

ORAL ARGUMENT NOT YET SCHEDULED**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 21-1139 and 21-1186 (consolidated)

WATERKEEPERS CHESAPEAKE, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR REVIEW OF ORDER OF THE FEDERAL ENERGY
REGULATORY COMMISSION, 174 FERC ¶ 61,217 (MARCH 19, 2021)

PROOF OPENING BRIEF OF PETITIONERS**DATED: January 28, 2022**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioners Waterkeepers Chesapeake, Lower Susquehanna Riverkeeper Association,¹ ShoreRivers, and Chesapeake Bay Foundation (collectively, “Petitioners”) submit this certificate as to parties, rulings, and related cases.

(A) Parties and Amici

(i) Parties, Intervenors, and *Amici* Who Appeared in the District Court

This is a petition for review of final agency action, not an appeal from a decision of a district court.

(ii) Parties to This Case

Petitioners:

Petitioners in this case are Waterkeepers Chesapeake, Lower Susquehanna Riverkeeper Association, ShoreRivers, and Chesapeake Bay Foundation.

Respondents:

The Respondent in this case is the Federal Energy Regulatory Commission.

¹ Previous filings have referred to Lower Susquehanna Riverkeeper Association as Lower Susquehanna Riverkeeper. *See* Petition for Review and Rule 26.1 Disclosure Statement, *Waterkeepers Chesapeake v. EPA*, filed June 17, 2021, ECF No. #1902794. The full name of this petitioner, Lower Susquehanna Riverkeeper Association, is used throughout this brief.

Intervenors:

Exelon Power Generation Company, LLC, the United States Department of the Interior on behalf of the U.S. Fish and Wildlife Service, and Maryland Department of the Environment have been granted leave to intervene in support of Respondent.

(iii) *Amici* in This Case

None at present.

(iv) Circuit Rule 26.1 Disclosures

See disclosure form filed herewith.

(B) Rulings Under Review

Petitioners seek review of the Federal Energy Regulatory Commission's March 19, 2021, Order Issuing a New License to Exelon Power Generation Company, LLC for the Conowingo Hydroelectric Project.

(C) Related Cases

None.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Waterkeepers Chesapeake, Lower Susquehanna Riverkeeper Association, ShoreRivers, and Chesapeake Bay Foundation make the following disclosures:

Waterkeepers Chesapeake

Non-Governmental Corporate Party to this Action: Waterkeepers Chesapeake.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Waterkeepers Chesapeake fights for clean water and a healthy environment by supporting Waterkeepers throughout the Chesapeake and coastal regions as they protect their communities, rivers, and streams from pollution.

Lower Susquehanna Riverkeeper Association

Non-Governmental Corporate Party to this Action: Lower Susquehanna Riverkeeper Association.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Lower Susquehanna Riverkeeper Association is dedicated to improving the ecological health of the Lower Susquehanna River Watershed and the Chesapeake Bay.

ShoreRivers

Non-Governmental Corporate Party to this Action: ShoreRivers.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: ShoreRivers protects and restores Eastern Shore waterways through science-based advocacy, restoration, and education.

Chesapeake Bay Foundation

Non-Governmental Corporate Party to this Action: Chesapeake Bay Foundation.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Founded in 1967, the Chesapeake Bay Foundation ("CBF") is the largest independent conservation organization dedicated solely to saving the Bay. Serving as a watchdog, CBF fights for effective, science-based solutions to the pollution degrading the Chesapeake Bay and its rivers and streams.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

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

CBF	Chesapeake Bay Foundation
CEQ	Council on Environmental Quality
C.F.R.	Code of Federal Regulations
cfs	cubic feet per second
CWA	Clean Water Act
EIS	Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
LSRWA	Lower Susquehanna River Watershed Assessment
Md Code Regs.	Maryland Code of Regulations
MDE	Maryland Department of Environment
NEPA	National Environmental Policy Act
U.S.C.	United States Code

JURISDICTIONAL STATEMENT

The Federal Power Act (“FPA”) authorizes the Federal Energy Regulatory Commission (“FERC” or “the Commission”) to issue licenses for dams and reservoirs. 16 U.S.C. § 797(e). It also gives this Court jurisdiction to review FERC’s orders issuing such licenses. *Id.* § 8251(b).

FERC issued a new 50-year license for the Conowingo Hydroelectric Project No. 405 (“Conowingo Dam” or “the Dam”) on March 19, 2021. 174 FERC ¶ 61,217 (“License Order”), JA____. Petitioners filed a timely petition for rehearing with FERC on April 19, 2021, and a timely petition for review in this Court on June 17, 2021.

In a second order dated July 2021, FERC “modif[ied] the discussion in the License Order” while “continu[ing] to reach the same result.” 176 FERC ¶ 61,029 (“Rehearing Order”), JA____. FERC also stated that ShoreRivers did not intervene in the licensing proceedings. *Id.* at ¶ 10, JA____. Petitioners filed a second rehearing petition on that issue alone, which FERC granted in part and denied in part. 176 FERC ¶ 61,153 (Sept. 8, 2021) (“2nd Rehearing Order”), JA____. Petitioners filed a petition for review of the Rehearing Order on September 10,

2021 (No. 21-1186), and this Court consolidated the two cases. Order, Oct. 8, 2021, ECF No. 1917413.²

STATEMENT OF ISSUES

1. Whether Clean Water Act § 401 prohibits FERC from issuing a license for a project unless:
 - a. a § 401 certification “has been obtained” and is included as a condition on the license; or,
 - b. certification “has been waived as provided in” § 401(a)(1) by a state’s “fail[ure] or refus[al] to act on a request for certification” within a reasonable time period.
2. Whether FERC acted unlawfully or arbitrarily by issuing a license for the Conowingo Dam that does not include as a condition the certification that Maryland issued for the Dam.
3. Whether FERC acted unlawfully or arbitrarily by issuing a license for the Dam based on its claim that Maryland “waived” § 401 certification, even

² Contrary to FERC’s statement in the Rehearing Order, ShoreRivers did intervene in the licensing proceedings. Midshore Riverkeeper Conservancy moved to intervene in 2013. 2nd Rehearing Order at ¶ 6, JA____. In 2017, Chester River Association and Sassafras River Association merged into Midshore Riverkeeper Conservancy, which then changed its name to ShoreRivers. *See id.* (noting that a party does not become a new entity by changing its name); Hardesty Decl. at ¶¶ 3-4.

though Maryland did not waive those requirements in the only way § 401 recognizes—*i.e.*, by “fail[ing] or refus[ing] to act” on Exelon’s request for a certification.

4. Whether FERC misread the Clean Water Act or acted arbitrarily by assuming states can unilaterally “nullify” existing § 401 certifications after issuing them.
5. Whether FERC acted arbitrarily or contravened the FPA or the National Environmental Policy Act (“NEPA”) by dismissing as irrelevant to its licensing decision the fact that its license contains none of the requirements Maryland found necessary to assure the Dam’s compliance with water quality standards over the next fifty years.
6. Whether FERC acted arbitrarily and contravened the FPA, NEPA, or NEPA regulations by failing to adequately consider the environmental impacts of the flow regime it selected for the Dam.
7. Whether FERC acted arbitrarily and contravened the FPA, NEPA, or NEPA regulations by failing to adequately consider the environmental impacts of nutrients and sediments that are discharged from the Dam during storm events and rejecting dredging as a means to reduce these impacts; and,

8. Whether FERC contravened NEPA regulations by refusing to supplement its 2015 Environmental Impact Statement (“EIS”) after selecting a flow regime it did not consider in the EIS and receiving significant new information regarding the impacts and dredging’s effectiveness.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in an addendum to this brief.

STATEMENT OF THE CASE

I. INTRODUCTION.

This case challenges FERC’s issuance of a new 50-year license for the Conowingo Dam. Almost 100 feet high and a mile long, the Dam blocks the Susquehanna River ten miles upstream from the River’s mouth in the Chesapeake Bay.

Because the Dam’s owner has not maintained the giant reservoir behind it, the reservoir has filled up with nutrient-laden sediments. In large storms, the Dam now dumps huge loads of nutrients, fine sediment, trash and debris from the reservoir into the lower River and the Bay, smothering aquatic habitat and contributing heavily to low levels of dissolved oxygen that leave “dead zones” in the Bay and frustrate efforts to restore the Bay’s fisheries. With climate change making storms both more frequent and more severe, the Dam threatens the Bay, its fisheries, and its ecosystem with catastrophic and irreversible damage.

The Clean Water Act authorizes states to participate in the licensing and relicensing of dams through the § 401 “certification” process. States may veto licenses altogether by denying certification or issue certifications that impose any requirements necessary to assure a dam’s compliance with water quality standards. FERC must include such requirements as conditions of any license it issues.

In a process that involved input from environmental groups, local governments, legislators, and thousands of private citizens, Maryland exercised its authority and, in 2018, issued a water quality certification (“Certification”) that establishes requirements to restore fish passage, protect habitat, and ensure the Conowingo Dam’s compliance with water quality standards over the next fifty years.

These requirements are not in FERC’s license for the Dam, however. Exelon challenged the Certification under the public hearing process Maryland established pursuant to § 401. Exelon also filed lawsuits in state and federal court and a petition before FERC. Then, bypassing Maryland’s public hearing process, Exelon and Maryland entered into closed-door negotiations in the FERC action. In 2019, they struck a private deal by which—according to FERC—Maryland sought to unilaterally “nullify” the Certification and waive its rights to issue one. In 2021, FERC approved the deal and issued a license for the Dam that does not contain the Certification or any of its cleanup requirements. FERC dismissed the Dam’s future

compliance or noncompliance with water quality standards as irrelevant to its licensing decision.

