**ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED**

**No. 21-1139 and 21-1186**

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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WATERKEEPERS CHESAPEAKE, *ET AL.*
*Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent*.

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On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

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# BRIEF OF INTERVENOR CONSTELLATION ENERGY GENERATION, LLC

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# CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

## A. Parties, Intervenors, and Amici in this Petition for Review

### (i) Parties, Intervenors, and Amici

Except for the following, all parties and intervenors appearing in this Court in this Petition for Review are listed in the Brief for Petitioners. As a result of a change of corporate affiliation and change of name, intervenor (and licensee in the agency proceedings) Exelon Generation Company, LLC became a wholly owned subsidiary of Constellation Energy Generation and changed its name to Constellation Energy Generation, LLC ("Constellation"). In this brief, references to "Exelon" are replaced with "Constellation."

The following amici have appeared in support of Petitioners: Maryland Charter Boat Association, Inc.; Maryland State Senator Stephen S. Hershey, Jr. and Delegates Jay A. Jacobs, Dana C. Jones and Vaughn M. Stewart; and National Wildlife Federation.

### (ii) Circuit Rule 26.1 Disclosure

Constellation Energy Generation, LLC is a wholly owned subsidiary of Constellation Energy Generation, a publicly traded

company. Constellation Energy Generation has no parent company, and no publicly traded company owns 10 percent or more of its shares.

## B. Ruling Under Review

References to the rulings at issue appear in the Brief for Respondent.

## C. Related Cases

There are no related cases.

Dated: April 22, 2022

/s/ David W. DeBruin
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Generation, LLC

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES*

## CASES



* Authorities chiefly relied upon are marked with an asterisk.

STATUTES

ADMINISTRATIVE RULINGS



OTHER AUTHORITIES

# GLOSSARY

| | |
|---|---|
| Bay TMDL | Chesapeake Bay Total Maximum Daily Load |
| CEQ | Council on Environmental Quality |
| COMAR | Code of Maryland Regulations |
| Conowingo or Project | Conowingo Hydroelectric Project |
| CWA | Clean Water Act |
| DOI | Department of the Interior |
| EPA | U.S. Environmental Protection Agency |
| FEIS | FERC's Final Environmental Impact Statement |
| FERC | Federal Energy Regulatory Commission |
| LSRWA | May 2015 Lower Susquehanna River Watershed Assessment |
| MDE | Maryland Department of the Environment |
| SGA | Maryland State Gov't Art. |
| SRBC | Susquehanna River Basin Commission |
| TNC | The Nature Conservancy |
| UMCES Study | Cindy M. Palinkas et al., *Influences of a River Dam on Delivery and Fate of Sediments and Particulate Nutrients to the Adjacent Estuary: Case Study of Conowingo Dam and Chesapeake Bay*, 42 Estuaries & Coasts 2072 (2019) |

# INTRODUCTION

Conowingo Hydroelectric Project is an important renewable energy resource on the Susquehanna River in Maryland. Its dam protects the water quality of the Chesapeake Bay by trapping harmful pollutants introduced into the river upstream of the Project. Conowingo sought and properly obtained from FERC a license to continue its operations.

In connection with the relicensing proceedings, and prior to the completion of its own administrative process, the State of Maryland issued a purported water quality certification for the Project. The certification was unprecedented and contrary to law, and it would have forced Conowingo to shut down. The certification would have required Conowingo to remove from the Susquehanna River each year significant amounts of nitrogen and phosphorous introduced upstream of the Project, or pay over $8 billion to Maryland over the life of its new federal license.

Conowingo's owner, Constellation, challenged the certification in state administrative proceedings, state and federal court litigation, and at FERC. Rather than litigate, Maryland chose to enter a settlement with Constellation that preserved the Project, accomplished many of the

certification's objectives in proposed license conditions submitted to FERC, and gave Maryland millions of dollars for environmental programs to enhance the water quality of the Chesapeake Bay.

FERC accepted Maryland and Constellation's proposed license conditions and issued a new license for the Project. Its decision should be affirmed. Maryland was entitled to waive its certification right and protect the Bay as it did, through a valuable settlement. FERC independently ensured that Conowingo's operations would adequately protect the environment, while generating important renewable power. FERC properly concluded that pollutants in the river must be addressed at their source, and that Conowingo should not be forced to remove upstream pollutants it did not introduce and had no reasonable way to remove.

## STATEMENT OF THE CASE

### A. Conowingo

Conowingo is a vital resource for the electric grid that provides substantial environmental benefits, including with regard to the Bay's water quality.

Conowingo is by far the largest source of renewable energy in

Maryland, generating more electricity than all other renewable facilities in the state combined. Under average conditions, Conowingo generates enough power to supply 165,000 homes. It has no carbon footprint and is important for combating climate change, preventing 880,000 tons of greenhouse gas emissions each year (the equivalent of taking 170,000 cars off the road). FERC gave weight to these facts, noting that although the "flow regime" for Conowingo's operations proposed in the Maryland/ Constellation settlement would reduce the Project's output of renewable energy by more than 36,000 MWh each year, that loss was significantly less than the effects of an alternative flow regime proposed by The Nature Conservancy (which has not appealed FERC's decision). License Order (R.1256) ¶126.

Conowingo also is a vital resource to the electric grid in other respects. Its ability to capture water in a reservoir and release it through turbines when needed allows Conowingo to serve as a "peaking" facility, meaning it can generate renewable energy when electricity is most needed during times of peak demand; other renewable generators like wind and solar generally cannot control when they provide output to the grid. Conowingo is also a "Black Start" resource, meaning it can begin

power generation without assistance from the electric grid. In the event of a large power outage, Black Start resources are essential to restart other facilities and restore power to the grid.[1]

Conowingo also provides substantial other benefits. Its reservoir captures a stable supply of drinking water for Baltimore and other cities, and cooling water for other power plants. The 14-mile long reservoir is used heavily for recreation, including fishing, boating, hiking, swimming, and bird watching. Conowingo's forested shoreline and open waters provide prime breeding, nesting and foraging grounds for the formerly-endangered American Bald Eagle, which, in turn, attract many visitors to Conowingo. A single winter day often witnesses more than 250 bald eagles at the Project, which actively manages and protects its unique bald eagle habitat. License Order ¶108. The Project also removes each year over 600 tons of trash and debris deposited into the river by others, upstream of Conowingo. FERC is required to consider all these factors—development of renewable power, energy conservation, recreational opportunities, environmental effects—under the Federal Power Act. 16

[1] *Cal. Indep. Sys. Operator Corp.*, 161 FERC ¶61,116 at P2 (2017).

U.S.C. §797(e).

