Nos. 25-1460 & 25-1961, 25-1464 & 25-1959

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LOWER SUSQUEHANNA RIVERKEEPER, *et al*.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

LANCASTER COUNTY CONSERVANCY, *et al*.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petitions for Review of Agency Action by the
United States Federal Energy Regulatory Commission, No. P-15332

BRIEF OF *AMICI CURIAE*, ELECTED OFFICIALS, IN SUPPORT OF PETITIONERS

J. BRETT GROSKO
CHESAPEAKE LEGAL ALLIANCE
1212 West Street
Annapolis, MD 21401
Tel: (410) 216-9441 x 205
brett@chesapeakelegal.org

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Counsel for Amici Curiae, Elected Officials

TABLE OF CONTENTS

STATEMENT OF IDENTIFICATION 1

SUMMARY OF THE ARGUMENT 2

INTRODUCTION 3

ARGUMENT 4

I. The Permit Undercuts Consistent Efforts to Recognize the Lower Susquehanna River Gorge as Unique and Deserving of Protection 4

II. FERC Disregarded the Extraordinary Aesthetic, Recreational, Conservation, and Environmental Nature of Cuffs Run 11

III. FERC Illogically Ignored the Elected Officials' and Other Stakeholders' Concerns about the Permit 13

CONCLUSION 16

COMBINED CERTIFICATES 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

Cases

Mt. Hope Waterpower Project LLP, 116 F.E.R.C. ¶ 61,232 (2006) 15

Mid-Atl. Energy Engineers, Ltd., 53 F.E.R.C. P61,155, 1990 FERC LEXIS 2790 (FERC Nov. 1, 1990) 16

Statutes

16 U.S.C. § 791, *et seq*. 2

54 U.S.C. § 120102(a) 4

John D. Dingell, Jr. Cons., Management, and Rec. Act, Public Law 116–9 (Mar. 12, 2019), § 6001(a)(6), 133 Stat. 580, *codified at* 54 U.S.C. § 320101, note 4, 5 8

Congressional Record

164 Cong. Rec. 92, at H4751-52 (June 5, 2018) 5

Federal Rules

Federal Rule of Appellate Procedure 29(a) 2

Other Authorities

T. Umbauch, *The Economic Impact Of National Heritage Areas: a Case Study Analysis of Six National Heritage Areas in the Northeast and Midwest Regions, available at* https://www.nps.gov/subjects/heritageareas/upload/The-Economic-Impact-of-National-Heritage-Areas_Six-Case-Studies-2015-1.pdf 6

Pennsylvania Conservation Landscapes: Models of Successful Collaboration, *available at* https://elibrary.dcnr.pa.gov/GetDocument?

docId=1750563&DocName=PA_Conservation_Landscapes_Report2019.pdf. 9

Pennsylvania Department of Conservation and Natural Resources, Conservation Landscapes, *available at* https://www.pa.gov/agencies/dcnr/programs-and-services/community-outreach-and-development/conservation-landscapes#:~:text=Engagement%20%2D%2D%20Civic%20engagement%20process,conducted%20to%20better%20understand%20the: 8

Susquehanna Riverlands Conservation Landscape, *available at*: https://www.pa.gov/agencies/dcnr/programs-and-services/community-outreach-and-development/conservation-landscapes/susquehanna-riverlands 9

STATEMENT OF IDENTIFICATION

This Amicus Brief supports vacatur and remand of the Federal Energy Regulatory Commission ("FERC") order that is being challenged in this case. It is being filed by a bipartisan group of elected officials composed of the Honorable Lloyd Smucker, Member of the U.S. House of Representatives; the Honorable Kristin Phillips-Hill, the Honorable Dawn Keefer, the Honorable James Malone, the Honorable Chris Gebhard, and the Honorable Scott Martin, Members of the Pennsylvania Senate; the Honorable Wendy Fink, the Honorable Bryan Cutler, the Honorable Mindy Fee, the Honorable Kate Klunk, the Honorable Tom Jones, the Honorable Brett Miller, the Honorable Ismail Smith-Wade-El, the Honorable Keith Greiner, the Honorable David Zimmerman, the Honorable Steven Mentzer, and the Honorable Joe D'Orsie, Members of the Pennsylvania House of Representatives; the Honorable Julie Wheeler, York County President Commissioner, the Honorable Scott Burford, York County Vice President Commissioner, the Honorable Doug Hoke, York County Commissioner; the Honorable Joshua G. Parsons, Chairman, Lancaster County Board of Commissioners, the Honorable Ray D'Agostino, Vice-Chair, Lancaster County Board of Commissioners, and the Honorable Alice Yoder,

