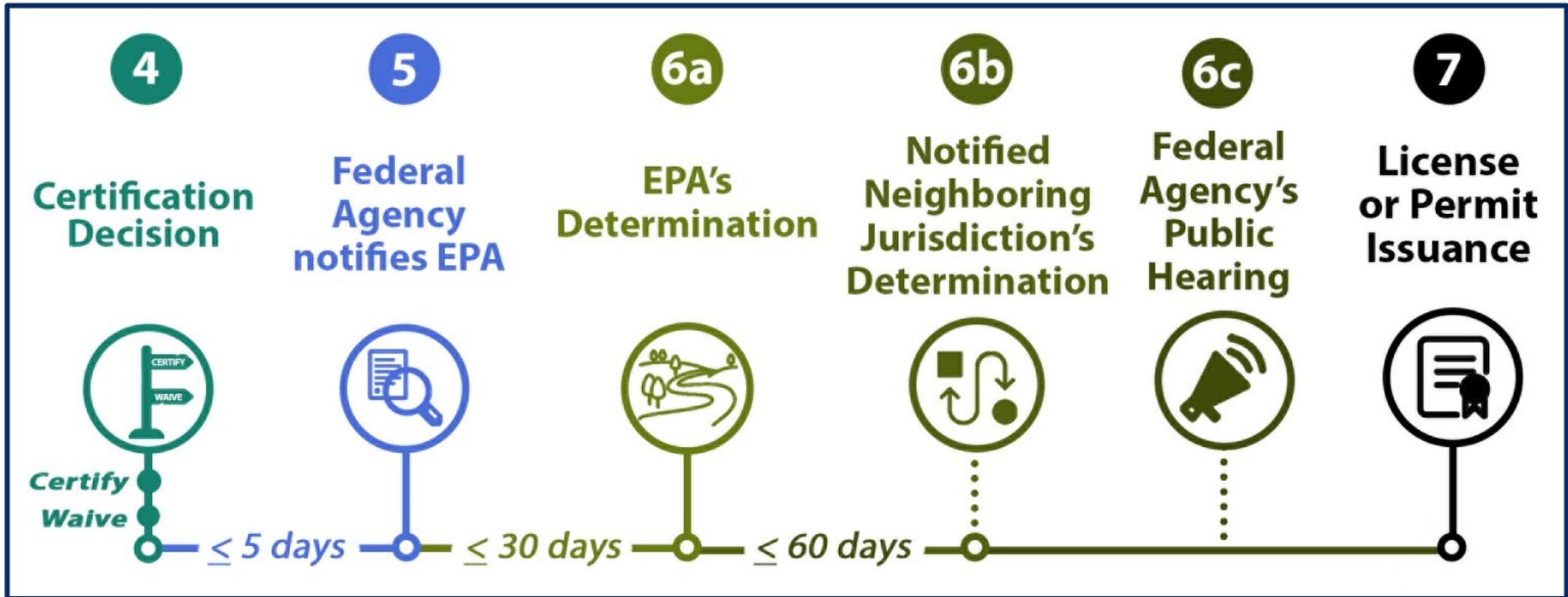


Clean Water Act Section 401(a)(2) Overview

Fall 2024

*Office of Wetlands, Oceans and Watersheds
Environmental Protection Agency*

Neighboring Jurisdictions Process



What is **CWA Section 401(a)(2)**?

