UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Exelon Generation Company, LLC Project No.: 405-121

MOTION TO INTERVENE
OF THE LOCAL GOVERNMENT MEMBERS
OF THE CLEAN CHESAPEAKE COALITION

Respectfully submitted,

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The County Commissioners of Caroline County, the County Commissioners of Carroll County, Cecil County, Maryland, the County Council of Dorchester County, the County Commissioners of Kent County, and Queen Anne's County, Maryland (collectively, the Clean Chesapeake Coalition (the "Coalition" or "CCC")), by their undersigned counsel, pursuant to 18 C.F.R. §§ 385.212 & 385.214, and the March 11, 2019 notice of the Federal Energy Regulatory Commission ("FERC" or the "Commission") in this proceeding, move for intervenor status in the above-captioned proceeding, and as grounds therefore state as follows:

I. PRELIMINARY POSITION TAKEN BY THE COALITION

A. Overview

In its Petition for Declaratory Order[1], Exelon Generation Company, LLC ("Exelon") requests that the Commission find that Maryland has waived its Section 401 certification authority over the Conowingo Hydroelectric Project, FERC Project No. P-405, on the Susquehanna River in Maryland because a Section 401 application has been withdrawn and resubmitted. On April 27, 2017, the Maryland Department of the Environment's (MDE) issued to Exelon its Water Quality Certification (WQC) pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1251 et seq. (CWA) for the project on April 27, 2018 in response to Exelon's relicensing application dated May

[1] eLibrary no. 20190228-5371 (Feb. 28, 2019).

17, 2017. (the "Section 401 Certification"). Since then, Exelon has initiated a barrage of legal proceedings as described in Exelon's May 25, 2018 letter to the Commission. It the May 25, 2018 letter, Exelon requests that the Commission defer action on the federal relicensing for the project pending resolution of the proceedings.[2] *See* letter from Colleen Hicks to Secretary Bose, eLibrary no. 20180525-5191 (May 25, 2018) at 3.

Leading up to the filing of its Petition herein, Exelon had repeatedly renewed its request that the Commission defer action on the federal relicensing for the project pending resolution of the proceedings. Falsely emboldened, however, by the D.C. Circuit's recent opinion of *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), Exelon has now cast aside its request for the Commission to defer action in this matter, and its Petition for Declaratory Order operates as a retraction of Exelon's deferment request. Since Exelon cannot have its cake and eat it too, once the Commission denies or dismisses Exelon's petition for the reasons stated herein, the Commission should proceed to act on the relicensing and impose the requirements contained in the MDE's Section 401 Certification.

The U.S. Supreme Court has long held that dams have significant adverse impacts on water quality. *See S.D. Warren Co. v. Me. Bd. Of Envt'l Protection*, 547 U.S. 370, 385 (2006); *PUD No. 1 v. Washington, Dep't of Ecology*, 511 U.S. 700, 719-20 (1994). Section 401 of the CWA stands as a bulwark against the harmful effects that federally permitted energy projects may have on water quality, providing states with the opportunity to exercise mandatory authority specifying the conditions under which a federally licensed project must operate in order to comply with state water quality standards. The authority granted to the states under Section 401 underscores "the

[2] A federal Complaint filed in the U.S. District Court for the District of Columbia, a state Protective Petition for Reconsideration and Administrative Appeal filed with the MDE, and a state Complaint for Declaratory Relief, Petition for Judicial Review, and Complaint for Mandamus filed in the Circuit Court for Baltimore City, Maryland (the Circuit Court proceeding was dismissed on October 9, 2018 as premature).

policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act." 33 U.S.C. § 1251(b).

The Maryland Department of the Environment ("MDE") is the state agency responsible for protecting, preserving, and restoring Maryland's water resources. The MDE implements the CWA in Maryland, and is the Maryland state agency authorized to grant, waive, or deny water quality certification under Section 401 of the CWA, as amended, the Environment Article, Sections 9-313 - 9-323, inclusive, Annotated Code of Maryland, and Code of Maryland Regulations ("COMAR") 26.08.02. Due to Federal Power Act preemption, it is generally only through the Maryland's Water Quality Standards as set forth in COMAR 26.08.02 pursuant to MDE's Section 401 authority that the State of Maryland can ensure that Federal Energy Regulatory Commission (FERC) licensed projects comply with state and federal water quality laws. Section 401 of the CWA provides that a state agency waives its certification authority if it "fails or refuses to act on a request for certification[] within a reasonable period of time (which shall not exceed one year) …." 33 U.S.C. § 1341(a). FERC allows states a full year to act on an applicant's Section 401 application for complex hydroelectric relicensing projects. 18 C.F.R. § 4.34(b)(5)(iii); *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 at PP 20-21 (Jan. 11, 2018).

