comply” with various limitations under designated CWA provisions, where applicable, “and with any other appropriate requirements of State law.” 33 U.S.C. § 1341(d). Limitations or requirements set forth in a conditional 401 certification “shall become a condition on [the applicant’s] Federal license.” 33 U.S.C. § 1341(d). FERC believes that it lacks the authority to review the legality of State-imposed conditions and is required to incorporate them in the federal hydroelectric license, even if they are inconsistent with federal law.

D. Maryland’s Prior Certifications of the Conowingo Project

Maryland has no statute that references or provides substantive or procedural requirements with respect to 401 certifications. MDE has promulgated procedural regulations for considering requests for 401 certifications at COMAR 26.08.02.10. These regulations mandate that a 401 certification be issued when MDE “determines the proposed activities will not *cause* a violation of applicable State water quality standards.” COMAR 26.08.02.10(E)(1) (emphasis added). Thus, under the regulation, there must be a causal connection between any conditions imposed and the “proposed activities” subject to certification.

Consistent with this approach, the State of Maryland issued a certification for operation of the Conowingo Project in 1975 (“1975 Certification”). A copy of the State’s certification is attached hereto as Exhibit E. The 1975 Certification set forth a single requirement: to “insure that

the operation of the facility will comply with appropriate requirements of State law,” the Conowingo Project must “be operated at all times in such a manner as to conform to the requirements contained in State Permit No. 75-DP-0491 attached hereto.” State Permit No. 75-DP-0491 was a permit issued under the National Pollutant Discharge Elimination System, which authorizes discharges from the Conowingo Project.

The State has continuously renewed State Permit No. 75-DP-0491, with the most recent renewal occurring in 2014. The current version is numbered State Permit No. 10-DP-0491. This version became effective on October 1, 2014, and expires on September 30, 2019. State Permit No. 10-DP-0491 is attached hereto as Exhibit F. State Permit No. 10-DP-0491 authorizes discharges from the Conowingo Project, subject to effluent limitations and monitoring requirements for water flow, biochemical oxygen demand, total suspended solids, dissolved oxygen, pH, oil and grease, and total residual chlorine. Under the relevant regulations, “[d]ischarges permitted by the Department under the National Pollutant Discharge Elimination System are certified by the Department”; as a result, State Permit No. 10-DP-0491 is also “a certification from this State that the activity does not violate State water quality standards or limitations.” COMAR 26.08.02.10(A). Further, State Permit No. 10-DP-0491 states that “[t]his permit is consistent with the terms and conditions of the Chesapeake Bay Total Maximum Daily Load (TMDL) for Sediments, Nitrogen, and Phosphorus, approved December 29, 2010.”

The 1975 Certification has never been withdrawn and remains valid today. As stated above, State Permit No. 10-DP-0491 remains valid and does not expire until September 30, 2019.

E. Exelon’s Recent Application to MDE for 401 Certification

On January 31, 2014, Exelon submitted a request to MDE for a 401 certification in connection with the current FERC relicensing of the Conowingo Project. That application

included copies of studies that had been completed as part of the FERC relicensing process. In response to the application, MDE asked Exelon to conduct an additional study to understand the impacts of sediment transport on water quality in the Susquehanna River and the Chesapeake Bay (the “Sediment Study”). While Exelon believed its application was complete and that no additional study was required for MDE to issue a 401 certification for the Conowingo Project, in December 2014 Exelon entered into an agreement with MDE to work with Maryland agencies, the Army Corps, the U.S. Geological Survey, the University of Maryland Center for Environmental Science, and EPA to design and conduct a multi-year Sediment Study, to provide additional information to MDE. Exelon paid \$3.5 million to fund the Sediment Study.

States must act on applications for 401 certifications within one year, but the Sediment Study would not be completed within that time. On December 4, 2014, cognizant of MDE’s desire for additional study, Exelon provided MDE with more time by withdrawing its application for a 401 certification and then timely refiling. Exelon refiled its application for a 401 certification on March 3, 2015, and withdrew that application on February 5, 2016, pending conclusion of the Sediment Study. Exelon again refiled its application on April 25, 2016, and withdrew that application on February 17, 2017.

Each time Exelon withdrew and refiled its application, it did so to cooperate with MDE’s stated desire for more time to study the 401 certification request. On March 13, 2017, MDE indicated that it expected to receive Exelon’s resubmission no later than May 18, 2017, and would, upon receiving the resubmission, initiate its review of the water-quality impacts associated with the Conowingo Project. On May 17, 2017, Exelon submitted another request to MDE for a 401 certification in connection with the relicensing of the Conowingo Project.

The studies that Exelon submitted to MDE as part of its request and the information in the record before MDE demonstrate that the Conowingo Project is not the source of pollution entering the Susquehanna River. They also demonstrate that the Project is meeting all applicable state water-quality standards in waters immediately downstream. The Sediment Study confirmed that Conowingo Project operations introduce negligible amounts of sediment into the water, solely from natural causes, and do not cause downstream water-quality violations that may result from sediment transport. *See Lower Susquehanna River Watershed Assessment, Maryland and Pennsylvania*, at 158 (2015); *see* EIS at 74-75, 77.

Similarly, the Water Quality Study shows that the average dissolved-oxygen (“DO”) conditions within all of the turbine boils are always at or above standards, that DO standards in the tailrace (where water from the turbines is discharged) are met, that DO standards are being met immediately downstream of the Project, that minimum and maximum turbidity values recorded downstream are within state water-quality standards, and that operation of the Conowingo Project has no measurable effect on the temperature of the water being released downstream. *See Final Study Report: Seasonal and Diurnal Water Quality in Conowingo Pond and Below Conowingo Dam*, at ii-iv, 20-22 (Conowingo RSP 3.1). Likewise, the aquatic-resources studies show that the Conowingo Project is not adversely impacting fish propagation and instead supports a diverse assemblage of fish and a healthy multi-species sport fishery supported by natural reproduction. *See Final Study Report Impact of Plant Operation on Migratory Fish Reproduction*, at 22-24.

F. MDE’s Issuance of the 401 Certification

On April 27, 2018, MDE issued the Certification to Exelon pursuant to CWA Section 401; Title 9, Subtitle 3 of the Maryland Code, Environment Article; and COMAR 26.08.02. In a departure from the State’s previous 401 certifications and previous recognition by the State and

others of the Conowingo Project's benefits to the Bay, the Certification asserts that "the Project adversely impacts water quality in the State of Maryland."

The Certification imposes conditions that go far beyond the requirements of the 1975 Certification and State Permit No. 10-DP-0491, without attempting to explain what changed circumstances would justify this departure, and require Exelon to address impacts on the Susquehanna River that are caused by upstream polluters and are unrelated to the activities of the Conowingo Project.

The Certification contains conditions regarding dissolved oxygen that, among other things, require Exelon to undertake Required Nutrient Reductions that would annually reduce the amount of nitrogen and phosphorus in the Project's discharges by 6,000,000 pounds and 260,000 pounds, respectively. (High levels of nutrients such as nitrogen and phosphorus can cause low levels of dissolved oxygen.)

The Certification provides no authority for requiring Exelon to remove nutrients from the Susquehanna River rather than imposing future nutrient reductions on the sources of those nutrients. Nor does the Certification identify any effective or reasonable means to achieve this massive nutrient removal at the Conowingo Project, which is downstream from the sources of these pollutants.

Instead, MDE seeks payment from Exelon in excess of \$172 million annually, the installation of best management practices and/or ecosystem restoration activities, and/or dredging of the Conowingo Reservoir. None of these purported nutrient-reduction methods actually addresses the sources of the pollution.

Section 7.D.iv of the Certification provides that Exelon "shall provide to MDE for review and approval, no later than December 31, 2019, a nutrient corrective action plan (the 'NCAP') for

achieving the Required Nutrient Reductions and otherwise ensuring that DO [dissolved oxygen] levels in the DO Non-Attainment Area [two segments in the central Chesapeake Bay] are not adversely impacted by Project operations and discharges.” Section 7.D.iv further provides that Exelon’s “NCAP may propose any combination of corrective action strategies,” including: (1) “[d]redging the Reservoir,” *id.* § 7.D.iv.c; (2) “[i]nstallation of best management practices and/or ecosystem restoration actions,” *id.* § 7.D.iv.b; or (3) “[p]ayment of an in-lieu fee” prescribed by MDE, *id.* § 7.D.iv.a.

None of these conditions is related to Exelon’s own activities. Instead, the conditions all relate to the abatement of pollution introduced into the Susquehanna River by others. Moreover, neither dredging nor the installation of “best management practices” or “ecosystem restoration actions” is a workable method for attaining the Bay’s dissolved-oxygen standards. Thus, the in-lieu fee is the Certification’s dominant condition. The Section 7.D.iv conditions present only an illusion of genuine “options” for Exelon. The conditions were designed to leave Exelon with no choice but to pay Maryland a massive annual fee.

