189 FERC ¶ 61,130
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 4, 5, 6, 7
[Docket No. RM24-5-000]

Establishment of Categorical Reasonable Period of Time for Action on Requests for Water Quality Certification under Section 401(a)(1) of the Clean Water Act and Clarifying Types of Hydroelectric Project Proceedings that May Require Water Quality Certification

(Issued November 21, 2024)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: In this final rule, the Federal Energy Regulatory Commission (Commission) amends its regulations to clarify that for any proceedings before the Commission that require a water quality certification pursuant to section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), the reasonable period of time during which the certifying authority may act on the water quality certification request is one year from the certifying authority's receipt of the request. The final rule also clarifies that all Commission authorizations that have the potential to discharge into waters of the United States require a section 401 water quality certification or waiver, including, depending on the activity being proposed, authorizations associated with hydropower exemptions, amendments, and surrenders. Finally, the final rule provides updated terminology in the Commission's hydropower regulations, updates the timing of the filing requirements for the Commission's expedited hydropower licensing process, and in response to comments on the Commission's Notice of Proposed Rulemaking, removes inconsistent language from parts 5 and 7 of the Commission's regulations.

DATES: The rule will become effective **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**

FOR FURTHER INFORMATION CONTACT:

Amber Leasure-Earnhardt (Legal Information)
Office of the General Counsel
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426
(202) 502-6891
Amber.Leasure-Earnhardt@ferc.gov

Miranda Millerick (Legal Information)
Office of the General Counsel
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426
(202) 502-8781
Miranda.Millerick@ferc.gov

Michael Tust (Technical Information)
Office of Energy Projects
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426
(202) 502-6522

Jody Callihan (Technical Information)
Office of Energy Projects
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426
(202) 502-8278

Andrea Claros (Technical Information)
Office of Energy Projects
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426
(202) 502-8171

SUPPLEMENTARY INFORMATION:

189 FERC ¶ 61,130
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Chairman;
Mark C. Christie, David Rosner,
Lindsay S. See and Judy W. Chang

Establishment of Categorical Reasonable Period of Time for Action on Requests for Water Quality Certification under Section 401(a)(1) of the Clean Water Act and Clarifying Types of Hydroelectric Project Proceedings that May Require Water Quality Certification

Docket No. RM24-5-000

FINAL RULE

(Issued November 21, 2024)

TABLE OF CONTENTS

Paragraph Numbers

I. Background ..... - 2 -
II. Notice of Proposed Rulemaking ..... - 6 -
III. Discussion ..... - 8 -
A. Reasonable Period of Time ..... - 8 -
B. Hydropower Exemptions ..... - 10 -
C. Terminology ..... - 10 -
D. Timing of Section 401 Filing Requirements Under Parts 4 and 5 ..... - 11 -
E. Timing of Section 401 Filing Requirements Under Part 7 ..... - 13 -
F. Additional Comments Under Parts 6 and 7 ..... - 15 -
IV. Regulatory Requirements ..... - 19 -
A. Information Collection Statement ..... - 19 -
B. Environmental Analysis ..... - 20 -
C. Regulatory Flexibility Act ..... - 21 -
D. Document Availability ..... - 23 -
E. Effective Date and Congressional Notification ..... - 23 -

I. Background

A. Clean Water Act Section 401

1. Section 401 of the Clean Water Act (CWA) is a direct grant of authority to states and authorized Tribes[1] (i.e., certifying authorities) to review for compliance with appropriate federal, state, and Tribal water quality requirements any discharge into waters of the United States that may result from a proposed activity that requires a federal license or permit.[2] Section 401(a)(1) of the CWA prohibits a federal agency from issuing a federal license, permit, or other authorization for a project or activity that may result in a discharge into waters of the United States, such as a Federal Energy Regulatory Commission (Commission) order issuing a license for a hydroelectric project or order authorizing an amendment or surrender of a license, unless the appropriate certifying authority either grants certification or waives its certification authority.[3] Under the Clean Water Act, 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 certification is waived.[4]

2. The January 2021 Executive Order 13990 entitled *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, among other things

[1] "Authorized Tribes" refers to Indian Tribes that have been approved for "treatment as a state" status under the CWA. Authorized Tribes may also have the authority under section 401 to issue water quality certifications.

[2] 33 U.S.C. 1341(a)(1).

[3] *Id.*

[4] *Id.*

directed the Environmental Protection Agency (EPA) to review the water quality certification rule EPA promulgated in 2020 under section 401 of the CWA.[5] In compliance with the Executive Order, on September 14, 2023, the EPA issued a final Clean Water Act Section 401 Water Quality Certification Improvement Rule (Certification Improvement Rule),[6] which revised its regulations under 40 CFR part 121.[7] The Certification Improvement Rule applies to all actions after the effective date of the rule.

B. Reasonable Period of Time

3. Regarding the statutory reasonable period of time in which a certifying authority must act on a request for certification, section 121.6(b) of EPA's Certification Improvement Rule contemplates that the federal agency and certifying authority will establish a reasonable period of time on a case-by-case basis. If the federal agency and certifying authority do not agree, the rule sets a six-month default reasonable period of time.[8] The rule, however, also provides that if a federal agency establishes a one-year reasonable period of time by regulation, the maximum time allowed under the CWA, the

[5] Exec. Order No. 13990, 86 FR 7037 (Jan. 25, 2021). EPA issued the Clean Water Act Section 401 Certification Rule on June 1, 2020. 85 FR 42210 (July 13, 2020).

