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| **EXELON GENERATION COMPANY, LLC** | * | **IN THE** |
| **Plaintiff,** | * | **CIRCUIT COURT** |
| | * | **FOR** |
| **v.** | * | **BALTIMORE CITY** |
| **MARYLAND DEPARTMENT OF THE ENVIRONMENT** <br> **Defendant.** | * | **CASE NO. 24-C-18-003410** |

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# MEMORANDUM OPINION AND ORDER

Defendant, the Maryland Department of the Environment has moved to dismiss the Complaint of Exelon Generation Company, LLC (Docket 7). Exelon opposes the Motion (7/2), and the Department has replied (7/3). Scheduled arguments were heard on September 6, 2018.

Plaintiff Exelon owns and operates the Conowingo Hydroelectric Project (Complaint ¶ 1, Docket 1, filed May 25, 2018); the Project is licensed by the Federal Energy Regulatory Commission. Exelon demands Declaratory and Injunctive Relief, or Judicial Review on a Mandamus Petition, challenging an unlawful Certification issued on April 27, 2018 by the Maryland Department of the Environment pursuant to Section 401 of the Clean Water Act and required of the Project licensee. Exelon seeks to void or invalidate the Certification as it "imposes on Exelon the sole responsibility to remove from the Susquehanna River pollutants that Exelon did not introduce into the river and that flow to the Conowingo Project…", and the Certification was improvidently issued as a "final decision." Complaint ¶ 2, 3.

The Motion to Dismiss (Docket 7, filed July 9, 2018) by Defendant Maryland Department of the Environment (MDE or Department), challenges Exelon's Complaint for failing to identify a justiciable controversy as a licensee of the Federal Energy Regulatory Commission (FERC), and failing to exhaust administrative remedies through administrative appeal procedures established by

Maryland regulation. Exelon counters (Docket 7/2) that MDE is shifting the burden of federal law pollution controls to Exelon by imposing onerous and unyielding conditions of the Certification—conditions precedent to FERC licensing of the Conowingo Project—and bypassing contested case procedures of Maryland's Administrative Procedures Act (APA) requiring an adversarial hearing before MDE issues a final decision.

**Motion to Dismiss**

"A motion to dismiss for failure to state a claim tests the sufficiency of the pleadings." *Afamefune v. Suburban Hosp., Inc.*, 385 Md. 677, 682 (2005). When considering a motion to dismiss a complaint for failure to state a claim upon which relief may be granted, the "court must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them, and order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, *i.e.,* the allegations do not state a cause of action for which relief may be granted." *RRC Northeast, LLC v. BAA Md., Inc.*, 413 Md. 638, 643 (2010). The court's "[c]onsideration of the universe of 'facts' pertinent to the court's analysis of the motion is limited generally to the four corners of the complaint and its incorporated supporting exhibits, if any." *Id.* at 434. "The well-pleaded facts setting forth the cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice." *Id.*; *Bobo v. State,* 346 Md. 706, 708-09 (1997). Any "ambiguity or want of certainty in the allegations of a pleading must be construed against the pleader." *Manikhi v. Mass Transit Admin.*, 360 Md. 333, 345 (2000) (quoting *Read Drug & Chem. Co. v. Colwill Constr. Co.*, 250 Md. 406, 416 (1968)).

Dismissal of a complaint seeking declaratory judgment may follow if the petitioner can seek redress through other statutory means.

> Section 3-409(a)(3) of the Courts and Judicial Proceedings Article provides, in pertinent part, that "a court may grant a declaratory judgment ... if it will serve to

> terminate the uncertainty or controversy giving rise to the proceeding, and if ... [a] party asserts a legal relation, status, right, or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it." MD. CODE ANN., CTS. & JUD. PROC. § 3-409(a)(3).

*Reid v. State*, No. 2609, Sept. Term, 2016, 2018 WL 4624254, at *6 (Md. Ct. Spec. App. Sept. 27, 2018). However, declaratory relief is not appropriate in all circumstances. The Uniform Declaratory Judgments Act was intended to "supplement, not to supersede, existing remedies at law and in equity, and accordingly where an immediate cause of action exists for which one of the existing remedies is available and adequate, a proceeding for declaratory judgment is not appropriate within the contemplation of the Act." *Reid, supra*, quoting *Davis v. State*, 183 Md. 385, 389 (citing *Caroline Street Permanent Building Ass'n v. Sohn*, 178 Md. 434, 444 (1940)).

**Application Process, Governing Statutes and Regulations**

Exelon's Conowingo Hydroelectric Plant ("Conowingo Project" or "Project") is a dam and electric generating power plant. Hydroelectric power plants are licensed by the Federal Regulatory Commission for periods of up to 50 years. 16 U.S.C. §§ 799, 817(1). As an applicant seeking to renew its federal operating license, Exelon is required to provide FERC with "a certification from the State" that any discharge into the navigable waters of the Susquehanna River and Chesapeake Bay will comply with the Clean Water Act [§ 401(a)(1)]. Upon securing the federal operating license "with respect to which a certification has been obtained", Exelon may be at risk of license suspension or revocation upon entry of a judgment that the Conowingo Project has been operated in violation of the Clean Water Act. [§ 401(a)(5)], 33 U.S.C. § 1341(a)(1); (a)(5).