Conowingo has served to protect, rather than harm, the water quality of the Bay. FERC relied heavily on the May 2015 Lower Susquehanna River Watershed Assessment ("LSRWA"), a study commissioned by Congress and prepared by the U.S. Army Corps of Engineers and the Maryland Department of the Environment ("MDE"), with assistance from the U.S. Geological Survey, Susquehanna River Basin Commission, The Nature Conservancy, Chesapeake Bay Program of the U.S. Environmental Protection Agency ("EPA"), and Maryland Department of Natural Resources.[2]

As described in the LSRWA, the series of dams on the Susquehanna River, including Conowingo at the river's end, "have historically acted as sediment traps, reducing the amount of sediment and associated nutrients reaching the Chesapeake Bay." R.1163-001 at ES–2. The ability of these dams, including Conowingo, to trap pollutants has

[2] License Order ¶¶145–46; Rehearing Order (R.1285) ¶¶40, 43, 51; *see* R.1163-001 (LSRWA). FERC's Final Environmental Impact Statement ("FEIS"), discussed below, relied extensively on a draft of the LSRWA, issued in November 2014. In relying on these paragraphs in the FEIS, the Commission cross-referenced the comparable statements in the final LSRWA. License Order ¶¶145–46.

decreased as they have filled over time with sediment from upriver; in addition, that trapped sediment is occasionally "scoured" over the dams during a large storm flow. But ultimately, the harm to the Bay comes from those who introduce pollutants into waterways throughout the Bay watershed, which flow into the Bay. The LSRWA specifically found that "the majority of the sediment load from the lower Susquehanna River entering the Chesapeake Bay during storm events originates from the watershed rather than from scour from the reservoirs." *Id.*

FERC also relied on the LSRWA's finding that "[i]ncreasing or recovering storage volume of reservoirs via dredging or other methods is possible, but the Chesapeake Bay ecosystem benefits are minimal and short-lived … due to the constant deposition of sediment and associated nutrients that originate throughout the Susquehanna River watershed." *Id.* at ES–5; License Order ¶¶145–46; Rehearing Order (R.1285) ¶51.

## B. Chesapeake Bay TMDL

Responsibility for the water quality of the Chesapeake Bay does not rest principally with FERC, but rather with a specific federal program under the Clean Water Act known as the Chesapeake Bay "Total

Maximum Daily Load" ("TMDL" or the "Bay TMDL"),[3] which is administered by the Environmental Protection Agency.

The Clean Water Act requires that state environmental agencies complete TMDLs for impaired waters, and that the federal EPA approve (or disapprove) those TMDLs. *See generally* 33 U.S.C. §1313(d). The Chesapeake Bay is unique in that it is affected by seven jurisdictions—Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia, and the District of Columbia. The Clean Water Act thus establishes a special "Chesapeake Bay Program" for the Bay. 33 U.S.C. §1267.

Congress directed EPA's Administrator to "ensure" that the States in the Bay watershed develop and implement management plans "to achieve and maintain … (A) … nutrient goals … for the quantity of nitrogen and phosphorus entering the Chesapeake Bay" and "(B) the water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem." 33 U.S.C. §1267(g)(1)(A)–(B). EPA did so in 2010 by establishing, following public notice and comment, a

[3] A "TMDL" is essentially a "pollution diet" designed to identify necessary reductions of pollutant loads so that a waterway can meet applicable water quality standards. *See* Clean Water Act §303(d)(1)(C), 33 U.S.C. §1313(d)(1)(C).

comprehensive Bay TMDL that, unique among TMDLs, imposes specific pollutant reductions on each of the Bay States.

EPA calculated that, to reach its goals for the Bay's water quality by 2025, significant reductions in discharges of nitrogen and phosphorus would be required. EPA allocated those reductions among the Bay States. EPA calculated the reductions in nitrogen, phosphorus, and sediment loads that specific "point" sources of pollution (such as a factory) and "non-point" source sectors (such as agriculture) would need to undertake, so that the Bay would satisfy all applicable water quality standards by 2025. In turn, the States became obligated to implement the Bay TMDL through phased-in "Watershed Implementation Plans." 33 U.S.C. §1313(e). The Bay TMDL set several intermediate checkpoints, including a goal of achieving 60% of all pollutant reductions by 2017 (roughly the midpoint between 2010 and 2025).

The Bay TMDL expressly addressed the impacts of Conowingo on the Bay's water quality. EPA's Chesapeake Bay Program has underscored that "[t]rapping of pollutants by the Conowingo reservoir over the past 80+ years has benefited the water quality of the Bay" and has "benefited states to varying degrees by lessening [pollutant] load

reduction responsibilities."[4] The 2010 Bay TMDL recognized that the reservoir eventually would be filled in by a natural deposition process and thereafter would have a reduced ability to serve this protective role, but it expected that Conowingo would maintain trapping capacity through 2025. EPA provided a contingency, however: "If future monitoring shows that trapping efficiencies [at Conowingo] are reduced, Pennsylvania, New York, and Maryland's respective 2-year milestone delivered loads could be adjusted accordingly."[5] These potential adjustments, EPA explained, would "ensure that each jurisdiction is meeting its obligations."[6]

### C. Conowingo Relicensing

Constellation began the relicensing process for Conowingo in 2009. Constellation developed study plans, prepared extensive environmental analyses, and circulated a preliminary licensing proposal for stakeholder

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[4] *Framework for the Conowingo Watershed Implementation Plan* at 3 (Jan. 31, 2019), https://www.chesapeakebay.net/channel_files/37495/cwip_framework_-_final_1_31_19_version.pdf.

[5] Chesapeake Bay TMDL, Section 10–6, at 10–8, https://www.epa.gov/sites/–default/files/2014-12/documents/cbay_final_tmdl_section_10_final_0.pdf.

[6] *Id.*

comment. Constellation filed its license application with FERC in 2012.

In March 2015, after reviewing extensive comments and proposals submitted by federal and state resource agencies, environmental groups, and other parties participating in the Conowingo relicensing proceeding, FERC completed a Final Environmental Impact Statement ("FEIS") for three hydroelectric projects on the lower Susquehanna, including Conowingo. R.722. The document totals 890 pages with appendices. It includes detailed analyses of Conowingo's impacts on fish habitats under different "flow regimes" (the amount of water flowing through the dam during different months or periods of the year); on the transport of fish and eels (though "fish lifts" or other means) over the dam to spawn upstream; on the delivery of nutrients (nitrogen and phosphorus) and sediment to the Bay, including during storm events, and other water quality impacts; and on numerous other environmental attributes (ranging from bald eagles to turtles to shoreline management) and recreational activities.

The Federal Power Act also authorizes the Department of the Interior to issue a "Fishway Prescription" in connection with a hydropower licensing, which further addresses fish passage and

spawning issues. 16 U.S.C. §811. Constellation reached a settlement with Interior regarding the terms of the Fishway Prescription for Conowingo, under which Constellation agreed to make substantial investments at the dam to improve upstream passage for eel, shad, and other fish. Constellation also agreed to "trap and transport" fish upstream—not merely past Conowingo, but past the four upstream hydroelectric projects as well—to ensure that a higher percentage of fish successfully reached spawning grounds.

## D. Maryland's 2018 Certification And Settlement With Constellation

### 1. 2018 Certification

In 2014, Constellation submitted a request to Maryland for a Clean Water Act §401 certification for the relicensing. Although FERC generally has exclusive regulatory authority over hydropower projects on navigable waterways,[7] §401 gives States a specific right: to certify that any "discharge" from an activity for which an applicant seeks a federal license will comply with state water quality standards, or to impose

[7] *See First Iowa Hydro-Elec. Co-op. v. Fed. Power Comm'n*, 328 U.S. 152, 167–81 (1946); *California v. FERC*, 495 U.S. 490, 506–07 (1990); *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 722 (1994).

conditions to ensure such compliance. 33 U.S.C. §1341.