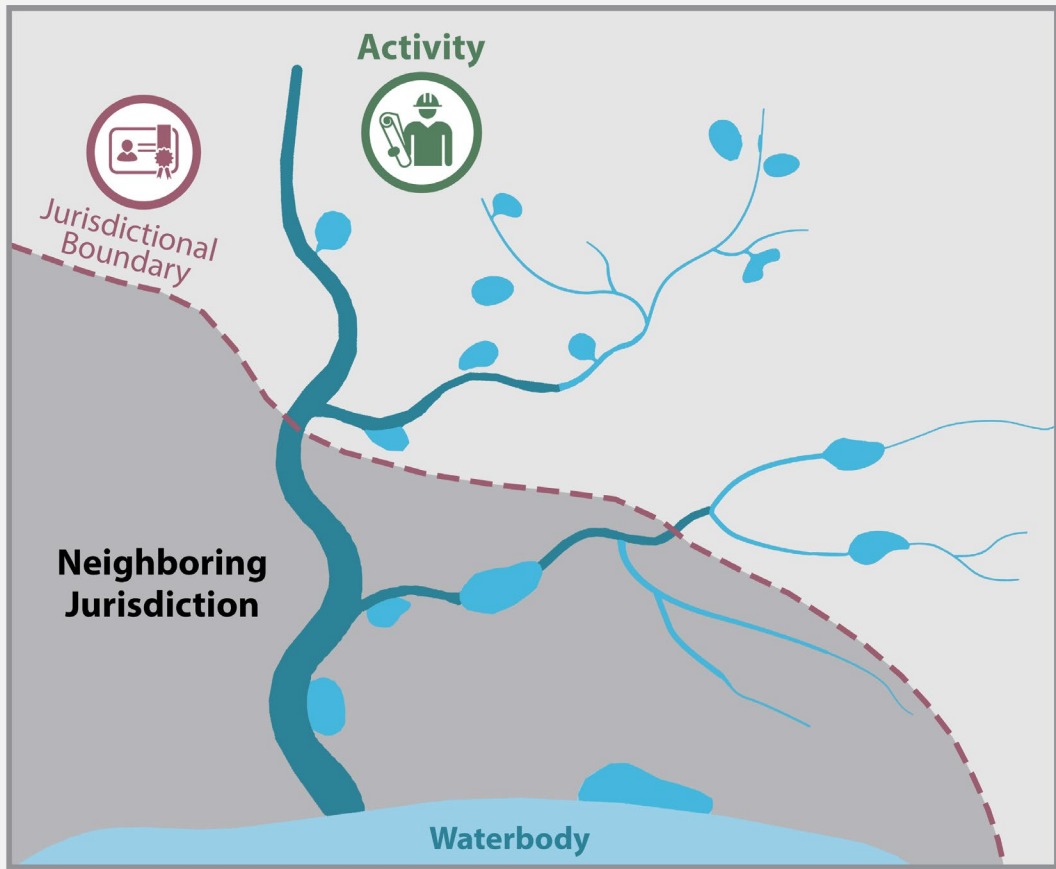
What is it?

CWA Section 401(a)(2) provides **notified neighboring jurisdictions** the opportunity to evaluate and object to the issuance of the Federal license or permit if a discharge originating in another jurisdiction will violate its water quality requirements.

When is a neighboring jurisdiction notified?

EPA provides notification to a neighboring jurisdiction in circumstances where it has determined, following appropriate notification from the Federal licensing or permitting agency, that **discharge from a project may affect its water quality**.

*A Federal license or permit **may not be issued** until the CWA section 401(a)(2) process is complete.*



Adapted from Resource Environmental Solutions



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

What is a neighboring jurisdiction?

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”

Neighboring Jurisdiction: **Tribes with TAS**

Tribes with treatment in a similar manner as a state (TAS) for Section 401 *or* Section 401(a)(2) are accorded the status of **“neighboring jurisdiction”** for purposes of section 401(a)(2)

Tribes may obtain TAS **solely for section 401** or obtain TAS for the **limited purpose of participating as a neighboring jurisdiction under section 401(a)(2)**.

For more information on TAS for Section 401 or Section 401(a)(2), see Slide 24

Who has **specific roles** in CWA Section 401(a)(2)?



ENVIRONMENTAL PROTECTION AGENCY (EPA)

EPA is responsible for notifying other states or authorized Tribes when the Agency determines they may be affected by a discharge from a federally licensed or permitted activity, and where required, for providing an evaluation and recommendations on such notified state or authorized Tribe's objections.



NOTIFIED NEIGHBORING JURISDICTION

A notified neighboring jurisdiction is responsible for evaluating whether a discharge from another jurisdiction will violate its water quality requirements, and if so, objecting to the issuance of the license or permit and requesting a public hearing from the federal licensing or permitting agency on its objection within 60 days of notification from EPA.



FEDERAL LICENSING OR PERMITTING AGENCY

Federal agency is responsible for notifying EPA within 5 days of receiving a certification or waiver and application, holding a public hearing on the objection of a notified neighboring jurisdiction; and consider the recommendations of the notified neighboring jurisdiction and EPA, as well as any additional evidence presented at the hearing, as it determines whether additional permit or license conditions are necessary to ensure compliance with applicable water quality requirements.

Who has **specific roles** in CWA Section 401(a)(2)?