[6] 88 FR 66558 (Sept. 27, 2023).

[7] The rule was published in the *Federal Register* on September 27, 2023, and became effective 60 days after publication on November 27, 2023.

[8] 88 FR 66663.

federal agency may use that one year as the reasonable period of time without negotiating with certifying authorities.[9]

4. With respect to licensing proceedings, the Commission promulgated regulations providing for a categorical one-year reasonable period of time for action by a certifying authority, as reflected in subsection 4.34(b)(5)(iii) of its regulations in 1987,[10] subsection 5.23(b)(2) of its regulations in 2003,[11] and subsection 7.2(b)(3)(ii) of its regulations in 2019.[12] Although it is the Commission's practice to apply a one-year reasonable period of time for water quality certification applications in all hydropower proceedings where they are required,[13] the current regulations are silent as to certain

[9] *Id.* at 66588.

[10] *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) (cross-referenced at 38 FERC ¶ 61,146); 18 CFR 4.34(b)(5)(iii). Part 4 of the Commission's regulations governs applicants using the traditional licensing process and the alternative licensing process.

[11] *Hydroelectric Licensing under the Fed. Power Act*, Order No. 2002, 68 FR 51070 (Aug. 25, 2003), Order No. 2002-A, 69 FR 5268 (Feb. 4, 2004), 104 FERC ¶ 61,109 (2003), *order on reh'g*, 106 FERC ¶ 61,037 (2004); 18 CFR 5.23(b)(2). Part 5 governs applicants using the integrated licensing process.

[12] *Hydroelectric Licensing Reguls. under the Am.'s Water Infrastructure Act of 2018*, Order No. 858, 84 FR 17064 (Apr. 24, 2019), 167 FERC ¶ 61,050 (2019); 18 CFR 7.2(b)(3)(ii). Part 7 governs applicants using the expedited licensing process for qualifying non-federal hydropower projects at existing nonpowered dams and for closed-loop pumped storage projects.

[13] In 2021, the Commission also promulgated subsections 153.4 and 157.22(b) of its regulations governing liquified natural gas (LNG) facilities and natural gas pipelines, respectively, to establish a categorical "reasonable period of time" of one year for a certifying authority to act on a certification request. 18 CFR 153.4, 157.22(b); *Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, 174 FERC ¶ 61,196 (2021).

Federal Power Act (FPA) proceedings, including those regarding hydropower exemptions (a subcategory of licensing proceedings), amendments to hydropower licenses, or surrenders of hydropower licenses, some of which may trigger section 401 of the CWA.

C. Hydropower Exemptions

5. Currently, the Commission's regulations do not specify that hydropower exemption applicants must obtain a water quality certification or waiver if the proposed project may result in a discharge into waters of the United States. The Commission stated in its preamble to the 1980 rule establishing the small hydropower exemption that there is no applicable section 401 requirement where there is no license.[14] This unsupported statement implied, incorrectly, that an exemption is not a federal license or permit subject to section 401 of the CWA.[15] Subsequently, in 1987, the Commission explained in its response to comments for its final rule promulgating the Commission's part 4 regulations for waiver of water quality certification requirements that, although the Commission had not required applicants for exemptions to obtain water quality

[14] *Exemption from All of Part of Part 1 of the Fed. Power Act of Small Hydroelectric Power Projects with an Installed Capacity of 5 Megawatts of Less*, Order No. 106, 45 FR 76115 (Nov. 18, 1980), FERC Stats. & Regs. ¶ 30,204, at 31,368 (1980) (cross-referenced at 13 FERC ¶ 61,116). The Commission's hydropower exemption regulations were revised in 2014 to increase the maximum installed capacity for eligible small hydroelectric power projects from 5 MW to 10 MW. *Revisions & Tech. Corrections to Conform the Commission's Reguls. to the Hydropower Regul. Efficiency Act of 2013*, Order No. 800, 79 FR 59105 (Oct. 1, 2014), 148 FERC ¶ 61,197 (2014); *see also* 18 CFR 4.101-4.108. The Commission also issues exemptions for qualifying conduit hydroelectric projects, pursuant to section 30 of the FPA, as amended. *See* 18 CFR 4.90-4.96.

[15] The Commission's prior statement in a preamble does not supersede the statutory mandate under Section 401(a) of the CWA.

certification, it would consider changing its practice in a later rulemaking.[16] As matter of practice, the Commission incorporates water quality certification conditions into final exemption orders when a certification is issued by the relevant certifying authority.[17]

II. Notice of Proposed Rulemaking

6. On May 23, 2024, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing to amend its regulations to: (1) clarify that, for all proceedings before the Commission that require a water quality certification under section 401(a)(1) of the CWA, the reasonable period of time during which the certifying authority may act on the water quality certification request is one year from the certifying authority's receipt of the request; (2) clarify that any Commission authorizations that have the potential to discharge into waters of the United States require a section 401 water quality certification or waiver, including, depending on the activity being proposed, authorizations associated with hydropower exemptions, amendments, and surrenders; (3) update terminology in the Commission's hydropower regulations; and (4) update the timing of the filing requirements for the Commission's expedited hydropower licensing process.[18]

[16] Order No. 464, FERC Stats. & Regs. ¶ 30,730 at 30,546.