1. Dredging the Conowingo Reservoir

As Maryland itself has conceded (in a report that MDE co-authored with the Army Corps), dredging is an impractical solution whose high costs cannot be justified by water-quality benefits that would likely be both minimal and short-lived. Dredging and disposing of this much sediment is not feasible, and would itself cause environmental harm. For numerous reasons, dredging the reservoir is not a realistic option.

It is impossible at this time to precisely project the full costs of dredging the Conowingo Reservoir. But the MDE/Army Corps LSRWA study estimated that the cost of a limited dredging program could total as much as \$2.8 billion. And based on the projected costs of a pilot dredging

program proposed by Maryland (which has yet to obtain regulatory approval or commence), it appears that dredging to merely maintain the Reservoir's current depth could cost more than \$900 million per year. As MDE and the Army Corps noted, those costs are likely to increase over time as convenient sites for disposing of the dredged sediment become scarcer.

Dredging would also significantly diminish the community's enjoyment of the fisheries and other recreational activities at Conowingo Reservoir. Any ecosystem benefits from dredging would be short-lived. With the Susquehanna River's 27,000-square-mile watershed, significant and continuous sediment deposition is unavoidable. According to MDE and the Army Corps, a dredging program would be hard-pressed even to "keep[] up" with new deposition, much less to return the Reservoir to twentieth-century conditions. EIS at 80.

According to the MDE/Army Corps report, dredging would have little beneficial effect on the environment because it would result in only "minor" improvements in ecosystem conditions and would have little effect on water-quality conditions in the Chesapeake Bay. *Id.* at 139. In its EIS, FERC credited the MDE/Army Corps report's findings that "dredging of Conowingo [Reservoir] would be cost prohibitive and ineffective" and concluded that there was "no justification at this time for requiring Exelon to implement measures such as dredging to help control sediment and nutrient loading in the Bay, which would occur in the long term whether or not Conowingo Dam was in place." *Id.* And State-imposed dredging would require Exelon to remove pollutants introduced into the Susquehanna River not by Exelon, but by polluters in New York and Pennsylvania.

2. Best Management Practices and/or Ecosystem-Restoration Actions

Generally, Exelon embraces best management practices for the Project lands that Exelon owns. But the Project lands cover a miniscule portion of the Susquehanna River basin, so these

practices are insignificant compared with the Certification’s massive Required Nutrient Reductions. The Certification does not identify “best management practices” or “ecosystem restoration actions” that could potentially achieve the targeted level of nutrient reductions.

3. In-Lieu Fees

Under Section 7.D.iv.a of the Certification, Exelon’s NCAP may propose “payment of an in-lieu fee annually at \$17.00 per pound of nitrogen and \$270.00 per pound of phosphorus in accordance with payment instructions provided by MDE from time to time” and subject to adjustments for inflation. This condition would result in annual payments from Exelon to MDE of more than \$172 million, totaling more than \$7 billion over the term of the license — or roughly a half-million dollars *per day* for 40-plus years. In-lieu fees under the Certification will automatically escalate with inflation and may be further increased under the Certification’s reopener provisions, which purport to allow MDE to amend the Certification conditions at any time.

The Certification does not identify or constrain how Maryland will spend this money. But even aggressive pollution-control and pollution-reduction efforts focused solely on the Conowingo Project and other parts of the Susquehanna River watershed that fall within the confines of Maryland would be insufficient to cure the identified dissolved-oxygen problem in the Bay.

The Certification’s conditions are unprecedented. MDE’s Certification for the Conowingo Project is the first Section 401 water-quality certification for a FERC-licensed hydroelectric project, anywhere in the Nation, that has been conditioned on the licensee’s removal of pollution not caused by the project’s operations. The Certification also is the first Section 401 water-quality certification for a FERC-licensed hydroelectric project, anywhere in the Nation, that has been

conditioned on the licensee's payment to a State of an annual multimillion-dollar "fee" in lieu of such removal.

Ordinarily, Section 401 certifications for hydroelectric projects set threshold quantities for compliance (for example, for dissolved-oxygen levels in the dam's tailrace), require the licensee to monitor for quantities inconsistent with that threshold and, if monitoring reveals such quantities, require the licensee to undertake measures to bring the quantities back in line with that threshold. Maryland's Certification for the Conowingo Project departs dramatically from this approach by functionally requiring Exelon to pay the State tens or hundreds of millions of dollars every year for 40-plus years for an unspecified purpose.

4. Other Conditions

Section 7.F of the Certification contains conditions requiring the Conowingo Project to remove, at least 40 times per year, "all" trash and debris that flows down the River into the Project. Section 7.B of the Certification contains fish-passage conditions that exceed the requirements established in Exelon's settlement with the Department of the Interior, without citing any evidence that the additional measures are needed. And some of the Certification's conditions will actually make it easier for invasive species to migrate upstream through the Conowingo Project. Sections 2.C and 7 of the Certification also contain other conditions that provide for planning, additional studies, reopening, and modification by MDE and would allow MDE to impose as-yet-unknown additional requirements on the Conowingo Project.

G. The Chesapeake Bay TMDL

Maryland has unilaterally placed these obligations on Exelon despite the existence of a comprehensive federal regulatory scheme for water quality in the Chesapeake Bay and its tidal tributaries. The CWA establishes distinct roles for the federal and state governments in addressing

water quality in waters of the United States. For the Bay, these federal and state roles have been implemented through EPA's Chesapeake Bay Program, pursuant to CWA Section 117. 33 U.S.C. § 1267. The Chesapeake Bay Program was established as a regional partnership in 1983 to protect and restore the Bay's ecosystem by, among other things, identifying impaired waters, identifying sources of pollutants that cause the impairments, and developing specific plans for reducing pollutants.

To achieve these goals, in CWA Section 117(g)(1), Congress directed the Administrator of the United States Environmental Protection Agency (the "Administrator" or "EPA") to "ensure" that States in the Chesapeake Bay watershed develop management plans and begin implementation "to achieve and maintain ... (A) ... nutrient goals ... for the quantity of nitrogen and phosphorus entering the Chesapeake Bay and its watershed" and "(B) the water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem." 33 U.S.C. § 1267(g)(1)(A)-(B).

The Chesapeake Bay watershed spans seven jurisdictions: Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia, and the District of Columbia (the "Bay Jurisdictions" or "the States"). The States recognized that water pollution in the Bay is a "tragedy of the commons." Because the Bay is affected by so many sources of pollution throughout its watershed, no single State has sufficient incentive to reduce pollutant loads from its own sources unless it believes that other States will do likewise.

For each waterway in each State, CWA Section 303 requires the State to develop and periodically update "water quality standards." 33 U.S.C. § 1313(c)(2)(A). But the standards can take effect only if EPA approves them. *Id.* § 1313(c)(2)(A), 1313(c)(3)-(4).

For any waters that do not meet applicable water-quality standards, the State may establish a "total maximum daily load" ("TMDL") for each relevant pollutant, at a level necessary to satisfy

the applicable water-quality standards. 33 U.S.C. § 1313(d)(1)(C). A TMDL is essentially a “pollution diet” designed to identify necessary reductions of pollutant loads so that a waterway can meet the applicable water-quality standards.

However, these State-established “loads” cannot take effect unless they are approved by EPA. 33 U.S.C. § 1313(d)(2). If new facts come to light or new scientific methods are developed that indicate that a previously calculated “load” for a particular pollutant in a particular waterway will no longer result in attainment of applicable water-quality standards, the “load” must be amended as necessary to satisfy the water-quality standards. As with the initial load allocation, a load reallocation must be approved by EPA. *Id.* § 1313(d)(2).

EPA exercised its authority under CWA Section 303(d)(2) to establish a comprehensive federal TMDL for the entire Bay watershed that, unique among TMDLs, imposed pollutant reductions on the Bay jurisdictions, including the State of Maryland. Each State in turn had to find ways to secure reductions at the sources of pollution within that State. Following formal public notice and comment, EPA established the Bay TMDL for the Chesapeake Bay on December 29, 2010. EPA, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus, and Sediment* (Dec. 29, 2010) (the “Bay TMDL”). In the Bay TMDL, EPA established a comprehensive “pollution diet” to restore the health of the Bay and the waterways that feed it. *Id.* at ES-2.

H. The Chesapeake Bay TMDL’s Pollution Allocations

To calculate pollutant loads, EPA used then-available data and complex computer models that described hydrologic and water-quality processes, estimated the load of each pollutant to each water body, and predicted how the load would change as various remediation methods are implemented. EPA acknowledged in the 2010 Bay TMDL that its “models produce estimates, not perfect forecasts”; that improving data and modeling methods could necessitate “[c]hanging

modeling numbers”; that EPA’s models would “be updated continuously according [to] the state of the art of modeling technology”; and that EPA therefore would, over the years, “modify the TMDL” and “adjust[] ... the allocations” if necessary based on updates to the models.

