

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

*Implementation Considerations*

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

# Overview

Background

Certification Process

Post-Certification Process

More information



Original public domain image from Wikimedia Commons

# 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



## 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



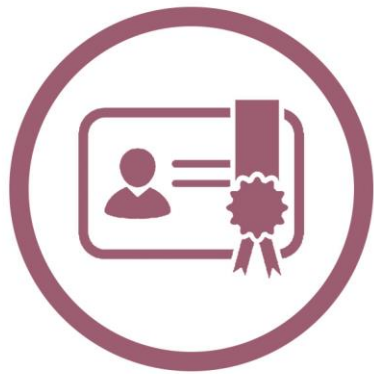
## FEDERAL LICENSING OR PERMITTING AGENCY

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

# Implementation Considerations



**PROJECT  
PROPONENT**



**CERTIFYING  
AUTHORITY**



**FEDERAL  
AGENCY**

Each icon represents a different stakeholder who is part of the section 401 process. If you see any of these icons, it indicates that the stakeholder(s) has a particular role to play in that step of the process.

## EXAMPLES



Project Proponent ONLY

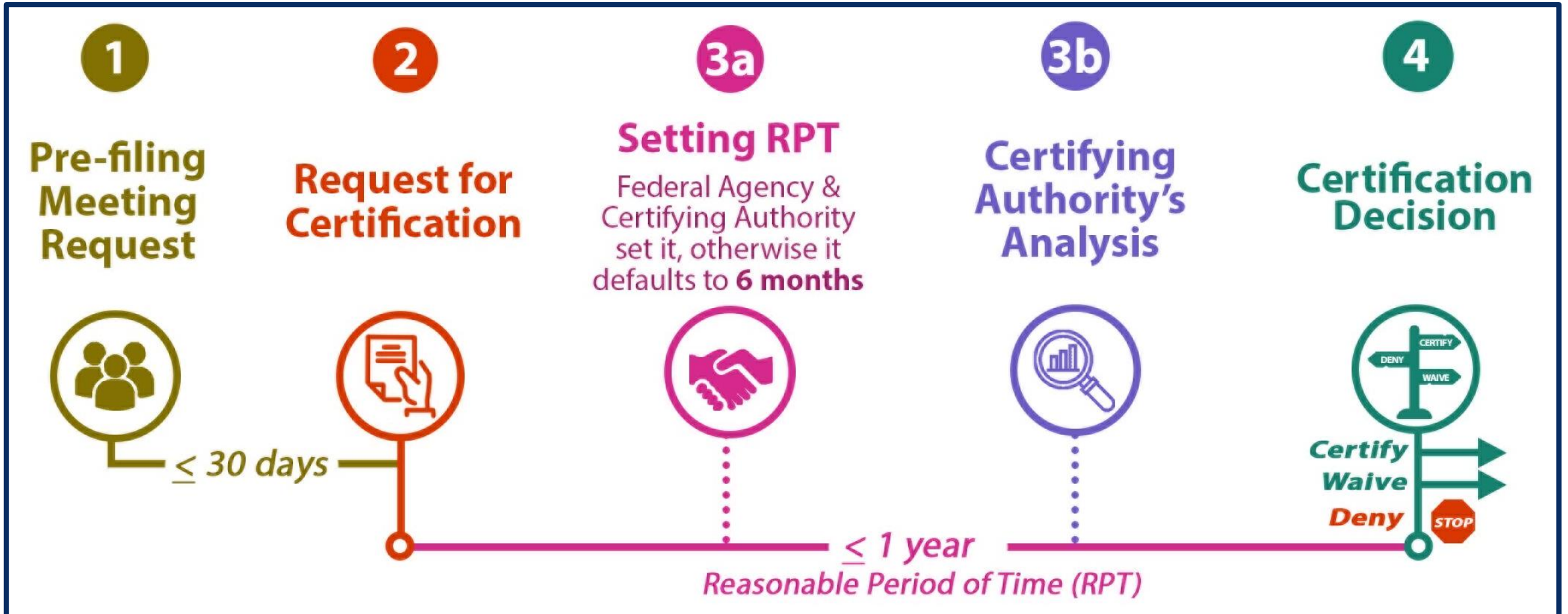


Project Proponent & Certifying Authority



Project Proponent & Federal Agency

# 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><b>Does it trigger section 401?</b></i>
<b>Individual</b> licenses or permits	✓
<b>General</b> 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

Reasonable Period of Time

Certifying Authority's Analysis

Certification Decision

Post-Certification Process



### Certifying authority action on issuance of general permit?



### Project proponent action for certification coverage under general permit?

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

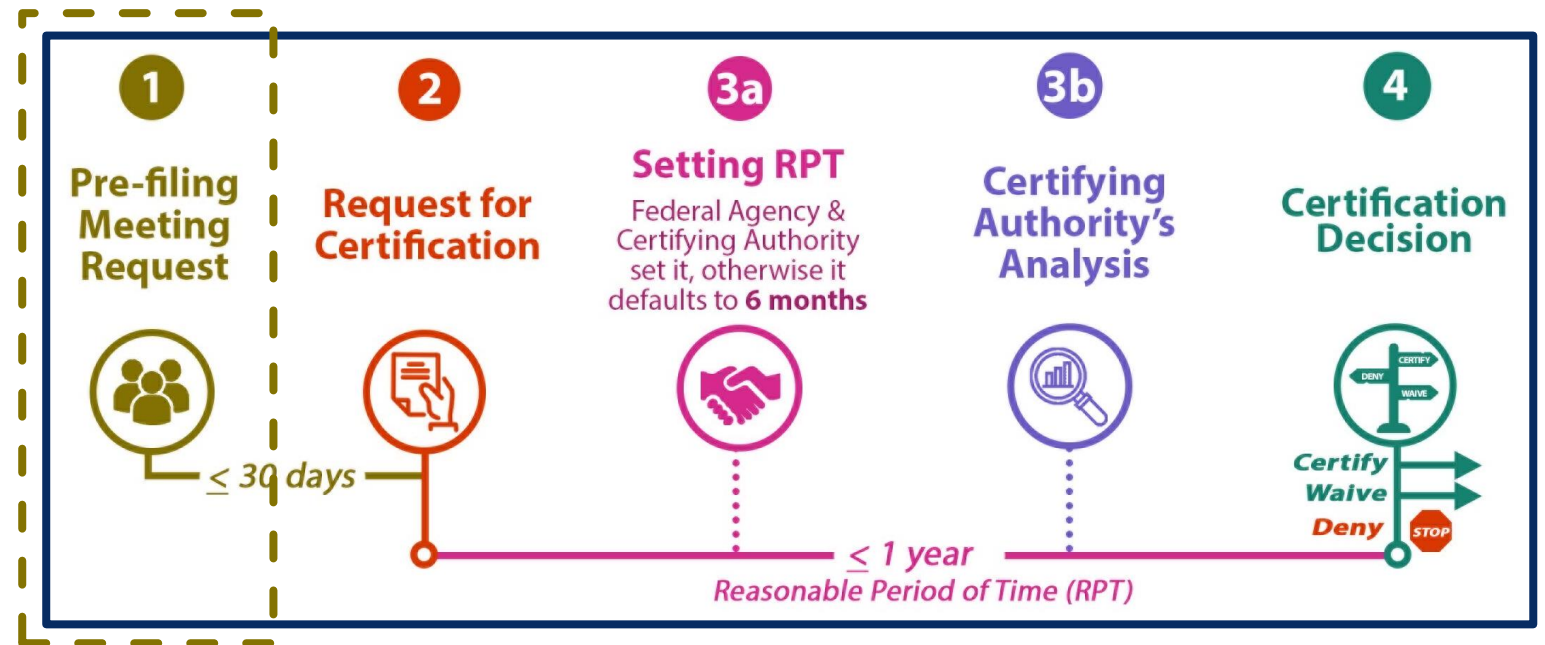
- (1) Turbine or tailrace of a hydroelectric dam
- (2) Bulldozers or other construction equipment





# 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.



The final rule provides certifying authorities with the **flexibility** to waive or shorten the requirement on:

1. **A case-by-case basis** (*i.e.*, individually); or
2. **A categorical basis** (*e.g.*, certifying authorities could waive the pre-filing meeting request requirement for:
  1. all projects,
  2. specific types of projects (*e.g.*, projects under 300 linear feet), or
  3. types of federal licenses or permits (*e.g.*, general permits)).



