UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

EXELON GENERATION COMPANY, LLC	)	**PROJECT NO. 405**

EXELON GENERATION COMPANY, LLC'S FINAL LICENSE APPLICATION FOR THE CONOWINGO HYDROELECTRIC PROJECT AND REQUEST FOR WAIVER OF THE REQUIREMENT TO INCLUDE A DRAFT BIOLOGICAL ASSESSMENT

Pursuant to Sections 5.17 and 5.18 of the Federal Energy Regulatory Commission (FERC or Commission) regulations, 18 C.F.R. §§ 5.17, 5.18 (2012), Exelon Generation Company, LLC (Exelon), a wholly-owned subsidiary of Exelon Corporation, hereby files the attached Final License Application (FLA) for the Conowingo Hydroelectric Project (Conowingo or Project). The current license for the Project expires on September 1, 2014.

Set forth below is a summary of the Project and a description of Exelon's proposal for implementing protection, mitigation, and enhancement (PM&E) measures over the new license term, as provided in the FLA, and a request for a 46-year term for the new license. Exelon also includes its proposed schedule for entering into a comprehensive settlement agreement with interested stakeholders to engage in further dialogue regarding the Conowingo relicensing. Finally, Exelon requests a waiver of the Commission's requirement to include a draft biological assessment in the FLA.

I. Introduction

The 573 MW Project, located on the Susquehanna River in Harford and Cecil Counties in Maryland and Lancaster and York Counties, Pennsylvania, has been operating for more than 80 years. Conowingo is instrumental in meeting regional peak

electricity demands, and provides energy and capacity without the harmful release of NOx, SO2, CO2, mercury, and other hazardous air pollutants. The Project also serves as an important regional recreational resource. Project recreation facilities provide the public with water access, fishing, hunting, hiking, swimming, and other recreational opportunities. The Project also provides significant economic benefits, directly employing approximately 56 employees (a shared workforce with the Muddy Run Pumped Storage Project (Muddy Run)) with a total compensation for both projects in excess of $8 million. In addition to these direct socioeconomic benefits, the Project generates tax revenues and expenditures within the region for various goods and services.

Exelon formally initiated the FERC relicensing process for the Project with the filing of a Notice of Intent and Pre-Application Document (PAD) on March 12, 2009. Since that time, Exelon has engaged in extensive stakeholder outreach with state and federal resource agencies, non-governmental organizations, local municipalities, recreational users, and other individuals with an interest in the Project. This process—FERC's Integrated Licensing Process (ILP)—resulted in the development and implementation of 32 FERC-approved resource studies examining the benefits and impacts of the Project. Exelon also conducted 15 resource studies for Muddy Run, many of which also informed development of the Conowingo FLA. Together, these ILP processes and associated studies have cost approximately $22 million.

The Conowingo FLA represents Exelon's careful consideration of the pre-existing information included in the PAD, the ILP resources studies, and the interests expressed by stakeholders throughout the relicensing process, including comments received on Exelon's Draft License Application (DLA), which it filed on April 3, 2012. Where the

studies and ILP consultations have clearly identified Project impacts, the FLA proposes resource protection and mitigation measures. Where studies and ILP consultations have identified opportunities to improve Project features, the FLA proposes appropriate enhancements. The FLA reflects Exelon's efforts to concurrently maximize the benefits of the Project for the community, the environment, and Exelon's shareholders. Exelon believes the FLA reflects an appropriate balancing of competing interests.

II. Description and Rationale for Major Proposals / Issues

Exelon's ILP studies demonstrated that the Conowingo Project provides valuable recreation resources, meets Maryland water quality standards at the designated monitoring point, has little impact on resident and migratory fish populations, and provides rich shoreline resources. Based on the results of these studies, and consultations with federal and state resource agencies and other stakeholders, Exelon has committed to further protect and enhance environmental resources at the Project by implementing several measures over the new license term. These proposals are discussed below.

A. Recreation

The Project offers extensive formal and informal recreation sites which provide the recreating public trails, day use and interpretive sites, boat launch facilities, a swimming pool, wildlife viewing areas, and shoreline fishing opportunities. Exelon partners with state, county, municipal, non-profit agencies, and individuals for the development and management of these recreational facilities which, together with public access lands administered directly by Exelon, occupy over 720 of the 1,069 acres of Project lands above the ordinary high water mark as proposed herein. In order to ensure, in accordance with Commission policy, that the Project provides the "ultimate

development of these resources, consistent with the needs of the area to the extent that such development is not inconsistent with the primary purpose of the project,"[1] Exelon conducted a thorough evaluation of recreation resources in the Project vicinity.

Exelon's Recreational Inventory and Needs Assessment: (1) inventoried recreation in the Project area to identify public access points within the Project boundary; (2) estimated the amount of recreational use occurring at the Project; and (3) determined whether enhanced and/or new recreation facilities are needed to support recreation use at the Project.[2] The assessment, which involved on-site data collection for one year, found that recreational users are satisfied with existing recreation conditions and opportunities at the Project, and that capacity at the Project's numerous and diverse recreation facilities far exceeds demand.[3] Even with an estimated one-third increase in recreation demand at the Project through 2050,[4] Exelon's assessment concluded that Project recreation facilities are expected to continue to be substantially underutilized.[5]

Despite high levels of user satisfaction and excess capacity at existing Project recreation facilities, Exelon believes that improvements to existing facilities would enhance access and recreational use of the Project, consistent with the Commission's policy of maximizing public recreation at licensed hydropower projects. Following the formal user preference surveys, Exelon held four public meetings to receive stakeholder input and feedback on recommended enhancements to existing recreation facilities, and ideas for new facilities. Using the suggestions received through user preference surveys,

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1 18 C.F.R. § 2.7.

2 *See* Recreation Management Plan at i (RMP), included in FLA Volume III.

3 *Id.* at 6-41 (calculating facility use and capacity at Project recreation areas to range from 10 to 40%).

4 *Id.* at 7-4; *see also* FLA Exhibit E at E-293.

5 RMP at 7-6 to 7-7.

informal comments received at public meetings, and formal written comments submitted during the ILP, Exelon has developed a Recreation Management Plan (RMP) for managing recreational resources at the Project over the new license term.

As set forth in Exhibit E and Exelon's RMP, Exelon is proposing to improve and enhance Lock 13, Lock 15, Muddy Creek Boat Launch, Cold Cabin, Dorsey Park, Peach Bottom Marina, Line Bridge, Conowingo Creek Boat Launch, Glen Cove Marina, Funk's Pond, Conowingo swimming pool, Conowingo Dam Overlook, Fisherman's Park/Shure's Landing, and Peach Bottom access.[6] Exelon believes these enhancements reflect its commitment to provide high-quality public recreation at the Project in accordance with Commission policy, meet current and future recreational demand in the Project area, and appropriately consider the needs of persons with disabilities. The estimated cost for constructing these recreation improvements is approximately $2.5 million.