The Clean Water Act establishes the structure for regulating discharges of pollutants into navigable waters, and for regulating quality standards for surface waters. 33 U.S.C. § 1251. Section 401 requires a federal license applicant first to obtain a certification from the state in which the discharge originates "that any such discharge will comply with the applicable provisions" relating to water quality under the Act. 33 U.S.C. § 1341(a). Section 401 unquestionably applies to

hydroelectric operating licenses issued by FERC. *S.D. Warren Co. v. Maine Bd. Of Envtl. Prot.*, 547 U.S. 370 (2006). Section 401 is to be read broadly so as not to "limit the authority of any department or agency pursuant to any other provisions of law to require compliance with any applicable water quality requirements." [§ 401(b)], 33 U.S.C. § 1341(b). Certifications shall set out necessary compliance with water quality standards extending to "any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, … and with any other appropriate requirement of State law set forth in such certification…." [§ 401(d)], 33 U.S.C. § 1341(d).

Section 401 defers to the relevant State agency to "establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearing in connection with specific applications." [§401(a)(1)]. In Maryland, the Department of the Environment is responsible to adopt rules and regulations setting water quality standards and effluent standards. E.g., MD. CODE ANN., ENVIR. § 9-314; c.f. § 9-302. MDE's regulations are to protect surface water quality and implement the State's water quality standards. COMAR § 26.08.02.01. Express procedures are established for Water Quality Certification according to Section 401 of the Clean Water Act. § 26.08.02.10 ("This regulation establishes the procedures under which this certification will be issued", § 26.08.02.10.A.(1)), 33 U.S.C. § 1341(a)(1).

Exelon, as an applicant for certification, was required to provide certain information and descriptions of facilities, activities and discharges, together with "[a]ny other information the Department determines is necessary for evaluation of the impact of the activity on water quality." COMAR § 26.08.02.10.B.(1)(g). Upon receipt of such an application, "[t]he Department shall provide public notice of each application for certification", invite written comments and provide instructions for such comments. § 26.08.02.10.C. The Department may hold a public hearing if the

Department has determined the application is of "broad, general interest" or if the written comments demonstrate that the application has "generated substantial public interest." § 26.08.02.10D. Notice of such public hearing must be published in the *Maryland Register* at least 45 days prior to the hearing. § 26.08.02.10.F.(1). At public hearing, all that is required is that "[a]n interested person shall be given an opportunity to present evidence for or against the granting of water quality certification", § 26.08.02.10.F.(2)(a). The Department also may extend the time for written comments at a public hearing. § 26.08.02.10.F.(2)(b).

By applicable regulation, it is for the Department ultimately to determine, with or without a public hearing, whether to issue certification: "If the Department determines the proposed activities will not cause a violation of applicable State water quality standards, the Department shall issue the water quality certification." COMAR § 26.08.02.10.E(1). The timing of that determination is "[a]fter the closing date for receipt of written comments and after any public hearing", and after the Department shall have undertaken to "[c]onsider the testimony and other information presented", "[p]repare a written decision", and "[p]ublish the decision in the Maryland Register." § 26.08.02.10.F.(3)(a),(b),(c). The Department's final decision on certification may be appealed by a "person aggrieved by the Departments' decision concerning a water quality certification". § 26.08.02.10.F.(4)(a).

> "The appeal shall:
> (i) Be filed within 30 days of the publication of the final decision with the hearing office; and
> (ii) Specify, in writing, the reason why the final determination should be reconsidered."

*Id*. Thereafter, a "further appeal shall be in accordance with the applicable provisions of State Government Article, § 10-201 et seq., Annotated Code of Maryland." § 26.08.02.10F(4)(b).

**Certification for Conowingo Hydroelectric Project**

Dated on April 27, 2018, the MDE issued its Certification to Exelon, as Licensee, citing the Clean Water Act, the Environment Article of the Maryland Code (Title 9, Subtitle 3) and Section 26.08.02 of the Code of Maryland Regulations. (Certification incorporated as Exhibit A in Complaint). MDE certified that the Conowingo Project operations and discharge will comply with "applicable effluent limitations, other limitations, and water quality standards and requirements…provided that Licensee complies with all of the provisions, requirements, and conditions in this Certification." Certification at ¶ 3. MDE summarized the process and information reviewed "during the Application review process", ¶ 6, with its findings "that the Project adversely impacts water quality in the State of Maryland", *id.*, and consequent determination of requirements and conditions of certification. ¶ 7. Among those requirements, the provisions of the Certification were identified as severable, in that certain provisions might be held "invalid for any reason" without affecting remaining provisions. ¶ 7.Q.xv. The Certification may be reevaluated and modified; a modified condition of the Certification shall become a condition of any federal Authorization to be issued for the Project. *Id.* at xvii.