Does the certifying authority have a specific role in the process?

No. The certifying authority has no role in the process, nor any obligation to consider neighboring jurisdiction impacts when issuing a certification decision.

Does the project proponent have a specific role in the process?

No, but EPA must notify the project proponent if it makes a may affect determination.

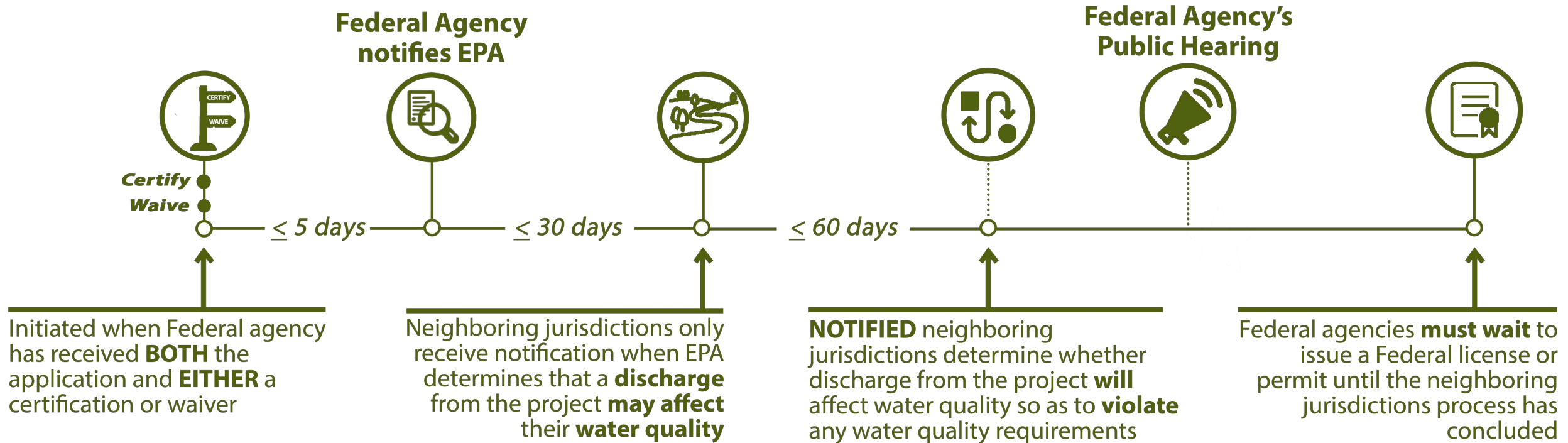
Does the public have a specific role in the process?

No. The public does not have a specific role in the process.

In the event the notified neighboring jurisdiction objects to the issuance of a license or permit and requests a public hearing, the certifying authority, project proponent, and members of the public are **free to participate** in the Federal agency's public hearing process.

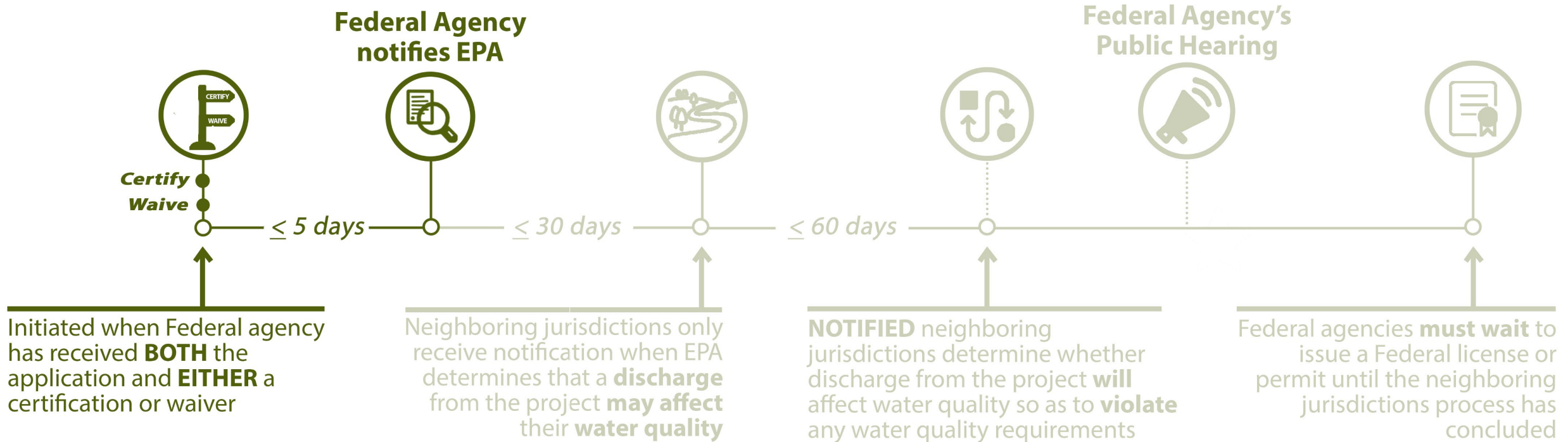
The Federal agency **must** consider any additional evidence presented at the public hearing.

