

Final 2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule

Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency

Overview

Background

Certification Process

Post-Certification Process

Treatment in a similar manner as a State

More information

Questions



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Background on the rulemaking

The final rule is only the second time the Agency has updated the water quality certification regulations (first promulgated in 1971, updated in 2020)

Goal for rulemaking?

To develop a durable rule that supports a **predictable, stable, and transparent** certification process that aligns with the **water quality protection and cooperative federalism principles** central to Clean Water Act (CWA) section 401

Post-Proposal Outreach



Stakeholder listening sessions

(June 2022)

States, territories, Tribes, federal agencies, project proponents



Virtual Public Hearing

(July 2022)

18 speakers total



60-day Public Comment period *(June-August 2022)*

>27,500 public comments; 301 unique comments

Public comment letters are available in the docket; Docket ID No. EPA-HQ-OW-2022-0128 on www.regulations.gov.

What is Clean Water Act (CWA) section 401?

Under CWA section 401:

A federal agency may *not* issue a license or permit to conduct any activity that may result in any discharge into “waters of the United States”, *unless* the state or authorized tribe where the discharge would originate either issues a CWA Section 401 water quality certification or waives certification.

Section 401 applies to *any* federal license or permit that may result in a discharge into waters of the United States.

Who is involved in CWA section 401 certification?



PROJECT PROPONENT

applicant for a federal license or permit, or the entity seeking certification



CERTIFYING AUTHORITY

a state or authorized tribe where the discharge originates



All 50 states, the District of Columbia, and the territories

Tribes with “treatment in a similar manner as a state” (TAS) for section 401

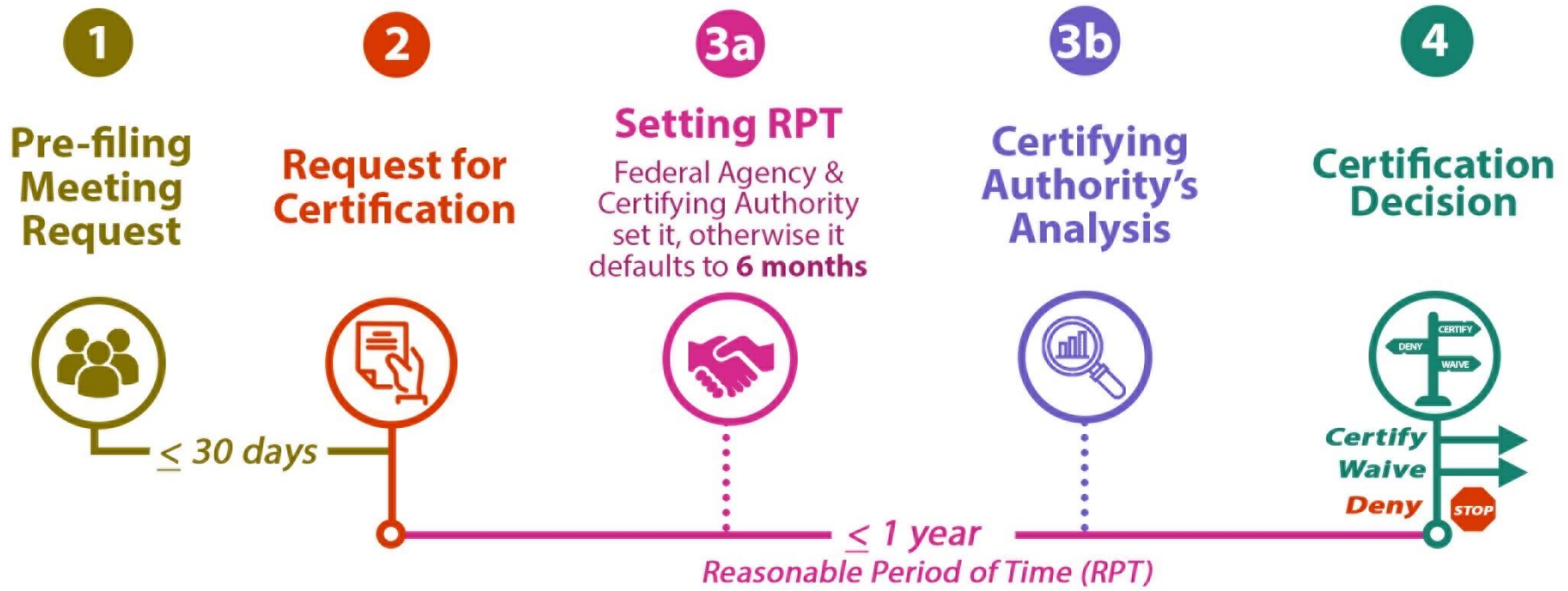
EPA acts as the certifying authority where there is no authorized tribe or state



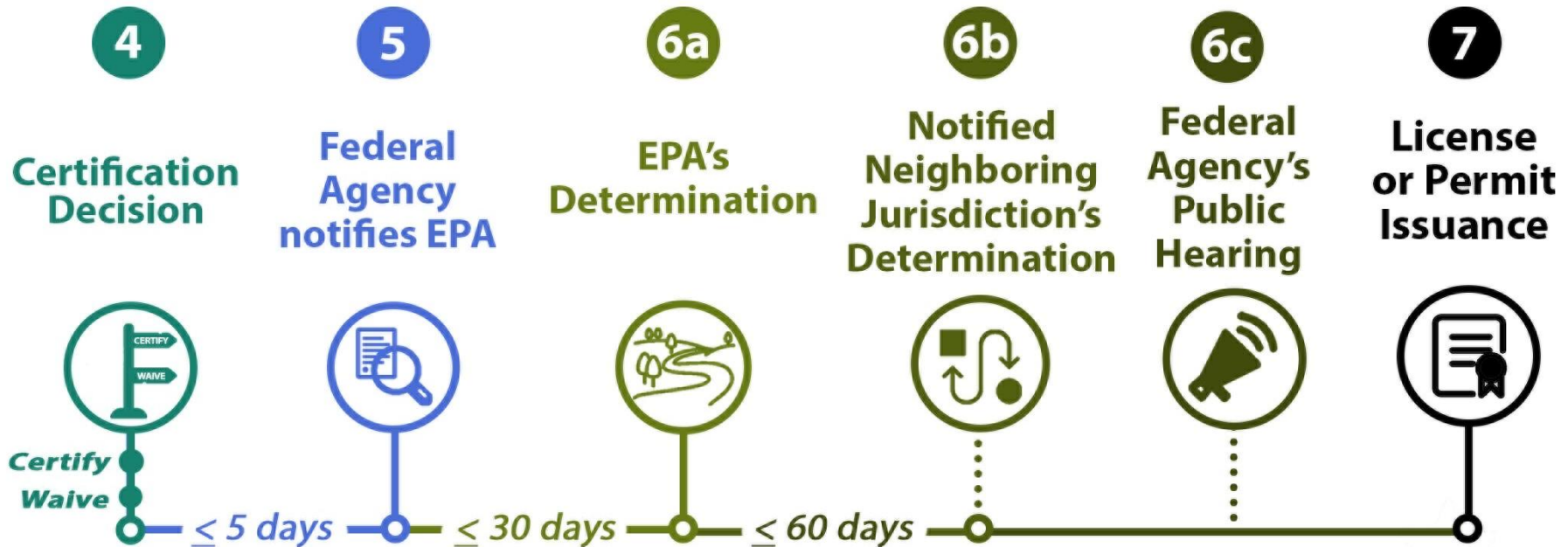
FEDERAL LICENSING OR PERMITTING AGENCY

any agency of the Federal Government to which application is made for a Federal license or permit that is subject to CWA section 401

