



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

Federal Agencies Webinar

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

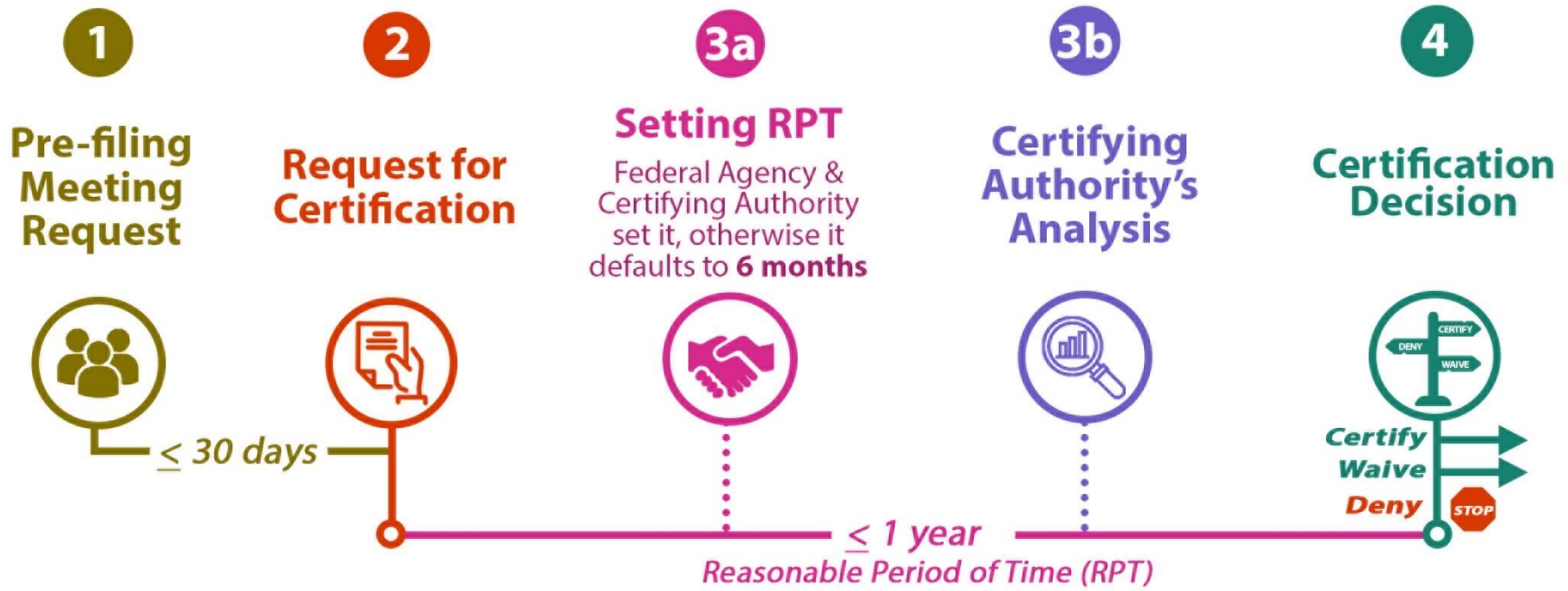
EPA acts as the certifying authority where there is no authorized tribe or state



