

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

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

WATERKEEPERS CHESAPEAKE, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

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

**BRIEF OF AMICI CURIAE MARYLAND STATE SENATOR
STEPHEN S. HERSHEY, JR. AND DELEGATES
JAY A. JACOBS, DANA C. JONES AND
VAUGHN M. STEWART IN SUPPORT OF PETITIONERS**

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

FERC

Federal Energy Regulatory Commission

**IDENTITY OF AMICI, INTEREST
IN THE CASE AND AUTHORITY TO FILE**

Amici are one Member of the Maryland State Senate and three Members of the Maryland House of Delegates from both political parties and different parts of the State.¹ All file as individuals. The source of authority is Fed. R. App. P. 29. This brief is filed based on the consent of all parties and intervenors: Petitioners Waterkeepers Chesapeake, Lower Susquehanna Riverkeeper Association, Shore Rivers and Chesapeake Bay Foundation; Respondent Federal Energy Regulatory Commission; and Intervenors Exelon Power Generation Company, LLC, the United States Department of the Interior on behalf of the U.S. Fish and Wildlife Service, and the Maryland Department of the Environment. Consent was given by counsel for these parties in written communications with counsel for Amici.

Amici relate facts and observations based on their personal experience and knowledge as state legislators and representatives of their constituents. Together they represent six Maryland counties, including one of the two counties where the Conowingo Dam is located (Cecil), two counties immediately below the Dam along the Upper Chesapeake Bay (Kent and Queen Anne's), one county including a major tributary to the Chesapeake Bay, the Choptank River (Caroline), one county further downstream (Anne Arundel), and Maryland's most populous

¹ The Maryland General Assembly has one Member of the State Senate and three Members of the House of Delegates for each of Maryland's Legislative Districts.

county, Montgomery. Amici file this brief to inform the Court of the significant adverse impacts of the Federal Energy Regulatory Commission (FERC) 50-year license for the Conowingo Dam on themselves, their constituents, and their ability to perform their jobs as state legislators.

Senator Stephen S. Hershey, Jr., a Republican, has been the State Senator representing Maryland District 36 since 2013. From 2011 to 2013 he represented District 36 in the Maryland House of Delegates. He is a resident of Queen Anne's County. District 36 (also represented by Amicus Delegate Jacobs) includes Cecil, Kent, Queen Anne's, and Caroline Counties on Maryland's Eastern Shore. Senator Hershey's constituents include many commercial watermen who depend on the fish and shellfish of the Chesapeake Bay for their livelihoods, as well as many who work in businesses that serve tourists and recreationists, all of whom depend on a clean and healthy Chesapeake Bay.

Senator Hershey's primary concern with the FERC license is its failure to address the problem of the hundreds of tons of sediment that have accumulated in the reservoir behind the Conowingo Dam over the years since it was built in 1928. While the Dam used to trap sediment and other materials coming from upstream, the Dam owners never maintained the reservoir or had a sediment management program in place as they should have. As a result, the reservoir has filled in and reached capacity, and any heavy rainfall event in the watershed above the Dam

causes the Dam to release large amounts of sediment and other materials through its floodgates and by overtopping of the Dam.

These events cause many types of damage, one of which is sediment covering up many historic native oyster beds. This not only hurts commercial watermen, but because oysters are important for water quality, it also degrades the water quality of the Bay. Maryland taxpayers have been paying for oyster restoration projects in the Chesapeake Bay and its tributaries aimed at improving the oyster fishery as well as the ecological health of the Bay. However, the success of these projects has been limited by the failure to address the sediment that continues to be released from the Dam.

The Clean Water Act Section 401 Certification, 33 U.S.C. § 1341(a), that was issued by the Maryland Department of the Environment in 2018 had many provisions to address the sediment problems and require Exelon, the Dam owner, to pay its fair share to remediate the problems the Dam causes. Most of these provisions, and the 401 Certification itself, were abandoned in the FERC license, and as a result Senator Hershey's constituents and the State of Maryland are left to attempt to address the issues and bear their enormous economic and environmental costs.