MDE responded to Constellation's application by declaring that it needed an additional three-year sediment transport study (beyond its own LSRWA, already then in draft form) before ruling on the application. Constellation responded that its application was complete and no further study was needed. But Constellation ultimately agreed with MDE to repeatedly withdraw and resubmit its same §401 application, ostensibly to continually "re-start" the one-year deadline in §401 for Maryland to act on the application.

Thus, Constellation withdrew its application in December 2014, and resubmitted essentially the same application in March 2015. Constellation then withdrew that re-filed application in February 2016, and resubmitted it again in April 2016; Constellation in turn withdrew that application in February 2017. Constellation resubmitted the application once again in May 2017.

On April 27, 2018, MDE issued what it identified as a §401 "certification" for Conowingo. R.972. Under Maryland law, this certification was not yet administratively final or subject to judicial review (as a Maryland court later confirmed, *see Exelon Gen. Co., LLC v.*

*Md. Dep't of the Env't*, No. 24-C-18-003410 (Md. Cir. Ct., Baltimore City Oct. 9, 2018)). Under MDE's regulations, an interested party could seek reconsideration of the certification as originally issued. Code of Maryland Regulations, 26.08.02.10(F)(4)(a). Moreover, an interested party was entitled thereafter to request a "contested case hearing," which is a full evidentiary hearing. *See id.*, 26.08.02.10(F)(4)(b); Maryland State Gov't Art. ("SGA") §§10–201 *et seq.*

Under Maryland law, an agency issuance prior to a contested case hearing (where, as here, a right to such hearing exists) is an "agency action," which should set forth "facts that are asserted" and a "proposed" sanction or "potential" penalty, and is not a "final decision." *See* SGA §§10–207, 10–216(a)(1), 10–221, 10–222. A final decision is rendered after the contested case hearing. *Id.*; *Walker v. Dep't of Hous. & Cmty. Dev.*, 29 A.3d 293, 300 (Md. 2011). Although Maryland's April 2018 certification asserted "findings," no evidence had yet been adduced on those findings, the contested case hearing had not yet occurred, and Constellation had not yet presented its own evidence (including, for example, evidence showing that the water quality impacts from "scour" events are *de minimis*).

Despite the Maryland law set forth above, MDE called the alleged certification issued in 2018 a "final decision," and it submitted the certification to FERC for incorporation into Conowingo's license. R.972.

MDE's purported certification was extraordinary. For the first time in Conowingo's nearly century-long operation—and contrary to Maryland's previous §401 certification, and countless other §401 certifications for other hydropower projects—MDE's certification sought to make Constellation responsible for cleaning up pollutants in the river it did not introduce and had no reasonable way to remove. The certification would have imposed a requirement that Conowingo "annually reduce" the amount of nitrogen present in the Susquehanna River flowing past Conowingo by 6,000,000 pounds and the amount of phosphorus by 260,000 pounds, even though those nutrients were introduced solely by upstream sources. *Id.* at 15. The certification did not specify a method for Constellation to accomplish those reductions; it allowed, however, an annual payment to MDE "in lieu of" the reductions. *Id.* at 16. Under a formula set forth in the certification, the "in lieu of" payment exceeded $172 million annually—or more than $8 billion over a 50-year license term. *Id.* This was nearly a half-million dollars per day,

every day. The amount far exceeded the value of Conowingo as an operating asset; the Project could not operate under those conditions.[8]

The nutrient reductions also were noteworthy because they mirrored—precisely—further nutrient reductions that EPA had identified as necessary under one application of the Bay TMDL's Midpoint Assessment, addressing the contingency it had identified in 2010. *Supra* at 9. Thus, rather than allowing EPA to determine how to allocate those further reductions to Maryland and other jurisdictions, Maryland took it upon itself to allocate all of the reductions to Constellation, absolving Maryland of any potential responsibility.

MDE's certification imposed other unprecedented requirements. It required Conowingo to remove "all" trash and debris from the river, regardless of where that trash entered the river or who deposited it. It required Conowingo to take onerous measures to stop invasive fish from moving upstream, even though the dam does not contribute to such migration and instead helps to block it. In sum, the certification made

[8] In comparison to the $172 million annual payment Maryland required, petitioners assert that Conowingo's annual revenues range between $115 and $121 million. Br. 19 n.7.

Constellation responsible for cleaning up a watershed it did not pollute and for environmental initiatives that had nothing to do with its hydropower operations.

Constellation challenged MDE's certification in four proceedings, prior to FERC's issuance of a new license: (1) Constellation sought reconsideration from MDE and asserted its right to a contested case hearing; (2) Constellation challenged, in state court, the fact that MDE called the certification a "final decision" even though, as a matter of state law, the agency could not issue a final decision until after a contested case hearing; (3) Constellation contended, in federal court, that MDE's certification exceeded its authority under §401 by requiring Conowingo to remove pollutants it did not discharge, and that MDE lacked authority to allocate nutrient reductions identified in EPA's Bay TMDL process; and (4) Constellation sought a declaratory order at FERC that MDE had waived its rights under §401 by agreeing with Constellation to a repetitive "withdraw and resubmit" application arrangement, rather than ruling on the application within one year as required by §401.

Constellation's waiver argument was predicated on this Court's recent finding of waiver in *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099

(D.C. Cir. 2019)—which also involved a repetitive "withdraw and resubmit" arrangement. FERC thereafter applied the *Hoopa Valley* waiver principle in several cases, extending it to other facts.[9] Taken together, these decisions created a significant risk that Maryland had waived its certification right and had no ability to impose *any* conditions on Conowingo's license. Constellation's other legal challenges also created substantial litigation risk and uncertainty.[10]

### 2. MDE Settlement With Constellation

While these challenges were pending, MDE and Constellation agreed to participate in a court-ordered mediation. The mediation ultimately led to a comprehensive settlement between MDE and Constellation that resolved the §401 issues and above legal disputes. R.1055. As described more fully below, MDE and Constellation agreed (1) to petition FERC through an Offer of Settlement to adopt certain "Proposed License Articles" that paralleled many of the requirements in

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[9] *See, e.g.*, *Placer Cnty. Water Agency*, 167 FERC ¶61,056 (2019); *Constitution Pipeline Co., LLC*, 168 FERC ¶61,129 (2019).

[10] In *Exelon Generation Co., LLC v. Grumbles*, 380 F. Supp. 3d 1 (D.D.C. 2019), the court considered and denied a portion of MDE's motion to dismiss Constellation's federal court challenge.

the certification; (2) if (and only if) FERC agreed to adopt the Proposed License Articles in full, without modification, then MDE would withdraw the 2018 certification and waive its right to issue a certification, and Constellation would withdraw its pending legal challenges to the certification, including its claim that MDE had already waived its right to issue a certification; and (3) if FERC agreed to adopt the Proposed License Articles, Constellation agreed to off-license funding and other commitments worth millions of dollars to support water quality initiatives for the Bay.