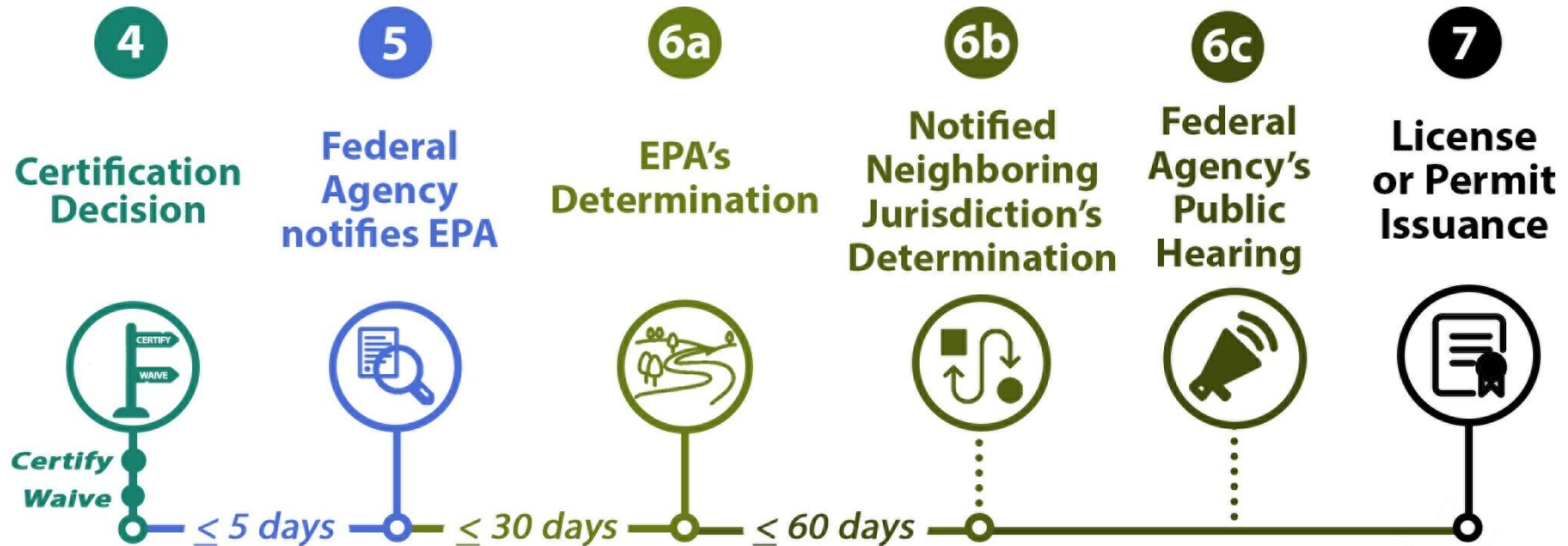
FEDERAL LICENSING OR PERMITTING AGENCY

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





Certification



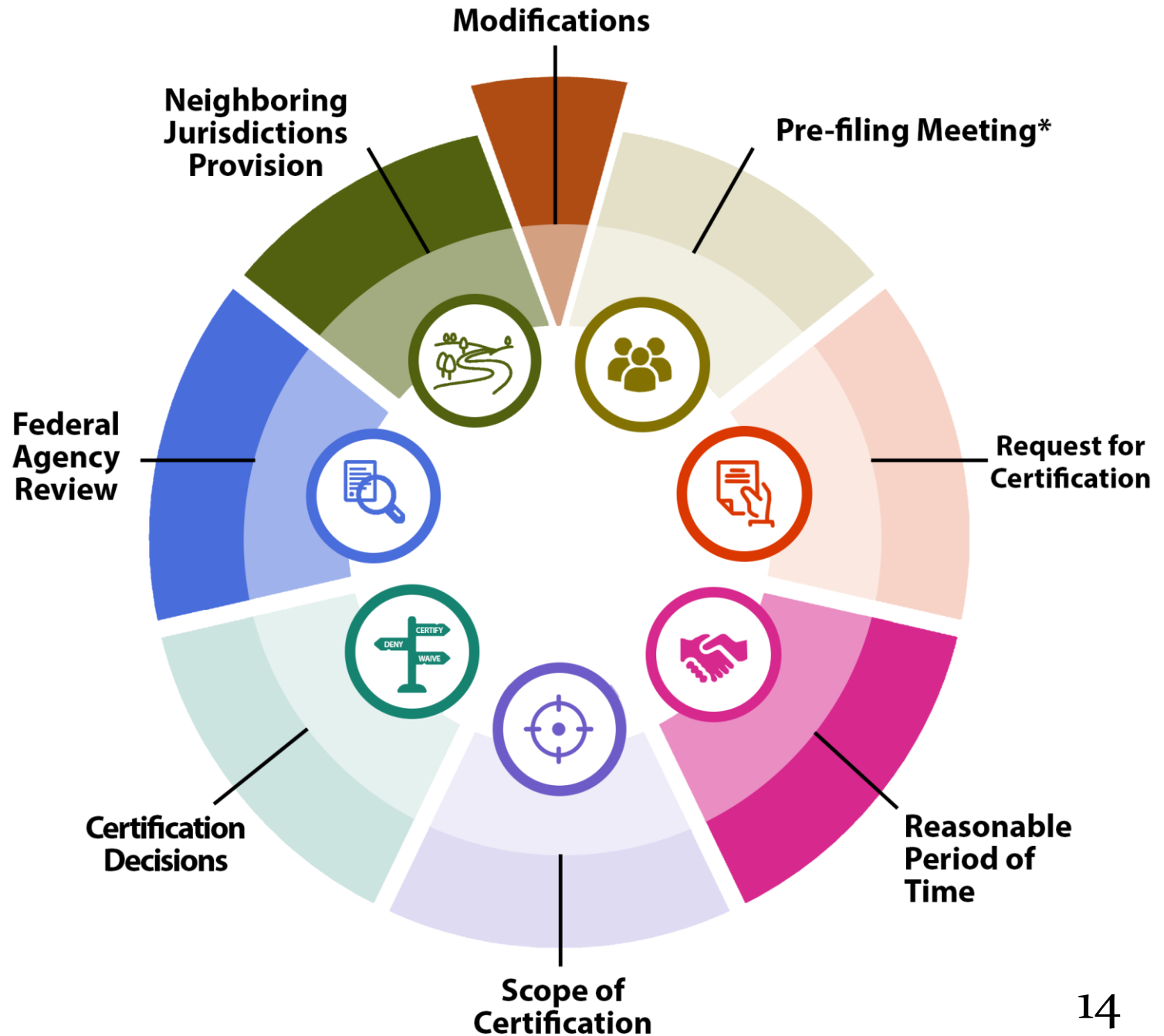
Post-Certification



Federal Agency Roles

-  **Pre-filing Meeting***
-  **Reasonable Period of Time**
-  **Federal Agency Review**
-  **Neighboring Jurisdictions Provision**

**opportunity for possible federal agency participation*



Federal licenses or permits subject to section 401

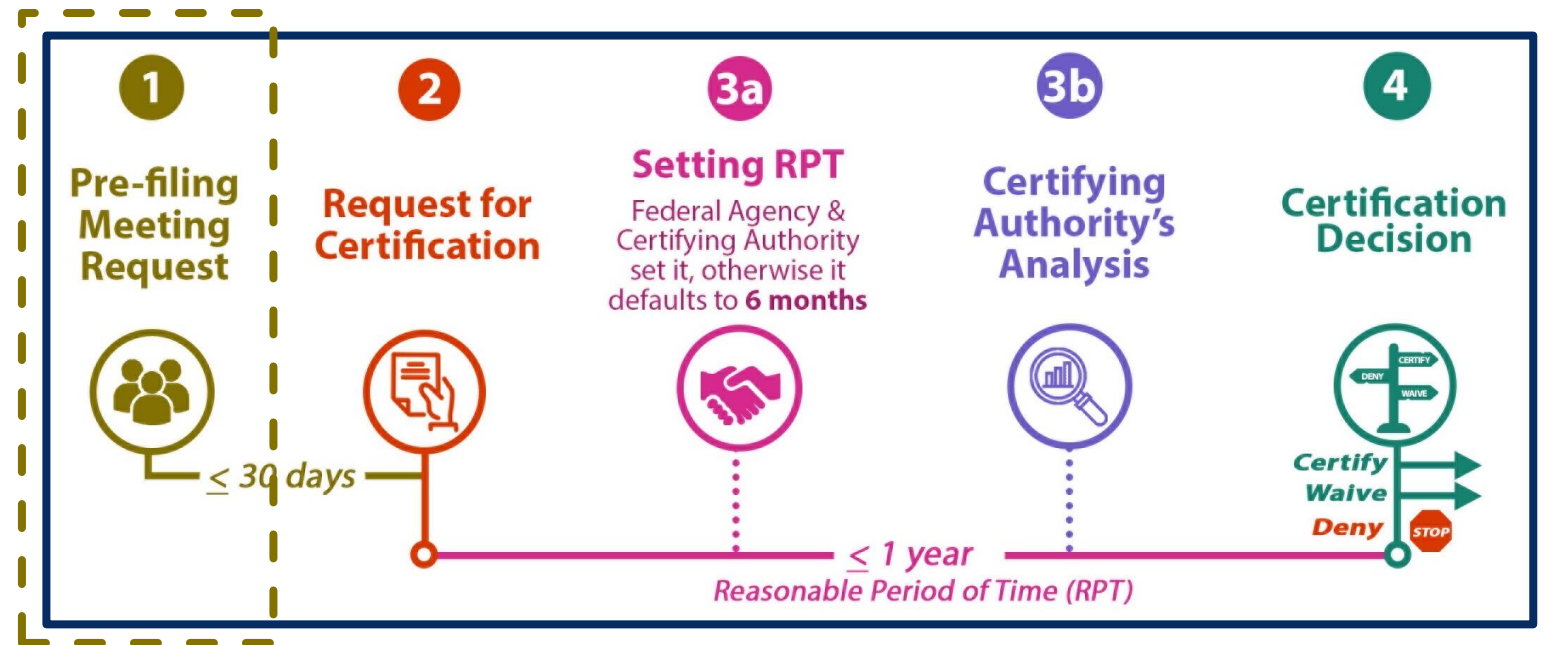
Section 401 certification is required for **any** Federal license or permit to conduct any activity that may result in any discharge into “waters of the United States.”

	<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	✗



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)).



