



120 SPEER ROAD, SUITE 1  
CHESTERTOWN, MARYLAND 21620  
PHONE: (410) 810-1381  
FAX: (410) 810-1383  
[WWW.CLEANCHESAPEAKECOALITION.COM](http://WWW.CLEANCHESAPEAKECOALITION.COM)

August 31, 2017

Honorable Christopher Van Hollen, Jr.  
U.S. Senate  
110 Hart Senate Office Building  
Washington, DC 20510

Honorable Benjamin L. Cardin  
U.S. Senate  
509 Hart Senate Office Building  
Washington, DC 20510

Honorable Andrew P. Harris  
House of Representatives  
1533 Longworth House Office Building  
Washington, DC 20515

Honorable C. A. Dutch Ruppersberger III  
House of Representatives  
2416 Rayburn House Office Building  
Washington, DC 20515 – 2002

Honorable John P. Sarbanes  
House of Representatives  
2444 Rayburn House Office Building  
Washington, DC 20515

Honorable Anthony G. Brown  
House of Representatives  
1505 Longworth House Office Building  
Washington, DC 20515

Honorable Steny H. Hoyer  
House of Representatives  
1705 Longworth House Office Building  
Washington, DC 20515

Honorable John K. Delaney  
House of Representatives  
1632 Longworth House Office Building  
Washington, DC 20515 - 2006

Honorable Elijah E. Cummings  
House of Representatives  
2163 Rayburn House Office Building  
Washington, DC 20515

Honorable Jamin B. Raskin  
House of Representatives  
431 Cannon House Office Building  
Washington, DC 20515

Re: H.R. 3043 – Hydropower Policy Modernization Act of 2017  
Comments in OPPOSITION

Dear Maryland Congressional Delegation:

For the sake of the Chesapeake Bay and the billions of tax dollars spent and earmarked in the name of saving the Bay, the Clean Chesapeake Coalition (the “Coalition”) opposes any provision in House of Representatives Bill 3043 (H.R. 3043) – *Hydropower Policy Modernization Act of 2017* - that would undermine, constrain or otherwise diminish the State of Maryland’s rights and authority under Section 401 of the Clean Water Act to impose conditions on the relicensing of Conowingo Dam, as explained more fully below.

The Coalition is comprised of Maryland counties located within the Chesapeake Bay watershed, with an objective of pursuing improvement to the water quality of the Chesapeake Bay in the most prudent and fiscally responsible manner possible. The Coalition counties coalesced in the wake of the 2010 Chesapeake Bay Total Maximum Daily Load (“Bay TMDL”)<sup>1</sup> established by the U.S. Environmental Protection Agency (“EPA”), which sets forth a comprehensive “pollution diet” modeled to restore water quality in the Bay and its tributaries, and around the time that the U.S. Geological Survey issued a report confirming that the 14-mile reservoir above Conowingo Dam in the lower Susquehanna River is full and no longer trapping upstream nutrients and sediments before polluting the Bay.<sup>2</sup> Since then we have been researching and advocating for options to cost-effectively and meaningfully address the enormous accumulation of nutrient-laden sediments behind Conowingo Dam which, coupled with the loss of trapping capacity in all the reservoirs in the lower Susquehanna River, pose the single largest concentrated threat to the Chesapeake Bay and to downstream Bay restoration efforts.

The loss of trapping capacity at Conowingo Dam is causing adverse impacts to the health of the Chesapeake Bay ecosystem and is undermining our efforts and expenditures downstream to improve the water quality of the Bay. The State of Maryland’s water quality certification (“WQC”) authority under Section 401 of the Clean Water Act<sup>3</sup> (“CWA”) to inform and influence the relicensing of Conowingo Dam now pending before the Federal Energy Regulatory Commission (“FERC”) is critical to the health of the Chesapeake Bay and to the efficacy of Maryland’s efforts and investments to save the Bay. Indeed, the Section 401 WQC for the Conowingo Dam is an historic and powerful opportunity for Maryland to meaningfully address and mitigate the harmful impacts downstream on the Chesapeake Bay and Bay restoration efforts attributable to the loss of trapping capacity above Conowingo Dam and the operation and maintenance of the Dam and reservoir system. The Coalition counties are deeply concerned that this most import State lever in the federal relicensing process may be weakened by legislation such as H.R. 3043 in the name of streamlining or modernizing the FERC licensing process. As both the relicensing of Conowingo Dam before FERC (FERC Project No. 405) and Maryland’s review of Exelon’s WQC application for Conowingo relicensing are already underway, a change in the process and rules now to advantage the hydropower industry - at the expense of states’ rights - would be unfair to the citizens of Maryland and thwart our water quality improvement efforts.