As FERC later underscored, the Proposed License Articles captured many of the requirements in MDE's certification (other than the challenged nutrient reductions). License Order ¶¶50–59 (finding requirements in the Proposed License Articles to be similar to provisions in the certification).[11] The Proposed License Articles adopted by FERC implemented environmental restrictions beyond those recommended in FERC's Final Environmental Impact Statement, and they imposed

[11] Many of the "off-license provisions" of the settlement also paralleled provisions in the certification. License Order ¶60 nn.59, 60, 61, 62, 63, 65, 66, 67, 68, 70, 71.

significant limits on Conowingo's ability to generate revenue. In particular, the Proposed License Articles included a revised flow regime that substantially increased minimum flows and imposed limits on the rate of "up-ramping" and "down-ramping" of flows, adopting in part recommendations that had been made by The Nature Conservancy and evaluated in the FEIS. *Id.* ¶¶119–27; Rehearing Order ¶26. Conowingo also agreed to make additional changes to its fish and eel lifts, to increase the amount of upstream trash and debris the Project would remove annually from the river, and to implement other environmental measures.

### E. FERC Issuance of License

FERC invited, obtained, and reviewed extensive comments on the MDE/Constellation Offer of Settlement from government resource agencies, environmental groups, and others. Thereafter, as described at length in the Commission's brief, FERC accepted the Offer of Settlement and issued a new license for Conowingo, adopting the Proposed License Articles in full with only technical revisions. R.1256. It subsequently denied Petitioners' request for rehearing. R.1285.

## SUMMARY OF ARGUMENT

None of Petitioners' arguments provides a basis to reverse FERC's issuance of a new license for Conowingo.

FERC correctly ruled that Maryland was entitled to waive its §401 certification rights in its settlement with Constellation, as Maryland sought to do. To begin, this Court need not address the merits of this issue because Petitioners fall outside the pertinent zone of interests of the waiver provision they invoke. The rights at issue are Maryland's rights, not Petitioners' rights. Section 401 confers certification rights on, and only on, "the State." 33 U.S.C. §1341(a)(1). Under settled law, Petitioners cannot pursue their arguments regarding §401 because they fall outside the zone of interests of the provisions they invoke. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126–28 (2014).

Regardless, FERC's decision was correct on the merits. An unbroken wall of authority—including §401's text, court interpretations, and EPA regulations—all establish that Maryland was well within its rights when it waived certification in settlement. Petitioners' arguments to the contrary lack merit. They ask this Court to draw a negative

implication from §401 and limit Maryland's right to waive. But courts should draw such a negative implication only when the context indicates it is appropriate. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013). And here, both the context of §401 and background legal principles establish that Maryland was entitled to waive its own right to certify.

Petitioners fare no better with their remaining arguments that FERC's license conditions are arbitrary and capricious under the Federal Power Act, and that the Commission failed to take a detailed look at the environmental impacts of those conditions in violation of the National Environmental Policy Act. FERC thoroughly considered and reasonably adopted the revised flow regime for Conowingo proposed in Maryland's settlement with Constellation, which imposed greater environmental protections than FERC's comprehensive Final Environmental Impact Statement had found to be necessary, and was squarely within the range of alternatives that already had been evaluated in the FEIS. Similarly, FERC thoroughly considered and reasonably determined not to require Conowingo to dredge the reservoir to remove sediment from upstream polluters that has accumulated in the reservoir, given findings in the Lower Susquehanna River Watershed Assessment that dredging would

need to be ongoing given the continuing inflow of sediment from upstream polluters, would be cost-prohibitive, and would likely be ineffective. FERC's determination not to require dredging was further supported by substantive evidence that "scour" from the reservoir during a large storm event has minimal impacts on the water quality of the Bay.

## ARGUMENT

### I. FERC PROPERLY ACCEPTED MARYLAND'S WAIVER OF ITS SECTION 401 RIGHTS.

FERC correctly determined that Maryland could waive its §401 certification rights in its settlement with Constellation, while that certification was still subject to administrative and judicial review (and not yet final under Maryland law). Constellation had argued (among other things) that Maryland had *already* waived its certification rights. So rather than go to the mattresses and risk getting nothing, Maryland did what parties often do: It negotiated a settlement that yielded enormous environmental benefits while avoiding downside risk. The Court should reject Petitioners' request to set aside FERC's decision for two reasons. One, Petitioners cannot pursue their arguments regarding §401 because they fall outside the zone of interests of the provision they invoke. Two, their position conflicts with §401's text, courts' uniform

interpretations, and EPA's regulations receiving *Chevron* deference—all of which make clear that federal law imposes no limit on States' authority to waive their §401 rights. Regardless of whether *state law* may impose such limits, Petitioners chose not to challenge Maryland's waiver in state court. And now, this Court should reject Petitioners' attempt to create new limits on States that Congress never provided.

### A. Petitioners Cannot Pursue Their Arguments Regarding §401 Because They Fall Outside The Zone Of Interests Of The Waiver Provision They Invoke.

Every plaintiff must show it "falls within the class of plaintiffs whom Congress has authorized to sue." *Lexmark*, 572 U.S. at 128. This rule—formerly known as "prudential standing"—protects the "general prohibition on a litigant's raising another person's legal rights" and "the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Id.* 126 (quotation marks omitted). This rule forecloses suit "when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Id.* 130 (internal quotation marks omitted). Here, that rule bars Petitioners' attempt to invoke rights held by Maryland, over Maryland's

objection.

Section 401's text makes clear that the rights at issue are Maryland's rights, not Petitioners' rights. *Lexmark*, 572 U.S. at 128 (courts measure a statute's zone of interests by applying "traditional principles of statutory interpretation"). Section 401 confers certification rights on, and only on, "the State." 33 U.S.C. §1341(a)(1). It thus "expressly grants *States* … the right to add conditions to federally issued … permits as necessary to assure compliance with state water quality standards." *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 11 n.11 (D.C. Cir. 2011) (emphasis added) (quoting EPA Response Comments). Section 401 does so in order to further the Clean Water Act's scheme of cooperative federalism, which "recognize[s], preserve[s], and protect[s] the primary responsibilities and rights *of States* to prevent, reduce, and eliminate pollution." 33 U.S.C. §1251(b) (emphasis added); *see Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991).

In myriad ways, §401 underscores that federal law recognizes *only* States as holding the relevant rights. For example, States have absolute discretion to waive their rights by allowing §401's clock to expire. 33 U.S.C. §1341(a)(1). And if someone thinks a certification is too lenient

(or too harsh), the sole recourse is state administrative processes and state courts. *E.g.*, *Keating*, 927 F.2d at 622. Within that scheme, §401 also safeguards the interests of license applicants, by ensuring they can receive federal licenses if States do not timely invoke their rights. Section 401, however, nowhere authorizes *private parties* like Petitioners to invoke the §401 rights of States in order to thwart States' judgments about how best to vindicate their interests in "prevent[ing], reduc[ing], and eliminat[ing] pollution." 33 U.S.C. §1251(b).

It is no answer to say that §401 protects environmental interests and that Petitioners profess to assert such interests. Br. 26–31. Courts apply "the zone-of-interests test … not by reference to the overall purpose of the Act in question … but by reference to the particular provision of law upon which the plaintiff relies." *Bennett v. Spear*, 520 U.S. 154, 175–76 (1997). Here, that "particular provision" is §401's right for a *State* to certify, or waive. 33 U.S.C. §1341(a). Petitioners fall outside that zone of interests.