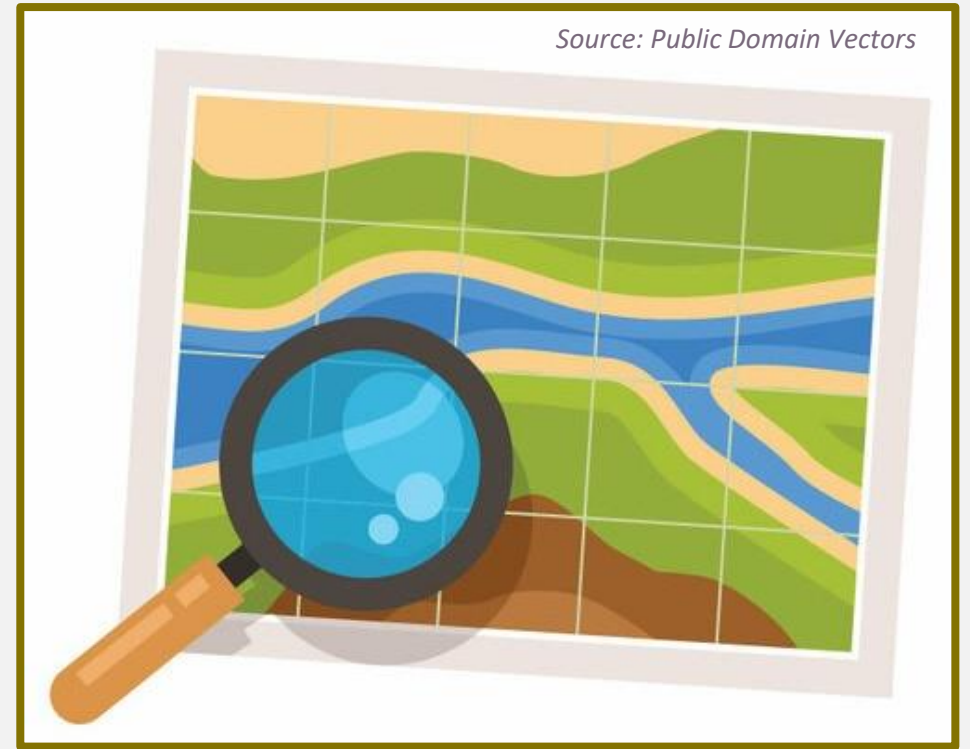
Shortening or waiving the pre-filing meeting request requirement



Recommended pre-filing meeting 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



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.

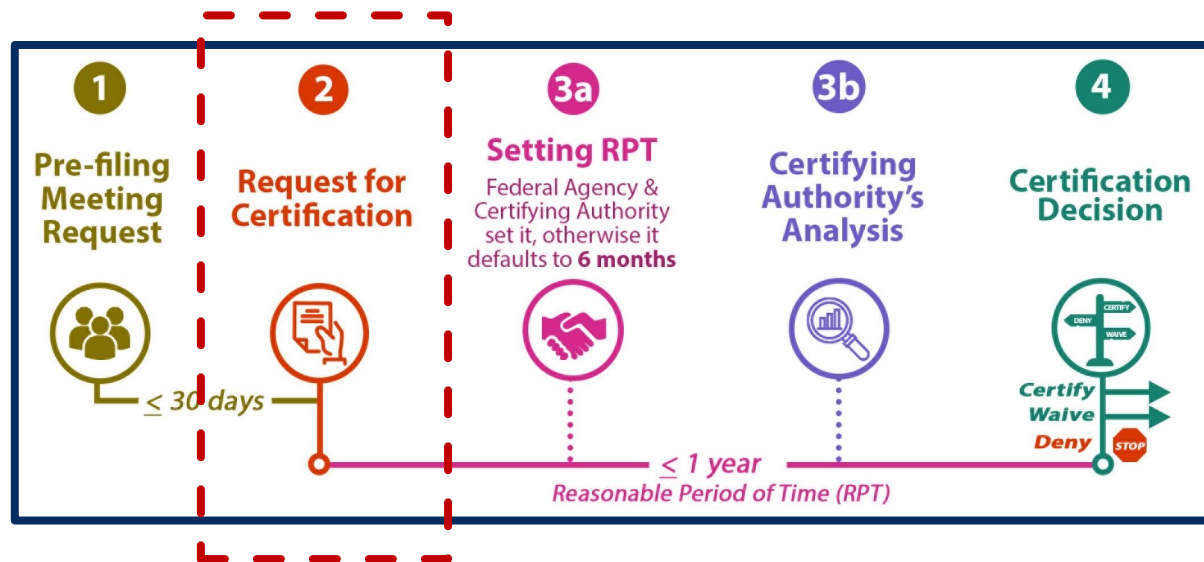


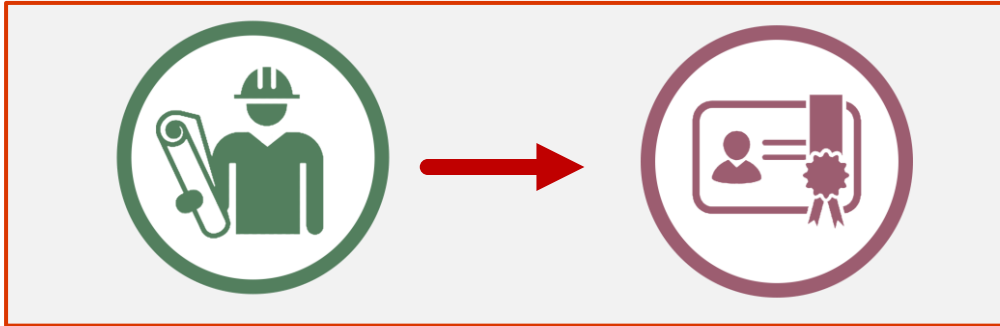
Request for certification

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.

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

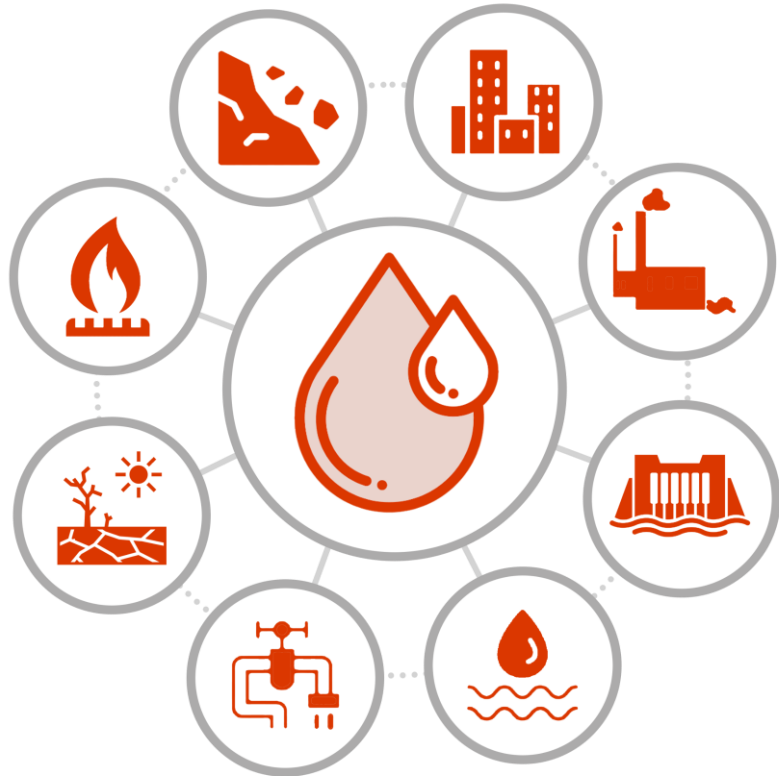
Certification Decision

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



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).