The last section of the Certification identifies it as "a final decision on the Application" and allows that "[a]ny person aggrieved by the Department's decision to issue this Certification may appeal such decision in accordance with COMAR § 26.08.02.10F(4)." ¶ Q.xix. A timely "request for appeal" shall "specify in writing (a) the reason why the final decision should be reconsidered…." "After issuance of notice of the Department's decision on the request for reconsideration, a contested case hearing shall be available in accordance with the applicable provisions" of Maryland's Administrative Procedure Act ("APA"). *Id.*

**Contested Case Proceedings under the Administrative Procedure Act**

Applicable provisions of the APA, § 10-202, inform that an agency hearing 'required only by regulation' is not subject to 'contested case' provisions unless "the regulation expressly … requires the hearing to be held in accordance with" the APA. § 10-202(d)(2).[1] Those contested case provisions include reasonable notice of the ensuing hearing, § 10-208; that a party "shall offer all of the evidence that the party wishes to have made part of the record", § 10-213(a); admission of probative evidence, § 10-213(b); direct examination of the party's witnesses and cross-examination of any witness called by the agency on any 'genuine issue', § 10-213(f); preparation of findings of fact based only on record evidence, § 10-214. A "final decision" may not issue until each party is given notice of the proposed decision, is afforded opportunity to file exceptions to that proposed decision, and present argument to the final decision maker. § 10-216. The final decision, based on a preponderance of evidence, shall issue within 90 days, and its contents conform to § 10-221. A party aggrieved by that final decision is entitled to judicial review of the decision. § 10-222(a).

Pending judicial review, the final decision maker or reviewing court "may order a stay of enforcement of the final decision on terms that the final decision maker or court considers proper." APA § 10-222(e)(2). Judicial review is limited to record evidence § 10-222(f); the standard of review is set out in § 10-222(h).

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[1] (d)(1) "Contested case" means a proceeding before an agency to determine:

(i) a right, duty, statutory entitlement, or privilege of a person that is required by statute or constitution to be determined only after an opportunity for an agency hearing; or

(ii) the grant, denial, renewal, revocation, suspension, or amendment of a license that is required by statute or constitution to be determined only after an opportunity for an agency hearing.

(2) "Contested case" does not include a proceeding before an agency involving an agency hearing required only by regulation unless the regulation expressly, or by clear implication, requires the hearing to be held in accordance with this subtitle.

MD. CODE ANN., STATE GOV'T § 10-202(d).

**DEFENDANT MDE's MOTION TO DISMISS**

Defendant MDE's Motion to Dismiss (Docket 7) challenges Exelon's Complaint for failing to exhaust the administrative remedies that it has invoked under the relevant regulation and failing to state a claim against MDE upon which relief can be granted.[2] As described in the Complaint and incorporated into the Complaint as Exhibit B, Exelon currently is pursuing a "protective Petition for Reconsideration and Administrative Appeal," dated May 25, 2018 and citing COMAR § 26.08.02.10(F)(4). Complaint at ¶ 5; Motion at ¶ 3.

MDE describes its reliance on the instructions and allowances of Section 401 of the Clean Water Act to include in its Certification "a wide array of state-imposed conditions addressing matters like minimum and maximum stream flow, restrictions on pollution within the facility's discharges, and measures to mitigate the dam's adverse effect on wildlife." Motion, p. 4; also citing *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994). MDE's certification "identifies a number of water quality impacts caused or made worse by the Project's location, operation, and discharge, and contains a number of conditions to mitigate those impacts[.]" Motion, p. 7. Those conditions include plans required of Exelon for fish passage, reduction of nutrients, and removal of debris.

The breadth of MDE's concerns appeared over the course of several years on Exelon's four successive applications for certification beginning on January 31, 2014 (withdrawn on December 4, 2014, and twice thereafter). Motion, p. 6, fn. 2. MDE's eventual certification on April 27, 2018 followed Exelon's application on May 17, 2017, MDE's public notice in July 2017, an extended comment period through August 2017, a notice of a public hearing conducted on December 5, 2017, oral comments, and an extended date for written comments into January 2018. Instructed by

[2] MDE also contests Plaintiff's claim of attorneys' fees pursuant to a federal statute that does not apply to the causes of action it alleges in this case.

statute to do so "within a reasonable period of time", MDE acted on Exelon's request for certification within one year of the application. [§ 401(a)(1)], 33 U.S.C. § 1341(a)(1).

MDE relied on state regulation to process Exelon's application and issue its Certification. MDE now argues that Exelon's challenge to the Certification must follow state regulation and the APA to exhaust administrative remedies before any judicial review. Because MDE has "primary or exclusive jurisdiction" over the Certification process and decision, Exelon must "await a final administrative decision before resorting to the Courts for resolution of the controversy." *Bd. Of Public Works v. K. Hovanian's Four Seasons at Kent Island, LLC*, 443 Md. 199, 215 (2015) (quoting *State v. Maryland State Bd. Of Contract Appeals*, 364 Md. 446, 457 (2001)). MDE relies on *Priester* to require Exelon "to invoke and pursue the administrative process until [Exelon] receives a final decision from the agency at the utmost level of the administrative hierarchy," including the appeal process. *Priester v. Baltimore County, Maryland*, 232 Md. App. 178, 193 (2017).