In 2010, EPA calculated that, to reach its goals for the Bay’s water quality by 2025, significant nutrient reductions of discharges of nitrogen and phosphorus would be required. EPA allocated those total amounts with some specificity. For each of the 92 segments of the Chesapeake Bay watershed, EPA calculated the reductions in nitrogen, phosphorus, and sediment loads, or “allocations,” that specific point sources of pollution (such as a factory) and nonpoint-source sectors (such as agriculture) would have to undertake, so that the Bay would satisfy all applicable water-quality standards by 2025. Each segment is located in one and only one of the seven Bay jurisdictions and in one and only one of the eight major river basins (Susquehanna, Potomac, James, Rappahannock, York, Patuxent, Eastern Shore, or Western Shore).

The Bay TMDL does not hold any discharger singularly responsible for restoring the Bay, but instead distributes the obligations to prevent pollution among the seven Bay jurisdictions. In turn, the States became obligated to implement the Bay TMDL through a series of phased-in Watershed Implementation Plans (“WIPs”). WIPs are mandatory, detailed planning documents that each Bay jurisdiction must develop, subject to EPA approval, under CWA Section 303(e). 33 U.S.C. § 1313(e). WIPs identify specific programs to require or encourage polluters to control pollution at its source, ranging from tax incentives to grants to new state regulations and local land-use ordinances.

The Bay TMDL spans 15 years, from 2010 to 2025, when each segment of the Bay is to attain its goals under the States’ EPA-approved water-quality standards. There are numerous checkpoints over that period. First, the Bay TMDL requires that States create three WIPs over the

life of the project. States submitted Phase I WIPs to EPA in 2010 and updated, more-detailed Phase II WIPs to EPA in 2012. These WIPs described actions and controls to be implemented by 2017 and 2025. States will submit Phase III WIPs to EPA to provide updated, more-detailed information on actions the States will take through 2025. Second, States are required to follow biennial milestones, which began in 2012, to track progress and evaluate the effectiveness of the WIPs. EPA reviews the milestones and assesses whether they have been met and whether they are sufficient to achieve pollution reduction. Third, EPA set a goal of achieving at least 60% of all pollutant reductions for the 15-year timeframe by 2017, roughly the midpoint between 2010 and 2025.

EPA made clear that revisions to the TMDL's allocations could be proposed by a State, but could be approved only by EPA: “[I]t might be appropriate for EPA to revise the Bay TMDL (or portions of it). EPA would consider a request by the jurisdictions to propose such a revision to the TMDL following appropriate notice and comment. Alternatively, a jurisdiction could propose to revise a portion(s) of the Bay TMDL that applies within its boundaries (including, but not limited to specific [allocations]) and submit those revisions to EPA for approval.” Bay TMDL at 10-5.

I. The Conowingo Project and the Chesapeake Bay TMDL

The 2010 Bay TMDL recognized that the Conowingo Project had long kept some pollutants from flowing into the Chesapeake Bay but would eventually fill in under a natural deposition process and thereafter would have diminished ability to serve this protective role. For purposes of the 2010 Bay TMDL, EPA assumed that the Conowingo Project would maintain trapping capacity through 2025. But EPA provided a contingency plan: “If future monitoring shows the trapping capacity of the dam is reduced, then EPA would consider adjusting the

Pennsylvania, Maryland, and New York 2-year milestone loads.” Bay TMDL at 10-8. These potential adjustments, EPA explained, would “ensure that each jurisdiction is meeting its obligations.” *Id.*

In the years immediately following adoption of the 2010 Bay TMDL, the Chesapeake Bay Program came to believe that the Conowingo Project had already reached “dynamic equilibrium,” which means that, over a long period (such as a decade), the amount of pollutants flowing toward the dam from the north and the amount flowing away from the dam to the south would be roughly equal. As a consequence, the dam had effectively lost its long-term trapping capacity, although it continues to provide environmental benefits related to sediment and nutrients.

When preparing for the Bay TMDL’s 2017 Midpoint Assessment, EPA learned that upgraded computer models and better data (relating to both the Conowingo Project and many other issues, such as the impacts of economic growth and climate change) showed that the 2010 projections had been overly optimistic. The nutrient reductions that EPA had established in 2010 would need to be increased by at least two or three percent. If the 2010 Bay TMDL allocations for nitrogen and phosphorus were not amended, dissolved-oxygen levels in parts of the Bay would not satisfy applicable water-quality standards by 2025.

Using the upgraded computer models and better data, potential allocations were recalculated. Two of the options considered were (1) concentrating the burden of reallocation (for both nitrogen and phosphorus) solely in the Susquehanna River watershed and (2) spreading that burden across the entire Chesapeake Bay watershed. Under the first option, new calculations showed that the shortfall could be compensated for by reducing nutrient loads in the Susquehanna River by about 6,000,000 pounds of nitrogen and about 260,000 pounds of phosphorus per year — *precisely the reduction allocated to Exelon in MDE’s 401 Certification*. Because only a small

fraction of the Susquehanna River's length and only a small fraction of the sources that pollute the River are located in Maryland, this approach would require Maryland sources of pollution to reduce their loads by only about 120,000 pounds of nitrogen and about 5,000 pounds of phosphorus per year. The rest of the reductions would come from pollution sources in Pennsylvania and New York.

By contrast, under the second option, if the shortfall were compensated for by reducing nutrient loads across the entire Chesapeake Bay watershed, rather than just in the Susquehanna River watershed, Maryland would be forced to go on a much stricter "pollution diet." That is because Maryland represents a much smaller fraction of the Susquehanna River watershed than of the total Chesapeake Bay watershed. Spreading the burden across the entire Bay watershed, rather than concentrating it in the Susquehanna River watershed, would increase the burden on Maryland more than 14-fold for nitrogen and about 18-fold for phosphorus.

As the Chesapeake Bay TMDL is a federal TMDL, all revisions to the Bay TMDL loads must be approved by EPA. MDE has no authority to make decisions regarding allocations among States or among watersheds. Neither Maryland nor any of the other Bay jurisdictions formally asked EPA to modify the 2010 Bay TMDL's allocations to adjust for the shortfall. And to date, EPA has not approved any revisions to the 2010 Bay TMDL's allocations based on the new calculation of needed reductions in the amounts of nitrogen and phosphorus.

Instead of asking EPA to reallocate nutrient reductions and run the risk of taking on additional burdensome obligations, MDE has now essentially "self-reallocated" the additional 6,000,000 pounds of nitrogen and 260,000 pounds of phosphorus to the tiny portion of the Susquehanna River basin located in Maryland, where the Conowingo Project is located, and then placed the burden on Exelon to remove those pollutants.

The Certification presented a convenient opportunity to shift the burden of pollution reduction from the States onto a private entity. The Conowingo Project, located in Maryland, was up for relicensing by FERC, so the Project's owner and operator, Exelon, needed to obtain a Section 401 certification from Maryland as a prerequisite to federal relicensing. The Certification uses this opportunity to impose billions of dollars of fees on Exelon.

Instead of awaiting EPA's determination on amended allocations for nitrogen and phosphorus and running the risk that Maryland would have to shoulder its fair share of the obligation for protecting the Bay, Maryland is now attempting to saddle Exelon with responsibility for the entire annual shortfall of 6-plus million pounds of pollutants, by making those reductions an express condition of Maryland's Section 401 certification.

J. Incorporation of the § 401 Certification into Exelon's Operating License

As set forth above, the Certification provides: "This is a final decision on the Application." Certification at 27. It also states: "Any request for an appeal does not stay the effectiveness of this Certification." *Id.* On May 8, 2018, MDE submitted the Certification to FERC. Exhibit B. Under the Clean Water Act, the conditions of a certification "shall become a condition on any Federal license or permit" to which the § 401 certification pertains. 33 U.S.C. § 1341(d).

Because MDE has purported to issue "a final decision" that is not stayed by an appeal, and has submitted the Certification to FERC, FERC could incorporate the Certification and its conditions into the Conowingo Project's federal license. Because, for reasons set forth below, the Certification is unreasonable and unlawful as a matter of federal and state law, is arbitrary and capricious, is not supported by substantial evidence, is an abuse of discretion, and violates the United States and Maryland Constitutions, Exelon respectfully petitions that MDE reconsider the

Certification. Exelon also requests that MDE reconsider whether the Certification will be stayed pending further reconsideration by MDE or judicial review, and grant such a stay.

III. GROUNDS FOR RECONSIDERATION

As set forth above, Exelon has not yet received MDE's complete administrative record or notice of the grounds upon which MDE purports to base its decision. The following grounds for reconsideration are therefore preliminary. Exelon expressly reserves the right to supplement and amend these grounds for reconsideration upon receipt of MDE's complete administrative record and notice of the factual and legal grounds upon which MDE purports to have based its decision.