[17] *See, e.g.*, *City of Nashua, N.H.*, 182 FERC ¶ 62,009, at PP 12-14 (2023) (stating "[u]nder Section 401(a) of the [CWA], the Commission may not authorize construction or operation of a hydroelectric project that may result in a discharge into the navigable waters of the United States unless the state water quality certifying agency either has issued water quality certification for the project or has waived certification"); *New England Hydropower Co., LLC*, 155 FERC ¶ 62,132, at P 13 (2016) (making the water quality certification conditions mandatory conditions of the exemption); *Charlie Hotchkin & Claire Fay*, 132 FERC ¶ 62,037, at P 7 (2010) (same).

[18] *Establishment of Categorical Reasonable Period of Time for Action on Requests for Water Quality Certification under Section 401(a)(1) of the Clean Water Act & Clarifying Types of Hydroelectric Project Procs. that May Require Water Quality*

7. The NOPR established a 30-day comment period after the date of publication in the Federal Register. The NOPR was published in the Federal Register on June 6, 2024,[19] setting July 8, 2024, as the deadline for filing comments.[20] On June 25, 2024, the Hydropower Reform Coalition (Hydro Coalition)[21] filed a motion to extend the deadline for filing comments on the NOPR, which the Commission granted on June 28, 2024, with the revised deadline of August 7, 2024.

8. In response to the NOPR, the Commission received comments, from five entities, Oregon Department of Environmental Quality (DEQ), Maryland Department of the Environment, Idaho Department of Environmental Quality (DEQ), National Hydropower Association, Inc. (NHA),[22] and Hydro Coalition. The proposal set forth in the NOPR, the

Certification, 89 FR 48,351 (June 6, 2024), 187 FERC ¶ 61,094 (2024) (NOPR).

[19] 89 FR 48351.

[20] The Commission's Rules of Practice and Procedure provide that if a filing deadline falls on a Saturday, Sunday, holiday, or other day when the Commission is closed for business, the filing deadline does not end until the close of business on the next business day. 18 CFR 385.2007(a)(2). Because the 30-day filing deadline fell on a Saturday (i.e., July 6, 2024), the filing deadline was extended until the close of business on Monday, July 8, 2024.

[21] Hydro Coalition is an association of over 160 national, regional, and local membership groups, including Alabama Rivers Alliance, American Rivers, American Whitewater, Appalachian Mountain Club, California Outdoors, California Sportfishing Protection Alliance, California Trout, Foothill Conservancy, Friends of the River, Idaho Rivers United, Michigan Hydro Relicensing Coalition, South Yuba River Citizens League, and Trout Unlimited.

[22] NHA is a non-profit national association, and its membership consists of more than 320 organizations, including public and investor-owned utilities, independent power producers, equipment manufacturers, and professional organizations that provide legal, environmental, and engineering services to the water power industry.

comments received in response to the NOPR, and the Commission's determinations are discussed below.

III. Discussion

A. Reasonable Period of Time

9. The NOPR explained that the Commission continues to believe that the benefits of setting a categorical one-year reasonable period of time for a certifying authority to act on a request for certification best serves the public interest by providing certainty and consistency for all Commission hydropower proceedings in which a section 401 certification is required.[23] We noted that the proposed rule is consistent with EPA's proviso that federal agencies may establish a categorical one-year reasonable period of time in their regulations, which would promote administrative efficiency given there would be no need to negotiate with the certifying authority in every case where a section 401 water quality certification is required.[24]

10. Therefore, the NOPR clarified that for all proceedings before the Commission that require water quality certification, the reasonable period of time for a certifying authority to act on the certification request is one year from the certifying authority's receipt of the request.[25] Specifically, the Commission proposed to revise its regulations in parts 4, 5, 6, and 7 to cover any proceedings before the Commission that may require a section 401

[23] NOPR, 187 FERC ¶ 61,094 at P 7 (citing *Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, 174 FERC ¶ 61,196; Order No. 464, FERC Stats. & Regs. ¶ 30,730).

[24] *Id.*

[25] *Id.*

water quality certification, so that all certification requests related to a Commission proceeding would be governed by the same reasonable period of time and be consistent with the regulations currently governing applications for hydropower licenses.[26]

11. In response to the Commission's request for comments on the NOPR, all commenters supported setting a categorical one-year reasonable period of time. Commenters stated that the one-year reasonable period of time would save time and resources;[27] promote administrative efficiency;[28] serve the public interest by providing certainty, clarity, and consistency;[29] and better serve the purposes of the CWA and the FPA for hydropower projects compared to EPA's six-month default reasonable period of time.[30]

B. Hydropower Exemptions

12. The NOPR explicitly incorporated applications for an exemption from licensing under the water quality certification requirements in part 4 of the Commission's regulations to remove any uncertainty as to whether an applicant for an exemption should apply for water quality certification if the proposed project may result in a discharge into

[26] *Id.* P 8.

[27] Maryland Department of the Environment Comments at 1 (emphasizing that the one-year timeframe is reasonable if the application submitted is complete or nearly complete, which is crucial for the certifying authority).