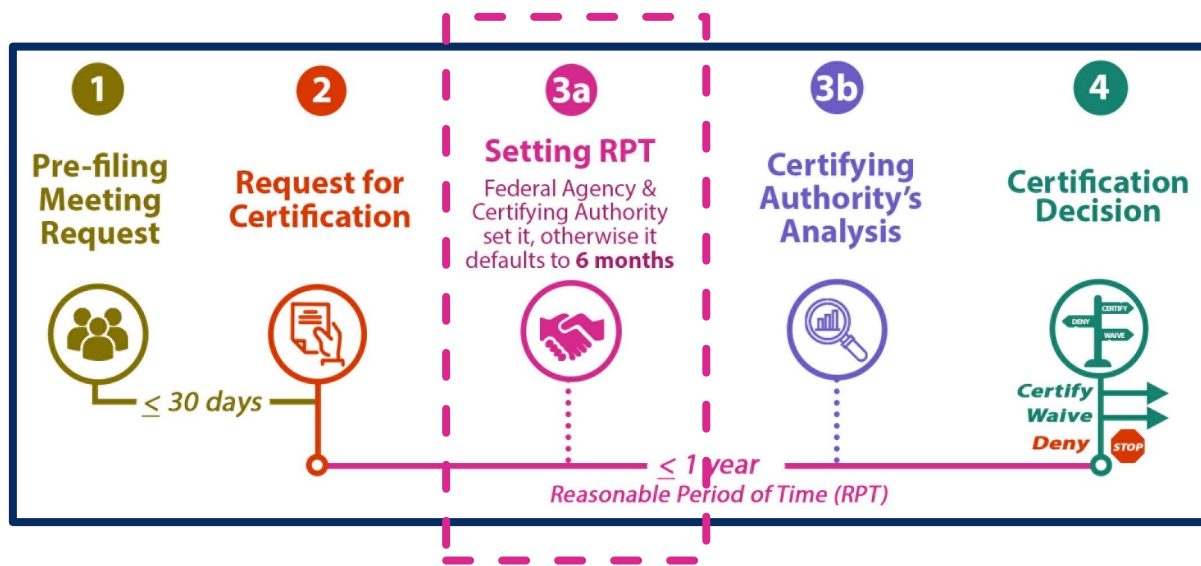
Reasonable period of time (RPT)



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.**





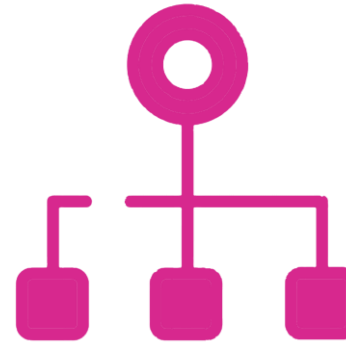
Setting the reasonable period of time

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



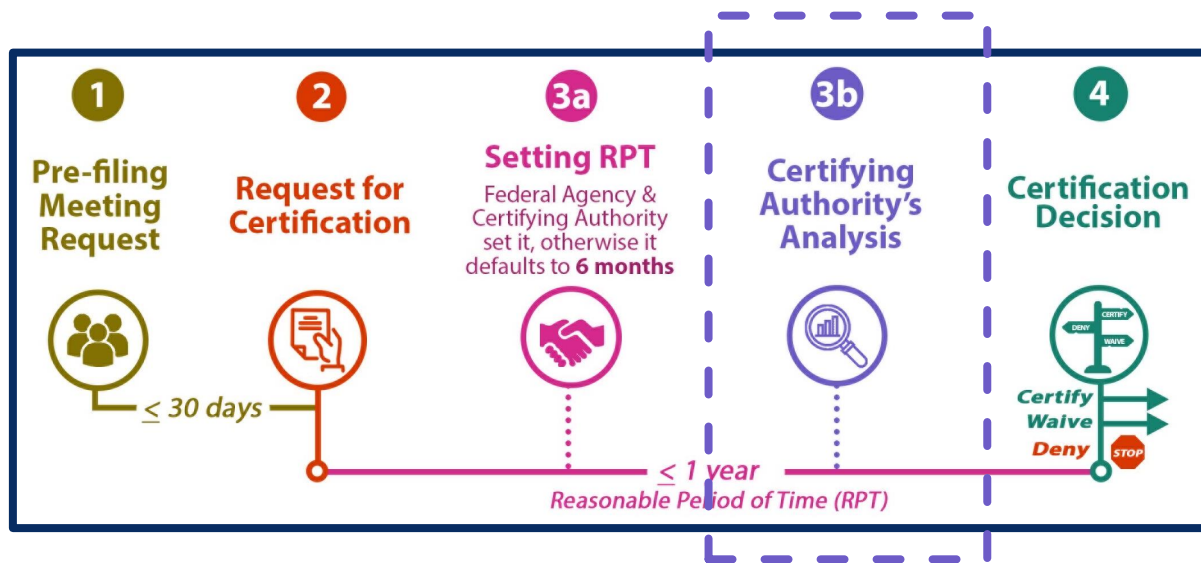
If the Federal agency and certifying authority **agree to extend** the reasonable period of time for any reason



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.

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.

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

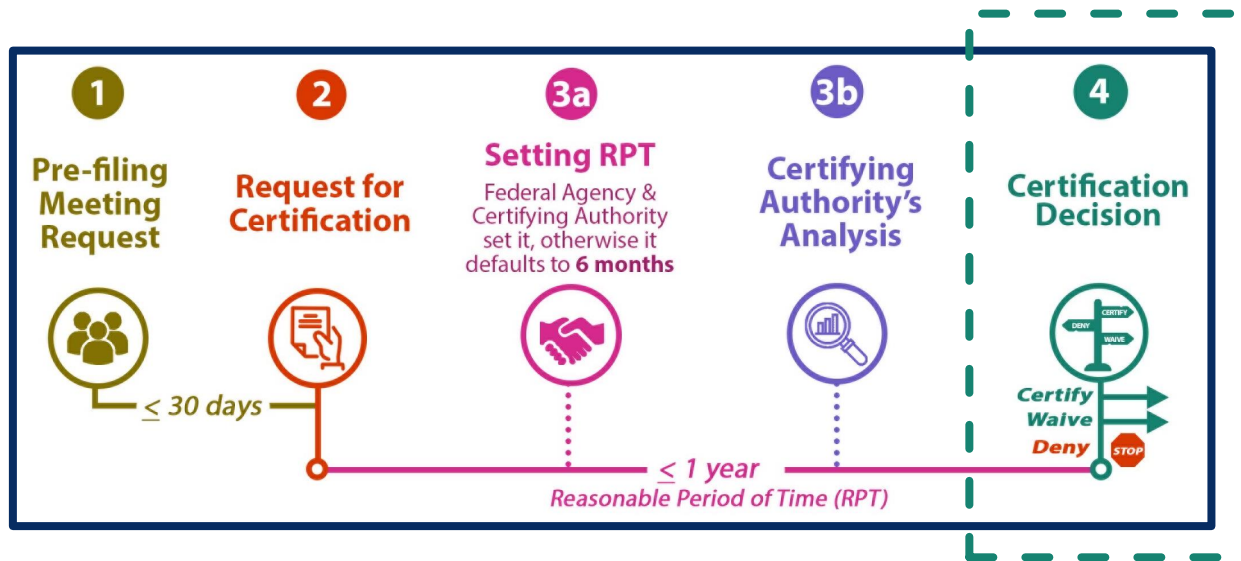
A certifying authority’s analysis of any given activity is limited to adverse **water quality-related impacts** that may prevent compliance with water quality requirements.