B. Shoreline Management Plan

Exelon undertook a number of studies to evaluate the Project's benefits and effects on the numerous environmental resources and uses that relate to the Project's shoreline. These studies, including the Shoreline Management Report, contributed to the development of the Shoreline Management Plan (SMP), a comprehensive plan for the management of the Project shoreline over the new license term.[7]

Based on the findings of the Shoreline Management Report and other relicensing studies, and in accordance with applicable statutory and regulatory provisions, the goals and objectives of Exelon's SMP are to:

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[6] As described in the Sediment Management Plan included in the FLA, Exelon continues to evaluate the need for, feasibility, and cost effectiveness of dredging at certain recreation facilities in a manner that supports usage and protects aquatic resources.

[7] Shoreline Management Plan, included in FLA Volume III (Conowingo SMP).

- Protect environmental resources such as wetlands, fish and wildlife habitat, and spawning areas.
- Preserve the scenic quality of Project lands for boaters and shoreline recreation activities.
- Maintain existing water quality.
- Protect historic and cultural resources.
- Ensure cooperation with federal, state, and local government agencies to coordinate adjacent land uses and proposed infrastructure with shoreline uses.
- Ensure coordination with separate regulatory authority permitting review and approval efforts.
- Minimize conflicts among differing uses.
- Institute best management practices to minimize sediment and nutrient delivery to Project waters.[8]

To meet these goals and objectives, the SMP includes a land classification system.[9] In addition, Exelon has developed a "Sensitive Natural Resource Protection Overlay" (Overlay), which identifies the locations of natural or cultural resources within the Project boundary that may be affected by Project operations or the activities of lessees of project lands or recreating members of the public.[10] Prior to undertaking any ground-disturbing activity or significant exterior maintenance, or permitting a lessee to undertake such activities, Exelon will review the Overlay to determine if natural or cultural resources may be affected. If so, Exelon will take appropriate avoidance or mitigation measures consistent with the plans, programs, and policies consolidated within the SMP to better inform shoreline users and the public, and to enhance coordination with government agencies and interested non-governmental organizations.

These plans, programs, and policies include:

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[8] *Id.* at i, 3-1.

[9] *Id.* at 5-2 to 5-3. The six land classification include: (1) lands that have electric power generation and/or transmission infrastructure; (2) lands managed for developed public recreation facilities and activities; (3) lands which are primarily undeveloped and generally available for public access and use; (4) lands managed for industrial/commercial uses and other non-Project uses; (5) lands managed by federal, state, or county agencies or conservation organizations under agreement with Exelon that are generally open to the public; and (6) lands leased to individuals for seasonal recreation use. *Id.*

[10] *Id.* at 6-4 to 6-5.

- Shoreline Erosion Control Policy to guide the modification of shoreline vegetation for control purposes.
- General Maintenance Policy to address shoreline buffer maintenance and modification.
- Erosion and Remediation Policy to monitor and remediate erosion affecting Project resources.
- Shoreline Vegetation Management Policy to guide the maintenance and modification of shoreline vegetative cover.
- Viewsheds and Shoreline Access Policy to address modifications to shoreline vegetation to enhance water views and access.
- Woody Debris Policy to provide for Exelon's treatment of woody debris.
- Leased Premises Policy for Non-Cottage Lands to guide the lease of Project lands and waters for non-Project purposes, consistent with the provisions of the Standard Use and Occupancy Article, any relevant L-Form standard articles, or a FERC order approving the lease, as applicable.
- Leased Premises Policy for Cottage Lands to incorporate the comprehensive rules and regulations for leases of Project lands for existing seasonal cottages, and to reflect Exelon's policy not to permit any new cottage leases.
- Conowingo Islands Public Use Policy to limit access and use areas for leased lots on islands in Conowingo Pond for seasonal cottages.
- Public Recreation and Access Facilities to govern parcels of Project land that are leased to local, county, or state agencies, or commercial vendors for development and operation of public recreation and access facilities.
- Limitations on Public Recreation Access to restrict public access to Project lands for operational, public safety, and security reasons, such as prohibiting hunting and fishing in posted secure areas, and prohibiting the use of off-road vehicles on all Project lands.
- Overall Land Use Monitoring and Enforcement to provide for regular inspection of Project facilities and property to ensure adherence by lessees and members of the public to applicable contractual or regulatory requirements, and implementation of measures necessary to ensure compliance.[11]

In addition, the SMP provides for the protection of aquatic and terrestrial resources and habitat on Project lands by requiring all activities undertaken by Exelon or its permittees to incorporate best management practices (BMPs) to minimize or eliminate sediment and nutrient delivery to Project waters.[12] The BMPs are intended to minimize soil erosion, control sedimentation, and restrict the use of impervious surfaces associated

[11] *Id.* at iii-viii.

[12] FLA Exhibit E at E-29.

with new construction activities. Exelon also will implement BMPs for the use of pesticides and fertilizers, and restrict removal of vegetation.

Finally, the SMP incorporates Exelon's plans for management of rare, threatened, and endangered species, as well as for historic properties. These plans are discussed below.

C. Rare, Threatened, and Endangered Species

Exelon conducted relicensing studies to examine potential impacts of the Project on rare, threatened, and endangered species, including the bald eagle, osprey, black-crowned night heron, shortnose and Atlantic sturgeon, as well as Maryland darter.

The lower Susquehanna River in the Upper Chesapeake Bay is an important breeding, foraging, and roosting area for bald eagles. Exelon's bald eagle study examined the abundance levels of bald eagles, specific locations of foraging, roosting, and nesting habitat, and daily/seasonal patterns of use by migrant and nesting bald eagles within the Project area.[13] The study determined that the shoreline forests along Conowingo Pond and the Susquehanna River downstream from Conowingo Dam provide habitat that currently supports 11 pairs of breeding bald eagles and many foraging and roosting bald eagles each year.[14] Exelon's Bald Eagle Management Plan, which is developed in consultation with the U.S. Fish and Wildlife Service (USFWS), the Pennsylvania Game Commission (PGC), and Maryland Department of Natural Resources (MDNR), addresses the use of Project lands by bald eagles for nesting, roosting, and

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[13] Study to Identify Habitat Use Areas for Bald Eagle, RSP 3.23 (Conowingo RSP 3.23).

[14] *Id.* at 7; FLA Exhibit E at E-244.

foraging based on the national Bald Eagle Management Guidelines.[15] It provides a framework for evaluating and implementing land management practices that minimize impacts to bald eagles on Project lands. Exelon anticipates that implementation of the plan will enhance and benefit bald eagles on Project lands and in the region as a whole.

