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November 27, 2015

Honorable Paul D. Ryan, Speaker
U.S. House of Representatives
H-232 The Capitol
Washington, DC 20515

Honorable Nancy Pelosi, Minority Leader
U.S. House of Representatives
233 Cannon House Office Building
Washington, DC 20515

Honorable Barbara A. Mikulski
U.S. Senate
Hart Senate Office Building, Suite 503
Washington, DC 20510 – 2003

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

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

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

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

Honorable Donna F. Edwards
2445 Rayburn House Office Building
Washington, DC 20515

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

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

Honorable Elijah E. Cummings
2235 Rayburn House Office Building
Washington, DC 20515

Honorable Christopher Van Hollen, Jr.
1707 Longworth House Office Building
Washington, DC 20515

Re: H.R. 8 – North American Energy Security and Infrastructure Act of 2015
Comments in OPPOSITION

Dear Speaker Ryan, Minority Leader Pelosi and 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”) vehemently opposes House of Representatives Bill 8 (H.R. 8) - *North American Energy Security and Infrastructure Act of 2015*, as explained more fully below.

The Coalition is comprised of seven 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”)¹ 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.² 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 authority under Section 401 of the Clean Water Act³ (“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.

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 is doing very little compared to Maryland to reduce 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. 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 - 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 water quality certification 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. 8 will strip from the states - 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.

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

² 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/>.

³ 33 U.S.C. § 1341.



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 86+ 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.

Mistake to diminish the right of public stakeholders in state waters:

H.R. 8 diminishes the due process of public stakeholders in the state waters impacted by power generating projects such as Conowingo Dam to intervene in and to obtain meaningful redress from the private power company projects that adversely impact their public waters. H.R. 8 diminishes the obligation of private for-profit power companies to investigate the harms that they cause to waters of the State and to mitigate such harms. Such private for-profit companies have no right to the free, uncompensated use, and in some cases abuse, of such public treasures – the waters of the states and the fisheries and navigational and recreational opportunities provided by such waters.

Private for-profit power companies should be going to great lengths to assuage the concerns of the public in their sovereign state waters. Amendments such as those proposed by H.R. 8 upset a legislative balance between interest groups that has supported power projects for nearly a century. This balance, if anything, already too heavily favors private for-profit power companies. Further disenfranchisement of the public interest will cause the public to react unfavorably to the uncompensated use of its sovereign state property.

Usurps 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. 8 strips states of their authority under Section 401 to develop license conditions to protect water quality for FERC licensed projects. 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 the Senate Energy and Natural Resources Committee in June 2015 and reiterated in a letter dated November 25, 2015 to Speaker Ryan and Minority Leader Pelosi opposing H.R. 8:

“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 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 [the Bay TMDL].”

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 as proposed by the H.R. 8, 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. 8 that would remove or impair the State of Maryland’s primary role and responsibility under Section 401 of the CWA (conditioning FERC licenses) to protect water quality; and we echo the concerns of the Maryland Department of the Environment and the Maryland Department of Natural Resources regarding the proposed legislation. The effect of H.R. 8 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.

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 at 410-810-1381 or cmacleod@fblaw.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

