The background features abstract, overlapping geometric shapes in various shades of blue, ranging from light to dark, creating a modern and professional look.

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

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April 17, 2024

When section 401 certification is required

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.”

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.

	<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	✗

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

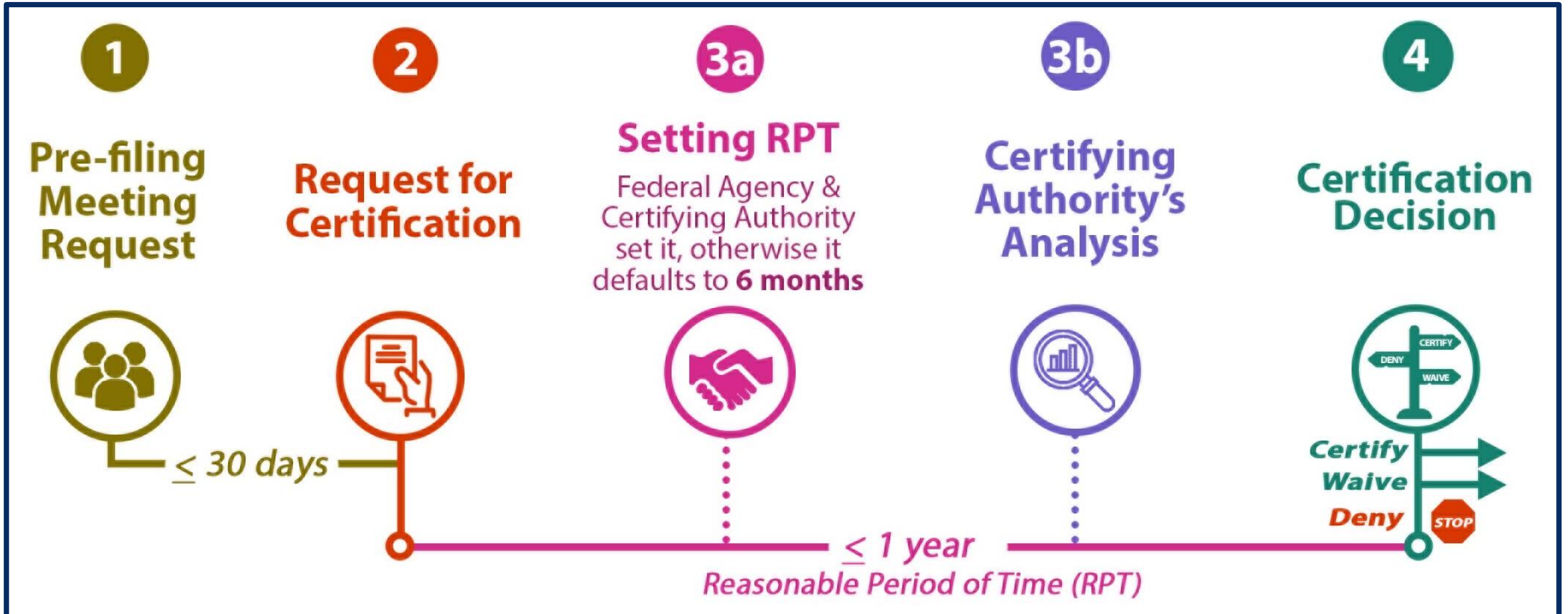
EPA acts as the certifying authority where there is no authorized tribe or state