As shown below, FERC's issuance of a license that does not contain the Certification exceeds FERC's statutory authority and contravenes the Clean Water Act. Further, FERC's disregard of the water quality and environmental impacts of its decision is arbitrary and contravenes the Federal Power Act and the National Environmental Policy Act. FERC's action harms the Bay, the River, and the people who use them. Petitioners respectfully ask this Court to vacate the license.

II. THE CONOWINGO DAM'S IMPACTS ON THE CHESAPEAKE BAY AND THE SUSQUEHANNA RIVER.

The record establishes that the Dam harms aquatic life in the Susquehanna River and the Chesapeake Bay severely and in many interrelated ways.

By preventing their migration upstream to spawn, the Dam has almost entirely destroyed the Susquehanna River's once-teeming populations of American Shad and River Herring. Although "millions of Shad and Herring should be passing upstream in the River every year," "only 15,000 Shad and 65 Herring passed the Dam" in 2017. Maryland Department of Environment, Clean Water Act Section 401 Certification for the Conowingo Hydroelectric Project (April 27, 2018) ("Certification") at 12, JA____. In 2019, only 4,787 Shad passed the Dam and, in 2020, only 485. Waterkeepers Chesapeake, et al., Petition for Rehearing of FERC's Order Issuing New License (Apr. 19, 2021) ("Rehearing Petition") at 3,

JA____. These fish species “are important links in the food chains for freshwater and ocean ecosystems.” U.S. Fish and Wildlife Service, Modified Prescription for Fishways (June 7, 2016) (“USFWS Fishways Prescription”) at 11, JA____.

Similarly, although “millions of eel” should pass upstream each year, Maryland found that only “thousands” made it in 2017. Certification at 12, JA____. Eels play an especially important role in the ecosystems of the Susquehanna River and the Chesapeake Bay by providing transport for the larvae of freshwater mussels which, in turn, “filter pollution out of waters.” *Id.* “The River should support tens of millions of freshwater mussels; today, the freshwater mussel population is significantly diminished above and below the Dam such that it is considered unviable.” *Id.*

More harm is done by the giant reservoir created behind the Dam.³

The Reservoir, formed by the construction of the Project, replaced 14 miles of flowing, dynamic River habitat with an impoundment and fundamentally altered aquatic habitat. The Reservoir lacks suitable habitat for freshwater mussels, which has adverse consequences for water quality, as these organisms provide important ecosystem services of filtration and transformation of sediment and nutrient pollution. Reservoir-adapted fish such as gizzard shad have replaced and continue to threaten populations of riverine species that would typically be dominant. The Reservoir has elevated levels of chlorophyll-A during summer months with increased water

³ See Exelon Generation, LLP, Section 401 Water Quality Certification Application (May 17, 2017) at 11, JA____ (“Conowingo Pond extends approximately 14 miles upstream from Conowingo Dam ... with a surface area of approximately 8,500 acres”).

temperatures, which impact drinking water supply uses of the water. Elevated PCB levels in fish tissue in fish in the Reservoir and below the Dam impact fish consumption related uses, and have triggered the development of TMDLs to address these impairments.

Certification at 12, JA____.

The Dam also harms water quality both by blocking much of the coarse sediment that the River would otherwise transport downstream. *Id.* at 11, JA____. Coarse sediment is important to the growth and survival of submerged aquatic vegetation, which in turn provides habitat for fish, mussels, and other aquatic species in the lower portion of the River. *Id.* The Dam's "highly unnatural" flows further harm habitat by preventing the coarse sediment that does make it past the Dam from being deposited. *Id.* In addition, the flows result in "drastic" changes in water depth which kill fish "by stranding [them] in shallow pools with insufficient water and subjecting them to increased threat of predation." *Id.*; *see* EIS at 148, JA____.

Most importantly, perhaps, the Dam contributes much of the nutrient and fine sediment pollution that degrades water quality in the lower Susquehanna River and Chesapeake Bay. *See* Chesapeake Bay Foundation, Inc., Comments on Offer of Settlement (Jan. 17, 2020) ("CBF Comments") at 4-6, JA____-____; Waterkeepers Chesapeake and Lower Susquehanna Riverkeeper Association, Comments on Proposed Settlement Agreement (Jan. 17, 2020) ("Waterkeepers Comments") at 4-7, JA____-____. Fine sediment smothers and kills aquatic vegetation, destroying

habitat for fish and shellfish and depriving the water of the filtering effect the shellfish it hosts would provide. *Id.* The nutrients lead to the proliferation of algae and other organisms that suck oxygen out of the water—causing fish kills and leaving dead zones in the Bay. *See* CBF Comments at 4-6, 18-20, JA____-__, JA____-__; Lower Susquehanna River Watershed Assessment (May 2015) (“LSRWA”) at ES-1, 100, JA____, ____; Comments of the Local Government Members of the Clean Chesapeake Coalition Regarding the Joint Offer of Settlement (“Local Government Comments”) at 2-3, 12-14, JA____-__, ____-__; Waterkeepers Comments at 4-7, JA____-__.

The reservoir, which was 120 feet deep for much of its length when the Dam was built, is now an average of “15 feet or less” deep over the vast majority of the same stretch of water. Local Government Comments at 13, JA____; CBF Comments at 4-5, 18-20, JA____-__, ____-__; Waterkeepers Comments at 6-7, JA____-__ & Ex. A, JA____-__. There is now “an enormous artificial repository of sediment and associated nutrients, which are available to be ‘scoured’ by high flow conditions like storms or snow melt events, and then dumped all at once into the Lower Susquehanna River, the Susquehanna Flats (the shallow underwater delta of the Susquehanna River), and the upper Chesapeake Bay.” Waterkeepers Comments at 6-7, JA____-__, Ex. B at 7-8, JA____-__.

“Scour of nutrient-laden sediments that have accumulated in the reservoirs behind the dams in the lower Susquehanna River occurs several times a year during major storm events” already. Local Government Comments at 14, JA____. These “scoured loads deliver much greater quantities of sediment and nutrients to the Chesapeake Bay than the natural loading that would have occurred during the same flow events had the Project not been in place.” Waterkeepers Comments at 6, JA____. A satellite photograph of the 100-mile plume of sediments and nutrients discharged from the Dam during one such event, 2011’s Tropical Storm Lee, is attached to Local Government comments (at Ex. A, JA____) and provided below.

As Maryland reported to EPA when it listed waters as impaired by the Dam in 2018, one of Maryland’s “major water quality concerns centers around the Conowingo Dam.” “[T]his build-up of sediments poses a major threat to Chesapeake Bay restoration efforts and [] without addressing the additional load due to the lack of trapping, the Bay partnership will not be able to meet its water quality standards for the long term.” Maryland’s Final 2018 Integrated Report of Surface Water Quality, at 38, JA____.⁴

The Certification echoes this finding and explains the cause:

the Reservoir is now full, as no efforts have been undertaken over the life of the Project, such as routine dredging, to maintain any trapping

⁴ EPA approved Maryland’s report. EPA, Letter from Liebertz to Curry (Apr. 9, 2019), JA____.

function. As a result, sediments and nutrients move downstream, and during large storm events, significant amounts of trapped sediment and nutrients are scoured from the behind the Dam and discharged downstream. By releasing significant amounts of sediment and nutrients through scouring during storm events, the Dam has altered the nature, timing, and delivery method of these materials with adverse consequences for the Lower River and the Bay.

Certification at 12, JA_____ (emphasis added).

As climate change causes ever more frequent and severe storms, the unchecked buildup of sediment and nutrients behind the Dam threatens even greater damage to the Bay and its ecosystem over the next fifty years. Average temperatures are predicted to rise by almost 5 degrees Fahrenheit by 2055, and “extreme” rain events involving more than an inch of rain in a single day are expected to exceed 1971-2000 levels by 10-20 percent over during the Dam’s 50-year license period. Waterkeepers Comments at 6, JA_____.

Figure 1: Sediment Plume Following Tropical Storm Lee (2011)

Label identifying Conowingo Dam added, and county lines removed. The LSRWA estimates that in the days following Tropical Storm Lee more than a year's worth of sediment was scoured and discharged from the Conowingo Dam. LSRWA at 78, JA____ (estimating 3.5-6 million tons of scour for an “approximately a 709,000-[cubic-foot-per-second]) event”); *id.* at 72, JA____ (reporting average annual load of 2.2 million tons/year to the Bay).

III. STATUTORY BACKGROUND.

A. The Clean Water Act.

Clean Water Act authorizes states to participate in licensing decisions for projects like the Conowingo Dam through the § 401 “certification” process. 33 U.S.C. § 1341(a)(1). It gives states three choices: (1) deny a project owner’s request for certification and prevent the project from going forward; (2) waive § 401’s requirements by failing or refusing to act on an application for a certification with a reasonable period of time not to exceed one year and allow the project to go forward without imposing any conditions on it; or, (3) allow a project to go forward with state-imposed conditions by issuing a § 401 “certification.” *Id.* If a state chooses to issue a certification for a project, the certification must set forth any “requirements necessary to assure” the project “will comply” with water quality standards, and FERC must include it as a condition of the project’s license. *Id.* § 1341(d). “No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence”—*i.e.* by a state’s failure or refusal to act on a request for certification within a reasonable period of time. *Id.* § 1341(a)(1).