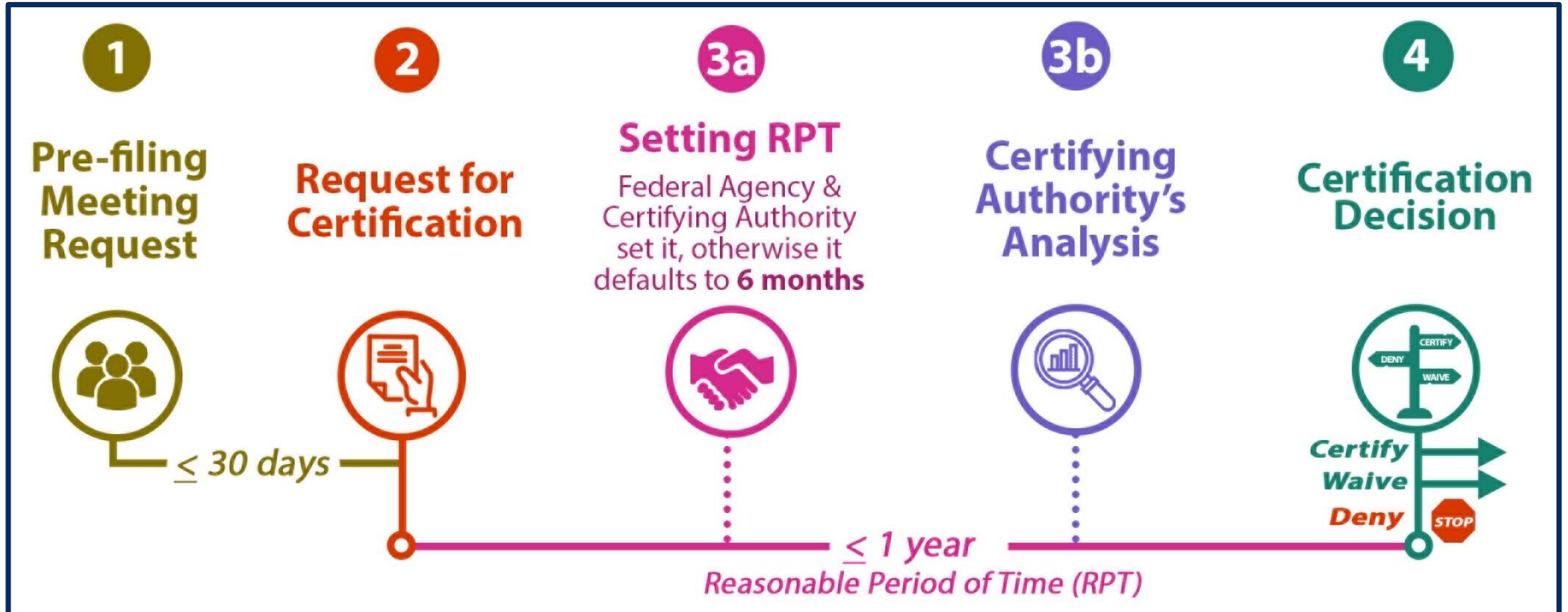
Certification



Post-Certification



Final 2023 Rule: Certification Process



When section 401 certification is required



A **project proponent** must request section 401 certification for any federal license or permit that authorizes any activity which may result in any discharge from a point source into waters of the United States.

When certification is required

Pre-filing Meeting Process

Request for Certification

Reasonable Period of Time

Certifying Authority's Analysis

Certification Decision

Post-Certification Process

Federal licenses or permits subject to section 401

Section 401 certification is required for **any** Federal license or permit to conduct any activity that may result in any discharge into “waters of the United States.”

	<i>Does it trigger section 401?</i>
Individual licenses or permits	✓
General licenses or permits	✓
Corps Civil Works projects	✓
Permits issued by states or tribes pursuant to their authorized or approved programs	✗

Federal licenses or permits subject to section 401

Examples of Federal license or permits that may trigger the need to seek section 401 certification



EPA-issued CWA section 402 permits for discharge of pollutants



FERC certificates for construction/operation of interstate natural gas pipeline projects



CWA section 404 permits issued by Corps for discharge of dredge/fill materials



Shoreline permits issued by Tennessee Valley Authority for shoreline construction activities



Rivers and Harbors Act section 10 permits issued by Corps for construction of wharfs, piers, etc.



Nuclear power plant licenses issued by Nuclear Regulatory Commission



Rivers and Harbors Act section 9 permits issued by Corps (for construction of dams/dikes) and Coast Guard (for construction of bridges and causeways)



Permits for wineries and distilleries issued by Alcohol and Tobacco Tax and Trade Bureau



FERC licenses for construction/operation of non-Federal hydropower projects



Mine plans of operation for mining activities on National Forest Service Lands approved by the Forest Service

When certification is required

Pre-filing Meeting Process

Request for Certification

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Post-Certification Process



Certifying authority action on issuance of general permit?



Project proponent action for certification coverage under general permit?

Grants section 402 general permit	Does not need to separately seek certification
Waives section 402 general permit	Does not need to separately seek certification
Denies section 402 general permit	Cannot obtain coverage and must seek certification for <i>individual permit</i>
Grants section 404 general permit	May need to obtain certification for project to qualify for coverage
Waives section 404 general permit	Does not need to separately seek certification
Denies section 404 general permit	Must obtain certification for project to qualify for coverage

Certification when project proponents seek coverage under a general permit



Potential for a point source discharge

Section 401 certification is required for any Federal license or permit to conduct any activity that may result in any discharge ***from a point source*** into “waters of the United States.”

Point source is a discernable, confined, or discrete conveyance from which pollutants are or may be discharged

Point source discharge \neq discharge of pollutants

Examples of point source discharges?

- (1) Turbine or tailrace of a hydroelectric dam
- (2) Bulldozers or other construction equipment



Source: Wikimedia Public Domain

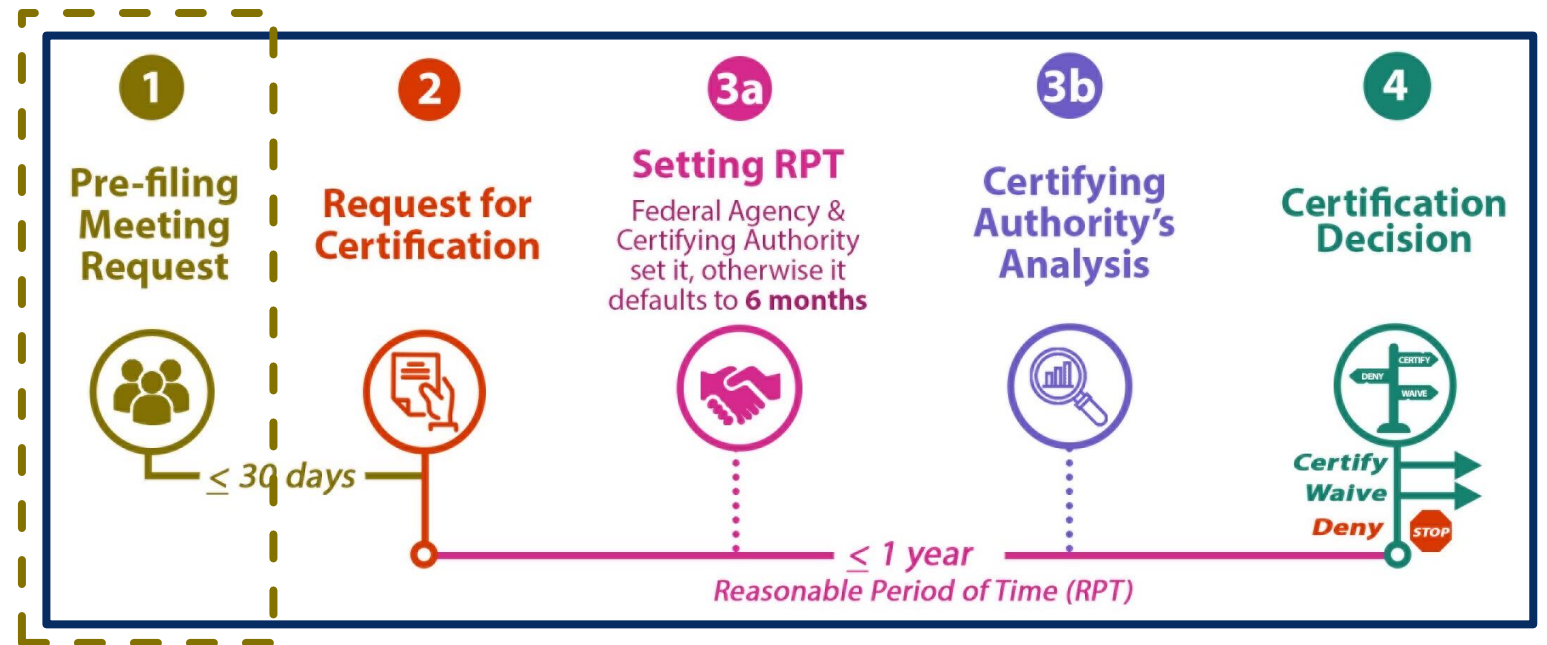


Source: PxHere Public Domain



Pre-filing meeting request

Section 121.4 requires all project proponents to request a pre-filing meeting with the appropriate certifying authority at least 30 days prior to submitting a request for certification, **unless** this requirement is shortened or waived by the certifying authority.