Commissioner, Lancaster County Board of Commissioners (collectively, "Elected Officials"). The Elected Officials are public officials who advocate against the proposed pumped storage hydroelectric project that is the subject of this litigation ("Project"). They represent communities and constituents in and around the footprint of the Project. They filed comments in the underlying FERC proceeding that culminated in the issuance of the Project's November 21, 2024 preliminary permit under the Federal Power Act, 16 U.S.C. § 791, *et seq*. JA127.

Amici file this brief with the consent of all parties. *See* Fed. R. App. P. 29(a)(2). No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person other than *Amici* and their counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

SUMMARY OF ARGUMENT

The Elected Officials have supported the Petitioners' ongoing opposition to the Project. The Elected Officials file their own brief to offer a unique perspective of *Amici* on the impacts of FERC's decision to allow the Project to move forward. On February 12, 2025, the Elected Officials filed a

comment letter with FERC in strong opposition to the Project. JA127. The FERC Chairman responded and assured all the officials who filed the comment letter that "Commission decisions are based upon a thorough and careful review of the record[,] including the filings of all participants." JA436. FERC fell short on that promise and arbitrarily and capriciously ignored the Elected Officials' constituents' comments. Moreover, the Permit has adversely affected the Elected Officials by injecting a great deal of uncertainty into their long-running effort to conserve and develop the recreation-based economy in the Lower Susquehanna River Gorge. These efforts, which culminated in the creation of the Susquehanna National Heritage Area, are now under a significant cloud because of this uncertainty.

The arbitrary and capricious nature of FERC's decision warrants vacatur and remand to FERC to ensure the yet-absent full consideration of the comments submitted by the Elected Officials and their constituents in opposition to the Project.

INTRODUCTION

The Court should find that FERC's November 21, 2024 decision granting the preliminary permit ("Permit") for the Project is contrary to law and arbitrary and capricious. In support of Petitioners' briefs, the Elected

Officials provide details concerning the Permit's impact on them, their constituents and their communities.

ARGUMENT

I. THE PERMIT UNDERCUTS ONGOING CONSISTENT EFFORTS TO RECOGNIZE THE LOWER SUSQUEHANNA RIVER GORGE AS UNIQUE AND PROTECT IT.

FERC's decision to grant the Permit undermines efforts over the past several decades in Congress and the Pennsylvania government to protect the natural and cultural heritage of York and Lancaster Counties. One result of those efforts was Congressional recognition, in 2019 and after eleven years of effort, of the special nature of the area, by designating York County and Lancaster County as the Susquehanna National Heritage Area ("SNHA"). John D. Dingell, Jr. Cons., Management, and Rec. Act, Public Law 116–9 (Mar. 12, 2019), § 6001(a)(6), 133 Stat. 580, *codified at* 54 U.S.C. § 320101, note ("Dingell Act"). National Heritage Areas protect and conserve "the natural, historic, scenic, and cultural resources of areas that illustrate significant aspects of the [nation's] heritage . . . ." 54 U.S.C. § 120102(a).

In such areas, the National Park Service supports state and local conservation efforts through federal recognition, seed money, and technical assistance. These efforts sustain local communities through revitalization

and heritage tourism. They encourage people to enjoy natural and cultural sites by providing new recreational opportunities. They also improve the local quality of life through new or improved amenities, unique settings, and educational and volunteer opportunities. And they strengthen a sense of place and community pride.