## Shortening or waiving the pre-filing meeting request requirement



# Recommended pre-filing meeting request contents

The Agency recommends that project proponents include the following information, as available, in any written request for a pre-filing meeting with EPA:

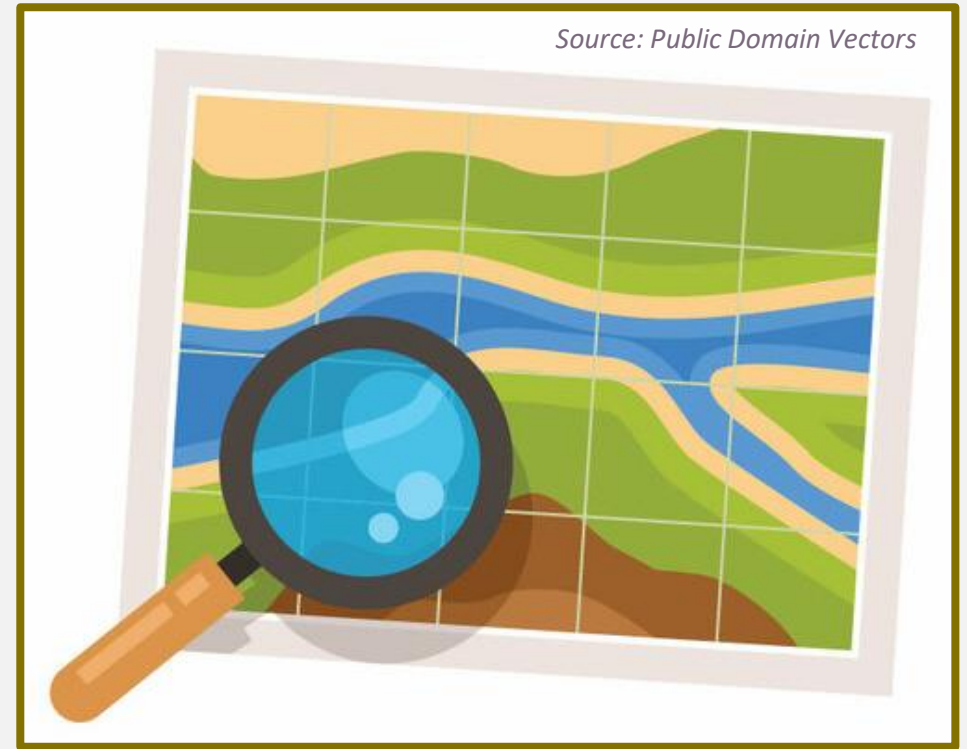
- 1 A **statement** that it is *“a request for CWA section 401 certification pre-filing meeting”*
- 2 **Name of project proponent** and appropriate **point of contact**
- 3 **Name of the Tribe or jurisdiction** for which EPA is serving as the certifying authority
- 4 Planned **project location** (including identification of waters of the United States into which any potential discharges would occur)
- 5 **List** of any other necessary **licenses/permits** (e.g., state permits, other Federal permits, etc.)
- 6 **Project type** and a **brief description** of anticipated project construction and operation activities
- 7 The anticipated **start work date**



# Recommended pre-filing meeting process



Source: Evolution Equity Partners



Source: Public Domain Vectors

Project proponents could share a **description** and **map** of the proposed project location and **timeline**, as well as discuss **potential water quality-related impacts** from the activity.

When certification is required

Pre-filing Meeting Process

Request for Certification

Reasonable Period of Time

Certifying Authority's Analysis

Certification Decision

Post-Certification Process

# Recommended pre-filing meeting process, continued



Certifying authorities could provide information on **how to submit requests for certification** (e.g., discuss procedural requirements for submission of a request for certification) or discuss the **additional contents in requests for certification**.



Certifying authorities could also **consider including the Federal agency** in the pre-filing meeting process for early coordination where the Federal agency is not otherwise legally precluded.



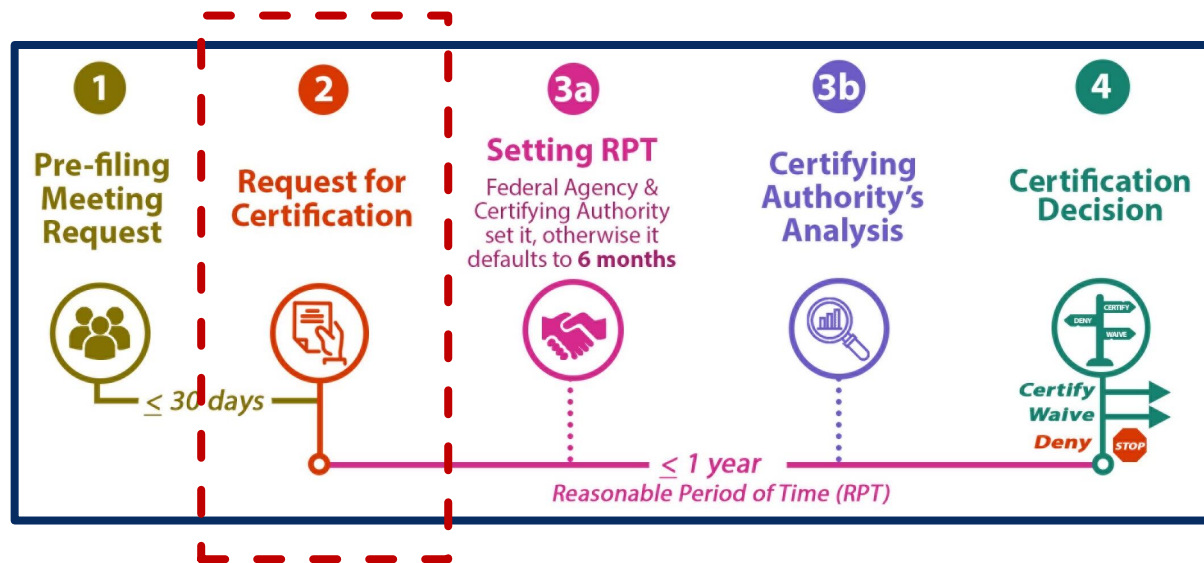


# Request for certification

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

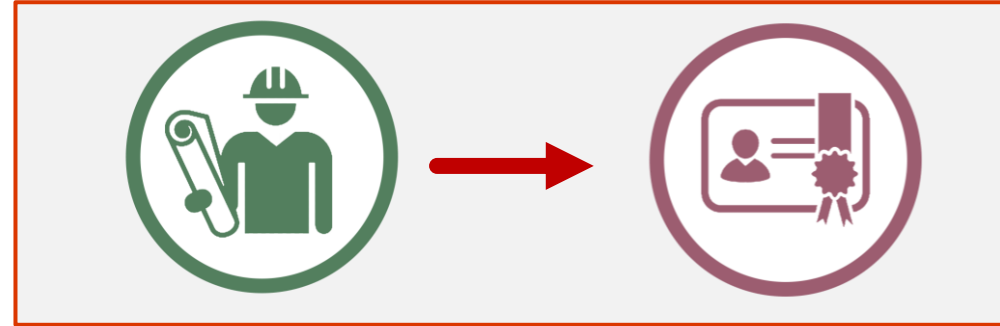
Section 121.5(b) defines **additional requirements** when EPA is the certifying authority (or when states/Tribes do not identify additional requirements).