A. Procedural Defects in the Certification.

1. MDE Has Violated Exelon's Statutory and Constitutional Rights by Issuing a "Final Decision" Without Affording Exelon Administrative Review, Including the "Contested Case" Hearing MDE Expressly Recognizes Is Available to Exelon.

In the Certification, MDE recognizes that Exelon is entitled to seek reconsideration, and MDE expressly provides that "[a]fter issuance of notice of the Department's decision on the request for reconsideration, a contested case hearing shall be available in accordance with the applicable provisions of State Government Article, § 10-201, et seq., Annotated Code of Maryland." Certification at 27. Yet the Certification nevertheless purports to be a "final" decision, and MDE has already submitted it to FERC to become a condition on Exelon's federal license. MDE violated Exelon's statutory and constitutional rights by issuing a "final decision" *before* the "contested case" hearing that MDE recognizes "shall be available in accordance with the applicable provisions of State Government Article, § 10-201, et seq." *Id.*; *see also* COMAR 26.08.02.10F(4)(b) (review "shall be in accordance with the applicable provisions of State

Government Article, §10-201 et seq., Annotated Code of Maryland,” *i.e.*, the contested case procedures).

Under the State Government Article, a contested case hearing shall be conducted *before* an agency renders a “final decision,” contrary to what MDE did here. *See, e.g., State Bd. of Physicians v. Bernstein*, 167 Md. App. 714, 754 (2006) (“an agency’s *final decision* can be made based on a record review of testimony and other evidence *adduced at a contested case hearing*” (emphasis added)). The State Government Article provides that a “*final decision* or order in a contested case that is adverse to a party shall be in writing or stated on the record.” State Gov’t Art. § 10-221(a) (emphasis added). Because a final decision or order must be based on the record developed in the contested case proceeding, there can be no final decision or order before the contested case proceeding has even begun. Likewise, the Article specifies that “if the final decision maker in a contested case has not personally presided over the hearing, *the final decision may not be made* until each party is given notice of the proposed decision ... and an opportunity to” object, *id.* § 10-216(a)(1) (emphasis added) — again making clear that where a contested case hearing is available, there can be no final decision until after the contested case hearing has occurred. The judicial-review provisions further provide that “a party who is aggrieved by *the final decision* in a contested case is entitled to judicial review” — confirming that an agency decision is not final before the contested case hearing. *Id.* § 10-222(a)(1) (emphasis added). Indeed, MDE’s purported issuance of a “final decision” *before* the contested case hearing effectively requires Exelon to seek judicial review of the final decision before the contested case hearing has occurred (or risk waiving judicial review) and deprives MDE of jurisdiction even to conduct the contested case hearing (and deprives Exelon of the hearing). *See* Maryland Rule 7-203(a) (requiring that “a petition for judicial review *shall be filed* within 30 days after the latest

of (1) the date of the order or action of which review is sought; [or] (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner”) (emphasis added); *Friends of Croom*, 2017 WL 1833206, at *2 (“petition for judicial review divests an administrative agency of jurisdiction”).²

The nature of a contested case hearing confirms that, although MDE has claimed to issue a “final decision,” Certification at 27, its action is *not* a valid final decision as a matter of state law. MDE’s action is subject to a full evidentiary hearing before an agency factfinder who is free to issue an entirely different decision *before* an agency final decision is issued, all within the agency’s administrative process. The contested case hearing may be conducted by an “agency head” or *delegated* by an agency head to other appropriate authority. State Government Article § 10-205(a)(1). Prior to the hearing, the hearing officer shall provide written notice of the hearing. *Id.* § 10-208. Each party — here, both Exelon and MDE — has the right to present evidence. *See id.* § 10-213(a)(1) (“Each party in a contested case shall offer all of the evidence that the party wishes to have made part of the record.”); *id.* § 10-213(a)(2) (“If the agency has any evidence that the agency wishes to use in adjudicating the contested case, the agency shall make the evidence part of the record.”). A party is entitled to call witnesses, cross-examine any witness that another party or the agency calls, and introduce documents. *Id.* § 10-213(f), (g). Numerous other procedural details are specified in the State Government Article, § 10-201, *et seq.*

Given these administrative proceedings that MDE has acknowledged still “shall be available in accordance with the applicable provisions of the State Government Article,”

² To the extent MDE’s regulations purport to authorize the issuance of a final decision *before* the contested case hearing, those regulations are invalid. *See* State Government Article § 10-201 *et seq.*; *see McClanahan v. Washington Cty. Dep’t of Soc. Servs.*, 445 Md. 691, 708 (2015) (“We will not ... give effect to agency regulations that are inconsistent with or conflict with the statute the regulations are intended to implement.” (quotation marks omitted)).

Certification at 27, it is clear that MDE has not yet issued a valid final decision as a matter of state law. The administrative record is obviously not yet complete. Witnesses may be called and cross-examined, and documents submitted. It remains to be seen what administrative decision *will* result, and indeed properly *can* result consistent with the evidentiary record that is yet to be created. At the end of the day, MDE cannot have it both ways: It cannot claim to have issued a final decision and to file that decision with FERC, while at the same time claiming that Exelon is still entitled to a full evidentiary hearing within the administrative process that — unless it is an entirely hollow exercise — will result in a new and different decision that is *actually* the agency’s “final decision” under the statute.

Under State Government Article § 10-202(d)(2), contested case procedures apply — and a “final decision” cannot lawfully issue until the contested case hearing is complete — when an agency “regulation expressly, or by clear implication, requires the hearing to be held in accordance with this subtitle.” Here, MDE’s regulations do so. *See* COMAR 26.08.02.10(F)(4)(a) (identifying as applicable “State Government Article, §10-201 et seq., Annotated Code of Maryland”).

In addition, under State Government Article § 10-202(d)(1), contested case procedures apply — and, again, a “final decision” cannot lawfully issue until the contested case hearing is complete — where the proceeding involves “the grant, denial, renewal, revocation, suspension, or amendment of a license,” or “a right, duty, statutory entitlement, or privilege of a person that is required by statute *or constitution*,” “to be determined *only after* an opportunity for an agency hearing” (emphasis added). Here, procedural due-process rights under the Federal Constitution and the Maryland Declaration of Rights required a hearing before MDE could issue its decision as “final” and file it before FERC, which may, at any time, incorporate the Certification’s conditions

into the Conowingo Project’s federal license, thereby depriving Exelon of liberty and property by compelling Exelon to commit to undertake costly removal of nutrients for which Exelon is not responsible, or pay enormous sums of money. When the State is acting pursuant to “some established state procedure,” due process generally “requires a predeprivation hearing before the State interferes with any liberty or property interest enjoyed by its citizens.” *Parratt v. Taylor*, 451 U.S. 527, 537 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).³ The exception is if there is “either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process.” *Parratt*, 451 U.S. at 539; *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (“We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.” (quotation marks omitted)); *see also Roberts v. Total Health Care, Inc.*, 349 Md. 499, 510 (1998) (applying *James Daniel Good*’s rule to a claim under the Maryland Declaration of Rights).

Neither exception to the general requirement for a predeprivation hearing applies here. To the extent MDE deemed an immediate final action necessary because of the one-year deadline for issuing a 401 certification, *see* 33 U.S.C. § 1341(a), that cannot justify denying Exelon a predeprivation hearing — because the “necessity of quick action,” *Parratt*, 451 U.S. at 537, was

³ Exelon has myriad interests protected by due process: a protected property interest as the Conowingo Project’s owner and in the Conowingo Project’s economically beneficial use as a generation facility; a protected property interest in continuing to operate the Conowingo Project under State Permit No. 10-DP-0491; and a protected property interest in the Conowingo Project’s 401 certification, as is required for the Conowingo Project’s operating license. License applicants have rights protected by due process when they have “a legitimate claim of entitlement.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). And here, the governing regulations provide that if MDE “determines the proposed activities will not cause a violation of applicable State water quality standards, the Department *shall issue* the water quality certification.” COMAR 26.08.02.10(E)(1) (emphasis added). MDE has no discretion in the matter.

entirely due to MDE's own choices, which had a year to assess Exelon's most recent application (and extensive additional time prior to that). Nor can it be said that there is some "public health emergency [that] justify[es] immediate action." *Id.* Whatever one's view of the environmental issues that the Certification seeks to address, they have arisen over many years and will take many years to resolve.

By issuing a "final decision" *before* the "contested case" hearing that MDE recognizes "shall be available in accordance with the applicable provisions of State Government Article, § 10-201, et seq.," Certification at 27, MDE violated Exelon's statutory and constitutional rights. MDE accordingly should reconsider and stay its decision.

2. The Conditions in the Certification Are Invalid as a Matter of Law Because They Are Inherently Vague, Incomplete, Indefinite, and Expressly Subject to Further Analysis and Revision by MDE.

