

FERC Adopts Final Rule Formalizing One-Year Deadline for States To Issue Clean Water Act Certifications; Second Circuit Affirms FERC's Approach

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On March 18, 2021, the [Federal Energy Regulatory Commission \(FERC\)](#) adopted a [Final Rule](#) requiring state agencies to issue Clean Water Act (CWA) Section 401 water quality certificates within one year of receiving a request or else waive the right to issue a certification. The rule formalizes the firm one-year limit on the amount of time a state may take to consider a request under Section 401, and clarifies that the time period begins upon receipt of a request, thereby reducing confusion.

Days later, on March 23, 2021, the U.S. Court of Appeals for the Second Circuit in [New York State Department of Environmental Conservation v. FERC](#) (2nd Cir. Docket No. 19-1601-ag) affirmed FERC's strict approach to the one-year deadline. That case affirmed FERC orders, issued in 2017 and 2018, concluding that New York waived its Section 401 rights because it had not acted within one year of receiving a natural gas pipeline's application for certification, despite the fact that the Department of Environmental Conservation and the pipeline project sponsor had agreed to a stipulation extending the one-year deadline by 36 days. Although the Second Circuit's decision does not directly address FERC's new rule, it provides strong support for the strict approach taken in the final rule.

As we [reported](#) in greater detail when FERC proposed the rule late last year, the Final Rule is significant because it sets specific limits on how states may exercise their power under [Section 401\(a\)](#) of the CWA. Section 401(a) requires an applicant for any federal license or permit that may result in a discharge of any pollutant into navigable waters to obtain a certification from the affected states that the project will meet all applicable Clean Water Act requirements. The rule is important for a variety of FERC permits or licenses—for example, licenses to operate a hydroelectric project or permits to construct a natural gas pipeline—because it places a clear time limit on the state's ability to act, and therefore reduces the possibility of unnecessary and costly delays in project approvals.

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