Once a state has issued a certification, a state may amend or withdraw it through state administrative proceedings established by the state under the Clean Water Act. *See Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 966-967,

969 (D.C. Cir. 2011); 33 U.S.C. § 1341(a)(1); Md. Code Regs. 26.08.02.10. And, in limited circumstances, a state may unilaterally revoke an existing certification. *See* 33 U.S.C. § 1341(a)(3).

B. The Federal Power Act and National Environmental Policy Act.

FERC's licensing decisions are also subject to the FPA, NEPA and applicable NEPA regulations. Sections 4(e) and 10(a) of the FPA, 16 U.S.C. §§ 797(e), 803(a), both require FERC to "consider environmental issues when deciding whether to issue hydropower licenses." *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 543 (D.C. Cir. 1992). Similarly, NEPA "compel[s] federal agencies to take a hard and honest look at the environmental consequences of their decisions." *Am. Rivers v. FERC*, 895 F.3d 32, 49 (D.C. Cir. 2018). In addition, the NEPA regulations promulgated by the Council on Environmental Quality (CEQ), with which FERC must comply, provide that agencies "[s]hall prepare supplements to either draft or final environmental impact statements if ... (i) [t]he agency makes substantial changes to the proposed action that are relevant to environmental concerns; or (ii) [t]here are significant new circumstances or information relevant

to environmental concerns and bearing on the proposed action or its impacts.” 40

C.F.R. § 1502.9; 18 C.F.R. § 380.1.⁵

IV. FERC’S 2015 ASSESSMENT OF THE DAM’S ENVIRONMENTAL IMPACTS.

As noted above, FERC’s license for the Conowingo Dam must satisfy the FPA and NEPA as well as the Clean Water Act’s certification requirements. FERC prepared an EIS for the Dam in 2015, considering four alternative flow regimes. *See* Rehearing Order at ¶ 23, JA____ (summarizing EIS). FERC claimed dredging would be costly, but found it “premature” to make a decision on dredging before conducting additional analysis. EIS at xxxvii, 80-81, JA____, ____-____.

Since FERC’s 2015 assessment, FERC received new information showing that dredging could accomplish all the nutrient reductions needed in the Bay for only \$41 million. Waterkeepers Comments, Ex. M at 7, JA____. And, FERC received new information showing that, both because the reservoir is now completely filled up with sediment and nutrients and because climate change will drive more frequent and severe storms, the Dam’s impacts will be significantly

⁵ The Council on Environmental Quality recently revised its regulations implementing NEPA. 85 Fed. Reg 43,304 (July 16, 2020). The new regulations do not apply here because FERC completed the Project’s 2015 EIS before they took effect. *See* 85 Fed. Reg. 14,470 (March 12, 2020); *see also* 85 Fed. Reg. at 43,372, 43,340. Throughout this brief Petitioners cites to the 2019 version of the NEPA regulations, 40 C.F.R. §§ 1500-1508.

worse than the EIS acknowledges. *See, e.g.*, Waterkeepers Comments at 7, JA____; The Nature Conservancy Answer at 11-13, JA____-__ & Att. 2, JA_____.

V. MARYLAND'S 2018 WATER QUALITY CERTIFICATION.

Maryland timely issued a certification for the Dam on April 27, 2018. Certification, JA____-__; Exelon, Section 401 Water Quality Certification Application (May 17, 2017), JA____-__. To address the Dam's impacts on Shad and Herring populations, Maryland's Certification requires Exelon to take actions necessary to assure that 5,000,000 Shad and 12,000,000 Herring are able to pass the Dam each year. Certification at 13-14, JA____-__. It requires Exelon to increase minimum flows and significantly reduce the drastic flow fluctuations that harm aquatic life below the Dam. *Id.* at 14-15, JA____-__.

To address nutrient discharges from the Dam and their impacts on water quality downstream, the Certification requires Exelon to either reduce the amount of nitrogen and phosphorus the Dam's discharges annually by 6,000,000 pounds and 260,000 pounds respectively, or make payments to achieve the required nutrient reductions and restore dissolved oxygen levels in the Lower Susquehanna River and the Bay. *Id.* at 15-16, JA____-__. If Exelon chooses to address the Dam's nutrient discharges entirely through payments, that would amount to \$172,200,000 per year, or approximately \$8.6 billion over the 50-year license period. *Id.* at 16, JA_____.

The Certification also sets forth several other requirements, including:

- to regularly clean up the accumulated trash and debris in the reservoir so that it is not washed into the Lower Susquehanna River and the upper Bay during storm events;
- to monitor and, if necessary, reduce levels of algae in the reservoir;
- to reduce levels of polychlorinated biphenyls (PCBs) in the reservoir, if necessary; and,
- to protect habitat for Bog Turtles, nesting waterfowl (including Black-Crowned Night Heron), Sturgeon and other species.

Certification at 17-22, JA____-__; *see generally* Waterkeepers Comments at 11-13 (listing Certification’s cleanup requirements), JA____-__.

Consistent with Clean Water Act § 401, the Certification states that the Conowingo Dam “will comply” with water quality standards “provided that [Exelon] complies with all the provisions, requirements, and conditions in this Certification.” *Id.* at 7, JA____ (emphasis added).⁶

VI. PRIVATE SETTLEMENT BETWEEN EXELON AND MARYLAND.

After Maryland issued the Certification in 2018, Exelon filed an administrative request for reconsideration before Maryland Department of the Environment (“MDE”) under the provisions for public hearings that Maryland established pursuant to Clean Water Act § 401(a)(1). Exelon, Protective Petition

⁶ The Certification lists the limitations and requirements and water quality standards (collectively “water quality standards”) at 8-11, JA____-__.

for Reconsideration and Administrative Appeal (May 15, 2018) at 2, JA____ (Md. Code Regs. 26.08.02.10(F)(4)). Exelon also immediately filed suits in Maryland state court and in the U.S. District Court for the District of Columbia and, shortly afterwards, an action for declaratory judgment by FERC that Maryland had involuntarily waived its opportunity to issue a § 401 certification.

With all of these actions still pending, Exelon and Maryland entered into private, closed-door settlement negotiations in the FERC action. In October, 2019, Exelon and Maryland reached a deal. Water Quality Settlement by and between State of Maryland Department of the Environment and Exelon Generation Company, LLC (Oct. 29, 2019) (“Settlement”), JA____-____. Exelon agreed to do significantly less to clean up the Susquehanna River and the Chesapeake Bay than is required by the Certification. Maryland, despite having already issued the Certification in 2018, agreed to “waive its rights to issue a CWA Section 401 certification.” Settlement at 1-2, 13, JA____-__, ____.

Unlike the Certification, which requires Exelon to assure that 5,000,000 Shad and 12,000,000 Herring pass the Dam each year, the Settlement does not require Exelon to assure that any Shad or Herring are able to pass the Dam.

With respect to flow fluctuations, the Settlement also requires considerably less of Exelon than the Certification. At year 10, for example, the Settlement allows far lower minimum flows, requiring only half to a third of what the

Certification requires in some months. *Compare* Rehearing Order at 13, JA____ with Certification at 14-15, JA____-__ & Att. 5, JA_____.

The Settlement does not require Exelon to reduce the nutrients and sediment discharged from the Dam at all. Although it requires some payments, Settlement at 6-10, JA____-__, the total of such payments is less than \$30 million over the entire 50-year license period—less than 1 percent of the \$8.6 billion value of the nutrient reductions required by the Certification. Certification at 15-16, JA____-__; Waterkeepers Comments at 11, JA____. Exelon’s payments under the Settlement would also fall far short of the amount needed to achieve the nitrogen and phosphorous reductions required in the Certification by restoring the trapping capacity of its reservoir through dredging, approximately \$41 million per year. Waterkeepers Comments, Ex. M at 7, JA____.⁷

Containing none of the requirements that Maryland found necessary to assure the Dam’s compliance with water quality standards in its Certification, the Settlement does not purport to assure the Dam will comply. Further, it largely precludes Maryland from requiring cleanup measures that are not in the Settlement, no matter how clear it becomes that such measures are necessary to

⁷ Exelon’s annual revenues from the Conowingo Dam alone are estimated to range between \$115 million and \$121 million. CBF Comments, Attach., Energy and Environmental Economics, “An Economic Analysis of Conowingo Generating Stations” (2017), JA_____.

protect the River and the Bay from the Dam's discharges and to achieve water quality standards. Settlement at 16-17, JA____-__. If other parties seek to enforce Maryland's water quality standards, the Settlement requires Maryland to "represent" that "Exelon's compliance with this Agreement and the New License satisfy Exelon's obligations under applicable water quality standards," regardless of whether that is true. *Id.*

SUMMARY OF ARGUMENT

Clean Water Act § 401. FERC contravened the Clean Water Act by issuing a license for the Conowingo Dam that does not include, as a condition, the Certification Maryland issued for the Dam. The Act authorizes FERC to issue a license only if a certification “has been obtained,” in which case FERC must include the certification as a condition of the license, or if certification “has been waived” by a state’s “fail[ure] or refus[al] to act on a request for certification” within a reasonable period of time.

FERC’s belief that Maryland intended its private Settlement with Exelon to waive § 401’s requirements and “nullify” the Certification Maryland had already issued does not give FERC authority to issue a license. Section 401(a)(1) provides “no license shall be issued” unless certification has been waived in the specific way that it spells out: a state’s “fail[ure] or refus[al] to act on a request for a certification” within a reasonable time period. FERC does not and cannot claim that happened here.