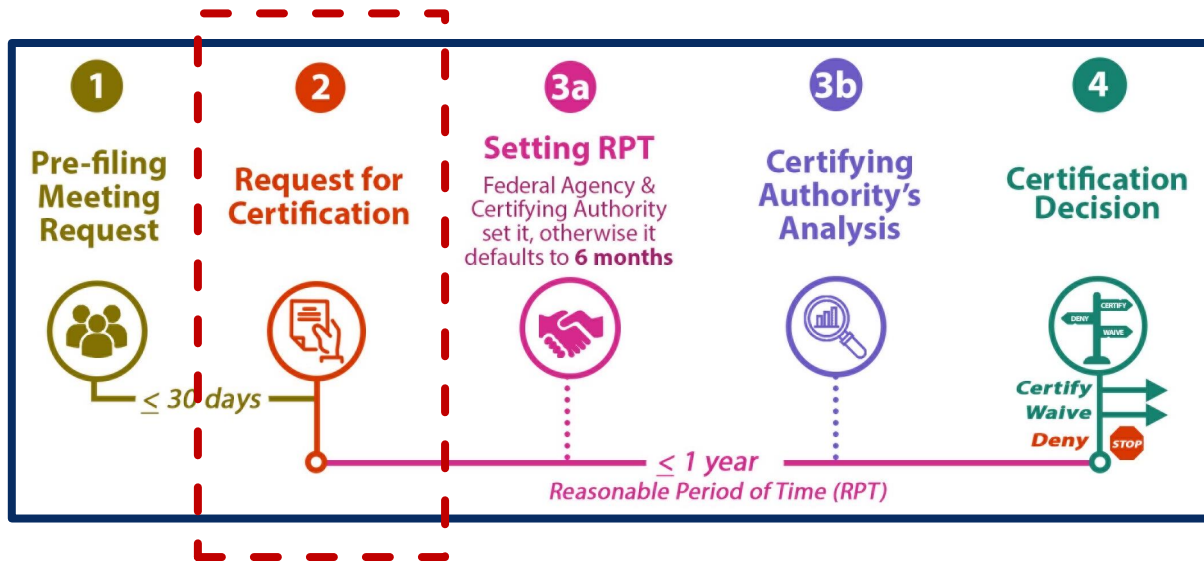


Request for certification

Section 121.5(a) defines **minimum contents** that must be in all requests for certification.

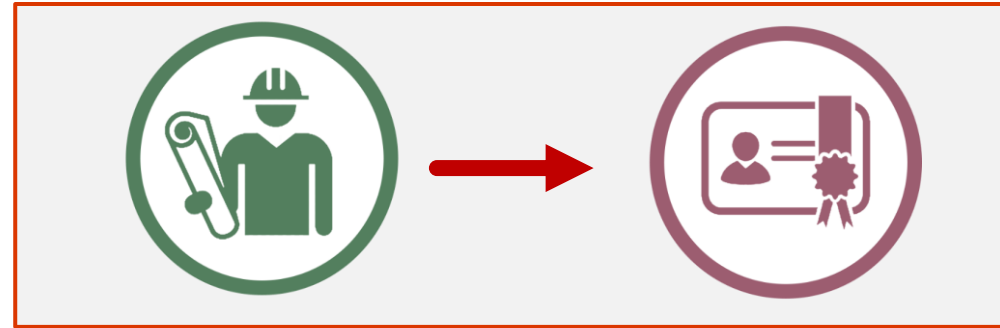
Section 121.5(b) defines **additional requirements** when EPA is the certifying authority (or when states/Tribes do not identify additional requirements).

HOWEVER: States/Tribes are free to identify (*prior to* when the request for certification is made) additional contents for a request for certification that are relevant to the water quality-related impacts from the activity.



Minimum contents of a request for certification

121.5(a)



INDIVIDUAL Federal license or permit request

- 1 A **copy** of the Federal license/permit **application** submitted to the Federal agency
- 2 Any **readily available water quality-related materials** that informed development of the application

Issuance of a GENERAL Federal license or permit request

- 1 A **copy** of the **draft** Federal license/permit
- 2 Any **readily available water quality-related materials** that informed development of the draft

All requests must be in writing, signed, and dated.

When certification is required

Pre-filing Meeting Process

Request for Certification

Reasonable Period of Time

Certifying Authority's Analysis

Certification Decision

Post-Certification Process

Minimum contents of a request for certification

121.5(a)



What does “readily available water quality-related materials that informed the development of” either the application or the draft license or permit refer to?

Existing water quality-related materials that:

- 1) are in the project proponent’s possession or easily obtainable and
- 2) informed the project proponent’s development of the application or draft license or permit

Project proponents may redact or exclude personally identifiable information and/or other sensitive information

When certification is required

Pre-filing Meeting Process

Request for Certification

Reasonable Period of Time

Certifying Authority’s Analysis

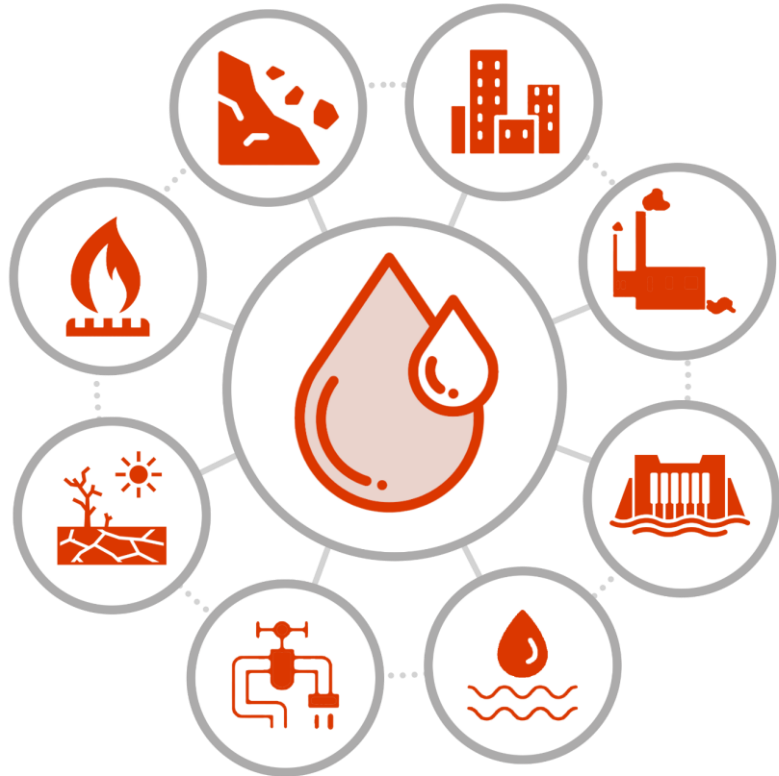
Certification Decision

Post-Certification Process



Additional contents of a request for certification

121.5(c)



State and tribal certifying authorities may define **other contents** that must be included in a request for certification, but such additional contents must be:

1. “Relevant to the water quality-related impacts from the activity” and
2. “Identified prior to when the request for certification is made” and not after the request for certification is made



Minimum contents of a request for certification

121.5(b), (d)

If the certifying authority has **not identified contents** of a request for certification in addition to those identified in 121.5(a), the project proponent must include the additional contents identified in 121.5(b), as applicable, if they are not already included in the minimum contents for a request for certification

- 1 A **description** of the **proposed activity**, including purpose of proposed activity and type(s) of discharge(s) that may result
- 2 The **specific location of any discharge(s)** that may result from the proposed activity
- 3 **Map or diagram** of the proposed activity site, including proposed activity boundaries in relation to local streets, roads, and highways
- 4 **Description of current activity site conditions**, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation
- 5 **Date(s)** on which the proposed activity is planned to begin and end and, if known, the approximate date(s) when any discharges may commence
- 6 A **list** of all other Federal, interstate, Tribal, state, territorial, or local agency **authorizations** required for the proposed activity and the current status of each authorization
- 7 **Documentation** that a pre-filing meeting request was submitted to certifying authority in accordance with applicable submission procedures, unless the pre-filing meeting request requirement was waived



Certifying authorities are **required** to send written confirmation to the project proponent and the Federal agency of the date that the request for certification was received.