[28] Idaho DEQ Comments at 1.

[29] Oregon DEQ Comments at 1; NHA Comments at 2.

[30] Hydro Coalition Comments at 4.

waters of the United States.[31] The proposed rule further clarified that because exemptions are federal permits, section 401 of the CWA applies to such projects.[32] Several commenters support the Commission's clarification that section 401 applies to exemptions, as it eliminates uncertainty in the exemption process.[33] No commenters oppose this clarification.

C. Terminology

13. The NOPR proposed to update the term "certifying agency" previously used in the Commission's regulations in parts 4, 5, and 7 to "certifying authority," which is the defined term EPA uses in its regulations to describe the entity responsible for certifying compliance with applicable water quality requirements under section 401 of the CWA.[34] The proposed rule also incorporated the term "express" waiver into the Commission's regulations in parts 4, 5, and 7, to reflect the four ways that a certifying authority may act on a request for certification, pursuant to 40 CFR 121.7.[35] In the NOPR, the Commission

[31] NOPR, 187 FERC ¶ 61,094 at P 9.

[32] *Id.*

[33] *See* Oregon DEQ Comments at 1; Idaho DEQ Comments at 1; Hydro Coalition Comments at 5.

[34] NOPR, 187 FERC ¶ 61,094 at P 10 (citing 88 FR 66662; 40 CFR 121.1(b)). The NOPR also explained that there are other parts of the Commission's regulations that use the term "certifying agency" in the context of section 401 that the NOPR was not proposing to update but clarified that these two terms would be used interchangeably throughout the Commission's regulations. *Id.* at note 20.

[35] NOPR, 187 FERC ¶ 61,094 at P 10 (citing section 121.7 of the EPA's regulations, which stipulates that a certifying authority may act on a request for certification in one of four ways: grant certification, grant certification with conditions, deny certification, or expressly waive certification).

explained that these proposed changes would align the Commission's regulatory terminology with the EPA's regulatory terminology for clarity and consistency. Idaho DEQ supports the Commission's updates to terminology for clarity and consistency.[36] No commenters oppose these proposed changes.

D. Timing of Section 401 Filing Requirements Under Parts 4 and 5

14. Idaho DEQ filed comments requesting that the Commission consider changing the timing of the filing requirements under 18 CFR 4.34(b)(5)(i) and 5.23(b), as it, as a certifying authority, relies on the Commission's National Environmental Policy Act (NEPA) analysis for its water quality certification analysis.[37] Idaho DEQ notes that there are some applicants who file their water quality certification application well in advance of the Commission issuing its notice of ready for environmental analysis, a practice that Idaho DEQ wants to discourage because it needs the Commission's NEPA analysis to complete its water quality certification review. Idaho DEQ thus requests that the Commission reaffirm that our existing regulatory requirements are met if the applicant submits to the Commission a copy of the *request for certification* within 60 days from the notice of ready for environmental analysis.[38]

15. Hydro Coalition also requests that the Commission consider changing the overall timing requirement for when applicants must file a water quality certification application under parts 4 and 5 of the Commission's regulations, as the current requirement to file a

[36] *See* Idaho DEQ Comments at 1.

[37] *Id.* at 2.

[38] *Id.*

water quality certification application within 60 days from the Commission's notice of ready for environmental analysis does not allow certifying authorities or stakeholders to use the Commission's NEPA analysis, which it asserts can cause duplication of efforts, delays, and increases certification denials without prejudice.[39] Thus, Hydro Coalition recommends that the Commission revise its regulation to allow applicants to file their water quality certification application at least 60 days after the draft NEPA document is issued.[40]

16. The Commission declines to change its filing requirements under sections 4.34(b)(5)(i) and 5.23(b) of its regulations. We note that the EPA's regulations setting out the minimum content requirements for a request for certification do not include the draft or final NEPA document.[41] Further, we believe that our current regulations provide the flexibility needed for applicants to be able to comply with the Commission's regulations and any filing requirements a particular certifying authority may require.[42] We also note that EPA's updated section 401 regulations require applicants to request a pre-filing meeting with the certifying authority at least 30 days prior to submitting a request for certification, so before an applicant can submit its water quality certification application,

[39] Hydro Coalition Comments at 4-5, 8-9.

[40] *Id.* Hydro Coalition also recommends that the Commission change its licensing process to issue draft licenses for greater efficiency and transparency in the process. *Id.* at 7-8. This request is outside the scope of this rulemaking.

[41] *See* 40 CFR 121.5(a) and (d). The Commission recognizes that each certifying authority may identify additional contents that are required for a compliant water quality certification application, which could include the Commission's NEPA document. 40 CFR 121.5(c).

[42] *See* 18 CFR 4.34(b)(5)(i)(B) & 5.23(b)(1)(ii).

it should know what information is needed from the certifying authority for a compliant application.[43] Therefore, if there is a conflict between the certifying authority's and the Commission's water quality certification filing requirements, the applicant may bring the filing issue to the Commission's attention.[44]

E. Timing of Section 401 Filing Requirements Under Part 7

17. The NOPR also proposed changes to the timing of the filing requirements under part 7 of the Commission's regulations, which governs the expedited licensing process available for a subset of hydropower projects.[45] Currently section 7.2(b)(3) of the Commission's regulations requires that an application under part 7 must include either a copy of the request for a water quality certification, the issued certification, or evidence of waiver of the certification.[46] This requirement conflicts with the EPA's Certification Improvement Rule, which requires any request for a water quality certification to include a copy of the final application for the federal license or permit.[47] To avoid this conflict, the Commission proposed that an applicant under part 7 must file within 60 days of

[43] *See* 40 CFR 121.4.

