



**PennState Law**

Center for Agricultural  
and Shale Law

# Chesapeake Bay/Conowingo Dam Update & WOTUS – Déjà Vu All Over Again



## 2<sup>nd</sup> Annual PA Farm Show Agricultural Law Symposium

Hour 4: Evolving Environmental Regulation Issues in Agriculture

*Thursday, January 13, 2022*





## CHESAPEAKE BAY DEVELOPMENTS



Clean water:  
Great for PA  
Good for the Bay

### PENNSYLVANIA'S 2020 CHESAPEAKE BAY PROGRESS REPORT

- **PA Department of Environmental Protection (DEP)** releases this report without fanfare in December 2021.
- “In 2020, Pennsylvania reported more than 4 million pounds of nitrogen reductions to the U.S. Environmental Protection Agency (EPA), with more than 2 million pounds each from the agriculture and wastewater sectors.”
- “Through extensive work under the Wolf Administration, Pennsylvania is at an unprecedented turning point in improving its share of the Chesapeake Bay Watershed.”
- “Four counties completed Countywide Action Plans last year, identifying water quality improvement projects and initiatives that will help advance their local community and economic priorities. They joined four counties that did so in 2019, bringing to eight the number of counties that have begun carrying out CAPs. Twenty-six more counties agreed to develop their plans and begin implementing them in 2021. This means all 34 counties that were asked to develop and carry out CAPs have signed on to do so, a level of commitment whose significance is impossible to overstate..”

In state funds invested in Chesapeake Bay restoration in 2020 from the following state agencies:

\$169,827,091



17.2

Stream miles fully restored in 2020



16,379

Acres of grass buffers reported



305,569

Acres of cropland with enhanced nutrient management



538,007

Acres of cropland in compliance for nutrient and manure management





- “Pennsylvania remains far off track, threatening the Blueprint’s success, and equally as important, the ability to restore its local waterways. Getting the Commonwealth on track is essential and will require a massive influx of technical and financial assistance to provide farmers the resources to implement conservation practices.”
- “Despite reducing over four million pounds of nitrogen pollution in 2020, Pennsylvania is not on track to achieve its 2025 pollution-reduction targets, and the Commonwealth is significantly behind in implementing the practices necessary to close the gap. More than 90 percent of its remaining pollution reductions must come from agriculture.”

# 2020 POLLUTION-REDUCTION PROGRESS SUMMARY

All sectors compared to 2025 Phase III WIP. Total compared to EPA Planning Target.

PENNSYLVANIA

	WASTEWATER	URBAN/ SUBURBAN RUNOFF	AGRICULTURE	SEPTIC	OVERALL
NITROGEN	ON TRACK	OFF TRACK	OFF TRACK	OFF TRACK	OFF TRACK
PHOSPHORUS	ON TRACK	OFF TRACK	OFF TRACK	N/A	IN DANGER OF BEING OFF TRACK

MARYLAND

NITROGEN	ON TRACK	OFF TRACK	IN DANGER	OFF TRACK	ON TRACK
PHOSPHORUS	ON TRACK	ON TRACK	OFF TRACK	N/A	ON TRACK

VIRGINIA

NITROGEN	ON TRACK	OFF TRACK	OFF TRACK	OFF TRACK	ON TRACK
PHOSPHORUS	ON TRACK	OFF TRACK	OFF TRACK	N/A	ON TRACK

No state is completely on track. Model projections indicate Maryland and Virginia will be close to meeting their 2025 targets overall, though not for agriculture and urban/suburban runoff pollution. Pennsylvania remains far off track.

- ON TRACK:** Projected loads less than 10% off target
- IN DANGER OF BEING OFF TRACK:** Projected loads within 10-25% of target
- OFF TRACK:** Projected loads more than 25% off target or pollution is increasing

- “Pennsylvania remains far off track, threatening the Blueprint’s success, and equally as important, the ability to restore its local waterways. Getting the Commonwealth on track is essential and will require a massive influx of technical and financial assistance to provide farmers the resources to implement conservation practices.”
- “Despite reducing over four million pounds of nitrogen pollution in 2020, Pennsylvania is not on track to achieve its 2025 pollution-reduction targets, and the Commonwealth is significantly behind in implementing the practices necessary to close the gap. More than 90 percent of its remaining pollution reductions must come from agriculture.”