EPA recommends that certifying authorities promptly notify a project proponent when it **does not submit** a request for certification in accordance with the final rule.



Communicating when a request for certification is received



Tips for submitting a request for certification in accordance with the final rule:



Leverage **pre-filing meeting** opportunities and/or make **content requirements** readily accessible (e.g., posted on a website).



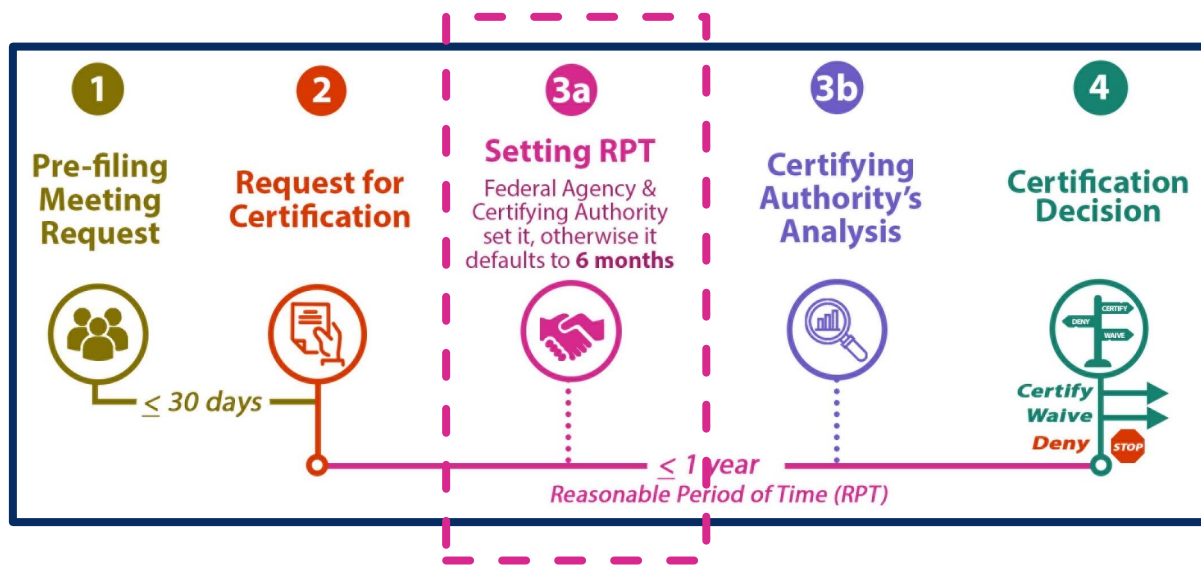
Reasonable period of time (RPT)



Reasonable Period of Time: the time that a certifying authority has to review a request for certification and ultimately act on that request

A certifying authority must act on a request for certification within the reasonable period of time, which shall not exceed one year, as **jointly determined by the federal licensing or permitting agency and certifying authority.**

If the federal agency and certifying authority fail to set a reasonable period of time, it will **default to 6 months.**





Setting the reasonable period of time

The final rule clarifies that the **JOINT DETERMINATION** of the reasonable period of time may happen on:



(1) Case-by-Case Basis
(i.e., individually)

ACTIVITY



CATEGORY

(2) Categorical Basis

(e.g., written agreements setting the reasonable period of time based on certain types of Federal licenses or permits, project type, etc.)

If the federal agency and certifying authority fail to set a reasonable period of time, it will default to 6 months.



Extending the reasonable period of time

Provided it does not exceed one year from the date that the request for certification was received, **the reasonable period of time may be extended:**



If there is a **force majeure event** (including, but not limited to, government closure or natural disasters) and when state or Tribal **public notice procedures** necessitate a longer reasonable period of time



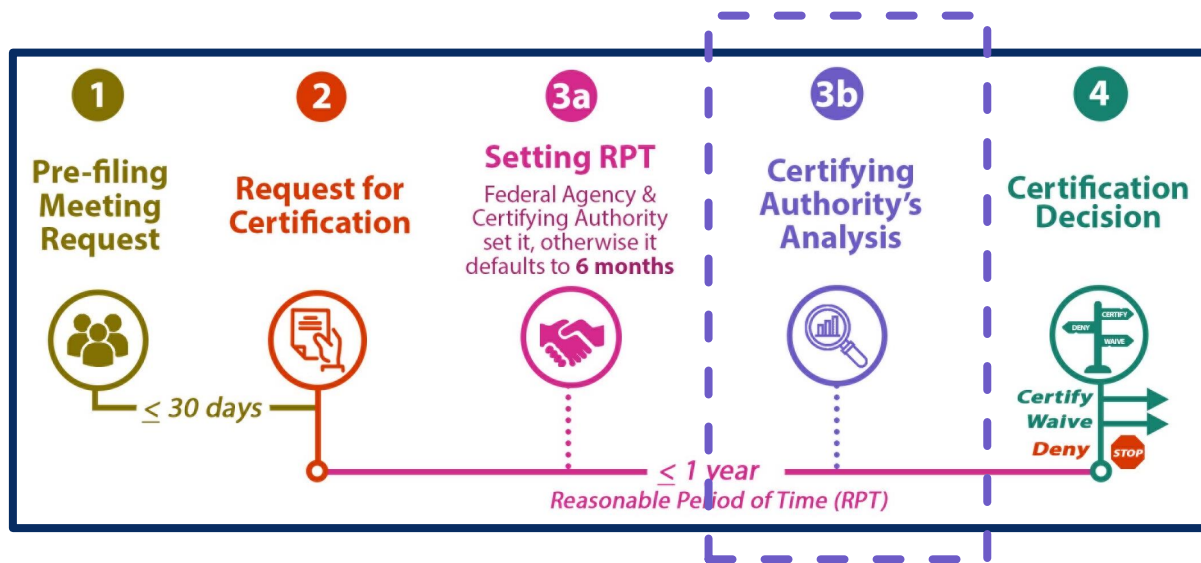
If the Federal agency and certifying authority **agree to extend** the reasonable period of time for any reason



Public notice procedures

What are the public notice procedures when EPA is the certifying authority?

EPA must provide public notice **within 20 days** of receiving a request for certification.



Section 401(a)(1) requires a certifying authority to establish procedures for public notice, and a public hearing where necessary, on a request for certification.

Certifying authority must determine whether the **activity** will comply with applicable **water quality requirements**.



Scope of Certification

The certifying authority's evaluation is limited to the water quality-related impacts from the activity subject to the federal license or permit, including the activity's construction and operation.



***Water quality requirements** means any limitation, standard, or other requirement under sections 301, 302, 303, 306 and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law.*



Limitations on the “activity” scope

A certifying authority’s analysis of any given activity is limited to **ADVERSE** water quality-related impacts that **may prevent compliance** with water quality requirements.

What does this **NOT** include?



Conditions to address impacts from the activity that **DO NOT** adversely affect water quality

Conditions to protect waters that are **NOT** impacted by the activity

Conditions that **DO NOT** affect compliance with applicable water quality requirements in waters impacted by the activity

What can be water quality-related impacts?



Impacts that **ADVERSELY** affect the chemical, physical, and biological integrity of waters.

What are NOT water quality-related impacts?

Impacts with **NO CONNECTION** to water quality (e.g., based on solely on potential air quality, traffic, noise, or economic impacts that have no connection to water quality).