In any event, § 401 does not allow states to waive § 401 certification requirements after they have already issued a certification. By specifying how certification may be waived—by a state’s failure or refusal to act on a request for a certification—§ 401(a)(1) makes clear that Congress did not silently authorize states to nullify existing certifications by waiving § 401’s requirements after they

have acted on a request. Confirming this point, § 401(a)(3) provides limited authority to revoke existing certifications and § 401(a)(1) provides for state-level public hearing processes by which existing certifications can be withdrawn. Reading authority to waive existing certifications into § 401(a)(1) would drain meaning from these provisions and defeat their purpose.

Finally, because Maryland's Settlement with Exelon did not "nullify" its existing Certification for the Conowingo Dam, FERC's refusal to include the Certification as a condition of the license contravenes § 401(d), which provides that "any" certification "shall become a condition" of "any" license.

Water Quality Standards. FERC's license contains none of the cleanup requirements Maryland found necessary to assure the Dam's compliance with water quality standards. Even if compliance with water quality standards were not required, as FERC claims, FERC's dismissal of this point as irrelevant to its licensing decision is arbitrary and contravenes the FPA and NEPA. Whether the Dam does or does not comply with water quality standards over the next fifty years, and the impacts of non-compliance are important aspects of the problem that FERC needed to consider to issue a non-arbitrary decision that satisfies the requirements for consideration of environmental impacts in the FPA and NEPA.

FERC also violated CEQ's NEPA regulations by refusing to supplement its 2015 EIS for the Dam. After issuing the EIS, FERC received uncontroverted

record evidence that the Dam is causing violations of water quality standards now and may cause more violations in the future. These are the type of “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” that trigger CEQ’s supplementation requirements.

Flow regime. Abandoning the flow regimes that it considered in the EIS, FERC adopted a new flow regime in the License Order, one that Exelon and Maryland privately selected in their Settlement. FERC’s failures to consider this “Settlement Flow Regime” in its EIS (or at any point before including it in the License) and to allow the public to comment on it contravene NEPA’s most fundamental requirement and defeat its purpose. FERC’s after-the-fact arguments that the Settlement Flow Regime “generally provides for higher flows” and generally maintains aquatic habitat for more of the year than the flow regimes it considered are irrelevant under NEPA and merely underscore the inadequacy of its consideration of environmental impacts.

By failing to supplement its EIS to consider the Settlement Flow Regime, FERC also violated CEQ’s regulations which require supplementation when “[t]he agency makes substantial changes to the proposed action that are relevant to environmental concerns.” FERC does not dispute that putting a completely different flow regime in the license is such a change.

Nutrients, sediment, and dredging. Throughout the licensing process, FERC has refused to consider the harmful impacts of the Dam's nutrient and sediment discharges, based on its opinion that the Dam is not responsible for these discharges and that the River and Bay would suffer the same impacts in the long term even if the Dam did not exist. In the record, Maryland found that Exelon's failure to maintain the reservoir behind the Dam has led to the now-routine scour events that send huge quantities of nutrients and sediment into the Susquehanna River and Chesapeake Bay all at once—causing enormous damage that would not happen but for the Dam. FERC's failure to draw a rational connection between this record evidence and its head-in-the-sand dismissal of the impacts of the Dam's nutrient discharges is arbitrary.

Because it views dredging as ineffective and too expensive, and because it believes the Dam is not responsible for the impacts of its nutrient and sediment discharges, FERC refused to require dredging to reduce the Dam's nutrient and sediment discharges. After issuing its EIS in 2015, FERC received evidence that nutrient and sediment discharges will increase over the 50-year license period, that dredging would reduce these discharges to the levels necessary to meet water quality standards, and that dredging would cost far less than FERC estimated. FERC's rejection of this evidence and refusal to supplement the EIS are arbitrary and contravene NEPA regulations.

STANDARD OF REVIEW

Because FERC is not the agency charged with administering the Clean Water Act, “the Court owes no deference to its interpretation of Section 401 or its conclusion regarding the states’ waiver.” *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1102 (D.C. Cir. 2019) (citing *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (“Our review of the Commission’s interpretation of Section 401 is *de novo*.”)).

The standard of review for FERC’s “action, findings, and conclusions” is supplied by section 706(2) of the Administrative Procedure Act, 5 U.S.C. § 706(2). “To satisfy that standard, there must be “a rational connection between the facts found and the choice made” by the Commission.” *Missouri Public Service Comm’n v. FERC*, 337 F.3d 1066, 1070 (D.C. Cir. 2003) (internal quotation marks and citations omitted). “FERC must articulate the critical facts upon which it relies, and when it finds it necessary to make predictions or extrapolations from the record, it must fully explain the assumptions it relied on to resolve unknowns and the public policies behind those assumptions.” *Id.* When “the Commission balances competing interests in arriving at its decision, it must explain on the

record the policies which guide it.” *Id.* FERC’s “factual findings are conclusive if, but only if, they are supported by substantial evidence in the record.” *Id.*⁸

STANDING

Petitioners have standing to bring this suit on behalf of their members. *See Friends of the Earth v. Laidlaw Env’t Servs.*, 528 U.S. 167, 181 (2000); *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977). The challenged license harms Petitioners’ members’ professional, recreational, and aesthetic interests in the waters above and below the Conowingo Dam, including the Chesapeake Bay.

Some members, like Scott Budden, Keith Williams, Garrett Pensell, and Jeffery Andrews rely on the waters professionally. Scott co-owns an oyster aquaculture business that farms oysters in the Chester River and the eastern Bay. Budden Decl. at ¶ 4. Scott farms using off-bottom cages and surface floats to avoid the sediment that the Dam discharges and dumps on the Bay floor. *Id.* at ¶ 6. Off-bottom farming is more expensive and labor-intensive than farming on the Bay floor, adding costs to his operations. *Id.* Further, despite these costly precautions, the Dam harms his operations and his oysters. Excess nutrients from behind the

⁸ *Missouri Public Service Comm’n* cites the Natural Gas Act’s judicial review provision, 15 U.S.C. § 717r(b), for the proposition that FERC’s factual findings must be supported by substantial evidence, but Federal Power Act’s judicial review provision contains the same requirement, 16 U.S.C. § 825l(b).

Dam feed algae that fouls his gear, slowing his oysters' growth and even killing them. *Id.* at ¶ 5. High flows at the Dam lower the water salinity, slowing the oysters' growth and negatively affecting their flavor. *Id.*

Garrett Pensell is the President and Service Manager of the Tidewater Marina in Havre de Grace, Maryland. Pensell Decl. at ¶ 3. Jeffrey Andrews is the Dockmaster and General Manager of the Tidewater Marina. Andrews Decl. at 3. The Tidewater Marina is located where the Susquehanna River empties into the Chesapeake Bay, northwest of the Susquehanna Flats area of the Bay. Pensell Decl. at ¶ 3. The operation of the Dam, and the associated discharge of sediment and debris, directly impacts Tidewater Marina. During storms, increases in water turbidity and floating debris make recreation in the waters near the marine hazardous and undesirable, decreasing business at the marina. Pensell Decl. at ¶ 9. Sediment scoured from behind the Dam impacts access to the marina, filling in the deepwater bulkhead at the marina requiring more frequent maintenance dredging. Andrews Decl. at ¶ 7.

Keith Williams organizes snorkeling trips in the waterways below the Dam through his company, Freshwater Journeys, and has published two books promoting freshwater snorkeling that feature his underwater photography. Williams Decl. at ¶ 9. Keith is currently working on a third book. *Id.* The success of Keith's trips and his photography is dependent on clear and safe water; when

visibility is poor due to sediment from behind the Dam, or when excess nutrients from behind the Dam fuel algal blooms—including blooms that are harmful to humans, Keith must reschedule or relocate the snorkeling trips, sometimes out-of-state. *Id.* It is more difficult to consistently get people into the water because of the Dam's effects, and out-of-state trips are less convenient and more expensive. When sediment or algae muddy the waters, Keith also cannot take good photographs for his books. *Id.* at ¶ 8.

Petitioners' members' personal recreational and aesthetic interests are also harmed by the Dam. Keith snorkels, kayaks, and fishes about once a month. Williams Decl. at ¶ 8. Sediment from behind the Dam and algae growth fed by nutrients from behind the Dam detract from his enjoyment of these activities. *Id.* One of Keith's favorite areas to snorkel is the Susquehanna Flats in the northern Bay. *Id.* Keith describes snorkeling over the Flats as like "flying over a tropical rainforest," or "an emerald city when the underwater grasses grow in." *Id.* However, Keith has watched as many grass beds have been lost—smothered by sediment and algae. *Id.*

Zack Kelleher is out on or around the waters most days to hunt, fish, crab, kayak, and hike. Kelleher Decl. at ¶ 7. Zack likes to hunt waterfowl which feed on the underwater grass beds, including in the Susquehanna Flats. *Id.* at ¶ 8. When the grass beds are destroyed or unhealthy, the waterfowl leave the area or starve. *Id.*

Zack has lost more and more hunting days each year as sediment and nutrient pollution from behind the Dam destroy grass beds, driving away or killing waterfowl. *Id.* Knowing the impacts that previous storms have had on the Bay and its ecosystem, Petitioners' members are also concerned about the next catastrophic storm. Ted Evgeniadis, for example, is particularly concerned that climate change will create more frequent and larger storms, scouring more harmful sediment and nutrient pollution. Evgeniadis Decl. at ¶ 11. Keith fears that the amazing diversity of underwater grasses and other aquatic life that he enjoys may disappear entirely as a result of discharges from even one catastrophic storm. Williams Decl. at ¶ 10.