**OFF TRACK** Help farmers implement crop- and soil-management practices that improve long-term soil health.

**Steps taken:** Farms across Pennsylvania are shifting toward production systems that improve the health of their soils to reduce erosion, nutrient and pesticide loss, and polluted runoff to local streams draining to the Chesapeake Bay. However, Pennsylvania is far off track meeting targets for practices such as rotational grazing and the implementation of soil and water conservation and nutrient management plans at the whole-farm level.

**Steps needed:** The Commonwealth should pass legislation to create the Agricultural Conservation Assistance Program (ACAP) to provide dedicated, stable funding sources and farm-specific technical assistance to implement these practices.

**IN DANGER OF BEING OFF TRACK** Implement Agricultural Compliance and Enforcement Strategy to inspect farms in the Chesapeake Bay Watershed and ensure they have plans to limit pollution from erosion, manure, and fertilizer.

**Steps taken:** From 2016 to 2020, the Commonwealth verified that 11,162 farms had the required plans. In 2019, the majority of farms already had plans in place at the time of inspection, many by taking advantage of the cost-share provided by the Agricultural Plan Reimbursement Program. By the end of the fiscal year, 98 percent of the inspected farms had the necessary plans.

**OFF TRACK** A comprehensive communication/ outreach strategy to engage farmers/landowners in planting and maintaining riparian forest buffers and technical assistance and funding sources to achieve 95,000 acres of forested buffers by 2025.

**Steps taken:** The Pennsylvania Department of Conservation and Natural Resources (DCNR) provides financial support through the Riparian Forest Buffer Grant program and the TreeVitalize program, a public-private partnership to build capacity within communities to plan for, plant, and care for trees.

**Steps needed:** Pennsylvania established just over a quarter of the buffers its two-year milestone commitment calls for by 2021. Increased funding and technical assistance are required to accelerate the creation of new buffers and maintain existing buffers.

Pennsylvania is counting on agriculture to achieve more than 90 percent of its remaining nitrogen-pollution reductions. Although each farm's circumstances are unique, and many lack resources, in 2020, model estimates indicated conservation practices by Pennsylvania farmers would result in over two million pounds of additional nitrogen-pollution reductions. Despite that progress, Pennsylvania remains significantly behind, and a major acceleration of financial and technical assistance is essential to help farmers establish the conservation practices needed to reach Pennsylvania's commitment.



## **Lawsuits filed against EPA over Pa and NY Chesapeake Bay**

On September 10, 2020, the Chesapeake Bay Foundation and the states of Maryland, Virginia, Delaware, and the District of Columbia filed separate complaints against the U.S. Environmental Protection Agency (EPA) seeking to invalidate New York and Pennsylvania’s Chesapeake Bay Agreement nutrient reduction plans and compel EPA Secretary Andrew Wheeler to ensure state compliance with the Chesapeake Bay Agreement nutrient reduction goals. ([Chesapeake Bay Foundation, Inc. v. Environmental Protection Agency, No. 1:20-cv-02529](#); [State of Maryland v. Wheeler, No. 1:20-cv-02530](#)). Filed in the U.S. District Court for the District of Columbia, the complaints allege that Pennsylvania and New York submitted Phase III Watershed Improvement Plans (WIP) that facially “failed to attain levels of pollution reduction required by the Bay [Total Maximum Daily Load] by 2025” and that EPA’s approval of the plans “ensur[e] that Bay water quality will not be restored by 2025.”