Exelon incorrectly asserts that Maryland has waived its rights to issue a water quality certification under Section 401 because of Maryland's failure to timely act. In an astonishing display of corporate arrogance and greed, Exelon fails to acknowledge the objective and declaration of goals and policies incorporated in the CWA,[3] and Exelon's active and willing

[3] "The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA, Section 101(a).

participation with the MDE and FERC in the process as the parties collaboratively worked their way forward in the relicensing process. Exelon behaves as if the relicensing process is some sort of gambit between itself and MDE where winner takes all, instead of a profoundly important exercise of regulatory scrutiny on both the state and federal levels, the outcome of which will impose water quality consequences that will persist for decades and potentially threaten significant negative environmental consequences downstream for millions of Americans, including the thousands of residents within the Coalition's counties.

B. Exelon's Petition for Declaratory Order is Legally and Procedurally Flawed and Should Be Dismissed Without Prejudice or Denied Outright

Exelon's Petition for Declaratory Order is wholly based on two legal arguments: first, that under the D.C. Circuit's recent opinion of *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), MDE has allegedly waived its Clean Water Act Section 401 certification authority by failing to "act" within the timeframe provided under that statute. The glaring problem for Exelon is that *Hoopa Valley* is not a final decision or binding citable authority. The reality is that simultaneously with the issuance of the Judge Sentelle's written opinion in the *Hoopa* case, the D.C. Circuit ordered that the Clerk withhold issuance of the mandate until seven days after disposition of any timely petition for rehearing or petition for rehearing *en banc*.[4] To that end, on March 11, 2019, a Petition for Panel Rehearing or Rehearing *En Banc* was filed in the case on which the D.C. Circuit has not acted to date. Therefore, the *Hoopa* upon which Exelon relies is not a final decision or binding on FERC.

Second, Exelon argues that even under the status quo prior to *Hoopa Valley*, MDE's Section 401 Certification issued on April 27, 2018 did not suffice because it was merely a

[4] *See* Court of Appeals Docket #: 14-1271. The Clerk's Order withholding issuance of the mandate was entered on the docket on 01/25/2019 at 09:56 AM. Judge Sentelle's written opinion was entered on the docket on 01/25/2019 at 09:52 AM.

"placeholder." Contrary to Exelon's legal analysis, the facts and the case law cited by Exelon uniformly support a conclusion that the MDE's Section 401 Certification meets the criteria imposed by that statute and FERC's applicable regulations. On that basis, the Petition for Declaratory Order be dismissed without prejudice pending the issuance of a mandate in *Hoopa Valley* or denied outright.

1. *Hoopa Valley* is currently not a final decision or binding citable authority

Hoopa Valley is currently not a final decision or binding citable authority. Under Rule 41 of the Federal Rules of Appellate Procedure (Fed. R. App. P.), an opinion of the appeals court is not final or effective until it issues its mandate. *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F3d 942, 951-52 (6th Cir. 1999), *reh'g, en banc, denied*, 2000 US App LEXIS 3382 (6th Cir. Mar. 2, 2000), *cert. denied*, 531 US 818, 121 S. Ct. 58, 148 L Ed 2d 25 (2000). *See also Carver v. Lehman*, 558 F.3d 869, 878-79 (9th Cir. 2009) ("Until the mandate has issued, opinions can be, and regularly are, amended or withdrawn, by the merits panel at the request of the parties pursuant to a petition for panel rehearing, in response to an internal memorandum from another member of the court who believes that some part of the published opinion is in error, or sua sponte by the panel itself.").

