

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

<hr/>)
EXELON GENERATION COMPANY, LLC,)
)
Plaintiff,)
)
v.)
)
BENJAMIN H. GRUMBLES, et al.,)
)
Defendants,)
)
and)
)
STEWARDS OF THE LOWER SUSQUEHANNA)
d/b/a LOWER SUSQUEHANNA RIVERKEEPER)
ASSOCIATION)
2098 Long Level Road)
Wrightsville, PA 17368)
)
and)
)
WATERKEEPERS CHESAPEAKE)
P.O. Box 11075)
Takoma Park, MD 20913)
)
Proposed Intervenor-Defendants.)
)
<hr/>)

Civil Action No. 1:18-cv-01224 (RMC)

**MEMORANDUM IN SUPPORT OF THE MOTION OF
STEWARDS OF THE LOWER SUSQUEHANNA, D/B/A LOWER SUSQUEHANNA
RIVERKEEPER ASSOCIATION AND WATERKEEPERS CHESAPEAKE
FOR LEAVE TO INTERVENE AS DEFENDANTS**

In this action, Plaintiff Exelon Generation Company, LLC (“Exelon”) challenges Maryland’s water quality certification for Plaintiff’s Conowingo Hydroelectric Project, issued by the Maryland Department of the Environment (“MDE”) under section 401 of the Clean Water Act as a prerequisite to Exelon’s application for a 50-year renewed operating license from the Federal Energy Regulatory Commission (“FERC”). Complaint, Dkt. 1. Exelon seeks to prevent

implementation of the certification and to diminish the scope of Maryland's legal authority to protect water quality within the state. Specifically, Exelon asks this Court to declare that the certification includes requirements that exceed Maryland's authority under the Clean Water Act and the United States Constitution, and further requests an order directing Maryland to withdraw its certification. *Id.* at 35.

Proposed Intervenor-Defendants are Stewards of the Lower Susquehanna, d/b/a Lower Susquehanna Riverkeeper Association (hereafter "Lower Susquehanna Riverkeeper") and Waterkeepers Chesapeake, two nonprofit watershed organizations dedicated to advocating for adequate pollution controls in the Lower Susquehanna River and Chesapeake Bay watersheds. The declaratory relief requested by Exelon would constrain Maryland's authority to issue the certification with terms the groups have requested, thus depriving the groups of a legally-required tool needed to ensure that discharges from Exelon's facility will not harm downstream water quality. Vacatur of the certification could lead to the uncontrolled discharge of millions of tons of nitrogen and phosphorus-laden sediment into the northern Chesapeake Bay, harming the groups' members' interests in those water bodies and undermining their efforts to improve the health of waters they regularly use and enjoy for recreation, aesthetic enjoyment, and education. Lower Susquehanna Riverkeeper and Waterkeepers Chesapeake seek intervention as defendants to protect these interests.

BACKGROUND

I. Water Quality Impacts Of The Conowingo Dam

The Conowingo Hydroelectric Project is a 100-foot concrete dam and integrated power plant that traverse the Susquehanna River in Maryland, approximately 10 miles north of its confluence with the Chesapeake Bay. Complaint at 6, ¶¶ 18-19. The Project has profoundly altered the Lower Susquehanna River system, impeding its natural flow and "replac[ing] 14

miles of flowing, dynamic River habitat with an impoundment and fundamentally altered aquatic habitat.” Ex. A, MDE, *Clean Water Act Section 401 Certification For the Conowingo Hydroelectric Project, FERC Project No. P-405*, at 12, ¶ 6.E (May 11, 2018). Since construction, the Dam and its 14-mile Reservoir have annually retained millions of tons of pollutant-laden sediment that would otherwise be transported with the River’s natural flow into the lower River and upper Chesapeake Bay. *Id.*; Complaint at 6, ¶ 22. In recent years, the Reservoir has filled to capacity with sediment, nutrients, and other pollutants, such that the volume of material that enters the Reservoir is roughly equal to the volume discharged from the dam. Ex. A at 12, ¶ 6.G; Complaint at 7, ¶ 25.