**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

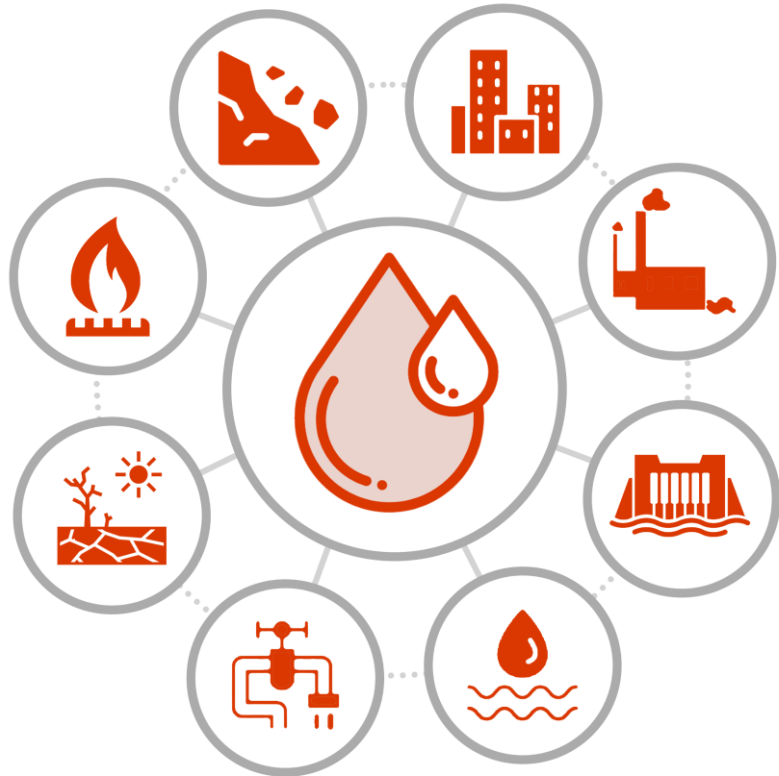
Certification Decision

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 commerce
- 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



# Additional contents of a request for certification

Certifying authorities should make their additional contents for request for certification and applicable submission procedures **READILY AVAILABLE** and **TRANSPARENT** to the regulated public.

## EXAMPLES



Discuss additional contents and applicable submission procedures in **pre-filing meetings**



Post additional contents and applicable submission procedures on the **certifying authority's website**



Ensure an **up-to-date** certifying authority **point of contact** is readily available to project proponents with questions about the additional contents and/or applicable submission procedures



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).



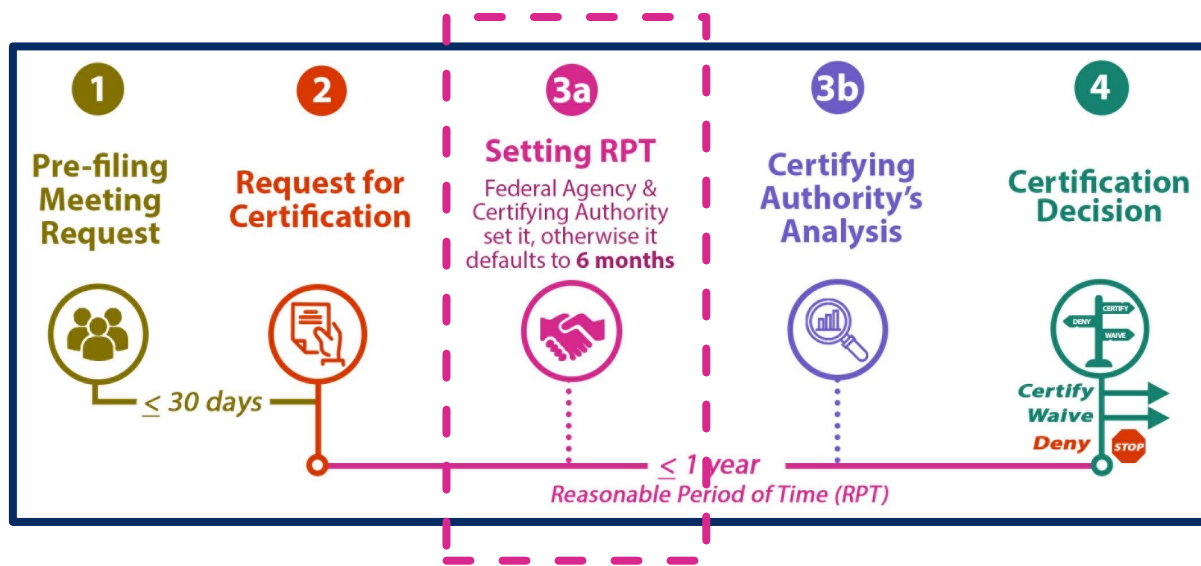
# Reasonable period of time (RPT)



**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.**







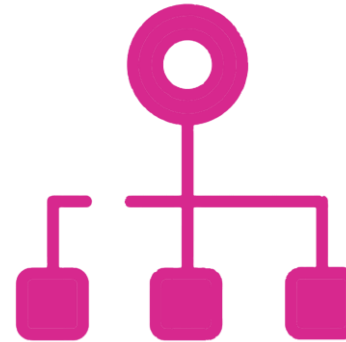
# Setting the reasonable period of time

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.)

- ✓ **Project type, complexity, location and scale**
- ✓ The certifying authority's **administrative procedures**
- ✓ **Other relevant timing considerations** (e.g., Federal license or permit deadlines)
- ✓ Associated National Environmental Policy Act **deadlines** and/or **anticipated timeframe** for neighboring jurisdictions process
- ✓ The **potential** for the licensed or permitted activity to **affect water quality**



# Setting the reasonable period of time

Example **FACTORS** that Federal agency and certifying authority may consider when setting the reasonable period of time

# 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



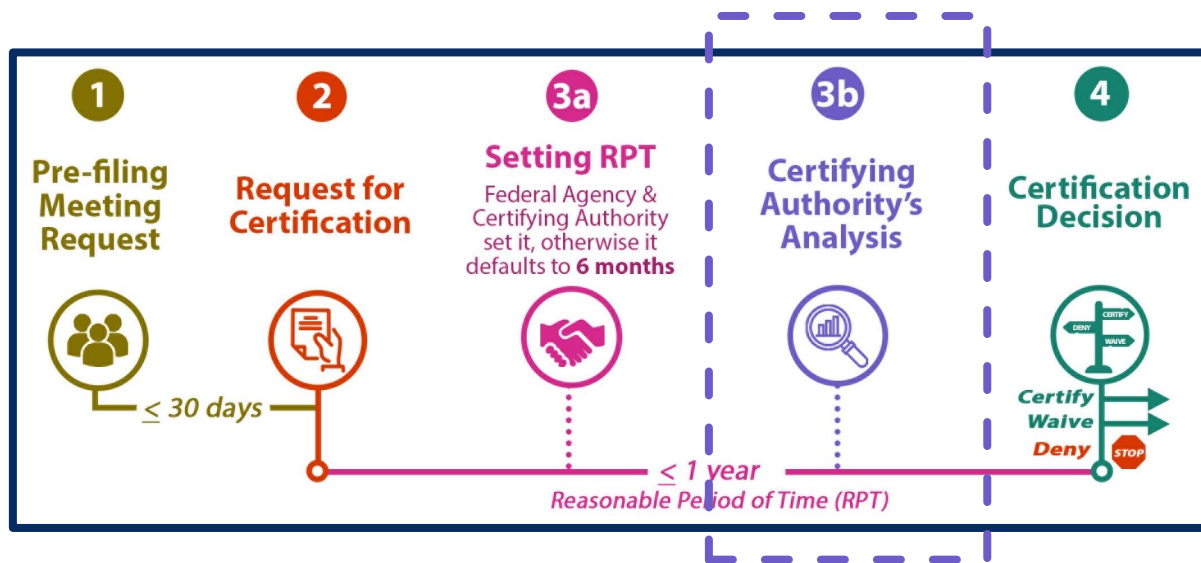
If the Federal agency and certifying authority **agree to extend** the reasonable period of time for any reason