Petitioners' members are also concerned about the safety of seafood harvested from the Bay. Keith mostly releases the bass he catches because he is concerned about chemicals released to the water by scouring of the sediment behind the Dam. Williams Decl. at ¶ 11. Keith has also noticed lately that the smallmouth bass are suffering from a wasting disease. *Id.* He attributes this to stress from the Dam—low flows from the Dam means stagnant water, which heats up and, in combination with nutrient pollution, fuels algae growth. *Id.*; *see also* Evgeniadis Decl. at ¶ 9. Michael Helfrich loves to eat wild oysters and crabs but does so less often than he would like because wild oysters as well as crabs have gotten more expensive due to sediment and nutrient pollution scoured from behind the Dam. Helfrich Decl. at ¶ 12.

The Dam also harms members' recreational and aesthetic interests by blocking the passage of fish species up the Susquehanna River. Keith particularly enjoys seeing numerous and diverse species when snorkeling, like eels, shad, and herring, but understands that the number of these fish passing the Dam is only a fraction of what it used to be. Williams Decl. at ¶¶ 6, 8, 10. He sees less of these fish above the Dam as a result and snorkels there less often. *Id.* at ¶ 6. And Michael used to enjoy shad fishing in Deer Creek below the Dam but noticed the shad population declining. Michael would like to fish for shad again if the fish stock improved. Helfrich Decl. at ¶ 13.

FERC's licensing of the Conowingo Dam also harms Petitioners. *See Am. Legal Found. v. F.C.C.*, 808 F.2d 84, 92 (D.C. Cir. 1987). Petitioner CBF's education and restoration programming in the Susquehanna River and the Chesapeake Bay, for example, is harmed by the Conowingo Dam and FERC's license. CBF and its members have undertaken oyster restoration activities, including "oyster gardening", growing and planting oyster spat on sanctuary reefs, and recycling oyster shells for new habitat. Prost Decl. at ¶¶ 21-22. Good water quality free of harmful pollutants is critical for the success of CBF's oyster restoration efforts. The addition of nitrogen and phosphorous to the Bay and its tributaries causes harmful algae blooms that die and deprive the water of oxygen necessary for oysters to live. *Id.* at ¶ 25. Sediment added to the water smothers

oysters and prevents them from feeding. Prolonged low salinity after flooding events can be lethal to oysters in the Bay. *Id.* The Conowingo Dam contributes to the introduction of excess nitrogen, phosphorous, and sediment to the Bay, which harms water quality and natural resources like oysters in the Bay and its tributaries, harming CBF's ability to successfully conduct these restoration programs. *Id.* at ¶ 26; *see also* Nicholas Decl. at ¶¶ 17-26, 29.

Environmental Petitioners and their members are harmed by FERC's decision to issue a 50-year license for the Conowingo Dam that does not contain adequate cleanup measures and by FERC's failure to give adequate consideration to the impacts of this decision. The Court can redress these injuries by vacating the license and/or by requiring FERC to revise the license to include the requirements set forth in Maryland's Certification for the Dam. *See Am. Rivers v. FERC*, 895 F.3d 32, 41 (D.C. Cir. 2018) (finding harms to water quality and fish species "traceable to the Commission's decision to issue a license and redressable by revocation or alteration of its terms.").

ARGUMENT

I. FERC ACTED UNLAWFULLY AND ARBITRARILY BY ISSUING A LICENSE FOR THE CONOWINGO DAM THAT DOES NOT INCLUDE THE CERTIFICATION AS A CONDITION.

FERC exceeds its statutory authority and contravenes the Clean Water Act by issuing a license for the Conowingo Dam without including Maryland's Certification for the Dam as a condition. The Act authorizes FERC to issue a license for a dam in only two situations. One is where a certification for that dam "has been obtained," in which case the certification "shall become a condition" of the license. 33 U.S.C. §§ 1341(a)(1), (d). The other is where a state "waives" § 401's certification requirements by "fail[ing] or refus[ing] to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request." *Id.* § 1341(a)(1). Because Maryland timely issued the Certification for the Dam but FERC refuses to include it as a condition of the Dam's license, neither situation exists here.

A. FERC Exceeded Its Statutory Authority and Contravened Clean Water Act § 401(a)(1).

FERC does not disagree that Maryland acted on Exelon's request by timely issuing the Certification for the Dam in 2018. Nonetheless, FERC claims Maryland intended its private Settlement with Exelon to "waive its § 401 authority and nullify the 2018 Certification." Rehearing Order at ¶ 15, JA____. In a sweeping new argument, FERC asserts nothing in the Clean Water Act prevents states from

bypassing § 401(a)(3)'s revocation requirements and their own public hearing procedures by using private settlements to make publicly and validly issued § 401 certifications disappear as if they never existed. *Id.* at ¶¶ 15-18, JA ____-__.

FERC's novel argument is irrelevant to this case. Regardless of whether states might have authority to unilaterally nullify existing § 401 certifications, Clean Water Act § 401(a)(1) expressly limits FERC's license-issuing authority by providing "[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence." 33 U.S.C. § 1341(a)(1). That "preceding sentence" provides for § 401's certification requirements to be waived only if a state "fails or refuses to act" on a request for an application within a reasonable period of time. *Id.* Because Maryland did not fail or refuse to act within a reasonable time period, § 401's certification requirements were not "waived as provided in" § 401(a)(1). Under these circumstances, "[n]o license or permit shall be granted." *Id.*; *see Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-462 (2002) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

Further, FERC's unexplained reliance on its belief that states have authority to waive § 401's requirements after issuing certifications is arbitrary. Even if states did have such authority, it would not follow that FERC has authority to issue a

license in circumstances other than those that § 401(a)(1) specifies. “FERC is a creature of statute, and ‘if there is no statute conferring authority, FERC has none.’” *Tesoro Alaska v. FERC*, 778 F.3d 1034, 1038 (D.C. Cir. 2015) (quoting *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002)). By failing to consider or even acknowledge the express statutory limits that § 401 places on its own license-issuing authority, FERC “entirely failed to consider an important aspect of the problem” and acted irrationally. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Mozilla Corp. v. FCC*, 940 F.3d 1, 60 (D.C. Cir. 2019) (“A ‘statutorily mandated factor, by definition, is an important aspect of any issue before an administrative agency’”) (quoting *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004)); *see also Int’l Union of Operating Engineers, Loc. 147 v. NLRB*, 294 F.3d 186, 191 (D.C. Cir. 2002) (agency action is arbitrary where it rests on non-sequitur).

Equally arbitrary is FERC’s assumption that the Settlement actually did “nullify” the Certification. Rehearing Order at 15, JA____. The Settlement provides only that Maryland “shall waive its rights to issue a CWA Section 401 certification.” Settlement at 1-2, JA____-____. Maryland exercised that right long before it entered into the Settlement, and the Settlement does not purport to “nullify” the Certification Maryland had already issued. *See Calomiris v. Woods*, 353 Md. 425, 435-436 (1999) (in interpreting contracts, courts “look to the

language of the agreement itself”). FERC supplies no record basis for assuming Maryland “intended” something entirely different than the Settlement says—the unlawful nullification of its existing Certification—let alone for giving the Settlement that effect. *See Missouri Public Service Comm’n*, 337 F.3d at 1070 (FERC’s “factual findings are conclusive if, but only if, they are supported by substantial evidence in the record.”). If there is some explanation for FERC’s belief that a waiver of rights “to issue” a certification makes an existing certification just vanish, it appears nowhere in the record. *See Int’l Union*, 294 F.3d at 191 (non-sequitur); *State Farm*, 463 U.S. at 43 (failure to consider important aspect of problem).

B. FERC Misreads § 401’s Grant of Authority To States.

1. Section 401(a)(1) Does Not Authorize States To “Nullify” Existing Certifications.

Even if FERC’s misreading of its own license-issuing authority could be overlooked, FERC’s assumption that the Clean Water Act authorizes states to waive certification for a project after they have already certified it is refuted by § 401’s text. Section 401(a)(1) provides for waiver only by a state’s “fail[ure] or refus[al] to act” on an application. 33 U.S.C. § 1341(a)(1). That can happen only before the state has “acted.”

FERC argues that because § 401 does not expressly “prohibit[] states from waiving certification after granting it,” the Act must allow this maneuver.

Rehearing Order at ¶ 15, JA____. Section 401(a)(1), however, is a limited grant of authority to states by Congress. *See, e.g., Alcoa*, 643 F.3d at 971 (authority “granted to states” in § 401 enables them to abate pollution). In this context, § 401(a)(1)’s specification of the ways certification can be waived makes clear that certification cannot be waived in other ways.

Moreover, § 401(a)(1)’s provision for waiving certification requirements must be read together with its provision for issuing licenses. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme”). As noted above, § 401(a)(1) expressly precludes FERC from issuing a license for a project unless certification has been waived “as provided in the previous sentence”—i.e., by a state’s “fail[ure] or refus[al] to act on a request for a certification.” It would make little sense for Congress to authorize the waiver of § 401’s certification requirements for a project in ways that could not support the issuance of a license for that project. FERC’s new reading of states’ authority requires this Court to believe that Congress did just that. *See Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (“Congress cannot be presumed to do a futile thing”).

FERC’s interpretation of § 401(a)(1) not only ignores its text but opens the door to process-free waiver of any existing certification at any time for any reason.