Exelon's study on the osprey, which is listed as threatened by Pennsylvania,[16] sought to identify locations in the Project area inhabited by osprey.[17] Twelve osprey nests were found in the Project area; four in the Maryland portion of the Project and eight in the Pennsylvania portion.[18] To appropriately protect these and other nests, Exelon's SMP includes an Osprey Management Policy developed in consultation with state and federal agencies.[19] The policy includes the establishment of appropriate buffer areas to prevent visual or auditory disturbance of nests during the breeding and nesting season (January to late July).

Exelon's study on the black-crowned night heron, which is endangered in Pennsylvania,[20] involved a habitat survey.[21] Field surveys identified three to six birds regularly foraging below the dam, traveling between Rowland Island and Fisherman's Park, and roosting in trees over the water on Rowland Island. No black-crowned night heron nests were observed, however, and these locations are not anticipated to change in

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15 Because the Bald Eagle Management Plan includes sensitive information about the species, it is being filed as privileged in Volume IV of the FLA.

16 Osprey Nesting Survey, RSP 3.30 (Conowingo RSP 3.30); 58 Pa. Code § 133.21(2)(i) (2012).

17 Conowingo RSP 3.30 at i.

18 *Id.* at 11-12, Figure 4.1-1; FLA Exhibit E at E-245.

19 Conowingo SMP at 6-6.

20 58 Pa. Code § 133.21(1)(xii).

21 Black-Crowned Night-Heron Nesting Survey, RSP 3.31 (Conowingo RSP 3.31).

character over the new license term, so no measures for protecting heron habitat are proposed at this time.[22]

Exelon conducted monitoring of the Susquehanna River for tagged sturgeons from other river systems (Delaware River, Potomac River) that might use the Susquehanna River.[23] No tagged sturgeon were recorded in the Susquehanna River in the Exelon studies. [24]

Exelon's study for Maryland darter did not identify the presence of this species in the Susquehanna River, or two of its tributaries (Deer and Octoraro creeks).[25]

D. Historic Properties

In order to assist the Commission in assessing the impacts of Project facilities and operations on historic and cultural resources included in, or eligible for inclusion in, the National Register of Historic Places (National Register) in compliance with Section 106 of the National Historic Preservation Act,[26] Exelon conducted a historic structure study in the Project's area of potential effect (APE), which includes the lands enclosed by the Project boundary. Exelon prepared a Phase 1A Study and Report[27] noting many previously recorded archaeological sites within the Project APE in Pennsylvania and Maryland.[28] The Phase 1A studies also identified various areas where additional

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22 *Id.* at 17.

23 Shortnose and Atlantic Sturgeon Life History Studies, RSP 3.22 (Conowingo RSP 3.22).

24 Exelon is continuing to consult informally with the National Marine Fisheries Service on shortnose and Atlantic sturgeon.

25 Maryland Darter Surveys, RSP 3.10 (Conowingo RSP 3.10).

26 16 U.S.C. § 470f.

27 Phase 1A Archaeological Study and Preliminary Historic Structures Assessment Report for the Conowingo Hydroelectric Relicensing Application Project, Harford and Cecil Counties, Maryland and Lancaster and York Counties, Pennsylvania (ER2011-0212-042-B) (Conowingo Phase 1A Report). Like the RSPs, the historic properties reports are being filed with the FLA.

28 *Id.* at 51-55.

archaeological sites were likely to be focused.[29] Nine areas were selected for Phase 1B surveys, which revealed several previously unrecorded sites in Maryland.[30] With one exception, the sites were considered to be potentially National Register eligible.[31]

The Conowingo Historic Structures Assessment Report for the Maryland portion of the Project[32] identified in the APE three National Register listed sites or historic districts, three previously recorded bridges determined to be eligible, two previously recorded resources for which no determination of eligibility has been made, and several newly recorded resources of various types.[33] It recommended that eligibility determinations be made for two previously recorded resources.[34] The Historic Structures Assessment Report for the Pennsylvania portion of the Project also recommended that eligibility determinations be made for these two resources.[35]

Exelon's Historic Properties Management Plan (HPMP) included with the FLA describes the historic and archaeological resource studies reviewed and undertaken for the Conowingo Project, the architectural and archaeological resources within the APE, resource management goals and standards, and the specific proposed Project management

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29 *Id.* at 66-74; *see also* FLA Exhibit E at E-335.

30 Final Report, Conowingo Project Relicensing Application, Harford and Cecil Counties, Maryland and Lancaster and York Counties, Pennsylvania, Phase 1B Archaeological Survey of Nine High Priority Areas of Interest (AOIs 6, 18, 19, 33, 36A, 36B, 38, 39, and 45) (ER 2011-0212-042) (Conowingo Phase 1B Survey); FLA Exhibit E at E-355.

31 Conowingo Phase 1B Survey at 109-11.

32 Historic Structures Report for the Conowingo Hydroelectric Project Relicensing Application, Harford and Cecil Counties, Maryland (Conowingo Historic Assessment – MD).

33 Conowingo Historic Assessment – MD also identifies the Southern Terminus of the Susquehanna & Tidewater Canal as being within the APE, but this location was recently removed from the Project Boundary. *See Exelon Generation Co., LLC,* 135 FERC ¶ 62,179 (2011).

34 Conowingo Historic Assessment – MD at ii.

35 Historic Structures Report for the Conowingo Hydroelectric Project Relicensing Application, Drumore, Martic, and Fulton Townships, Lancaster County and Lower Chanceford and Peach Bottom Townships, York County, Pennsylvania at ii (ER2011-0212-042-B).

measures.[36] These include designation of a Cultural Resources Coordinator, measures for reviewing proposed ground-disturbing activities for potential effects on archaeological resources, monitoring of sites with potential for erosion impacts, and treatment of unanticipated discoveries of archaeological resources.

E. Water Quality

Exelon's study of seasonal and diurnal water quality, Revised Study Plan (RSP) 3.1, documented water quality within Conowingo Pond under a variety of conditions. It also monitored the dissolved oxygen (DO) of turbine discharges under all operational configurations to ensure that state DO water quality standards are being met downstream of the Project. Pursuant to the FERC-approved study plan, Exelon conducted weekly monitoring of DO, water temperature, surface pH, and turbidity at locations both upstream and downstream of the dam for a period of seven months, and sampled discharge "boils" of operating turbines hourly on various dates in the summer months.[37]

The observed pattern of DO and water temperature distribution in Conowingo Pond was similar to that observed in the Pond for more than 50 years. A comparison of water temperature data collected upstream and downstream of the dam confirmed that the operation of the Project has no measurable effect on the temperature of the water being released downstream; water temperatures were uniform throughout the lower Conowingo Pond and the tailwater area under a variety of unit operating and river flow conditions.[38]

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[36] The HPMP is included in Volume IV of the FLA as privileged.