[44] Further, while we recognize that it might be useful for state agencies to have the Commission's NEPA document in hand when developing a water quality certification, it would be equally useful for the Commission to have the certification in hand when developing its NEPA document and, further, the Commission needs the certification to prepare and issue a license order.

[45] The expedited licensing process is available under Part 7 for applications for original licenses for qualifying non-federal hydropower projects at existing nonpowered dams and for certain closed-loop pumped storage projects. 18 CFR 7.1(a).

[46] 18 CFR 7.2(3); *see also* NOPR, 187 FERC ¶ 61,094 at P 11.

[47] NOPR, 187 FERC ¶ 61,094 at P 11 (citing 40 CFR 121.5(a)(1)(i)).

submitting its license application to the Commission a copy of the certification request, certification, or the certifying authority's express waiver.

18. Idaho DEQ filed comments in support of the Commission's proposed changes to the timing of the filing requirements under part 7.[48] On the other hand, Hydro Coalition states that applying for a water quality certification within 60 days after the application is filed is far too early in the process and should be required only after the Commission has issued a draft license or draft NEPA analysis.[49]

19. Regarding Hydro Coalition's comments on the proposed changes to the timing of the filing requirement under part 7, we continue to believe that requiring applicants to file certification requests (or issued certifications or evidence of waiver) within 60 days of filing applications is reasonable and will assist the Commission in efficiently processing applications using the expedited process.[50]

F. Additional Comments Under Parts 5, 6, and 7

20. Several commenters filed comments requesting that the Commission expand the rulemaking to change the existing requirements in parts 5, 6, and 7 regarding when a new section 401 certification request is required for: (1) amendments to existing licenses under part 5; (2) amendments to license applications under part 5; (3) license surrenders under part 6; and (4) amendments to expedited license applications under part 7.

---

[48] Idaho DEQ Comments at 2.

[49] Hydro Coalition Comments at 11.

[50] 18 CFR 7.1 (detailing the expedited licensing process for original licenses for qualifying non-federal hydropower projects at existing nonpowered dams and for closed-loop pumped storage projects under FPA sections 34 and 35).

21. Oregon DEQ does not support the proposed changes in part 7, asserting that the current language in section 7.7 allows the Commission to determine whether an amendment to an expedited license application would result in a "material adverse impact on the water quality in the discharge from the proposed project" that would warrant a new or modified water quality certification.[51] It states that this existing section is inconsistent with the CWA, case law, and the Commission's repeal of a similar provision previously included in part 4 of its regulations.[52] Oregon DEQ asserts that whether an amendment to a license application triggers a new water quality certification request is a determination for the certifying authority and not the federal agency.[53] If the proposed activity changes, Oregon DEQ states that a new request for certification must be made to the certifying authority to ensure compliance with all applicable water-quality-related laws, which would trigger a new one-year reasonable period of time.[54]

22. Hydro Coalition also asserts that the Commission's proposed rule falls short in several areas, including that the Commission's regulations only require section 401

[51] Oregon DEQ Comments at 2.

[52] *Id.* (citing *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 383 (2006) ("State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution."); 18 CFR 4.38(f)(7)(iii) (1995); and *State of N.C. v. FERC*, 112 F.3d 1175, 1186 (D.C. Cir. 1997) ("We note that on remand the Commission discarded 18 [CFR] 4.38(f)(7)(iii) as an alternative basis for upholding the decision not to require that a water quality certification be obtained from North Carolina. As a result, we need not address the legality of that regulation despite our serious reservations concerning FERC's attempt to redefine the statutory phrase 'any discharge,' 33 U.S.C. [] 1341(a)(1), to mean only those discharges that are 'material,' 18 CFR [] 4.38(f)(7)(iii).").

[53] Oregon DEQ Comments at 2.

[54] *Id.* at 3.

certification for amendments that "have a material adverse impact on water quality," and recommends that the Commission clarify in section 5.23 that section 401 applies to all amendments under 18 CFR 4.200.[55] Hydro Coalition further states that the Commission's regulations lack a meaningful surrender process and recommends that the Commission clarify that section 401 applies to all surrenders where the decommissioning proposal includes continuing or releasing a new discharge into navigable waters.[56]

23. We clarify here that part 7 of the Commission's regulations does not apply to license applications under parts 4 and 5 of the Commission's regulations, nor to exemptions, amendments to existing licenses, or surrender applications. We also note that the Commission did not propose any substantive changes in the NOPR to the language in section 7.7, beyond the updated terminology and reference to section 7.2(c).

24. Nevertheless, we agree with Oregon DEQ[57] and Hydro Coalition that section 7.7(a)(1) in the Commission's regulations, which includes the phrase "material adverse impact," should be removed for consistency and clarity to align with current Commission practice. The Commission removed that phrase from part 4 of its regulations in its 2012 rulemaking based on Commission practice and court precedent.[58]

[55] Hydro Coalition Comments at 9 & 12.