The SNHA advances these goals. It became a reality on March 12, 2019, when President Trump signed the Dingell Act. The bill passed in the U.S. Senate and House by a combined 455-70 vote. It recognized the "natural beauty" in the area, including Cuffs Run, a scenic, wooded, nearly pristine area along the Susquehanna River known for its steep gorge, scenic trails, diverse ecosystem, and preserved farmland cherished by generations of families and outdoor enthusiasts. 164 Cong. Rec. 92, at H4751-52 (June 5, 2018). It similarly established the need to "maintain that safe and clean environment [in the area] into the future for residents and visitors." *Id*. It sought to help the "region prosper from heritage and outdoor tourism" and "attract more visitors, stimulate [the] local economy, and preserve natural resources and historical landmarks." *Id*.

"[C]ountless local officials and Members of Congress . . . worked on [the] legislation for many years," and the SNHA depended on the "tireless

work and the sustained input and support from the residents of York and Lancaster Counties . . . .” *Id*. at H4752. It resulted from a “bottom-up effort led by grassroots support from these communities.” *Id*. “[D]ozens of local Organizations” supported the legislation. *Id*.

National Heritage Areas often generate significant tourism-related income for communities, foster historical understanding, and further a sense of place and belonging.[1] The SNHA is no exception. Since its creation, Lancaster and York Counties have seen their recreation-based economy continue to grow. JA158. Tourists visit to hike the Cuffs Run area trails, including the Mason-Dixon National Trail. *Id*. They bird watch, fish the Susquehanna River, and hunt. *Id*.

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[1] A 2012 study by the Alliance of National Heritage Areas and National Park Service demonstrated that NHAs generate $5.4 billion to the Northeast Region annually. T. Umbauch, *The Economic Impact of National Heritage Areas: a Case Study Analysis of Six National Heritage Areas in the Northeast and Midwest Regions*, *available at* https://www.nps.gov/subjects/heritageareas/upload/The-Economic-Impact-of-National-Heritage-Areas_Six-Case-Studies-2015-1.pdf (last visited Dec. 23, 2025), at 4, n.1.

[2] The efforts to build the Project petered out after the second preliminary permit, issued in 1997, failed to move forward. This development led to several decades of highly successful conservation efforts and the establishment of the SNHA. The Permit undercuts those efforts.

[3] *See* Pennsylvania Department of Conservation and Natural Resources, Conservation Landscapes, *available at* https://www.pa.gov/agencies/dcnr/

However, the Permit challenged in this case unsettles the momentum behind the SNHA and upends the efforts of these stakeholders. *Id*. The SNHA is premised on the recreational opportunities available in, and scenic beauty of, Lancaster and York counties. *Id*. But the Permit revives the cloud that the previously-issued preliminary permits had placed over the area and region in the 1990s.[2] *Id*. While farmers, individuals, and the Petitioner groups have preserved the Cuffs Run area for generations, and intensified their efforts in the past fifteen years, the Permit runs in the opposite direction. It enhances the prospect that the Project will wipe out Cuffs Run. As a result, instead of a place of solace, protected in perpetuity, visitors now experience Cuffs Run as an area living on borrowed time. *Id*. at 1. Tourists and the Elected Officials' constituents now face a heightened risk that Cuffs Run will be destroyed, depriving them of a cherished place to recreate, experience the outdoors, exercise, and recharge. *Id*.

More broadly, the Project would irreparably harm the regional environment and alter the region's aesthetics. In lieu of a forested area, those experiencing Cuffs Run now do so with the seemingly ever-present

[2] The efforts to build the Project petered out after the second preliminary permit, issued in 1997, failed to move forward. This development led to several decades of highly successful conservation efforts and the establishment of the SNHA. The Permit undercuts those efforts.

possibility hanging over them that it will be replaced with a dike, spillway, and reservoir. The Project would cause irreparable harm and permanently mar the countryside, all for a project that is projected to be a net negative (*i.e.*, "vampire") electricity grid participant. JA158. As the entity charged with managing this heritage area stated, the Project:

> [W]ill directly and adversely impact important scenic viewsheds, historic resources, preserved farms, woodlands, and land and water trails along the river and severely limit SNHA's ability to effectively carry out [its] responsibilities under the Dingell Act and our NPS/DOI approved SNHA Management Plan.

Id.