> Unlike district courts, the courts of appeals direct the district courts and administrative agencies over which they have appellate or reviewing jurisdiction through mandates, not through orders and judgments. See, e.g., *Shakespeare Co. v. Silstar Corp. of America, Inc.*, 906 F. Supp. 997, 1002 (D.S.C. 1995) (noting that the mandate is the "official mode of communicating the judgment of an appellate court to a lower court, thereby directing action to be taken or disposition to be made of the cause by the trial court") (citation and brackets omitted), aff'd, 110 F.3d 234 (4th Cir. 1997), cert. denied, 522 U.S. 1046, 118 S. Ct. 688, 139 L. Ed. 2d 634 (1998). This is true even though in most cases the mandate simply consists of a certified copy of the judgment of the court of appeals, a copy of the court's opinion, and any directions regarding the taxation of costs. *See* Fed. R. App. P. 41.
>
> Although the issuance of the mandate is largely a formality, ***the court of appeals retains jurisdiction over the case until it issues, and the district court or agency***

> ***whose order is being reviewed cannot proceed in the interim***. See, e.g., 16A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3987, at 735-36 (3d ed. 1999); *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 897-98 (5th Cir. 1995) (collecting cases).

Youghiogheny & Ohio Coal Co., 200 F3d at 951-52 (Emphasis added).

"Our control over a judgment of our court continues until our mandate has issued." *Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir.), cert. denied, 434 U.S. 823, 54 L. Ed. 2d 80, 98 S. Ct. 67 (1977). "It is important to understand that unless specifically directed, the parties cannot rely on the decision as final until the mandate issues." *Heartland By-Products, Inc. v. United States*, 223 F. Supp. 2d 1317, 1332-33 (U.S.C.I.T. 2002), *citing Alphin v. Henson*, 552 F.2d at 1035.

Fed. R. App. P. 41(b) provides as follows:

> The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order.

F. R. App. P. 41(c) provides that "[t]he mandate is effective when issued." The Notes of the Advisory Committee on the 1998 amendments, in reference to Subdivision (c), state in pertinent part as follows:

> Subdivision (c) is new. It provides that the mandate is effective when the court issues it. A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed.

In *Hoopa Valley*, simultaneously with the issuance of the Judge Sentelle's written opinion in the case, the D.C. Circuit ordered that the Clerk withhold issuance of the mandate until seven days after disposition of any timely petition for rehearing or petition for rehearing *en banc*. To that end, on March 11, 2019, a Petition for Panel Rehearing or Rehearing *En Banc* was filed in the case on which the D.C. Circuit has not acted to date. Exelon's reliance on the *Hoopa Valley* opinion is without merit, and the citation as binding or even persuasive authority was

inappropriate. It would be unjust for the Commission to give the opinion credence unless and until a mandate is issued. If and when that may occur is purely speculative at this time. Accordingly, for purposes of its review of Exelon's Petition for Declaratory Order, FERC's longstanding recognition of the withdraw-and-resubmit process upon which the parties have reasonably relied should remain in place.

2. Under FERC's Current Regulations and Section 401 of the CWA, MDE's Certification Suffices

FERC's longstanding recognition of the withdraw-and-resubmit process was reaffirmed as recently as 2018. "We reiterate that once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under section 401(a)(1)." *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 at P 23 (Jan. 11, 2018). There can be no disagreement that FERC, Exelon, and MDE all understood that Exelon's resubmission of a Section 401 application restarted Maryland's one-year certification period. The withdrawal-and-resubmission procedure, while imperfect, contributes to efficient administration of the FPA, CWA, and state procedures. Under 18 C.F.R. § 4.34(b)(5), FERC has a bright-line test for when a certification period begins and ends. By permitting the withdrawal-and resubmittal procedure, the rule allows states to comply with each state's own rules to assure that § 401 requests are complete, and allows applicants to develop information necessary to evaluate and manage water quality impacts. Given this basis, the procedure is not, in and of itself, arbitrary and capricious. Further, FERC established the procedure by rule, which is still in effect.

The MDE reasonably relied on FERC's interpretation—repeatedly announced in the form of numerous Commission orders—that the withdrawal and resubmission of Section 401 applications, like Exelon's here, started a new one-year period for state agencies to act. The MDE

conformed its actions accordingly to preserve its statutory authority based on FERC's officially announced interpretation. Given FERC's interpretation of Section 401, a review of FERC's record demonstrates that the MDE acted diligently in pursuing the right to exercise Section 401 certification authority over Exelon's relicensing application, although it is beyond the scope of this motion to catalogue all of the actions the MDE took concerning Exelon's Section 401 application. The state's actions did not reflect an effort to thwart federal relicensing. Rather, the parties reasonably used the withdraw-and-resubmit process to ensure that any relicensing of the Conowingo Hydroelectric Project—which was the subject of lengthy and complex studies involving numerous stakeholders—would be in compliance with Maryland's water quality standards. Had the MDE been aware that FERC's guidance was wrong and that the withdrawal-and-resubmit procedure would not reset the one-year certification deadline, the MDE would have denied Exelon's application without prejudice, because the Exelon request did not contain the information necessary to ensure that relicensing would be consistent with state water quality standards.

