

131 FERC ¶ 61,167
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Exelon Generation Company, LLC

Project No. 405-097

ORDER GRANTING REHEARING

(Issued May 20, 2010)

1. On February 4, 2010, the Director, Office of Energy Projects (Director), issued a study plan determination letter to Exelon Generation Company, LLC (Exelon), licensee for the 573-megawatt (MW) Conowingo Hydroelectric Project No. 405, located on the lower Susquehanna River. On February 24, 2010, the Maryland Department of Natural Resources, Power Plant Research Program (Maryland DNR), and Maryland Department of the Environment (Maryland Department of the Environment) filed a notice of study dispute regarding four studies for the Conowingo Project. On March 5, 2010, the Director dismissed the notice. On March 8, 2010, the two agencies filed a joint request for rehearing of the Director's letter dismissing their notice of study plan dispute and the underlying study plan determination letter. In this order, we grant the rehearing request.

Background

2. The Conowingo Project is the lowermost of five hydroelectric projects on the lower Susquehanna River. The most upstream of these projects is the 19.6-MW York Haven Hydroelectric Project No. 1888 at river mile (RM) 55. Proceeding downstream from the York Haven Project are the 417.5-MW Safe Harbor Hydroelectric Project No. 1025 (at RM 33), the 107.2-MW Holtwood Project (at RM 25), and the Conowingo Project (at RM 10). The 800-MW Muddy Run Pumped Storage Project is located between the Holtwood and Conowingo Projects and uses the Conowingo Pond as its lower reservoir. Three of these projects, York Haven, Conowingo, and Muddy Run, are currently in the relicensing process.¹

¹ The current license for the Conowingo Project was issued in 1980 (19 FERC ¶ 61,348 (1982)) and will expire in 2014. The license for the Muddy Run Project was issued in 1964 (32 F.P.C. 826) and will expire in 2014. The license for York Haven was issued in 1980 (21 FERC ¶ 61,430 (1982)) and will expire in 2014. The licenses for the Safe Harbor and Holtwood projects will expire in 2030.

3. On March 12, 2009, Exelon filed with the Commission notices of its intent to apply for new licenses for the Conowingo and Muddy Run Projects, pursuant to the integrated licensing process (ILP),² as well as pre-application documents (PAD).³ In its PAD for the Conowingo Project, Exelon proposed, in addition to a number of studies on various matters, to conduct an assessment of the environmental effects of coordinated flow releases at the Safe Harbor, Holtwood, and Conowingo Projects in the lower Susquehanna River and to complete literature reviews on American eel and American shad populations and the impacts of passage through the projects on these species.⁴

4. On May 11, 2009, Commission staff issued a notice and scoping document for the purpose of obtaining public comment on its initial determination of the issues to be studied in the proposed environmental assessment in the two relicensing proceedings, and seeking comments and study requests from interested stakeholders for both projects.

5. On June 11 and 12, 2009, Commission staff held two scoping meetings for the purpose of obtaining public comment for both projects. Representatives from Maryland DNR attended, but made no mention of Maryland Department of the Environment. There were no attendees from the Maryland Department of the Environment.

6. On July 10, 2009, Maryland DNR, by itself and with no reference to the Maryland Department of the Environment, filed comments, which included a request that for the Conowingo Project Exelon (1) include an on-site turbine mortality study of adult and juvenile American shad as part of the downstream fish passage effectiveness study (study 3.2); (2) include the entire 55-mile reach from the York Haven Project to the Conowingo Project in the hydrologic study of the lower Susquehanna River (study 3.11); and (3) include a river reach (reference reach) that could be used to compare to the aquatic community downstream of the Conowingo Project (study 3.18).⁵

² The ILP was established by the Commission in 2003 with the goal of creating efficiencies by integrating a potential license applicant's pre-filing consultation with the activities of the Commission and other agencies pursuant to the Federal Power Act, the National Environmental Policy Act (NEPA), and other applicable legislation. *See Hydroelectric Licensing Under the Federal Power Act*, Order No. 2002, 68 Fed. Reg. 51,070 (Aug. 25, 2003), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,150 (2003) (ILP Preamble).