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).

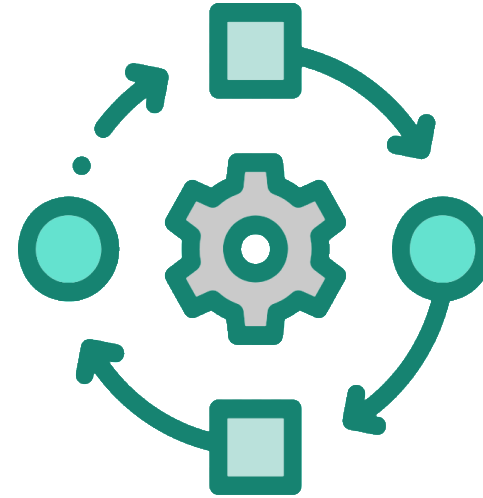


Certification conditions

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

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Waiver of Certification

A certifying authority may waive certification:



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



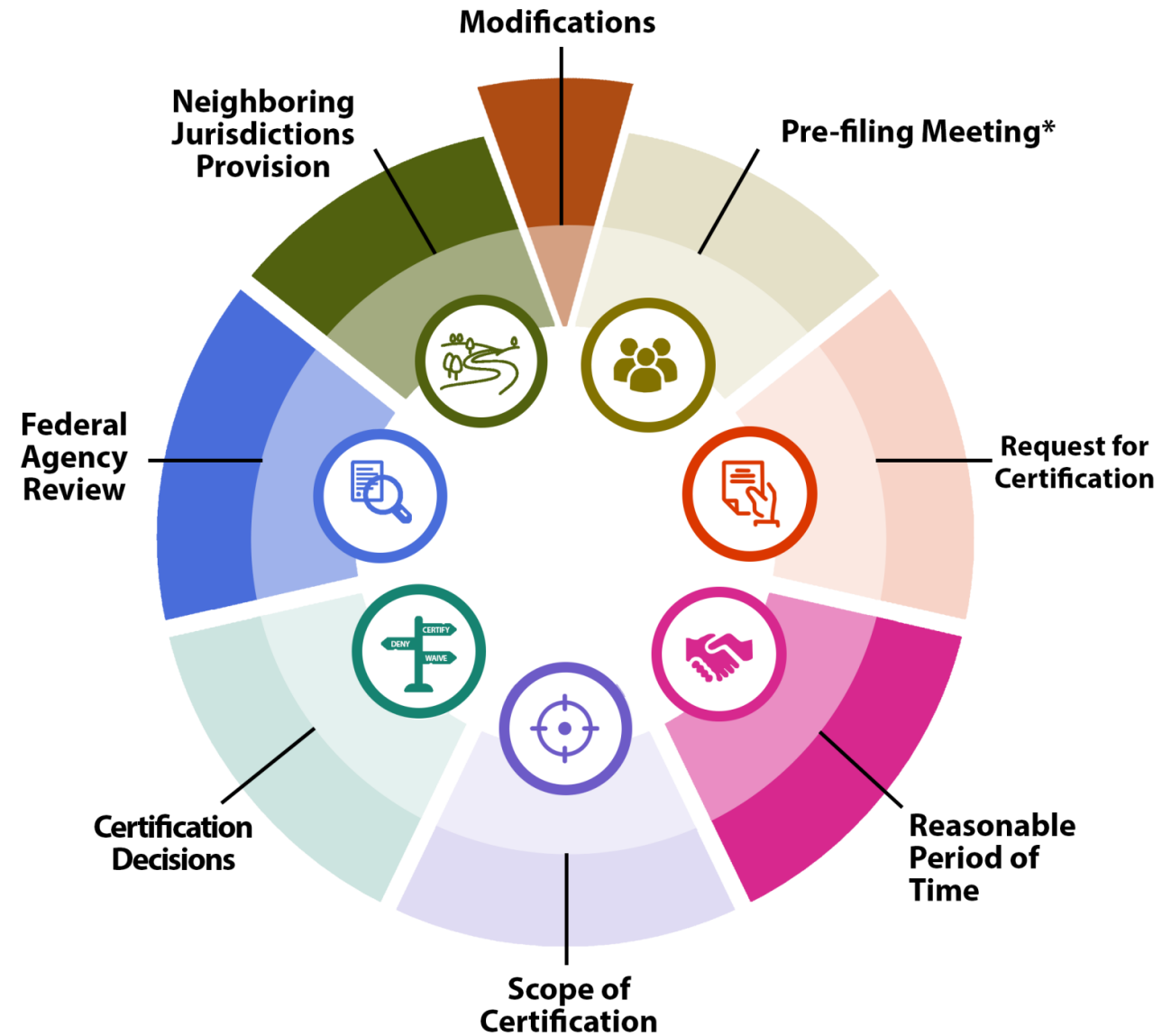
2) by failing or refusing to act within the reasonable period of time



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.



When certification is required

Pre-filing Meeting Process

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Certifying Authority's Analysis

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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



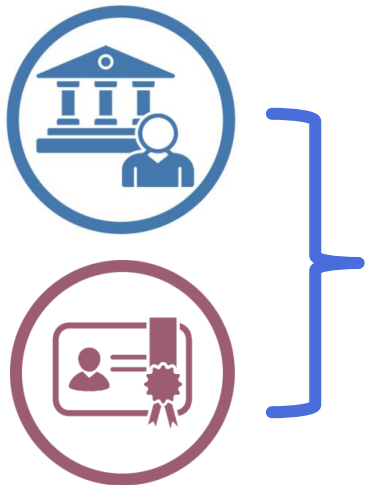
Federal agency could **verify** with notice received under section 121.6(a) and **joint written agreement** made under section 121.5(b)