Because of these concerns, after the settlement agreement that abandoned the 401 Certification was filed with FERC in October 2019, Senator Hershey,

along with Amici Delegates Jacobs and Stewart and others, advanced legislation to prohibit the State of Maryland from entering an agreement that waived its authority under Section 401. The legislation was considered in the 2020 legislative session, but, as a result of the COVID-19 global pandemic, that session adjourned early and the Assembly was unable to act on it. The legislation was again considered in the 2021 session, but FERC's action approving the license rendered its adoption futile. In February 2021, the Maryland Department of the Environment and Exelon filed a motion with FERC to expedite a ruling on the settlement and for issuance of the new license. In response, Senator Hershey wrote a letter to FERC on March 11, 2021, asking that it not act on the license until the conclusion of the legislative session in April 2021, so that the legislature had time to act on the proposed legislation. FERC ignored the letter and issued the license on March 19, 2021, thwarting the legislature's ability to act.

Senator Hershey is now planning to introduce legislation that will require Exelon to contribute financially to some of the efforts to partially compensate for the damage caused by the Dam that is not addressed in the FERC license, especially regarding oyster restoration.

Delegate Jay A. Jacobs, a Republican, like Senator Hershey, represents Maryland District 36, which includes Cecil, Kent, Queen Anne's, and Caroline Counties on Maryland's Eastern Shore. He has been a delegate since 2011, and is

a resident of Kent County. Located immediately below the Conowingo Dam, he and his constituents are on the front lines of downstream effects of pollution from the Dam. Delegate Jacobs' constituents include many watermen who depend on the fish and shellfish of the Chesapeake Bay for their livelihoods. They also include many small business owners and employees whose businesses, such as seafood restaurants, boat marinas, and those providing services to tourists and recreationists, depend on a clean and healthy Chesapeake Bay. For example, just in Delegate Jacobs' hometown of Rock Hall, there are approximately 1700 boat slips, with boat owners from numerous locations in Maryland and other states contributing to the local economy.

Residents of the four counties in District 36 are directly harmed when the Dam releases sediment, debris, sewage and other pollution into the Susquehanna River and Upper Chesapeake Bay. These releases have greatly grown in frequency and magnitude in recent years, as the reservoir behind the dam has filled to capacity and can no longer absorb and retain additional sediment and other materials coming from upstream. These releases harm fish and shellfish and also interfere with both commercial and recreational boating when sediment reduces visibility and debris creates dangerous underwater obstacles. The Dam also severely impedes fish migration, harming commercial and recreational fishermen in Delegate Jacobs' District. Forty percent of the freshwater that flows into the

Bay comes across the Dam, which means that the Bay can never be clean or healthy unless that water is clean and free of pollution and debris.

The Maryland 401 Certification required Dam owner Exelon to protect habitat for aquatic and terrestrial species, ensure compliance with Maryland water quality standards, clean up trash and debris and control algae in the Dam's reservoir, and dramatically reduce nutrients and sediments discharged by the Dam. However, the FERC license entirely relinquished the 401 Certification and does none of these things. This leaves the residents of Delegate Jacobs' District unprotected from these adverse effects for the next 50 years of the license term.

Delegate Jacobs has observed and learned from his constituents, including some from multi-generational families of watermen, that the most recent harvest season has had the most dead zones in the Upper Bay in memory and the worst crab harvest in years. While the season for crabs started out unusually good, four large rain events in the summer and fall of 2021 caused the Dam to release large amounts of sediment into the Upper Bay. After that, watermen began retrieving only dead crabs and fish from their traps. There are no provisions in the FERC license for watermen to be compensated for such losses, and only the most minimal provisions to prevent or mitigate them. The license provides for only very small amounts of funding for oyster restoration and other mitigation projects over

its 50-year term, a tiny fraction of the amount that will be needed. It provides only \$500,000 to find solutions for the sediment issues, a trifling amount over 50 years.