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



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 EPA must be **notified** pursuant to section 401(a)(2)?



The Federal agency must notify EPA within 5 days of receiving:

1. the license or permit application, *and*
2. related certification or waiver for purposes of section 401(a)(2).

This applies to **ALL** certifications and waivers on Federal licenses or permits (e.g., EPA-issued section 402 permits, general permits).

*What if there is **no application**, e.g., general permits?*

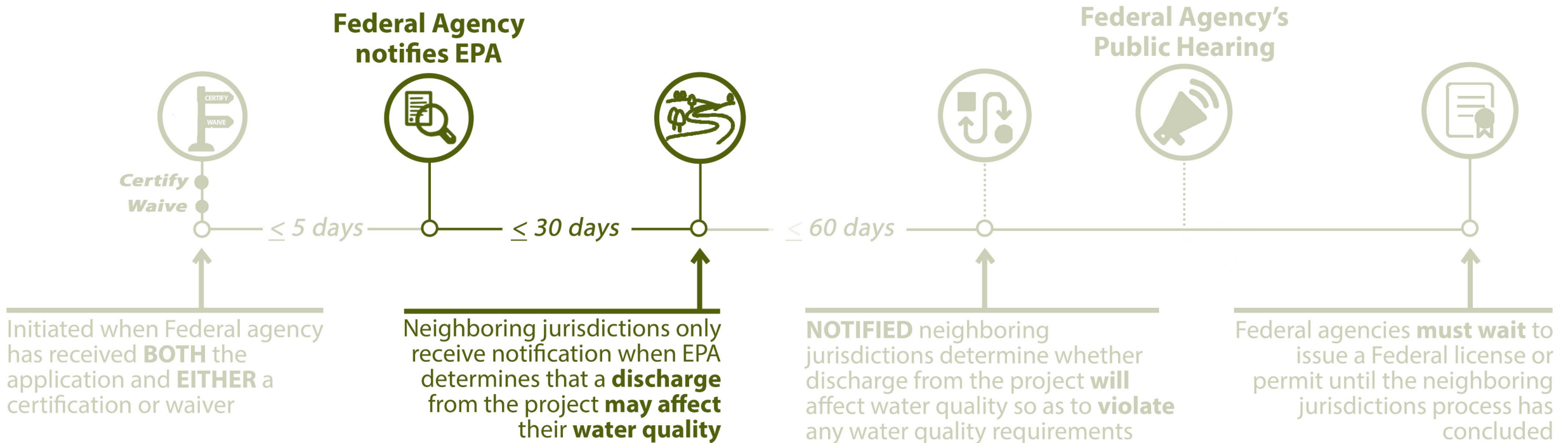
The Federal agency must determine how best to comply with all section 401 requirements (e.g., include a copy of the draft license or permit or project study)

What is included in the **Federal agency notice** to EPA?

All components in **40 CFR 121.12(a)**, including the factors for general description of the project, must be included in the notice



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 happens **after** EPA is notified by the Federal agency?



EPA has **30 days** to determine whether **discharge** from the project **may affect** the water quality of a neighboring jurisdiction

The standard applied by EPA in its “may affect” analysis:

- **Does not** require consideration of whether water quality effects of discharge from the project will result in violation of water quality requirements
- **Does not** require a finding that the discharge “will” effect water quality.

