

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

WATERKEEPERS
CHESAPEAKE, *et al.*,

*

*

Petitioners,

*

v.

No. 21-1139

*

FEDERAL ENERGY
REGULATORY COMMISSION,

*

Respondent.

*

* * * * *

**MOTION TO INTERVENE OF THE MARYLAND
DEPARTMENT OF THE ENVIRONMENT**

Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), the State of Maryland, Department of the Environment (“MDE” or “the Department”), seeks leave to intervene in this proceeding, for the following reasons.

STATEMENT OF INTEREST

MDE is the state agency charged with responsibility for implementing the Maryland laws protecting the water resources of the State. Among its duties, MDE is responsible for the processing, review, and determination of requests for water quality certifications under § 401 of the Federal Clean Water Act. *See* 33 U.S.C. § 1341; Md. Ann. Code, Envir. §§ 9-302, 9-314, 9-319 (LexisNexis 2014); Code of Maryland Regulations (“COMAR”) 26.08.02.10.

Petitioners initiated this action to seek review of the Federal Energy Regulatory Commission’s (“Commission”) decision to issue a renewed 50-year license for the Conowingo Hydroelectric Project (“Project”), owned and operated by Exelon Generation Company, LLC (“Exelon”). *Exelon Generation Co.*, 174 FERC ¶ 61,217 (2021). The Project spans the lower Susquehanna River in Maryland, approximately 10 miles from the river’s confluence with the Chesapeake Bay. It sits at the mouth of a nearly 450-mile-long river—the longest on the East Coast of the United States—and its operation substantially affects water quality in both the river and the bay, by altering the movement of sediment downstream and impeding fish passage, among other things.

Exelon initiated the relicensing proceeding in 2009, before the expiration of its prior license for the Project. MDE became a party to the proceeding upon the timely filing with the Commission of a notice of intervention. 174 FERC ¶ 61,217, at P 5 & n.7. The relicensing of the Project also presented MDE with an opportunity to impose new conditions on the Project’s operation and discharges, under the authority of the water quality certification provisions of § 401 of the Clean Water Act.

As required by § 401, Exelon applied to MDE on January 31, 2014, to request a water quality certification. On November 14, 2014, MDE issued a public notice of its intent to deny certification because Exelon had not provided sufficient

information about the Project and its impact on water quality. To avoid that outcome, Exelon withdrew its application on December 5, 2014. After submitting and withdrawing new applications in 2015 and 2016, Exelon submitted a final application on May 17, 2017. MDE issued a certification on April 27, 2018.

Shortly thereafter, Exelon initiated four legal challenges to MDE's certification. First, on May 28, 2018, Exelon requested an administrative appeal of the certification under COMAR 26.08.02.10F(4) by submitting to MDE a Protective Petition for Reconsideration and Administrative Appeal. Two of the Petitioners here—the Lower Susquehanna Riverkeeper and Waterkeepers Chesapeake—also filed an administrative appeal of MDE's decision.

Also on May 28, 2018, Exelon filed a complaint in Maryland state court seeking declaratory and injunctive relief, or in the alternative mandamus and judicial review, in part on the theory that the decision was not final because the agency had not yet provided the opportunity for a contested case hearing, and in the alternative that MDE's certification decision was a final agency act subject to direct judicial review. *Exelon Generation Company, LLC v. Maryland Dep't of the Envir.*, No. 24-C-18-003410 (Balt. City Cir. Ct.).¹ Also on May 28, 2018, Exelon initiated a third legal action by filing a complaint in the United States District Court for the District

¹ On October 9, 2018, the circuit court dismissed the state complaint, which dismissal Exelon appealed to the Maryland Court of Special Appeals. *Exelon v. MDE*, No. 2908, Sept. Term (Md. Ct. Sp. App., filed Nov. 5, 2018).

of Columbia, seeking declaratory and injunctive relief based on claims that the certification exceeded Maryland's authority under federal law and the Constitution. *Exelon Generation Company, LLC v. Grumbles, et al.*, No. 1:18-cv-01224 (D.D.C., filed May 28, 2018).

Finally, on February 28, 2019, Exelon filed a Petition for Declaratory Order with the Commission, asking the Commission to declare that Maryland had waived its right to issue a certification under § 401 of the Clean Water Act, in part based on this Court's decision in *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019).

In the litigation in the state courts, MDE and Exelon were ordered to mediation, and the parties ultimately settled their disputes over the water quality certification. The settlement agreement contained a series of "proposed license articles" that the parties agreed to request the Commission to incorporate into the Project's new license, as well as contractually-enforceable off-license settlement provisions. As part of the settlement, MDE agreed to conditionally waive its § 401 certification authority upon the Commission's incorporation of the proposed license articles, without modification, into a new Project license. The settlement agreement further provided that MDE could terminate the agreement if the Commission failed to incorporate the proposed license articles in full and MDE and Exelon could not successfully negotiate a curative amendment.