The Certification is also invalid because it purports to exercise a power that Maryland plainly lacks under the Clean Water Act. The Certification is replete with conditions that provide for continued planning, additional studies, reopening, and modification, making it a continuously evolving certification. Maryland essentially claims an unconstrained and unsupervised right to impose additional requirements on Exelon during the entire 50-year FERC license period. Most significantly, the Certification claims it can be reopened by MDE at any time to increase the already-onerous requirement that the Project remove more than six million pounds of nutrients from the water. Certification at 16. Similarly, MDE asserts it may modify *any* of the conditions with respect to an extensive list of legal or scientific changes, or simply because MDE concludes that "further conditions are necessary to assure compliance." *Id.* at 26. MDE clearly intends to exercise this authority over the entire license term. For example, it purports to be able to require

Exelon to submit improved fish protection plans for approval every five years until 2054. *See id.* at 22 (requiring submissions in “2024, 2029, 2034, 2039, 2044, 2049, and 2054”).

These conditions are invalid, because they exceed Maryland’s authority under CWA Section 401(a)(1) and Section 401(d). Under those provisions, States may impose conditions that are necessary to ensure compliance with state water-quality standards at the time of certification. A State’s authority under CWA Section 401 is a threshold “gating” power that exists prior to, and in connection with, the issuance of a federal license. Under Section 401, a State is given 12 months to make its determination. After this period has expired, the State’s authority under Section 401 comes to an end. *See Airport Communities Coalition v. Graves*, 280 F. Supp. 2d 1207, 1217 (W.D. Wash. 2003) (holding that state conditions issued outside the one-year window need not be incorporated into a federal license); *see also* 40 C.F.R. § 121.2(b) (EPA regulations prohibiting modification of a 401 certification without agreement from the licensing agency and EPA). Maryland has issued a certification that disregards this one-year limitation and asserts the right to alter the conditions at any point in the future. Nothing in the Clean Water Act grants the State an unlimited ability to make revisions to a 401 certification. As a result, MDE’s certification conditions are invalid. The CWA allows Maryland to issue a certification with defined conditions, not a moving target that is yet to be determined.

B. The Certification Is Unlawful, *Ultra Vires*, and Contrary to Controlling Provisions of the Clean Water Act.

In numerous respects, the Certification is unlawful, *ultra vires*, and contrary to controlling provisions of the Clean Water Act, including but not limited to the following.

1. MDE Cannot Impose Conditions Relating to the Removal of Pollutants That Exelon Has Not Added to the River, and That Do Not Have Anything to Do with a “Discharge” That Can Be Regulated Under the Clean Water Act.

The Certification violates fundamental limits on the CWA, and MDE’s certification authority under it.

Unlawfully requiring removal of pollutants. First, the CWA limits the introduction of pollutants into the navigable waters. *See South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004); 33 U.S.C. § 1362(12)(A). It does not demand the removal of pollutants from the navigable waters. *Appalachian Power Co. v. Train*, 565 F.2d 1351, 1377 (4th Cir. 1976). The CWA is thus a pollution-control statute, not a pollution-cleanup statute. In enacting other environmental statutes, Congress has exercised its authority to require regulated parties to remove pollutants (or pay for the removal of pollutants) from navigable waters in circumstances not pertinent here — but it has not done so under Section 401 of the CWA. *E.g.*, Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* (imposing liability for and addressing cleanup of polluted and contaminated sites); Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.* (addressing cleanup of oil spills in waterways). The Certification violates this limit by requiring the removal of pollutants from the Susquehanna River.

Unlawfully imposing conditions that purport to regulate the Project’s “discharge” of a pollutant. Under CWA § 401, the State may regulate the “discharge” of a dam. The term “discharge” is a defined term under the CWA, and includes the “discharge of a pollutant” or “pollutants,” such as nitrogen or phosphorus. 33 U.S.C. § 1362(16). The term “discharge of a pollutant,” in turn, is also a defined term, meaning “any *addition* of any pollutant to navigable waters.” *Id.* § 1362(12) (emphasis added). Applying this definition, the Supreme Court held in

Los Angeles County Flood Control District v. Natural Resources Defense Council, 568 U.S. 78, 82 (2013), that “no pollutants are ‘added’ to a water body when water is merely transferred between different portions of that water body”; *see also id.* at 83 (“no discharge of pollutants occurs when water ... simply flows from one portion of the water body to another”). Thus, a State cannot lawfully impose conditions under Section 401 relating to the discharge of pollutants that the licensee did not itself add to the waterbody.

Here, MDE violates that limit on its authority. Under the guise of regulating Exelon’s “discharge” of water, it imposes onerous conditions relating to the discharge of pollutants (nitrogen and phosphorus) for which Exelon cannot lawfully be held responsible, because the Project’s operation does not result in “any *addition* of any pollutant to navigable waters.” 33 U.S.C. § 1362(12) (emphasis added); *see also National Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 174 (D.C. Cir. 1982) (approving EPA position that “the point or nonpoint character of pollution is established when the pollutant first enters navigable water, and does not change when the polluted water later passes through the dam from one body of navigable water (the reservoir) to another (the downstream river)”). It also cannot be said that it is the “activity” of Exelon that has resulted in the nutrient levels found in the Susquehanna River, *see* 33 U.S.C. § 1341(a)(1), or that MDE’s conditions are “necessary” to assure that *Exelon* will comply with substantive provisions of the CWA or applicable requirements of Maryland law, *see id.* § 1341(d).

Exelon acknowledges that the Project’s flowing water is a Section 401 discharge (although *not* a discharge of a pollutant), and that Maryland has authority under Section 401 to ensure that this discharge complies with requirements specified under Section 401(d). Restrictions on the discharge of water flow by a hydroelectric project can impact fish habitats, and a dam can restrict access to fish spawning grounds. That is the precise point of the Supreme Court decisions in *PUD*

No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994), and *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006). To the extent the discharge itself may impact state requirements as to conditions such as flow, MDE can impose reasonable constraints on how the water is discharged. But MDE significantly exceeds that authority in the Certification, by requiring the removal of *pollutants* that Exelon did not add to the Susquehanna River.

2. The Certification Is Unlawful and *Ultra Vires* Because It Is Fundamentally Inconsistent with the Existing TMDL and Statutory Framework in the CWA for Addressing Water Quality in the Chesapeake Bay.

The Certification also is unlawful and *ultra vires* under the CWA for a separate reason. Again as set forth above, the Certification is inconsistent with the comprehensive Chesapeake Bay ecosystem-restoration plan that is administered by EPA. In 2010, based on detailed studies and computer modeling, EPA identified the “total maximum daily load” (“TMDL”) required to implement the applicable water-quality standards for the Chesapeake Bay. 33 U.S.C. § 1313(d). Based on its computer models, EPA identified reductions in the amounts of nutrients (like nitrogen and phosphorus) reaching the Bay that would need to be achieved by 2025 to restore the health of the Bay. Consistent with the Clean Water Act, EPA focused on requiring reductions of the addition of those nutrients at the source, and then allocated these reductions equitably among the seven jurisdictions, including Maryland, that are responsible for the addition of nutrients into the waterways, including the Susquehanna River, that flow into the Bay. In 2017, at the mid-point of the 15-year target period between 2010 and 2025, newer computer models showed that EPA’s original estimate of the amount of the reduction of nutrients needed to restore the health of the Bay was insufficient, and additional reductions were needed. EPA is in the process of determining how those additional reductions should be achieved. However, in the Certification, MDE has

determined that the entire amount of the additional reductions that are needed shall be Exelon's responsibility to remove from the Susquehanna River — rather than having EPA re-allocate those reductions among the same seven jurisdictions, *including Maryland*, responsible for achieving EPA's nutrient reductions to restore the health of the Bay. Maryland lacks authority to commandeer EPA's comprehensive Chesapeake Bay ecosystem-restoration plan and shift nutrient-reduction responsibility from *itself*, and other States, onto Exelon, simply because Exelon happens to be in the process of applying for a FERC operating license.

For similar reasons, MDE's actions are also conflict-preempted. Under the Supremacy Clause of the United States Constitution, a state action is preempted when it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Wyeth v. Levine*, 555 U.S. 555, 564 (2009). Here, the CWA gave EPA exclusive authority to allocate among the seven jurisdictions in the Chesapeake Bay watershed and the watershed's eight major river basins the amounts of nitrogen and phosphorus that each jurisdiction and basin may contribute to the Bay. The Certification is conflict-preempted because it invades and interferes with that exclusive authority — substituting MDE's judgment for EPA's by allocating to Exelon responsibility for all additional reductions of nitrogen and phosphorus.

3. Numerous Other Conditions in the Certification Are Unlawful and *Ultra Vires* Under CWA Section 401.

In numerous other respects, the Certification exceeds Maryland's authority under CWA Section 401.