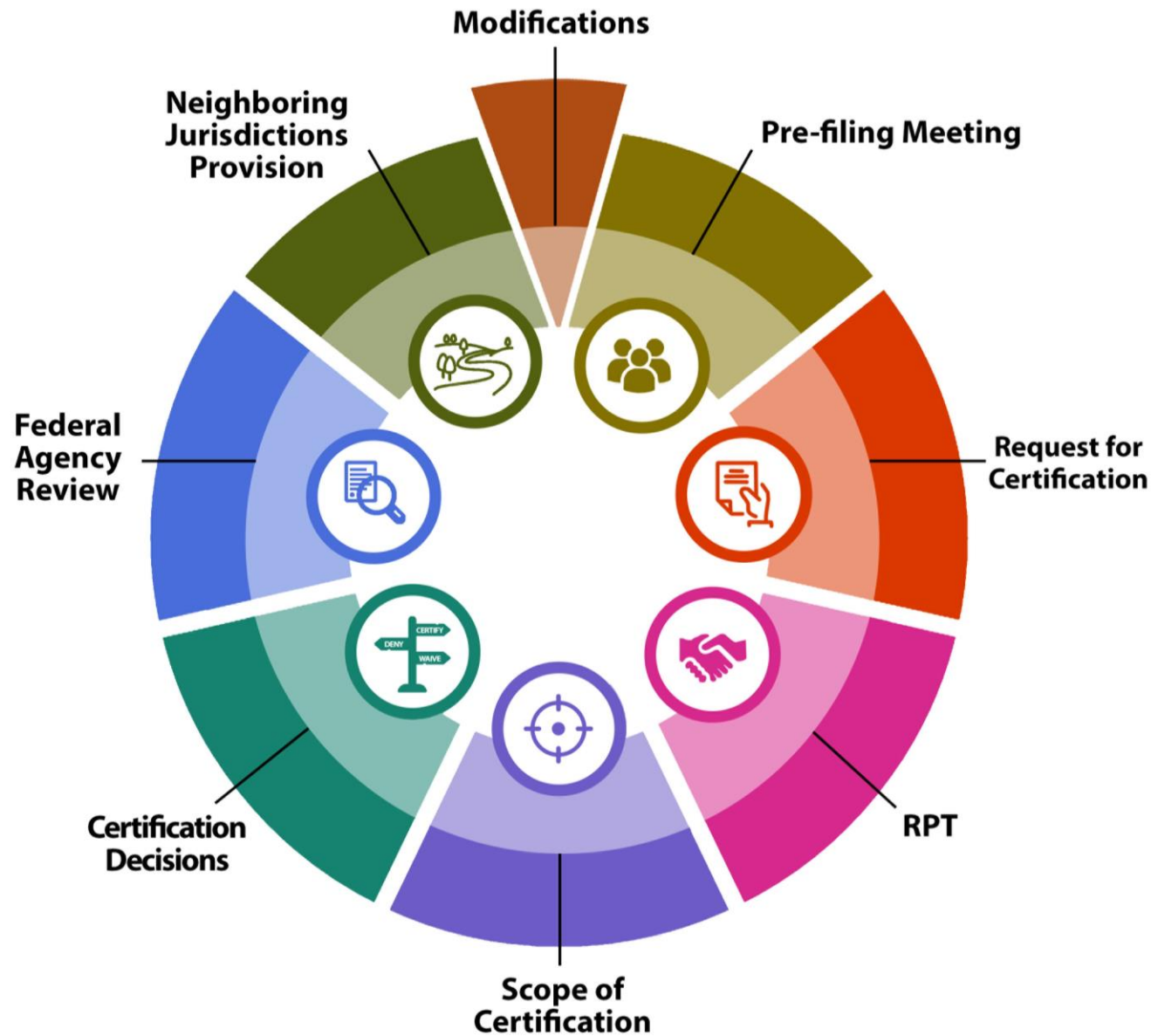
# Public notice procedures

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

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.



# Scope of Certification

Certifying authority must determine 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.*

# What is the “activity”?

Certifying authority shall evaluate the water quality-related impacts of the *entire activity* subject to the Federal license or permit.

- ▶ Includes the construction and operation
- ▶ Not limited to the aspect of the activity that:
  - ▶ Is directly authorized by a given Federal license or permit, or
  - ▶ Will occur before the Federal license or permit expires

## How does the certifying authority determine the activity subject to its analysis?

Depends on the nature, size, location, and type of project that requires a federal license or permit.

When certification is required

Pre-filing Meeting Process

Request for Certification

Reasonable Period of Time

Certifying Authority's Analysis

Certification Decision

Post-Certification Process



# 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.





# 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 are water quality requirements?

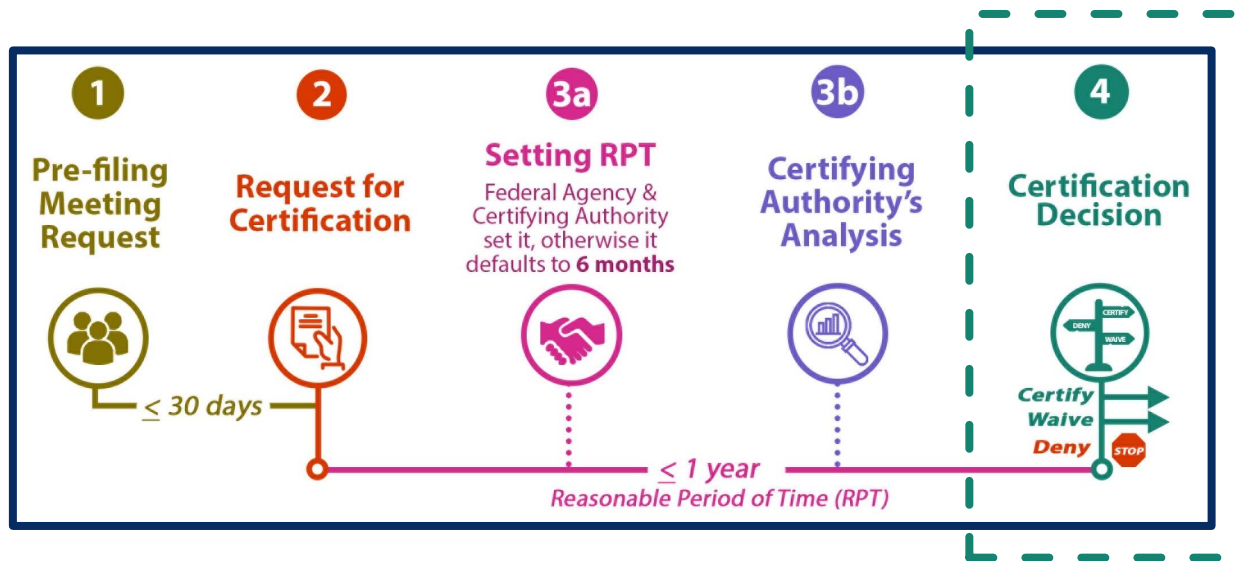
- ▶ *Any limitation, standard, or other requirement under (CWA):*
  - ▶ Section 301 (**effluent limitations**)
  - ▶ Section 302 (**water quality-related effluent limitations**)
  - ▶ Section 303 (**water quality standards and implementation plans**)
  - ▶ Section 306 (**national standards of performance**)
  - ▶ Section 307 (**toxic and pretreatment effluent standards**)
- ▶ *Any Federal and state or Tribal laws or regulations implementing those sections, and*
- ▶ *Any other water quality-related requirement of state or Tribal law.*



# 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



**Grant**

Certifying authority has determined that the activity will comply with water quality requirements

**Grant with conditions**

Certifying authority has determined that the activity will comply with water quality requirements, but only if certain conditions are met

**Denial**

Certifying authority is not able to certify that the activity will comply with water quality requirements

**Express Waiver**

Indicates only that the certifying authority has chosen not to act on a request for certification

**Hybrid Decisions**

**Decisions without a request for certification**

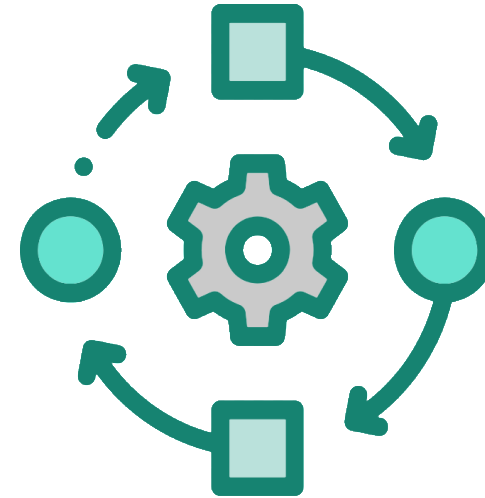


# Certification conditions

Section 401(d) requires certification conditions to be incorporated into the Federal license or permit.