The Dam and its Reservoir have thus produced an enormous artificial repository of sediment and associated nutrients, which are available to be “scoured” by high flow conditions like storms or snow melt events, and then dumped all at once into the Lower Susquehanna River, the Susquehanna Flats (the shallow underwater delta of the Susquehanna River), and the upper Chesapeake Bay. Ex. B, Lower Susquehanna Riverkeeper, et al., *Comments Re: Conowingo Hydroelectric Project, Application for Water Quality Certification, Application # 17-WQC-02* at 7-8 (Sept. 11, 2017). Scoured loads deliver much greater quantities of sediment and nutrients to the Lower Susquehanna River and Chesapeake Bay than the natural loading that would have occurred during the same flow events had the Project not been in place. The resulting excessive concentrations of sediment and nutrients impair aquatic wildlife habitat by fueling excessive algae growth, blocking light penetration that is critical to underwater life, and physically smothering sensitive aquatic life, including underwater vegetation and oyster beds. *Id.*; Ex. A at 12-13, ¶ 6.G-J. Particularly in the case of very large storms, scouring of the Project’s sediment accumulation could overwhelm pollution reduction efforts undertaken upstream in the Lower

Susquehanna River watershed, and set water quality and the growth of underwater grasses in the Susquehanna Flats and Chesapeake Bay back for decades. Ex. B at 13.

II. Maryland’s Clean Water Act Section 401 Authority

Section 401 of the Clean Water Act (“CWA” or “the Act”) gives states the authority to review any federally-permitted or licensed activity that may result in a discharge to navigable waters, and to condition the permit or license upon a certification that any discharge would comply with key provisions of the Act and relevant state laws. 33 U.S.C. § 1341(a)(1) (requiring that such certification ensure “that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317” of the Clean Water Act). The term “discharge” under section 401 has been broadly interpreted to include the release of anything that flows out, including discharges from hydroelectric dams. *S.D. Warren Co. v. Maine Bd. of Env’tl. Protection*, 547 U.S. 370, 373 (2006). This expansive certification authority preserves a substantial role for the states in protecting water quality, even when the authority to grant a license lies solely in federal hands. As the U.S. Supreme Court characterized it:

State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution... “No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a *fait accompli* by an industry that has built a plant without consideration of water quality requirements.”

Id. at 386 (citation omitted).

In addition to ensuring compliance with the statutorily enumerated provisions of the CWA (§§ 1311, 1312, 1313, 1316, and 1317), certifying states must assure compliance with “any other appropriate requirement of State law.” 33 U.S.C. § 1341(d). Courts have consistently interpreted this provision to mean that all state water quality standards must be satisfied. *See*,

e.g., *PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology*, 511 U.S. 700 (1994) (holding that state water quality standards, including minimum stream flow requirements, should be enforced through § 401 certifications). In addition, courts have regularly allowed certifying states to deny certifications based on the need to comply with state water quality standards, including non-quantitative standards such as the protection of aquatic life and shellfish habitat. *See, e.g.*, *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 733 (4th Cir. 2009); *Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141 (2d Cir. 2008).

Maryland has adopted a number of water quality standards that are applicable to the Conowingo Hydroelectric Project's receiving waters, including "designated uses" and the numeric and narrative water quality criteria designed to protect those uses. 33 U.S.C. § 1313(c)(2)(A). The portion of the River from the Dam to the River's confluence with the Bay is designated to be used for "water contact recreation, public water supply, habitat for non tidal warmwater aquatic life, estuarine and marine aquatic life and shellfish harvesting, migratory spawning and nursery, seasonal shallow water submerged aquatic vegetation (SAV), and Open-Water Fish and Shellfish." Ex. A at 8-9, ¶ 5.B.i. Maryland has also adopted numeric criteria that apply to these waters, and that govern toxic substances, color, turbidity, temperature, pH, and dissolved oxygen. *Id.* In addition, this segment of the River is covered by narrative water quality criteria that prohibit pollution by any material in an amount that would produce objectionable color for aesthetic purposes, or would interfere directly or indirectly with designated uses, among other things. *Id.*