Delegate Jacobs is concerned that even far worse impacts on his constituents will occur over the 50-year license term that is just now beginning. This is especially so given that the devastating impacts on the crab harvest last year took place solely because of rain events, without any major storm or hurricane. Such storms are guaranteed to occur over the next 50 years. His constituents are at risk of catastrophic consequences should a major storm cause the nearly mile-long, 94-foot-high Dam to allow debris and millions of tons of sediment trapped behind it to flow into the Chesapeake Bay. The FERC license ties the hands of the Maryland Department of the Environment from requiring new restrictions or mitigation to meet new conditions over the next 50 years.

As a legislator, Delegate Jacobs attempted to prevent the adoption of the settlement between Exelon and the Maryland Department of the Environment that negated the terms of the 401 Certification by joining with Senator Hershey and others in the legislation described above. In both 2020 and 2021, he held hearings on the legislation that garnered significant support, but the legislation was not reported out of committee. FERC thwarted his legislative efforts by issuing the license in March 2021, cementing in the settlement terms for the next 50 years.

The settlement, and ultimately the FERC license, did not require Exelon to pay a fair share of the cost to remediate the pollution the Dam causes, requiring only a small fraction of the payments required under the 401 Certification. In response, in 2019 Delegate Jacobs introduced a bi-partisan Joint Resolution to hold Exelon financially responsible for a portion of Conowingo Dam's clean-up costs as well as 25% of the costs associated with the Dam's Watershed Implementation Plan. Even if implemented, such provisions will only very partially compensate for the damage and lost funding occasioned by the FERC license.

Delegate Jacobs will face continuing challenges as a legislator stemming from the increased funding that will be required from the State to attempt to compensate for the amounts that Exelon will not be required to pay. This will squeeze state budgets and constrict his ability to fund his other legislative priorities going forward.

Delegate Dana C. Jones is a Democrat who has represented District 30A, Anne Arundel County, since May 2020. She lives and is raising her family in the County. Even though they are several miles downstream from the Conowingo Dam, when there are releases from the floodgates and overtopping of the Dam, she and her constituents are overrun with enormous quantities of trash and debris in their yards, parks, and on their beaches and shorelines. This includes large objects like trees, tires, and refrigerators, as well as tons of plastic. The affected areas can

be dangerous to access and take several weeks to clean up each time this occurs. Neighborhood groups spend significant money and volunteer time to remove these materials and dispose of them. These events are likely to become more frequent and damaging as climate change results in more frequent and more intense storms. The FERC license fails to prevent or mitigate these events, or require Exelon to pay its fair share to do so, so that the responsibility falls on the State or directly on the public, including her constituents.

The settlement and the FERC license that adopted it deprived the State and its citizens of literally billions of dollars that Exelon would have paid under the 401 Certification over the 50-year license term. The Certification required \$4.5 billion (\$8.6 billion including a conservative inflation rate) in monetary payments to fund nutrient pollution reductions, or that Exelon undertake direct measures to achieve those reductions itself. These funds for clean-up and mitigation of the impacts of the Dam will now have to come from other sources, burdening the State and its citizens, including Delegate Jones and her constituents. There is a good possibility that much of these funds cannot be obtained at all, and the Susquehanna River and Chesapeake Bay and the people who depend on them will suffer the consequences. Either way, there will be ripple effects reaching the entire economy of Maryland.

In order to confront these issues, Delegate Jones is planning to introduce legislation that would charge an annual fee to hydroelectric dam owners. The funds would be directed for use for aquatic species restoration, mitigation of water quality impacts, and climate adaptation related to dam impacts. This legislation was only made necessary because of the FERC license and its abandonment of the 401 Certification, and will only compensate for a small percent of the funds that were lost.

