

# Section 401/Clean Water Act Litigation: Maryland Department of the Environment and Exelon Generation Company, LLC Settlement



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The Maryland Department of the Environment (“MDE”) and Exelon Generation Company, LLC (“Exelon”) entered into a October 29th settlement agreement (“Settlement Agreement”) related to litigation involving a Section 401 Clean Water Act certification.

Exelon had sought a 401 certification from MDE as part of its relicensing process for the Conowingo Hydroelectric Project (“Project”).

Section 401 of the Clean Water Act prohibits federal agencies from issuing permits or licenses that result in exceedance of water quality standards, or other applicable authorities, of a state. This provision of the Clean Water Act requires an applicant for a federal license or permit to provide a certification that any discharges from the facility will comply with applicable state water quality standards. If not provided, the federal permit or license may not be granted. Further, states can impose certain conditions upon federal permits or licenses as a prerequisite for granting the permit or license.

Because a federal license was needed from the Federal Energy Regulatory Commission, Exelon was required by Section 401 of the Clean Water Act to apply to MDE for a water quality certification.

Exelon challenged the MDE 401 certification conditions through an administrative appeal and litigation in state and federal courts. Further, the company filed a Petition for Declaratory Order with the Federal Energy Regulatory Commission, asking that it declare that MDE had waived its right to issue a certification under Section 401 of the Clean Water Act because of a recent federal appellate court decision.

MDE denied the allegations asserted by Exelon in the litigation.

MDE and Exelon entered into an October 29th Settlement Agreement addressing both Federal Energy Regulatory Commission licensing and non-licensing (i.e., Section 401) issues. MDE is conditionally waiving its rights to issue a water quality certification under Section 401 of the Clean Water Act for the relicensing of the Project. The state agency is doing so based on its ability to secure certain environmental benefits along with avoidance of further litigation.

The environmental benefits are stated to be worth approximately \$200 million. They are stated to include:

- \$47 million for climate resiliency projects, including submerged aquatic vegetation, clams, oysters, and restoration of living shorelines.

- \$41 million to significantly increase efforts to remove trash and debris flowing down the Susquehanna River.
- \$25 million for an unprecedented initiative to restore a healthy population of water-filtering mussels in the Susquehanna River, including contribution of land for the construction of a 40,000 square foot, state-of-the-art hatchery.
- \$19 million for other projects to improve water quality in the Chesapeake Bay, including agricultural projects such as cover crops and forest buffers.
- \$12 million to support MDE and the Department of Natural Resources in overseeing and implementing the agreement.
- \$11 million—over and above the commitments already made by Exelon in its 2016 settlement with the U.S. Fish and Wildlife Service—to make upgrades and operational changes to improve the passage of migrating fish and eels.
- \$5 million to conduct chlorophyll A monitoring and reporting.
- \$1 million for eel-related research and projects.
- \$500,000 to fund a study of dredged material management options.
- Elements of the agreement will be submitted for approval to the Federal Energy Regulatory Commission (FERC) as part of the licensing renewal for the dam.

A link to the Settlement Agreement can be downloaded [here](#).