[37] Seasonal and Diurnal Water Quality in Conowingo Pond and Below Conowingo Dam, RSP 3.1 at i (Conowingo RSP 3.1). During low-flow periods, the waters in Conowingo Pond may stratify and result in a vertically-varying DO profile in deeper parts of the pond. The occasionally low DO water in Conowingo Pond, however, is not expected to impact waters downstream of the dam. *Id.*

[38] *Id.* at ii, 18.

Moreover, the water temperature recorded at Station 643, 0.6 miles downstream of the dam, was virtually identical to that of turbine discharge "boils."[39]

Discharge from the dam also meets state DO standards. Average DO conditions within all the turbine boils were always at or above standards, and were usually similar to the DO conditions measured downstream of the Project at Station 643.[40] While Station 643 consistently measured DO concentrations 1-2 mg/L lower than the DO measured at Transect 8, the farthest station downstream from Station 643, this difference seems most likely due to natural aeration in the river, as waters move downstream.[41]

These findings demonstrate that Project operations have little, if any, adverse impact on water quality, and that the Project is meeting state water quality standards. Accordingly, Exelon is not proposing to modify current Project operations.

F. Fish Passage

Exelon conducted a number of studies to comprehensively review both upstream and downstream fish passage at the Project.[42] The Project includes two fish lift facilities. The West Fish Lift (WFL), which began operation in 1972, operated through 1996 as part of a trap and transport program; since 1997, the WFL has allowed resource agencies to conduct specific experiments, such as induced spawning.[43] While the WFL cannot pass

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[39] *Id.* at 17.

[40] *Id.*; FLA Exhibit E at E-85 to E-86.

[41] Conowingo RSP 3.1 at iii, 20. The representativeness of Station 643 for DO monitoring is addressed in FLA Exhibit E at E-86.

[42] Upstream Fish Passage Effectiveness Study, RSP 3.5 (Conowingo RSP 3.5); Conowingo East Fish Lift Attraction Flows, Addendum-Statistical Analysis of Turbine Operations and East Fish List Catch, RSP 3.6; Fish Passage Impediments Study, RSP 3.7; Biological and Engineering Studies of the East and West Fish Lifts, RSP 3.9 (Conowingo RSP 3.9); Downstream Fish Passage Effectiveness Study, Initial Study Report Summary, RSP 3.2 (Conowingo Downstream Passage RSP 3.2); Estimation of Survival of Juvenile American Shad Passed Through Francis Turbines, RSP 3.2 (Conowingo Juvenile Shad RSP 3.2).

[43] Conowingo RSP 3.9 at i.

migrating fish directly to Conowingo Pond, the East Fish Lift (EFL), constructed in 1991, was designed to be used either as a trap and transport facility or for direct passage.[44] Exelon has used the EFL for volitional passage since 1997.[45] Exelon's relicensing studies included a comprehensive evaluation of the operational history of the lifts, current maintenance and operations methods, and a range of potential upgrades, modifications, or replacement options based on consultation with the agencies. Specific measures to extend the life of the facilities over the new license term are detailed in Appendix B to FLA Exhibit E.

Exelon's Upstream Passage Effectiveness Study calculated fishway attraction effectiveness, upstream fish passage efficiency, and upstream fish passage effectiveness for American shad.[46] Of the 89 shad radio-tagged for the study, 73% entered into the EFL; 44.9% completed passage through the EFL; and 43.8% remained upstream for 48 hours or more after passage.[47] The study, in conjunction with Exelon's companion study on EFL attraction flows, did not identify any single operational parameter for the Project or the EFL that may result in substantial improvements in fish passage effectiveness at the EFL. Radio telemetry data collected in the spring of 2012 will provide additional information on the effectiveness of the EFL. Exelon anticipates filing a study report detailing this analysis on or before September 30, 2012.

In addition, Exelon's study on velocity barriers concluded that there was no evidence suggesting that water velocities present a barrier to upstream migration of

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44 *Id.*

45 *Id.*; FLA Exhibit E at E-116.

46 Conowingo RSP 3.5 at i.

47 *Id.* at ii-iii, 15-18.

American shad or river herring.[48] Moreover, fish migrated upstream with little observable difficulty regardless of Project discharge.

With regard to downstream fish passage, Exelon examined both entrainment potential and survival for eight fish species collaboratively identified by Exelon and ILP stakeholders as important management species. Overall, the results of the study indicate that the entrainment potential for most resident fish species is low at the Project.[49] Entrainment when it occurs, however, does not necessarily result in injury to fish. In fact, Exelon's study estimated survival rates for juvenile American shad are greater than 90%.[50] Adult American shad passing through the Project's Kaplan units have a survival rate of 86.3%, and a survival rate of 93.0% when passing the Project's Francis units.[51]

In all respects, Exelon's studies confirmed that Conowingo Pond and the Project tailrace supports a diverse assemblage of fishes and a healthy multi-species sport fishery supported by natural reproduction. Moreover, Project operations do not appear to be adversely impacting upstream or downstream passage.[52]

G. American Eel

In February 2007, the Department of the Interior (DOI) determined that the overall American eel population is stable based on trends in glass eel abundance indices. Specifically, DOI determined that "the American eel is not undergoing a sustained

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[48] FLA Exhibit E at E-144 to E-145.

[49] Conowingo Downstream Passage RSP 3.2 at ii.

[50] *Id.* at iii, 9; Conowingo Juvenile Shad RSP 3.2 at 5, 11.

[51] *Id.* at iii; *see also* FLA Exhibit E at E-125.

[52] Exelon acknowledges, however, that given fish passage efficiency issues associated with other hydroelectric projects on the lower Susquehanna River, the Project may have a cumulative impact on the American shad. Other identified cumulative impacts affecting shad population include predation, by-catch, and climate change.

downward trend at the population level."[53] Notwithstanding the abundance of the species, it has remained a species of interest to resource agencies.[54] USFWS has been sampling eel near the WFL since 2005. Working with USFWS and the other relicensing stakeholders, Exelon conducted biological and engineering studies which described the spatial distribution and size characteristics of American eels in the Conowingo tailrace, examined the engineering feasibility and costs of upstream and downstream passage options, and assessed the cumulative impacts to biodiversity of the Susquehanna River ecosystem of upstream and downstream passage of American eel, among other objectives.[55]

To evaluate the impacts of eel passage, Exelon's assessment considered the expected overall upstream passage efficiency and expected downstream passage survival. Because it is expected that a portion of migrating eels will become residents in the impoundments through which they pass, cumulative passage efficiency from the Conowingo tailrace to the York Haven impoundment was estimated, as a product of the four dams' upstream passage efficiencies, to be between 1.3-2.5%.[56] In contrast to volitional passage, the upstream passage efficiency of a trap-and-transport approach from

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53 FWS, Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List the American Eel as Threatened or Endangered, 72 Fed. Reg. 4967, 4977 (Feb. 2, 2007).