On October 29, 2019, MDE and Exelon jointly submitted to the Commission the offer of settlement. The Commission placed the offer on public notice and accepted public comments, including those submitted on behalf of the Petitioners. On March 19, 2021, the Commission issued a new license for the Project, stating that it was “adopting the Proposed License Articles and only making modifications to ensure that the Commission can enforce those articles.” 174 FERC ¶ 61,217, at P 77.

The settlement and the Commission’s issuance of the new license have resolved the litigation against MDE. The parties have filed voluntary dismissals in the state and federal litigation, and because the State conditionally waived its § 401 certification authority as part of the settlement, the administrative appeals of the original 2018 water quality certification are moot. Similarly, upon issuance of the license, Exelon agreed to withdraw its Petition for a Declaratory Order, which the Commission also affirmatively dismissed as moot. *Id.*

GROUND FOR INTERVENTION

MDE has a direct and substantial interest in the issues raised by Petitioners: the Department is the State’s certification agency; it is a party to the hydropower licensing proceeding that is the subject of Petitioners’ appeal; and it has entered into a settlement agreement with the licensee relating to water quality issues associated with the dam and its operations. In particular, as part of their settlement, MDE and

Exelon presented portions of the settlement agreement, reflected in proposed license articles, to the Commission for its incorporation into the license. To the extent that the petition calls into question the Commission's decision to incorporate the proposed license articles into the license, it inherently implicates the effectuation of MDE's settlement.

MDE is therefore directly affected by the outcome of this appeal, and no other party can adequately represent the Department's legal interests as both a settling party and the State's water quality certification agency. The Clean Water Act expressly preserves the "primary" role of States to protect their own water resources, and MDE carried out this role here in reaching the settlement. *See* 33 U.S.C. § 1251 ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources"). Moreover, in the absence of the settlement, the litigation against the State almost certainly would resume, involving significant expense, uncertainty, and years of delay.

The interests set forth above meet the standard for intervention pursuant to Federal Rule of Appellate Procedure 15(d). *See, e.g., Sierra Club, Inc. v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004) ("Persons whose legal interests are at stake are appropriate intervenors [under Rule 15(d).]"); *New Mexico Dep't of Human Servs.*

v. Department of Health & Human Servs. Health Care Fin. Admin., 4 F.3d 882, 884 n.2 (10th Cir. 1993) (holding that intervention under Rule 15(d) is appropriate for those with a “substantial and unique interest in the outcome”); *Bales v. NLRB*, 914 F.2d 92, 94 (6th Cir. 1990) (granting intervention under Rule 15(d) to party with “a substantial interest in the outcome”); *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 744-45 (D.C. Cir. 1986) (permitting entities “directly affected by” the outcome to intervene); *cf. Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 966 (D.C. Cir. 2011) (noting intervention of state § 401 agency in challenge to FERC decision involving water quality certification). MDE not only has a direct legal interest in its settlement with Exelon, which may be affected by this appeal, but § 401 of the Clean Water Act also gives the agency a specific role in FERC licensing proceedings, by requiring the licensee to obtain a water quality certification before a new license for the Project can issue. *See Texas v. U.S. Dep’t of Energy*, 754 F.2d 550, 551 (5th Cir. 1985) (considering whether parties seeking to intervene have a “defined role in the statutory scheme at issue”).

MDE’s motion to intervene is timely, and no party will be prejudiced by the grant of MDE’s request. MDE anticipates that it will be aligned with the Commission with respect to the Commission’s incorporation of the proposed license articles.

CONCLUSION

WHEREFORE, MDE respectfully requests that it be granted leave to intervene in this proceeding.

Respectfully submitted,

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Attorney General of Maryland

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

MDE is a state agency within the executive branch of the State of Maryland. It is not a nongovernmental corporate party and does not issue stock. It is not required to file a corporate disclosure statement pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure.

/s/

Jonathan E.C. May
Assistant Attorney General

CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to Circuit Rule 27(a)(1)(4), MDE states that the parties before this Court are:

1. Petitioners: Waterkeepers Chesapeake, Lower Susquehanna Riverkeeper, ShoreRivers, and Chesapeake Bay Foundation
2. Respondent: Federal Energy Regulatory Commission
3. Movant-Intervenor: Exelon Generation Company, LLC
4. Movant-Intervenor: U.S. Department of the Interior, on behalf of the U.S. Fish and Wildlife Service
5. Movant-Intervenor: Maryland Department of the Environment

There are currently no amici.

/s/

Jonathan E.C. May
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2021, I caused the foregoing motion to be electronically served through the Court's CM/ECF system.

/s/

Jonathan E.C. May
Assistant Attorney General