Limitation to the "activity" of the "applicant." CWA § 401 provides that "any *applicant* for a Federal license or permit to conduct any *activity ... which may result in* any discharge into the navigable waters" must provide a certification from the State in which the discharge originates that "any such discharge will comply" with applicable provisions of the Act. 33 U.S.C.

§ 1341(a)(1) (emphasis added). Similarly, Section 401(d) provides that such a certification may set forth limitations “*necessary* to assure that any *applicant* for a Federal license or permit will comply” with substantive provisions of the CWA and other appropriate requirements of state law. *Id.* § 1341(d) (emphasis added). In numerous other respects (beyond the nutrient issue identified above), the Certification imposes conditions that are wholly unrelated to the “activity” of the applicant, and that are not “necessary to assure that [the] applicant” will comply with the CWA and applicable state law.

For instance, the Certification requires that Exelon employ clamming or other measures to remove floating and water-surface trash and debris at least weekly, and that in connection with such activity Exelon “*shall remove all visible trash and debris.*” Certification at 17 (emphasis added). Yet it is undisputed that virtually all trash and debris in the Susquehanna River has nothing to do with the “activity” of the Conowingo Project, but rather is discarded by other persons along the 464-mile course of the river. This condition in the Certification therefore exceeds Maryland’s authority under CWA Section 401. *See also Natural Resources Defense Council, Inc. v. EPA*, Civ. Action No. 16-1861 (JDB), – F. Supp. 3d –, 2018 WL 1568882, at *8 (D.D.C. March 30, 2018) (finding EPA action to be arbitrary, capricious, and not in accordance with law because, instead of setting a maximum daily amount of trash that could *enter* a river, EPA set a minimum amount of trash that must be *removed*).

As other examples, the Certification also requires Exelon to prevent aquatic invasive species from moving *upstream* past the Project, Certification at Attachment 3; to study and potentially reduce Chlorophyll-A levels in the Maryland portion of the Reservoir, *id.* at 18; and to study and potentially reduce PCB levels in the Reservoir, *id.* at 19. None of these conditions has

anything to do with the “activity” of the Conowingo Project, and these and other similar conditions in the Certification exceed Maryland’s authority under CWA Section 401.

Nonpoint sources of pollution. Section 401 addresses activities involving a point source that may result in a discharge to navigable waters. Section 401 does not govern nonpoint-source pollution. Yet Maryland has purported to impose obligations on Exelon under Section 401 to clean up pollution deposited in the Susquehanna River by nonpoint sources upstream of the Conowingo Project. *See, e.g., Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982); *Oregon Nat. Desert Ass’n v. U.S. Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008).

Substantive limits on Section 401 certifications. Under Section 401(d), the only conditions that a State may impose through a 401 certification are “effluent limitations and other limitations, and monitoring requirements necessary to assure” that the applicant “will comply with any [1] applicable effluent limitations and other limitations, under [CWA Section 301 or 302], [2] standard or performance under [CWA Section 306], or [3] prohibition, effluent standard, or pretreatment standard under [CWA Section 307], and with any [4] other appropriate requirement of State law.”

None of the Certification’s conditions are “necessary” to assure that the Conowingo Project will comply with any of these provisions. There are no effluent limitations or other limitations under CWA Section 301 or 302 that apply to the Conowingo Project. There are no standards of performance under CWA Section 306 that apply to the Conowingo Project. There are no prohibitions, effluent standards, or pretreatment standards under CWA Section 307 that apply to the Conowingo Project. And as to “appropriate requirement[s] of State law,” the Certification does not identify *anything* in Maryland law that authorizes the Certificate’s conditions — much less an “appropriate requirement.” Section 401 does not authorize a State, in the guise of issuing

a certification, to craft *new* purported requirements of state law; rather, the State must, at minimum, identify some preexisting requirement of state law that qualifies as an “appropriate requirement” under CWA Section 401.

4. The Enormous Annual “Payment of an In-Lieu Fee” in the Certification Is Unlawful Under CWA Section 401 and the Federal Power Act.

The Certification requires Exelon, beginning with calendar year 2025, to “annually reduce the amount of nitrogen included in the Project’s discharges by six million (6,000,000) pounds and the amount of phosphorus in the Project’s discharges by two hundred sixty thousand (260,000) pounds,” or such different amounts as may be approved by MDE that “provide the equivalent protection of [Dissolved Oxygen] levels.” Certification at 15. To achieve these amounts, Exelon must submit a “corrective action plan,” which may propose any combination of corrective action strategies, including (a) payment of an “in-lieu fee annually” per pound of nitrogen and phosphorus; (b) installation of best management practices and/or ecosystem restoration actions; and/or (c) “Dredging the Reservoir.” *Id.* at 16.

MDE fails to identify any set of “best management practices” or “ecosystem-restoration actions” that could achieve the massive reductions of nitrogen and phosphorus required in the Certification. And MDE *itself* has acknowledged that dredging would be “cost prohibitive and ineffective.” FERC, *Final Multi-Project Environmental Impact Statement for Hydropower Licenses* at 139 (2015) (discussing MDE’s LSRWA study). To dredge the required amounts, Exelon would need to remove 25 football fields of sediment to a depth of 67.5 feet every year, and would then need to deposit the dredged sediment somewhere else. Dredging and disposing of this much sediment is not feasible, and would itself cause environmental harm. In reality, MDE expects Exelon to make the annual “in-lieu fee” alternative compliance payment, which would

amount to more than **\$7 billion** over the course of the license, or approximately \$500,000 *every day* over 40-plus years. This amount exceeds, by orders of magnitude, the economic value of the Conowingo Project as an operating asset.

Section 401 of the CWA does not authorize Maryland to impose such a massive financial obligation on Exelon. The provision allows a State to provide, or to decline to provide, “a certification ... that any such discharge *will comply with the applicable provisions of [CWA] sections 301, 302, 303, 306 and 307 of this Act*” — not to impose independent financial obligations on federal licensees or to facilitate other parties’ compliance with the Clean Water Act. 33 U.S.C. § 1341(a)(1) (emphasis added); *see also id.* § 1341(d) (authorizing the State to impose limitations “to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations” or other CWA limitations, “and with any other appropriate requirement of State law”). FERC has expressed the view that water-quality conditions that impose a monetary penalty on a licensee violate the Federal Power Act (“FPA”) once implemented in the federal license, because the FPA establishes a different procedure for sanctioning a licensee’s noncompliance. *See, e.g., Consumers Powers Co.*, 68 FERC ¶ 61,077, at P 61,380 (1994) (refusing to incorporate condition requiring licensee to pay state agency liquidated damages for noncompliance); *Settlements in Hydropower Licensing Proceedings Under Part I of the Federal Power Act*, 116 FERC ¶ 61,270 at P 62,087 (2006) (“[B]ecause the FPA does not allow the Commission to impose damages, a damages provision may not properly be included in a license.”).

The staggering financial obligation that MDE effectively requires in the Certification, given the impracticability and harmful effects of dredging, exceeds Maryland’s authority under Section 401 and is unlawful under the CWA and FPA.

C. The Certification Is Unlawful as a Matter of State Law.

The Certification also cannot stand as a matter of state law, including the requirements for rational and adequately reasoned agency decision-making, supported by sufficient evidence.

1. The Certification Is Unlawful as a Matter of State Law in Imposing Obligations on Exelon That Are Unrelated to Exelon’s Own Activities.

The conditions identified above as beyond the State’s authority under the CWA — including the Certification’s nutrient-reduction provisions, trash and debris removal provisions, and invasive fish species, Chlorophyll-A, and PCB requirements — also are unlawful as a matter of state law. Fundamentally, MDE’s own regulations provide, with regard to a water quality certification, that “[i]f the Department determines *the proposed activities* will not *cause* a violation of applicable State water quality standards, the Department shall issue the water quality certification.” COMAR 26.08.02.10(E)(1) (emphasis added). Maryland’s own regulations thus confirm that the State may not require an applicant to cleanse water polluted by others. For the reasons set forth above, it is clear that Exelon’s “proposed activities” are not the “cause” of the water-quality conditions that MDE seeks to address. Exelon did not deposit the nutrients, trash, invasive fish, Chlorophyll-A, or PCBs into the Susquehanna River, and it is a violation of MDE’s own regulations to require Exelon to remove those items from the water as a condition of receiving a water-quality certification.

MDE’s attempt to hold Exelon responsible for conditions that it did not cause not only violates the controlling regulation, but renders MDE’s decision arbitrary and capricious. In considering the lawfulness of agency actions, the Court of Appeals in *Maryland Department of Environment v. Anacostia Riverkeeper*, 134 A.3d 892, 911-12 (Md. 2016), adopted the standards for agency decision-making set forth in *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) — which the Court of Appeals described as the

“leading case on the arbitrary and capricious standard.” 134 A.3d at 911. Thus, a fundamental principle of both federal and Maryland administrative law is that agency action is arbitrary and capricious when the agency fails to articulate a “rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); see *Anacostia Riverkeeper*, 134 A.3d at 911 (stating that this requirement is “in accord with Maryland’s treatment of this standard”).