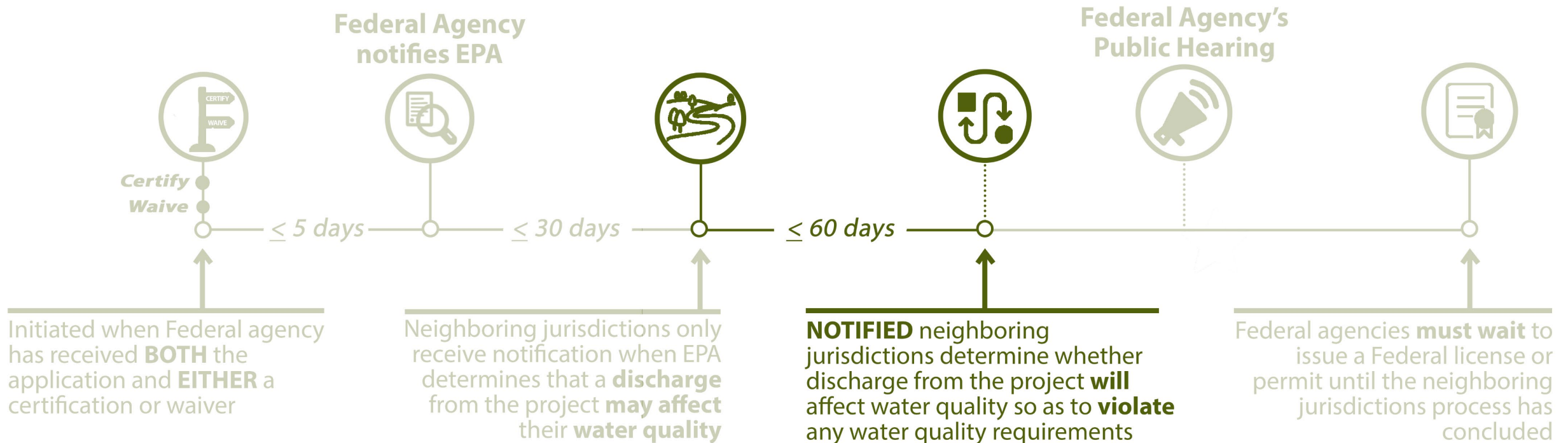
What happens **after** EPA is notified by the Federal agency?

EPA may consider several different factors when making a “may affect” determination, *including but not limited to:*

- 1 Type of project and discharge covered in the Federal license or permit
- 2 Proximity of the project and discharge to neighboring jurisdictions
- 3 Certification conditions
- 4 Other conditions already contained in the draft Federal license or permit
- 5 Neighboring jurisdiction’s water quality requirements
- 6 Views of the neighboring jurisdiction on the effect of discharge from the project on its water quality
- 7 Current water quality and characteristics of the water receiving the discharge

No one size fits all: The rule **does not establish** specific factors that the EPA must analyze in making a “may affect” determination. **Not all factors** may be relevant and/or necessary to make a “may affect” determination on every project.

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 Evaluation

The neighboring jurisdiction has **60 days** to consider its water quality requirements and complete an analysis or evaluation to determine whether a discharge from the project **will violate** such water quality requirements, and if so, object to the issuance of the federal license or permit and request a public hearing from the federal licensing or permitting agency.

The rule **does not** further define the “will violate” standard in regulation or identify factors for consideration in making this determination.

However, the neighboring jurisdiction does not have to find that the discharge itself violates water quality requirements and, instead, **can find that the discharge contributes to violations of water quality requirements** to determine the “will violate” standard is met.

Comparing this standard with EPA’s may affect standard:

EPA’s “may affect” standard **does not** require a finding that the discharge “will” effect water quality *or* consideration of whether water quality effects of discharge from the project will result in violation of water quality requirements.

Neighboring Jurisdictions Objection

The neighboring jurisdiction shall (in writing) include the following components in their notification to the EPA and Federal agency:



A statement that the neighboring jurisdiction **objects** to the issuance of the federal license or permit



An explanation of the reasons supporting the neighboring jurisdiction's determination that the discharge from the project **will violate** its water quality requirements (e.g., an identification of those water quality requirements that will be violated)



A request for a **public hearing** from the Federal agency on the neighboring jurisdiction's objection

Reason for the Neighboring Jurisdictions Objection

An objection **must** include an explanation of the reasons supporting the neighboring jurisdiction's determination that the discharge from the project will violate its water quality requirements, **including but not limited to**, an identification of those water quality requirements that will be violated.