The Clean Water Act's citizen-suit provision reinforces that conclusion. It authorizes any citizen to sue "any person … who is alleged to be in violation of … an effluent standard or limitation" and defines an

"effluent standard or limitation" to include "a certification under section 1341." 33 U.S.C. §1365(a)(1), (f). Congress thus authorized private parties to enforce "violation[s]" of §401 certifications. But that authorization does not allow a suit over the question of whether a State has waived or may waive its certification rights in the first place.

### B. Section 401 Allows States To Waive Their Rights.

Regardless, FERC's decision that Maryland had authority to waive its certification rights was correct. As just explained, §401 vests certification rights in States alone. And "[s]tatutory rights are generally waivable unless Congress affirmatively provides they are not." *Price v. U.S. Dep't of Just. Att'y Off.*, 865 F.3d 676, 679 (D.C. Cir. 2017); *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (citing *Evans v. Jeff D.*, 475 U.S. 717, 730–32 (1986)).

Here, far from "affirmatively provid[ing]" that States' certification rights are nonwaivable, §401 reaffirms that States may waive and provides a specific circumstance in which States do so. In one sentence, §401 specifies that "[i]f the State … fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) … , the certification requirements … shall be waived." 33

U.S.C. §1341(a)(1). Then, §401's next sentence specifies that when waiver has occurred, FERC may issue a license without regard to the State's certification rights. *Id.* ("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."). Because neither sentence prohibits States from waiving, States may do so.

Every relevant authority agrees—including this Court. In *Alcoa Power Generating Inc. v. FERC*, this Court affirmed that a State may "decide[] to waive its certification rights" after already issuing a certification. 643 F.3d 963, 969 (D.C. Cir. 2011).

For 50 years, EPA's regulations—which are entitled to deference under *Chevron*, *see PUD No. 1 of Jefferson Co. v. Washington Department of Ecology*, 511 U.S. 700, 712 (1994)—have provided the same thing. Since 1971, they have specified that §401's "certification requirement ... shall be waived upon ... [w]ritten notification from the State or interstate agency concerned that it expressly waives its authority." *Reorganization and Republication*, 36 Fed. Reg. 22,369, 22,488 (Nov. 25, 1971). The current regulations reaffirm that "a certifying authority may expressly waive," 40 C.F.R. §121.7(a), and that

waiver occurs if "the certifying authority expressly waives" or "fail[s] or refus[es] to act," *id.* §121.9(a)(1)–(2).

Other courts uniformly agree that §401 allows "for express waivers by a state" as well as "waivers by silence." *City of Olmsted Falls v. EPA*, 435 F.3d 632, 636 (6th Cir. 2006); *see City of Olmstead Falls v. EPA*, 266 F. Supp. 2d 718, 726–27 (N.D. Ohio 2003); *City of Shoreacres v. Tex. Comm'n of Env't Quality*, 166 S.W.3d 825, 833, 836–37 (Tex. App. 2005). FERC's decisions, too, have followed that uniform authority. *See*, *e.g.*, *Fraser Papers, Inc.*, 78 FERC ¶62,083, at 64,175 (1997); *N. States Power Co. of Wis.*, 78 FERC ¶62,086, at 64,226–27 (1997); *City of New Martinsville*, 53 FERC ¶61,166, at 61,615–16 (1990).

Petitioners' contrary arguments lack merit. Petitioners say that because §401 references "waive[r] as provided in the preceding sentence," FERC may accept only state waivers that occur via inaction. Br. 33 (quoting 33 U.S.C. §1341(a)). Express waivers like Maryland's, however, *are* waivers "as provided in the preceding sentence." That sentence reaffirms the "background principle[]," *Sault Saint Marie Tribe of Chippewa Indians v. Haaland*, 25 F.4th 12, 19 (D.C. Cir. 2022), that States may waive their rights and identifies one specific (but not

exclusive) circumstance in which States waive (inaction within a year). And even if that phrase could be read more narrowly, it would be too "thin [a] reed," *Martin v. Hadix*, 527 U.S. 343, 357 (1999), to overcome the presumption that a State may expressly waive its own statutory rights and the *Chevron* deference due to EPA's conclusion (shared by courts and FERC) that federal agencies may accept such waivers.

Alternatively, Petitioners argue by negative implication. Section 401 provides that if States "fail[] or refuse[] to act" within a year, then "the certification requirement[] … *shall be* waived." 33 U.S.C. §1341(a)(1). That means, Petitioners contend, that §401's certification requirements *shall not be* waived in any other circumstances. Br. 36. The Supreme Court, however, has cautioned against exactly that type of argument. The "force of any negative implication," the Court has explained, "depends on context." *Marx*, 568 U.S. at 381. And in particular, "the background presumptions governing" the subject "are a highly relevant contextual feature." *Id.* The Court has thus emphasized that it is "dubious to infer," simply from the fact that a statute does not expressly reiterate a background presumption, "congressional intent to override" that principle. *Id.* 382.

Likewise here, the relevant sentence simply specifies that waivers can occur by inaction. Congress did so to "[e]nsure that sheer inactivity by the State … will not frustrate the Federal application." 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 809 (1973). Congress did not intend, via this sentence, to displace the presumption that a party may expressly waive a statutory right. Instead, when Congress does intend to prohibit such a waiver, it speaks clearly (as it did just two sections later in providing that certain "requirements … may not be waived," 33 U.S.C. §1343(b)). The absence of similar language in §401 confirms that States retain their presumptive right to waive their own rights. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[W]hen 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." (quotation marks omitted)).[12]

[12] The relevant sentence in §401 also does important work by defining inaction as yielding *waiver*. Normally, when a party fails to timely assert its rights, the result is "forfeiture." *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 371 (1999). And "equity permits … forfeiture" to be "excuse[d]." *Id.* at 370 n.3. In §401, by contrast, Congress defined inaction as waiver—to make clear that equitable excuses do not apply. *E.g.*, *S. Cal. Edison Co.*, 170 FERC ¶61,135, at P36 (2020) (§401's

Petitioners' argument is nearly identical to the one the Supreme Court rejected in *New York v. Hill*, 528 U.S. 110 (2000). The statute there permitted continuances of criminal proceedings "provided that … good cause [is] shown." *Id.* at 112 (quotation marks omitted). *Hill* considered whether this provision, by expressly permitting continuances only based on good cause, impliedly prohibited agreed-upon continuances *absent* a "good cause" showing. *Id.* The answer was no. This provision, *Hill* explained, protected defendants' right to speedy trials. *Id.* And the "general rule … presumes the availability of waiver." *Id.* at 114. *Hill* thus concluded that the "negative implication" from the "good cause" provision was "not clear enough to constitute the 'affirmative indication' required to overcome the ordinary presumption." *Id.* at 116 (quoting *Mezzanatto*, 513 U.S. at 201). So too, here.

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deadline not subject to "equitable tolling"); *Pac. Gas & Elec. Co.*, 172 FERC ¶61,065, at P17 (2020) (rejecting "unclean hands" defense). Indeed, the distinction between forfeiture and waiver underscores just how backwards is Petitioners' reading of the statute: Petitioners would define "waiver" under §401 to include only conduct that normally constitutes "forfeiture" and to exclude the conduct that, everywhere else, constitutes a waiver—the "intentional relinquishment ... of a known right." *Hemphill v. New York*, 142 S. Ct. 681, 694 (2022) (Alito, J. concurring). Nothing in §401 indicates that Congress intended that bizarre result.