Further, regarding Exelon's argument that MDE's Section 401 Certification did not suffice because it was merely a "placeholder," the courts have refused to read additional terms into the waiver provision of Section 401 that do not appear in the certification. In *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963 (D.C. Cir. 2011), relied on by Exelon, the applicant contended that the State had waived its certification authority by issuing a certification on the final day of the one-year period that included a "number of terms and conditions," including a requirement that the applicant post a surety bond. *Id*. at 966. The certification further provided that it would not become effective until the bond was in place. *Id*. Like Exelon, the applicant argued that the State had

waived its certification authority because the certification was not effective prior to the statutory deadline. This Court rejected that argument:

> The Commission's interpretation of Section 401(a)(1) to allow licensing once a certification has been "obtained," 33 U.S.C. § 1341(a)(1), even if the certification is not by its terms immediately "effective," is consistent with the plain text and statutory purpose of the provision. It also conforms to the State's understanding of when the condition in its certification is enforceable. Nowhere in Section 401 is it stated that a certification must be fully effective prior to the one-year period much less prior to licensing; it requires only that a State "act" within one year of an application and that a certification be "obtained." 33 U.S.C. § 1341(a)(1). The largely unqualified terms of Section 401 are broader than Alcoa Power suggests and unrelated to the effectiveness of a certification prior to licensing. To accept Alcoa Power's interpretation would require adding terms to the statute that Congress has not included. *See Nat'l Ass'n of Mfrs. v. Dep't of Labor*, 159 F.3d 597, 600, 333 U.S. App. D.C. 7 (D.C. Cir. 1998).

643 F.3d at 974.

The other cases cited by Exelon also support the validity of the MDE's Section 401 Certification. For example, in *Duke Energy Carolinas, LLC*, the Commission noted that:

> Even if South Carolina's notice were deemed not to be a "final action," this would not help Duke Energy. Section 401 of the Clean Water Act does not mandate "final action" by a state, but rather provides that a state must "act on a certification request within one year" (emphasis added). While we might agree that the issuance of a draft certification (which some states elect to provide) with no provision for it becoming final would not satisfy the requirement to act, we conclude that where, as here, a state timely issues a certification that will by its terms become final within 15 days if not appealed, the state action is sufficient to avoid waiver.

147 FERC ¶ 61,037, at Para. 18 (2014). Notwithstanding Exelon's vociferous protestations, no reasonable person could construe MDE's Section 401 Certification as a "draft certification" or "placeholder."

3. Even if MDE is Deemed to Have Waived its Section 401 Authority, the Commission Should Impose the Requirements Contained in its Certification

Maryland's counties have been mandated by the Maryland General Assembly and MDE with planning and funding obligations related to restoration of the Chesapeake Bay, and spend

millions of dollars on protecting our water resources with TMDL strategies. Such effort is abundantly demonstrated in the Coalition's Motion to Intervene in the Conowingo Hydroelectric Project's relicensing docket (Project No. 405-106 referred to as the "Relicensing Docket"), supplements thereto, and the substantive documentation filed by the Coalition into the Commission's record, all of which are incorporated herein by this reference.[5] The Coalition's filings show that one of the largest threats to the water quality of the Chesapeake Bay is the impact