The designated uses of the Chesapeake Bay include support of "aquatic life, fishing, seasonal migratory fish spawning and nursery, seasonal shallow water [submerged aquatic vegetation], ... open-water fish and shellfish uses, seasonal deep-water fish and shellfish, [and]

seasonal deep-channel refuge.” *Id.* at 10, ¶ 5.B.ii. To implement these designated uses Maryland has adopted a set of numeric criteria for dissolved oxygen that are specific to a variety of timeframes and seasons. *Id.* The Bay is also covered by narrative criteria that prohibit pollution by materials or substances that are unsightly, putrescent, odorous, create a nuisance, or interfere directly or indirectly with designated uses. *Id.*

Maryland’s May 2018 certification for the Conowingo Hydroelectric Project imposes a number of conditions intended to implement water quality criteria for dissolved oxygen and to support the related designated uses. Two of these conditions are most relevant to Exelon’s lawsuit. The first requires Exelon to “annually reduce the amount of nitrogen included in the Project’s discharges by six million (6,000,000) pounds and the amount of phosphorus in the Project’s discharges by two hundred sixty thousand (260,000) pounds (or such different amounts of phosphorus and nitrogen reductions as may be approved by [the Maryland Department of the Environment], provided that such different amounts of nitrogen and phosphorus reductions provide the equivalent protection of [dissolved oxygen] levels...)” *Id.* at 15, ¶ 7.D.ii. Exelon is given three options for achieving these reductions: paying specified in-lieu fees, performing pollution reduction practices, or dredging the Reservoir. *Id.* at 16, ¶ 7.D.iv. The certification specifies that Exelon will be given credit against its nutrient reduction requirements if one or more of the Chesapeake Bay states take actions to achieve reductions. *Id.* at 15, ¶ 7.D.iii.

The second certification condition most relevant to this lawsuit directs Exelon to develop a “Sediment & Nutrient Monitoring Plan” to “quantify changes in the extent and amount of sediment and nutrients being discharged from the Dam” over the requested 50-year license term, and to “understand the impacts of changing sediment and nutrient conditions on living resources

in the Bay,” including the “changes and impacts resulting from major storm events of greater than 400,000 [cubic feet per second].” *Id.* at 16, ¶ 7.D.vi.

III. Proposed Intervenor-Defendants’ Longstanding Participation In The Conowingo Hydroelectric Project Relicensing Proceedings

Stewards of the Lower Susquehanna is a non-profit watershed advocacy organization headquartered in Wrightsville, Pennsylvania. Established in 2005, it has more than 100 individual and organization members, working to carry out its mission to protect and improve the ecological and aesthetic integrity of the Lower Susquehanna River watershed and Chesapeake Bay. Lower Susquehanna Riverkeeper is a program of Stewards of the Lower Susquehanna, and leads the organization’s work in advocating for strong environmental standards and policies that protect and serve the public interest. Lower Susquehanna Riverkeeper has participated actively in the Dam’s relicensing process, for example by testifying at the June 2009 FERC Scoping Meeting, and submitting comments to FERC in March and July 2012 on Exelon’s Initial Study Reports. Ex. G, ¶¶ 9-21.

Waterkeepers Chesapeake is a nonprofit watershed advocacy organization headquartered in Takoma Park, Maryland. It operates as a coalition of 18 independent Waterkeeper programs working throughout the Chesapeake and Delmarva Coastal Bays Watersheds. The mission of the Waterkeepers Chesapeake organization is to make the Chesapeake Bay and Maryland’s coastal Bays clean enough for fishing and swimming as defined in Maryland’s water quality standards. The organization works with and through its member organizations, including Lower Susquehanna Riverkeeper, amplifying the voices of the individual Waterkeeper groups, and coordinating regional campaigns to leverage the collective capacity of each member Riverkeeper in advocating for Bay-wide pollution controls and fighting pollution sources that harm the shared goals of the coalition.

On July 17, 2013, both groups formally intervened as parties in the FERC relicensing proceeding pursuant to 18 C.F.R. § 385.214(a)(3). Since that time they have filed comments with FERC highlighting the current and likely future adverse water quality effects of the Conowingo Hydroelectric Project. In this process they have submitted comments on proposed fishway prescriptions to address the Dam's blockage of American eels and the resulting loss of pollution-filtering mussels for which the eels serve as a host (Feb. 28, 2014); comments on the issue of sediment scouring in response to FERC's Draft Environmental Impact Statement (Sept. 29, 2014); and comments in response to the release of a study, the Lower Susquehanna River Watershed Assessment (Feb. 3, 2015), on which FERC's Draft Environmental Impact Statement heavily relied.