Federal agency review for timeliness and constructive waivers

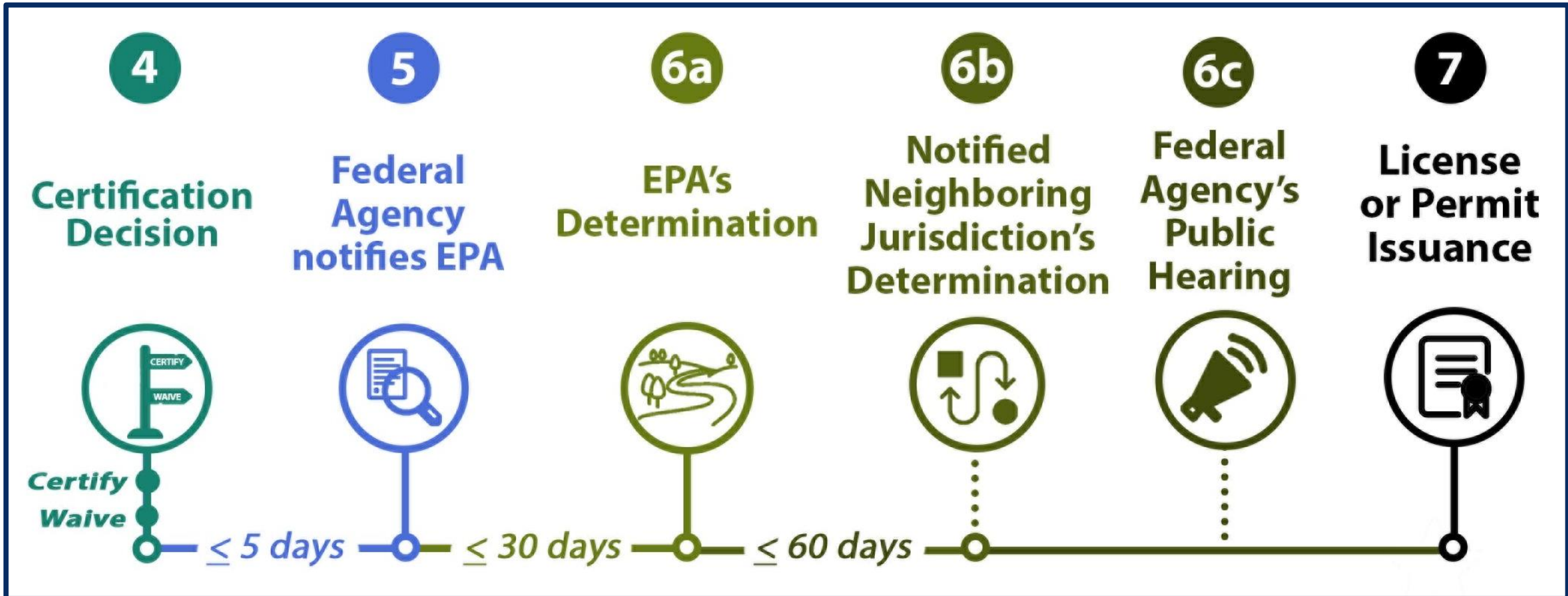
If the Federal agency reviews for timeliness and determines that the reasonable period of time has passed without the certifying authority acting on the request for certification, then the Federal agency may determine that a constructive waiver has occurred.

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

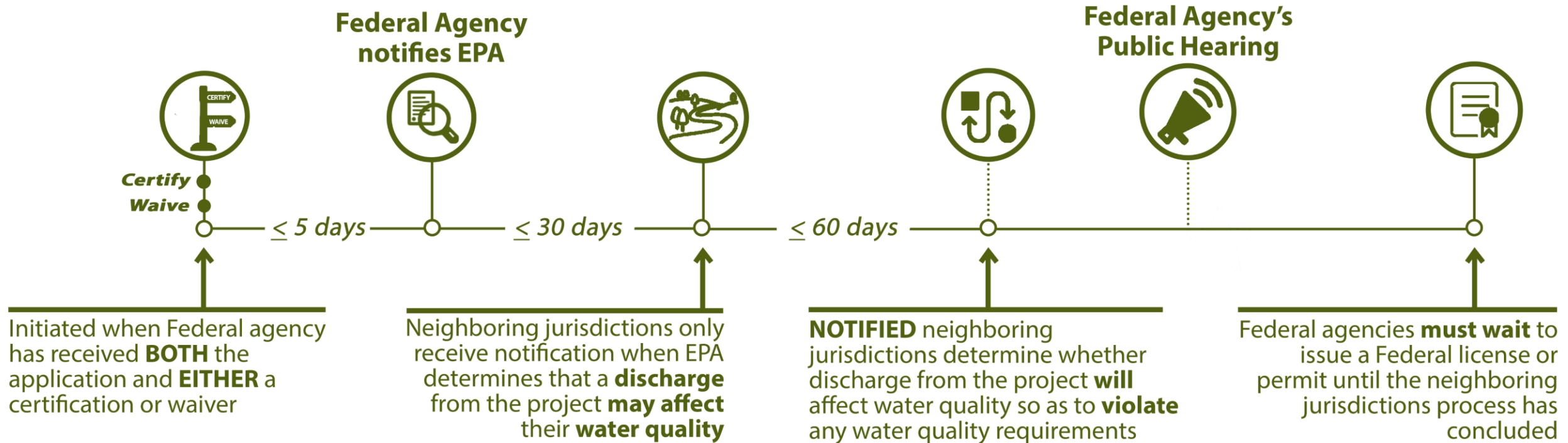
Example: where a certifying authority has not acted by 30 days prior to the end of the reasonable period of time, the Federal agency will notify the certifying authority that a waiver will occur if it does not receive a certification decision or a request to extend the reasonable period of time in that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