- **Motion to Dismiss for lack of jurisdiction filed by EPA on 11/20/20 remains pending. Theory is that there is no final agency action subject to review at this time.**



**PennState Law**

Center for Agricultural  
and Shale Law

# **CONOWINGO DAM RELICENSING APPEAL**

**&**

# **CONOWINGO WATERSHED IMPLEMENTATION PLAN**





## Exelon's Conowingo Dam Relicensed As Per Settlement with Maryland

On **March 18, 2021**, the Federal Energy Regulatory Commission (FERC) [issued](#) a new 50-year [license](#) to Exelon Generation Company, LLC's Conowingo Hydroelectric Project, the nearly century-old dam located on the Susquehanna River in Maryland approximately ten miles north of its entry to the Chesapeake Bay. *Exelon Generation Company, LLC, Project Nos. 405-106 and 405-121*, 174 FERC ¶ 61,217. In recent years it was discovered that previous modeling of phosphorous, nitrogen and sediment trapped behind the dam were flawed and pollutants previously assumed to be trapped behind the dam for decades routinely wash over the dam in current heavy rain events. A focus of the relicensing was Exelon's financial responsibility to address water quality issues of the Chesapeake Bay. The relicensing culminated years of administrative and judicial litigation that produced a settlement agreement between the State of Maryland and Exelon which formed the basis of the FERC relicensing approval. As a condition of the relicensing, Exelon must pay approximately \$200 million to Maryland's Clean Water Fund, some of which is earmarked for particular measures to improve water quality and habitats below the dam. The Chesapeake Bay Foundation, one of more than twenty intervenors in the proceeding, has continuously and publicly [announced](#) its strong opposition to the terms of the settlement which are now terms of the license, including that Maryland waived its rights to issue a Water Quality Certification for the dam as well as to require pollution discharge permitting.



## Conowingo Dam Relicensing Appealed to D.C. Circuit Court of Appeals

On **June 17, 2021**, the Chesapeake Bay Foundation, Inc., Waterkeepers Chesapeake, Lower Susquehanna Riverkeeper and ShoreRivers, filed a [petition](#) in the U.S. Court of Appeals for the D.C. Circuit requesting the reversal and vacatur of the Federal Energy Regulatory Commission (FERC)'s March 19, 2021 grant of a [50-year license](#) renewal to Exelon Generation Company, LLC to operate the Conowingo hydroelectric dam. *Waterkeepers Chesapeake, et al v. FERC*, No. 21-01139. While the text of the petition is simply one sentence until briefing by the parties, according to a [statement](#) issued by the Petitioner Waterkeepers Chesapeake, “FERC’s action is unlawful because it does not include the cleanup requirements that the Maryland Department of the Environment (MDE) determined are necessary to assure the Dam’s compliance with water quality standards and . . . because FERC did not give adequate consideration to the harm the Dam currently does to the River, the Bay, and the fish and wildlife that live in them, as required by both the Federal Power Act and the National Environmental Policy Act.”

- Meanwhile, FERC had been petitioned for a rehearing and entered a 34-page “Order Addressing Arguments Raised on Rehearing” on 7/15/21, resulting in another petition for review filed on 9/10/21. Both petitions for review were consolidated on 10/8/21 and the briefing schedule on merits was set on 11/19/21.

**ORDER**

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 21-1139**

**September Term, 2021**

**FERC-147FERC61217**

**Filed On:** October 8, 2021

Waterkeepers Chesapeake, et al.,

Petitioners

v.

Federal Energy Regulatory Commission,

Respondent

**No. 21-1186**

**FERC-Project No. 405-129**

Waterkeepers Chesapeake, et al.,

Petitioners

v.

Federal Energy Regulatory Commission,

Respondent

Upon consideration of the joint procedural motion to adopt the briefing schedule intervals when this court sets a briefing schedule; and petitioners’ unopposed motion to set the briefing schedule, it is

**ORDERED** that the following briefing schedule will apply in these cases:

Petitioners' Brief	January 28, 2022
Briefs of Amicus Curiae, if any	February 4, 2022
Respondent's Brief	April 8, 2022
Intervenors for Respondent's Brief(s)	April 22, 2022
Petitioners' Reply Brief	May 23, 2022
Deferred Appendix	June 6, 2022
Final Briefs	June 21, 2022