³ *See* 18 C.F.R. § 5.6 (2009) (requiring filing of PAD).

⁴ *See* Conowingo PAD filed on March 12, 2009, at sections 5.1 and 5.2.

⁵ *See* letters filed by the Maryland DNR regarding Conowingo Project No. 405 on July 10, 2009, at Requested studies 5, 6, and 10; November 23, 2009, at pp. 5, 12-13 and 17; and January 20, 2010, at pp. 6 and 13-15.

7. Exelon did not include most of these components in the proposed study plans that it filed on August 24, 2009.⁶

8. On September 22 and 23, 2009, Exelon and numerous stakeholders, including Maryland DNR, but not the Maryland Department of the Environment, participated with Commission staff in a meeting to discuss the proposed study plan and try to resolve disagreements about what the plan should address.⁷ The meetings did not result in the inclusion of Maryland DNR's requested changes to the three studies. On November 23, 2009, Maryland DNR, again on its own behalf and with no reference to the Maryland Department of the Environment, filed comments on the proposed plan.

9. On December 22, 2009, Exelon filed its revised study plan.⁸ On January 20, 2010, Maryland DNR, once again with no reference to the Maryland Department of the Environment, filed comments on Exelon's plan.

10. On February 3, 2010, in response to supplemental comments filed by Exelon, the State of Maryland filed an objection on behalf of Maryland DNR and described Maryland DNR as "a State resource agency participating in the relicensing of the Conowingo Hydroelectric Project." No reference was made to Maryland Department of the Environment or any other Maryland agency.

11. On February 4, 2010, the Director issued his study plan determination letters, which did not require Exelon to include the elements proposed by the Maryland DNR for the Conowingo Project. On February 24, 2010, Maryland DNR and Maryland Department of the Environment jointly filed a formal dispute notice regarding the elements requested by Maryland DNR for Exelon's studies 3.2, 3.11, and 3.18, and an element requested by the Susquehanna River Basin Commission (SRBC) for Exelon's study plan 3.1.

12. On March 5, 2010, the Director dismissed the study dispute notice, explaining that according to the Commission's regulations, a study dispute resolution notice may be filed by, *inter alia*, any agency or Indian tribe with authority to issue a water quality certification for the project license under section 401 of the Clean Water Act (CWA) with

⁶ See Exelon's Proposed Study Plan for the Conowingo Project, filed August 24, 2009, at sections 3.2, 3.3, 3.11, and 3.18. Exelon did include an onsite balloon tagging study to address turbine-induced mortality of fish, though not at the sample sizes requested by Maryland DNR and others.

⁷ See Exelon's Revised Study Plan filed December 22, 2009, at section 6.

⁸ See Exelon's Revised Study Plan for the Conowingo Project, filed December 22, 2009, at Table 1-1, and sections 3.2, 3.3, 3.11, and 3.18.

respect to studies pertaining directly to the exercise of its CWA authority. The Director noted that while Maryland DNR, which does not have authority to issue water quality certification, had filed a request for studies in response to the Commission's May 11, 2009, notice requesting such, no study requests were filed by Maryland Department of the Environment, which does have certification authority. Accordingly, the Director declined to consider Maryland DNR's proposed studies under the formal study dispute resolution process for the Conowingo Project.

13. On March 8, 2010, the two agencies filed a request for rehearing of the Director's dismissal letter and study plan determination.

Discussion

14. Section 5.14 of the Commission's regulations⁹ allows state agencies or tribes with mandatory authority pursuant to section 401 of the Clean Water Act (CWA)¹⁰ to file a notice of study dispute with respect to studies pertaining directly to the exercise of their authority under CWA section 401. While the Maryland Department of the Environment is a state agency with authority pursuant to CWA section 401, it did not participate in the study plan process and the notice of dispute resolution did not demonstrate how the failure to include the requested study components pertained directly to Maryland Department of the Environment's exercise of section 401 authority.

