

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 21-1139

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WATERKEEPERS CHESAPEAKE, et al.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

**PROOF BRIEF FOR INTERVENOR
U.S. DEPARTMENT OF THE INTERIOR**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing in this Court are listed in the brief of Petitioners and the brief for Respondent Federal Energy Regulatory Commission (FERC).

B. Rulings Under Review

Two rulings are under review:

1. Exelon Generation Company, LLC, Order Issuing New License, 174 FERC ¶ 61,217 (Mar. 19, 2021) (License Order), JA _____ - _____; and
2. Exelon Generation Company, LLC, Order Addressing Arguments Raised on Rehearing, 176 FERC ¶ 61,029 (July 15, 2021) (Rehearing Order), JA _____ - _____.

C. Related Cases

This case has not previously been before this Court.

/s/ Justin D. Heminger

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INTRODUCTION

Petitioners (collectively Waterkeepers) challenge the license issued by Respondent Federal Energy Regulatory Commission to Intervenor Exelon Generation Company for the Conowingo Project on the Susquehanna River. Waterkeepers requests vacatur of the entire license. Intervenor U.S. Department of the Interior, on behalf of the U.S. Fish and Wildlife Service (together, the Service), is participating in this case to make one critical point about the requested remedy.

The Commission incorporated into the license the Service's modified fishway prescription. As a result, the license includes fish passage measures protecting fish in the Susquehanna River and Chesapeake Bay. Vacating the license in its entirety, as Waterkeepers requests, would be detrimental to fish species in the River and the Bay by eliminating or delaying measures that otherwise allow migratory and resident fish to pass safely upstream and downstream of the Project. Thus, if the Court finds any error with the Commission's orders, the Court's remedy should, at a minimum, preserve the important environmental benefits of the license's fish passage measures.

STATEMENT OF JURISDICTION

The Service adopts the Commission's Statement of Jurisdiction.

Commission Brief 3.

STATEMENT OF THE ISSUES

In this brief, the Service addresses the following issue:

Whether, if the Court were to find any error in the Commission's orders, the Court should grant Waterkeepers' requested remedy to vacate the license for the Conowingo Project in its entirety, when vacatur of the license in its entirety would cause disruptive consequences, including detrimental effects on fish species in the Susquehanna River and Chesapeake Bay.

PERTINENT STATUTE

The Service's authority to prescribe fish passage measures is in 16 U.S.C.A.

§ 811:

The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of . . . such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate. The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such fishways. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection¹ and within the time frame established by the Commission for each license proceeding.

STATEMENT OF THE CASE

The Service provides the following Statement relevant to Waterkeepers' request to vacate the license.

The Commission's License Order granted Exelon a new license under the Federal Power Act for the Conowingo Hydroelectric Project on the Susquehanna River in Pennsylvania and Maryland. Exelon Generation Company, LLC, Order Issuing New License, 174 FERC ¶ 61,217 (Mar. 19, 2021) (License Order), JA ____ - ____.

Section 18 of the Federal Power Act provides that the Commission must require the construction, maintenance, and operation by a licensee of such fishways as may be prescribed by Interior or the Department of Commerce. 16 U.S.C. § 811. Under this authority, and under an April 2016 settlement agreement with Exelon, the Service filed a modified fishway prescription with the Commission that requires Exelon to construct and maintain fish passage facilities so that fish, including American shad, herring, and American eel, can migrate safely past the Project. License Order ¶¶ 80-85, 223, JA ____ - ____, _____. The Service devoted significant resources to developing the fishway prescription and to ensuring that the Commission included the prescribed conditions in the License Order.

In the License Order, the Commission incorporated the Service's modified fishway prescription into the license. License Order, Ordering Term F, JA ____ -

____.¹ The Commission also included Article 401 in the license, which requires Exelon to prepare fishway plans in consultation with the Service, to obtain the Service's approval of those plans, and to submit annual monitoring plans on the effectiveness of the upstream and downstream passage facilities. License Order, Article 401, JA ____ - _____. The modified fishway prescription is in Appendix 1 to the license. License Order, Appendix 1, JA ____ - _____.

