

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 11, 2022

Decided December 20, 2022

No. 21-1139

WATERKEEPERS CHESAPEAKE, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

CONSTELLATION ENERGY GENERATION, LLC, ET AL.,
INTERVENORS

Consolidated with 21-1186

On Petitions for Review of Orders
of the Federal Energy Regulatory Commission

James S. Pew argued the cause for petitioners. With him on the briefs were *Paul W. Smail*, *Brittany E. Wright*, and *Kathleen Riley*.

Paula Dinerstein was on the brief for *amici curiae* Maryland State Senator Stephen S. Hershey, Jr., et al. in support of petitioners.

Carl S. Pavetto was on the brief for *amicus curiae* National Wildlife Federation in support of petitioners.

Sandra P. Franco was on the brief for *amicus curiae* Maryland Charter Boat Association, Inc. in support of petitioners.

Scott Ray Ediger, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With him on the brief were *Matthew R. Christiansen*, General Counsel, and *Robert H. Solomon*, Solicitor.

Jonathan E.C. May, Assistant Attorney General, Office of the Attorney General for the State of Maryland, argued the cause for intervenor State of Maryland, Department of the Environment in support of respondent. With him on the brief was *Brian E. Frosh*, Attorney General.

David W. DeBruin argued the cause for intervenor Constellation Energy Generation, LLC in support of respondent. With him on the brief was *Zachary C. Schauf*.

John E. Bies, Attorney, U.S. Department of Justice, argued the cause for intervenor U.S. Department of the Interior in support of respondent. On the brief were *Todd Kim*, Assistant Attorney General, and *Justin D. Heminger*, Attorney.

Before: SRINIVASAN, *Chief Judge*, MILLETT, *Circuit Judge*, and TATEL, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* TATEL.

TATEL, *Senior Circuit Judge*: This case involves the Federal Energy Regulatory Commission's (FERC) licensing of the Conowingo Dam on the Susquehanna River in Maryland. Under section 401(a)(1) of the Clean Water Act, FERC may issue a license only if the state where the dam is located either certifies that the dam will comply with the Act's water quality standards or waives its authority to do so. After initially granting a section 401(a)(1) certification, Maryland attempted to withdraw it and waive its authority as part of a settlement with the dam's operator, which FERC then used as the basis for the Conowingo license. By issuing a license under such circumstances, FERC exceeded its authority under section 401(a)(1), and we therefore vacate the license and remand to FERC.

I.

The Federal Power Act authorizes FERC to issue licenses for the operation of hydroelectric projects on navigable waters. 16 U.S.C. § 797(e). The Clean Water Act makes states the “prime bulwark in the effort to abate water pollution, . . . expressly empower[ing] them to impose and enforce water quality standards that are more stringent than those required by federal law.” *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (internal quotation marks and citation omitted). Accordingly, before applying to FERC for a license to operate a dam, the operator must first obtain state certification of the project under section 401(a)(1) of the Clean Water Act. 33 U.S.C. § 1341(a)(1) (“Any applicant for a Federal license . . . shall provide [FERC] a certification from the State . . . that any

[discharge from the dam] will comply with the [Clean Water Act].”).

Section 401(a)(1) gives a state presented with a certification request three options: First, the state can deny the request, in which case “[n]o license or permit shall be granted” by FERC. 33 U.S.C. § 1341(a)(1). Second, the state may grant the request, either in full or with specified “limitations” and “monitoring requirements” that FERC must incorporate into the license. *Id.* §§ 1341(a)(1), (d); *see also Department of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) (explaining that FERC “may not alter or reject conditions imposed by the states through section 401 certificates”). Or third, the state may “fail[] or refuse[] to act on a request” within a reasonable period and thus “waive[]” its right to certify. 33 U.S.C. § 1341(a)(1). In that situation, the license “shall be granted” by FERC without any input from the state. *Id.*

In 2014, petitioner Constellation Energy Generation, LLC, the Conowingo Dam’s operator, submitted a certification request to Maryland’s Department of the Environment. Following years of back-and-forth, a public notice and comment period, and a public hearing, Maryland issued a section 401(a)(1) certification in 2018. The certification required Constellation to develop a plan to reduce the amount of nitrogen and phosphorus in the dam’s discharge, improve fish and eel passage, make changes to the dam’s flow regime, control trash and debris, provide for monitoring, and undertake other measures for aquatic resource and habitat protection. Calling these conditions “unprecedented” and “extraordinary,” Constellation challenged the certification in several fora. Constellation Br. 14–16. Specifically, it filed (1) a request to the Maryland Department of the Environment for reconsideration; (2) suits against the state of Maryland in both federal and state court; and (3) a petition to FERC requesting a

“declaratory order” that Maryland had waived its opportunity to issue a certification.

While those proceedings were pending, Maryland and Constellation entered mediation and arrived at a settlement. The settlement agreement contained a series of “proposed license articles,” which the parties agreed to jointly submit to FERC for incorporation into the dam’s license. “[U]pon, but only upon” FERC’s incorporation of the proposed license articles in the Conowingo license, Maryland agreed to “conditionally waive[] any and all rights it had or has to issue a water quality certification.” Joint Appendix 588–89. After receiving comments on the settlement, FERC issued a 50-year license, “adopting the Proposed License Articles and only making modifications to ensure that [FERC] can enforce those articles.” *Exelon Generation Company, LLC*, 174 F.E.R.C. ¶ 61,217, at 61,979 (2021).

In response, several environmental groups—Waterkeepers Chesapeake, Lower Susquehanna Riverkeeper Association, ShoreRivers, and Chesapeake Bay Foundation (collectively, “Waterkeepers”)—filed a petition for rehearing. They argued that Maryland had no authority to retroactively waive its 2018 certification and that FERC therefore exceeded its authority under the Clean Water Act by issuing a license that failed to incorporate the conditions of that certification. Rejecting that argument, FERC ruled that “[t]he settlement agreement makes clear that [Maryland] intended to waive its section 401 authority and nullify the 2018 certification if [FERC] approved the agreement.” *Exelon Generation Company, LLC*, 176 F.E.R.C. ¶ 61,029, 2021 WL 3013502, at *3 (2021). In FERC’s view, because “[n]othing in the Clean Water Act prevents a state from affirmatively waiving its authority to issue a water quality certification,” Maryland’s waiver satisfied the requirements of section 401(a)(1) and the Commission had

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.