15. The Maryland agencies argue that the Commission failed to recognize the collaborative and coordinated review by the State of Maryland. They argue that the state has long used a coordinated multi-agency review process and that Maryland DNR is the agency that coordinates review with other state agencies, including the Department of the Environment.¹¹ The agencies assert that Maryland Department of the Environment worked closely with Maryland DNR to ensure studies related to minimum freshwater flow volumes and related aquatic issues were raised during the ILP process.¹²

16. As noted above, Maryland DNR filed a number of pleadings during the development of Exelon's study plan, and none of the pleadings made any reference to the

⁹ 18 C.F.R. § 5.14 (2009).

¹⁰ 16 U.S.C. §§ 797(e) and 811 (2006). Federal agencies with mandatory authority pursuant to sections 4(e) and 18 of the Federal Power Act are also permitted by 18 C.F.R. § 5.14 to avail themselves of the formal dispute process.

¹¹ Rehearing request at 3, 6-7.

¹² Rehearing request at 7.

Maryland Department of the Environment.¹³ If the two Maryland agencies intended to act as one, they bore the affirmative obligation of so informing the other stakeholders and the Commission. The Maryland agencies did not do so here, and the record appears to indicate that Maryland DNR was in fact operating independently. A number of states bifurcate environmental responsibilities among two or more agencies, as is the case with Maryland Agencies.¹⁴ These agencies may, in a given case, take the same position, but may disagree in others. Thus, it cannot be assumed that multiple state agencies are always operating in harmony and representing each others' interests.

17. It is important the Commission and other stakeholders know, as study requests are presented, on whose behalf they are being made and what, if any, statutory interest they are intended to further. This is necessary so that entities involved in study development can evaluate the need for particular studies. At the time Maryland DNR made its study requests, it stated that they were needed to confirm the current method of measuring and reporting dissolved oxygen levels to determine compliance with water quality standards, to properly manage resident fish communities downstream of the project, to identify and maintain downstream hydrology regimes that will protect and optimize conditions for target biota, and to meet established anadromous fish restoration goals, but did not suggest that they were needed so that another state agency could carry out its responsibilities under the Clean Water Act.

18. Given that Maryland DNR made the study requests at issue on its own behalf, with no reference to the needs of its sister agency, that it has no Clean Water Act conditioning authority, and that Maryland Department of the Environment, which made no study requests, did not involve itself in the study plan process until after Maryland DNR's study requests were not granted, the Director had a reasonable basis for dismissing the state agencies' joint notice of study dispute resolution. However, because we have not previously addressed this issue and the two agencies have, on rehearing, clarified the nature of their joint activities, we will allow Maryland Department of the Environment to participate in formal dispute resolution in this instance. On an ongoing and forward

¹³ Moreover, a group of entities calling themselves "the resource agencies" – the U.S. Fish and Wildlife Service, Maryland DNR, the Pennsylvania Boat and Fish Commission, the Pennsylvania Department of Environmental Protection, and the SRBC filed pleadings on October 1, 2009 and January 20, 2010 with respect to the study plan. The Maryland Department of the Environment was not included in this group.

¹⁴ For example, Pennsylvania Fish and Boat Commission (responsible for the protection, conservation, and enhancement of fish and other aquatic species in Pennsylvania) and the Pennsylvania Department of Environmental Protection (responsible for water quality issues and section 401 certification for projects within Pennsylvania) filed separate comments and study requests in the proceeding.

basis, we expect agencies make clear what, if any, mandatory conditioning authority they are representing and how the studies they are requesting inform that mandatory authority.

19. Maryland Department of the Environment is reminded that the formal dispute resolution process applies only to study requests directly related to the exercise of mandatory conditioning authority, and so it will need to clearly explain how the requested studies apply to its consideration of the CWA section 401 certification before staff convenes a dispute resolution panel with respect to the matters raised by the Maryland Department of the Environment. In order to ensure the panel is convened as soon as possible, Maryland Department of the Environment is directed to file its explanation within fourteen days of this order.

The Commission orders:

(A) The rehearing request filed on March 8, 2010, by the State of Maryland, on behalf of Maryland Department of Natural Resources, Power Plant Research Program, and Maryland Department of the Environment, is granted.

(B) Within 14 days from the date of issuance of this order, the Maryland Department of the Environment shall file an explanation of how the requested studies apply to its consideration of the CWA section 401 certification.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.