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[5] Including but not limited to the following filings:

a. Comments of the Clean Chesapeake Coalition re the water quality of the Chesapeake Bay under P-405. eLibrary no. 20130307-0002, 3/1/2013
b. Comments of Clean Chesapeake Coalition re the Maryland Conowingo Hydroelectric Project under P-405 filed 4/8/2013, eLibrary No. 20130408-0008.
c. Motion to Intervene filed 06/24/2013, eLibrary No. 20130625-5007 and exhibits, eLibrary 20130625-5039.
d. Comments re the 6/13/13 letter about a pre-filing consultation process for the Maryland Conowingo Hydroelectric Project under P-405 filed 7/9/2013, eLibrary No. 20130709-0007.
e. Comment Re:Exelon's request to FERC to extend August 30, 2013 deadline for filing MDE water qual. Cert. and September 30, 2013 deadline for filing interventions, protests, comments, prelim terms and cond, etc. filed 8/23/2013, eLibrary No. 20130823-5120
f. Comments re the environmental impact of the Conowingo Dam Project under P-405 filed 9/3/2013, eLibrary No. 20130903-0003.
g. First Supplement to Motion to Intervene filed 01/31/2014, eLibrary No. 20140131-5218.
h. Second Supplement to Motion to Intervene filed 3/28/2014, eLibrary No. 20140328-5298
i. Third Supplement to Motion to Intervene filed 8/6/2014, eLibrary No. 20140806-5075
j. Fourth Supplement to Motion to Intervene filed 9/29/2014, eLibrary No. 20140929-5206
k. Comment regarding the U.S. Environmental Protection Agency's filing request to FERC to include the Lower Susquehanna River Watershed Assessment Draft Report under P-405 filed 1/7/2015, eLibrary No. 20150107-5043.
l. Comment filed 1/16/2015, eLibrary No. 20150116-5243.
m. Comment filed 1/16/2015, eLibrary No. 20150116-5307.
n. Comments on the Draft Lower Susquehanna River Watershed Assessment for the Conowingo Hydro Project under P-405 et al. filed 1/22/2015, eLibrary No. 20150122-0025.
o. Amended Comments of the Clean Chesapeake Coalition under P-405.replacing Comments filed by the Clean Chesapeake Coalition on 1/16/2015 (Submittal 20150116-5307) regarding the recently filed Support Conowingo Dam Petition (Submittal 20150109-5081) filed 1/22/2015, eLibrary No. 20150122-5142.
p. Comments re Exelon testimony (Christopher Gould) at Maryland Public Service Commission filed 1/30/2015, eLibrary No. 20150122-5142.
q. Comments filed 2/25/2015, eLibrary No. 20150225-5033.
r. Final EIS Comments of Clean Chesapeake Coalition under P-405 filed 4/20/2015, eLibrary No. 20150420-5283.
s. Comments filed 3/4/2016, eLibrary No. 20160304-5289.

of scour from the floor of the Conowingo Reservoir (a/k/a the "Conowingo Pond") located directly behind the Conowingo Dam. During storm events, suspended solids trapped behind the Dam during low flow rate and normal flow conditions are agitated, become re-suspended in the Susquehanna River, and flow through the Dam's gates into the Chesapeake Bay. Nutrient-laden sediment from the Susquehanna River has seriously impacted the water quality of the Chesapeake Bay.

In August 2012, Robert M. Hirsch of the Department of Interior's U.S. Geological Survey ("USGS") published a report that the Conowingo Reservoir had virtually achieved dynamic equilibrium reducing the Conowingo Dam's ability to trap sediments and nutrients. In presenting this report, Mr. Hirsch discussed the scour phenomena but advised that bathymetric data was warranted. Exelon acknowledged this lack of data from this report and other studies and agreed to collaborate with MDE in obtaining additional data through a year-to-year extension of Exelon's current license application while additional data is collected.[6] The need for additional data was not only acknowledged by the USGS report but also by the Counties and the Coalition's concerns regarding the detrimental impact to their waters and the Bay.

In its Petition for Declaratory Order, Exelon casts itself as a victim being coerced into conducting additional environmental studies by ignoring prior study results that show the need for additional data. Studies such as the Lower Susquehanna River Watershed Assessment Study (LSRWA) have expressly identified local government as targeted stakeholders that will be most likely impacted.[7] The Coalition submitted over 50 pages of comments regarding the LSRWA

[6] Exelon's December 22, 2014 letter from Baker Botts LLP to John B. Smith, Chief of the Mid-Atlantic Branch, FERC's Division of Hydropower licensing stated that Exelon intends to continue to withdraw and refile the 401 application for Exelon's Conowingo Hydroelectric Project every year until the study is complete.
[7] Page 4 of 5, Coalition's January 6, 2015 letter to FERC regarding the LSRWA study included in the Administrative Record.

study expressing the need for more data to MDE and the FERC docket and by showing that the raw data necessary to make a determination regarding the impact of scour was nonexistent.[8] Only eight (8) bed core samples were taken from the Conowingo Reservoir to a maximum depth of only one (1) foot. In addition, there was insufficient data to calibrate the ADH model for river flows greater than 600,000 cfs. How could a two-dimensional model (AdH model) provide accurate results with an open boundary approach? It was quite clear that the AdH model was incapable of simulating sediments passing through the flood gates of the Conowingo Dam.