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

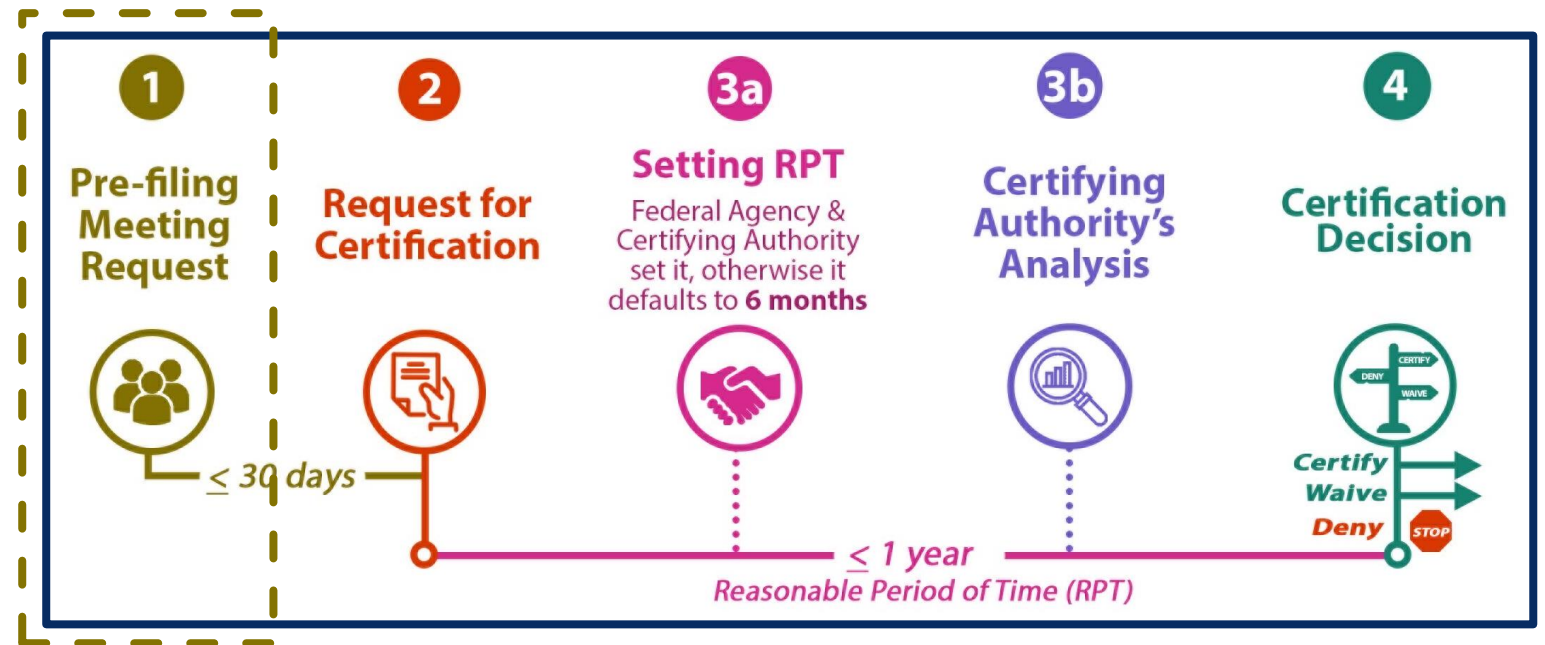
Final 2023 Rule: Certification Process





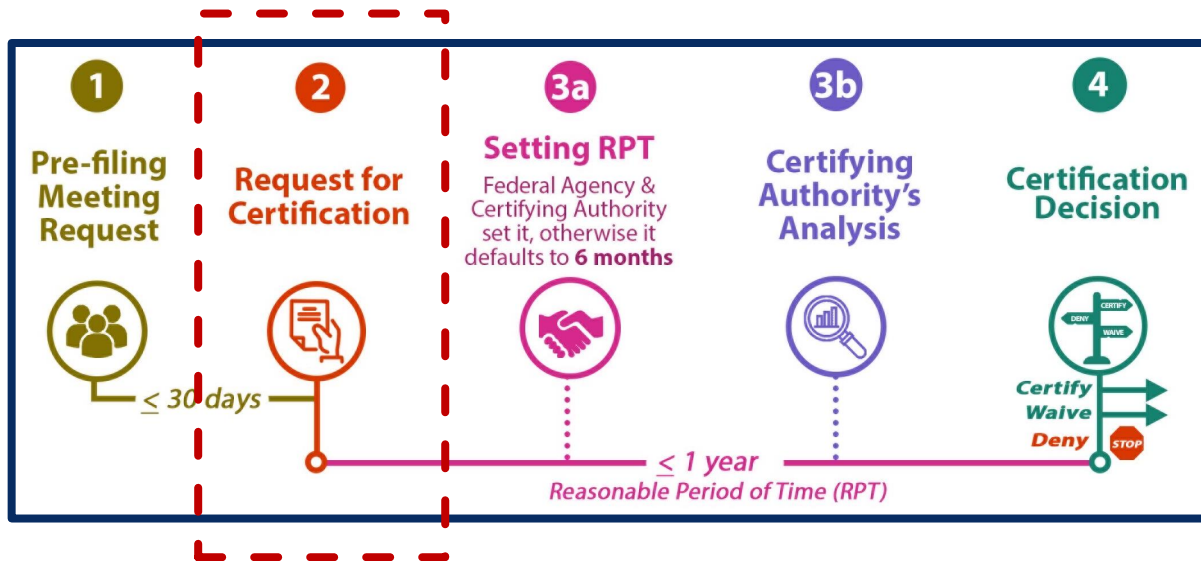
Pre-filing meeting request

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





Request for certification



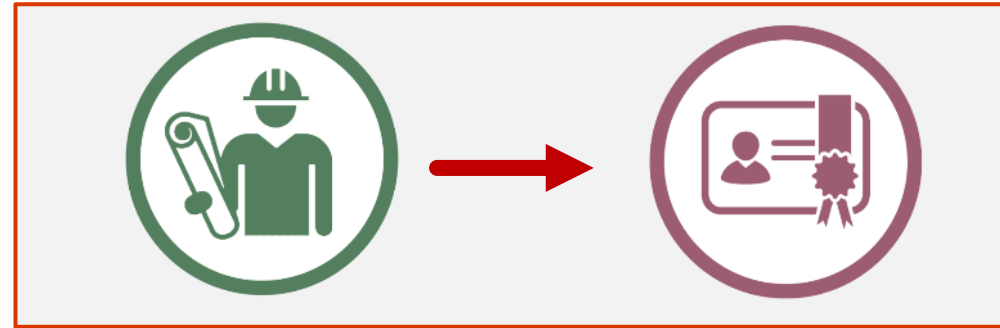
Section 121.5(a) defines **minimum contents** that must be in all requests for certification.

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

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

Minimum contents of a request for certification