Petitioners' argument is also nearly identical to the one this Court recently rejected in *Sault Saint Marie*. There, Congress authorized a tribe to spend interest from its "Self-Sufficiency Fund" for the "enhancement of tribal lands." 25 F.4th at 17. It then provided that "[a]ny lands acquired using [such] interest … shall be held in trust by the Secretary" of the Interior. *Id.* The tribe argued that because the second provision "specifie[d] one and only one condition for taking land into trust—that it be acquired with Fund interest—the Secretary lack[ed] the authority" to question the tribe's determination that the acquisition constituted an "enhancement of tribal lands." *Id.* at 20–21. Judge Rao, however, emphasized that Congress had enacted this provision against the backdrop of settled "background principles," including that the government must act "in accordance with law" and that trustees cannot give effect to "unlawful" acts. *Id.* at 17, 19. The statute, Judge Rao explained, did not need to "explicitly state" these "fundamental principle[s]" for them to remain "firmly embedded." *Id.* at 20. So, too, with the rule that statutory rights are presumptively waivable.

Petitioners' wooden reading contradicts settled law in another respect, as well. They claim that any condition that exists one year after

a certification request "shall become a condition of' the [federal] license." Br. 32 (internal quotation marks omitted). States, however, routinely modify or even delete conditions after the one-year period expires pursuant to state administrative or judicial review. And both FERC and reviewing courts have held that States may do so and that the revised conditions (not the original) may become part of the federal license. *FPL Energy Me. Hydro, LLC v. Dep't of Env't Prot.*, 926 A.2d 1197, 1203 (Me. 2007); *FPL Energy Me. Hydro LLC*, 111 FERC ¶61,104, P8 (2005), *aff'd sub nom. FPL Energy Me. Hydro LLC v. FERC*, 551 F.3d 58 (1st Cir. 2008); *Duke Energy Carolinas, LLC*, 147 FERC ¶61,037, P18 (2014). No text in §401 expressly authorizes those steps. But FERC and reviewing courts have sensibly interpreted §401 against the backdrop of the understanding that administrative and judicial review is presumptively available (much like the rule that rights are presumptively waivable).

This Court should reject an interpretation that would thwart that settled understanding and force States to freeze certifications at the one-year mark. Indeed, the consequence of Petitioners' argument would not necessarily be that conditions in a certification still subject to administrative review would become a condition of the federal license;

the import of Petitioners' argument may be that the State already has waived by failing to complete its chosen administrative process within one year. *See FPL Energy Me. Hydro LLC v. FERC*, 551 F.3d 58, 63 (1st Cir. 2008). This Court should reject Petitioners' argument and affirm FERC's determination that Maryland was entitled to waive its certification rights through its settlement with Constellation.[13]

## II. FERC'S DECISION IS NOT ARBITRARY AND CAPRICIOUS UNDER THE FEDERAL POWER ACT, AND IT CONDUCTED DETAILED ENVIRONMENTAL REVIEWS AS REQUIRED BY THE NATIONAL ENVIRONMENTAL POLICY ACT.

In a series of interrelated arguments, Petitioners contend that FERC's adoption of the flow regime in the MDE/Constellation settlement, and its failure to require dredging or other measures to address Conowingo's impacts on the delivery of nutrients and sediment to the Bay, was either arbitrary and capricious in light of FERC's environmental obligations under the Federal Power Act, and/or was based upon an inadequate assessment of the matter in violation of the National Environmental Policy Act ("NEPA"). These issues are

[13] Constellation agrees with FERC's arguments showing that FERC's decision here was fully consistent with §401(a)(1)'s public-participation requirements and that §401(a)(3) is irrelevant.

thoroughly addressed in FERC's order on rehearing, R.1285, and in its brief here. Constellation adds the following discrete points.

### A. FERC Did Not Treat Water Quality Issues As Irrelevant.

As FERC demonstrates, FERC Br. 45–48, the Commission made its own independent determination of water quality issues, and it was not legally required to adopt the conditions in Maryland's waived certification. Nor was FERC required to accept as fact the assertions in the certification, which was issued prior to a required evidentiary hearing and did not constitute a final agency decision subject to judicial review. *Supra* at 12–13. It also is significant that FERC accepted the Proposed License Articles in the MDE/Constellation Offer of Settlement, which (as FERC noted) in numerous instances paralleled conditions in the certification. *Supra* at 18. For all these reasons, there is no basis to conclude, as Petitioners contend, that FERC treated water quality issues as irrelevant.

### B. FERC Adequately Considered The Settlement Flow Regime.

Petitioners contend FERC was obligated to supplement the FEIS to evaluate the revised flow regime in the MDE/Constellation Offer of Settlement ("settlement flow regime"), which FERC adopted in the new

license. Br. 3–4 (Issues 6, 8), 23, 53–54. Again, FERC addressed these issues at length in its decision on rehearing, Rehearing Order ¶¶22–37, and in its brief. FERC Br. 36–45, 48–55.

FERC had extensive information regarding the environmental impacts of the settlement flow regime. Over the 12-year relicensing process, Constellation submitted substantial information concerning the impacts of various flow regimes. The FEIS evaluated the impacts of a range of flow regimes in great detail, FEIS (R.722) 145–161, and the settlement flow regime was within the range of outcomes studied. FERC thus already possessed and appropriately used applicable modeling data for the settlement flow regime. License Order ¶¶119–26; Rehearing Order ¶¶22–35. That data showed that in virtually all periods, the settlement flow regime improved fish-habitat conditions from what the FEIS already had found to be acceptable, and that for all periods the settlement flow regime remained within the range of acceptable flows for relevant fish habitat.

In particular, the FEIS evaluated at length an alternative flow regime proposed by The Nature Conservancy ("TNC"), which included increased minimum flows, maximum flow limits, and restrictions on the

rates of "up-ramping" and "down-ramping" the flow. FEIS 145–50, 152–58, 362, 415–16. To compare the environmental impacts of Constellation's proposed flow regime and TNC's alternative, the FEIS used complex habitat models to evaluate the relationship between flow rates and aquatic habitat (as measured by weighted usable area). FEIS 145–50, 152–58. The FEIS balanced the often-competing habitat needs of several target species and life stages over the course of the entire year, with a particular emphasis on the spring migration and spawning season. FEIS 152–58. The FEIS also considered the effects of each flow regime on the Project's ability to generate renewable energy, as part of the developmental assessment FERC is required to make under the Federal Power Act. FEIS 362, 372, 415–16, 429–30. Based on this detailed analysis, the FEIS recommended its own flow regime (the "Staff Alternative") that included increases to existing minimum flows to mitigate Project impacts. FEIS 412, 415–16. The FEIS did not find, however, that TNC's increased minimum flows, or its limitations on maximum flows, up-ramping rates, or down-ramping rates, were necessary to mitigate Project impacts. FEIS 148, 157–58, 430.