An agency fails to articulate a “rational connection between the facts found and the choice made,” *State Farm*, 463 U.S. at 43, when it holds a party responsible for conditions that it did not cause; rather, when an agency issues a license or permit, any conditions attached to the license or permit must be connected to the activity being authorized. Thus, in *Wisconsin Valley Improvement v. FERC*, 236 F.3d 738 (D.C. Cir. 2001), the D.C. Circuit determined that a FERC-imposed condition on the license of a hydropower facility, which required the facility to undertake a crop-enhancement plan, was not arbitrary and capricious only because it sought to remediate crop damage that was directly connected to the hydropower facility’s operation. *Id.* at 747. Although this was a federal-law decision, Maryland follows the same administrative-law principles. *Anacostia Riverkeeper*, 134 A.3d at 911.

In contrast, MDE cannot impose obligations on Exelon based on circumstances beyond Exelon’s control. In *American Iron & Steel Institute v. EPA*, 526 F.2d 1027 (1975), the court explained this principle in holding that EPA could not impose effluent limitations on dischargers of water without adjusting the limitations for pollution already in the water, because otherwise the party subject to the limitations “would be forced to clean up water that had already been polluted by other companies.” *Id.* at 1056. Indeed, “[s]uch an adjustment would seem required by due process, since without it a plant could be subjected to heavy penalties because of circumstances

beyond its control.” *Id.*; *see also FMC Corp. v. Train*, 539 F.2d 973, 986 (4th Cir. 1976) (concluding that it was arbitrary for EPA to impose penalties for exceedances of water-pollution regulations that were beyond the control of the water treatment facility); *cf. Union P. R. Co. v. DHS*, 738 F.3d 885, 893-94 (8th Cir. 2013) (“Neither our court nor the Supreme Court has ever sanctioned [an administrative] scheme” that would “punish innocent [property] owners for ‘the misconduct of mere strangers, over whom such owners or [the owners’] consignees could have no control.’” (quoting *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 365 (1808))). By the same logic, MDE cannot require that Exelon “clean up water that had already been polluted by other companies,” *American Iron*, 526 F.2d at 1056, over the Susquehanna’s 464-mile course.

2. MDE Failed to Explain and Provide an Adequate Basis for the Agency’s Dramatic Shift from Previous Certifications and Permits It Has Issued for the Project, as Recently as 2014.

As set forth above, MDE consistently has issued certifications and permits for the Conowingo Project, without the onerous conditions included in the Certification. Yet the operation of the Project has not changed. The agency has wholly failed to explain or provide an adequate basis for this dramatic change in position.

The State’s longstanding position has been that the operation of the Conowingo Project does *not* violate state water-quality standards. Consistent with that position, the State issued a certification for operation of the Conowingo Project in 1975, and subsequently during each NPDES permit renewal, including the most recent renewal in 2014. *See* COMAR 26.08.02.10(A) (2) (“Discharges permitted by the Department under the National Pollutant Discharge Elimination System are certified by the Department.”). These prior 401 certifications stated that compliance with the NPDES permit will “insure that the operation of the facility will comply with appropriate requirements of State law,” and thus only required that the Conowingo Project comply with the

limited effluent limitations and monitoring requirements that are set forth in State Permit No. 10-DP-0491. In addition, State Permit No. 10-DP-0491 acknowledges that the requirements therein are consistent with the Chesapeake Bay TMDL for sediments, nitrogen, and phosphorus, approved December 29, 2010.

MDE is not entitled to make such an abrupt departure from its prior practice without a reasoned basis and explanation. The Court of Appeals recently explained the applicable principles in *Frederick Classical Charter School, Inc. v. Frederick County Board of Education*, 454 Md. 330, 406-07 (2017). Generally, administrative agencies are afforded “ample latitude to adapt their rules and policies to the demands of changing circumstances.” *Montgomery Cty. v. Anastasi*, 77 Md. App. 126, 137 (1988) (quoting *State Farm*, 463 U.S. at 42). However, an administrative agency decision “may be deemed ‘arbitrary or capricious’ if it is contrary to or inconsistent with an enabling statute’s language or policy goals” or “if it is irrationally inconsistent with previous agency decisions.” *Harvey v. Marshall*, 389 Md. 243, 302-03 (2005); *see also Mesbahi v. Md. State Bd. of Physicians*, 201 Md. App. 315, 331-32 (2011) (holding that an administrative agency “was not free to ignore its prior policy statement[]” in a prior declaratory ruling, and concluding that the agency “gave the appropriate weight” to its prior ruling by treating it as “akin to a precedential adjudicatory ruling”); *Dillmon v. Nat’l Transp. Safety Bd.*, 588 F.3d 1085, 1090-91 (D.C. Cir. 2009). Thus, when an agency changes a position clearly established in its own prior precedent, it “must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.” *Anastasi*, 77 Md. App. at 137 (quoting *Local 32, Am. Fed’n of Gov’t Employees, AFL–CIO v. Fed. Labor Relations Auth.*, 774 F.2d 498, 502 (D.C. Cir. 1985)).

Here, MDE provided no such “reasoned analysis” identifying or explaining why the operation of the Project has changed, and accordingly the Certification should be reconsidered. *See Wisconsin Valley Improvement*, 236 F.3d at 748 (rejecting as arbitrary and capricious FERC’s attempt to impose usage fees as a condition of a hydropower facility’s license, because FERC “offered no explanation — far less a ‘reasoned’ one — for [the agency’s] abrupt departure” from its prior practice of not imposing such fees).

3. The Annual “Payment of an In-Lieu Fee” in the Certification Is an Impermissible Tax.

The enormous annual “in-lieu fee” in the Certification, described above, also is unlawful as a matter of state law as an impermissible tax on Exelon. MDE has “no general taxing authority”; it can only impose fees incident to valid regulatory measures. *Accokeek, Mattawoman, Piscataway Creeks Cmty. Council, Inc. v. Pub. Serv. Comm’n of Maryland*, 451 Md. 1, 16 (2016). While there “is no set rule by which it can be determined” whether a charge is a permissible regulatory fee or an impermissible tax, a tax’s hallmark is that it is imposed “for the purpose of raising revenue”; by contrast, a charge is a fee when it is “based solely on the service provided to the” regulated party, when it “defray[s] the expenses of the regulatory process,” or when the charge offsets “any negative impact” of the regulated party’s activities. *Id.* at 17. In *Accokeek*, for example, a charge imposed in a permit to build a new fossil-fuel electric-generating station was a permissible regulatory fee because it addressed the “negative impact” of the station’s activities — for example, its proceeds would help “offset the impact of the emission of pollutants from the ... station.” *Id.* at 18. Here, by contrast, the \$172 million annual charge is imposed on Exelon purportedly to address pollution that Exelon did not create, and there is nothing in the Certification even to require that its proceeds go to *counteract* this pollution. MDE is merely trying to “rais[e] revenue” from Exelon via an unlawful condition in the Certification. *Id.* at 17.

Even if the Certification were deemed to impose a regulatory fee, moreover, it would be an unlawful fee. For a regulatory fee, “the amount of money to be collected under it” must be “reasonable.” *Mayor & City Council of Ocean City v. Purnell-Jarvis, Ltd.*, 86 Md. App. 390, 406 (1991). Here, the Certification’s charges are not reasonable because they are not based on any harm caused by Exelon or the Conowingo Project. *Id.*

4. Other Findings, Numerical Values, and Obligations in the Certification Are Arbitrary and Capricious, Not Supported by Substantial Evidence, and Constitute an Abuse of Discretion.

There are numerous other findings, numerical values, and obligations in the Certification for which no foundation is provided by MDE, and for which there is no reference to adequate evidence in the record. Exelon has not yet been provided with MDE’s administrative record. Exelon reserves the right to supplement and amend this Petition upon receipt of the administrative record, and to contend that other findings, numerical values, and obligations in the Certification are arbitrary and capricious, not supported by substantive evidence, and constitute an abuse of discretion. *See Anacostia Riverkeeper*, 134 A.3d at 911-12.

Specifically, Exelon contends that the following findings, numerical values, and obligations in the Certification, among others, are arbitrary and capricious, not supported by substantive evidence, and constitute an abuse of discretion:

Dissolved Oxygen and Nutrients. There is no rational basis or sufficient evidence in the record to support the obligations in the Certification that the Project achieve annual nutrient reductions of 6,000,000 pounds of nitrogen and 260,000 pounds of phosphorus. Certification at 15. MDE has not identified any effective and reasonable means of achieving this massive nutrient removal at the Conowingo Project, which is downstream from the sources of these pollutants. Indeed, the Certification neither identifies any such means nor provides a basis for imposing

nutrient reductions on Exelon rather than the sources of those nutrients. Instead, MDE requires payment from Exelon in excess of \$172 million annually, the installation of best management practices and/or ecosystem restoration actions, and/or dredging of the Reservoir, while failing to address the pollution at its source.