The Permit and Project also negatively impact the 2010 Pennsylvania Department of Conservation and Natural Resources' Susquehanna Resources Conservation Landscape ("Conservation Landscape"). JA132; JA158. Conservation Landscapes are place-based partnerships that "drive strategic investments and actions around sustainability, conservation, community revitalization, and recreation projects."[3] In these areas, state agencies with regional and statewide partners "provide high-level leadership,

[3] *See* Pennsylvania Department of Conservation and Natural Resources, Conservation Landscapes, *available at* https://www.pa.gov/agencies/dcnr/programs-and-services/community-outreach-and-development/conservation-landscapes#:~:text=Engagement%20%2D%2D%20Civic%20engagement%20process,conducted%20to%20better%20understand%20the: (last visited Dec. 23, 2025).

financial support, and technical assistance to build better communities, conserve identified values and to invest in 'sustainable' economic development."[4] They "recognize[ ] that people are connected to nature and the landscapes where they live" and "need them to thrive."[5]

The 2010 designation of the Susquehanna Riverlands Conservation Landscape ("Conservation Landscape") encompasses portions of Lancaster and York counties and Cuffs Run and protects the "greenway corridor of river lands along the Susquehanna River."[6] It thus enhances the values of the region through increased land protection, natural and cultural resource stewardship, increased public connection to these resources, and promotion of sustainable economic development through heritage and outdoor tourism. By establishing it, the Pennsylvania Department of Conservation and

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[4] *Id.*

[5] Pennsylvania Conservation Landscapes: Models of Successful Collaboration, *available at* https://elibrary.dcnr.pa.gov/GetDocument?docId=1750563&DocName=PA_Conservation_Landscapes_Report2019.pdf, at 1 (last visited Dec. 23, 2025).

[6] *See* Susquehanna Riverlands Conservation Landscape, *available at* https://www.pa.gov/agencies/dcnr/programs-and-services/community-outreach-and-development/conservation-landscapes/susquehanna-riverlands (last visited Dec. 23, 2025). The Project would also "eliminat[e], relocat[e], build[ ] upon, and/or detract[ ] from the inherent value of the resources deemed of significance by [National Park Service] and SNHA" related to the National Park Service-managed Captain John Smith Chesapeake National Historic Trail and other important hiking routes, such as the Mason-Dixon Trail. JA160.

Natural Resources, York and Lancaster counties, energy companies, local municipalities, non-profits, and private donors have protected a total of over 7,240 acres of forested land within the Conservation Landscape worth over $60 million dollars[7] in "one of the most wild and scenic parts of [the Conservation Landscape] . . . ." JA678. These public and private investments have contributed to the economic development of the area by protecting and linking a landscape that is rich in ecological and heritage tourism.[8]

All of this momentum, and these efforts and investment, would be undermined by the Project by reducing opportunities for heritage and outdoor tourism, spoiling the scenic value of a rich natural resource area, contradict efforts to expand recreational opportunities, impair views of the scenic and historic landscape for paddlers and hikers, diminish the ability for land and water trail users to connect with the natural environment, and harm efforts to further protect land and water resources along the Lower Susquehanna River and within the Chesapeake Bay watershed. JA160. The failure to consider these serious impacts violated both the law and the FERC Chair's commitment to ensure that all of its actions are in "the public

[7] *Id.*
[8] *Id.*

interest" and the filings of "all participants" would be given a "thorough and careful review." JA436.

In the last fifteen years, regional, state, and federal leaders have come together to create an integrated economic model for Lancaster and York counties. A new regional paradigm has taken shape that was not in place decades ago, when FERC granted the 1990 and 1997 preliminary permits. The Permit vitiates and casts a long shadow over the vision that culminated in the SNHA and Conservation Landscape. JA158-160; JA203-209, JA298-305.