121.5(a)



INDIVIDUAL Federal license or permit request

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

Issuance of a GENERAL Federal license or permit request

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

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

When certification is required

Pre-filing Meeting Process

Request for Certification

Reasonable Period of Time

Certifying Authority's Analysis

Certification Decision

Post-Certification Process



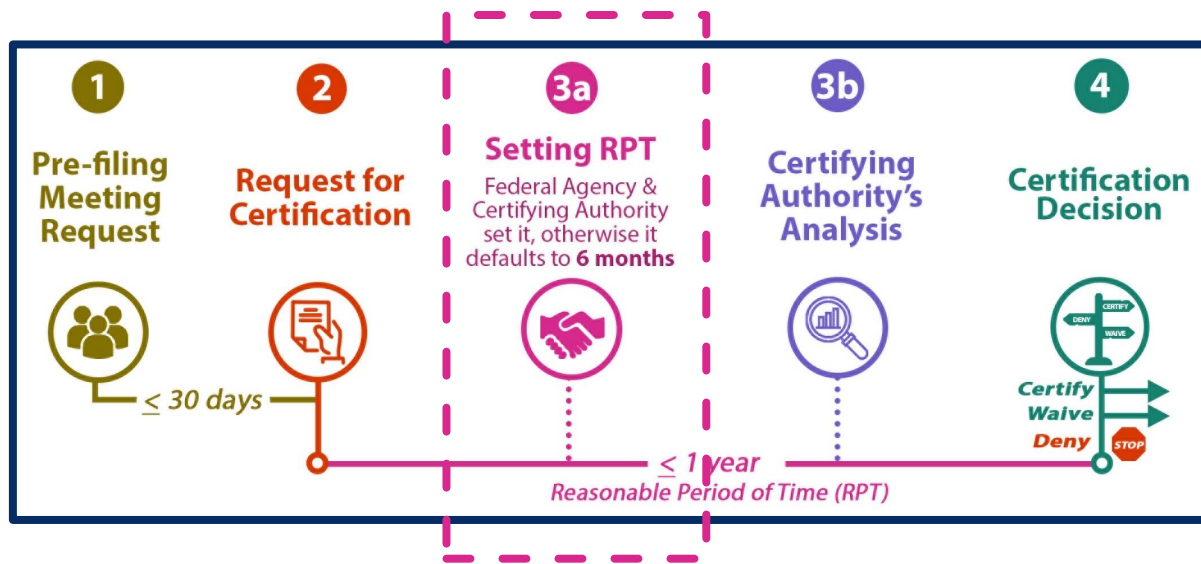
Reasonable period of time (RPT)