## Chesapeake Bay: EPA Releases Evaluation of Draft Conowingo Watershed Implementation Plan

On May 6, 2021, the U.S. Environmental Protection Agency (EPA) [announced](#) that the agency had completed its [evaluation](#) of the [draft Conowingo Watershed Implementation Plan](#) (CWIP), which outlines a proposed plan to reduce **6 million pounds of nitrogen** and 260,000 pounds of phosphorus added to the Conowingo Dam infill to compensate for the previously miscalculated capacity of the Conowingo Dam and reservoir to trap those nutrients accumulating behind the dam. According to EPA's evaluation, the draft CWIP targets best management restoration practices "in the most effective areas of the Susquehanna River Basin," although the agency raises three areas of concern: 1) that the CWIP "complements and does not compete with" the Phase III Water Implementation Plan (WIP) for resources and funding, 2) that the financing for the CWIP is still under development, and 3) that the CWIP does not contain a target date for its implementation. **As proposed, 10% of the 6 million pounds of nitrogen reduction is set to come from development, 1% comes from the natural sector, and the majority—89%—comes from the agricultural sector. That comes to an additional 2.5 pound-per-acre reduction, an approximate 54% increase of the 4.6 pound-per-acre agricultural reduction rate already required by the Phase III WIP.**

# Conowingo Watershed Implementation Plan

Revised July 31, 2021

Prepared by the Center for Watershed Protection, Inc.  
As part of the U.S. EPA Cooperative Agreement 96366901



“The implementation strategy presented here targets a specific geography but is not site-specific; the CWIP implementation will rely upon a cooperative multi-jurisdictional effort that includes further assessments to identify specific locations for implementation. The CWIP serves as a starting point for outreach and coordination with local stakeholders on an implementation framework that begins with web-based outreach to reach the widest audience, followed by more targeted outreach in the selected geographies that are aligned with the jurisdictions’ outreach strategies for the WIP III. The CWIP also lays out the initial process for developing and launching a financing strategy. A central focus of the CWIP is to promote flexible, cost-effective, and innovative approaches to address both CWIP load reductions and financing needs, as well as to accelerate the implementation of practices that maximize co-benefits, particularly climate change adaptation and resilience, and mitigation and restoration benefits. The CWIP also recognizes that in-water practices—such as reservoir dredging and reuse, submerged aquatic vegetation, and a restored aquatic ecosystem—have pollution reduction benefits that should be further explored and possibly utilized. Such BMPs may be explored in subsequent versions of the CWIP and are not included here, as additional information is needed to fully evaluate these innovative practices”

2021	<ul style="list-style-type: none"> <li>• Stakeholder Outreach</li> <li>• Complete financial strategy</li> <li>• Complete economic development investment plan</li> <li>• Draft plan for the financing framework</li> <li>• Project-specific BMP opportunity blueprint for priority geographies</li> </ul>
2022	<ul style="list-style-type: none"> <li>• Submit draft two-year milestones for 2022–2023 (January 15, 2022)</li> <li>• Submit final two-year milestones for 2022–2023, incorporating climate change by January 15</li> <li>• Stakeholder Outreach</li> <li>• Launch the financing framework</li> <li>• Implementation of investment activities (Winter)</li> <li>• Milestone progress reporting due on January 15, contingent upon funding available through the financing strategy or other sources to support implementation efforts</li> </ul>

February 9, 2022  
1:00 pm - 2:00 pm

Conowingo WIP  
Steering Committee,  
February 2022



# WOTUS

## EPA and Army Publish Proposed Rule to Reestablish the Pre-2015 “Waters of the United States” Definition

On **November 18, 2021**, the U.S. Environmental Protection Agency (EPA) and U.S. Department of the Army released the text and [announced](#) the forthcoming Federal Register publication of a new proposed 290-page proposed rule titled, [“Revised Definition of “Waters of the United States”](#) which is intended to “re-establish the pre-2015 definition of ‘waters of the United States,’ which had been in place for decades, updated to reflect consideration of Supreme Court decisions.” The agencies stated “[t]he proposed rule would maintain the longstanding exclusions of the pre-2015 regulations as well as the exemptions and exclusions in the Clean Water Act on which the agricultural community has come to rely.” Once published, there will be a 60-day public comment period at [Regulations.gov](#), docket No. EPA-HQ-OW-2021-0602. Three virtual public hearings will be conducted on January 12, 13 and 18, with [speaker registration](#) for a 3-minute time slot closing on January 7, 10, and 13 respectively. More information is available at EPA’s dedicated webpage, titled [Public Outreach and Stakeholder Engagement Activities](#). Publication occurred 12/7/21 and the comment period closes on 2/78/21.