II. FERC DISREGARDED THE EXTRAORDINARY AESTHETIC, RECREATIONAL, CONSERVATION, AND ENVIRONMENTAL NATURE OF CUFFS RUN.

FERC's decision to ignore public comments on the impact of granting the Permit is especially problematic in light of the extraordinary nature of Cuffs Run, which is emblematic of the beauty the SNHA and Conservation Landscape showcase. Cuffs Run represents some of the most pristine remaining landscapes of the Lower Susquehanna River. It encompasses some 2.5 stream miles, many of which have been designated Natural Trout Reproduction Streams because they could potentially support the reintroduction of indigenous wild trout populations. It exhibits exceptionally

high dissolved oxygen levels and the cool temperatures that trout and other fish species need. In the words of one commenter, "[t]he beauty of the landscape in this area is a unique, distinctive, and unparalleled." Supplemental Appendix ("SA") at 1.[9]

Cuffs Run has been protected for decades by local families and serves an area recognized as one of the most scenic and natural resource rich sections of the nationally-recognized Mason Dixon Trail. JA136. The proposed activities would destroy the views from the Enola Low Grade, Conestoga, and Turkey Hill Trails, and a significant portion of the Apollo Park, eliminate a minimum of 580 acres of interior forest habitat, and flood farms. *Id*.

Moreover, some of the areas of Cuffs Run have not been developed for over 100 years. Rare plants are located there, and the forest riparian buffers include large trees, including hemlock and red oak stands. Pennsylvania has designated parts of Cuffs Run as Core Habitat in its Natural Habitat Program. It is also part of York County's Natural Heritage Inventory. As a result of the exceptional recreational, aesthetic, conservation, and environmental value of the area, nearly $100 million has

[9] *Amici* are concurrently filing an unopposed Motion for Leave to File a Supplemental Appendix, which contains the documents labeled "SA" herein.

been invested in the area to create recreational opportunities in recent years. JA131. Those investments, as well as farms, trails, viewsheds, and forested areas, would be destroyed by the Project. Yet FERC postponed consideration of impacts to Cuffs Run and the community until the later license stage. It was arbitrary for FERC to do so, especially in the context of a permit application for a massive hydropower facility proposed for construction in the heart of the SNHA and Conservation Landscape.

III. FERC ILLOGICALLY IGNORED THE ELECTED OFFICIALS' AND OTHER STAKEHOLDERS' CONCERNS ABOUT THE PERMIT.

FERC invited but then waved away arguments about impacts to the SNHA, Conservation Landscape, and Cuffs Run because, in its view, "a preliminary permit does not authorize access to project lands or project construction", so "addressing the commenters' concerns at the permit stage is premature." JA14 ¶ 13. But as detailed by the Lancaster County Conservancy, Susquehanna National Heritage Area, Lower Susquehanna Riverkeeper Association, Farm & Natural Lands Trust of York County and Chesapeake Bay Foundation (collectively, the "Conservation Groups"), the comments were not limited to those concerning project construction or access to lands for studies. Cons. Groups' Br. at 40-55; JA196. Rather, the

over 1,700 comments articulated clear impacts to them and the serious negative impacts on nearby communities flowing from *the Permit*. *See* Dkt. P-15332, *available at* https://elibrary.ferc.gov/eLibrary/search?searchtype=docket (last visited Dec. 23, 2025). Together, they demonstrated that the Project and Permit are unique and warranted scrutiny because of the unique nature of the Lower Susquehanna River Gorge and the repeated zombie-like nature of the Project.

For example, citizens have had to "put their life on hold because [they] do not know what's going to happen to [their] land," at times having to rent because, while they bought property years ago, they do not know whether to build on that land due to the uncertainty caused by the grant of the Permit. JA138. Others spoke of "undue stress at the fear" of having their happiness and land "stolen" from them for private gain, "anxiety over this [repeated application] process since 1990" and the desire to be free from "experiencing this provocation."[10] SA2; JA126. Restaurant owners, tour guides, and others testified about the impact the specter of the Project on their businesses would have.[11] SA3. A homeowner within the Project's

[10] *See also* JA139 (Permit creates anxiety that their home would be inundated and sit at the bottom of a reservoir, which is "heartbreaking").
[11] SA4 (tour guide and boat tour manager, explaining how she explains the "rich history and heritage of the Susquehanna River" to "over 4,000 people

footprint testified that she have been forced to undergo a "minimum of 4 years of worry and stress" as to how they would afford to move or sell their property with the Permit "looming over the area." JA396.