MDE also moves for dismissal of Exelon's Complaint arguing that it seeks declaratory relief but fails to allege a justiciable controversy, an actual controversy between the parties. MDE relies on *120 W. Fayette St., LLP v. Mayor & City Council of Baltimore City*, 413 Md. 309 (2010), to urge that Exelon's challenge of the Certification is not yet ripe and that Exelon's concerns for its future license are hypothetical or theoretical. No justiciable controversy exists when no final administrative decision has concluded the agency's decision-making process, "thus leaving nothing further for the agency to do." *Priester*, 232 Md.App. at 196, citing Arnold Rochvarg, Principles and Practice of Maryland Administrative Law 190 (2011). MDE distinguishes the Certification as a "final decision on Exelon's Application", from the ultimate finality of an agency decision after an administrative appeal is exhausted, a final decision for purposes of judicial review. At present, a full administrative record has not been developed; no evidence has yet been offered at a contested case hearing.

MDE's Motion describes the prospect of FERC's licensure of Exelon's Project as flexibly reactive to a state's certification process: "If a state's administrative appeals process results in a change of the Certification, FERC simply amends the license accordingly." Motion, p. 19, citing *Flambeau Hydro, LLC*, 113 F.E.R.C. ¶ 61,291 (2005)[3]. FERC's determination to license the Project, having received the requisite certification, does not depend on Exelon's exhaustion of its administrative challenges or the potential for altered conditions of the Certification. Rather, FERC can be expected to accept – not reject – reopened and adjusted certification conditions. *Id.*, citing *American Rivers Inc. v. FERC*, 129 F.3d 99 (2d. Cir. 1997)[4].

Exelon opposes the Motion (Docket 7/2) by declaring that its entitlement to fundamental due process required a statutorily assured contested case hearing before MDE's "final decision" on certification. Exelon relies primarily on *Walker v. Dep't of Housing & Community Development*, 422 Md. 80 (2011), to urge that "because Exelon's application for certification is subject to the APA's contested case procedures," the APA's definition of "final decision" is controlling. Opposition, p. 17. Exelon cites APA contested case procedures to explain that no such "final decision" can issue before the record is developed in the contested case. Exelon would distinguish the circumstances and dicta cited by MDE in *Priester*, and also urge that its property interests as Project owner, operator, and licensee have been unconstitutionally deprived without due process.

The crux of Exelon's complaint is that MDE "erroneously declared that the Certification was a 'final decision'", while at the same time acknowledging that Exelon is entitled to contested case procedures that have not yet occurred. Opposition, pp. 23-24. Exelon urges that the

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[3] FERC may issue a license after receiving a state certification, even before state administrative appeals of that certification are complete. *Flambeau Hydro, LLC*, 113 F.E.R.C. ¶ 61,291 (2005).
[4] FERC's decision reversed when FERC had rejected state-imposed certification conditions that allowed the state to reopen the certification when appropriate. *American Rivers Inc. v. FERC*, 129 F.3d 99 (2d. Cir. 1997).

consequence of that 'final decision' label is that MDE has already imposed the obligations of the Certification on Exelon because the conditions could be incorporated into FERC's prospective license.

Exelon answers MDE as to justiciability concerns by demanding declaratory relief only to address "whether MDE acted unlawfully by (1) issuing the Certification as a 'final decision', and (2) filing it as such with FERC." Opposition, p. 24. Exelon seeks a declaratory judgment "that the obligations in the Certification cannot be imposed on Exelon before the contested case process." *Id.* Exelon relies on *Holiday Spas v. Montgomery County Human Relations Comm'n*, 315 Md. 390 (1989), to explain that the "finality" of MDE's Certification and its consequences cannot be remedied at a later date. Exelon also urges that exhaustion of administrative remedies is not required when no adequate remedy can be provided to reverse the consequence of MDE's erroneous but "final decision" as filed with FERC (so as to impose and enforce MDE's conditions without a contested case hearing).

## I. **The Certification is not subject to judicial review prior to Exelon's exhaustion of its administrative remedies.**

MDE issued a final determination on Exelon's water quality certification application, subject to administrative appeal rights. COMAR § 26.08.02.10F(4). In response to the Department's final determination of the Certification, Exelon filed a request for reconsideration (Complaint Exhibit B). This request is currently pending before the Department. Once the Department makes a decision on the request for reconsideration, Exelon may pursue its further appeal according to APA contested case procedures. § 26.08.02.10F(4)(b). After exhausting all administrative appeal rights, any party aggrieved by the Department's final decision may then seek judicial review. MD. CODE ANN., STATE GOV'T § 10-222.

An aggrieved party may not seek judicial review until it has exhausted its administrative remedies. "When a legislature provides an administrative remedy as the exclusive or primary means

by which an aggrieved party may challenge a government action, the doctrine of administrative exhaustion requires the aggrieved party to exhaust the prescribed process of administrative remedies before seeking *'any other'* remedy or 'invok[ing] the ordinary jurisdiction of the courts.'" *Priester*, 232 Md.App. at 178 quoting *Soley v. State Comm'n on Human Relations*, 277 Md. 521, 526 (1976) (emphasis added). Prior to seeking relief from the Court, "a party must exhaust the administrative remedy and obtain a final administrative decision . . .." *Priester*, 232 Md.App. at 193 quoting *Laurel Racing Ass'n, Inc. v. Video Lottery Facility Location Comm'n*, 409 Md. 455, 460 (2009) (emphasis added). To meet the standards of exhaustion, a party must "invoke and pursue the administrative process until he or she receives a final decision from the agency at the utmost level of the administrative hierarchy." *Priester*, 232 Md.App. at 194 (emphasis added).