Lower Susquehanna Riverkeeper and Waterkeepers Chesapeake are concerned that the current draft of Maryland's water quality certification for the Project falls substantially short of what is needed to ensure attainment of water quality standards in the Lower Susquehanna River and Chesapeake Bay. Specifically, the certification fails to address the problem of the accumulated sediment and nutrients sitting in the Conowingo Dam's Reservoir, and the threat to water quality when those materials are scoured by one or more major high-flow events like storms or snow melts. Accordingly, on June 8, 2018, they submitted an administrative appeal urging the Maryland Department of the Environment to reconsider and revise the conditions in the certification. Lower Susquehanna Riverkeeper, et al., *Administrative Appeal of Final Decision to Issue Clean Water Act Section 401 Certification for the Conowingo Hydroelectric Project*, MDE WSA App. No.17-WQC-02 (Md. Dept. of Envir., June 8, 2018).¹

¹ Because both Exelon and the Proposed Intervenor-Defendants have filed timely administrative appeals requesting reconsideration of the certification under Maryland law, the certification is subject to revision. *Contra* Complaint, at 18, ¶¶ 93-97.

Although the groups have serious concerns about the sufficiency of the certification, they strongly oppose Exelon's attempt to challenge the certification as overly-stringent or in excess of Maryland's Clean Water Act section 401 authority. The relief requested by Exelon in this lawsuit would harm the groups' interests, by constraining Maryland's ability to revise the water quality certification to include the conditions the groups have requested, and by depriving Maryland and other states of a key legal authority to protect water quality within the states' own boundaries.

ARGUMENT

Proposed Intervenor-Defendants respectfully request that the Court grant their intervention pursuant to Federal Rule of Civil Procedure 24(a), or, in the alternative, Rule 24(b), for reasons discussed below.

I. PROPOSED INTERVENOR-DEFENDANTS ARE ENTITLED TO INTERVENE AS OF RIGHT

Federal Rule of Civil Procedure 24(a) provides that:

On timely motion, the court must permit anyone to intervene who ... claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). Thus, this Court must grant intervention as of right if: (1) sought by timely motion; (2) the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest may not be adequately represented by existing parties. *See Fund for Animals v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003).

A. Proposed Intervenor-Defendants Timely Filed This Motion to Intervene.

The court determines the timeliness of a motion to intervene “in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant’s rights, and the probability of prejudice to those already parties in the case.” *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (quoting *United States v. AT&T*, 642 F.2d. 1285, 1295 (D.C. Cir. 1980)).

This motion is timely, as this litigation was only recently filed and no substantial filings have been fully briefed or resolved. Plaintiff filed suit on May 25, 2018. Dkt. 1. On June 26, Plaintiff and Defendants filed a motion for extension of time for the Defendants to file a responsive pleading, which they intended to file on or before July 11, 2018. Dkt. 10. Maryland filed a Motion to Dismiss on July 11. Dkt. 11. Exelon’s deadline for responding to the Motion to Dismiss was extended to August 7, in a Minute Order dated July 19. Accordingly, granting this intervention would cause no prejudice to any party. If intervention is granted, Proposed Intervenor-Defendants intend to file a proposed Response in support of that Motion by August 1, along with the appropriate motion for leave to file the response. Beyond the Motion to Dismiss, Proposed Intervenor-Defendants intend to adhere to any briefing schedule set by the Court and to cooperate with the other Parties on the scheduling of briefs and motions to the extent possible, to serve the interest of judicial efficiency, avoid duplicative arguments, and respect the resources of all parties to this litigation.

