

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

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

# Overview

## **(1) Final 2023 Rule**

**(a) Certification Process**

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**(c) Treatment in a Similar Manner as a State**

**(d) EPA's Roles in Section 401**

## **(2) Effective Date and More Information**



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# Background on the rulemaking

The proposed 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](http://www.regulations.gov).



# Background:

## 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.

# Background:

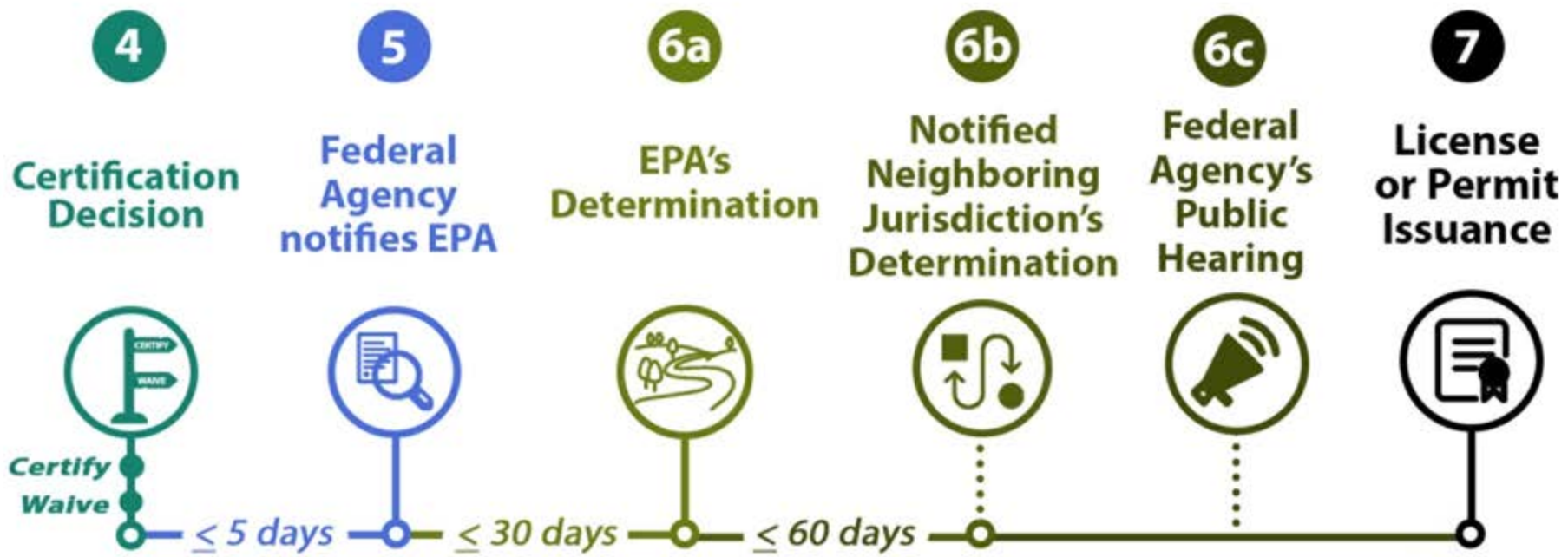
## Who is involved in CWA section 401 certification?

- ▶ **Project proponent:** applicant for a federal license or permit, or the entity seeking certification
- ▶ **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
- ▶ **Certifying authority:** a state or authorized tribe where the discharge originates
  - ▶ **State:** all 50 states, the District of Columbia, and the territories
  - ▶ **Authorized tribes:** 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