The modified fishway prescription, and thus the license, provides for a complex series of phased steps of construction and testing of fishway facilities over a period of years, as well as active interim measures such as trapping of fish below Conowingo Dam for transport to areas upstream of all four dams on the mainstem of the lower Susquehanna River, all with due dates dating from license issuance. License Order, Appendix 1, JA ____ - _____. Exelon has been implementing the license in accordance with its terms and agency direction since its issuance. The process contemplated in the modified prescription and license for improvement of fish passage has begun but is not completed.

¹ The license contains additional measures to protect American eels, which Exelon and Maryland agreed to in their separate settlement agreement. License Order, Articles 414 to 418, JA ____ - _____.

SUMMARY OF ARGUMENT

The Service is participating in this case to address a single, narrow issue. Waterkeepers requests that the Court vacate in its entirety the license for the Conowingo Project. But the license includes detailed fish passage measures that require Exelon to ensure the safe passage of fish through the Project, including American shad, herring, and American eel. Vacatur of the whole license would cause disruptive consequences by eliminating or delaying these significant environmental benefits. Thus, if the Court were to find any error in the Commission's orders granting the license, the remedy that the Court orders should, at a minimum, preserve the license's fish passage measures.

ARGUMENT

I. The Court should decline Waterkeepers' request to vacate the license in its entirety to avoid suspending fish passage measures that bring substantial benefits to fish species in the River.

Waterkeepers requests that the Court vacate the license for the Conowingo Project. Waterkeepers Brief 57. If the Court finds any error in the Commission's orders, the Court should exercise its discretion to, at a minimum, remand without vacating the license's fish passage measures.

When this Court holds that an agency action is arbitrary and capricious, it weighs two factors when deciding whether to remand that action with or without vacatur: (1) the "seriousness of the order's deficiencies (and thus the extent of

doubt whether the agency chose correctly),” and (2) the “disruptive consequences of an interim change that may itself be changed.” *Allied-Signal Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (cleaned up). This Court has also found it “appropriate to remand without vacatur in particular occasions where vacatur would at least temporarily defeat . . . the enhanced protection of the environmental values covered by” the agency’s action. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam) (cleaned up).

Vacating the license as Waterkeepers requests would be highly disruptive and detrimental to fish species in the Susquehanna River and the Chesapeake Bay. Vacatur in whole would render ineffective the modified fishway prescription that the Service developed for the Conowingo Project and that the Commission included in the license. *See* License Order, Ordering Term F & Appendix 1, JA____, ____-____.

Removing the prescription, which Exelon is actively implementing, would delay or even prevent long-planned and intricately scheduled measures for restoring native diadromous fish to the Susquehanna River. Likewise, the ecological, recreational, and water quality benefits that will accrue to the public as a result of the fish passage measures would be delayed or lost. This would include immediate suspension of the requirement to trap fish below Conowingo Dam and transport them into the upper watershed, as well as suspension of requirements for

construction and testing the effectiveness of fishways. *See* License Order, Appendix 1, JA ____ - ____ (sequencing of upstream fish passage construction and implementation; trapping and trucking; and testing of facilities). Vacatur would also introduce uncertainty about the timing of Exelon's obligations, should the modified prescription terms, now partially completed, be incorporated into an eventual new license issued by the Commission after vacatur and remand.

Given that vacatur of the license in its entirety “would at least temporarily defeat” the environmental benefits provided to species in the Susquehanna River, at a minimum, “it is appropriate to remand without vacatur” of the license’s fish passage measures. *North Carolina*, 550 F.3d at 1178; *see also Wisconsin v. EPA*, 938 F.3d 303, 336 (D.C. Cir. 2019) (“As a general rule, we do not vacate regulations when doing so would risk significant harm to the public health or the environment.”).

CONCLUSION

For these reasons, if the Court finds any error in the Commission's orders, the Court should, at a minimum, remand without vacatur of the license's modified fishway prescription to preserve the prescription's substantial environmental benefits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) this document contains 1,429 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

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