In addition, EPA **encourages** neighboring jurisdictions to include additional information to support its determination that the discharge from the project will violate its water quality requirements, such as:

- Identify **affected receiving waters**
- **Provide Federal license or permit conditions** that will resolve the objection (if possible)
- Indicate if it **does not find any conditions** would resolve the objection

Withdrawing the Neighboring Jurisdictions Objection

The neighboring jurisdiction may **withdraw** its objection *prior to the public hearing* and shall notify both the EPA and Federal agency, in writing, of such withdrawal.

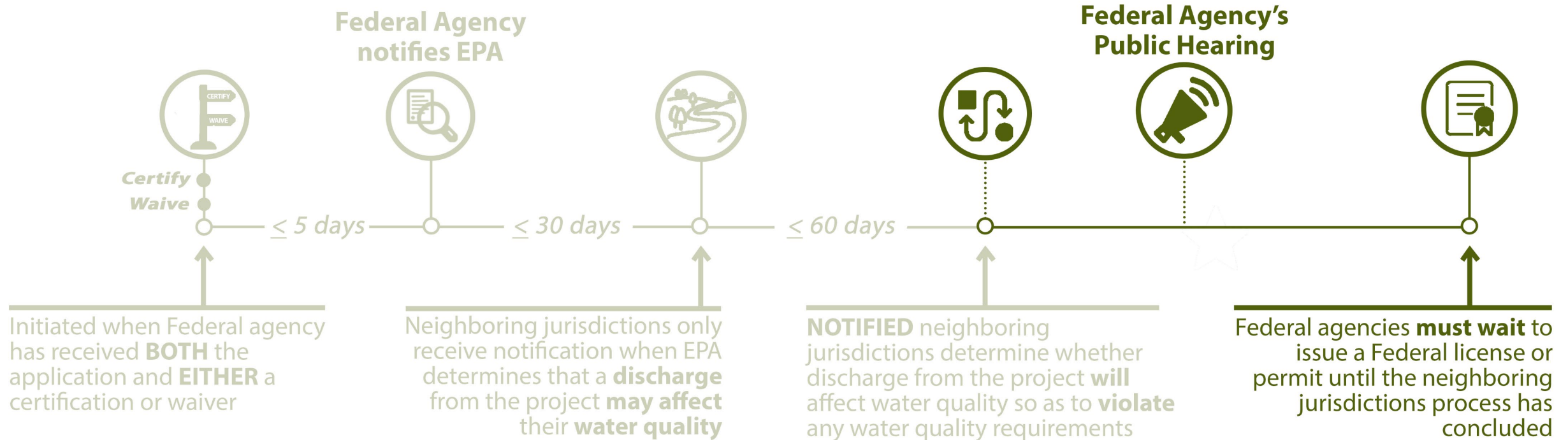


If a notified neighboring jurisdiction notifies EPA and the Federal agency **in writing** of its objection to the issuance of the license or permit and **requests a public hearing** on such objection, the licensing or permitting agency shall hold such a hearing.



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.

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.

Public Hearing Process

The Federal agency shall provide public notice **at least 30 days** in advance of the hearing to interested parties, including but not limited to the notified neighboring jurisdiction, the certifying authority, the project proponent, and EPA.

The Federal licensing or permitting agency **must** conduct a public hearing on the notified neighboring jurisdiction's objection (*unless the objection is withdrawn*).

The regulations **do not define** the type of public hearing that the Federal agency must hold.

EPA recommends that the Federal agency accept comments and additional evidence on the objection at the public hearing and encourages Federal agencies to take into consideration the ability for interested parties, which include representatives of the neighboring jurisdiction, to easily attend the public hearing when determining the method for conducting the hearing and the hearing location.

What is EPA's role after an objection?

EPA objectively and neutrally **evaluates** the notified neighboring jurisdiction's objection and provides recommendations to the Federal agency based on its **expert, technical analysis** of the record before it at the public hearing.

Does EPA seek public input or input from the notified neighboring jurisdiction on its evaluation?

No, but EPA may **seek additional information** from the notified neighboring jurisdiction on its objection to be sure it can develop an informed and well-supported evaluation and recommendation.

What is EPA's role **during** the public hearing process?

What happens **after** the public hearing?

The Federal licensing or permitting agency **must consider** the recommendations of the neighboring jurisdiction and EPA Administrator as well as any additional evidence presented at the hearing.