# Certification

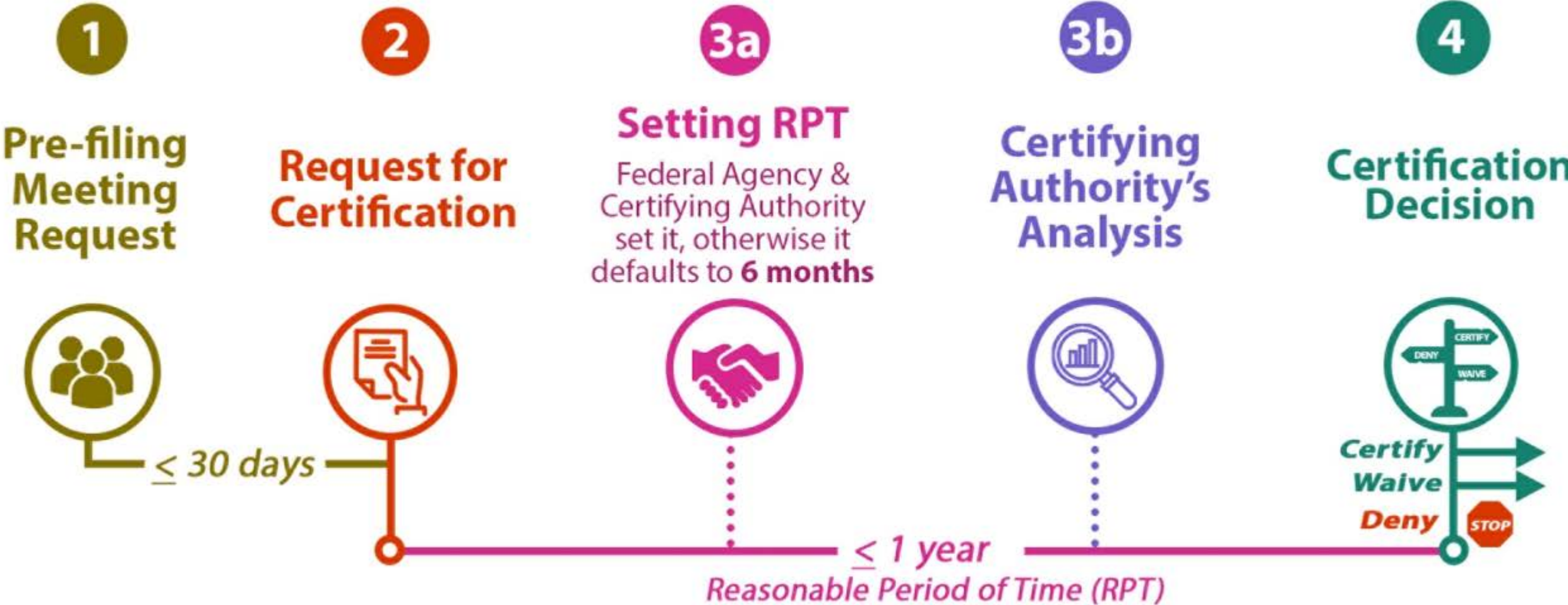


# Post-Certification





# Final 2023 Rule: Certification Process





# When section 401 certification is required

**Final 2023 Rule:** 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.

**2020 Rule:** Same.

# Pre-filing meeting request

**Final 2023 Rule:** All project proponents must request a pre-filing meeting with the appropriate certifying authority at least 30 days prior to submitting a certification request, **unless** this requirement is shortened or waived by the certifying authority.

**2020 Rule:** Similar, except the certifying authority could not waive or shorten the time between receiving a pre-filing meeting request and a request for certification.

# Request for certification

## Minimum content requirements

### Final 2023 Rule:

- ▶ All requests for certification must be:
  1. In writing, signed, and dated;
  2. Include *either* a copy of the **license or permit application** (for an *individual* license or permit) **or** a copy of the **draft license or permit** (for the *issuance of* a general license or permit); and
  3. Include any readily available water quality-related materials that informed the development of the application or draft license/permit.

### 2020 Rule:

- ▶ All requests for certification were required to be in writing, signed, and dated and include either 9 (individual licenses/permits) or 7 (issuance of general licenses or permits) components.