Exelon failed to exhaust its administrative remedies under COMAR § 26.08.02F.10 before seeking relief from this Court; Exelon is not yet eligible for judicial review. The regulation and the adopted APA procedures for a 'contested case' provide a detailed administrative appeal process for Exelon. The agency hearing instructed by the regulation is a hearing on an aggrieved applicant's appeal of the certification decision, after MDE's reconsideration of its 'final determination' to issue the certification. "The appropriate time to argue that the decision of an administrative agency was not in accordance with the law is in a judicial review action, *after* the rendering of a final administrative decision." *Renaissance Centro Columbia, LLC v. Broida*, 421 Md. 474 (2011) (holding that the party "failed to exhaust administrative remedies and await a final decision" *Id.* at 491) (emphasis added)).

MDE has not issued a final determination on Exelon's request for reconsideration, and Exelon's prospective appeal has not reached the "utmost level of the administrative hierarchy"—the agency's final decision after exhaustion of contested case procedures on Exelon's administrative appeal. MDE issued a final determination on Exelon's water quality certification application, subject

to administrative appeal rights. COMAR § 26.08.02.10F(4). In response to the Department's final determination of the Certification, Exelon's request for reconsideration is currently pending before the Department. Once the Department makes that decision on reconsideration, Exelon may pursue its administrative appeal according to APA contested case procedures. § 26.08.02.10F(4)(b). Only after exhausting all administrative appeal rights, may Exelon, if aggrieved by the Department's final decision, then seek judicial review. MD. CODE ANN., STATE GOV'T § 10-222. The appeal process provided by MDE has not reached its conclusion, and there are still further actions for the agency to take, including MDE's final determination on Exelon's request for reconsideration, contested case proceedings to accomplish an administrative appeal by MDE, and MDE's final decision when the contested case procedures are concluded. Exelon may not pursue judicial review in this court until after that final decision.

## II. ***Walker*** **does not require a contested case hearing prior to a final decision on the Certification application.**

Exelon argues that its water quality certification application is or should be subject to the APA's contested case procedures before the agency renders its "final decision" upon certification. Exelon relies on *Walker v. Dep't of Housing & Community Development*, 422 Md. 80 (2011), to urge that wherever 'contested case' procedures are to apply, a 'final decision' cannot issue *before* contested case procedures are invoked. In *Walker*, the Court of Appeals addressed whether APA contested case procedures applied to decisions terminating rental assistance to participants in the Housing Choice Voucher Program. The Court reviewed the Voucher Program administered by the Department of Housing & Urban Development ("HUD", see 24 C.F.R. 982), and the "informal hearing" required by regulation before terminating rental assistance. Maryland's state public housing agency was responsible to adopt an Administrative Plan conforming to statutory requirements and HUD regulations. 24 C.F.R. § 982.555(a)(1). The Maryland Department of Housing and Community

Development adopted an Administrative Plan affording participants the right to the informal hearing, and instructing how that informal hearing is to be conducted. 24 C.F.R. § 982.555(e).

On *Walker's* petition for judicial review in the Circuit Court, pursuant to APA § 10-222, after termination of housing assistance benefits, Walker challenged the termination decision because the informal hearing was intended to be a "contested case" under Maryland's APA, see § 10-202(d), but those procedures were not followed in her case. The Housing Department urged that the informal hearing conducted pursuant to regulation was not defined as a "contested case" in the APA and subject to judicial review, arguing, instead, that § 10-202(d)(2) exempted the informal hearing from classification as a "contested case." *Walker*, 422 Md. at 96-97. The Court of Appeals determined that federal due process principles entitled *Walker* to a pre-termination hearing within the meaning and contemplation of the APA as a contested case, 422 Md. at 93-94; the agency was to determine a 'right … required by statute or constitution to be determined only after an opportunity for an agency hearing", § 10-202(1)(i); *Goldberg v. Kelly*, 397 U.S. 254 (1970)(termination of welfare benefits first required evidentiary hearing consistent with constitutional due process). In *Walker*, where constitutional due process required the contested hearing, the state agency's interpretation of its regulation and § 10-202(d)(2) could not apply to exclude the informal hearing from APA contested case procedures.

Upon rejecting the agency's analysis in *Walker*, the Court cited legislative history that APA § 10-202(d)(2) "makes clear that a public hearing that is required by regulation or statute before an agency takes a particular action <u>need not</u> take the form of a 'contested case' proceeding…." *Walker*, 422 Md. at 97 (emphasis added; quoting Bill Analysis of HB 877). The Maryland General Assembly, on legislating the APA amendment that became APA § 10-202(d)(2), had intended to limit

"contested cases" in regulatory proceedings.[5] Such a limitation appears obvious as to MDE's certification proceedings according to the Clean Water Act.