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.**





Scope of Certification



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

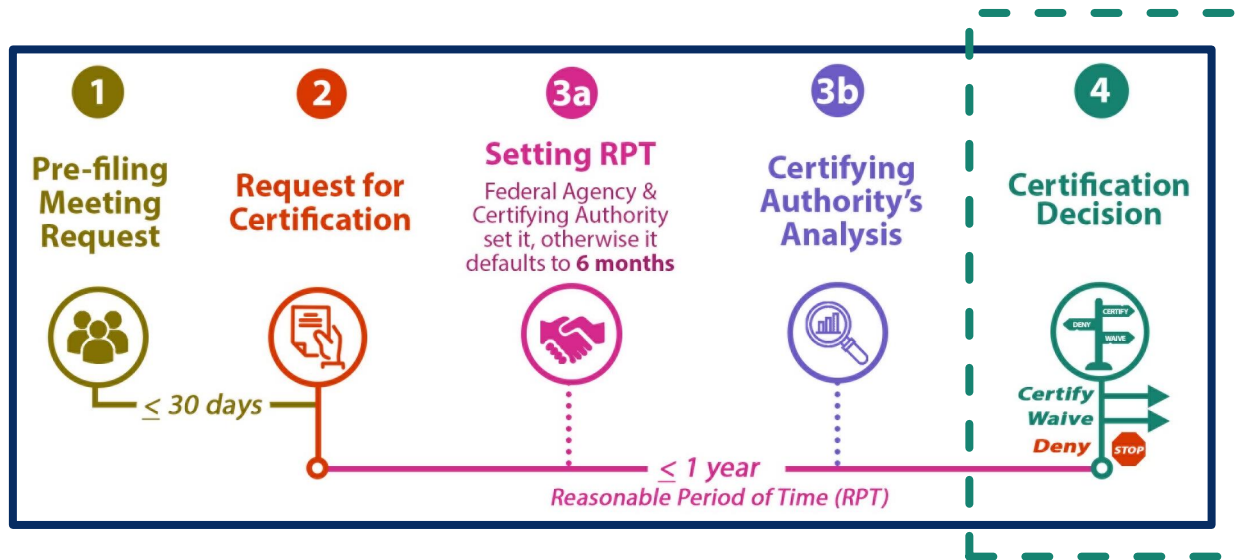
The certifying authority's evaluation is limited to the water quality-related impacts from the activity subject to the federal license or permit, including the activity's construction and operation.



Certification decisions

A certifying authority may act in one of four ways:

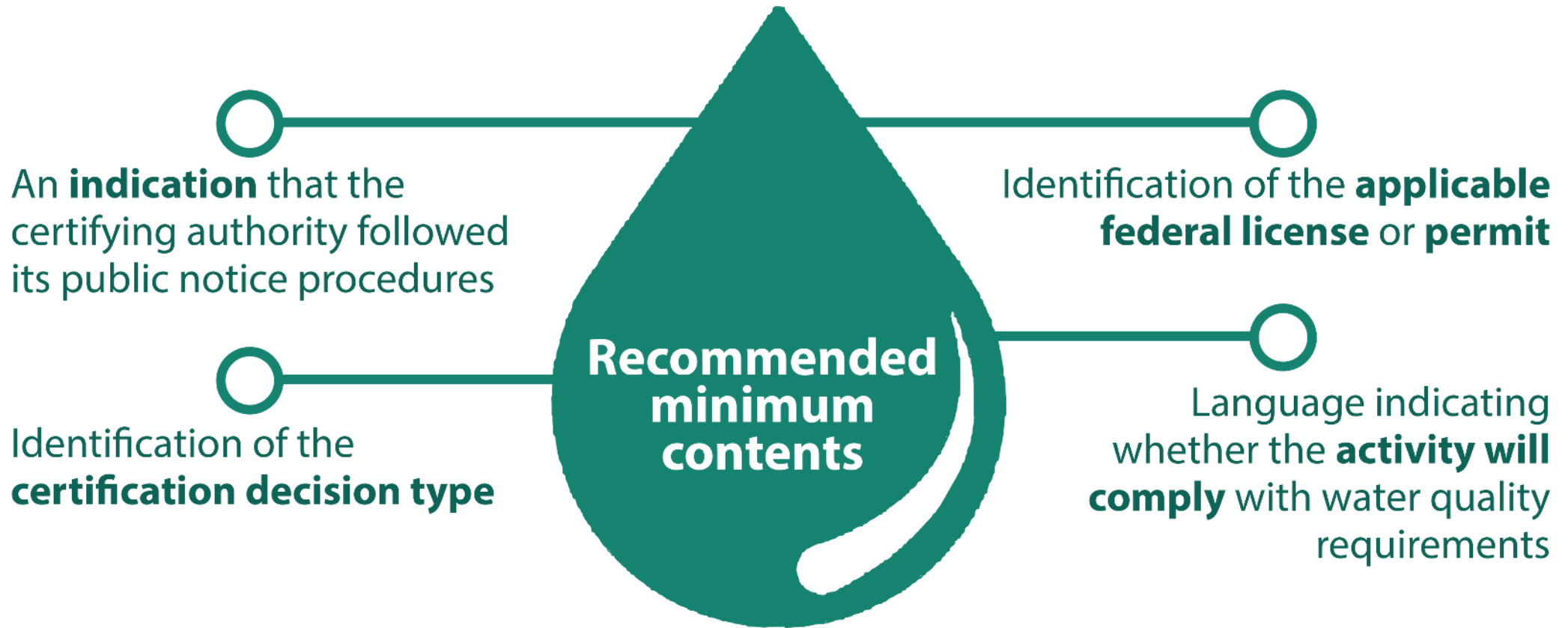
1. Grant certification
2. Grant certification with conditions
3. Deny certification
4. Expressly waive certification