The state funds that are expended to compensate for the losses stemming from the FERC license will squeeze the state budget for all other potential legislative initiatives that Delegate Jones might pursue. Already in Governor Hogan's proposed capital budget for Fiscal Year 2023, \$31 million has been proposed specifically to address water quality issues related to the Conowingo Dam, comprising \$25 million for watershed improvements and \$6 million for dredging.² The lack of funding from Exelon also puts more pressure on various sources of grants and funds for mitigation projects Delegate Jones might

²See DEPT. OF BUDGET AND MGMT., *Summary of FY 2023 Capital Budget as Proposed*, <https://dbm.maryland.gov/budget/Documents/capbudget/Proposed/FY2023-CBAP.pdf> at p. 3 (Last visited Feb. 4, 2022); *see also* DEPT. OF BUDGET AND MGMT., OFFICE OF CAPITAL BUDGETING, <https://dbm.maryland.gov/budget/Documents/capbudget/Proposed/FY2023-CapitalBudgetVolume.pdf>, pp. 37 and 47 (Jan. 2022) (describing the projects to be funded).

champion, and requires non-profit organizations to attempt to pick up more of the work. Basically, the legislature and the public are left to attempt to compensate because Exelon has been relieved from funding clean-up and mitigation of the damage it is causing.

Delegate Vaughn M. Stewart, a Democrat, has represented District 19 in Montgomery County since 2019. Even though his constituents are not directly affected by pollution from Conowingo Dam in their District, they will all pay for the costs of remediation from which Exelon has been excused, through their taxes and utility bills, for the 50-year life of the license. As residents of the most populous Maryland county which also has high tax rates, Montgomery County residents will end up paying the lion's share of the costs necessitated by FERC's decision to grant the license without the conditions and monetary payments the 401 Certification had imposed. Delegate Stewart has a long list of legislative proposals to benefit Maryland's environment that he has already or would like to introduce that will be hindered by the loss of funds from Exelon.

The major shortfall in revenue that Exelon would have provided will result in both increased taxes and fees and shortfalls in services for all Maryland residents, especially in the environmental and pollution control realm that Exelon's payments would have addressed. The pollution and harm to the Chesapeake Bay that the FERC license fails to address will affect the state's economy broadly,

including seafood and tourism and recreation-related businesses that are dependent on the beauty, cleanliness, and health of the Bay. It will also diminish the enjoyment of the Chesapeake Bay by the many Maryland residents, including in Delegate Stewart's District, who visit the Bay for recreation and vacations, or own vacation homes there. In damaging the Bay, it will damage the most iconic feature of Maryland for all of its residents.

In order to address these issues, Delegate Stewart joined with Senator Hershey and Delegate Jacobs as a lead sponsor of the bills described above seeking to halt the settlement process that led to the FERC license. If allowed to remain in place, the FERC license will harm the economic, recreational, and aesthetic interests of his constituents, and hamper his ability to enact his legislative agenda.

STATEMENT OF AUTHORSHIP AND FINANCIAL SUPPORT

No party's counsel has authored this brief in whole or part. No party or party's counsel has contributed money that was intended to fund preparing or submitting the brief, and no person other than amici curiae or their counsel has contributed money intended to fund preparing or submitting the brief.

ARGUMENT

Amici do not address here the factual and legal arguments for invalidating FERC's license which have been ably presented in the Petitioners' brief, and concur in the arguments presented there. They focus instead on the adverse

impacts of the FERC license, and particularly its abnegation of the Maryland Section 401 Certification, on themselves, their constituents, and the State of Maryland and its legislature.

In essence, FERC's claim that it can ignore and invalidate the already issued State 401 Certification, as well as other state authorities described below, amounts to a nullification of the authority and responsibility of the executive branch of the State of Maryland, through the Maryland Department of the Environment, to protect the quality of state waters and related ecosystems for the benefit of its citizens. The FERC license leaves Maryland's citizens to suffer the environmental consequences and its state coffers to pick up the multi-billion-dollar tab for the damage from the Conowingo Dam, instead of putting those responsibilities on Exelon, where the State's Certification placed them and where they belong.