Perhaps aware of what its sweeping new interpretation of § 401 implies, FERC claims that states' authority to nullify existing certifications is limited to situations where the statutory one-year period has not yet expired or where an appeal of the certification is pending. Rehearing Order at ¶ 15, JA____. FERC does not explain, however, where these limits might be found in the text of § 401(a)(1). Nothing in this provision provides either the authority FERC seeks to create or the limits that FERC would impose on that authority. The Clean Water Act simply provides no authority at all for states to "waive" § 401's requirements after they have already issued a certification, and FERC cannot rewrite § 401 to suit its policy preferences. *See New Jersey v. EPA*, 517 F.3d 574, 582-83 (D.C. Cir. 2008) ("EPA may not 'substitute[] [its] desires for the plain text' of the Act.").

Finally, even if it had any merit, FERC's argument that states can nullify existing certifications "before the statutory 'reasonable period' expires" would not help FERC in this case. Rehearing Order at ¶ 15, JA____. Here, the statutory reasonable period of time expired in 2018, more than two years before the alleged waiver occurred. *See supra* at 16. Nor would it help FERC that the alleged waiver occurred during "pendency of the certification's appeal," *id.* For that claim, FERC seeks to rely on *Alcoa*, but *Alcoa* merely suggests a state might decide to waive § 401's certification requirements rather than fixing a defective certification when a state-level challenge to the certification has been resolved and the challenger has

“prevailed.” *Alcoa*, 643 F.3d at 969. FERC itself describes *Alcoa* as addressing what a state might do “to accommodate a ruling on appeal.” Rehearing Order at ¶ 15, n.32, JA____. Here, because Maryland abandoned the state-level appeal process, there has been no “ruling on appeal,” let alone a ruling that would require Maryland to change the Certification. In these circumstances, *Alcoa* does not even suggest that Maryland can waive certification.⁹

2. Section 401(a)(3) Confirms that § 401(a)(1) Does Not Authorize the Nullification of Existing Certifications.

FERC states the intended effect of Maryland’s so-called “waiver” is to “nullify” its 2018 certification for the Conowingo Dam. Rehearing Order at ¶ 15, JA____. To nullify an existing certification is to revoke it. The meaning of “nullify” fits easily within the ordinary meaning of “revoke”: “[t]o annul or make void by recalling or taking back; to cancel, rescind, repeal or reverse.” Black’s Law Dictionary, 5th Ed. (1979) at 1188 (emphasis added).

Section 401(a)(1) must be read together with § 401(a)(3) which, as this Court has held, is the sole authority that the Clean Water Act grants to states to “revoke” existing certifications. *Keating v. FERC*, 927 F.2d 616, 623 (D.C. Cir.

⁹ FERC asserts that states have authority to “affirmatively” waive § 401 requirements. Rehearing Order at ¶ 15 & n.32, JA____. Although § 401(a)(1) provides states can waive them affirmatively by “refus[ing]” to act on an application, 33 U.S.C. § 1341(a)(1), it does not even suggest states can waive them after acting on an application.

1991); *see Davis*, 489 U.S. at 809 (“words of a statute must be read in their context and with a view to their place in the overall statutory scheme”). Congress’s decision to authorize the revocation of certifications under specific and limited circumstances in § 401(a)(3) confirms that Congress did not silently authorize revocations under other circumstances in § 401(a)(1). *See Barnhart*, 534 U.S. at 452 (“when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”) (citations and internal quotation marks omitted).

Moreover, if states have broad authority to nullify existing certifications, the limitations on revocation that Congress included in § 401(a)(3) become meaningless. *See Keating*, 927 F.2d at 623 (“Obviously, such a result would make no sense.”). Indeed, the narrow revocation authority in § 401(a)(3) would be completely subsumed into the broader nullification authority FERC finds in § 401(a)(1). Thus, § 401(a)(3) itself would become mere surplusage. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”) (internal quotation marks omitted).

FERC argues § 401(a)(3) applies only to situations where a state revokes an existing certification as a step to denying certification and blocking a project. Rehearing Order at ¶ 16, JA____. Section 401(a)(3) lends no support to that argument; it says nothing about what a state can do after properly revoking a certification and leaves open all options to deny certification, waive certification, or issue a new certification with the same or different conditions. Nor does *Keating* support FERC's argument. See Rehearing Order at ¶ 16 n.35, JA____. Although FERC assumes the state that issued the certification addressed in *Keating* would subsequently have denied certification if the court had upheld its revocation, *id.* at ¶ 16, JA____, that assumption has no basis in the decision and is, in any event, immaterial to *Keating*'s holding. *Keating* merely holds that states must comply with § 401(a)(3) if they wish to revoke a certification. 927 F.2d at 623.

FERC's failure to address the implications of its expansive new "waiver" theory and its baseless reliance on a false distinction between nullifying existing certifications and revoking them render its action arbitrary as well as unlawful. An agency's failure to consider an important aspect of the problem before it is arbitrary, *State Farm*, 463 U.S. at 43, and "[a] long line of precedent has established that an agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently," *Transactive Corp. v. U.S.*, 91 F.3d 232, 237 (D.C. Cir. 1996).

3. FERC's Reading Is Undermined by § 401(a)(1)'s Public Participation Requirements.

Section 401(a)(1)'s waiver provision must also be read together with § 401(a)(1)'s provision for state-level public hearings. 33 U.S.C. § 1341(a)(1). *See Davis*, 489 U.S. at 809. As this Court has recognized, existing certifications may be revised or withdrawn altogether in state administrative proceedings. *Alcoa*, 643 F.3d at 966-967, 969. The availability of these public state-level processes confirms that Congress did not silently authorize states to withdraw existing certifications unilaterally, with no public process at all. *See Barnhart*, 534 U.S. at 452.

Further, FERC's reading of § 401(a)(1) defeats the purpose of the public process that Congress mandated for certifications. Section § 401(a)(1) requires states not only to establish public participation procedures, but "*comply with*" them. *City of Tacoma, Washington v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006). Had Maryland withdrawn the Certification in compliance with the public hearing process it established under § 401(a)(1), Maryland would have had to issue a final decision explaining why it was abandoning all of the requirements it had just found "necessary to assure" the Dam's compliance with water quality standards, 33 U.S.C. § 1341(d). *See* Certification at 7, JA____; Md. Code Regs. 26.08.02.10(E)-(F). In particular, Maryland would have had to explain either: (1) why it no longer believes these requirements are necessary; or (2), why it no longer cares whether

the Dam achieves compliance with water quality standards. Maryland's action and its explanation—or lack of one—would have been reviewable in state court. *See* Md. Code Regs. 26.08.02.10(F)(4). Maryland chose to abandon the public hearing process for a private deal with Exelon, however, and thanks to that maneuver Maryland has never had to issue a decision that can be reviewed in state court, let alone provide a rational explanation for that decision.

As the present case illustrates, FERC's reading of § 401(a)(1) would allow states to circumvent the public participation procedures they establish under § 401(a)(1) by entering into settlements with project owners and then, behind closed doors, nullifying certifications and replacing them with private deals. Creating such a bypass undermines § 401(a)(1)'s requirement that states establish and comply with public participation procedures. *See Rumsfeld v. Padilla*, 542 U.S. 426, 446 (2004) (rejecting interpretation that “would undermine, if not negate, the purpose of Congress”); *NRDC v. EPA*, 489 F.3d 1364, 1373 (D.C. Cir. 2007) (“[T]he problem Congress sought to solve should be taken into account’ to determine whether Congress has foreclosed the agency’s interpretation.”) (quoting *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 796 (D.C. Cir. 2004)); *see also Air All. Houston v. EPA*, 906 F.3d 1049, 1064-65 (D.C. Cir. 2018) (rejecting interpretation where agency “d[id] not demonstrate, or even acknowledge, that [it] considered [the] statutory objectives”).

Finally, FERC does not even acknowledge the corrosive effect that its reading of § 401(a)(1) has on state-level public participation in the certification process, let alone explain how its decision can be reconciled with Congress's purpose in requiring the establishment of these processes. *See State Farm*, 463 U.S. at 43 (failure to consider important aspect of problem is arbitrary); *Transactive Corp.*, 91 F.3d at 236 (“In order to ensure that an agency's decision has not been arbitrary, we require the agency to have identified and explained the reasoned basis for its decision.”).

C. FERC's Issuance of a License That Does Not Incorporate the Requirements of Maryland's Certification Contravenes § 401(d).

Because Maryland's Settlement with Exelon did not nullify its existing Certification for the Dam, *see supra* at 32-42, FERC's refusal to include the Certification as a condition in the license it issued for the Dam contravenes the Clean Water Act. Section 401(d) provides that “[a]ny certification ... shall become a condition of any federal license or permit subject to the provisions of this section.” 33 U.S.C. § 1341(d). Thus, it is well established that “[i]f a State issues a certification contingent on the applicant's satisfaction of various conditions, Section 401(d) requires the agency upon issuing the license to incorporate those conditions in the final license.” *Alcoa*, 643 F.3d at 971. “This language is unequivocal.” *Am. Rivers v. FERC*, 129 F.3d 99, 107 (2nd Cir. 1997); *see PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700, 708 (1994)

(“The limitations included in [a] certification become a condition on any federal license.”).

It bears emphasis that § 401(d) draws no distinctions among either certifications or licenses. Rather it provides that “any” certification for a project shall become a condition of “any” license for that project. *See NRDC v. EPA*, 489 F.3d 1250, 1257 (D.C. Cir. 2007) (“The word ‘any’ is usually understood to be all inclusive.”) (quoting *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 488 (D.C. Cir. 2007)).