In this case, Exelon challenges the impact of conditions to MDE's certification on FERC's eventual licensure of the Project, and complains of prospective and extraordinary costs of compliance with such conditions. In these circumstances, no constitutional due process requirement and no statutory instruction of the Clean Water Act directs or informs the application of APA contested case procedures anticipating a certification decision. Instead, the discretionary public hearing allowed by COMAR § 26.08.02.10D, precedent to MDE's certification decision, clearly need not take the form of a contested case proceeding. Only after the certification is issued do the MDE regulations anticipate such procedures for any administrative appeal. The Department's 'final decision' on certification and 'final determination' on reconsideration may be appealed by a "person aggrieved by the Departments' decision concerning a water quality certification". § 26.08.02.10.F.(4)(a). The appeal is to be filed promptly with the 'hearing office' and 'Specify, in writing, the reason why the final determination should be reconsidered." *Id.* Then, a

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[5] The Court of Appeals decision in *Sugarloaf Citizens Ass'n v. Northeast Maryland Waste Disposal Authority*, 323 Md. 641 (1990), had been criticized for interpreting a statutory "public hearing" as "contemplating a contested case hearing." The *Sugarloaf* opinion had posed an unwarranted expansion of the applicability of "contested case" hearing. *See Walker*, 422 Md. at 97. APA § 10-202(d)(2) (1993) was a legislative response to *Sugarloaf.* Exelon cites *Sugarloaf Citizens Ass'n v. Northeast Maryland Waste Disposal Authority*, 323 Md. 641 (1990), as requiring an agency to hold a "contested case" hearing before ruling on an application for approval. Opposition, p. 23. *Sugarloaf* involved the Prevention of Significant Deterioration (PSD) permit process "required by the federal Clean Air Act, 42 U.S.C. § 7401 *et seq*., and implemented by the State of Maryland through the Air Management Administration (AMA) of the Maryland Department of the Environment." *Sugarloaf*, 323 Md. at 647. The permit process was divided into three stages: PSD approval, a permit to construct, and a permit to operate. *Id.* The issue presented to the Court was whether the AMA is required to hold a "contested case" hearing as defined by the APA prior to ruling on an application for PSD approval, stage one of the permit process. *Id.* at 651. The Court held that "[u]nder COMAR 26.11.02.10C and the statutory permit scheme as a whole, the hearing required at the PSD permit stage is not a contested case hearing." *Id.* at 653. The State chose the construction permit stage as the point at which a hearing is required by law, and the Court found that this was a "more appropriate time for a contested case hearing than the PSD approval stage." *Id.* at 658. The Court cited the lack of "immediate effect on any individual property rights" at the approval stage, and that granting a permit at the construction stage "would create an immediate right in the County to begin building the facility." *Sugarloaf*, 323 Md. at 658. The Court therefore concluded that the contested case hearing was more appropriate at the construction stage. *Id.* Similarly in this case, there is no "immediate effect on any individual property rights" at the current stage in MDE's certification, then appeal process.

"further appeal shall be in accordance with the applicable provisions of State Government Article, § 10-201 et seq., Annotated Code of Maryland." § 26.08.02.10F(4)(b).

Exelon's reliance on *Walker* to claim constitutional entitlement to due process is misplaced. The Court in *Walker* relied on *Goldberg v. Kelly*, 397 U.S. 254 (1970), where the Supreme Court held that "the termination of welfare benefits without first affording the recipient an opportunity for an evidentiary hearing violates the Due Process Clause of the Fourteenth Amendment." *Walker*, 422 Md. at 93. The interests of the participant in the "uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." *Goldberg*, 397 U.S. at 266. The *Goldberg* and *Walker* analysis does not apply to this case because, as a licensee, Exelon has neither a property entitlement to relicensure nor a property interest in a renewed license from FERC. *See Entergy Arkansas, Inc. v. Nebraska*, 161 F.Supp.2d 1001 (D. Neb. 2001) (holding that an applicant for a license to operate a radioactive waste facility did not possess a "property interest" in the license or money spent to obtain it, and therefore Nebraska state officials' allegedly improper denial of license did not amount to the denial of substantive or procedural due process.); Christopher Scoones, *Let the River Run: Strategies to Remove Obsolete Dams and Defeat Resulting Fifth Amendment Taking Claims*, 2 SEATTLE J. ENVTL. L. 1, 32-34 (2012); Katherine Costenbader, *Damning Dams: Bearing the Cost of Restoring America's Rivers*, 6 Geo. Mason L. Rev. 635, 656 25(1998) (summarizing series of Supreme Court cases demonstrating "that licensees undergoing relicensing in fact do not have a vested property interest in the expired license or the property as a hydropower development site.").

## III. <u>MDE has not issued a Final Decision pursuant to the APA.</u>

Judicial review is available for the agency's <u>final decision</u>--after the contested case procedures are exhausted. Without finality there is ordinarily no exhaustion. *See Renaissance Centro*, 421 Md. at 485. Therefore, to determine eligibility for judicial review, the Court evaluates what is, or is not, a final decision.