Limitations on the “activity” scope

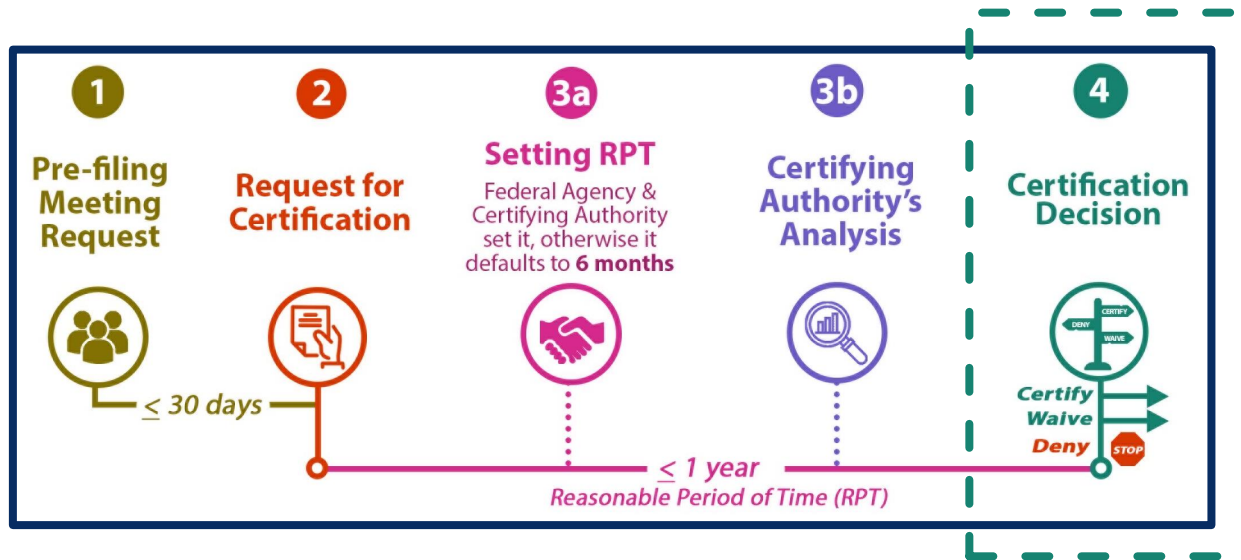
A certifying authority’s analysis of any given activity is limited to adverse **water quality-related impacts** that may prevent compliance with water quality requirements.



Certification decisions

A certifying authority may act in one of four ways:

1. Grant certification
2. Grant certification with conditions
3. Deny certification
4. Expressly waive certification



All certification decisions must be in writing and should include **recommended minimum contents** (but do not have to).



Certification decisions



Certification decisions must be **in writing** to ensure the project proponent and Federal agency can clearly understand the certification decision and, for a certification with conditions, any conditions that must be included in the Federal license or permit.

To encourage development of clear certification decisions, the Agency identified **recommended—but not required—contents** for each certification decision type at final rule section 121.7(c)-(f).



Waiver of Certification

A certifying authority may waive certification:



1) expressly (i.e., in writing) or



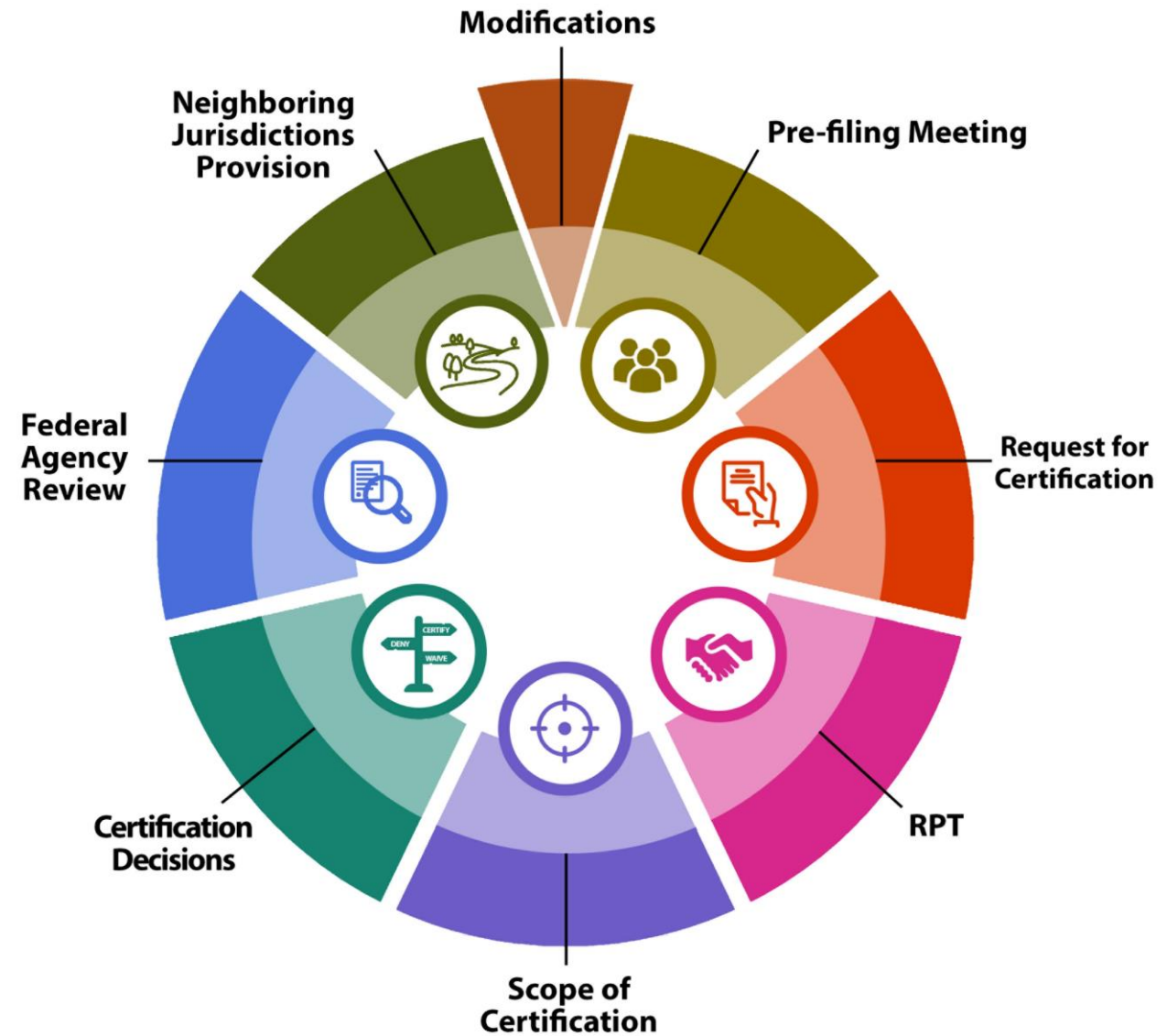
2) by failing or refusing to act within the reasonable period of time



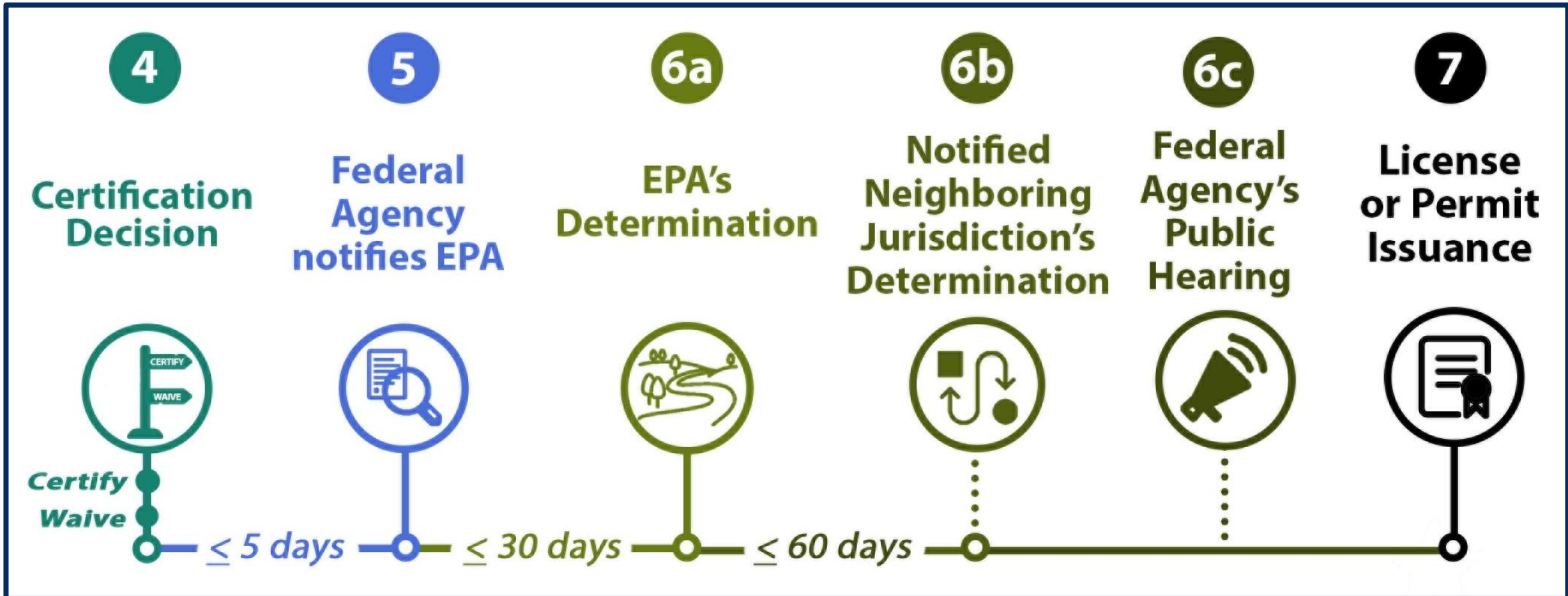
Federal agency review

A federal agency *may* verify compliance with the requirements of section 401:

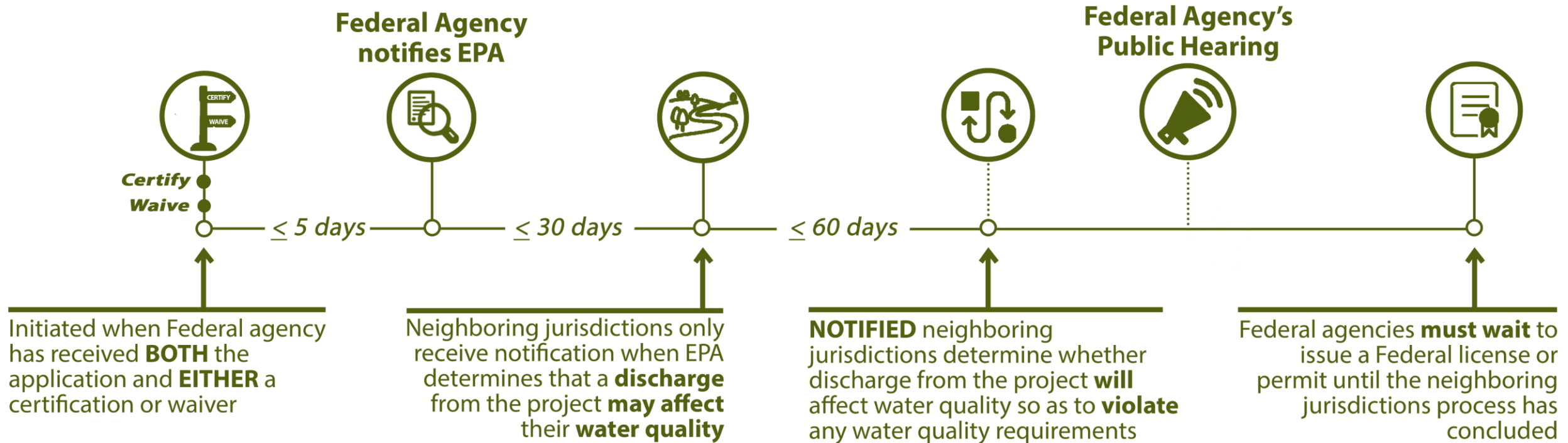
1. Whether the **appropriate certifying authority** issued the decision,
2. Whether the certifying authority confirmed it complied with its **public notice procedures** established pursuant to section 401(a)(1), and
3. Whether the certifying authority **acted** on the request for certification **within the reasonable period of time**.



Final 2023 Rule: Post-Certification Process

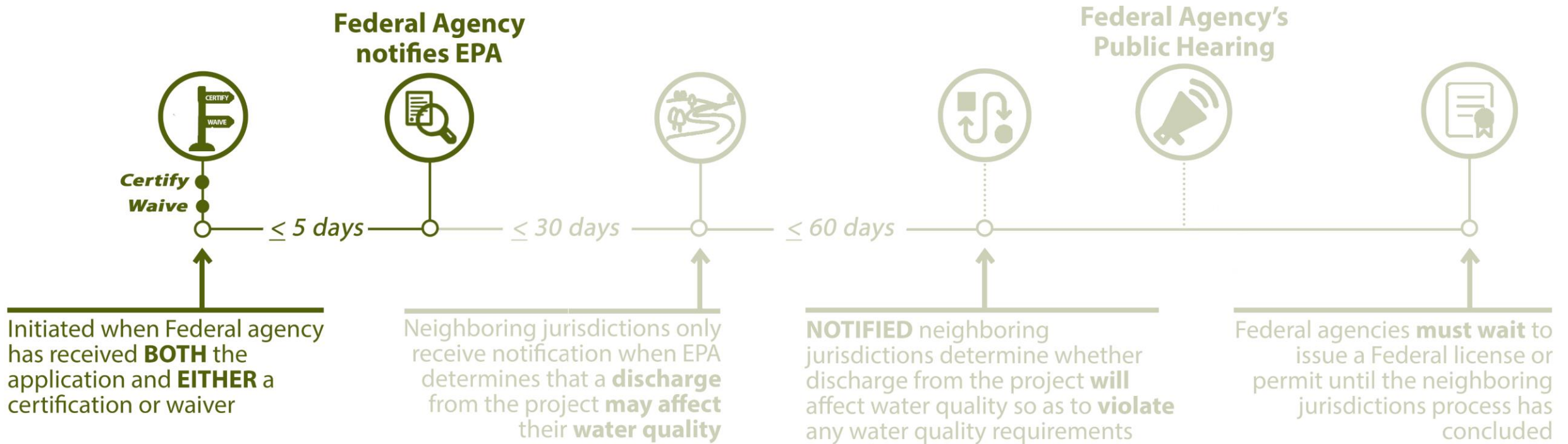


Neighboring jurisdictions process



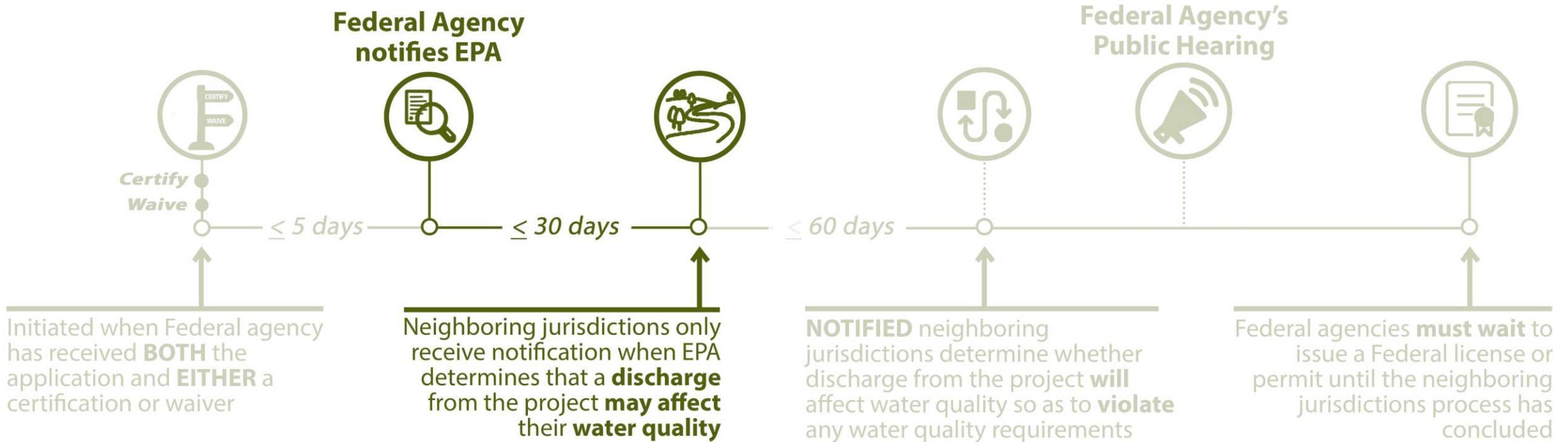
OUTCOME: The Federal licensing or permitting agency determines outcome based upon recommendations of neighboring jurisdiction, EPA, and any additional information presented at a hearing.

Neighboring jurisdictions process



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Neighboring jurisdictions process



OUTCOME: The Federal licensing or permitting agency determines outcome based upon recommendations of neighboring jurisdiction, EPA, and any additional information presented at a hearing.