# Request for certification

## Additional content requirements

### **Final 2023 Rule:**

- ▶ Defines additional requirements when EPA is the certifying authority (or when states/Tribes do not identify additional requirements).
- ▶ 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.

### **2020 Rule:**

- ▶ Certifying authorities could not add to or modify the contents in a request for certification in the 2020 Rule.

# Start of the reasonable period of time

**Final 2023 Rule:** The date that the certifying authority receives a request for certification (as defined in this final rule) in accordance with applicable submission procedures from the project proponent.

**2020 Rule:** The date that a certification request (as defined in the 2020 Rule) was documented as received by a certifying authority in accordance with applicable submission procedures from the project proponent.

# Length of the reasonable period of time

**Final 2023 Rule:** 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.

**2020 Rule:** A certifying authority must act on a request for certification within the reasonable period of time, as determined by the federal agency. The reasonable period of time shall not exceed one year.

- ▶ There was no default reasonable period of time in the 2020 Rule (instead, relied on other federal agency defaults or let it go to one year if they had no default).



# Extensions to the reasonable period of time

**Final 2023 Rule:** There are two ways extensions to the reasonable period of time may occur.

- ▶ The reasonable period of time is **automatically extended** in two scenarios if the certifying authority provides written justification: (1) need to meet certifying authority public notice procedures and (2) force majeure events, as long as it does not exceed one year from the date the request for certification was received.
- ▶ The reasonable period of time may be extended **upon agreement** between the certifying authority and federal agency as long as it does not exceed one year from the date that the request for certification was received.

**2020 Rule:** A certifying authority or project proponent may request an extension to the reasonable period of time, but the federal agency was not obligated to grant the request. Any extension could not extend the reasonable period of time beyond one year from receipt of the certification request.

# Withdrawal/resubmission of a request for certification

**Final 2023 Rule:** Declines to take a regulatory position.

**2020 Rule:** Prohibited the practice of withdrawing and resubmitting a certification request.

# Scope of Certification

**Final 2023 Rule:** Whether the **activity** will comply with applicable water quality requirements.

- ▶ 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.

**2020 Rule:** The scope of a certifying authority's review was limited to assuring that a **discharge** from a federally licensed or permitted activity will comply with water quality requirements.

# To “act” on a request for certification

**Final 2023 Rule:** 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**

**2020 Rule:** Not defined.

# Contents of a certifying authority's decision (i.e., grant, grant with conditions, denial, express waiver)

**Final 2023 Rule:** All certification decisions must be in writing and should include **recommended minimum contents** (but do not have to).

**2020 Rule:** Required all certification decisions to be in writing and include specified information based on the nature of the decision.

# Waiver of certification

**Final 2023 Rule:** A certifying authority may waive certification expressly or by failing or refusing to act within the reasonable period of time.

**2020 Rule:** A certifying authority may waive certification expressly or by failing or refusing the act within the reasonable period of time, which includes failing or refusing to (1) satisfy the 2020 Rule requirements for a grant of certification, (2) satisfy the 2020 Rule requirements for a denial, (3) act on a certification request within the reasonable period of time, or (4) comply with other procedural requirements of section 401.