The settlement flow regime was squarely within the range of the extensive analysis conducted in the FEIS. The settlement flow regime increased minimum-flow requirements in virtually all periods above the Staff Alternative flow regime, which the FEIS already had concluded was adequate to protect fish habitat; indeed, for several periods, the increase was substantial. Rehearing Order ¶26; *see generally* License Order ¶¶121, 124–26; Rehearing Order ¶¶23–33.[14] The settlement flow regime also adopted maximum flow, up-ramping, and down-ramping restrictions, *see* Rehearing Order ¶¶23, 26, which the FEIS already had concluded were not necessary to protect environmental concerns, but which the Commission found "would offer additional protection of aquatic resources, particularly migratory fishes, as reducing flow variability could facilitate upstream passage and reduce fish stranding." License

[14] It is not correct that the settlement flow regime included lower minimum flows than the FEIS had considered. Although the minimum flow in the settlement flow regime for the period August 1 through September 14 was lower than the Staff Alternative flow regime (while being higher, and often significantly higher, in all other periods, *see* Rehearing Order ¶26), the minimum flow during that period remained higher than other minimum flows studied in the FEIS, and the Commission considered the effects of the settlement flow regime during this period and found that fish habitats would be adequately protected. Rehearing Order ¶¶24–25.

Order ¶125. The settlement flow regime fell squarely between Constellation's original license proposal (as modified by the Staff Alternative), on the one hand, and TNC's alternative, on the other hand—with both of those bounds thoroughly analyzed in the FEIS in terms of their impacts on fish habitats. As MDE stated in its comments on the settlement to FERC, the settlement flow regime was based on studies already in the record of the proceeding. *See* License Order ¶124.

It is significant that the settlement flow regime was supported not only by MDE, but also by the federal Fish and Wildlife Service, the Susquehanna River Basin Commission ("SRBC"),[15] and other resource agencies. The Commission also properly took into account that although the additional restrictions in the settlement flow regime would result in an annual loss of over 36,000 MWh of renewable energy, this amount was significantly less than would occur under TNC's alternative. License Order ¶126.

[15] The SRBC was established by the Susquehanna River Basin Compact, a federal interstate agreement among New York, Maryland, Pennsylvania, and the United States. Pub. L. No. 91–575, 84 Stat. 1509 (1970). The Compact imposes duties and responsibilities on SRBC for comprehensive planning, programming, and management of the water and related resources of the Susquehanna River Basin.

Given these facts, FERC adequately fulfilled its obligation to conduct a "detailed" review of the environmental impacts of the settlement flow regime adopted in the license, as required by the National Environmental Policy Act, and it was not obligated to conduct a Supplemental Environmental Impact Statement regarding the settlement flow regime. NEPA requires, for "major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on … the environmental impact of the proposed action…." 42 U.S.C. §4332(C). NEPA does not specify when an agency must prepare a supplement to an environmental impact statement; however, Council on Environmental Quality regulations provide that agencies "[s]hall prepare supplements to either draft or final environmental impact statements if a major Federal action remains to occur, and: (i) The agency makes substantial changes to the proposed action that are relevant to environmental concerns; or (ii) There 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(d)(1); *see also* Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026,

18,035 (Mar. 17, 1981) (explaining that a supplement is not required when the new alternative is "qualitatively *within the spectrum of alternatives* that were discussed in the draft" (emphasis added)). Thus, only "if the new information is sufficient to show that the remaining action will affec[t] the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989) (internal quotation marks omitted).

Both the Supreme Court and this Court have emphasized that "[c]onsistent with a 'rule of reason,' an agency need not supplement an EIS every time new information comes to light after the EIS is finalized; rather, the need for supplementation 'turns on the value of the new information to the still pending decisionmaking process.'" *Friends of Cap. Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1058 (D.C. Cir. 2017) (quoting *Marsh*, 490 U.S. at 374). In particular, "[a] supplemental EIS is only required where new information provides a *seriously* different picture of the environmental landscape." *City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002) (emphasis in original, internal quotation marks omitted). "[A]n agency is not required

to make a new assessment under NEPA every time it takes a step that implements a previously studied action, so long as the impacts of that step were contemplated and analyzed by the earlier analysis." *Mayo v. Reynolds*, 875 F.3d 11, 16 (D.C. Cir. 2017).

Identifying whether information *is* new and significant enough to require a supplemental impact statement "requires a high level of technical expertise" and warrants deference to "the informed discretion of the [Commission]." *Blue Ridge Env't Def. League v. NRC*, 716 F.3d 183, 197 (D.C. Cir. 2013) (quoting *Marsh*, 490 U.S. at 377) (alteration in original). As long as an agency's decision not to supplement an impact statement is "not 'arbitrary or capricious,'" it should not be set aside. *Marsh*, 490 U.S. at 377.

The settlement flow regime adopted by the Commission does not present a "seriously different picture of the environmental landscape" than that considered in the FEIS. *Friends of Cap. Crescent Trail*, 877 F.3d at 1060 (quotation marks omitted); *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218–19 (10th Cir. 1997) (noting that "a reduction in environmental impact is less likely to be considered a substantial change relevant to environmental concerns than would be an increase in the

environmental impact"). As FERC explained, the impacts of the settlement flow regime were within the spectrum of alternatives analyzed in the FEIS. Rehearing Order ¶¶23–33, 36–38. FERC allowed extensive public comments on the MDE/Constellation Offer of Settlement, and it considered at length the comments that were submitted regarding the settlement flow regime. License Order ¶¶49, 61–69, 119–27; Rehearing Order ¶¶22–38. The Commission thus took the requisite "hard look" at the record and determined that the settlement flows would adequately protect, and indeed increase, habitat availability, and would offer additional protection of aquatic resources. Supplementation of the FEIS was unnecessary, particularly given the extensive findings made by the Commission in its orders.[16]

### C. FERC Fully Considered Impacts Of Conowingo On The Delivery Of Nutrients And Sediment To The Bay And The Possibility Of Dredging The Reservoir.

Petitioners contend that FERC failed to adequately consider the impacts of Conowingo on the delivery of nutrients and sediment to the

[16] *Nat. Res. Def. Council v. NRC*, 879 F.3d 1202, 1211 (D.C. Cir. 2018) (declining to remand case to the NRC for further environmental analyses where the agency "augmented its decision before being challenged in this court … in a publicly accessible opinion"); *Friends of the River v. FERC*, 720 F.2d 93, 105–10 (D.C. Cir. 1983).

Bay and the potential benefits of dredging the reservoir, particularly in light of "new" information regarding the costs of dredging submitted by Petitioners. Once again, however, FERC addressed these issues at length in its orders. License Order ¶¶140–46; Rehearing Order ¶¶40–43, 48–50; *see* FERC Br. 55–64.

As set forth above, for 80+ years Conowingo has protected the water quality of the Bay by blocking harmful nutrients. *Supra* at 5–6, 8. During that time, Conowingo fully complied with its license obligations, including those imposed from Maryland's previous §401 certification. *See Susquehanna Power Co.*, 19 FERC ¶61,348 at 61,683 n.4 (1980). Conowingo was under no obligation to conduct "maintenance" on the reservoir to respond to nutrients and sediment that flowed into the reservoir from upstream. Thus, the only issue that existed at the time of relicensing was whether Conowingo would be required to conduct dredging or other remedial measures going forward, to remove the sediment that had accumulated in the reservoir as it was being blocked from entering the Bay.