B. The Proposed Intervenor-Defendants And Their Members Have Legally Protected Interests At Stake.

As explained by the D.C. Circuit, “[t]he right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that the interest of justice is best served when all

parties with a real stake in a controversy are afforded an opportunity to be heard.” *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972). Proposed Intervenor-Defendants are organizations whose core mission includes reducing pollution, restoring habitat, and encouraging public use and enjoyment in the Lower Susquehanna River and Chesapeake Bay. Their members use and enjoy those waters, and would thus be directly affected by the relief requested in this lawsuit. Effective implementation of the Clean Water Act’s pollution control tools, including section 401 water quality certifications for federally-licensed activities like the Conowingo Hydroelectric Project, is of central importance to protecting the interests of the Proposed Intervenor-Defendants and their members in protecting and restoring the natural resources of the Lower Susquehanna River and Chesapeake Bay. And, as discussed above, the groups have a long history of advocating for effective controls to address the water quality impacts of the Conowingo Hydroelectric Project on those waters, in both the FERC relicensing and Maryland certification proceedings. Ex. G.

Furthermore, the Proposed Intervenor-Defendants’ members have recreational and aesthetic interests in the waters affected by this litigation. For example, Lower Susquehanna Riverkeeper Association member Keith Williams is the Executive Director of NorthBay, an outdoor-education program he helped found based in the town of North East, Maryland, where he resides. Ex. C. His life is deeply rooted in the Chesapeake Bay watershed, and his work puts him in almost daily contact with the waters of the Chesapeake Bay, the Susquehanna Flats, or nearby tributaries of the Susquehanna River. *Id.* He has also worked to promote freshwater snorkeling in the area, including writing the first book on creek and river snorkeling, and he intends to film a movie about snorkeling and the biodiversity of the Susquehanna Flats. *Id.* In his personal and professional use of these waters he has watched underwater grasses in the northern

Bay and Lower Susquehanna River rebound after struggling for many years to recover from the enormous sediment and nutrient loads discharged into the Lower Susquehanna River and upper Chesapeake Bay as a result of Hurricane Agnes in 1972. Mr. Williams is concerned that all this biodiversity could be diminished by increased discharges from Conowingo Dam, or wiped out in a single catastrophic scouring event and only recovered after a decade or longer. *Id.* By harming the water quality and aquatic life habitat, such an event would diminish the quality of environmental education NorthBay is able to provide, and would also diminish Mr. Williams' ability to use and enjoy these waters for personal recreation and enjoyment.

Similarly, Lower Susquehanna Riverkeeper Association member Bruce Russell has a close personal and professional connection to the Conowingo Dam's receiving waters, including interests that would be seriously harmed by the pollution discharges that Maryland aims to control through its water quality certification. Ex. D. Mr. Russell is the President of the Havre de Grace Maritime Museum, located at the mouth of the Lower Susquehanna River and the head of the Chesapeake Bay. In that role he has spearheaded the establishment and ongoing development of the Museum's Environmental Center, which has embraced the mission of inspiring and educating residents and visitors about the Lower Susquehanna River and Upper Chesapeake Bay region, and promoting the appreciation, understanding, and protection of these areas by providing educational exhibits and experiential programs. *Id.* In addition, he has engaged in local pollution reduction and tracking efforts in collaboration with the Maryland Department of Natural Resources and the City of Havre de Grace. *Id.* Mr. Russell is very concerned that Exelon's challenge to Maryland's water quality certification will increase the chances that uncontrolled discharges, including a catastrophic scouring event, would set water quality back for years or even decades, and thereby harm his personal and professional interests. *Id.*

Theodore (Ted) Evgeniadis serves as the Lower Susquehanna Riverkeeper, a role he has carried out since April 2017. Ex. E. Like his predecessor, (*see* Ex. G), Ted has closely watched the FERC relicensing process for the Conowingo Hydroelectric Project, and has participated in that process at each opportunity, including through his submission of written and verbal testimony in December 2017 in the public comment process for Maryland's proposed water quality certification for the Project. In addition, he has had a close personal connection with the Susquehanna River since 2008, including his use and enjoyment of the River for fishing, kayaking, and boating. He also regularly uses and enjoys the Chesapeake Bay for fishing, kayaking, boating, oyster diving, crabbing, and wildlife observation. He uses the River below the Conowingo Dam ten times or more per year for such personal recreational uses. Ex. E. *See also* Ex. G ¶¶ 22-28 (declaration of prior Lower Susquehanna Riverkeeper and current member Michael Helfrich, describing personal and professional interests in water quality of the River and Chesapeake Bay). In Mr. Evgeniadis' role as Lower Susquehanna Riverkeeper, he also patrols the River once to twice quarterly to observe conditions and identify new or ongoing pollution problems or pollution sources. Ex. E. Mr. Evgeniadis is concerned that his personal and professional use of the River would be seriously harmed by uncontrolled discharges from the Conowingo Hydroelectric Project. He is further concerned that the ability of the Lower Susquehanna Riverkeeper Association's ability to achieve its mission could be obliterated by Exelon's attempt to have the water quality certification set aside, and to constrict Maryland's (and other states') legal authority to control pollution into the Lower Susquehanna River and Chesapeake Bay through such certifications.