54 In September 2011, FWS issued a 90-day finding on a more recent petition to list the American eel as threatened. FWS found that the effects of climate change on the species may warrant listing, but otherwise essentially affirmed its conclusions in the 12-month finding it issued on the previous petition in 2007. FWS, Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition to List the American Eel as Threatened, 76 Fed. Reg. 60,431 (Sept. 29, 2011).

55 Biological and Engineering Studies of American Eel, RSP 3.3 (Conowingo RSP 3.3).

56 *Id.* at vi.

Conowingo Dam to upstream of York Haven, the farthest upstream dam on the lower Susquehanna River, would be expected to be between 36-43%.[57]

Upon maturity, eels transported or volitionally passed upstream would have to migrate downstream and pass through one or more dam's turbines. Survival estimates for turbine passage is a function of turbine type. Based on the proportion of types of turbines at each of the lower Susquehanna River hydropower projects, survival estimates are expected to range from approximately 63-75% at Safe Harbor, on the low end, and about 80% at Conowingo. However, site specific data collected in the fall of 2011 indicate that adult American eel survival at Conowingo may range from 89.8% to 100%.[58]

In addition to hosting numerous ILP consultation and study meetings, Exelon also held a two-day workshop in October 2011 with resource agencies, other relicensing stakeholders, and eel experts to discuss options for eel passage generally and at Conowingo specifically. As a result of this workshop and the associated relicensing studies, Exelon is proposing an upstream and downstream trap and transport program for American eel.[59] Exelon continues to work with resource agencies and other relicensing stakeholders to further refine this proposal.[60]

H. Flow Regime

Exelon conducted various studies to identify potential impacts of the Project's flow regime on a variety of environmental resources. These studies were specifically

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[57] *Id.*; FLA Exhibit E at E-148.

[58] FLA Exhibit E at E-124, E-150.

[59] *See id.* at E-24.

[60] Exelon anticipates that costs associated with a trap and transport program would be shared by all of the licensees on the lower Susquehanna River.

designed to gauge the impacts, if any, of Project operations on aquatic communities,[61] migratory fish reproduction,[62] stranding,[63] littoral habitat,[64] tributary access,[65] and the emergent aquatic vegetation (EAV)/submerged aquatic vegetation (SAV) community.[66]

Exelon's Characterization of Downstream Aquatic Communities, RSP 3.18, involved a comprehensive review of data on fish and benthic macroinvertebrate communities downstream of the Project. The study concluded that while some species have increased or declined in abundance, the fish species assemblage—consisting primarily of gizzard shad, white perch, common carp, quillback, comely shiner, channel catfish, walleye, smallmouth and largemouth bass, along with seasonal migrants like American shad, blueback herring, alewife, sea lamprey and striped bass—has remained diverse, with this same core group of species as was observed in the 1980s.[67]

Exelon's Freshwater Mussel Characterization Study Below Conowingo Dam, RSP 3.19, similarly found that mussels are fairly well established in the Project area.[68] The study found that much of the reach below the dam is a challenging environment for mussels, due to the bedrock/boulder-dominated river bottom and turbulent water flow,

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61 Updated Study Report, Characterization of Downstream Aquatic Communities, RSP 3.18 (Conowingo RSP 3.18); Updated Study Report, Freshwater Mussel Characterization Study Below Conowingo Dam, RSP 3.19 (Conowingo RSP 3.19).

62 Impact of Plant Operation on Migratory Fish Reproduction, RSP 3.21(Conowingo RSP 3.21).

63 Updated Study Report, Downstream Flow Ramping and Stranding Study, RSP 3.8 at 18.

64 Water Level Management Study, RSP 3.12 (Conowingo RSP 3.12).

65 Updated Study Report, Study to Assess Tributary Access in Conowingo Pond, RSP 3.13.

66 Downstream EAV/SAV Study, RSP 3.17 (Conowingo RSP 3.17).

67 Conowingo RSP 3.18 at 10-2, 11-2; FLA Exhibit E at E-153.

68 Conowingo RSP 3.19 at 25.

and because the distribution of mussels is influenced by a combination of factors, it is difficult to determine the impact of Project operations on mussels.[69]

Exelon's study of the Impact of Plant Operation on Migratory Fish Reproduction, RSP 3.21, evaluated the potential impact of Project operations, including the current minimum flow regime, on the reproduction of target anadromous fish (*e.g.*, American shad, river herring, striped bass, and white perch).[70] The study found that Project operations had minimal to no adverse impacts on these species, and that any population declines—particularly in the case of river herring—were likely attributable to sources unrelated to Project operations.[71] In addition, Exelon conducted sampling in the spring of 2012 to gather additional information on the occurrence of ichthyoplankton in the Susquehanna River downstream of Conowingo Dam. A study report detailing the results will be filed with FERC on or before September 30, 2012.

Exelon's stranding surveys revealed that the potential for stranding—which can occur when downstream water levels decline following peaking generation—appears highest in the summer.[72] However, the consequences of stranding in the summer were found to be negligible, and the impacts of Project operations to populations of both non-migratory and anadromous fish in the spring were found to be minor.[73]

Exelon's ILP studies also concluded that: water level fluctuations attributable to Project operations do not appear to be impacting littoral habitat;[74] Project operations do

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69 *Id.* at iv.

70 Conowingo RSP 3.21.

71 *Id.* at 22-24.

72 Conowingo RSP 3.8 at 18.

73 *Id.*

74 Conowingo RSP 3.12 at 33.

not appear to be impacting fish access to Conowingo tributaries;[75] and Project operations are not affecting the downstream EAV/SAV communities, or species' use of EAV/SAV-associated habitats.[76]

Downstream fisheries communities are quite robust. Accordingly, Exelon is not proposing to modify minimum flows at the Project at this time.[77] Exelon continues, however, to consult with federal and state resources agencies and other interested stakeholders to discuss appropriate flow management decisions. These decisions must take into account not only the unregulated hydrology of the Susquehanna River, but upstream hydropower projects' water availability influences, which can greatly impact the lower Susquehanna River's flow management effectiveness.

I. Closure of Catwalk

Ongoing security and safety concerns arising from the catwalk's proximity to the Conowingo powerhouse, and the catwalk's use by Project employees for Project operations, preclude Exelon from providing public access to this Project facility. Moreover, Exelon's recreation studies demonstrate that existing facilities—including the $4 million Fisherman's Park facility that was approved by the Commission after the catwalk was closed in October 2001—are more than adequate to meet recreation demand at the Project.

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[75] Conowingo RSP 3.13 at 9.

[76] Conowingo RSP 3.17 at 16-19.