For purposes of section 401, certification conditions **cannot** “live on” past the expiration of the federal license or permit to which they attach

**Adaptive management conditions  $\neq$  reopeners**



Certifying authorities may develop certification conditions that enable projects to adapt to future water quality-related changes, i.e., “**adaptive management conditions**”

When certification is required

Pre-filing Meeting Process

Request for Certification

Reasonable Period of Time

Certifying Authority's Analysis

Certification Decision

Post-Certification Process



# Certification decisions

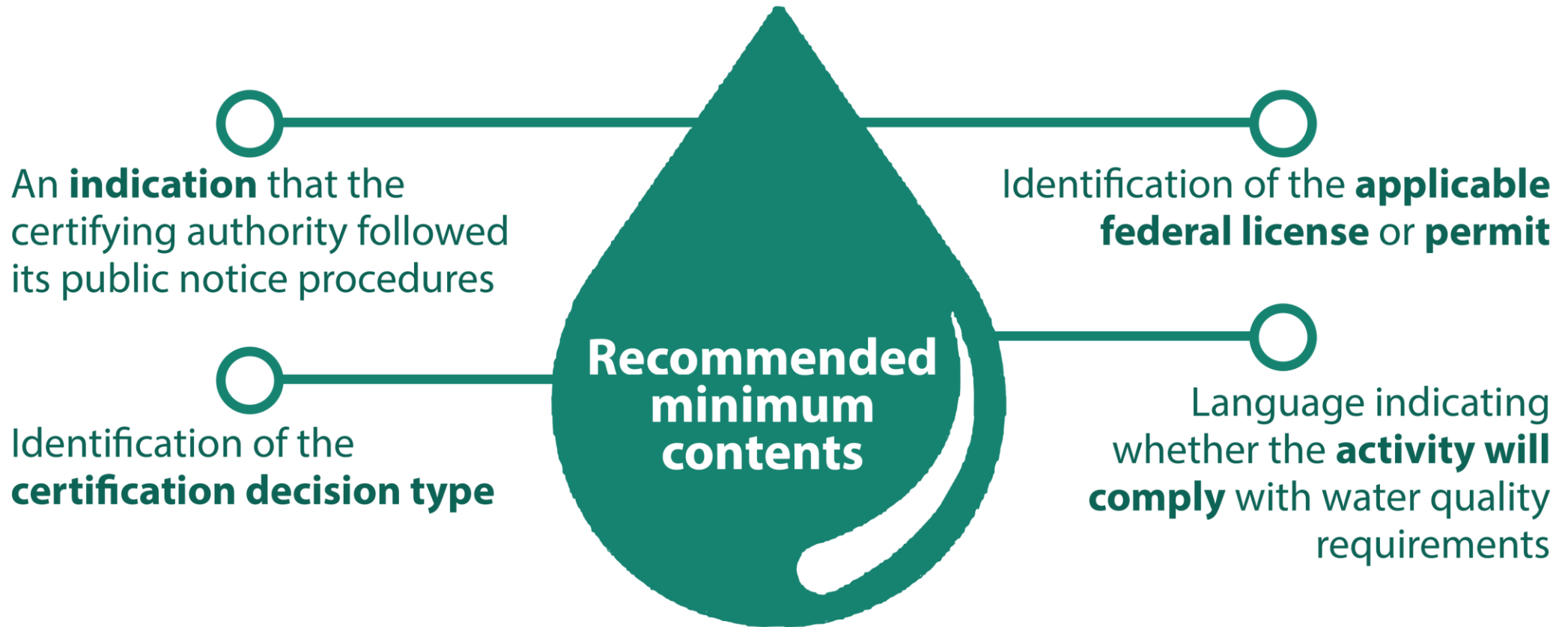


Certification decisions must be **in writing** to ensure the project proponent and Federal agency can clearly understand the certification decision and, for a certification with conditions, any conditions that must be included in the Federal license or permit.

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).



# Certification decisions

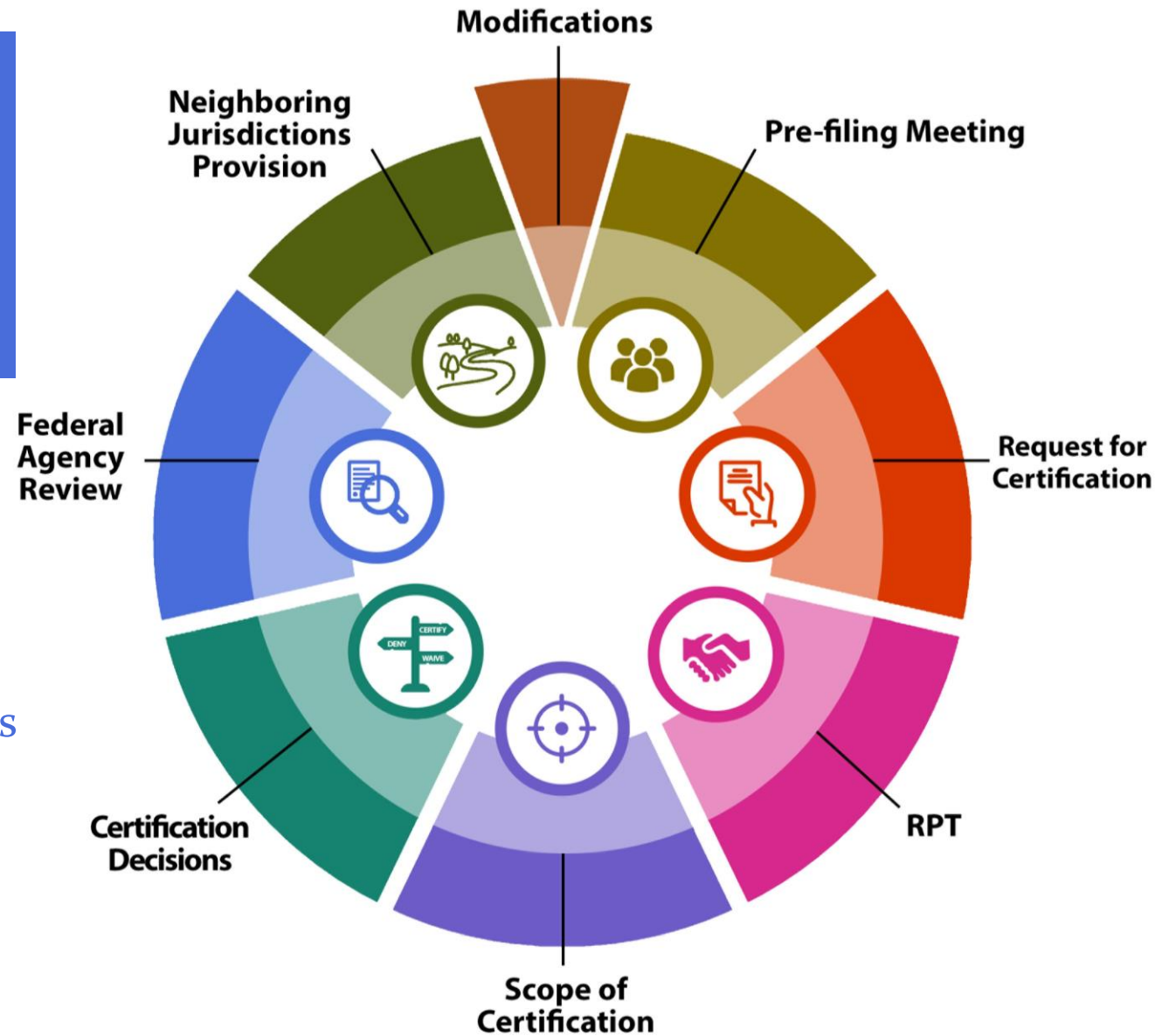




# Federal agency review

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.