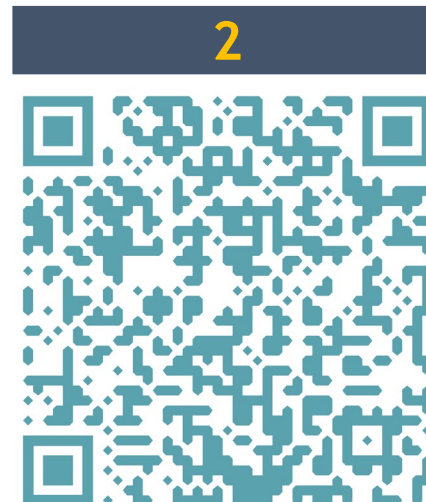
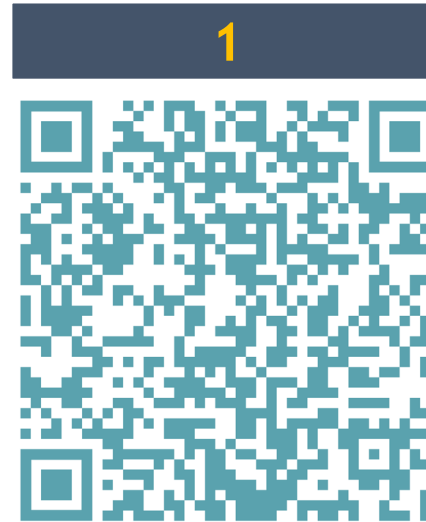
The federal agency **must condition the Federal license or permit** as may be necessary to ensure compliance with applicable water quality requirements.

If additional conditions cannot ensure compliance with applicable water quality requirements, the Federal agency shall **not** issue the license or permit.

Section 401 TAS Application Templates

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[Link to 401 TAS webpage](#)
[Link to 401 TAS application template](#)

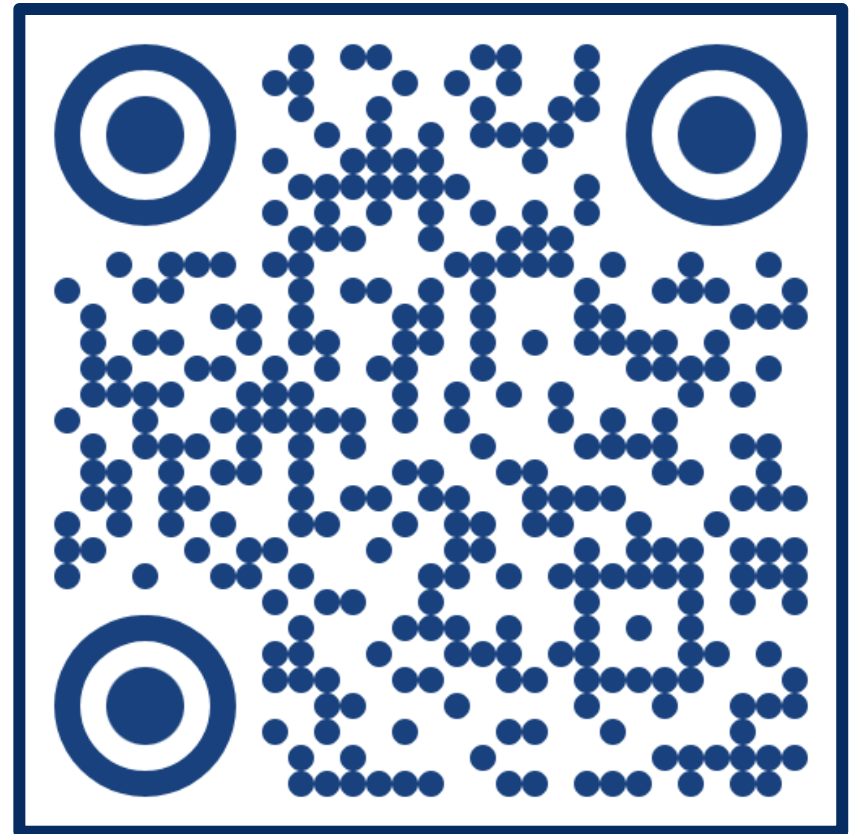


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[Link to 401\(a\)\(2\) TAS webpage](#)
[Link to 401\(a\)\(2\) TAS application template](#)

More Information

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



Questions?

Please send questions to
CWA401@epa.gov