[56] *Id.* at 5-6 & 10-11.

[57] Oregon DEQ cites to 18 CFR 4.38(f)(7)(iii) (1995), which language was later moved to 18 CFR 4.34(b)(5)(iv) (2003). *See Hydroelectric Licensing Under the Fed. Power Act*, Order No. 2002, 68 FR 51070 (Aug. 25, 2003), Order No. 2002-A, 69 FR 5268 (Feb. 4, 2004), 104 FERC ¶ 61,109 (2003), *order on reh'g*, 106 FERC ¶ 61,037 (2004).

[58] The Commission removed section 4.34(b)(5)(iv) of its regulations, which was substantively similar to sections 5.23(b)(3) and 7.7(a)(1). Section 4.34(b)(5)(iv) required

25. Similarly, we are removing section 5.23(b)(3) for consistency and clarity within our regulations, as that section is identical to section 7.7(a)(1). Although section 5.23(b)(3) was not included in the NOPR, the NOPR included terminology changes within section 5.23(b); thus, the Commission believes that the revisions to 5.23(b)(3) are a logical outgrowth of the edits in 7.7 in response to stakeholder comments.[59]

26. With respect to Hydro Coalition's request that the Commission clarify in part 6 of its regulations that all surrender applications where there is a continuing or new discharge and all license amendment applications filed under 18 CFR 4.200 require an applicant to apply for a section 401 certification,[60] this rulemaking is limited to updates in the Commission's hydropower regulations pertaining to the one-year reasonable period of time for a certifying authority to act on a request for certification, updates to terminology

---

new requests for water quality certification if an application to amend an existing license or an application to amend a pending application for a license would have a material adverse impact on the water quality in the discharge from the project. *Technical Corrections to Commission Regulations*, Order No. 756, 77 FR 4891 (Feb. 1, 2012), 138 FERC ¶ 61,032, at n.2 (2012) (citing *Ala. Rivers Alliance v. FERC*, 325 F.3d 290 (D.C. Cir. 2003)).

[59] *See, e.g., CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079–80 (D.C. Cir. 2009) ("To satisfy the APA's notice requirement, the [Notice of Proposed Rulemaking] and the final rule need not be identical: '[a]n agency's final rule need only be a 'logical outgrowth' of its notice.'") (quoting *Covad Commc'ns Co. v. FCC,* 450 F.3d 528, 548 (D.C. Cir. 2006)); *Fertilizer Inst. v. U.S. E.P.A.*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) ("This court has long recognized that an agency must be able to respond flexibly to comments and need not provide a new round of notice and comment every time it modifies a proposed rule. . . .[A] final rule will be deemed to be the logical outgrowth of a proposed rule if a new round of notice and comment would not provide commenters with 'their first occasion to offer new and different criticisms which the agency might find convincing.'") (quoting *United Steelworkers of Am. v. Marshall,* 647 F.2d 1189, 1225 (D.C. Cir. 1980)) (internal quotations omitted)).

[60] Hydro Coalition Comments at 9-11.

and general edits, and timing of section 401 filing requirements. Accordingly, the question of whether a water quality certification is required in particular cases or classes of cases is beyond the scope of this final rule. We note, as discussed above, that a new water quality certification or waiver would be required for any application to surrender or amend a license or license application if the proposal might result in a discharge into waters of the United States. This necessarily is determined on a case-by-case basis.

IV. Regulatory Requirements

A. Information Collection Statement

27. The Paperwork Reduction Act[61] 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 final rules published in the *Federal Register*.[62] This final rule does not impose new information collection requirements on ten or more persons. The final rule does not impose any new information collection requirements on license, amendment, and surrender applicants, nor certifying authorities.

28. The rule clarifies the filing requirements for exemption applicants who need a water quality certification. The final rule clarifies that if a proposed exemption project has the potential to discharge into waters of the United States, the applicant is required to

[61] 44 U.S.C. 3501-3521.

[62] *See* 5 CFR 1320.12.

file either a copy of the water quality certification or the certifying authority's express waiver, a copy of the request for certification, or notification that the certifying authority failed to act. Exemption applicants do not need to create a new document or fill out a form, rather they are just submitting to the Commission a copy of the certifying authority's response or informing the Commission that the certifying authority has failed to act within one year. Over the last ten years, the Commission received an average of less than two exemption applications per year. The directives to submit exemptions for certification or evidence of waiver of water quality certification are covered by and already included in, the existing OMB-approved information collection FERC-505 (Small Hydropower Projects and Conduit Facilities including License/Relicense, Exemption, and Qualifying Conduit Facility Determination; OMB Control No. 1902-0115).

B. Environmental Analysis

29. 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.[63] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment, 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.[64]

[63] *Reguls. Implementing the Nat'l Env't Pol'y Act of 1969*, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. 30,782 (1987) (cross-referenced at 41 FERC ¶ 61,284).

[64] 18 CFR 380.4(a)(2)(ii).