When certification is required

Pre-filing Meeting Process

Request for Certification

Reasonable Period of Time

Certifying Authority's Analysis

Certification Decision

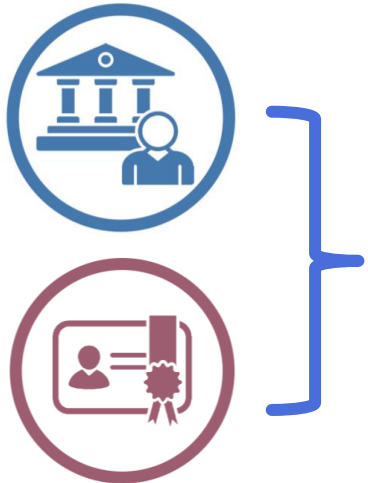
Post-Certification Process

# Federal agency review for timeliness and constructive waivers

If the Federal agency reviews for timeliness and determines that the reasonable period of time has passed without the certifying authority acting on the request for certification, then the Federal agency may determine that a constructive waiver has occurred.

**A Federal agency could set up an MOA with certifying authorities to establish notification protocols prior to finding a waiver of certification.**

**Example:** where a certifying authority has not acted by 30 days prior to the end of the reasonable period of time, the Federal agency will notify the certifying authority that a waiver will occur if it does not receive a certification decision or a request to extend the reasonable period of time in that 30 day period.







# Demonstrating compliance with federal agency review



Federal agency could work with the project proponent to **obtain location information** indicating where the discharge originates or will originate

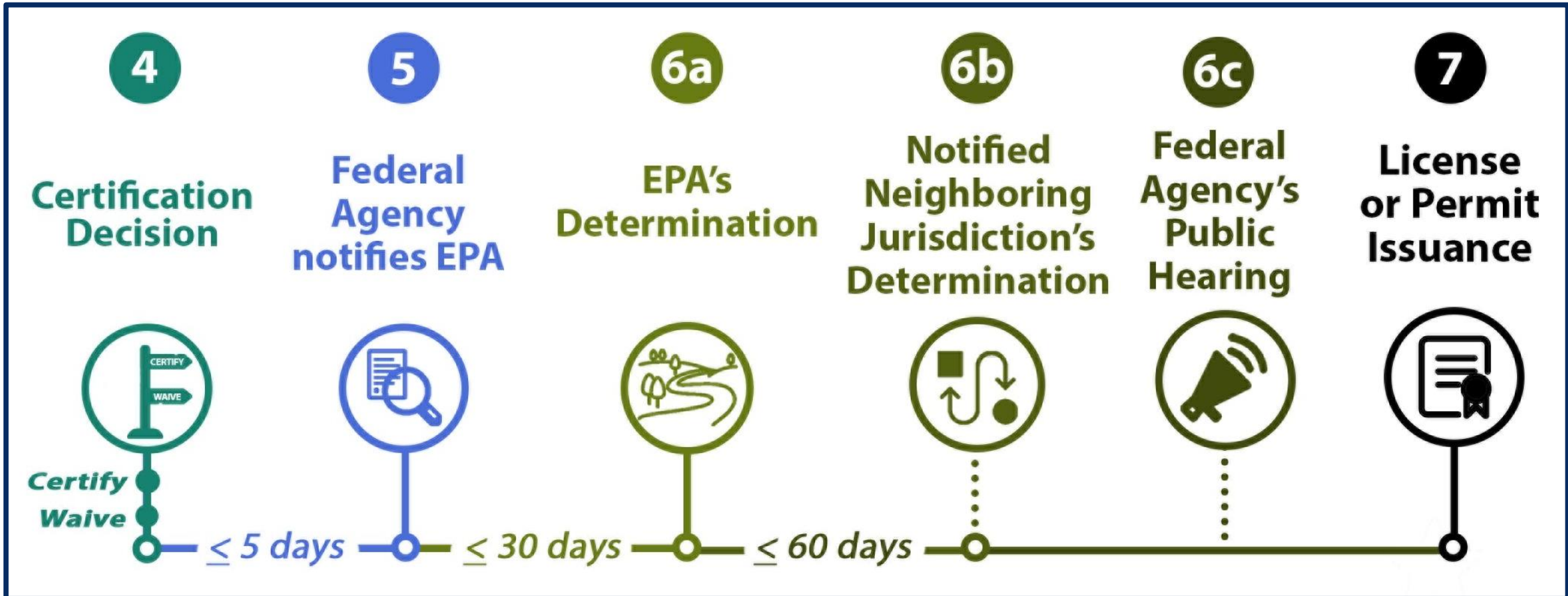


Certifying authority could include **a copy of the public notice** in its certification decision, include a description of the public notice process it undertook in the certification decision, or by simply including an **attestation statement** in the certification decision

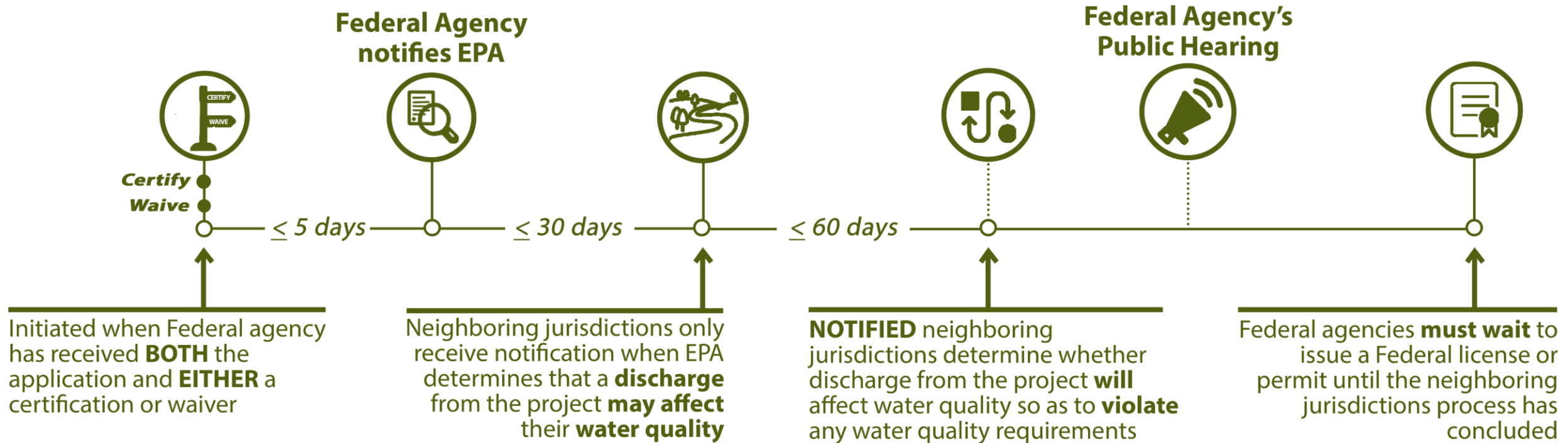


Federal agency could **verify** with notice received under section 121.6(a) and **joint written agreement** made under section 121.5(b)

