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June 17, 2015

The Honorable Lisa Murkowski, Chairman
Energy and Natural Resources Committee
United States Senate
304 Dirksen Senate Building
Washington, DC 20515

The Honorable Maria Cantwell, Ranking Member
Energy and Natural Resources Committee
United States Senate
304 Dirksen Senate Building
Washington, DC 20515

*Re: Clean Chesapeake Coalition – Comments in OPPOSITION to Senate
Energy and Natural Resources’ Hydropower Legislation S.1236 –
Hydropower Improvement Act of 2015*

Dear Chairman Murkowski and Ranking Member Cantwell:

The Clean Chesapeake Coalition (the “Coalition”) is an association of ten Maryland county governments committed to improving the water quality of the Chesapeake Bay in the most prudent and fiscally responsible manner possible. We oppose the Hydropower Improvement Act of 2015 (“S. 1236”) for the reasons set forth more fully below.

The Coalition counties coalesced in the wake of the U.S. Environmental Protection Agency’s (“EPA”) 2010 Chesapeake Bay Total Maximum Daily Load (“Bay TMDL”) and the costly mandates imposed by the State of Maryland on county governments in the name of achieving Bay TMDL pollution reduction goals. The Susquehanna River provides roughly half of the fresh water to the Chesapeake Bay and the pollution loading from that tributary to the Maryland portion of the Bay eclipses the overall pollution loading from any other Bay tributary. The operation and maintenance of Conowingo Dam is of great import to the Coalition and to Chesapeake Bay restoration efforts given that the reservoirs (Lake Clarke, Lake Aldred and Conowingo Pond) behind the three hydroelectric dams (Safe Harbor, Holtwood and Conowingo) in the lower Susquehanna River are all full and no longer serve as net traps of sediments and nutrients. 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 authority to

inform and influence FERC's relicensing of Conowingo Dam is vital to the health of the Chesapeake Bay and to the efficacy of Maryland's investments to save the Bay.

S. 1236 diminishes the due process afforded to stakeholders who are harmed by the effects of dams that enable the generation of hydroelectric power and it diminishes the obligation on private for-profit companies that are given the use of state property – the waters of the states – at no cost. S. 1236 diminishes the responsibility of such power companies to ensure that their power generating activities do not foul state waters, harm public fisheries, diminish navigation capability and violate riparian rights. The constitutionality of the Federal Powers Act (“Act”) already is questionable. If passed as proposed, S. 1236 may well lead to a declaration of the unconstitutionality of the Act.

The waters of the states:

Since the signing of the Declaration of Independence and the Revolutionary War, the navigable waters and the soils under them have been and are the property of each sovereign state held in trust for the people of that state as public fisheries (for the fish in the waters as well as shellfish on the bottoms) and public navigable waters. *Martin v. Waddell*, 41 U.S. 367, 412, 416 (1842). As new states were admitted into the union, those newly admitted states acquired a like property interest in their navigable waters. *Pollard v. Hagan*, 44 U.S. 212, 223, 229-230 (1845) (holding that the shores of navigable waters and the soils under them are reserved to the states and new states have the same rights, sovereignty and jurisdiction over their waters as the original colonial states). Maryland holds such waters in trust for its citizens and is obligated to manage such assets and keep them publicly available and usable to all. *Board of Public Works of Maryland v. Larmer Corp.*, 262 Md. 24, 35-36 (1971)(citing *Kerpelman v. Board of Public Works*, 261 Md. 436 (1971); *Bruce v. Director, Dept. of Chesapeake Bay Affairs*, 261 Md. 585 (1971); *Sollers v. Sollers*, 77 Md. 148, 151-52 (1892); *Hawkins Point Light-House Case*, 39 Fed. 77, 79-80 (D. Md. 1889); *Hess v. Muir*, 65 Md. 586, 606-07 (1886)(Concurring Op. of C.J. Alvey); and *Brown v. Kennedy*, 5 H. & J. 195 (1821)); *Van Ruymbeke v. Patapsco Indus. Park*, 261 Md. 470, 476 (1971) (citing *Bowie v. Western Md. R. R. Ter. Co.*, 133 Md. 1, 7 (1918)). See Md. Decl. of Rights Arts. 5 & 6. The Tenth Amendment to the United States Constitution protects the right of each state to sovereignty over its navigable waters. John F. Shields, *The Federal Power Act*, 73 U. Pa. L. Rev. 142, 146-47 (1925). Jurisdictional power over the waters of the states was never delegated to Congress and such waters are, under the Tenth Amendment, reserved unto the absolute jurisdiction and control of the respective states or to the people. *Id.* (citing *McCulloch v. Maryland*, 17 U.S. 316, 406 (1819), *cf.*: *The Daniel Ball*, 77 U.S. 557 (1871); *The Montello*, 78 U.S. 411 (1871); *U.S. v. Rio Grande Co.*, 174 U.S. 690 (1899); *Leovy v. U.S.*, 177 U.S. 621 (1900); *Kansas v. Colorado*, 206 U.S. 46; *Oklahoma v. Texas*, 258 U.S. 574 (1922)). See *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012) (discussing the difference between the public trust doctrine cases, the equal footing doctrine cases and natural flow theory cases).



Congress' Commerce Clause power:

The Commerce Clause of the Constitution (Article I § 8 cl. 3) provides the only constitutional authority permitting Congress to adopt the Federal Powers Act. The guise pursuant to which the Act was adopted is that if a state wanted to maximize the navigable capacity and commercial potential of its waters by damming such waters to reduce rapids and to make the waters more quiescent, navigable, and usable for drinking water and crop irrigation, Congress, under its Commerce Clause Powers, could regulate/license the dam franchise. Thus, the Federal Energy Regulatory Commission ("FERC") does not have the power to grant the franchise. FERC has the power only to regulate the franchise once a state in its fiduciary role as the manager of its sovereign waters held in trust for the public, agrees to permit, or acquiesces in permitting, a federally licensed franchise for the construction and maintenance of a dam. If the state objects to the operation of such franchise on its land and in its waters, there is nothing for FERC to regulate.

Emerging concerns with hydroelectric dams:

When the Act 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 Act, 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, 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.

Non-compensated taking:

The FERC power project licenses authorize private for-profit businesses to use state property – *e.g.*, the land under the navigable Susquehanna River and the Maryland waters, at no cost, in order to produce electricity that is privately marketed and distributed. No longer is the licensee a public utility. No longer is the electricity that is produced distributed directly to residents of the states that provide the free feedstock - water - used to generate the electricity at below-market cost. The projects are devoid of public benefit. Moreover, the fisheries and the navigable waters that the states hold in trust for the public have been injured, perhaps irreparably, by such power generating operations. States such as Maryland have a right to demand just compensation for such taking, if they do not have a right to discontinue such taking altogether.

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

S. 1236 diminishes the ability of public stakeholders in the state waters impacted by power generating projects to intervene in and to obtain meaningful redress from the private power company projects that adversely impact their public waters. S. 1236 reduces the requirements of private for-profit power companies to investigate the harms that they cause and to offer to redress 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 S. 1236 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. Passage of such amendments could have grave consequences to prospective licensees and existing power projects. Further disenfranchisement of the public interest will cause the public to react unfavorably to the uncompensated use of its sovereign state property.



Conclusion:

For these reasons, the Coalition counties oppose any and all provisions of S. 1236 that would remove or impair the State of Maryland's primary role and responsibility under Section 401 of the Clean Water Act (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.

Sincerely,

CLEAN CHESAPEAKE COALITION



Ronald H. Fithian

Chairman and Kent County Commissioner

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