When you boil it all down, the reservoir above Conowingo Dam (aka “Conowingo Pond”) is the largest stormwater management pond in the entire 64,000 square mile Chesapeake Bay watershed; it is full and thus no longer trapping pollution flowing down the largest tributary feeding the Bay; the Commonwealth of Pennsylvania has made scant progress compared to Maryland in terms of reducing upstream pollution loading into the Susquehanna River; so the Bay and our downstream restoration efforts and expenditures are in serious peril when the next big storm befalls the Bay watershed.

---

<sup>1</sup> See link: <http://www.epa.gov/chesapeakebaytmdl/>.

<sup>2</sup> Hirsch, R.M., 2012, Flux of nitrogen, phosphorus, and suspended sediment from the Susquehanna River Basin to the Chesapeake Bay during Tropical Storm Lee, September 2011, as an indicator of the effects of reservoir sedimentation on water quality: U.S. Geological Survey Scientific Investigations Report 2012–5185, 17 p. See link: <http://pubs.usgs.gov/sir/2012/5185/>.

<sup>3</sup> 33 U.S.C. § 1341.



Through cooperative federalism we must work together to regain trapping capacity in Conowingo Pond to give the Bay and Mother Nature's best filters - oysters and SAV - in the upper Bay a fighting chance.

To that end, the most significant and potentially efficacious tool currently available to Maryland in furtherance of Chesapeake Bay restoration and to meet Bay TMDL goals is its WQC authority under CWA Section 401 to review and condition the relicensing of Conowingo Dam by FERC. Without such a mechanism for Maryland to protect its interests in a healthier Chesapeake Bay in the FERC relicensing process - which H.R. 3043 will undermine - our ability to address the largest single source of pollution loading will be severely limited and our downstream efforts and expenditures to improve overall water quality will be in vain.

We advocate for Chesapeake Bay restoration activities that the Coalition counties believe will result in meaningful and lasting improvements to the water quality of the Bay in the most cost-effective manner; with "cost-effective" meaning the public cost of the activity in relation to the amount of nutrients and/or sediments that will be removed, minimized or prevented from polluting the Bay and its tributaries. Topping the list, and a condition to any relicensing of Conowingo Dam, is to dredge or otherwise address the 90+ years of sediments and nutrients accumulated in the reservoir above the Conowingo Dam and in other dam reservoirs in the lower Susquehanna River in order to regain trapping capacity and mitigate the scouring that flushes enormous amounts of pollution into the Bay during storm events.

#### **Emerging concerns with hydroelectric dams:**

When the Federal Power Act ("FPA") was adopted in 1920, major dams were a desired commodity. Dams quieted non-navigable rapids and made them more easily navigated. Dams provided a reservoir of water for drinking and irrigation of crops. Dams provided a non-fossil fuel source of renewable energy – water to turn hydroelectric turbines. *See, Dan Turlock, Hydro Law and the Future of Hydroelectric Power Generation in the United States, 65 Vand. L. Rev. 1723 (2012).* Experiences during World War I led to concerns of power shortages. *Id.* The FPA, as originally adopted, placed the power to grant hydroelectric licenses in a commission composed of the Secretary of War, the Secretary of Agriculture and the Secretary of the Interior. *Id.*

Experience approaching a century of operation has shown that dams negatively impact public fishers by interrupting fish runs. *Id.* This is particularly devastating to anadromous fish. *Id.* The reservoirs above dams change the flow conditions below dams. *Id.* Dams trap sediments and pollutants for a while, but as those sediments and pollutants accumulate in the reservoir behind the dam, when they are released during high flow events, the downstream shock to the lower estuary is much more environmentally devastating than would be if such sediments and pollutants were transmitted by the pre-dam rapids and unaltered river flows. As the reservoirs fill, the navigability above the dam can become severely restricted. Dams also change the waterside aesthetics both above and below the dam. *Id.*