The LSRWA had considered the issue of dredging and other remedial measures at length, and it had squarely rejected them. *See*

License Order ¶¶145–46; Rehearing Order ¶¶43, 48–50; LSRWA (R.1163-001) at ES-4 to ES-6, 103–48. FERC reasonably relied on these conclusions in the LSRWA—a comprehensive, multi-year assessment prepared jointly by the Army Corps of Engineers (the federal agency directly responsible for navigational water flows and dredging) and MDE, in partnership with the U.S. Geological Survey, the Susquehanna River Basin Commission, The Nature Conservancy, EPA's Chesapeake Bay Program, and others (all of whom joined the issuance of the final report). *See* LSRWA at Cover, 1–2.

FERC specifically considered the effects of "scour" events at Conowingo. The FEIS noted that the LSRWA had modeled the effects of a Conowingo scour event in 1996 on several water quality parameters, including dissolved oxygen levels, and that "[t]his modeling found that the effects on these water quality parameters would be small." FEIS 138; Rehearing Order ¶40; License Order ¶144. This modeling analysis of a Conowingo scour event was recently confirmed by a team of scientists from the University of Maryland Center for Environmental Science, which found (in a comprehensive study part of the record before FERC, R.1163-003) that "the potential biogeochemical impacts of these elevated

inputs [from a Conowingo scour event] are limited in time and space for several reasons" explained at length in the study, and that "model simulations of scour events within Conowingo Reservoir have only shown marginal impacts on dissolved oxygen" in the Bay. R.1163-003 at 2090.

Given all these facts, FERC's decision not to require ongoing, cost-prohibitive, and likely ineffective dredging in Conowingo's new license, License Order ¶¶145–46, was not arbitrary and capricious.

FERC also was not required, as Petitioners contend, to conduct a Supplemental Environmental Impact Statement because of a new submission by Petitioners suggesting that the costs of dredging might be lower than estimated in the LSRWA. The new information Petitioners submitted was not a scientific analysis, but a marketing initiative by a company interested in a Conowingo dredging contract. FERC properly concluded that "the statements from the dredging company, offered by Waterkeepers, that it could accomplish necessary nutrient reductions for $41 million, do not demonstrate any error in the Commission's consideration of dredging." Rehearing Order ¶51.

Again, FERC adequately considered the issue of nutrients and sediment in the Susquehanna River and Conowingo Reservoir, and its

decision should be affirmed. At bottom, the studies on which FERC relied showed that (1) the delivery of nutrients and sediment to the Bay is a watershed-wide issue, properly addressed through the Bay TMDL; and (2) Conowingo scour events do not have a major impact on the water quality of the Bay, and dredging the reservoir is not a cost-effective or efficient way to retard the delivery of harmful nutrients to the Bay.

## CONCLUSION

The Commission's decision should be affirmed.

DATED: April 22, 2022

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, Century 14-point.

Dated: April 22, 2022

/s/ David W. DeBruin
David W. DeBruin

## CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. I certify that Defendants-Appellees are registered CM/ECF users and that service to Defendants-Appellees will be accomplished by the CM/ECF system.

/s/ David W. DeBruin
David W. DeBruin

# ADDENDUM

# INDEX

## 16 U.S.C. § 797

### General powers of Commission

The Commission is authorized and empowered—

* * * *

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided:

* * * *

In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

* * * *

## 33 U.S.C. § 1341

### Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. 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. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

* * * *

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

* * * *

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or

pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

* * * *

42 U.S.C. § 4332

**Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts**

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

* * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which

has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * * *

40 C.F.R. § 1502.9

**Draft, final, and supplemental statements.**

* * * *

(d) Supplemental environmental impact statements. Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if a major Federal action remains to occur, and:

(i) The agency makes substantial changes to the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

* * * *

**Code of Maryland Regulations**

**COMAR 26.08.02.10**

**Water Quality Certification.**

* * * *

F. Procedures for Public Hearing.

* * * *

(4) Appeal of Final Decision.

(a) A person aggrieved by the Department's decision concerning a water quality certification may appeal the decision of the Department. The appeal shall:

(i) Be filed within 30 days of the publication of the final decision with the hearing office; and

(ii) Specify, in writing, the reason why the final determination should be reconsidered.

(b) A further appeal shall be in accordance with the applicable provisions of State Government Article, §10-201 et seq., Annotated Code of Maryland.

* * * *

**MD Code, State Government, § 10-207**

**Notice of agency action**

**In general**

(a) An agency shall give reasonable notice of the agency's action.

**Contents of notice**

(b) The notice shall:

(1) state concisely and simply:

(i) the facts that are asserted; or

(ii) if the facts cannot be stated in detail when the notice is given, the issues that are involved;

(2) state the pertinent statutory and regulatory sections under which the agency is taking its action;

(3) state the sanction proposed or the potential penalty, if any, as a result of the agency's action;

(4) unless a hearing is automatically scheduled, state that the recipient of notice of an agency's action may have an opportunity to request a hearing, including:

(i) what, if anything, a person must do to receive a hearing; and

(ii) all relevant time requirements; and

(5) state the direct consequences, sanction, potential penalty, if any, or remedy of the recipient's failure to exercise in a timely manner the opportunity for a hearing or to appear for a scheduled hearing.

**Consolidation with notice of hearing**

(c) The notice of agency action under this section may be consolidated with the notice of hearing required under § 10-208 of this subtitle.

**MD Code, State Government, § 10-216**

**Cases where final decision maker does not preside over hearing**

**Proposed decision; exceptions; argument**

(a)(1) In the case of a single decision maker, if the final decision maker in a contested case has not personally presided over the hearing, the final decision may not be made until each party is given notice of the proposed decision in accordance with § 10-220 of this subtitle and an opportunity to:

(i) file exceptions with the agency to the proposed decision; and

(ii) present argument to the final decision maker that the proposed decision should be affirmed, reversed, or remanded.

* * * *

**MD Code, State Government, § 10-221**

**Final decisions and orders**

**Form**

(a) A final decision or order in a contested case that is adverse to a party shall be in writing or stated on the record.

**Contents**

(b)(1) A final decision or order in a contested case, including a remand of a proposed decision, shall contain separate statements of:

(i) the findings of fact;

(ii) the conclusions of law; and

(iii) the order.

(2) A written statement of appeal rights shall be included with the decision.

(3) If the findings of fact are stated in statutory language, the final decision shall state concisely and explicitly the facts that support the findings.

(4) If, in accordance with regulations, a party submitted proposed findings of fact, the final decision shall state a ruling on each proposed finding.

**Distribution**

(c) The final decision maker promptly shall deliver or mail a copy of the final decision or order to:

(1) each party; or

(2) the party's attorney of record.

**MD Code, State Government, § 10-222**

**Judicial review**

**Right to judicial review**

(a)(1) Except as provided in subsection (b) of this section, a party who is aggrieved by the final decision in a contested case is entitled to judicial review of the decision as provided in this section.

(2) An agency, including an agency that has delegated a contested case to the Office, is entitled to judicial review of a decision as provided in this section if the agency was a party before the agency or the Office.

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