Finally, the interests of the Waterkeepers Chesapeake organization would be harmed by the requested relief in this lawsuit, including subsequent harms to the Lower Susquehanna River

and to the Chesapeake Bay. As detailed by its Executive Director, Elizabeth (Betsy) Nicholas, a catastrophic pulse of pollution would seriously undermine her organization's core mission to protect and restore water quality in the Chesapeake Bay. Ex. F. Since its inception in 2007, Waterkeepers Chesapeake has supported the Lower Susquehanna Riverkeeper and helped push toward their shared goal of a healthy Chesapeake Bay that meets water quality standards. *Id.* Waterkeepers Chesapeake has done this work through its intervention and participation in the FERC relicensing, and its participation in the Maryland water quality certification for the Conowingo Hydroelectric Project. *Id.* The relief requested in this lawsuit therefore threatens the demonstrated interests of the Waterkeepers Chesapeake organization and its members, including the Lower Susquehanna Riverkeeper. *Id.*

C. Proposed Intervenor-Defendants' Interests May Be Impaired as a Result of This Action.

Proposed Intervenor-Defendants are "so situated that disposition of the action may as a practical matter impair or impede" their ability to protect their interests. Fed. R. Civ. P. 24(a)(2). The D.C. Circuit has read this requirement "as looking to the practical consequences of denying intervention, even when the possibility of future challenges to the regulations remains available." *Fund for Animals*, 322 F.3d at 735 (internal citations and quotation omitted). That is, although Proposed Intervenor-Defendants remain able to bring independent legal action to protect their interests in the Susquehanna River and the water quality certification for the Conowingo Hydroelectric Project, that does not preclude their participation in the present action. Indeed, because Exelon's challenge may result in a ruling that makes binding legal determinations about Maryland's certification, to deny Proposed Intervenor-Defendants intervention would effectively exclude them from an adjudication implicating those interests.

As a practical matter, the relief Exelon seeks would impair Proposed Intervenor-Defendants interests. If granted, an order declaring the certification to be unlawful and directing Maryland to set it aside would deprive the Proposed Intervenor-Defendants of the benefits of the certification (or any potential future revised certification), an essential legal tool for ensuring that the Project will not cause or contribute to violations of water quality standards. In fact, Exelon's arguments presuppose that the conditions Proposed Intervenor-Defendants have urged Maryland to include in the certification are unlawful. If this Court issues a ruling declaring that Maryland lacks authority to condition the relicensing on pollution controls needed to address the sediment accumulated as a result of Exelon's Conowingo Dam, Proposed Intervenor-Defendants' interests could be irrevocably harmed.

Proposed Intervenor-Defendants' members' individual recreational and aesthetic interests in the Lower Susquehanna River and Chesapeake Bay would also be harmed by increased uncontrolled discharges from the Conowingo Hydroelectric Project. Members use these waters for recreation and aesthetic enjoyment. The Shenandoah River and Chesapeake Bay are designated for such uses, by Maryland water quality standards. *See supra* at 5-6. Greater sediment and nutrient concentrations would lead to diminished clarity and visibility, increased algae growth, and physical smothering of underwater grasses and the aquatic life that use the area as habitat.

D. Proposed Intervenor-Defendants' Interests May Not Be Adequately Represented by Defendants.

The burden on a party seeking intervention to demonstrate inadequate representation "is not onerous." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). Proposed Intervenor-Defendants need only show "that representation of [the party's] interest 'may be' inadequate, not that representation will in fact be inadequate." *Id.* (citing *Trbovich v. United*

Mine Workers of America, 404 U.S. 528, 538 n.10 (1972) (requiring “minimal” showing)).