# Final 2023 Rule: Post-Certification Process

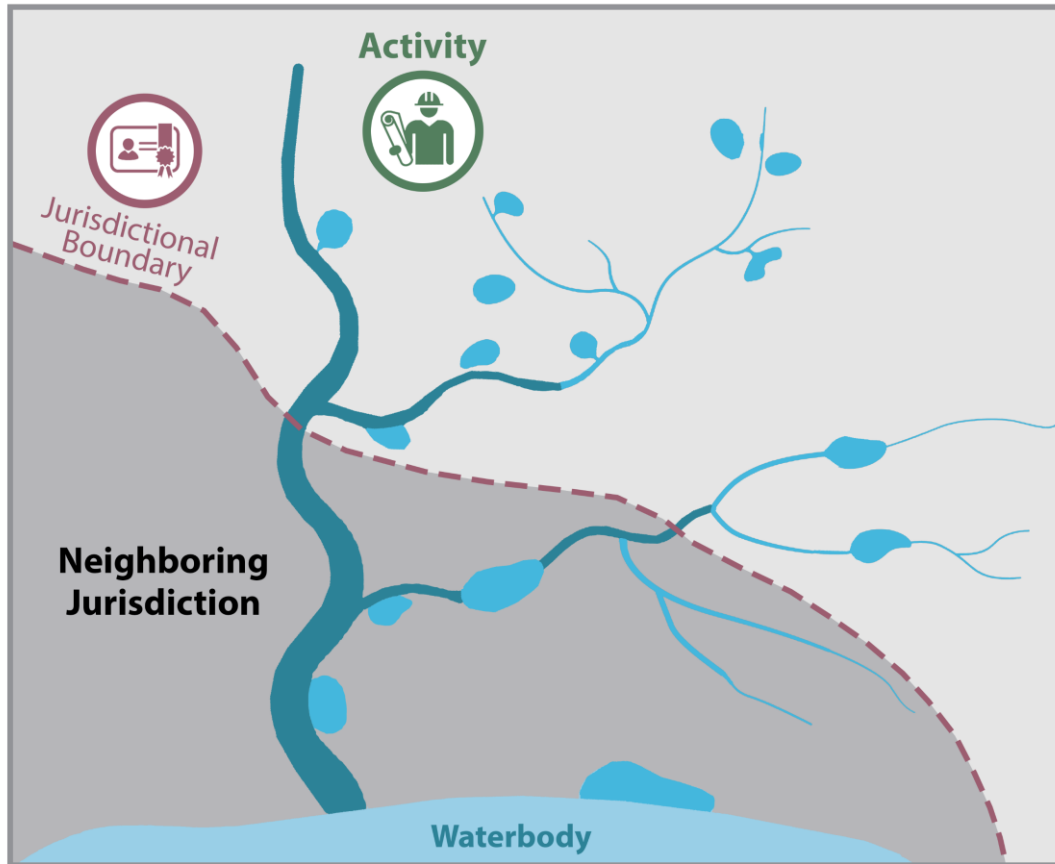


# Neighboring jurisdictions process



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

# What is a neighboring jurisdiction?



*Adapted from Resource Environmental Solutions*

## Section 121.1(g)

“any state, or Tribe with treatment in a similar manner as a state for Clean Water Act section 401 in its entirety or only for Clean Water Act section 401(a)(2), other than the jurisdiction in which the discharge originates or will originate”

When certification is required

Pre-filing Meeting Process

Request for Certification

Reasonable Period of Time

Certifying Authority's Analysis

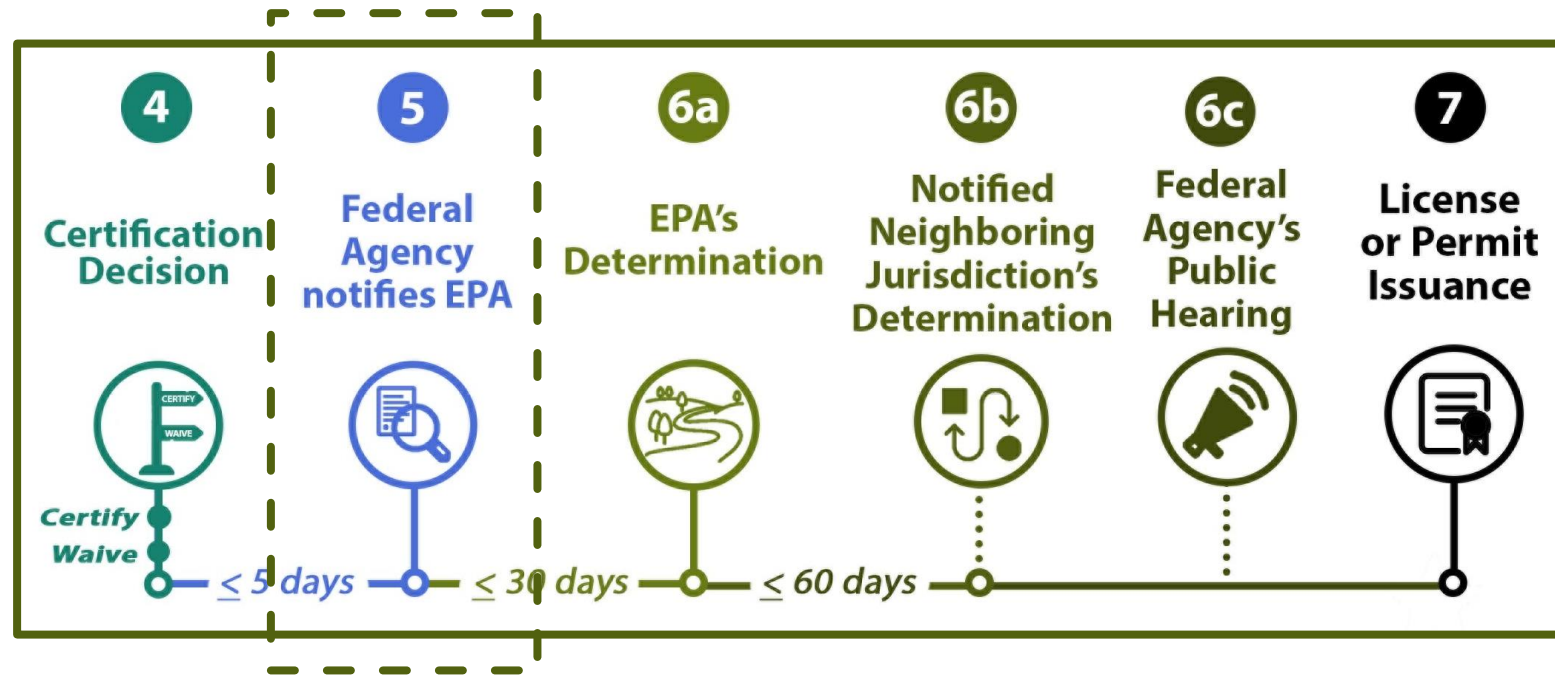
Certification Decision

Post-Certification Process



# When EPA must be notified pursuant to section 401(a)(2)

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).





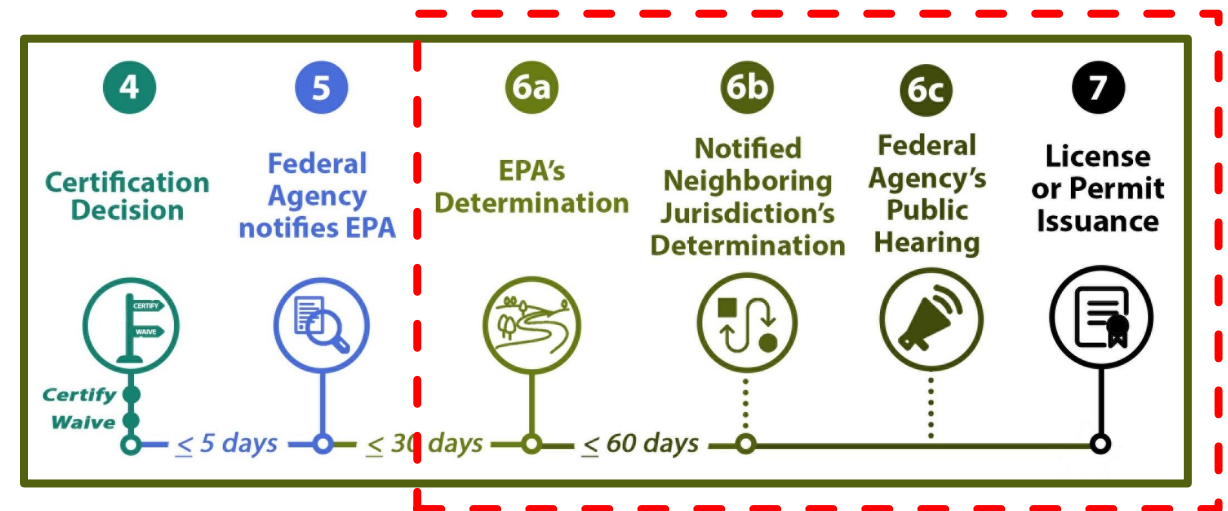
If a notified neighboring jurisdiction notifies EPA and the Federal agency **in writing** of its objection to the issuance of the license or permit and **requests a public hearing** on such objection, the licensing or permitting agency shall hold such a hearing.