The Elected Officials are also impacted because FERC's decision to grant the Permit means they have to continue for at least the next four years to devote scarce resources to opposing the Project, hampering their planning and conservation efforts. JA127. These impacts and concerns are justified, given that as FERC has said, the goal of preliminary permits is to "encourage hydroelectric development . . . ." JA4, n.12 (citing *Mt. Hope Waterpower Project LLP,* 116 F.E.R.C. ¶ 61,232, at P 4 (2006)).

FERC overlooked all of the above comments, as well as the fact that the Permit is the third preliminary permit and fifth preliminary permit application in the last 32 years concerning the same project. The residents of York and Lancaster counties have been living with the threat of this project since the early 1990s. In 1990, when hundreds opposed the first application, affected parties argued that "the uncertainty surrounding the project will adversely affect families in the area." *Mid-Atl. Energy Engineers, Ltd*., 53 F.E.R.C. P61,155, P61,548, 1990 FERC LEXIS 2790 (FERC Nov. 1, 1990).

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each year" and does not want that "special experience" that "moves people to tears" taken away).

FERC did not meaningfully respond to those comments then. *Id*. It has now been over thirty years, and stakeholders are still seeking a chance to be heard. These permits significantly burden local communities by imposing a constant threat of losing hundreds of acres of public and private lands, including homes, woods, farms, parks, and nature preserves.[12] FERC arbitrarily and capriciously ignored Elected Officials' and their constituents' comments.

CONCLUSION

For the foregoing reasons, the Elected Officials respectfully request that the Court vacate and remand FERC's decision with instructions to consider their views and the overwhelming opposition of their constituents to the Project.

[12] As the Conservation Groups ably argue, FERC's selective use of its "permanent legal barrier" rationale when considering preliminary permits demonstrates that FERC's approach is geared toward maximizing discretion rather than ensuring its decisions are in the "public interest." Cons. Groups' Br. (Dkt. 27) at 29-40; JA436. Here, moreover, FERC mechanically granted the Permit, apparently without having complete information on the Project's environmental effects because York Energy Storage LLC's predecessor apparently had not conducted any substantial environmental analysis pursuant to its 1990 or 1997 preliminary permits. JA9, ¶ 15. What is more, the Project proponent declined to submit a work plan that would have detailed the environmental effects of the studies that it intends to conduct concerning new dams. JA113. The application stated that the proponent would prepare "[w]ork plans for each of the proposed dams" at a later date. *Id*.; *cf.* JA113 (proponent, stating it may seek a waiver of same).

Respectfully submitted,

/s/ J. Brett Grosko
J. BRETT GROSKO
CHESAPEAKE LEGAL ALLIANCE
1212 West Street
Annapolis, MD 21401
Tel: (410) 216-9441 x 205
brett@chesapeakelegal.org

Counsel for the Amici, Elected Officials

COMBINED CERTIFICATIONS

1. Pursuant to Third Circuit L.A.R. 28.3(d), the attorney whose name appears on this brief is a member in good standing of the bar of this Court.

2. This brief complies with the word limit of Fed. R. App. P. 29(a)(5) because this document contains 3,243 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced 14-point serif font (Times New Roman), using Microsoft Word.

3. Pursuant to Third Circuit L.A.R. 31.1(c), the text of the electronic version of this document is identical to the text of the paper copies filed with the Court.

4. Pursuant to Third Circuit L.A.R. 31.1(c), McAffee has been run on this electronic file and no virus was detected.

/s/ J. Brett Grosko
J. BRETT GROSKO
CHESAPEAKE LEGAL ALLIANCE
1212 West Street
Annapolis, MD 21401
Tel: (410) 216-9441 x 205

Counsel for Amici, Elected Officials

CERTIFICATE OF SERVICE

I hereby certify that on this December 23, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ J. Brett Grosko
J. BRETT GROSKO
CHESAPEAKE LEGAL ALLIANCE
1212 West Street
Annapolis, MD 21401
Tel: (410) 216-9441 x 205
brett@chesapeakelegal.org

Counsel for the Amici, Elected Officials