[77] For Exelon's Instream Flow Habitat Assessment Below Conowingo Dam, for example, Exelon worked with stakeholders to select species for analysis in determining the relationship between flow and aquatic habitat conditions. Updated Study Report, Instream Flow Habitat Assessment Below Conowingo Dam, RSP 3.16. Exelon's habitat modeling results showed that target species had a wide range of preferred flows and area, and that many species had divergent flow preferences, with no single flow or flow range providing optimal or near-optimal habitat for all target species. *Id.* at ii.

1. Background

After the September 11, 2001 terrorist attacks, Exelon conducted a security review of the Conowingo Project. As a result of this review, Exelon concluded that "allowing the general public to access the project works, particularly the catwalk at the powerhouse, places the project and public at risk."[78] In October 2001, Exelon closed the catwalk to the public. These security measures were coordinated with the Commission through a series of letters and site visits.

After Exelon closed the catwalk to the public, it conducted a study of potential alternative recreational fishing opportunities at Conowingo. Exelon prepared an application to amend the license to provide for alternative public fishing access, including access for those with disabilities. Prior to filing its application with the Commission, Exelon consulted with various federal and state agencies to obtain comments on the proposed recreational facilities. By letter dated May 24, 2006, the licensees provided the following entities with a copy of the application for the proposal: USFWS; MDNR; Maryland Department of the Environment; Maryland Department of State Planning; Maryland Historic Trust (the State Historic Preservation Officer); Cecil County Board of Parks and Recreation; Harford County Department of Planning and Zoning; Harford County Department of Parks and Recreation; SRBC; and Chesapeake Bay Foundation. No comments were received.[79] Exelon also held meetings with resource agencies and the general public on October 13 and November 28, 2005, and May 6, 2006.

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[78] *Susquehanna Power Co. & PECO Energy Power Co.*, 119 FERC ¶ 62,088 at p. 64,247 (2007).

[79] *Id*. at p. 64,248.

In July 2006, Exelon filed an application to amend the Conowingo recreational facilities.[80] The application proposed to permanently discontinue public use of the catwalk for fishing and remove references to it as a fishing platform from Exhibit R of the Project license. To mitigate for the loss of the catwalk, Exelon proposed additional recreation facilities at Fisherman's Park on the west side of the river and public fishing access along the banks of Octoraro Creek on the east side of the river.

The Commission publicly noticed the application and received several comments on the proposal which were considered in the Commission's review. On May 1, 2007, the Commission, after balancing security concerns with the need for public access for recreation,[81] approved the license amendment.[82] The Commission acknowledged that the closure of the catwalk "has been the result of years of consideration and assessment" by Exelon and that "[t]here have been many meetings, site visits, and exchanges of correspondence on this matter. . . ."[83] In approving Exelon's proposal, the Commission held that the alternative fishing sites would "provide safe, secure and enjoyable fishing opportunities that are accessible to all ages, and to those with disabilities" and that Exelon's proposal would "provide additional and improved recreational facilities that adequately take into account public safety and project security."[84]

Exelon has since completed construction of the Octoraro Creek and Fisherman's Park facilities at a cost of $4 million. The new facility at Fisherman's Park, located in

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80 Application to Amend Exhibit R to Reflect Changes in Access for Recreational Fishing, Project No. 405-071 (filed July 28, 2006).

81 Letter from Chairman Jon Wellinghoff to U.S. Senator Robert P. Casey, Jr. at 1, Project No. 405-000 (issued May 20, 2009).

82 *Susquehanna Power Co. & PECO Energy Power Co.*, 119 FERC ¶ 62,088 at p. 64,249.

83 *Id.*

84 *Id*.

close proximity to the catwalk, provides anglers, including those with disabilities, with approximately 70 feet of shoreline, including boardwalks and observation platforms. The Octoraro Creek site allows easy access to the creek for approximately one-half mile from Maryland Route 222 to the creek's confluence with the Susquehanna River. Exelon also constructed a new parking area and ADA pathway to the creek to allow access to Octoraro Creek site.

2. Relicensing Studies

Despite previous recent determinations (1) finding that closing the catwalk was in the public interest, and (2) approving Exelon's plan to expend $4 million in alternative fishing facilities, FERC required Exelon to conduct additional studies addressing whether the catwalk should be reopened to the public. The studies, performed by an independent security consultant, included a catwalk vulnerability assessment and a separate feasibility assessment.[85] Both reports concluded that the catwalk posed a significant risk to public safety and security and recommended that the catwalk remain closed to the public. While the feasibility assessment determined risks could be mitigated (but not eliminated), the cost of doing so would be approximately $2.5 million ($2014).

In addition to catwalk-specific studies, Exelon conducted a Recreation Facility Inventory and Estimated Recreation Use Report (RSP 3.26). This study, using methods approved by the Commission, clearly indicated that the existing facilities meet current and projected use. This is especially true for Fisherman's Park and Octoraro Creek Access, which had capacity uses of 27% and 17% (average weekend day use),

[85] Both of these reports contain Critical Energy Infrastructure Information (CEII) and are not publicly available. However, the vulnerability assessment is accessible to state and federal agency personnel through coordination with Colleen Hicks, Exelon Relicensing Manager, and the feasibility assessment may be requested through FERC's CEII program.

respectively.[86] Moreover, shoreline fishing has an expected growth rate over the next several decades (2008-2050) of only 24%, and may even decline, which clearly shows an additional fishing facility is not required to meet demand.[87]

3. Exelon Proposal

While Exelon is not unsympathetic to the interests of certain anglers to access a previous angling site, public safety and security considerations dictate the catwalk remain closed. It is feasible to reduce some—but not all—of the security risks associated with reopening the catwalk through substantial capital expenditures and ongoing operation and maintenance costs, but these costs are unwarranted given the availability of other angling opportunities provided by the Project. Finally, having made a determination—less than five years ago—that closure of the catwalk was in the public interest and that a new $4 million alternative facility was appropriate, it would be arbitrary and capricious for the Commission to now require Exelon to spend millions of dollars to reopen the catwalk. The security risk has not diminished and there is no other compelling change in circumstances that would warrant a reversal of the Commission's earlier determination.

III. Proposed Changes to Project Boundary

The Commission's regulations provide that: "The [project] boundary must enclose *only* those lands necessary for operation and maintenance of the project and for other project purposes, such as recreation, shoreline control, or protection of environmental resources. . . ."[88] The analysis of what lands are necessary for project

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[86] RMP at 6-16.

[87] *Id.* at 7-1, 7-4; Exhibit E at E-3-239.