Neither of the current parties adequately represents Proposed Intervenor-Defendants’ interests in this matter.

First, Plaintiff Exelon’s objectives in this suit plainly conflict with Proposed Intervenor-Defendants’ interest in reducing or eliminating excessive sediment and nutrient concentrations in the Lower Susquehanna River and upper Chesapeake Bay to the greatest extent possible. Second, in strategy and briefing of this case, Proposed Intervenor-Defendants cannot rely on Defendant Maryland to represent their interests. Those interests are narrow and specific, and focus on limiting sediment and nutrient pollution as stringently as is legally required to avoid harm to the waters their members use and enjoy. While Defendants must take these interests into account, they must also consider the interests and arguments put forward by other constituencies, including regulated dischargers like Plaintiff and upstream state and local jurisdictions and dischargers, whose interests may conflict with those of Proposed Intervenor-Defendants. Because of the broader set of considerations Defendants will consider, they are likely to take a different view of questions that are central to the defense of the challenged certification, including whether the certification conditions can be revised to address the problem of sediment scouring that the current version does not directly address other than a requirement to monitor the harm. *Cf. Dimond*, 792 F.2d at 192-93 (finding an agency “would be shirking its duty were it to advance [an individual’s] narrower interest at the expense of its representation of the general public interest”). In short, no current party in this proceeding represents the perspective brought by Proposed Intervenor-Defendants and their members.

Furthermore, “[a]lthough there may be a partial congruence of interests, that does not guarantee the adequacy of representation.” *Fund for Animals*, 322 F.3d at 736-37 (granting

intervention where federal defendant and movant's interests "might diverge during the course of litigation"). Indeed, Proposed Intervenor-Defendants do not support all aspects of the challenged certification. For example, Proposed Intervenor-Defendants are concerned that the certification does not protect against catastrophic scouring events; in contrast, Maryland takes the position that the certification includes adequate conditions to protect water quality in the Lower Susquehanna River and Chesapeake Bay. Ex. A at 16. Accordingly, although Proposed Intervenor-Defendants wish to intervene to aid Defendant Maryland in opposing the relief Exelon seeks, Proposed Intervenor-Defendants are positioned to make a range of arguments in defense of the certification that Maryland is unable or unlikely to make.

II. ALTERNATIVELY, PROPOSED INTERVENOR-DEFENDANTS REQUEST INTERVENTION BY PERMISSION

If this Court does not grant Proposed Intervenor-Defendants intervention of right, the groups request in the alternative that the Court grant permissive intervention. Federal Rule of Civil Procedure 24(b) provides that: "On timely motion, the court may permit anyone to intervene who ... has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). The Rule further states that, "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Proposed Intervenor-Defendants merit, at minimum, permissive intervention. First, as demonstrated above, no significant events have yet occurred in this case and Proposed Intervenor-Defendants' motion is timely. Proposed Intervenor-Defendants do not bring new claims as intervenor-defendants. They intend directly to oppose claims and requests for relief made by Plaintiff Exelon in this action and to offer defensive arguments that share central

questions of law raised by this case. If intervention is granted, Proposed Intervenor-Defendants intend to respect the timeframes for briefing established by the Court for the current parties.

Proposed Intervenor-Defendants seek intervention to ensure that this Court is able to hear a key perspective on the issues involved in this case that may aid the Court's review. Proposed Intervenor-Defendants have gained particular knowledge and expertise from their years of work to protect the Susquehanna River and Chesapeake Bay, particularly in relation to Defendant Exelon's Conowingo Hydroelectric Project. This perspective and experience would ground Proposed Intervenor-Defendants' targeted briefing, and would complement Defendant Maryland's defense. *Cf. Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912-13 (D.C. Cir. 1977) (granting intervention for movant to protect own interests and where it "may also be likely to serve as a vigorous and helpful supplement to EPA's defense"). As such, Proposed Intervenor-Defendants' briefing will focus on their core aim of ensuring that the disposition of this case does not lead to uncontrolled sediment and nutrient discharges from the Conowingo Hydroelectric Project.