II. FERC’S ORDER CONTRAVENES THE FEDERAL POWER ACT AND NEPA, AND IS ARBITRARY.

A. FERC’s Dismissal of Compliance With Water Quality Standards Is Unlawful and Arbitrary.

In the License Order, FERC dismisses whether the Conowingo Dam will comply with water quality standards over the next fifty years as irrelevant. FERC argues “certification is waived” and, therefore, “the licensee is not compelled to construct, operate, or maintain a hydroelectric project in a manner consistent with state water quality standards.” License Order at ¶ 76, JA____; Rehearing Order at ¶ 21, JA____. FERC says it is “requiring those measures we deem necessary to protect aquatic resources,” and “[n]o more is required.” *Id.*

FERC has never disputed that the cleanup requirements established in the Certification are “necessary to assure” the Dam’s compliance with water quality

standards, 33 U.S.C. § 1341(d), and the Dam will meet water quality standards only “provided that” Exelon “complies with all” of these requirements, Certification at 7, JA____. Nor has Maryland withdrawn or altered its finding in any way. Regardless of whether compliance with water quality standards is “compelled,” the strong possibility that the Dam will violate water quality standards over the next fifty years—and the potential impacts of such violations on the Susquehanna River, the Chesapeake Bay, and the people who use them—are an “important aspect of the problem” FERC should have considered in deciding whether to issue a license for the Dam. *State Farm*, 463 U.S. at 43; *see Radio-Television News Directors Ass’n v. FCC*, 184 F.3d 872, 883 (D.C. Cir. 1999) (“mere consistency with a statute” does not mean that an agency’s action isn’t arbitrary and capricious.).

In its Rehearing Order, FERC claims it considered other impacts on water quality and “took account of” water quality standards “[i]n some instances.” Rehearing Order at ¶ 21, JA____. Those claims do not make FERC’s failure to consider Maryland’s finding or the potential impacts of the Dam’s noncompliance with water quality standards over the next fifty years any less arbitrary. FERC either believes: (1) the Dam will comply with water quality standards even though it will not take the steps Maryland found necessary to assure such compliance; or (2) it does not matter whether the Dam complies with water quality standards.

Either way, FERC leaves the court to “guess at the theory underlying the agency’s action.” *Bluewater Network v. EPA*, 370 F.3d 1, 21 (D.C. Cir. 2004). The record contains no claim that the Dam will comply with water quality standards and, if FERC believes compliance with water quality standards does not matter, the only reason it offers is the inadequate and arbitrary assertion that compliance “is not compelled” by law, License Order at ¶ 76, JA____. See *Missouri Public Service Comm’n*, 337 F.3d at 1070 (“FERC must articulate the critical facts upon which it relies, and when it finds it necessary to make predictions or extrapolations from the record, it must fully explain the assumptions it relied on to resolve unknowns and the public policies behind those assumptions.”) (internal quotation marks and citations omitted); *Bluewater Network*, 370 F.3d at 21; *Radio-Television News Directors Ass’n*, 184 F.3d at 883.

FERC’s dismissal of compliance with water quality standards also contravenes NEPA and the FPA. NEPA requires FERC to take a “hard and honest look at the environmental consequences” of its decision. *American Rivers*, 895 F.3d at 49, and Congress added the requirements for equal consideration of environmental impacts into § 4(e) of the FPA specifically to increase FERC’s “sensitivity to environmental concerns,” *U.S. Dep’t of Interior v. FERC*, 952 F.2d 538, 545 (D.C. Cir. 1992). “The amendments expressly identify fish and wildlife protection, mitigation, and enhancement, recreational opportunities, and energy

conservation as nondevelopmental values that must be adequately considered by FERC when it decides whether and under what condition to issue a hydroelectric license for a project.” H.R. Rep. No. 507, 99th Cong., 2d Sess. 21-22 (1986). By dismissing as irrelevant the Dam’s possible noncompliance with water quality standards over the next fifty years, FERC displays a remarkable insensitivity to environmental concerns and fails to give adequate attention to the practical implications of such noncompliance for the River and the Bay.

In addition, FERC violates CEQ’s NEPA regulations by failing to supplement its EIS. Maryland’s Final 2018 Integrated Report of Surface Water Quality shows (at 11, JA____) that at least one portion of the Susquehanna River is impaired by the Dam now, and the Certification shows (at 7, JA____) that there can be no assurance of the Dam’s future compliance with water quality standards unless Exelon satisfies all the Certification’s requirements. Because these are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” that emerged after FERC issued its 2015 EIS for the Dam, they required FERC to supplement that EIS. 40 C.F.R. § 1502.9; *see American Rivers*, 895 F.3d at 49; *NRDC v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 56 (2004) (quoting *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 385 (1989)).

B. FERC’s Failure to Adequately Consider the Settlement Flow Regime is Unlawful and Arbitrary.

1. FERC Failed to Consider the Settlement Flow Regime in the EIS.

By selecting a flow regime in the License Order that FERC did not consider or address in the EIS, FERC violates NEPA. The environmental impacts of a dam depend largely on its flow regime—a unique combination of minimum and maximum flows that vary month by month with the weather and with wildlife needs. *See* EIS at 148, 152, JA____, _____. Thus, for dams, the “heart” of the EIS is the comparison of alternative flow regimes. *Nevada v. Dep’t of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006) (quoting 40 C.F.R. § 1502.14).

As FERC agrees, each flow regime has different impacts that need to be carefully balanced:

[S]everal combinations of minimum and maximum flows may improve habitat for some species and life stages, but those flow combinations are not consistent among the evaluation species. Certain flows may improve habitat for some species and life stages, while those same flows would reduce habitat for other species and life stages. Selection of an alternative flow regime would require balancing among the several target species and life stages . . .

EIS at 152, JA_____ (emphasis added). FERC’s 2015 EIS does not consider or “balance” the flow regime FERC ultimately selected, one created by Exelon and Maryland in their 2019 Settlement. Rather, as FERC admits, it considers the “Settlement flow regime” for the first time in its License Order. *See* Rehearing Order at ¶¶ 23, 37, JA_____, _____.

FERC's consideration of the Settlement flow regime in its License Order cannot cure FERC's failure to consider this regime in the EIS. The twin purposes of the NEPA process are to: (1) take a "hard look" at environmental consequences and (2) engage the public—*before* taking action. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 896 F.3d 520, 523 (D.C. Cir. 2018); 40 C.F.R. § 1500.1(b). By providing its evaluation of the Settlement Flow Regime for the first time in its License Order, FERC delays analysis until it can "no longer have any useful decisionmaking function." *Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n*, 677 F.2d 883, 890 (D.C. Cir. 1981). As this Court has made clear, that is an "unreasonable, hence unlawful, evasion of NEPA." *Id.* Indeed, even including "[m]ost of FERC's analysis" of a potential alternative "in the [] order, not in the EIS," "d[oes] not measure up to NEPA's command." *Friends of the River v. FERC*, 720 F.2d 93, 106 (D.C. Cir. 1983). Here, FERC left the selected alternative out of the EIS altogether.

2. The EIS is Inadequate to License the Settlement Flow Regime.

Unable to claim that it considered the Settlement flow regime in the EIS, FERC now argues that the EIS is nonetheless adequate because the Settlement flow regime "generally provides for higher flows" than the alternative recommended in the EIS, and generally meets its habitat availability metric.

Rehearing Order at ¶ 32, JA____. Thus, FERC takes the position that it can avoid considering a flow regime in the EIS just by asserting, after its decision has been made, that the regime it ultimately chose is less-bad than the alternatives it considered. If NEPA’s requirements for pre-decisional consideration and public participation could be dodged so easily, they would be meaningless. *See Robertson*, 490 U.S. at 349.

FERC’s reliance on the claim that its chosen regime “generally provides higher flows” merely serves to illustrate why actual NEPA consideration of this regime—as opposed to after-the-fact rationalization—is required. As FERC admits, *see* Rehearing Order at ¶¶ 22 n. 49, the Settlement flow regime allows flows in August that are lower than any of the alternatives FERC considered in the EIS—and even lower than the previously licensed flows by 1,000 cubic-feet-per-second (“cfs”), or about 20%. *See id.* at 13, JA____ (comparing alternative flow regimes in August); License Order at ¶ 121, JA____ (“1,000 cfs less”); EIS at 249 (explaining Exelon’s alternative matched previously licensed operation). Nowhere in the record does FERC explain why the Settlement flow regime did not warrant NEPA analysis given these lower flows. *See State Farm*, 463 U.S. at 43 (agency must “articulate a satisfactory explanation for its action”); *Transactive Corp.*, 91 F.3d at 236 (“In order to ensure that an agency’s decision has not been arbitrary, we require the agency to have identified and explained the reasoned basis for its

decision.”). If FERC believes that the harm from the Settlement flow regime’s lower flows in August are outweighed by benefits from “generally ... higher” flows at other times, FERC needed to articulate that belief and support it with record evidence to show that it has in fact carefully balanced the benefits and harms of the Settlement flow regime. *See* EIS at 152, JA____; *State Farm, U.S.* at 43; *Transactive Corp.*, 91 F.3d at 236.