Trash and Debris. There is no rational basis or sufficient evidence in the record to support the obligations in the Certification that the Project remove “all” trash and debris by, among other things, using a self-propelled skimmer barge on a daily basis, removing all visible trash and debris at least 40 times per year, and performing a study regarding the feasibility of using one or more water-wheel trash interceptors powered by solar panels or other renewable sources. Certification at 17. Natural debris such as logs and vegetation, and artificial debris such as tires, metal, and plastic containers, accumulate at the Conowingo Project from upstream, and Exelon has a practice of collecting and removing a reasonable portion of such debris. The Conowingo Project’s practices “are similar to, and consistent with, the typical best management practices of other hydroelectric facilities.” *Final Study Report: Debris Management Study*, at 14 (Conowingo RSP 3.14). There is no evidence in the record demonstrating that the Project is the source of the trash and debris. Instead, these conditions impermissibly make Exelon responsible for trash and debris generated by other parties in Pennsylvania, New York, and other locations along the 464-mile long stretch of the Susquehanna River.

Fish Passage. There is no rational basis or sufficient evidence in the record to support the obligations in the Certification regarding fish passage that go beyond the requirements set forth in the fish-passage settlement with the Department of the Interior, would increase the likelihood that invasive species can migrate upstream through the dam, and include, among other things, goals of 5 million shad and 12 million herring passing each year. Certification at 13 and Attachment 3.

There is no evidence in the record demonstrating that the Project causes or contributes to the fish population declines asserted by MDE or to the presence of aquatic invasive species. Instead, these requirements set forth unrealistic goals that exceed historically reported populations and impermissibly fail to consider the science regarding the variety of causes of fish decline and the cause of the presence of invasive species. The record shows that the Project supports a diverse assemblage of fishes and a healthy multi-species sport fishery supported by natural reproduction.

The Certification is also inconsistent with the data-driven approach of the fish passage settlement with the Department of the Interior, which requires Exelon to make improvements only when the Department of the Interior determines them to be necessary based on data. By contrast, the Certification's fish passage conditions impose construction obligations, *whether or not* shown to be necessary based on data. They also assert MDE's authority to issue certain approvals that are within Department of the Interior authority under the Department of the Interior settlement agreement, such as approvals of changes to a Fishway Operation and Maintenance Plan.

Chlorophyll-A. There is no rational basis or sufficient evidence in the record to support the obligations in the Certification regarding Chlorophyll-A. Certification at 18.

PCB Levels in Fish Tissue. There is no rational basis or sufficient evidence in the record to support the obligations in the Certification regarding PCB levels in fish tissue. Certification at 19.

Oversight Costs. There is no rational basis or sufficient evidence in the record to support the obligations in the Certification requiring the Project to pay up to \$250,000 per year in oversight costs to both MDE and to the Maryland Department of Natural Resources. Certification at 27. This condition is not authorized by the Clean Water Act or state law.

D. The Obligations in the Certification Constitute a Taking Without Just Compensation, and Violate Exelon's Due Process and Equal Protection Rights, in Violation of the Federal Constitution and the Maryland Declaration of Rights.

Imposing enormous obligations on Exelon to remove pollutants and trash deposited by countless others along the river's 464-mile course is also fundamentally unfair and violates Exelon's constitutional rights. The Takings Clause of the Fifth Amendment provides that "private property shall not be taken for public use without just compensation." U.S. Const. amdt. 5. The Clause's purpose is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Maryland Constitution protects the same principle. *See Neifert v. Dep't of Env't*, 395 Md. 486, 518 (2006).

The government need not physically appropriate private property for its own use to effect an unconstitutional taking; economically burdensome government regulation can constitute a taking as well. *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). And "land" need not be taken; an unreasonable financial burden is also actionable. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522-23 (1998) (plurality op.). To evaluate whether economically injurious government action is an unconstitutional taking, courts must examine the "justice and fairness" of the governmental action, guided by consideration of "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Id.* at 523-24.

The ultimate economic impact of Certification will be, at a minimum, \$172,200,000 annually (the amount of the "in-lieu fee"), for a total amount of more than \$7 billion over the term of the license. This fee is more than "substantial." *See, e.g., id.* at 529 (finding that required "cumulative payments" under legislation "on the order of \$50 to \$100 million" were "substantial");

Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211, 222 (1985) (observing that liability under legislation, in the amount of “approximately \$200,000,” could not “be considered insubstantial”). As stated above, this amount exceeds, by orders of magnitude, the economic value of the Conowingo Project as an operating asset.

The retroactive nature of the Certification interferes with Exelon’s reasonable investment-backed expectations. *See Eastern Enterprises*, 524 U.S. at 532-34 (plurality op.). The Certification’s economic impact is as substantial as it is because MDE has attempted to use the Certification as a vehicle for removing from the Susquehanna River massive amounts of nutrients from the upstream agricultural runoff that has flowed into the river. The problem of agricultural runoff from Pennsylvania and New York polluting the Susquehanna is at least as old as the Reservoir. And despite the Reservoir’s existence for 90-plus years — during which time it helped keep the Bay clean by trapping upstream pollutants — the Project’s right to operate has never before been conditioned on an obligation to clean up after all upstream polluters.

An unconstitutional taking of property without compensation also exists here because MDE’s Certification belongs in a class of one: No other 401 certification (of which Maryland has issued many) has required a hydroelectric licensee to cover the full costs of removing from the river pollutants caused not by the licensee’s activities, but by upstream polluters. Nor has any other State attempted, through CWA Section 401, to extract annual “fees” of hundreds of millions of dollars from the licensee for some unspecified purpose. The “unusual” character of MDE’s Certification “implicates fundamental principles of fairness underlying the Takings Clause.” *Eastern Enterprises*, 524 U.S. at 537.

By shifting the costs for removing pollutants flowing into the Reservoir onto the Project, the Certification has shifted the public burden for the regulatory challenge posed by agricultural

runoff onto the Project alone. The Certification is a perfect embodiment of what the Takings Clause prohibits.

Viewed under another but similar lens, the Fifth and Fourteenth Amendment Due Process Clauses provide protection from economically burdensome regulations that are “arbitrary and irrational.” *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *see Eastern Enterprises*, 524 U.S. at 547 (Kennedy, J., concurring in the judgment and dissenting in part). “[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary and irrational that it runs afoul of the Due Process Clause.” *Lingle*, 544 U.S. at 543.

The governmental objective that the Certification purports to serve is the reduction of nutrients in the Susquehanna River. But none of the MDE’s proposed methods for doing so are directed towards regulating the true sources of the pollution. By imposing on Exelon the astronomical cost of removing upstream pollutants from the Susquehanna River, MDE has acted so arbitrarily and irrationally as to deprive Exelon of substantive due process.

For similar reasons, the Certification violates equal protection. Equal protection is violated when “the plaintiff ... has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). That remains true where, as here, the discrimination is against a “class of one.” *Id.* Here, the Certification intentionally, and without rational basis, discriminates against Exelon by attempting to extract a \$172 million annual payment from Exelon; by holding Exelon responsible for pollution caused by parties other than Exelon, which occurs upstream of the Conowingo Project throughout Pennsylvania and New York; and by imposing on Exelon other obligations that are costly, onerous, and have no relationship to the operation of the Conowingo

Project, thereby treating Exelon differently from similarly situated regulated properties in a manner having no rational relationship to a legitimate interest.

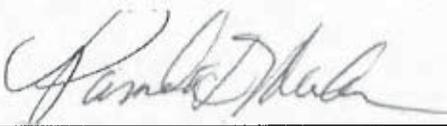
E. The Certification Unlawfully Discriminates Against Federally Licensed Dams.

Under the Supremacy Clause of the United States Constitution, States are not permitted to discriminate against the Federal Government or the private entities with whom the Federal Government deals. U.S. Const. art. VI, cl. 2. As the owner and operator of the Conowingo Project, Exelon is a licensee of the Federal Government. The Certification discriminates against Exelon because it imposes stricter conditions related to water-quality standards on Exelon at the Conowingo Dam than it imposes on State-licensed dams and therefore treats these dams preferentially to the federal licensee.

IV. RELIEF REQUESTED

The Certification is unlawful, arbitrary and capricious, not supported by substantial evidence, an abuse of discretion, and unconstitutional. Exelon requests that MDE reconsider its decision and remove all conditions that are unauthorized by Federal or Maryland law, arbitrary and capricious, not supported by substantial evidence, an abuse of discretion, and unconstitutional. Exelon further requests that MDE stay the Certification and inform FERC that it should not act upon the Certification while reconsideration and judicial review are pending.

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