The Supreme Court has articulated the "primary characteristics to be considered in determining whether an agency's action is final for purposes of judicial review." *Maryland Com'n on Human Relations v. Baltimore Gas & Elec. Co.*, 296 Md. 46, 52 (1983). In *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.,* 333 U.S. 103, 112-13 (1948), the Court said: "[A]dministrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." In *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic,* 400 U.S. 62, 71, 91 (1970), the Court considered "whether the process of administrative decision making has reached a stage where judicial review will not disrupt the orderly process of [administrative] adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." The Maryland Court of Appeals, in turn, has concluded that "ordinarily the action of an administrative agency, like the order of a court, is final if it determines or concludes the rights of the parties, or if it denies the parties means of further prosecuting or defending their rights and interests in the subject matter proceedings before the agency, thus leaving nothing further for the agency to do." *Maryland Com'n on Human Relations*, 296 Md. 46, 56 (1983). More succinctly, "an administrative agency's action is final if it determines the rights of the parties and leaves nothing further for the agency to do." *Id.* *See Kay Const. Co. v. County Council for Montgomery County*, 227 Md. 479, 490 (1962) (County Council resolution granting reconsideration was not an order final in nature from which an appeal could be taken).

Most recently, in *Priester*, the Court of Special Appeals reiterated that in order to be final, "the order or decision must dispose of the case by deciding all questions of law and fact and leave nothing further for the administrative body to decide." *Priester*, 232 Md.App. at 195, quoting *Willis v. Montgomery Cnty.*, 415 Md. 523, 534 (2010) (citations omitted). The Court declared an administrative agency action as final "if it determines or concludes the rights of the parties, or if it denies the parties means of further prosecuting or defining their rights and interests in the subject matter in proceedings before the agency, thus leaving nothing further for the agency to do." *Priester*, 232 Md.App. at 196 citing Arnold Rochvarg, Principles and Practice of Maryland Administrative Law 190 (2011). The Court cited Priester's complaint before the circuit court as conceding its lack of finality, where it alleged that the Board "violated its statutory mandate by not issuing a final decision, . . ." instead requesting the Court to order the Board to issue a final decision. *Priester*, 232 Md.App. at 199-200.

Exelon argues that because the Certification is labeled a "final decision on the Application" (Exhibit A to Complaint, ¶ Q.xix), it is a final decision for the purposes of provoking judicial review under the APA. The regulatory language and process of certification does not support such a conclusion, *supra*, pp. 3-6. However, even where underlying statutes and regulations are ambiguous, the Court of Special Appeals "will not substitute [its] judgment for MDE's reasonable interpretation of the [ ] requirement." *Stevens v. Prettyman Manor Mobile Home Park Wastewater Treatment Plant*, 237 Md.App. 565, 578 (2018). In applying rules of statutory construction, the Court "give[s] deference to an administrative agency's interpretation of the statutes it administers." *Headen v. Motor Vehicle Admin.*, 418 Md. 559 (2011). MDE's relevant interpretation of the regulatory process, and administrative appeal, appears in the final paragraph of the Certification; the "final decision on the Application" is not a final administrative decision for judicial review according to the APA.

Nor does MDE's 'final decision' on certification present a justiciable controversy. The rule of finality prevents the judiciary from determining issues that "perhaps would never arise if the prescribed administrative remedies were followed." *Soley*, *supra*, 277 Md. at 526. "A declaratory relief action that requests adjudication based on facts that have yet to occur or develop lacks ripeness and should be dismissed for failure to allege a justiciable controversy." *120 West Fayette Street, LLLP v. Mayor & City Council of Baltimore City*, 413 Md. 309, 356 (2010); See *Hickory Point P'ship v. Anne Arundel County*, 316 Md. 118, 130 (1989) ("Generally, an action for declaratory relief lacks ripeness if it involves a request that the court declare the rights of parties upon a state of facts which has not yet arisen, or upon a matter which is future, contingent and uncertain." (internal quotation marks and citations omitted)). "When a complaint fails to allege a justiciable controversy . . . a motion to dismiss is proper." *120 West Fayette Street,* 413 Md. at 356; see MD. CODE ANN., CTS. & JUD. PROC. § 3-409(a)(1) (authorizing declaratory judgments only when the complaint establishes that "[a]n actual controversy exists between contending parties"); *Boyds Civic Ass'n v. Montgomery County Council*, 309 Md. 683, 689 (1987) ("[U]nder the statute, the existence of a justiciable controversy is an absolute prerequisite to the maintenance of a declaratory judgment action." (internal quotation marks and citations omitted)). MDE has not determined Exelon's request for reconsideration. It is possible that the Department may modify its decision on the water quality certification on reconsideration.

Exelon argues that even if its other arguments fail, the Complaint is justiciable because exceptions to finality and exhaustion requirements apply. Exelon relies on *Holiday Spas v. Montgomery County*, urging that because MDE has used the Certification to "impose immediate and irreparable harm on Exelon, MDE's actions have the required 'finality'" for judicial review. Opposition, p. 25. In *Holiday Spas*, the Court concluded:

> The order did not merely determine liability but, in addition, required Holiday, among other things, to alter its practices almost at once. Holiday was ordered to post notices

> immediately, and to provide men and women with at least a substantially similar opportunity to engage in aerobic dance classes within ten days of the order. Because the negative effect on Holiday's business resulting from the cease and desist order could not be remedied at a later date, the order inflicted upon Holiday sufficient irreparable injury to be deemed final.

