

Section 401/Clean Water Act: Federal Appellate Court Addresses Federal Energy Regulatory Commission Licensing Issue



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01/04/2023

The United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) addressed in a December 20th Opinion an issue involving the Federal Energy Regulatory Commission (“FERC”) licensing process. See *Waterkeepers Chesapeake, et al. v. Federal Energy Regulatory Commission*, No. 21-1139.

The question involved the appropriate application of Section 401 of the Clean Water Act to the FERC’s licensing of a dam.

Section 401 of the Clean Water Act prohibits federal agencies such as the FERC from issuing permits or licenses that result in exceedance of water quality standards, or other applicable authorities, of the state. This provision of the Clean Water Act requires an applicant for a federal license or permit to provide a certification that any discharges from the facility will comply with applicable water quality standards. If not provided, the federal permit or license may not be granted. Further, states can impose certain conditions upon federal permits or licenses as a prerequisite to granting the permit or license.

If a state fails or refuses to act on a request for certification in a timely manner, the certification requirements are waived with respect to such federal application.

The Federal Power Act authorizes FERC to issue licenses for the operation of hydroelectric projects on navigable waters. Section 401 of the Clean Water Act requires that hydroelectric projects on navigable water apply to FERC for a license to operate a dam and obtain a state certification of the project under Section 401(a) of the Clean Water Act.

Section 401(a)(1) then gives a state three options to respond to a certification request:

1. Deny the request in which case a license and permit cannot be granted by FERC
2. Grant the request either in full or with specified limitations and monitoring requirements that the FERC must then incorporate into the license
3. Fail or refuse to act on a request within a reasonable period and thus waive its right to certify, in which case the FERC grants the license

Constellation Energy Generation, LLC, (“Constellation”) in 2014 submitted a certification request to the Maryland Department of the Environment (“MDE”) regarding the licensing of the Conowingo Dam on the

Susquehanna River. MDE issued a Section 401(a)(1) certification in 2018. The certification required that Constellation 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
- Undertake other measures for aquatic resource and habitat protection

Constellation challenged the certification through various petitions and lawsuits. However, while these proceedings were pending, MDE and Constellation arrived at a settlement.

The settlement agreement contained a series of proposed license articles which the parties would jointly submit to FERC for incorporation into the dam's license. Further, the Opinion notes that:

[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."

The FERC subsequently issued a 50-year license adopting the proposed license articles and only making modifications to ensure it could enforce those articles.

Various environmental groups filed a petition for rehearing arguing that MDE had no authority to retroactively waive its 2018 certification. They contended that FERC exceeded its authority under the Clean Water Act by issuing a license that failed to incorporate the conditions of that certification.

FERC responded that the settlement made clear that MDE intended to waive its Section 401 authority and nullify the 2018 certification if it approved the agreement. It argued that nothing in the Clean Water Act prevented a state from affirmatively waiving its authority to issue a water quality certification.

The environmental groups filed a petition with the D.C. Circuit arguing that Section 401(a)(1) does not permit retroactive waiver of the kind MDE attempted.

The D.C. Circuit stated that MDE's subsequent "backtracking" in the settlement agreement (i.e., in which it conditionally waived its authority to issue a water quality certification after the fact) is neither a failure nor a refusal to act as required by Section 401 of the Clean Water Act. Therefore, MDE's action was held to not qualify as a Section 401(a)(1) waiver.

FERC contended that nothing in the Clean Water Act prevented a state from affirmatively waiving its authority to issue a water quality certification before the statutory time period expires or during the pendency of the certification's appeal.

This argument was rejected by the D.C. Circuit which held that Section 401(a)(1) limits the FERC's power to issue a license to two circumstances:

1. Where a state is granted a certification
2. Where the state has waived its authority to certify as provided in the preceding sentence by failing or refusing to act

As a result, the D.C. Circuit noted that the FERC's "third alternative" in which it issued a license based on a private settlement arrangement entered into by MDE after the state had issued a certification with conditions (but then changed its mind) was not permissible.

The D.C. Circuit ultimately vacated the license determining that it would allow completion of the administrative and judicial review that it believed was interrupted by the settlement agreement. It noted that such a review could result in either:

1. Invalidation of MDE's 2018 certification, which would require Constellation to request a new certification; or
2. Validation of the 2018 certification, which would require FERC to issue a license incorporating the conditions contained therein.

The D.C. Circuit noted that either result would comport with the major goals of the Clean Water Act to:
... make states the "prime bulwark in the effort to abate water pollution."

The license was vacated and remanded to FERC for further proceedings.

A copy of the Opinion can be downloaded [here](#).