



**Maryland**

Department of  
the Environment



# Conowingo Dam Water Quality Certification Litigation and Settlement

# Introduction

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- Section 401 of the Clean Water Act
  - To obtain a federal license for an activity that may result in a discharge into waters of the U.S., the applicant must provide the federal agency with a water quality certification (WQC) issued by the State in which the discharge is located – 33 U.S.C. § 1341
  - WQC is a certification that the activity will comply with state water quality standards and other requirements
  - State has a reasonable period of time, not to exceed one year, to grant certification (with or without conditions), deny, or waive the right to issue a WQC
  - Any conditions in a WQC are incorporated into federal license or permit
  - 401 is an important tool in States' efforts to protect their waters
  - Efforts to curtail States' authority in recent years

# Introduction (cont.)

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- Conowingo Dam
  - Constructed in 1928
  - Fully spans Susquehanna River, which is over 450 miles long and has a watershed that extends through Pennsylvania and New York
  - Located approximately 10 miles upstream from the Bay
  - For nearly a century the dam's placement and operation have fundamentally altered the natural river system, and it plays a significant role in health of the Bay

# Conowingo Dam Relicensing

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- Conowingo Relicensing

- Conowingo Hydroelectric Project (P-405), owned by Exelon Generation Company, LLC and operated as a 573 MW hydroelectric power plant
- Regulated by the Federal Energy Regulatory Commission (FERC)
- Exelon applied to FERC in August 2012 seeking a new long-term license
- Exelon's first request for a WQC from Maryland was made in 2014, followed by three cycles in which it withdrew its request and then submitted a new application within 90 days

# Conowingo Dam WQC

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- Conowingo Water Quality Certification
  - MDE issued a WQC with conditions to Exelon in April 2018
  - First opportunity in decades for Maryland to impose conditions on the dam's operation to address impacts to water quality
- Conditions to Address Water Quality Impacts
  - Dissolved Oxygen in the Bay (sediment and nutrients)
  - Flow Regime (aquatic life and migratory fish)
  - Fish Passage (restoring migratory fish and mussels)
  - Trash and Debris Removal
  - Impacts on Aquatic Habitat (mussels, turtles, waterfowl, sturgeon, etc.)

# Exelon's Challenges to the WQC

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- Administrative Appeal
  - Both Exelon and the Lower Susquehanna Riverkeeper/Waterkeepers Chesapeake filed appeals pursuant to the State's administrative appeal procedures (COMAR 26.08.02.10)
- Maryland Circuit Court for Baltimore City
  - Exelon filed a complaint seeking a declaratory order that MDE could not issue the WQC as a final decision because it had not first provided a contested case hearing
  - State's motion to dismiss granted in October 2018; Exelon appealed to Court of Special Appeals, which remains pending
- U.S. District Court for the District of Columbia
  - Exelon filed a complaint challenging the WQC as unlawful because the conditions exceeded the State's authority under the Clean Water Act and violated federal and constitutional law
  - State's motion to dismiss remains pending
- FERC Petition for Declaratory Order
  - Exelon asked FERC to declare that Maryland waived Section 401 authority because it issued the WQC more than one year from receipt of the first WQC request in 2014

# Changing Legal Landscape for Section 401

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- *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019)
  - *“Resolution of this case requires us to answer a single issue: whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year.” Hoopa Valley Tribe*, at 1103.
  - FERC has since found states have waived Section 401 authority in other hydro relicensing decisions relying on *Hoopa Valley Tribe*
- Federal Rulemaking on Section 401
  - On June 1, 2020, EPA issued a new regulation implementing Section 401
  - According to EPA: *“The Environmental Protection Agency (EPA) is publishing this final rule to update and clarify the substantive and procedural requirements for water quality certification under Clean Water Act (CWA or the Act) section 401. CWA section 401 is a direct grant of authority to States (and Tribes that have been approved for ‘treatment as a State’ status) to review for compliance with appropriate federal, State, and Tribal water quality requirements any discharge into a water of the United States that may result from a proposed activity that requires a federal license or permit. This final rule is intended to increase the predictability and timeliness of CWA section 401 certification actions by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures.”* 85 Fed. Reg. 42,210 (July 13, 2020)

# Settlement Agreement

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- Mediation
  - Exelon and MDE ordered to confidential mediation by the Court of Special Appeals in the state litigation
  - Negotiations ultimately successful, and settlement reached on October 29, 2019
- Settlement and Proposed License Articles
  - Settlement Agreement imposes commitments on Exelon to address non-license issues, including monetary payments to the State to fund projects to improve water quality
  - Proposed license articles relating to dam operations to be incorporated into the new 50-year license; these require FERC approval



# FERC Approval

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- Joint Offer of Settlement and Explanatory Statement
  - Formal process for obtaining FERC approval, filed on October 29, 2019
  - FERC issued public notice and invited comments from interested persons until January 17, 2020
  - Exelon and MDE filed separate reply comments on January 31, 2020
  - Settlement becomes effective upon FERC's approval of proposed license articles and issuance of new license