*Holiday Spas*, 315 Md. at 399. Exelon argues that MDE has "attached legal consequences" to its Certification by "issuing it as a 'final decision' and filing it as such at FERC for incorporation into the Project's federal license." Opposition, p. 26. Exelon refers to the steps it must take to comply with conditions imposed by the Certification, that Exelon must "immediately commence costly work and thus 'alter its practices almost at once'", as "irreparable injury" that cannot be remedied at a later date. *Id.* However, unlike *Holiday Spas*, the Certification does not impose immediate and irreparable harm on Exelon. Exelon concedes that "the Certification's conditions are not enforceable until FERC acts." Opposition, p. 30. In *Holiday Spas*, the order required immediate action that did inflict irreparable injury. Because FERC has yet to act, but has complied with Exelon's request to defer action on the license, the Certification's conditions, while onerous, are not yet enforceable. Exelon is not without a license, having received successive annual licenses since September 2012 when it began the licensing renewal process. At present, there is no prospect of the "immediate and irreparable harm" that might allow an exception to the exhaustion requirement.

Exelon also urges that "the collateral order doctrine confirms that this suit is justiciable," especially because MDE has conclusively, but unlawfully, determined and will treat the certification as a binding final decision. Opposition, p. 27.

> The collateral order doctrine treats as final and appealable interlocutory orders that (1) conclusively determine the disputed question; (2) resolve an important issue; (3) resolve an issue that is completely separate from the merits of the action; and (4) would be effectively unreviewable on appeal from a final judgment. The collateral order doctrine is a very narrow exception to the final judgment rule, and each of its four requirements is very strictly applied in Maryland.

*Nnoli v. Nnoli*, 389 Md. 315, 329 (2005) (citations and quotations omitted). Several difficulties with Exelon's arguments already have appeared. Further, FERC will not be bound by a decision of this Court as to whether or not the Certification is "final" or "effective." There is no important issue this Court can resolve absent the administrative record. The collateral order doctrine does not apply.

**<u>Conclusion</u>**

According to the Complaint and statutory instruction, Exelon applied to FERC for renewal of its federal operating license for the Project for up to 50 years. Exelon properly sought the Certification required from MDE to ensure that MDE's water quality standards are satisfied pursuant to the Clean Water Act. MDE is the State agency authorized, by statute, to implement water quality standards in Maryland. Thus, with the terms and conditions contained in its Certification, MDE has acted to ensure compliance with the Clean Water Act while regulating discharges of pollution and quality standards of state waters.

MDE followed the procedural process for certification pursuant to applicable regulations. MDE exercised proper authority to request information from Exelon, sought written comments, and elected to conduct a public hearing; MDE relied upon its findings to determine the requirements and conditions that Exelon must follow to secure the Certification and licensure by FERC. During the Certification process, MDE followed procedural process established by COMAR, including providing public notice with opportunity and instruction for written comments, and exercising its discretion as to whether Exelon's Certification application warranted public hearing, conducting a public hearing with adequate notice, and extending a second post-hearing comment period. With its Certification, MDE advised Exelon of reevaluation and modification procedures.

Exelon has properly challenged MDE's conditions on certification by filing a request for reconsideration with MDE. This request remains pending, as does the potential for Exelon's administrative appeal of the MDE certification. There is no final administrative decision ripe for judicial review. There is no FERC license yet issued by which MDE's conditions, or modified conditions of certification, may be enforceable.

Exelon prematurely filed its Complaint with this Court, while claiming rights to a nascent appeal process that will proceed according to APA contested case procedures. Judicial review may only follow Exelon's exhaustion of those procedures and a final administrative decision.

The MDE's Certification was not a "final decision" of Exelon's rights, duty, statutory entitlement or constitutional privilege properly determined only after a contested case agency hearing. See APA § 10-202(d)(1)(i). Nor did the Certification, on Exelon's application, serve to grant or deny a license required by statute or constitution to follow a contested case agency hearing. § 10-202(d)(1)(ii). The certification procedures, including a discretionary public hearing, were undertaken by MDE according to a regulation that did not require a contested case agency hearing prior to certification. That regulation allows for administrative appeal of the Certification by means of APA contested case procedures; the regulation cannot be read 'expressly or by clear implication' to require contested case proceedings prior to the certification. § 10-202(d)(2). Accordingly, MDE's Motion to Dismiss will be granted.

**ORDER**

Upon applying cited authorities, for reasons stated and otherwise appearing in the Complaint and its attachments, it is on this 9th day of October, 2018, hereby

**ORDERED** that Defendant Maryland Department of the Environment's Motion To Dismiss (Docket 7), opposed by Plaintiff Exelon Generation Company, LLC (Docket 7/2), is **GRANTED**, and

**ORDERED** that the Plaintiff's Complaint (Docket 1) is **DISMISSED,**

**ORDERED** that the Clerk shall close the case, with open costs to be paid by Plaintiff Exelon.

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Judge Pamela J. White
Circuit Court for Baltimore City

Cc:
Court File
Chambers File
All Counsel