Congress intended Section 401 of the CWA to curb a state's "dalliance or unreasonable delay." *See* e.g. 115 Cong. Rec. 9264 (1969), which has not been the case in the Conowingo Hydroelectric Project recertification process. Multiple environmental studies to address concerns have been necessary throughout this proceeding. Given the stark results of those studies, imposing the MDE's Water Quality Certification conditions in Exelon's renewed license for the Conowingo Hydroelectric Project does not present an unreasonable burden given the serious impact this project will have on Maryland's waters. Since assuming control over the Conowingo Hydroelectric Project, Exelon has not operated or maintained the project as an environmental steward. Exelon has ignored the state and local governments' environmental concerns. Such mandatory conditions imposed by Maryland's certification are necessary given Exelon's dismal track record.

C. Right of Coalition members, i.e., Maryland local governments, to intervene.

Intervenors are Maryland counties, which are local government entities that have the right to sue and be sued, to tax and spend, and to engage in land use planning including environmental planning. See, e.g., Md. Code Ann., Local Government §§ 1-101 et seq., 12-101 et seq., 13-101 et seq., 16-101 et seq.; Md. Code Ann., Land Use §§ 1-101 et seq., 3-101 et seq., 4-101 et seq.; Md.

[8] Comments on the Draft Lower Susquehanna River Watershed Assessment for the Conowingo Hydro Project under P-405 et al. filed 1/22/2015, eLibrary No. 20150122-0025

Code Ann Envir. §§ 5-703, 5-903(b), 9-301 et seq., 9-501 et seq., 9-601 et seq. Such environmental plans are a component of the County Master Plan. Md. Code Ann. Land Use §§ 4-101 et seq. & Md. Code Ann. Envir. §§ 9-501 et seq. The objective of such plans is to interrelate and correlate to improve the human environment and the natural environment in which county residents live and work. *Id*.

Additionally, per the EPA mandate in furtherance of the Chesapeake Bay TMDL goals that each Bay watershed state prepare a Watershed Implementation Plan ("WIP"), the MDE is coordinating with all Maryland counties, including the Coalition counties, to prepare local Phase III WIPs.[9] The county WIPs are incorporated into the State of Maryland's WIP which is submitted to EPA in furtherance of meeting the goals of the Bay TMDL. The objective of the county WIPs is to explain what actions each local government will undertake and/or support to foster improvement to the water quality of the Bay and Bay tributaries. The goal of the county WIPs is to improve the human environment of those who enjoy, derive a living from, and use resources in or connected with the Bay and Bay tributaries and the natural environment of flora and fauna that inhabit the Bay and Bay tributaries. In essence, the goal of the county WIPs parallels the goal of the Commission's environmental assessment in this proceeding. The Commission's environmental assessment in this proceeding will directly impact what the Coalition counties are able to undertake and to accomplish pursuant to their WIPs. Absent meaningful and enforceable conditions on the operation and maintenance of the Dam through the relicensing process to minimize and/or mitigate the adverse downstream environmental impacts attributable to the loss of trapping capacity in the Conowingo Reservoir, implementation of the Coalition county WIPs will be a wasteful fool's errand.

[9] See MDE website - Maryland's Phase III WIP Development; https://mde.maryland.gov/programs/Water/TMDL/TMDLImplementation/Pages/WIP-3-Vision.aspx

Each Coalition county has a direct monetary interest in the application. The Dam, because of the sediments and other pollutants that it has trapped and that are scoured from the floor of the reservoir behind the Dam and deposited in shocking proportions during significant storm events, directly impacts whether actions undertaken and expenditures made by the Coalition counties to improve the water quality of the Bay and Bay tributaries will have any meaningful impact on improvement of the Bay. If the volume of sediments introduced into the Bay from scour and from activity in the watersheds above the Dam is not dramatically reduced, no amount of expenditures and efforts by Maryland local governments, including all Coalition members, will reverse the devastation caused by the operation and maintenance (or lack thereof) of the Dam and activities above the Dam.

