

172 FERC ¶ 61,213
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 153, 157

[Docket No. RM20-18-000]

Waiver of the Water Quality Certification Requirements of
Section 401(a)(1) of the Clean Water Act

(September 9, 2020)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: Pursuant to the Environmental Protection Agency's Clean Water Act Section 401 Certification Rule and Executive Order 13868, the Federal Energy Regulatory Commission (Commission) is proposing rules to categorically establish a reasonable period of time for a certifying authority to act on a water quality certification request related to natural gas and liquified natural gas projects for which either an application filed pursuant to section 3 or section 7(c) of the Natural Gas Act (NGA) is pending with the Commission. The Commission is amending parts 153 and 157 of its regulations to define when the certification requirements of section 401(a)(1) of the Clean Water Act (CWA) have been waived as a result of the failure of the state or other authorized certifying agency to act on a request for CWA certification filed by an applicant for a Commission-issued section 7 certificate of public convenience and necessity or section 3 authorization under the NGA. The Commission is allowing CWA certifying authorities up to one year after the certifying authority's receipt of a request for

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section 401 water quality certification to grant or deny the applicant's request for certification.

DATES: Comments are due **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**

ADDRESSES: You may send comments, identified by RM20-18-000, by either of the following methods:

- Agency web site: Electronic Filing through <http://www.ferc.gov>.
Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- Mail: Those unable to file electronically may mail comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426. Hand-delivered comments should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Comment Procedures section of this document.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Waiver of the Water Quality Certification Requirements Docket No. RM20-18-000
of Section 401(a)(1) of the Clean Water Act

NOTICE OF PROPOSED RULEMAKING

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172 FERC ¶ 61,213
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Waiver of the Water Quality Certification Requirements Docket No. RM20-18-000
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NOTICE OF PROPOSED RULEMAKING

(September 9, 2020)

I. Background

1. On April 10, 2019, Executive Order 13868 entitled *Promoting Energy Infrastructure and Economic Growth* was issued with the stated goal of enabling timely construction of energy infrastructure and reducing regulatory uncertainties from the permitting process for infrastructure projects. The Executive Order directed the Environmental Protection Agency (EPA) to update its regulations governing water quality certification under section 401 of the Clean Water Act (CWA).¹ CWA section 401 is a direct grant of authority to states² to review for compliance with appropriate federal, state, and tribal water quality requirements any discharge into a water of the United States that may result from a proposed activity that requires a federal license or permit. Section 401(a)(1) of the CWA requires that an applicant for a federal license or permit to conduct activities that may result in a discharge into the navigable

¹ 33 U.S.C. 1341(a)(1).

² Indian tribes that have been approved for “treatment as a state” status may also have the authority under section 401 to issue water quality certifications.

waters of the United States, such as a Federal Energy Regulatory Commission (Commission) hydroelectric project license or a Natural Gas Act (NGA) certificate of public convenience and necessity for a natural gas pipeline that crosses a navigable water, must provide the federal permitting agency a water quality certification from the state in which the discharge originates or evidence of waiver thereof.³ If the state “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 certification is waived.⁴

2. In compliance with the Executive Order, on June 1, 2020, the EPA issued the Clean Water Act Section 401 Certification Rule (Certification Rule), which revises its regulations under 40 CFR part 121. The rule was published in the *Federal Register* on July 13, 2020, and becomes effective 60 days after publication on September 11, 2020. The Certification Rule applies prospectively to certification requests submitted after the effective date of the rule. The Executive Order mandates that “[w]ithin 90 days of [EPA’s issuance of revised regulations], if necessary, the heads of each 401 Implementing Agency⁵ shall initiate a rulemaking to ensure their respective agencies’

³ 33 U.S.C. 1341(a)(1).

⁴ *Id.*

⁵ “Implementing agency” is defined as a federal agency that issues permits or licenses subject to the certification requirements of section 401 of the CWA.

regulations are consistent with” the EPA’s Certification Rule and “with the policies set forth in section 2 of this order.”⁶

3. Section 121.6(a) of the Certification Rule requires federal permitting agencies⁷ to establish the reasonable period of time for the certifying authority⁸ to act on a water quality certification request, which period may not exceed one year from receipt. If the certifying authority fails or refuses to act on a certification request within the reasonable period of time, then the certification requirement for a license or permit is waived.⁹ The reasonable period of time may be set either categorically or on a case-by-case basis.¹⁰

4. The Commission’s practice has been to deem the one-year waiver period to commence when the certifying agency receives the request. In 1987, the Commission

⁶ E.O. 13868 of Apr 10, 2019, 84 FR 15495, 15496 (Apr. 15, 2019).

