



FAQs on the MDE-Exelon Settlement Agreement on the Conowingo Dam Relicensing

In response to misunderstandings and misinformation circulating in the Maryland General Assembly, Waterkeepers Chesapeake and Lower Susquehanna Riverkeeper offer these FAQs that support the need for emergency legislation prohibiting Maryland from waiving its § 401 certification authority under the Clean Water Act.

Prior to the settlement agreement, did Maryland waive their authority to issue a water quality certification under the Clean Water Act?

No. MDE issued a draft certificate as part of the license agreement in April 2018, containing strong provisions, including removal of 6 million pounds of nitrogen and 260,000 pounds of phosphorus every year for the next 50 years. This is estimated to cost \$172 million.

Is there a recent federal court case that said that MDE had waived their authority?

No. There is a recent federal court case on a § 401 certification related to Hydropower, but it does not apply to the facts for Conowingo. In the *Hoopa Valley* case, the court expressly declined to rule on whether a State could waive its rights to issue a § 401 certification where an applicant withdraws its request and submits one that is either "wholly new" or substantially different, which is what happened with Exelon's application several times.

Exelon's application was glaringly incomplete when it was submitted in 2014, and remained so until Exelon finally provided the Sediment Study in 2017. After the final 2017 application was submitted – the only application that was accompanied by the Sediment Study and the only application that MDE deemed complete – MDE issued a water quality certification for the Conowingo Dam.

See below for a detailed explanation of Exelon's application process and the *Hoopa Valley* case.

Doesn't MDE have other tools it can use to protect water quality?

No. In the settlement agreement, MDE waived all of them. Under the proposed settlement, they will never be able to add additional measures to protect water quality, no matter what happens in the future.

Doesn't the settlement provide hundreds of millions of dollars for water quality improvements?

No. Actual cash payments under the settlement are only \$61 million over the entire 50 years, and much of that is focused on species and habitat restoration rather than water quality. In contrast, the Water Quality Certification issued in 2018 requires \$172 million per year just for nitrogen and phosphorus reductions.

For more information, contact Betsy Nicholas, (202) 423-0504, betsy@waterkeeperschesapeake.org, and Ted Evgeniadis, (609) 571-5278, riverkeeper@lowersusquehannariverkeeper.org

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Can other parties like nonprofit environmental organizations and municipalities require more?

No. The settlement agreement is solely between Maryland and Exelon. Other groups and communities were not allowed to be parties to the settlement, despite multiple requests. Also, the most relevant provisions of the settlement will not be entered into the Federal Energy Regulatory Commission (FERC) 50-year license. Therefore, no other group or municipality can enforce the settlement agreement.

Does the Chesapeake Bay TMDL (clean up plan) apply?

No. The agreement also waives the entire TMDL and Watershed implementation Plan (WIP) process from applying to the Conowingo Dam's pollution.

What about climate change?

The proposed settlement does not take climate change and increased storm intensity into consideration, and, by its terms, MDE will not be able to make any changes for the next 50 years. There will be nothing Maryland can do to stop big storms from dumping huge volumes of sediment and nutrients into the bay, destroying aquatic life, and no new measures to assist with environmental remediation.

Can the Maryland General Assembly do anything?

Yes. There are many actions the General Assembly can take, but the quickest and most effective would be to prohibit Maryland from waiving its § 401 certification authority under the Clean Water Act.

What is the *Hoopa Valley* case and how does it relate to the Conowingo Dam relicensing?

Hoopa Valley addressed a situation where two States, California and Oregon, engaged in a “coordinated withdrawal-and-submission scheme” with an applicant, PacificCorp. PacificCorp “entered a written agreement with the reviewing states to delay water quality certification,” even though “the record indicate[d] that PacificCorp’s water quality certification request ha[d] been complete and ready for review for more than a decade.” Under these highly specific circumstances, *Hoopa Valley* held that the States had not acted on the application and had waived their right to issue a certification under § 401. The *Hoopa Valley* Court **expressly declined to rule on whether a State could waive its rights to issue a § 401 certification where an applicant withdraws its request and submits one that is either “wholly new” or substantially different.** *Id.* at 1104. The Court expressly limited its holding to the specific facts before it, where the PacificCorp’s withdrawals and submissions “were not new requests at all” and the agreement between PacificCorp, the States, and the other parties “ma[de] clear that PacificCorp never intended to submit a new request.”

The record here in Maryland is entirely different, and it makes clear that neither the holding nor the reasoning in *Hoopa Valley* apply. In Maryland, Exelon first filed an application that was either incomplete, defective, or both on January 30, 2014. The very next day, MDE informed Exelon that Exelon’s application “is deficient” with respect to limiting sediment pollution from the Dam. MDE announced that it intended “to deny the application.” To avoid a denial, Exelon then withdrew its application voluntarily and unconditionally. Exelon submitted four applications total over a four year period and the applications that Exelon submitted were new and substantially different every time. Exelon’s second application, submitted in 2015, announced its agreement to fund and participate in the sediment study. Exelon’s third application included a new agreement to improve fish passage over the dam and included a reference to the Lower Susquehanna River Watershed Assessment Final Report. Exelon’s fourth and most recent application contained yet more changes, including a supplemental filing regarding eel passage and a proposal to increase its minimum flows and make them continuous year-round.

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