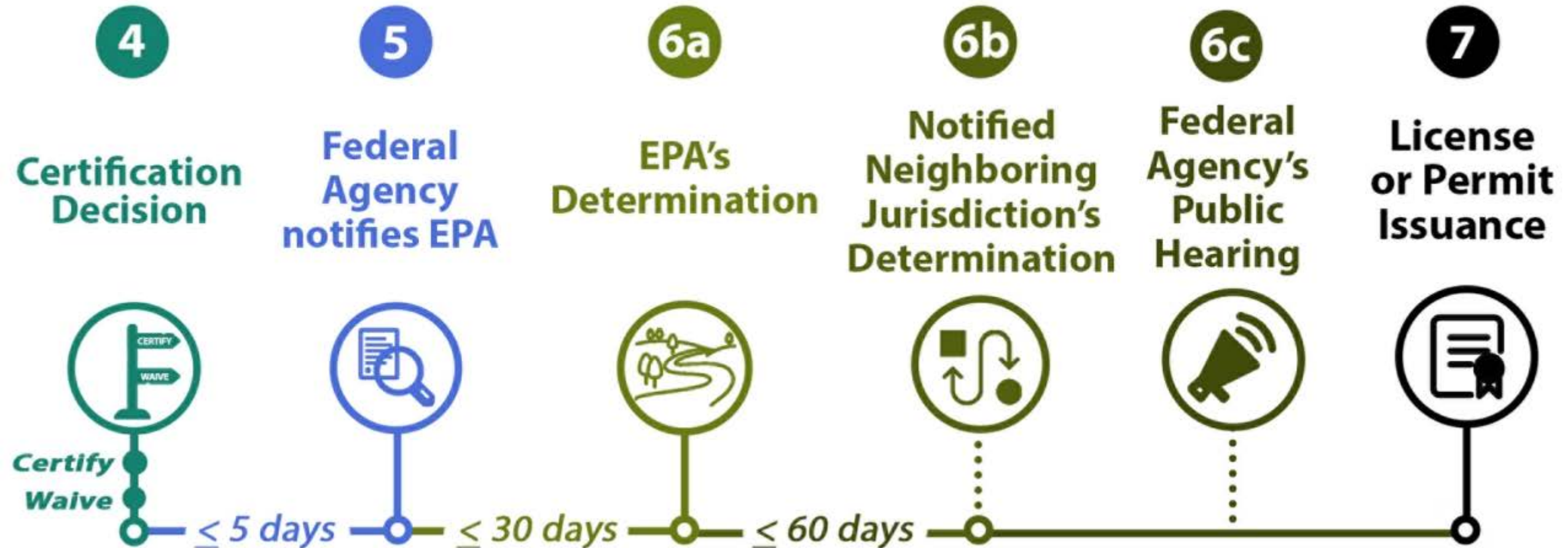
# Federal agency review

**Final 2023 Rule:** A federal agency may verify compliance with three 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.

**2020 Rule:** A federal agency was required to review a certification decision to determine whether it complied with the procedural requirements for those actions established by the 2020 Rule, whether the actions were issued in the reasonable period of time, and whether the actions followed the other procedural requirements of section 401.

# Final 2023 Rule: Post-Certification Process



# Start of the neighboring jurisdictions process

## Final 2023 Rule:

- ▶ The federal agency must notify EPA within 5 days of receiving the license or permit application *and* related certification or waiver for purposes of section 401(a)(2).
- ▶ The 5-day requirement is EPA's interpretation of statutory language that the federal agency "shall immediately" notify EPA.

**2020 Rule:** Same, except federal agencies only notified EPA for certifications, not waivers.

# Contents of a notification to EPA under section 401(a)(2)

**Final 2023 Rule:** Defines the contents of a federal agency's notification to EPA, but also provides EPA with the option of entering into agreements with federal agencies regarding the manner and contents of notification.

**2020 Rule:** Undefined.

# May affect analysis

**Final 2023 Rule:** EPA must determine if a discharge from a certified or waived project may affect water quality of a neighboring jurisdiction.

**2020 Rule:** EPA could determine in its discretion whether discharge from a certified project may affect water quality in a neighboring jurisdiction.

# Process after EPA makes a “may affect” determination

**Final 2023 Rule:** If EPA determines that a discharge from a project may affect water quality in a neighboring jurisdiction, EPA shall notify the neighboring jurisdiction, federal agency, and project proponent.

**2020 Rule:** Similar, except EPA also notified the certifying authority.



# Neighboring jurisdiction's determination

**Final 2023 Rule:** The notified neighboring jurisdiction has 60 days to notify EPA and the federal agency if it determines that a discharge from the project will violate its water quality requirements, object to the issuance of the federal license or permit, and request a public hearing from the federal agency.