⁷ The Certification Rule defines “Federal Agency” as any federal government agency to which application is made for a license or permit that is subject to the requirements of CWA section 401. Clean Water Act Section 401 Certification Rule, 85 FR 42210, 42285 (July 13, 2020) (to be codified at 40 CFR pt. 121).

⁸ The Certification Rule defines “Certifying Authority” as the agency with the responsibility to certify compliance with applicable requirements for water quality under CWA section 401. *Id.* The Commission’s regulations refer to a “Certifying Authority” as a “Certifying Agency.”

⁹ *Id.* at 42286.

¹⁰ *See id.* at 42285. In setting the reasonable period of time the Certification Rule calls for the federal agency to consider the complexity of the proposed project, the nature of any potential discharge and the potential need for studies of the effects from the proposed discharge. *See id.* at 42286.

promulgated subsections 4.34(b)(5)(iii) and 5.23(b)(2)¹¹ of its regulations governing hydropower licensing proceedings to provide that a certifying agency is deemed to have waived certification if it has not denied or granted certification by one year after the date it received a written certification request.¹² Accordingly, subsections 4.34(b)(5)(iii) and 5.23(b)(2)¹³ of the Commission's regulations establish for hydroelectric projects a categorical "reasonable period of time" of one year.

5. While no comparable regulation exists for NGA infrastructure proceedings, the Commission's practice is to also categorically apply a one-year waiver period for water quality certification applications filed in connection to a proposed natural gas or liquefied natural gas infrastructure project application.¹⁴

¹¹ 18 CFR 4.34(b)(5)(iii) and 5.23(b)(2). Part 4 of the Commission's regulations governs applicants using the traditional licensing process and part 5 governs applicants using the integrated license application process.

¹² *Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, Order No. 464, 52 FR 5446 (Feb. 23, 1987), FERC Stats. & Regs. ¶ 30,730 (1987).

¹³ 18 CFR 4.34(b)(5)(iii) and 5.23(b)(2).

¹⁴ *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014, at P 16 (explaining that since 1987 the Commission has consistently determined, both by regulation and in our orders on proposed projects, that the reasonable period of time for action under section 401 is one year after the date the certifying agency receives a request for certification), *reh'g denied*, 164 FERC ¶ 61,029 (2018).

II. Proposed Revisions

6. We continue to believe that the benefits of setting a categorical waiver period of one year, as permitted by the CWA, best serves the public interest by avoiding uncertainty associated with open-ended and varying certification deadlines.¹⁵

Considering the historical complexity of proposed projects and the nature and potential need for studies of the discharge, the Commission proposes to continue to use the categorical one-year waiver period as the “reasonable period of time” within which the certifying authority must act and to codify this waiver period for natural gas and liquefied natural gas projects by adding the categorical one-year waiver period to its regulations governing applications for authorizations under sections 3 and 7 of the NGA for liquefied natural gas and natural gas facilities in parts 153 and 157. Given that it would be administratively inefficient and a potential source of controversy to establish reasonable time periods on a case-by-case basis; that state certifying agencies may vary in terms of their procedures for reviewing requests for water quality certification; and that natural gas projects before the Commission include highly complex proposals that may well take a

¹⁵ *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 at PP 16-17, 20 (determining that setting a one-year waiver period yields substantial benefits to the applicant, the certifying agency, and the Commission); *Constitution Pipeline Co., LLC*, 164 FERC ¶ 61,029 at P 10 (same). See Order No. 464, FERC Stats. & Regs. ¶ 30,730 (concluding that giving the certifying agencies the maximum period allowed by the CWA will not unduly delay Commission processing of license applications and would achieve a major objective of the rule—obtaining early certainty as to when certification would be deemed waived and avoiding open-ended certification deadlines).

state a significant time to review, we find that providing the maximum time permitted under the CWA, i.e., a categorical one-year waiver period, is reasonable.

III. Regulatory Requirements

A. Information Collection Statement

7. The Paperwork Reduction Act¹⁶ requires each federal agency to seek and obtain the Office of Management and Budget's (OMB) approval before undertaking a collection of information (i.e., reporting, recordkeeping, or public disclosure requirements) directed to ten or more persons or contained in a rule of general applicability. OMB regulations require approval of certain information collection requirements contained in proposed rules published in the *Federal Register*.¹⁷ This proposed rule does not contain any information collection requirements. The Commission is therefore not required to submit this rule to OMB for review.

B. Environmental Analysis

8. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant effect on the human environment.¹⁸ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment,

¹⁶ 44 U.S.C. 3501-3521.