Maryland legislators like Amici depend on executive branch agencies like the Maryland Department of the Environment to perform their functions to protect the environment and require polluters to pay. The legislative branch does not have the resources to even barely begin to compensate for the nullification of the Maryland 401 Certification. Legislative measures that attempt to partially compensate for the loss of the Certification's terms drain state resources while leaving much of the damage unremediated. In short, the FERC license stymies Amici's ability to protect their constituents and legislate for their benefit.

The Maryland 401 Certification, as required by law, was the product of an extensive public process that included numerous affected organizations and citizens submitting comments and engaging in public hearings. *See* Md. Code Regs. 26.08.02.10.C, D and F. The resulting 401 Certification recognized the myriad adverse effects of the Conowingo Dam on Maryland's waters, their fish and wildlife, and adjoining coastal areas. It tasked Exelon, the private dam owner, with mitigating those effects through numerous remediation actions and payments. Exelon, which profits richly from the use of state waters for its hydroelectric project, was appropriately required to bear much of the burden for the pollution and damage its project causes.

However, all of this was subsequently undone in closed-door negotiations that excluded all of the groups who had previously taken part in the process and that afforded none of the procedural protections provided in Maryland law. The resulting settlement agreement was presented to the public only as a *fait accompli*, and was not altered in any manner despite strenuous objections from the interested parties. Without any change in the facts that had supported the terms of the 401 Certification, which asserted that its terms were necessary to assure compliance with the Clean Water Act, the Maryland Department of the Environment entered into a settlement agreement that ignored all of those terms. Then FERC interpreted that settlement to somehow waive the state's 401 certification authority, both

retroactively to nullify the 2018 Certification, and prospectively for the next 50 years.

The settlement and the FERC license went beyond nullifying the 401 Certification, and waived the State's authority over the entire 50-year license term to impose requirements based on the Conowingo Watershed Implementation Plan, the Chesapeake Bay Total Maximum Daily Load, and Clean Water Act and state discharge permits for the Dam. The settlement even contains a clause that in any future court or administrative proceeding, the State will represent that Exelon's discharges meet state water quality standards, despite the fact that the settlement and license nowhere claim that their terms will result in meeting those standards.

In short, the settlement now adopted into the FERC license contains extremely weak terms that do not ensure that Maryland state water quality standards will be met and do not address or mitigate most of the Dam's adverse impacts on Maryland's people and environment.

The 2018 Certification was the product of all of the mandated procedures and input from interested parties, resulting in a product that protected the interests of the State and its residents. Its abandonment was just the opposite, evading all of the required processes and forfeiting the State's legitimate interests.

As described above, this license will have dire economic and environmental consequences for the State's residents for the next 50 years. The legislature will

confront budgetary constraints occasioned by the failure of the license to require Exelon to pay for the damage it is causing (and profiting from) for the next two generations. Many legislative initiatives that Amici and other legislators would want to pursue will be foreclosed. The State and its legislature will be forced to grapple with the damage from the Dam that it cannot afford to mitigate or remediate. As just one example, the damage to shellfish populations may force the legislature to impose catch quotas or even cancel a season entirely because of the harm the Dam is causing. The State's economy, including its seafood and tourism industries, will continue to be harmed.

The economic and environmental harm will likely escalate over time as storms intensified by climate change cause the Dam to release more pollution, sediment, and debris. Communities will be forced to grapple with frequent onslaughts of materials from the dam overrunning their waterbodies, shorelines, and neighborhoods. Most concerning, the State's crown jewel, the Chesapeake Bay, will be at risk of environmental destruction.

CONCLUSION

Amici urge the Court to rule in favor of Petitioners and vacate the License Order and remand it to FERC with instructions to reissue the license to include Maryland's 2018 Certification.

DATED: February 4, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Counsel hereby certifies, in accordance with Federal Rules of Appellate Procedure 32(a)(5), that the foregoing Brief of Amici Curiae contains 3,733 words, as counted by counsel's word processing system, and thus complies with the 6,500 word limit.

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

DATED: February 4, 2022

/s/ Paula Dinerstein
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