When certification is required

Pre-filing Meeting Process

Request for Certification

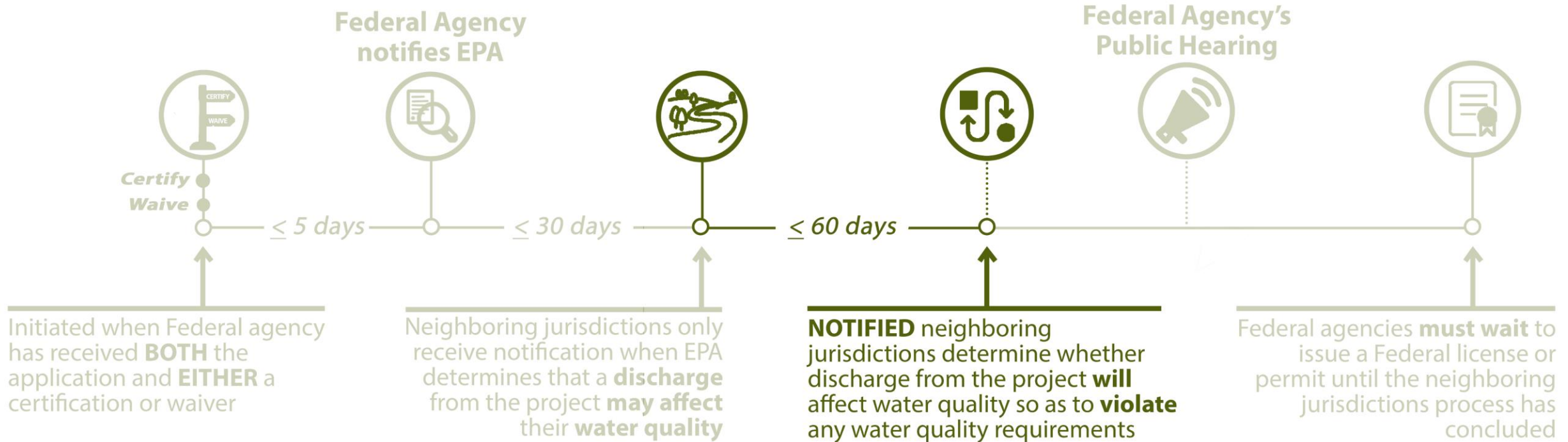
Reasonable Period of Time

Certifying Authority's Analysis

Certification Decision

Post-Certification Process

Neighboring jurisdictions process



OUTCOME: The Federal licensing or permitting agency determines outcome based upon recommendations of neighboring jurisdiction, EPA, and any additional information presented at a hearing.

When certification is required

Pre-filing Meeting Process

Request for Certification

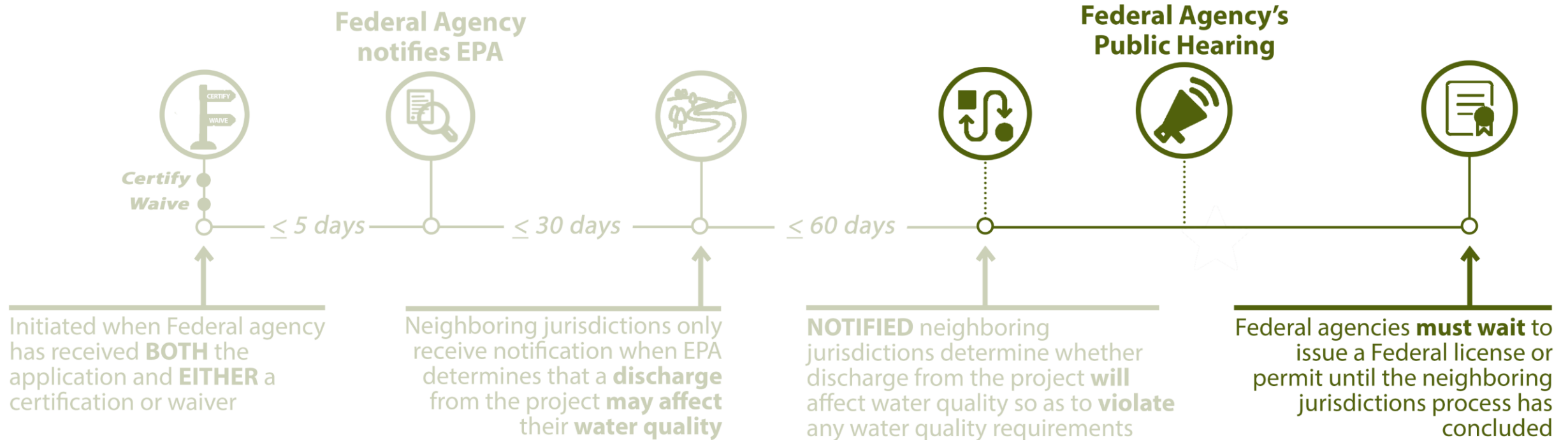
Reasonable Period of Time

Certifying Authority's Analysis

Certification Decision

Post-Certification Process

Neighboring jurisdictions process



OUTCOME: The Federal licensing or permitting agency determines outcome based upon recommendations of neighboring jurisdiction, EPA, and any additional information presented at a hearing.

When certification is required

Pre-filing Meeting Process

Request for Certification

Reasonable Period of Time

Certifying Authority's Analysis

Certification Decision

Post-Certification Process



Modifications to certifications



Certifying authorities and federal agencies may agree to modify a **grant of certification** (with or without conditions).

The cooperative approach in the final rule **does not allow for unilateral modifications** by certifying authorities, which includes through any “reopener^{*}” clauses included in a grant of certification.

^{*}Reopener clauses purport to authorize a certifying authority to “reopen” and modify a certification at a later date.

Enforcing certifications and conditions

The final rule **does not** address enforcement of section 401 certifications or conditions.



Can federal agencies enforce certification conditions?

Yes, but federal agencies have enforcement discretion.



Can state and tribal certifying authority enforce certification conditions?

Yes, if authorized under state or tribal law.



**Treatment in a
Similar Manner
as a State (TAS)**
*for CWA Section 401
and/or 401(a)(2)*



TAS for the section 401 program



FINAL 2023 RULE

A Tribe may obtain TAS for section 401 **without** obtaining TAS for CWA section 303(c) water quality standards. A Tribe may also obtain TAS solely for section 401(a)(2) to participate as a neighboring jurisdiction.



PRE-FINAL 2023 RULE

Tribes could obtain TAS for section 401 through the TAS process for water quality standards (section 303(c)).

Effective date and final rule implementation

The final rule will be effective **60 days** after the rule publishes in the *Federal Register*.

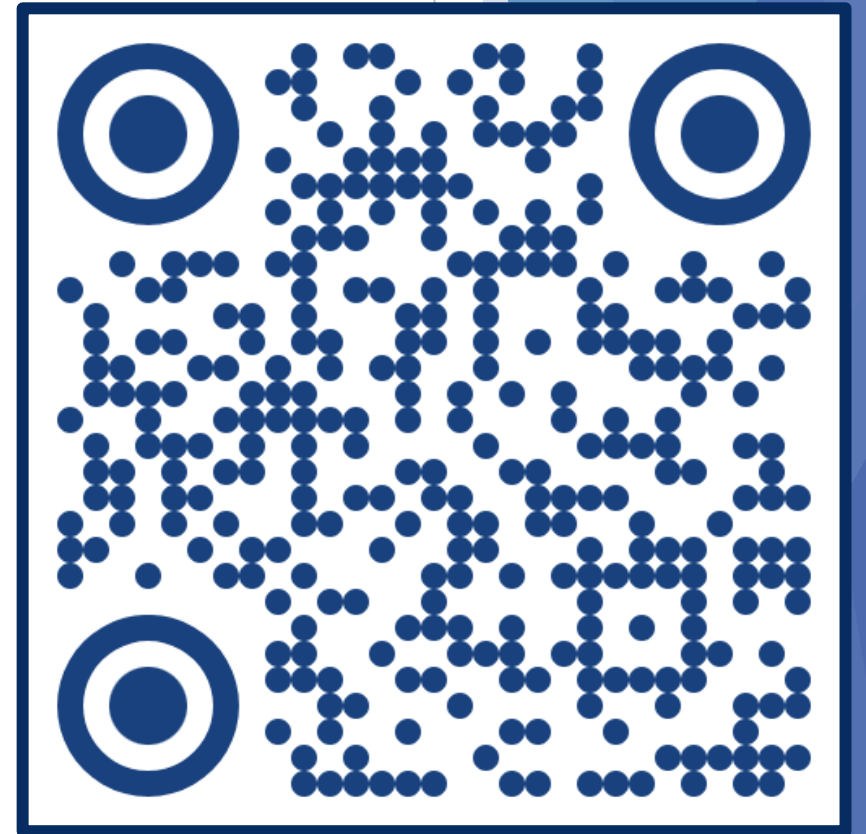


As of the effective date of this final rule, all actions taken as part of the section 401 certification process must be taken pursuant to the final rule.