It is senseless for the Coalition counties to fund and implement a WIP when scour from the Conowingo Reservoir has the ability to continue to negate any positive achievements in water quality improvement (i.e., oyster and SAV restoration) during significant storm events. Thus, part of the WIP of Coalition counties is to intervene in this relicensing proceeding and to petition the Commission to require Exelon to dredge the sediments and maintain the stormwater management pond, which Exelon refers to as the Conowingo Pond, so that scour from the floor of the reservoir does not routinely damage the Bay estuary and undermine Bay restoration efforts and expenditures below the Dam. The Conowingo Reservoir, just like any stormwater management pond, has to be dredged and maintained or it will become an environmental hazard. With the loss of trapping capacity, the Conowingo Pond is an environmental hazard. The Bay's natural ecosystems are not able to ameliorate the deleterious impact of the massive release of scoured nutrient-laden sediments during significant storm events. It is time for the Commission to impose the conditions

incorporated in MDE's water quality certification through the relicensing of the Dam in order to save the Bay, or at least give the upper Bay breathing room for restoration.

Coalition counties situated on the Chesapeake Bay are directly impacted by the sediments scoured from the floor of the Conowingo Reservoir. The oyster, rockfish, crab and other marine populations off the shores of Cecil, Kent, Queen Anne's and Dorchester Counties have been greatly diminished, if not totally wiped out, due to scour from the Conowingo Reservoir. This has resulted in the decimation of seafood harvesting and seafood processing/packaging industries that once thrived in those counties prior to Hurricane Agnes in 1972.

The marina industry and related trades in Cecil, Kent, Queen Anne's and Dorchester Counties have been detrimentally impacted by sediment scour that fills the navigable channels of the Bay, the marinas in those counties, and the Bay tributaries in those counties used to access the Bay.

Sediment scour has detrimentally and directly impacted the way of life in those counties and adversely affected the human and economic environment in those counties in addition to the adverse impact on the natural environment.

All of the public has an interest in a clean Chesapeake Bay for recreation and commercial endeavors. The economic development and the economic vitality of the Bay counties are more directly impacted by the health of the Bay because their seafood harvesting and processing industries, that once formed the backbone of those local economies, are disappearing.

The regulations and mandates being imposed by federal and state authorities on Coalition counties in the nature of saving the Bay and meeting TMDL goals have impaired the affordability and attractiveness of these counties as places to live and work in comparison to other communities

in the neighboring states of Pennsylvania, Delaware, and West Virginia that are not burdened with such regulations and expenses.

1. The Federal Powers Act.

The Federal Powers Act requires FERC to consider impacts to local government interests during the license renewal process. 16 U.S.C. §§ 802(b)(2), 803(a)(2)(B), 808 (a)(2)(D). More specifically, FERC "shall consider … [t]he recommendations of … agencies exercising administration over … recreation, cultural and other relevant resources of the State in which the project is located …." 16 U.S.C. § 803(a)(2)(B). As detailed in Part II.C supra, the Coalition counties exercise administration over recreational, cultural and other relevant resources that are and will be directly and indirectly impacted by activities at the Dam and in the Conowingo Pond formed by the Dam that is the subject of this license proceeding.

In addition, FERC is committed to adhering to the objectives and aims of the National Environmental Policy Act of 1969 ("NEPA"). 18 C.F.R. § 2.80(a). As FERC recognizes, NEPA requires FERC to include a detailed environmental statement including the impact to the human environment. *Id*.