This final rule categorically establishes a reasonable period of time for a certifying authority to act on a water quality certification request for a license, exemption, amendment, or surrender application of a hydroelectric project pending with the Commission. The final rule also updates the term "certifying agency" to "certifying authority," incorporates the term "express" waiver to reflect the four ways a certifying authority may act on a request for certification, and revises the requirements under part 7 to permit compliance with both EPA's and the Commission's regulations. Because this final rule is procedural in nature, preparation of an Environmental Assessment or an Environmental Impact Statement is not required.

C. Regulatory Flexibility Act

30. The Regulatory Flexibility Act of 1980 (RFA)[65] generally requires a description and analysis of final 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 final rule and minimize any significant economic impact on a substantial number of small entities.[66] In lieu of preparing a regulatory flexibility analysis, an agency may certify that a final rule will not have a significant economic impact on a substantial number of small entities.[67] The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a

[65] 5 U.S.C. 601-612.

[66] *Id*. 603(c).

[67] *Id*. 605(b).

small business.[68] The SBA size standard for hydroelectric power generation is based on the number of employees, including affiliates.[69] Under SBA's size standards, a hydroelectric power generator is small if, including its affiliates, it employs 750 or fewer people.[70]

31. This final rule applies to a number of entities, some of which may be small businesses, with an application for a license, exemption, amendment, or surrender of a hydroelectric project pending with the Commission that requires a water quality certification under section 401(a)(1) of the CWA. However, the final rule will not have a significant economic impact on these entities, regardless of their status as a small entity or not, as the final rule (1) updates terminology and the timing of filing requirements to be consistent with EPA regulations; (2) clarifies what and when an exemption applicant must file if the proposed project triggers section 401 of the CWA; (3) removes inconsistent language from parts 5 and 7 of the Commission's regulation; and (4) establishes a categorical one year period of time for a certifying authority to act on a request for a water quality certification for hydroelectric proceedings in which the proposed activity may result in a discharge into waters of the United States triggering section 401(a)(1) of the CWA.

[68] 13 CFR 121.101.

[69] *Id.* 121.201, subsection 221.

[70] *Id.*

32. Accordingly, pursuant to section 605(b) of the RFA, the Commission certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

D. Document Availability

33. 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).

34. 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.

35. 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.

E. Effective Date and Congressional Notification

36. Thes regulations are effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory

Affairs of OMB, that this rule is not a major rule as defined in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.[71] This rule is being submitted to the Senate, House, Government Accountability Office, and Small Business Administration.

List of Subjects

18 CFR Part 4

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements

18 CFR Part 5

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements

18 CFR Part 6

Electric power, Reporting and recordkeeping requirements

[71] 5 U.S.C. 804(2).

18 CFR Part 7

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements

By direction of the Commission.

(S E A L)

Debbie-Anne A. Reese,
Secretary.

In consideration of the foregoing, the Commission is amending Parts 4, 5, 6, and 7 Chapter I, Title 18, *Code of Federal Regulations*, as follows:

PART 4—LICENSES, PERMITS, EXEMPTIONS, AND DETERMINATION OF PROJECT COSTS

1. The authority citation for part 4 continues to read as follows:

Authority: 16 U.S.C. 791a-825; 42 U.S.C. 7101-7352

2. Revise § 4.34(b)(5) to read as follows:

§ 4.34 Hearing on application; consultation on terms and conditions; motions to intervene; alternative procedures.

* * * * *

(b) * * *

(5) * * *

(i) With regard to certification requirements under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act) for an application for a license or exemption from licensing, an applicant shall file within 60 days from the date of issuance of the notice of ready for environmental analysis:

(A) A copy of the water quality certification or the certifying authority's express waiver;

(B) A copy of the request for certification, including proof of the date on which the certifying authority received the request; or

(C) Evidence of waiver of water quality certification as described in paragraph (b)(5)(iii) of this section.

(ii) * * *

(iii) A certifying authority is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying authority has not denied, expressly waived, or granted certification by one year after the date the certifying authority received a written request for certification. If a certifying authority denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.

* * * * *

3. Add § 4.201(e) to read as follows:

§ 4.201 Contents of application.

* * * * *

(e) For any amendment that requires certification under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), a certifying authority is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying authority has not denied, expressly waived, or granted certification by one year after the date the certifying authority received a written request for certification.

PART 5—INTEGRATED LICENSE APPLICATION PROCESS

1. The authority citation for part 5 continues to read as follows:

Authority: 16 U.S.C. 792-828c, 2601-2645; 42 U.S.C. 7101-7352

2. Revise § 5.23(b) to read as follows:

* * * * *

(b) * * *

(1) With regard to certification requirements under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), the license applicant shall file within 60 days from the date of issuance of the notice of ready for environmental analysis:

(i) A copy of the water quality certification or the certifying authority's express waiver;

(ii) A copy of the request for certification, including proof of the date on which the certifying authority received the request; or

(iii) Evidence of waiver of water quality certification as described in paragraph (b)(2) of this section.

(2) A certifying authority is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying authority has not denied, expressly waived, or granted certification by one year after the date the certifying authority received a written request for certification. If a certifying

authority denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.

PART 6—SURRENDER OR TERMINATION OF LICENSE

1. The authority citation for part 6 continues to read as follows:

Authority: 16 U.S.C. 799, 803(i), 806, 825h; 44 U.S.C. 3501 et seq.

2. Revise § 6.1 to read as follows:

§ 6.1 Application for surrender.