- ▶ Defines the contents of the notified neighboring jurisdiction's notice to EPA and the federal agency.

**2020 Rule:** Similar, except required the notified neighboring jurisdiction to identify the receiving waters that it determined would be affected by the discharge.

# Public hearing process for a neighboring jurisdiction's objection

- ▶ **Final 2023 Rule:** The federal agency must hold a public hearing if the notified neighboring jurisdiction objects and requests one, unless the objection is withdrawn. The federal agency is required to provide public notice at least 30 days prior to the hearing, and EPA is required to provide its evaluation and recommendations at the hearing.
- ▶ **2020 Rule:** Similar, except the rule did not address withdrawal of an objection and the federal agency only provided notice to EPA at least 30 days prior to the hearing.

# Modifications to certifications

**Final 2023 Rule:** Certifying authorities and federal agencies may agree to modify a grant of certification (with or without conditions).

**2020 Rule:** Federal agencies were not precluded from establishing procedures on modifications, however unilateral modifications were not allowed.

# Enforcing certifications and conditions

**Final 2023 Rule:** The final rule does not address enforcement of section 401 certifications or conditions.

**2020 Rule:** The federal agency issuing the applicable federal license or permit was responsible for enforcing certification conditions that are incorporated into a federal license or permit.

**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.

**2020 Rule:** Tribes could obtain TAS for section 401 through the TAS process for water quality standards (section 303(c)).



# **EPA's Roles in CWA Section 401**

# EPA's roles under CWA section 401

**Final 2023 Rule:** EPA has three roles:

1. To act as the certifying authority when a state or Tribe does not have authority to act on a request for certification;
2. To determine whether a discharge may impact the water quality of a neighboring jurisdiction; and
3. To provide technical assistance to federal agencies, certifying authorities, or project proponents upon request.

**2020 Rule:** Same.

# Requirements when EPA acts as the certifying authority

**Final 2023 Rule:** EPA must follow all requirements in 40 CFR 121 and section 401. EPA must also issue public notice within 20 days of the date the request for certification was received and provide an opportunity for public comment.

**2020 rule:** Similar, except limited when EPA could request additional information from project proponents.

# EPA's advisory role under section 401(b)

**Final 2023 Rule:** Requires EPA to provide federal agencies, certifying authorities, and project proponents with any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any federal agency, certifying authority, or project proponent, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

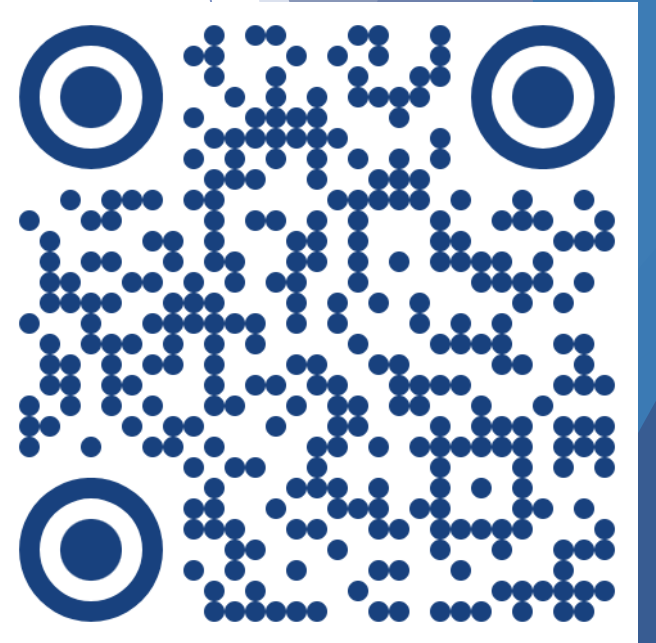
**2020 rule:** Similar.

# 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>



# Questions?

Please send questions to  
[CWA401@epa.gov](mailto:CWA401@epa.gov)