[88] 18 C.F.R. § 4.41(h)(2) (emphasis added). FERC's regulations also include specific guidance on impoundments and buffer zones around impoundments, i.e., "[t]he boundary must be located no more than 200 feet (horizontal measurement) from the exterior margin of the reservoir, defined by the normal maximum surface elevation, except where deviations may be necessary . . . where additional lands are

purposes may evolve "to reflect changing circumstances and developments with the passage of time."[89] In the context of amending licenses, the Commission has held that lands may be removed from the Project "if the Commission determines that the land is no longer necessary or appropriate for project purposes; that is, that all project purposes will continue to be satisfied in the absence of the lands at issue."[90]

As the Commission has recognized in this proceeding, the relicensing process allows for a comprehensive assessment of which lands are necessary for project purposes—in light of today's facts.[91] The location of the Project boundary under the license about to expire—established decades previously—should not be treated as presumptively "correct." Rather, the Commission should establish a new Project boundary on relicensing based on the evidentiary record regarding the existence, or lack thereof, of a nexus between operation of the Project and potentially affected resources, and a demonstrated need to include lands within the Project boundary in order to protect, mitigate potential damages to, or enhance resources that are adversely affected by the project.[92]

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necessary for project purposes, such as public recreation, shoreline control, or protection of environmental resources." *Id.* § 4.41(h)(2)(i)(B).

89 *Wis. River Power Co.*, 107 FERC ¶ 61,299 at P 10 (2004) (citing *Ala. Power Co.*, 55 FPC 1563, 1564-65 (1976)).

90 *Wis. Pub. Serv. Corp.*, 104 FERC ¶ 61,295 at P 18 (2003); *Pub. Util. Dist. No. 2 of Grant Cnty., Wash.*, 88 FERC ¶ 61,012 at pp. 61,032-33, *reh'g denied*, 89 FERC ¶ 61,177 (1999) (concerning removal of private residences).

91 *Exelon Generation Co., LLC*, 135 FERC ¶ 62,179 at P 16; *see also Confederated Tribes & Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466, 470-71 (9th Cir. 1984), *cert denied*, 471 U.S. 1116 (1985); *Power Auth. of the State of N.Y.*, 109 FERC ¶ 61,092 at PP 11-19 (2004).

92 The premise that there should be a nexus between project effects and the requirements of the license is reflected in the Commission's ILP regulations, which require parties requesting studies to "[e]xplain any nexus between project operations and effects . . . on the resource to be studied, and how the study results would inform the development of license requirements." 18 C.F.R. § 5.9(b)(5).

Consistent with this approach, Exelon proposes that the new Project boundary terminate on the east bank of the river about 3,500 feet below the dam; that is, at the terminus of the Octoraro Creek recreation access trail, and on the west bank about 2,500 feet below the dam below the boat launch at Shure's Landing at the downstream end of Fisherman's Park. The proposed boundary is shown on Figure 2.2.2-1 of FLA Exhibit E.

When the Project was originally constructed in the 1920s, large tracts of land downstream of the dam site on both sides of the Susquehanna River, were included within the Project boundary. This includes, on the west bank, a narrow strip of land which terminates approximately nine miles downstream from the dam in the City of Havre de Grace. This land was included in the Project boundary at that time only because it was needed for construction of a railroad to carry construction materials to the dam site. Yet the land has not been needed for that purpose since construction of the Project was completed in 1928, and it serves no operational purpose.

Not only are the lands downstream from the Conowingo Dam plainly unnecessary to operate the Project's power generation facilities, they also are not needed for recreational purposes. The recreation facilities that would be excluded from the Project boundary are on land owned by Exelon, but have never been operated or maintained by Exelon. Some are non-Project uses of Project lands.[93] Exelon is committed to negotiating leases with existing recreation facility operators for the continued operation

[93] These facilities include: (1) a portion of the Lower Susquehanna Heritage Greenway, managed by MDNR as a non-Project use of Project lands, *Susquehanna Power Co.*, 111 FERC ¶ 62,035 (2005) (approving lease of Project lands to Cecil County); (2) McLhinney Park, operated by the City of Havre de Grace and located 8.9 miles from Conowingo Dam, which also is a non-Project use of Project lands, *Susquehanna Power Co. and Philadelphia Electric Power Co.*, Order Approving Change in Land Rights, Project No. 405-000 (June 13, 1974); (3) Deer Creek Access Point, managed by MDNR as part of Susquehanna State Park, which is a non-Project recreation area; and (4) Lapidum Boat Launch, also managed by MDNR as part of Susquehanna State Park.

of those facilities located on lands owned by Exelon but no longer in the Project boundary.[94] In addition, Exelon will negotiate a new lease with MDNR for the continued protection and use of Exelon-owned lands outside the Project boundary for the co-located Lower Susquehanna Greenway Trail and Mason Dixon Trail.[95] Accordingly, public recreation needs will continue to be met throughout the term of the new license notwithstanding the removal of these downstream facilities from the Project boundary, because of the many recreation facilities on Conowingo Pond and downstream of the dam at Fisherman's Park, Shure's Landing boat launch, and the Octoraro Creek shoreline access facility on the east bank, that will all remain within the Project boundary.

IV. License Term

As described above and in the accompanying FLA, Exelon proposes to operate the Project in the new license term in a manner that: (1) provides clean energy and capacity to the electric grid and surrounding community; (2) enhances public use of recreational facilities and resources; (3) protects and enhances fish and terrestrial resources, including shoreline resources; (4) provides special measures to manage rare, threatened, and endangered species; (5) protects and maintains historic resources within the area affected by operation of the Project; and (6) maintains water quality. Exelon estimates that the average annual capital costs for the Project under the new license term will be nearly $16 million.[96] Additional capital costs related to implementation of the PM&E measures set forth in the FLA would exceed $5.4 million.[97] Annual operations

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94 FLA Exhibit E at E-27, E-299.

95 FLA Exhibit E at E-27, E-299.

96 FLA Exhibit D at D-3.

97 *Id.* at D-4. This figure does not include the capital costs associated with the SMP, which have not yet been determined and which could significantly add to this total.

and maintenance expenses for the Project are expected to be nearly $16 million under the new license term,[98] and Exelon will expend an additional $1.3 million annually in the implementation of the proposed PM&E measures.[99]

Given the substantial operational expenditures and resource PM&E measures Exelon proposes to implement at the Project during the new license term, Exelon believes that the Commission should grant a new license for the Project with a minimum 40-year term.[100] This is consistent with the Commission's policy on license terms as articulated in *Mead Corp.*, pursuant to which the Commission will grant:

> 30-year terms for the licenses for projects with little or no proposed redevelopment, new construction, new capacity or environmental mitigative and enhancement measures; 40-year terms for projects with a moderate amount of proposed redevelopment, new construction, new capacity or mitigative and enhancement measures; and 50-year terms for projects with proposed extensive redevelopment, new construction, new capacity, or mitigative and enhancement measures.[101]

The cost of Exelon's proposed measures is well within the annual costs of other projects granted a 40- to 50-year license term.[102]

While the measures Exelon proposes warrant a minimum 40-year license term for the Project, Exelon believes a 46-year term would be consistent with the Commission's

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98 *Id.* at D-3.