The hydroelectric power projects in the lower Susquehanna River provide an excellent example of the long-term harm caused by such projects. The reservoirs behind the dam are now full of sediments. In the relicensing of the Conowingo Dam now before FERC, Pennsylvania boaters and marina owner-operators have complained of the accumulated sediments that have filled in many riverside properties and marinas and precluded even shallow drawing recreational boats and pontoons from accessing the river. The sediment build-up has largely restricted navigable areas to those that are dredged, maintained and marked. Downstream, Maryland marina owner-operators and waterfront property owners have complained about how sediments and debris released during high flow events, such as Tropical Storm Lee in 2011 (see attached), filled-in their marinas and recreational channels, costing millions of dollars to dredge sediments and clear and dispose of debris scoured and released from behind the dams. The dams have led to the abolition of the American Shad fishery, have destroyed the oyster fishery north of the Chesapeake Bay Bridge and impacted that fishery as far south as the Choptank River, and have devastated the blue crab population in the northern Bay by smothering hibernating crabs and destroying submerged aquatic vegetation and wetlands where young-of-year can escape from predators and mature; to name just several of the harmful environmental impacts created or exacerbated by the dams.

#### **Undermining states' rights:**

The State of Maryland must have the right to insure maintenance of water quality so this state resource is not defiled in the long term – which is the genesis of the CWA Section 401 water quality certification – otherwise states would not give up the rights to such resource. The Coalition's specific objection is that H.R. 3043 chips away at the authority of states under Section 401 to thoroughly review and develop license conditions to protect water quality for FERC licensed projects, and vests too much unchecked discretion in FERC in terms of process and review timelines. This will jeopardize Maryland's ability to appropriately condition the relicensing of the Conowingo Dam to address sediment and nutrient transport and ensure that the Chesapeake Bay's water quality standards are maintained and that we are ultimately successful in meeting the Bay TMDL goals.

As the Maryland Department of the Environment and the Maryland Department of Natural Resources observed in comments to Speaker Ryan and Minority Leader Pelosi in a letter dated August 14, 2017 objecting to provisions in H.R. 3043:

“Maryland’s interest in protecting water quality is as important and relevant today as ever, particularly now as FERC considers the relicensing of the Conowingo hydroelectric dam on the Susquehanna River in Maryland. . . What is clear, however, is that any new FERC license for the Dam will have to contain appropriate conditions to address sediment and associated nutrient transport and ensure that Maryland’s water quality standards are maintained. Without appropriated conditions Maryland may not be able to meet its commitment to achieve EPA’s Total Maximum Daily Loads for the Bay.”



To usurp a state's authority to issue Section 401 water quality certification would cut off the local expertise provided by jurisdictions with the intimate knowhow and interest in preserving the waters and environment it is entrusted to protect. This local expertise cannot adequately be provided by the federal government and/or licensees, but rather removes a necessary check on FERC's hydropower licensing authority to the detriment of satisfying one of the major tenants (*i.e.*, state water quality rights) of the FPA.

**Conclusion:**

For the foregoing reasons, the Coalition opposes any and all provisions of H.R. 3043 or similar legislation that would remove, impair or otherwise undermine the State of Maryland's primary role and responsibility under Section 401 of the CWA (conditioning FERC licenses) to protect our water quality. The effect of H.R. 3043 in curtailing Maryland's ability to protect State waters and surrounding environments is in direct conflict with the goals of the Bay TMDL and Chesapeake Bay Watershed Agreement, as well as local plans of the Coalition counties.

The Coalition looks forward to the opportunity to provide further comments on this issue if necessary as well as working with you in general on local government interests in hydropower licensing reform. If you have any questions relative to these comments, please contact Chip MacLeod, General Counsel, at 410-810-1381 or [cmacleod@mlg-lawyers.com](mailto:cmacleod@mlg-lawyers.com).

Sincerely,

CLEAN CHESAPEAKE COALITION



Ronald H. Fithian  
*Chairman and Kent County Commissioner*

cc: Honorable Lawrence J. Hogan, Governor of Maryland  
Honorable Brian E. Frosh, Attorney General of Maryland  
Benjamin H. Grumbles, Secretary, Maryland Department of Environment  
Mark J. Belton, Secretary, Maryland Department of Natural Resources  
Clean Chesapeake Coalition Counties  
Maryland Association of Counties  
American Rivers