(a) Every application for surrender of a license shall state the reason therefor; and, except in the case of an application for surrender of a license for a minor project, or for a transmission line only, shall be executed by the licensee and filed in the same form and manner as the application for license, and shall be accompanied by the license and all amendments thereof. Public notice of such application shall be given at least 30 days prior to action upon the application.

(b) For any surrender that requires certification under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), a certifying authority is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying authority has not denied, expressly waived, or granted certification by one year after the date the certifying authority received a written request for certification.

PART 7—EXPEDITED LICENSING PROCESS FOR QUALIFYING NON-FEDERAL HYDROPOWER PROJECTS AT EXISTING NONPOWERED DAMS AND FOR CLOSED-LOOP PUMPED STORAGE PROJECTS

1. The authority citation for part 7 continues to read as follows:

Authority: 16 U.S.C. 791a-825r

2. Revise § 7.2 to read as follows:

§ 7.2 Use of expedited licensing process.

* * * * *

(b) Requirement to consult.

(1) Before it files any application for an original license for a qualifying non-federal hydropower project at an existing nonpowered dam or for a closed-loop pumped storage project pursuant to sections 34 and 35 of the Federal Power Act, a potential applicant must consult with the relevant Federal, State, and interstate resource agencies, including the National Marine Fisheries Service, the United States Fish and Wildlife Service, the National Park Service, the United States Environmental Protection Agency, the Federal agency administering any federal lands or facilities utilized or occupied by the project, the appropriate State fish and wildlife agencies, the appropriate State water resource management agencies, the certifying authority under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1341(c)(1), the agency that administers the Coastal Zone Management Act, 16 U.S.C. § 1451-1465, any Indian Tribe that may be affected by the proposed project, and members of the public.

(2) The Director of the Office of Energy Projects will, upon request, provide a list of known appropriate Federal, state, and interstate resource agencies, and Indian tribes, and local, regional, or national non-governmental organizations likely to be interested in any license application proceeding.

(c) An application that accompanies a request for authorization to use the expedited licensing process must include the information specified below.

(1) Section 34 of the Federal Power Act qualification—projects at nonpowered dams. The application must demonstrate that the proposed facility meets the following qualifications pursuant to section 34(e) of the Federal Power Act:

(i) As of October 23, 2018, the proposed hydropower facility was not licensed under or exempted from the license requirements contained in Part I of the Federal Power Act;

(ii) The facility will be associated with a qualifying nonpowered dam;

(iii) The facility will be constructed, operated, and maintained for the generation of electric power;

(iv) The facility will use for such generation any withdrawals, diversions, releases, or flows from the associated qualifying nonpowered dam, including its associated impoundment or other infrastructure; and

(v) The operation of the facility will not result in any material change to the storage, release, or flow operations of the associated qualifying nonpowered dam.

(2) Section 35 of the Federal Power Act qualification—closed-loop pumped storage projects. The application must demonstrate that the proposed closed-loop

pumped storage project meets the following qualifications pursuant to section 35(g)(2) of the Federal Power Act:

(i) The project will cause little to no change to existing surface and groundwater flows and uses; and

(ii) The project is unlikely to adversely affect species listed as a threatened species or endangered species, or designated critical habitat of such species, under the Endangered Species Act of 1973.

(3) Section 401 of the Clean Water Act. The license applicant shall file within 60 days from the filing date of application:

(i) A copy of a request for certification under section 401(a)(1) of the Clean Water Act, including proof of the date on which the certifying authority received the request; or

(ii) A copy of water quality certification or the certifying authority's express waiver.

(4) Evidence of waiver of water quality certification. A certifying authority is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying authority has not denied, expressly waived, or granted certification by one year after the date the certifying authority received a written request for certification. If a certifying authority denies certification, the applicant must file a copy of the denial within 30 days after the applicant receives it.

(5) Endangered Species Act (ESA). The application must include:

(i) A no-effect determination that includes documentation that no listed species or critical habitat are present in the action area;

(ii) Documentation of concurrence from the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Service(s)), as necessary, that the action is not likely to adversely affect ESA–listed species or critical habitat; or

(iii) A draft Biological Assessment that includes documentation of consultation with the Service(s).

(6) Section 106 of the National Historic Preservation Act. Documentation that section 106 consultation has been initiated with the state historic preservation officer(s) and any Indian Tribes identified as having an interest in the project.

(7) Dam owner documentation. For projects to be located at existing nonpowered dams:

(i) Documentation of consultation with any nonfederal owner of the nonpowered dam if the applicant is not the owner and confirmation that the owner is not opposed to a hydropower development at the location; or

(ii) Documentation from the federal entity that non-federal hydropower development is not precluded at the proposed location and confirmation that the federal entity is not opposed to a hydropower development at the location.

(8) Public parks, recreation areas, and wildlife refuges. If the project would use any public park, recreation area, or wildlife refuge established under state or local law, documentation from the managing entity indicating it is not opposed to the site's use for hydropower development.

3. Revise § 7.7(a) to read as follows:

§ 7.7 Amendment of application.

(a) Any proposed amendments to the pending license application after issuance of the notice of acceptance and ready for environmental analysis under this section must include updates to all material submitted under § 7.2(c).

* * * * *