2. NEPA and its regulations provide a legal basis for the intervention of the Coalition members.

NEPA, 42 U.S.C. § 4321 et seq., provides a legal basis for intervention by Coalition members. More specifically, NEPA provides:

> The Congress … declares that it is the continuing policy of the Federal Government, in cooperation with … local governments, … to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(Emphasis added.) 42 U.S.C. § 4331(a).[10] NEPA created the Council on Environmental Quality ("Council") pursuant to 42 U.S.C. §§ 4341-4347.[11] Section 4345 provides in pertinent part:

> The Council shall –
> (1) **consult with** … representatives of science, industry, agriculture, labor, conservation organizations, State and **local governments** and other groups, as it deems advisable; and
> (2) **utilize, to the fullest extent possible**, **the services, facilities, and information** (including statistical information) **of public** and private **agencies** and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

(Emphasis added.) The current state of the Chesapeake Bay, which EPA has declared an impaired body of water, requires cooperation of federal, state and local governmental entities and agencies to coordinate how sources of impairment and pollution are addressed and rectified.[12] Clearly, scour from the Conowingo Reservoir and the effect of the Dam in altering the water quality of the Susquehanna River above and immediately below the Dam make the Commission's decisions relative to Exelon during this relicensing process integral to the efforts of the Coalition members, in conjunction with EPA, Bay watershed states and local governments, and Maryland State regulatory agencies in pursuing cost-effective solutions and funding to improve the Bay.

Regulations established in response to NEPA provide for specific instruction in regards to engaging local governments in federal environmental proceedings, thereby supporting the Coalition's legal argument for the Coalition's intervening status. Specifically, 40 C.F.R. § 1503.1 provides that a federal agency should request the comments of local agencies prior to the preparation of a final environmental impact statement. This further requires the Commission's

[10] § 4331(c) provides further: "The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."
[11] *See generally* § 4344 for the Council's duties.
[12] *See generally* Executive Order 13508, *Chesapeake Bay Protection and Restoration*, May 12, 2009.

consideration of county input and coordination with county efforts as part of the NEPA process that the Commission is required to implement.

3. Executive Orders.

Executive Orders ("EO") promulgated under NEPA's authority support the Coalition's legal right to intervene. EO 13352 – Facilitation of Cooperative Conservation, August 26, 2004, attempts to ensure that federal agencies "implement laws relating to the environment…in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking…"[13] (Emphasis added.) "Cooperative conservation" is defined as "actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments…"[14] Section 3(a) of EO 13352 establishes finally that the secretaries of the subjected federal agencies must "implement laws relating to the environment and natural resources in a manner that: (i) facilities cooperative conservation; (ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources; and (iii) properly accommodates local participation in Federal decisionmaking…" (Emphasis added.)

Executive Order 11514 – Protection and Enhancement of Environmental Quality, March 5, 1970, Section 2(a) states that "[h]eads of agencies shall consult with appropriate Federal, State and local agencies in carrying out their activities as they affect the quality of the environment." Section 2(b) goes on to establish that federal agencies "shall [d]evelop procedures to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties..."

[13] See Executive Order 13352, Facilitation of Cooperative Conservation, Section 1, August 26, 2004.
[14] *Id*. Section 2.

(Emphasis added.) Similar to EO 13352, although passed several decades prior, the federal government specifically contemplated the cooperation and input of local governments in environmental activities that implicate NEPA. NEPA is brought into the Dam relicensing equation pursuant to the environmental issues that are related to the relicensing. The intent of EO 11514 clearly incorporates the interests of local governments and their constituents in matters that relate to NEPA. Further, the language provided in the EO (i.e., "shall") provides for mandatory inclusion of these parties. EO 11514 supports the legal basis for granting the Coalition intervenor status.

It is clear that the federal government, by statute, regulation and Executive Order, has called for local government input and for coordination with local governments during the environmental analysis process. There is abundant legal authority under the factual circumstances presented to support the grant of intervenor status to the Coalition counties.

II. CONCLUSION

The environmental requirements, conditions, and controls imposed by this Commission during the Conowingo Project's relicensing will directly impact each Coalition county's ability to implement its mandated WIP and related policies and programs. The Coalition and its member counties and the citizens thereof will be directly affected by the outcome of the above-captioned proceeding. Thus, the Coalition has a direct and substantial interest in this proceeding and its interests cannot be represented by any other party. Furthermore, the Coalition's intervention in this proceeding on behalf of its member counties and the citizens thereof is in the public interest.

WHEREFORE, the above-named members of the Coalition respectfully request that they be granted full party status in the above-captioned proceeding and be added to the service list as party-intervenors with electronic service to be made on the below named individuals on behalf of each member county:

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of March, 2019, a copy of the foregoing Motion to Intervene was served via the Commission's electronic service system upon each person designated on the official service list compiled by the Secretary in this proceeding that has provided an electronic address.

/s/ Charles D. MacLeod

Charles D. MacLeod