99 *Id.* at D-4. These annual O&M costs do not include the significant annual costs associated with implementation of the SMP, which have not yet been determined.

100 Should Exelon propose additional PM&E measures as a result of a settlement agreement, it reserves the right to request a 50-year license term.

101 72 FERC ¶ 61,027 at p. 61,077 (1995).

102 *See, e.g., Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 136 FERC ¶ 62,188 at P 162 (2011), Jackson Project Settlement Joint Explanatory Statement at 44, Project No. 2157-000 (filed Oct. 14, 2009) (issuing a 45-year license for a project with PM&Es expected to cost $1.1 million annually). *See also N.Y. Power Auth.*, 118 FERC ¶ 61,206 at P 113 (2007), Final Environmental Impact Statement for the Niagara Power Project, FERC/FEIS 0198F at 154-55 (issued Dec. 29, 2006) (granting a 50-year license where the licensee's annual implementation costs of PM&E measures were approximately $5.2 million). *See also N.Y. Power Auth.*, 105 FERC ¶ 61,102 at PP 226, 228 (2003) (granting a 50-year license term, where annualized PM&E measures totaled nearly $6.3 million).

policy of coordinating the license expiration dates of hydroelectric projects in the same river basin to the maximum extent possible, to maximize future consideration of cumulative impacts at the same time in contemporaneous proceedings at relicensing.[103] Muddy Run and Conowingo are two of three major hydroelectric projects in the lower Susquehanna River basin, the licenses for which expire in 2014.[104] The licenses for the two other projects in the lower Susquehanna River basin, Holtwood and Safe Harbor, expire in 2030.[105] Assuming that those projects receive 30 year license terms when relicensed in 2030, the licenses for Muddy Run and Conowingo will expire contemporaneously with those projects if Exelon receives a 46-year term for Muddy Run and Conowingo. Accordingly, Exelon believes a 46-year license is appropriate for the Project, based on both the PM&E measures proposed in the FLA, and to comply with the Commission policy of coordinating license terms of hydroelectric projects in the same river basin.

V. Proposed Settlement Schedule

As discussed herein, Exelon believes the FLA reflects a careful balance of power and non-power values in an effort to maximize the benefits of the Project for the competing interests of the community, the environment, and Exelon's shareholders. Exelon recognizes, however, that despite the filing of the FLA, the development of its licensing proposal remains an iterative process. To that end, Exelon has engaged interested stakeholders to participate in the development of a comprehensive settlement

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[103] 18 C.F.R. § 2.23.

[104] The license for the York Haven Hydroelectric Project, Project No. 1888, which is located approximately 45 river miles upstream of Conowingo, expires on September 1, 2014.

[105] Holtwood is located approximately 15 river miles upstream of Conowingo, while Safe Harbor is approximately 23 river miles upstream of Conowingo.

agreement to collaboratively negotiate specific terms and conditions for the new Conowingo license.

Exelon held an initial meeting with stakeholders in July 2012 to discuss and solicit feedback on its proposed settlement negotiating schedule. Specifically, Exelon proposed the following steps and anticipated dates in the settlement process to achieve comprehensive settlement for the relicensing of both Muddy Run and Conowingo:

Settlement Process Action Item	Anticipated Date(s)
Conduct Substantive Settlement Negotiations	October 9, 2012 – April 24, 2013
Finalize Conceptual Agreement	April 24, 2013
Develop Draft Settlement Agreement	April 24, 2013 – June 15, 2013
Negotiate Settlement Language with Settlement Partners	June 16, 2013 – November 29, 2013
Finalize Settlement Agreement	November 30, 2013
File Signed Settlement Agreement	January 15, 2014

Adherence to this schedule would allow the Commission sufficient time to conduct its environmental review of the Muddy Run and Conowingo Projects and issue new licenses before the current licenses expire. However, to achieve a comprehensive settlement agreement—including negotiating and developing settlement documents and preparing an offer of settlement—with the large number of parties involved within this ambitious timeframe, Exelon may need to seek an extension of the Commission's milestones for processing the FLA under the ILP, such as additional time for the Commission to issue its "Ready for Environmental Analysis" notice. Exelon will make this request, if necessary, at the appropriate time. Exelon commits to filing quarterly status reports to keep the Commission apprised of Exelon's progress in achieving comprehensive settlement under the schedule set forth above.

VI. Request for Waiver of Requirement to Include Draft Biological Assessment in the FLA

Although Exelon has been designated as the Commission's non-federal representative for purposes of informal consultation under Section 7 of the ESA[106] and would therefore typically file a draft biological assessment (DBA) with its FLA,[107] Exelon requests waiver of the requirement to include a DBA in the FLA.

Although no ESA-listed species are present at the Project, in NMFS's comments on Exelon's DLA, NMFS indicated that a DBA may be necessary to assess the effects of the Project, if any, on ESA-listed Atlantic and shortnose sturgeon species that may occur in the Susquehanna River.[108] However, Exelon believes that preparing a DBA for listed sturgeon in advance of settlement negotiations—which may result in operational or other changes that may enhance fish species—would be premature. A DBA representative of conditions in a comprehensive settlement agreement would be much more useful for both the Commission and NMFS. Therefore, Exelon proposes to provide the Commission with a DBA for ESA-listed Atlantic and shortnose species, if necessary, following the filing of an offer of settlement, and prior to the Commission's development of an environmental document for the Project relicensing.

VII. Conclusion

The FLA reflects Exelon's commitment to continuing to provide the resources necessary to meet regional peak electricity needs, while providing key regional recreational resources, protecting and enhancing fish, wildlife, and historic properties, as

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[106] The Commission designated Exelon as its non-federal representative for this purpose by notice dated May 11, 2009.

[107] *See* 18 C.F.R. § 5.18(b)(3)(ii).

[108] Comments of National Marine Fisheries Services on Draft License Application at 3, Project No. 405-000 (filed July 9, 2012).

well as shoreline resources. These proposals will enable the Commission to issue a new license for the Project that is best adapted to a comprehensive plan for waterpower development, and the PM&E of fish and wildlife, and for other beneficial uses,[109] and gives equal consideration to developmental and non-developmental values.[110] For the reasons set forth herein, Exelon requests that the Commission issue a new license for Conowingo with a 46-year term, and grant Exelon a waiver of the requirement to include a DBA with the FLA.

Respectfully submitted,

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[109] 16 U.S.C. § 803(a)(1).

[110] 16 U.S.C. § 797(e).

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Date: August 30, 2012

cc: Emily Carter
John Mudre
ILP distribution lists

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 30th day of August, 2012.

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