¹⁷ See 5 CFR 1320.11.

¹⁸ *Regulations Implementing the National Environmental Policy Act of 1969*, Order No. 486, 41 FERC ¶ 61,284 (1987).

including the promulgation of rules that are clarifying, corrective, or procedural, or that do not substantially change the effect of legislation or the regulations being amended.¹⁹ This proposed rule proposes to categorically establish a reasonable period of time for a certifying agency to act on a water quality certification request for natural gas and liquified natural gas projects with an application pending with the Commission. Because this proposed rule is procedural in nature, preparation of an Environmental Assessment or an Environmental Impact Statement is not required.

C. Regulatory Flexibility Act

9. The Regulatory Flexibility Act of 1980 (RFA)²⁰ generally requires a description and analysis of proposed rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and minimize any significant economic impact on a substantial number of small entities.²¹ In lieu of preparing a regulatory flexibility analysis, an agency may certify that a proposed rule will not have a significant economic impact on a substantial number of small entities.²² The Small Business Administration's (SBA) Office of Size Standards develops the numerical

¹⁹ 18 CFR 380.4(a)(2)(ii).

²⁰ 5 U.S.C. 601-612.

²¹ *Id.* 603(c).

²² *Id.* 605(b).

definition of a small business.²³ The SBA has established a size standard for pipelines transporting natural gas, stating that a firm is small if its annual receipts (including its affiliates) are less than \$30 million.²⁴

10. If enacted, this proposed rule would apply to entities, a small number of which may be small businesses, with an application for a project pending with the Commission under section 3 or 7 of the NGA that require a water quality certification under section 401(a)(1) of the CWA. However, the proposed rule would have no effect on these entities, regardless of their status as a small entity or not, as the rule imposes no action or requirement on those entities. Accordingly, pursuant to section 605(b) of the RFA, the Commission certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

D. Comment Procedures

11. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. Comments must refer to Docket No. RM20-18-000, and must include the commenter's name, the organization they represent, if applicable, and their address.

²³ 13 CFR 121.101.

²⁴ 13 CFR 121.201, subsection 486.

12. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

13. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

14. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

E. Document Availability

15. In addition to publishing the full text of this document in the *Federal Register*, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19).

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16. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

17. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. Email the Public Reference Room at public.referenceroom@ferc.gov.

List of subjects

18 CFR Part 153

Exports, Natural gas, Reporting and recordkeeping requirements

18 CFR Part 157

Administrative practice and procedure, Natural gas, Reporting and recordkeeping requirements

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

In consideration of the foregoing, the Commission is amending Parts 153 and 157, Chapter I, Title 18, *Code of Federal Regulations*, as follows:

PART 153 – APPLICATIONS FOR AUTHORIZATION TO CONSTRUCT, OPERATE, OR MODIFY FACILITIES USED FOR THE EXPORT OR IMPORT OF NATURAL GAS

1. The authority citation for part 153 continues to read as follows:

Authority: 15 U.S.C. 717b, 717o; E.O. 10485; 3 CFR, 1949–1953 Comp., p. 970, as amended by E.O. 12038, 3 CFR, 1978 Comp., p. 136, DOE Delegation Order No. 0204–112, 49 FR 6684 (February 22, 1984).

2. Revise § 153.4 to read as follows:

§ 153.4 General requirements.

The procedures in §§ 157.5, 157.6, 157.8, 157.9, 157.10, 157.11, 157.12, 157.22, and 157.23 of this chapter are applicable to the applications described in this subpart.

PART 157 – APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND FOR ORDERS PERMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT

1. The authority citation for part 157 is revised to read as follows:

Authority: 15 U.S.C. 717-717w, 3301-3432; 33 U.S.C. 1341(a)(1); 42 U.S.C. 7101-7352.

2. Revise § 157.22 to read as follows:

§ 157.22 Schedule for final decisions on a request for a Federal authorization.

(a) For an application under section 3 or 7 of the Natural Gas Act that requires a Federal authorization—*i.e.*, a permit, special use authorization, certification, opinion, or other approval—from a Federal agency or officer, or State agency or officer acting pursuant to delegated Federal authority, a final decision on a request for a Federal authorization is due no later than 90 days after the Commission issues its final environmental document, unless a schedule is otherwise established by Federal law.

(b) For requests for a water quality certification submitted pursuant to section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act) in connection with a project for which authorization is sought from the Commission under section 3 or 7 of the Natural Gas Act, the reasonable period of time during which the certifying agency may act on the water quality certification request is one year from the certifying agency's receipt of the request. A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification.

Document Content(s)

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