# FEDERAL REGISTER

The Daily Journal of the United States Government




[Sign in](#) [Sign up](#)

 Proposed Rule


## Revised Definition of “Waters of the United States”

A Proposed Rule by the [Engineers Corps](#) and the [Environmental Protection Agency](#) on 12/07/2021



 This document has a comment period that ends in 25 days. (02/07/2022)

[SUBMIT A FORMAL COMMENT](#)

[Read the 6410 public comments](#) 



- Following a federal district court decision vacating the NWPR on August 30, 2021, the agencies halted implementation of the NWPR and began interpreting “waters of the United States” consistent with the pre-2015 regulatory regime. Though EPA and the U.S. Army Corps of Engineers (Corps) are not currently implementing the NWPR, the agencies are aware that further developments in litigation over the rule could bring the rule back into effect. For these reasons, among others discussed more fully below, the agencies have decided that prompt replacement of the NWPR through the administrative rulemaking process is vital.
- In order to ensure necessary federal protections for the nation's waters, the agencies are proposing to exercise their discretion under the statute to return generally to the familiar pre-2015 definition that has bounded the Act's protections for decades, has been codified multiple times, and has been implemented by every Administration for the last 35 years, from that of Ronald Reagan through Donald Trump, which re-promulgated the pre-2015 regulations. . . . The pre-2015 regulations were largely in place for both agencies in 1986 and are thus commonly referred to as “the 1986 regulations.”





- In this proposed rule the agencies are exercising their discretionary authority to interpret “waters of the United States” to mean the waters defined by the longstanding 1986 regulations, with amendments to certain parts of those rules to reflect the agencies' interpretation of the statutory limits on the scope of the “waters of the United States” and informed by Supreme Court case law.
- Thus, in the proposed rule, the agencies interpret the term “waters of the United States” to include: Traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands; most impoundments of “waters of the United States”; tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments that meet either the relatively permanent standard or the significant nexus standard; wetlands adjacent to impoundments and tributaries, that meet either the relatively permanent standard or the significant nexus standard; and “other waters” that meet either the relatively permanent standard or the significant nexus standard.

# Thanks to Our Partners

The Center for Agricultural and Shale Law is a partner of the National Agricultural Law Center (NALC) at the University of Arkansas System Division of Agriculture, which serves as the nation's leading source of agricultural and food law research and information. This material is provided as part of that partnership and is based upon work supported by the National Agricultural Library, Agricultural Research Service, U.S. Department of Agriculture.



# Thank you!

## PENN STATE CENTER FOR AGRICULTURAL AND SHALE LAW

329 Innovation Blvd., Suite 118  
University Park, PA 16802  
Phone: 814-865-4290  
Fax: 814-865-3851  
Website: [AgLaw.psu.edu](http://AgLaw.psu.edu)

### PROFESSIONAL STAFF

#### **Center Director**

Ross H. Pifer  
[rpifer@psu.edu](mailto:rpifer@psu.edu)

#### **Staff Attorney**

Jackie Schweichler  
[jks251@psu.edu](mailto:jks251@psu.edu)

#### **Staff Attorney**

Brook Duer  
[dhd5103@psu.edu](mailto:dhd5103@psu.edu)

#### **Research Specialist**

Chloe Marie, LL.M.  
[cjm445@psu.edu](mailto:cjm445@psu.edu)

## CENTER MISSION AND BACKGROUND

The Center for Agricultural and Shale Law conducts research and educational programs to serve a wide variety of stakeholders including agricultural producers, landowners, mineral interest and royalty owners, business professionals, judges, attorneys, legislators, government officials, community groups, and the general public. Center programs are funded in part by the Commonwealth of Pennsylvania through the Pennsylvania Department of Agriculture. The Center for Agricultural and Shale Law is a partner of the National Agricultural Law Center (NALC) at the University of Arkansas System Division of Agriculture, which serves as the nation's leading source of agricultural and food law research and information.

This publication is available in alternative media upon request. Penn State is committed to affirmative action, equal opportunity, and the diversity of its workforce.



**PennState Law**



**USDA National Agricultural Library**

UNITED STATES DEPARTMENT OF AGRICULTURE