Final 2023 Rule: Post-Certification Process

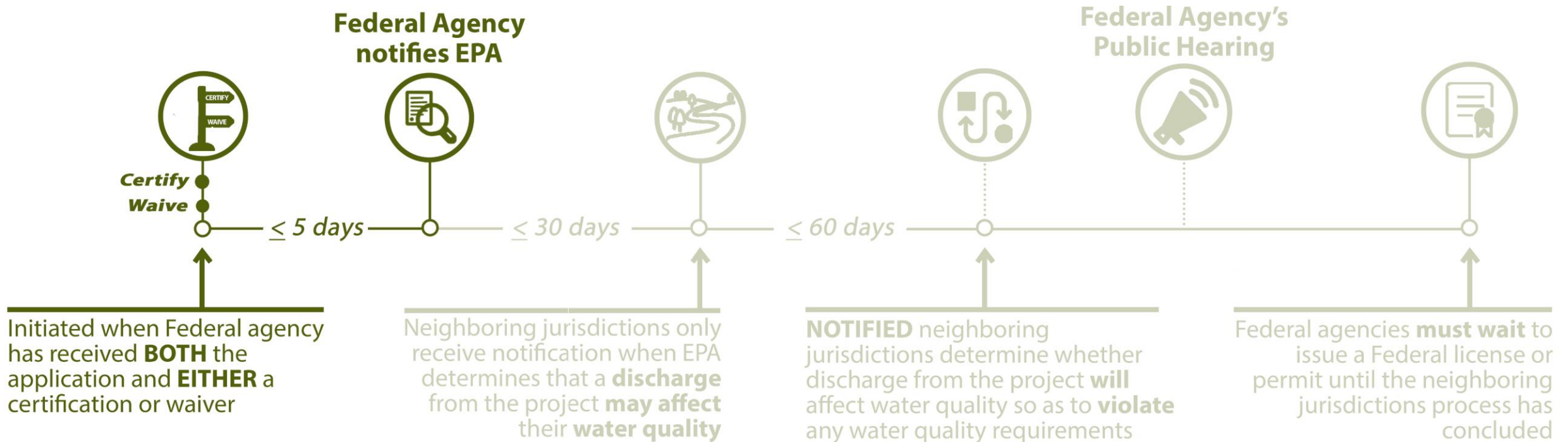


Neighboring jurisdictions process



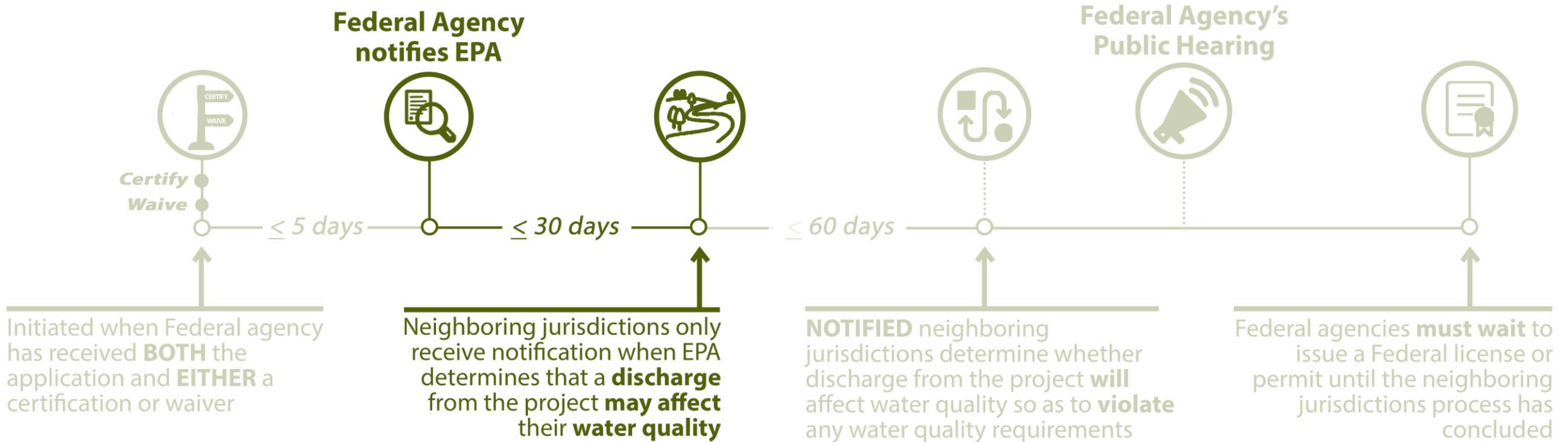
OUTCOME: The Federal licensing or permitting agency determines outcome based upon recommendations of neighboring jurisdiction, EPA, and any additional information presented at a hearing.

Neighboring jurisdictions process



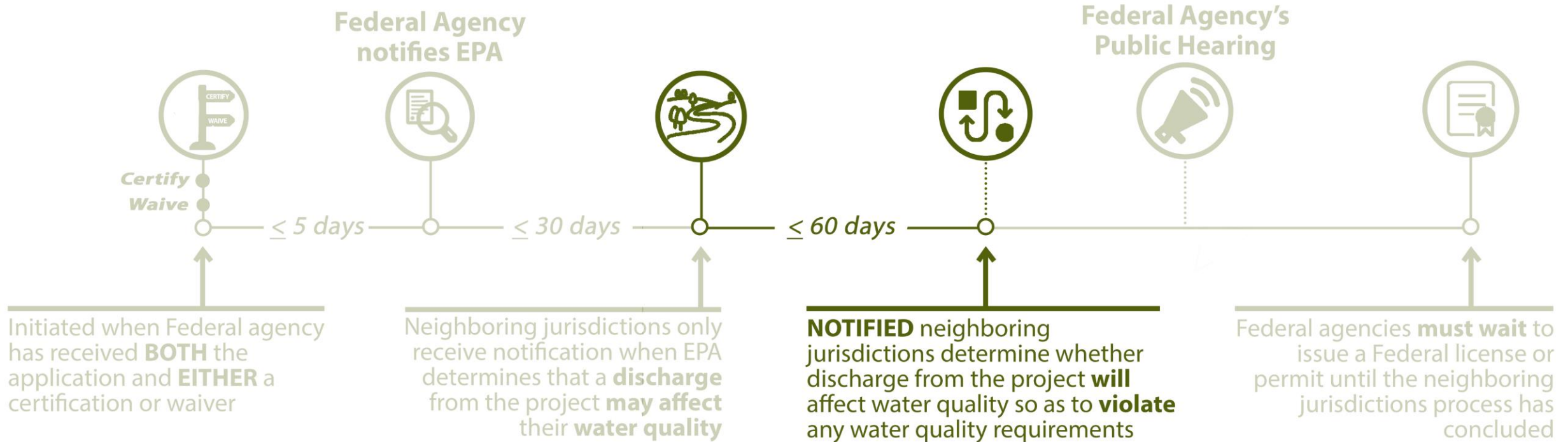
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Neighboring jurisdictions process



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Neighboring jurisdictions process



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When certification is required

Pre-filing Meeting Process

Request for Certification

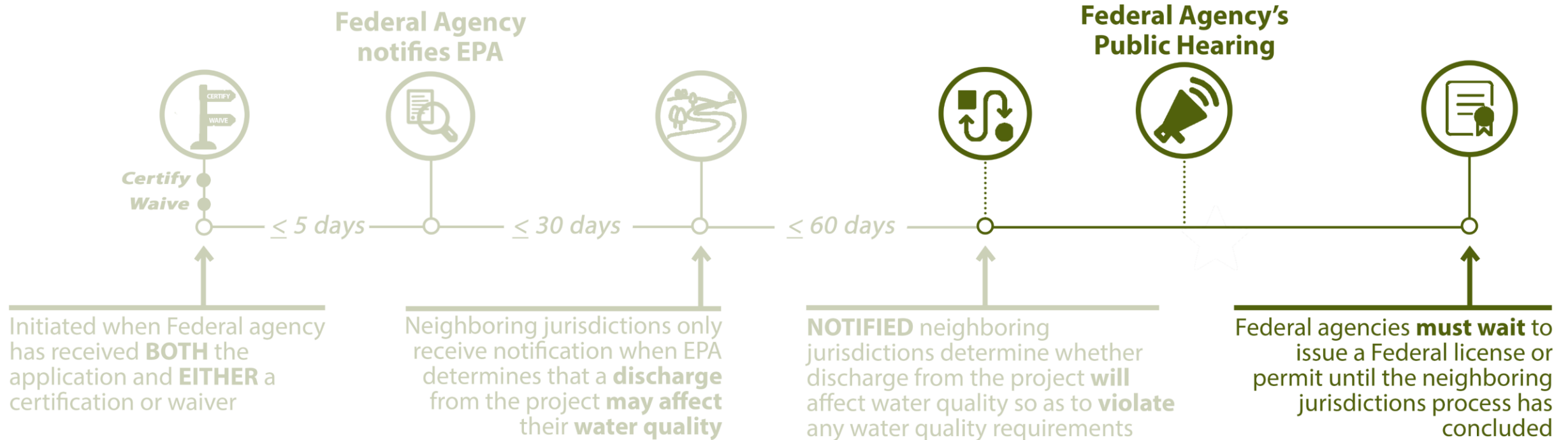
Reasonable Period of Time

Certifying Authority's Analysis

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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

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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.