If the neighboring jurisdiction withdraws the objection, it shall **notify EPA and Federal agency in writing** of the withdrawal, and the Federal agency will not need to proceed with a public hearing and can move forward with issuing the Federal license or permit.



# Withdrawal of the notified neighboring jurisdiction's objection



# 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.**

## Section 401(a)(4) inspection only applies where:

1. A federal license or permit and certification are issued **prior** to operation of the facility or activity, and
2. A subsequent federal operating license or permit is **not necessary** for the facility or activity to operate.



## Inspections under section 401(a)(4)

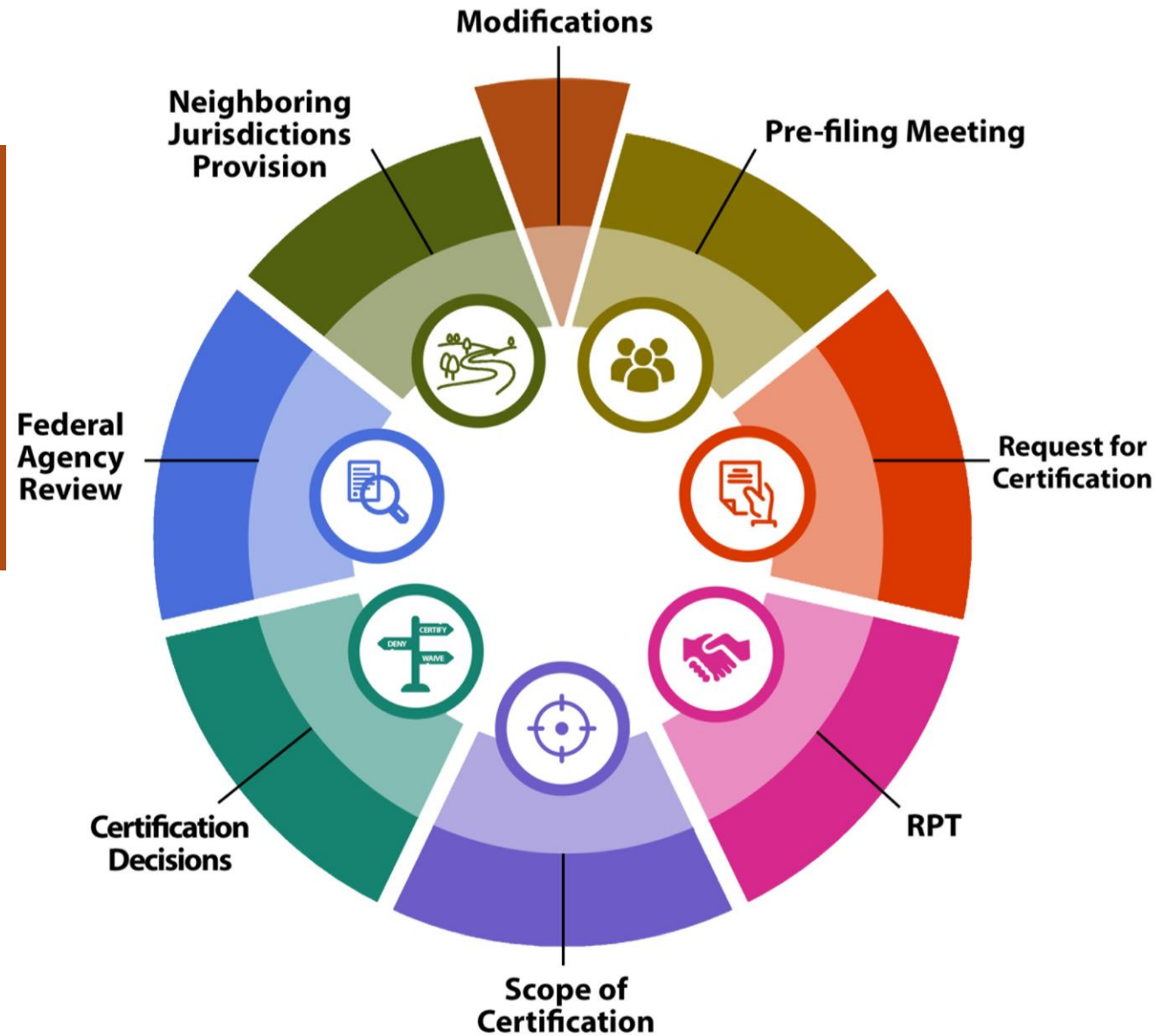
**BUT:** Section 401(a)(4) does **NOT** limit the certifying authority or federal agency's ability inspect a facility or activity in accordance with their laws and regulations.





# Modifications to certifications

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



When certification is required

Pre-filing Meeting Process

Request for Certification

Reasonable Period of Time

Certifying Authority's Analysis

Certification Decision

Post-Certification Process

# Limits to modifications

What can a certifying authority **NOT** do through the modification provision?



(1) Revoke a grant of certification (with or without conditions)

(2) Change a grant of certification (with or without conditions) into a denial or waiver of certification.

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.



# Modifications process

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

**When can it happen?** At any point after certification issuance (until the expiration of the Federal license or permit).

**What do the federal agency and certifying authority agree on?** The certifying authority and Federal agency must agree that a modification is appropriate but does not require agreement on the substance of the modification.



The process is meant to support a cooperative approach to adapting to changing circumstances or new information in an efficient and transparent way.

When certification is required

Pre-filing Meeting Process

Request for Certification

Reasonable Period of Time

Certifying Authority's Analysis

Certification Decision

Post-Certification Process

# Effective date and final rule implementation

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

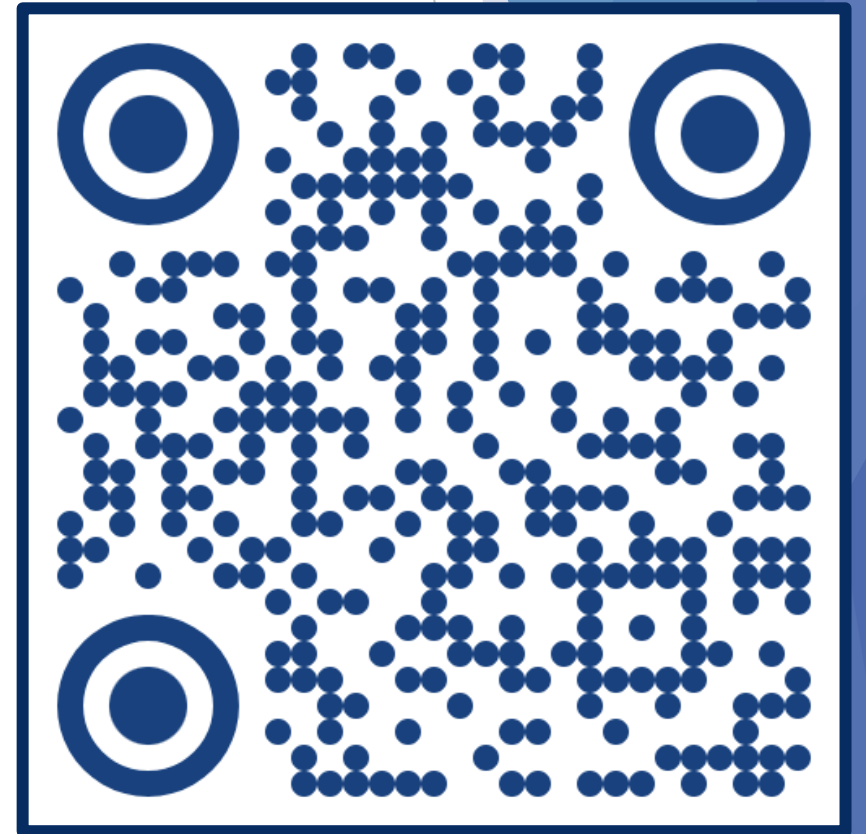


As of the effective date of this final rule, all actions taken as part of the section 401 certification process must be taken pursuant to the final rule.

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)