Equally unavailing is FERC’s after-the-fact assertion that the Settlement flow regime maintains 70% habitat availability for the key species—American shad and striped bass—from April 1 through November 30, excluding June 16 through June 30. Rehearing Order at ¶ 27, JA____. The Record refutes this claim by showing that the Settlement flow regime does not maintain 70% habitat availability for the various life stages of both key species in any month. *See* Rehearing Petition at 52-56, JA____-____. *Compare* Rehearing Order at ¶ 13, JA____ *with* EIS Tbl. 3-22, JA____-____. FERC now acknowledges, for example, that the Settlement flow regime maintains only 42% habitat availability overall for striped bass. Rehearing Order at ¶ 26, JA____. For example, the Settlement flow regime requires a minimum flow of only 4,000 cfs in August, Rehearing Order at 13, JA____, when FERC has found that juvenile striped bass require 7,961 cfs to maintain 70% habitat availability and adult striped bass require 21,450 cfs. EIS at

160, Tbl. 3-22, JA____-____.¹⁰ Rehearing Order at ¶ 26, JA____. Nowhere has FERC drawn a “rational connection” between its assumption that the selected flow regime did not need NEPA analysis because it will satisfy its chosen 70% metric and its record findings that this regime actually falls far short of this metric. *State Farm*, 463 U.S. at 52 (requiring “rational connection between the facts found and the choice made”) (citation omitted).

Additionally illustrating that the Settlement flow regime required NEPA analysis, FERC includes in the License Order a requirement that Exelon develop and implement a waterfowl nesting protection plan to “assess[] the impact, if any, of the new flow regime ... on waterfowl nesting success.” License Order at ¶ 58, n. 55, JA____ (emphasis added); Rehearing Order at ¶ 32, JA____ (omitting waterfowl in list of effects assessed). The plan further requires provisions to “verify specific-project related effects,” and “which species . . . are affected by the project, if any.” *Id.* at 95, Article 422, JA____ (emphasis added). That FERC cannot even say whether its selected flow regime has “any” impact on waterfowl or what species of waterfowl are impacted shows that it has not considered the

¹⁰ The alternative flow regime recommended in the EIS also fails to meet the 70% habitat availability metric. For example, in August, the recommended flow regime requires a minimum of 5,000 cfs. This flow is insufficient to maintain 70% habitat availability for juvenile or adult striped bass, which require 7,961 cfs and 21,450 cfs respective. Rehearing Order at 13, JA____; EIS at 160, Tbl. 3-22, JA____.

impacts of the Settlement flow regime. *See State Farm*, 463 U.S. at 43 (“failed to consider an important aspect of the problem”).

3. FERC Failed To Supplement the EIS To Consider the Settlement Flow Regime.

FERC’s selection of a flow regime it did not evaluate in the EIS, particularly one with lower flows than the alternatives it considered, is precisely the situation, CEQ’s supplementation requirements are designed to address. If “[t]he agency makes substantial changes to the proposed action that are relevant to environmental concerns,” it must prepare a supplemental EIS. 40 C.F.R. § 1502.9(d)(1)(i); *see also* 40 C.F.R. §§ 1507.1, 1507.3 (CEQ regulations are binding on all federal agencies).

On rehearing, FERC does not dispute that the new flow regime is both a “substantial change[] to the proposed action,” the relicensing of the Dam, and relevant to environmental concerns. 40 C.F.R. § 1502.9(d)(1)(i); *see* Rehearing Petition at 57, JA____; Rehearing Order at ¶ 37, JA____. Instead, FERC argues “[t]here is no new information showing that a supplemental analysis is needed or required to address potential impacts of the Settlement Flow Regime.” Rehearing Order at ¶ 37, JA____; *see* 40 C.F.R. § 1502.9(d)(1)(ii) (“new circumstances or information”). Even if that were true and FERC’s failure to supplement did not violate § 1502.9(c)(1)(ii), FERC’s failure to supplement the EIS to address the

undisputedly “substantial change[]” it made by adopting the Settlement flow regime contravenes 40 C.F.R. § 1502.9(d)(1)(i).

4. FERC’s Failure to Assess and Adequately Consider the Environmental Impacts of Scour and to Require Dredging is Unlawful and Arbitrary.

FERC does not dispute that sediment and nutrients scoured from behind the Dam harm the Lower Susquehanna River and the Chesapeake Bay or that dredging would reduce these harms. Rehearing Order at ¶¶ 43, 51, JA____, _____. Instead, FERC argues that upstream sediment and nutrient loads “are problems not of Exelon’s making,” “not from project land,” “which would occur in the long term whether or not the Conowingo Dam was in place.” *Id.*

Maryland has found that the Dam’s discharges after scour events are a problem of Exelon’s making. The Certification states that because “no efforts have been undertaken over the life of the Project, such as routine dredging, to maintain any trapping function, the Reservoir is now full” and “[a]s a result, ... during large storm events, significant amounts of trapped sediments and nutrients are scoured from [] behind the Dam and discharged downstream.” Certification at 12, JA____. Thus, record evidence ties the impacts of scour events to Exelon’s failure to maintain its reservoir. Nowhere in the record does FERC draw a rational connection between this undisputed finding by Maryland and its own contrary conclusion that the impacts from discharges during scour events are “not of

Exelon's making," Rehearing Order at ¶ 51, JA____. *See State Farm*, 463 U.S. at 52.

Moreover, record evidence shows that much of the damage caused by nutrients and sediment occurs precisely because the Dam is "in place." FERC's focus on "the long term" misses this point. Rehearing Order at ¶ 43, JA____. Maryland found that "[b]y releasing significant amounts of sediment and nutrients through scouring during storm events, the Dam has altered the nature, timing, and delivery method of these materials with adverse consequences for the Lower River and the Bay." Certification at 12, JA____. It is this alteration—to extremely large discharges which happen all at once—that does so much damage to the ecosystems of the Susquehanna River and the Bay. Waterkeepers Comments at 5-6, JA____-____. Further, even considering only the long term, record evidence shows the Dam is expected to become a net contributor of sediment and nutrient pollution—*i.e.*, discharge more nutrients and sediment than flow into the reservoir from upstream—within the 50-year license period. CBF Comments at 4-5, JA____-____. FERC does not grapple with any of these facts, let alone try to reconcile them with its conclusory dismissal of the impacts from nutrients and sediment discharged by the Dam. *See Robertson*, 490 U.S. at 349 (requiring a "hard look" at environmental consequences); *U.S. Dep't of Interior v. FERC*, 952 F.2d at 544 ("sensitivity to environmental concerns"); *State Farm*, 463 U.S. at 43 (failure to consider

important aspect of problem); *Am. Mining Congress v. EPA*, 907 F.2d 1179, 1191 (D.C. Cir. 1990) (failure to respond to comments).

In refusing to require dredging, FERC argues that dredging would provide only “minor improvements” and cost between \$48 million and \$267 million annually. Rehearing Order at ¶ 51, JA____. That argument ignores comments and record evidence showing that dredging could accomplish all the nutrient reductions needed in the Bay for \$41 million. Waterkeepers Comments, Ex. M at 7, JA____. Although FERC claims these comments do not demonstrate any error in its rejection of dredging, the only basis FERC provides for that claim is that it prefers the contrary conclusions in the studies it already considered. *See Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017) (“failure to reasonably reflect upon the information contained in the record and grapple with contrary evidence”); *Amerijet Int’l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (“[C]onclusory statements will not do; ‘an agency’s statement must be one of reasoning.’”).

Finally, FERC argues it did not need to supplement the EIS to consider the new information on dredging or climate change because sediment and nutrient loading “would occur in the long term whether or not Conowingo Dam was in place”, and that is “unchanged by the number or intensity of storm events.” Rehearing Order at ¶¶ 43, 51, JA____, _____. This merely recycles FERC’s

arbitrary argument that the Dam isn't responsible for its pollution. *See supra* 54-56. The information FERC received after issuing its EIS in 2015 shows not only that dredging is effective and affordable but that increased rainfall, flow, and nutrient and sediment loads to the Chesapeake Bay are going to make nutrient and sediment pollution far worse in the Susquehanna River and the Chesapeake Bay than the EIS acknowledges. *See e.g.*, Chesapeake Bay Program, "Hot, Wet, and Crowded: Phase 6 Climate Change Model Findings" (Apr. 20, 2020), JA____; Chesapeake Bay Program, "Draft Actions/Decisions," (Dec. 17, 2020), JA____ ("doubling of the 2025 [sediment and nutrient] loads" through 2035). FERC does not dispute that this new information is significant when considering the environmental impacts of the Dam's discharges of sediment and nutrients after scour events. *See* Rehearing Petition at 59-63, 63-66, JA____-__, ____-__. FERC's failure to supplement its analysis to consider the new information on dredging and climate change contravenes NEPA. *See* 40 C.F.R. § 1502.9(c)(1)(ii).

CONCLUSION

For the reasons given above, petitioners respectfully request that the Court vacate the License Order and remand it to FERC with instructions to reissue a license for the Conowingo Dam that includes, as a condition, the Certification for the Dam that Maryland issued for the Dam in 2018.

DATED: January 28, 2022

/s/ Paul W. Smail (with consent)

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Counsel hereby certifies, in accordance with Federal Rules of Appellate Procedure 32(a)(7)(B) that the foregoing **Proof Opening Brief of Petitioners** contains 12,793 words, as counted by counsel's word processing system, and thus complies with the 13,000 word limit.

Further, this document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (a)(6) because this document has been prepared in a proportionally spaced typeface using **Microsoft Word 2016** using **size 14 Times New Roman** font.

DATED: January 28, 2022

/s/ James S. Pew
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