When certification is required

Pre-filing Meeting Process

Request for Certification

Reasonable Period of Time

Certifying Authority's Analysis

Certification Decision

Post-Certification Process

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.



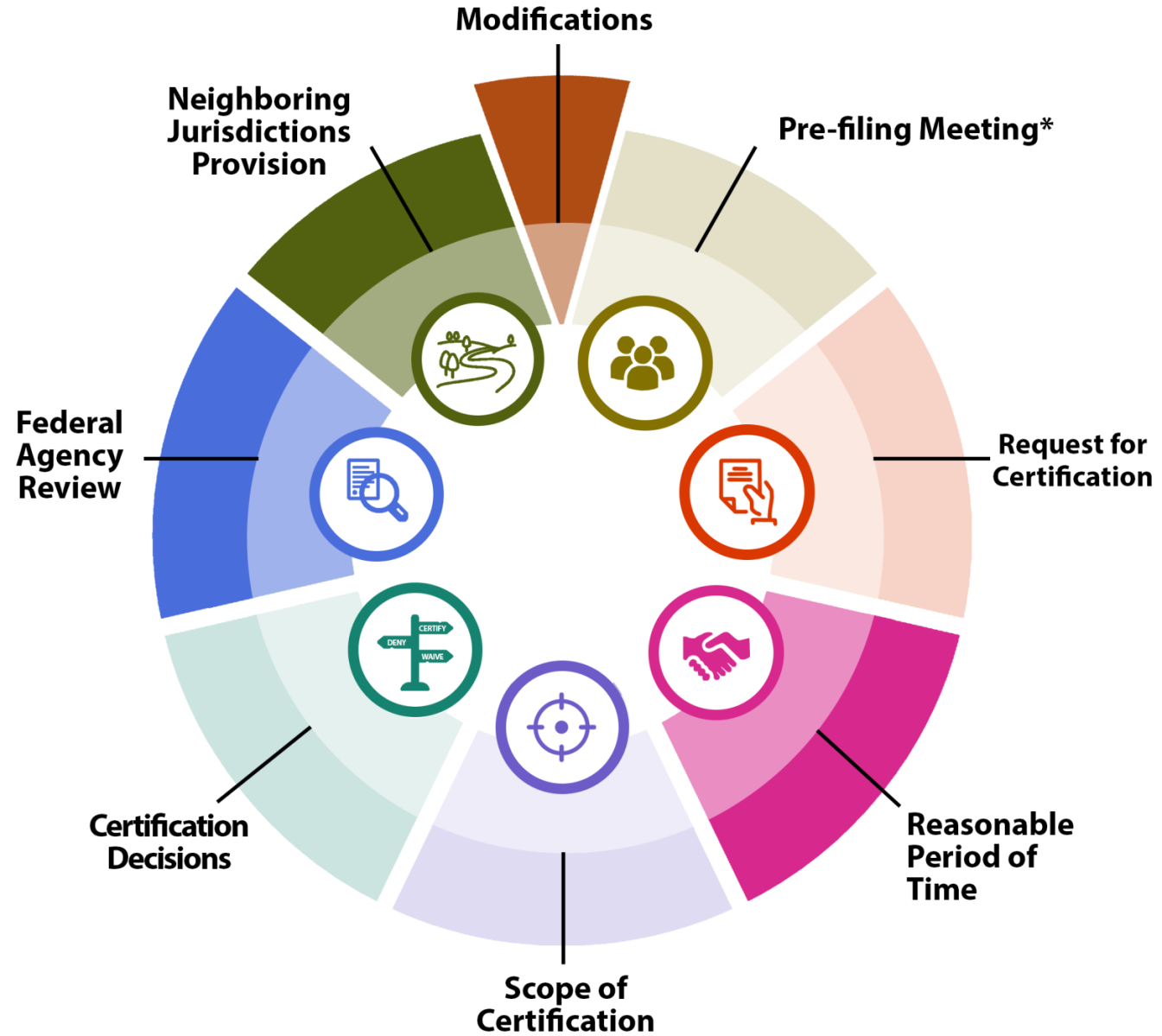
Inspections under section 401(a)(4)

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

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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.

Effective date and final rule implementation

The final rule will be effective on **November 27, 2023**.

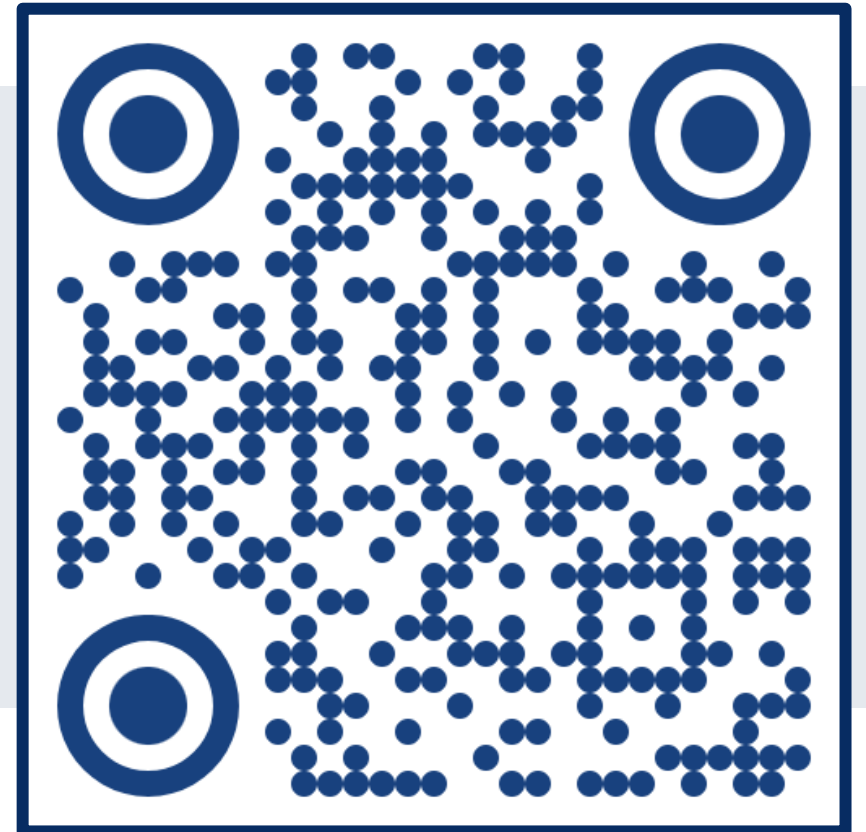


As of the effective date of this final rule, all actions taken as part of the section 401 certification process must be taken pursuant to the final rule.

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

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Implementation Considerations

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