III. CITIZEN GROUPS HAVE STANDING TO PARTICIPATE IN THIS LITIGATION

Assuming that Article III standing is required for intervenor-defendants,² Proposed Intervenor-Defendants meet the requirements of Article III standing for reasons already

² *See, e.g., Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316, 319-20 (D.C. Cir. 2015) (discussing case law and holding intervenor-defendants must show Article III but not prudential standing); *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013). *But see Bond v. United States*, 564 U.S. 211, 215-217 (2011) (Article III requirements apply to those "who seek[] to initiate or continue proceedings in federal court," not to those who defend against such proceedings); *McConnell v. FEC*, 540 U.S. 93, 233 (2003) (holding that where the position of the respondent-intervenors is identical to that of the agency and the agency's standing is unquestionable, no separate inquiry regarding intervenor standing is necessary), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010); *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1232 (D.C. Cir. 2018).

discussed and further elaborated below. The standing inquiry for an intervenor-defendant is the same as for a plaintiff, requiring a showing of: (1) injury in fact; (2) a causal relationship between the injury and the challenged action, such that the injury can be fairly traced to the challenged action; and (3) the likelihood that a favorable decision will redress the injury. *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015) (citing cases). After finding that a single movant satisfies these standing requirements, the Court may grant intervention to all listed movants. *See, e.g., Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (granting intervention to all co-applicants based on a finding for one named intervenor-applicant).

Proposed Intervenor-Defendants have associational standing. Under this standard, an association “must demonstrate that at least one member would have standing under Article III to sue in his or her own right, that the interests it seeks to protect are germane to its purposes, and that neither the claim asserted nor the relief requested requires that an individual member participate in the lawsuit.” *Nat. Res. Def. Council v. E.P.A.*, 489 F.3d 1364, 1370 (D.C. Cir. 2007) (citing *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 342-43 (1977)). For reasons similar to those demonstrated above showing that Proposed Intervenor-Defendants and their members satisfy the standard to intervene of right, Proposed Intervenor-Defendants’ members would have Article III standing in their own right. *Cf. Fund for Animals*, 322 F.3d at 735 (holding that finding standing is sufficient to establish an “interest” under Rule 24(a)(2)).

Proposed Intervenor-Defendants’ members have legally protected recreational and aesthetic interests in the Lower Susquehanna River and upper Chesapeake Bay, as discussed above in Part I.B., and the attached declarations. If Exelon succeeds in its efforts to weaken Maryland’s water quality certification aimed at preventing water quality violations, the waters

that Proposed Intervenor-Defendants' members use and enjoy would be degraded, and become unsuitable for swimming, snorkeling, kayaking, aquatic life habitat, and environmental education and observation. Proposed Intervenor-Defendants' members' use and enjoyment of these waters will therefore be diminished, and the resulting injuries to the interests of Proposed Intervenor-Defendants' members are sufficient to establish Proposed Intervenor-Defendants' standing. *See NRDC*, 489 F.3d at 1371 (finding standing where organization's members "use or live in areas affected" by the action at issue "and are persons 'for whom the aesthetic and recreational values of the area'" would be lessened as a result of the action) (citation omitted). Protecting these interests is a core part of Proposed Intervenor-Defendants' organizational missions.³

CONCLUSION

For the foregoing reasons, Proposed Intervenor-Defendants Lower Susquehanna Riverkeeper and Waterkeepers Chesapeake respectfully request leave to intervene as defendants in case No. 18-cv-01224 as of right pursuant to Fed. R. Civ. P. 24(a), or alternatively, by permission pursuant to Fed. R. Civ. P. 24(b), and D.D.C. Local Rule 7(j).

DATED: July 20, 2018.

Respectfully submitted,

/s/ Jennifer C. Chavez

JENNIFER C. CHAVEZ

DC Bar No. 493421

Earthjustice

1625 Massachusetts Avenue, N.W.

Suite 702

Washington, D.C. 20036

202-667-4500

jchavez@earthjustice.org

*Attorney for Lower Susquehanna
Riverkeeper and Waterkeepers Chesapeake*

³ The prudential "zone of interests" standing test does not apply for intervenor-defendants. *Crossroads Grassroots*, 788 F.3d at 319-20.