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FERC Issues Notice of Proposed Rulemaking to Conform to EPA's Recent CWA 401 Rule

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At its May 23 open meeting, the Federal Energy Regulatory Commission (FERC) issued a Notice of Proposed Rulemaking (NOPR), proposing to establish a one-year "reasonable period of time" for certifying authorities to act on requests for water quality certification under Section 401 of the Clean Water Act (CWA). The proposed rule also clarifies that all FERC authorizations "that have the potential to discharge into waters of the United States," including exemptions from licensing, require either a Section 401 water quality certification or waiver thereof.

CWA Section 401

Section 401 of the CWA provides that a federal agency may not issue a federal license or other authorization for a project or activity that may result in a discharge into U.S. waters unless the appropriate certifying authority either grants certification under Section 401 or waives its authority to do so. Section 401 provides that if the certifying authority "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request," then the certification is waived.

2023 Final Rule

On September 14, 2023, the Environmental Protection Agency (EPA) issued a Final Rule that significantly revised its regulations implementing Section 401. While the most significant revisions of the 2023 Final Rule expanded the scope of certifying agencies' authority to impose conditions in water quality certifications (*see* Troutman Pepper's full summary of the Final Rule here), EPA also sought comments on several other provisions, including the appropriate "reasonable period of time" for certifying authorities to act on requests for water quality certifications. Prior to the 2023 Final Rule, the federal licensing or permitting agency would set the reasonable period of time for certifying authorities to act. The 2023 Rule, however, allows the federal agency and the certifying authority to agree on the length of the reasonable period of time, but if the parties do not reach agreement, then the default reasonable period of time is six months. It also provides that a federal agency may establish a one-year reasonable period of time (the statutory maximum) by regulation, and use that one year as the reasonable period of time when working with certifying authorities.

Reasonable Period of Time

FERC initially promulgated regulations in 1987 that provided for a one-year reasonable period of time for action by a certifying authority in hydropower licensing proceedings. While FERC also applied the one-year reasonable

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period of time rule in other hydropower proceedings, including exemptions from licensing, its regulations did not specify that applicants for exemptions from licensing must obtain a water quality certification or waiver thereof if the proposed exemption may result in a discharge to the waters of the U.S.

For the first time, FERC's NOPR proposes to codify the requirement that hydropower applicants for any type of FERC license or permit — including licenses, exemptions, amendments, and surrenders — must obtain a water quality certification or waiver thereof if the proposed action may result in a discharge into U.S. waters.

The proposed rule reasons that, because these types of authorizations are "federal licenses or permits," Section 401 of the CWA applies where the project may result in a discharge. In its NOPR, FERC explains that these proposed revisions will ensure that all proceedings before FERC that require a Section 401 water quality certification will use the same one-year "reasonable period of time" for certifying authorities to act (FERC previously established a one-year reasonable period of time for natural gas projects under its jurisdiction (*see Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, 174 FERC ¶ 61,196 (2021)).

Finally, FERC's NOPR proposes a change to Part 7 of its regulations, which governs FERC's expedited licensing process for certain types of closed-loop pumped storage projects and projects located at existing nonpowered dams. While FERC's regulations currently require that an application to FERC under Part 7 include either a copy of the request for water quality certification, the issued certification, or evidence of waiver from the certifying authority, EPA's 2023 Final Rule requires that any request for a water quality certification include a copy of the final application for federal license or permit. To avoid inconsistency with EPA's Final Rule, FERC now proposes that an applicant under Part 7 must file a copy of the certification request, certification, or the certifying authority's express waiver, within 60 days of its application with FERC.

FERC's proposed rule is available here, and comments are due by [30 days after FR publication].

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