However, the final rule does **not** apply retroactively to actions already taken under the 2020 Rule.

More Information

Please visit the
CWA Section 401 website,
<https://www.epa.gov/cwa-401>




Available Resources

One-page Fact sheet (in [English](#) and [Spanish](#))

[Rule Provision Comparison](#)

Overview Fact sheet (in [English](#) and [Spanish](#))



Clean Water Act Section 401 Water Quality Certification Improvement Rule

Under Clean Water Act (CWA) section 401, Congress provides states, territories, and Tribes with a tool to protect water from adverse impacts that could result from federally licensed or permitted projects. The final 2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule (2023 Rule) restores the fundamental authority granted by Congress to states, territories, and Tribes to protect water resources that are essential to healthy people and thriving communities. The 2023 rule will support clear, efficient, and focused water quality reviews of infrastructure and development projects that are key to economic growth.

Overview of the Final 2023 Rule:
The final rule provides stakeholders with a clear and consistent certification process while ensuring protection of vital state, territory, and Tribal water resources by:


- Supporting flexible, early coordination with stakeholders – The 2023 Rule provides states, territories, and Tribes with the flexibility to engage with project proponents and federal agencies before the certification process begins. State, territory, and Tribal certifying authorities may decide when a pre-filing meeting request will lead to a more efficient certification process.
- Clearly defining the contents necessary to start the certification process – The 2023 Rule creates a bright-line approach to defining the required contents in a request for certification, limiting delays for project proponents, while still allowing state, territory, and Tribal certifying authorities to define the water quality-related information necessary to start the certification process.
- Ensuring actions occur within the 1-year statutory timeframe – The 2023 Rule allows certifying authorities to collaborate with federal agencies to determine the timeframe for review, up to the one-year statutory maximum. To ensure timely action and negotiations, the 2023 Rule provides a 6-month default timeframe (half of the statutory maximum) if the certifying authority and federal agency do not agree on a timeframe.
- Focusing on the water quality-related impacts of federal projects – The 2023 Rule realigns the scope of section 401 certification with nearly 50 years of established practice that preceded the 2020 Rule. Simultaneously, the 2023 Rule addresses stakeholder concerns regarding past practice and provides regulatory certainty by clarifying important concepts such as emphasizing that states, territories, and Tribes may only consider the adverse water quality impacts from the activity.
- Allowing projects to adapt easily and predictably to shifting context – The 2023 Rule does not allow states, territories, and Tribes to unilaterally modify certifications, but instead allows them to collaborate with federal agencies to do so. This balances certifying authorities' needs for flexibility (to protect water quality over the life of a project) and the potential for agencies.

For more information:
To learn more about the CWA Section 401 water quality certification process, please visit the [CWA Section 401 website](#). Available implementation Frequently Asked Questions, and fact sheets (in English and Spanish) can be found at [Regulations.s](#)

Appendix A. Rule Provision Comparison

Table A-1 compares major rule provisions, in plain language, under the 1971 Rule, the 2020 Rule, and the final rule.

1971 Rule and Practice	2020 Rule	Final Rule
When certification is required		
<ul style="list-style-type: none"> A project proponent must request section 401 certification from the appropriate certifying authority if a federally licensed or permitted activity may result in a discharge into waters of the United States. While not addressed in 1971 Rule, case law from the 9th Circuit held that only a point source discharge triggers section 401 (ONDA v. Dombeck, 172 F.3d 1092 (9th Cir. 1998)). 	<ul style="list-style-type: none"> Same as 1971 practice, but the regulatory text explicitly provided that certification is required for any license or permit that authorizes an activity that may result in a discharge. Defined "discharge" for purposes of section 401 as a discharge from a point source into water of the United States, consistent with ONDA. 	<ul style="list-style-type: none"> Same as 1971 practice, but the regulatory text explicitly provides that a certification or waiver is required for any license or permit that authorizes any activity which may result in a point source discharge into waters of the United States. Preamble provides that a discharge for purposes of section 401 is a discharge from a point source into waters of the United States, consistent with ONDA.
Pre-filing meeting request		
<ul style="list-style-type: none"> Pre-filing meeting requests were not required by rule but were encouraged by some certifying authorities. 	<ul style="list-style-type: none"> Project proponents were required to request a pre-filing meeting from a certifying authority at least 30 days before requesting certification. 	<ul style="list-style-type: none"> Project proponents are required to request a pre-filing meeting with a certifying authority at least 30 days prior to requesting certification, unless waived or shortened by the certifying authority.
Request for certification		
<ul style="list-style-type: none"> Included five components that must be in a certification request when EPA is the certifying authority. Did not define a certification request for other certifying authorities. 	<ul style="list-style-type: none"> Required all certification requests to be written, signed, and dated and include either seven or nine components, which are based on whether the certification request was for an individual license or permit, or the issuance of a general license or permit. 	<ul style="list-style-type: none"> Requires all requests for certification to be in written, signed, and dated. If the request for certification is for an individual license or permit, it must include a copy of the license or permit application submitted to the federal agency and any



Clean Water Act Section 401 Water Quality Certification Improvement Rule September 2023

EPA is finalizing a rule to support a timely and predictable water quality certification process under Clean Water Act (CWA) section 401. The final 2023 CWA Section 401 Water Quality Certification Improvement Rule (2023 Rule) is grounded in the fundamental authority granted by Congress to states, territories, and Tribes to protect water resources that are essential to healthy people and thriving communities over the past 50 years. For more information on the 2023 Rule, see the [CWA Section 401 website](#).

Overview: Section 401 Empowers States, Territories, and Tribes to Protect Vital Waters

Under CWA section 401, Congress provides states, territories, and Tribes with a tool to protect their waters from adverse impacts that could result from federally licensed or permitted projects. As required by CWA section 401, an applicant for a federal license or permit that may result in a discharge into waters of the United States must obtain a water quality certification or waiver from the certifying authority. Certifying authorities are typically a state (which includes territories) or a Tribe with treatment in a similar manner as a state (TAS).

Federal licenses and permits that may require section 401 water quality certification include, but are not limited to, CWA section 404 dredge and fill permits from the Army Corps of Engineers (Corps), hydroelectric licenses from the Federal Energy Regulatory Commission (FERC), and CWA section 402 pollutant discharge permits from EPA. A broad range of individuals and entities seek section 401 certification for projects requiring these kinds of permits, including businesses, federal and state agencies (e.g., state departments of transportation), contractors, and individual citizens. Thousands of water quality certifications are granted each year for a wide range of projects.

Stakeholders in this process include:

- Certifying authorities: The state, territory, or Tribe with TAS where the discharge from the proposed federally licensed or permitted project originates, or EPA if a state, territory, or Tribe does not have jurisdiction over the area.
- Federal licensing or permitting agency: The federal agency whose license or permit is subject to section 401 certification.
- Project proponents: Those seeking a section 401 certification, including project applicants and federal agencies seeking certification for the issuance of their general licenses and permits.

Options for water quality certification in 1971, which remained in effect until the CWA Section 401 Certification Rule (2020 Rule). President Biden's Executive Order 14176, as appropriate and consistent with applicable law, take action to revise or rescind the 2020 Rule to ensure that the rule is consistent with the intent of the CWA, states, territories, and Tribes under section 401. The Agency's rulemaking effort was informed by public input.

[Recorded Webinar: Final Rule Overview](#)



Final 2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule

Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency

Final 2023 CWA Section 401 Water Quality Certification Improvement Rule – Overview Webinar

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[Recorded Webinar: Implementation Considerations](#)



Final 2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule

Implementation Considerations

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Questions?

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Questions and Answers