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



Certification decisions

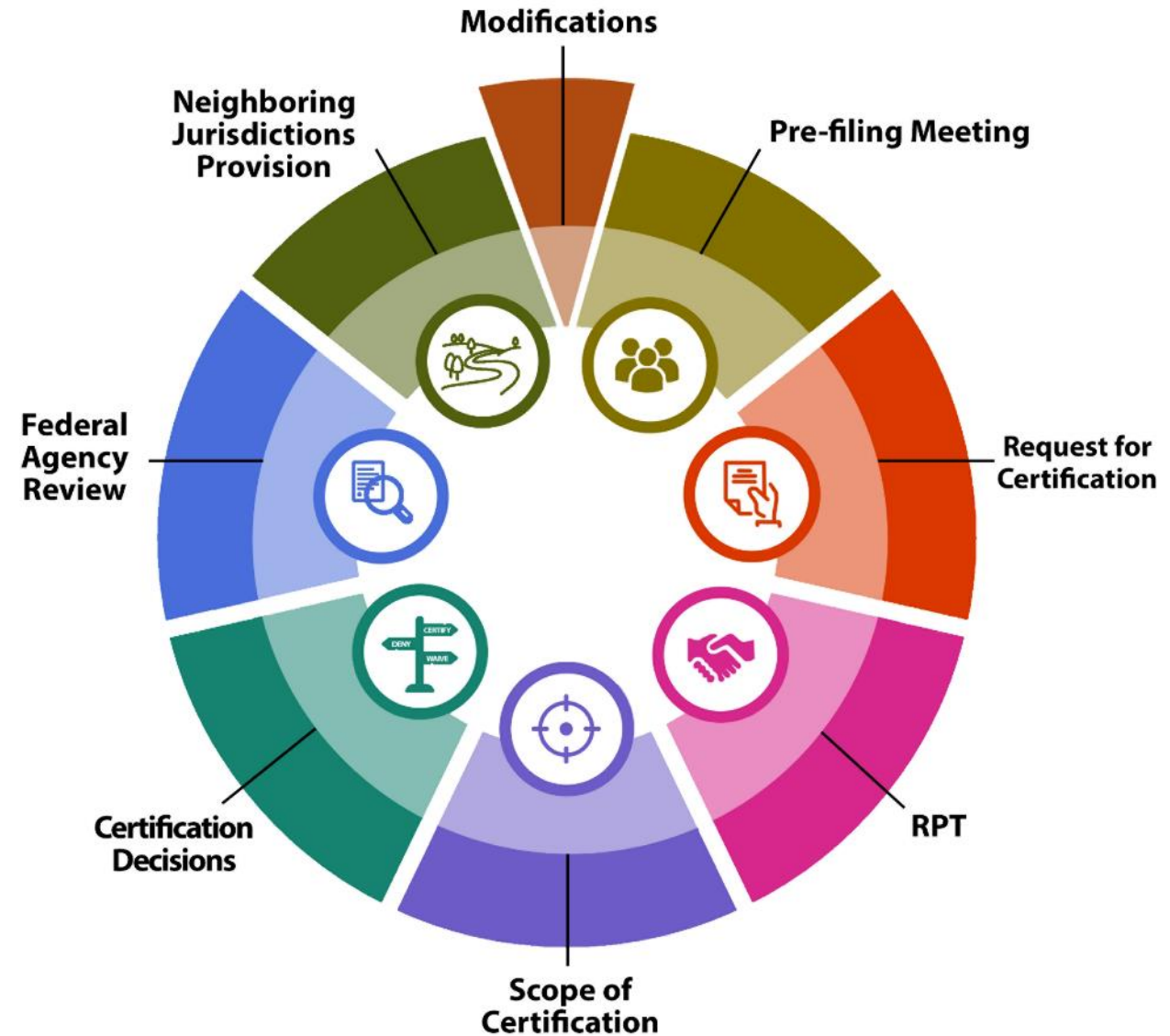




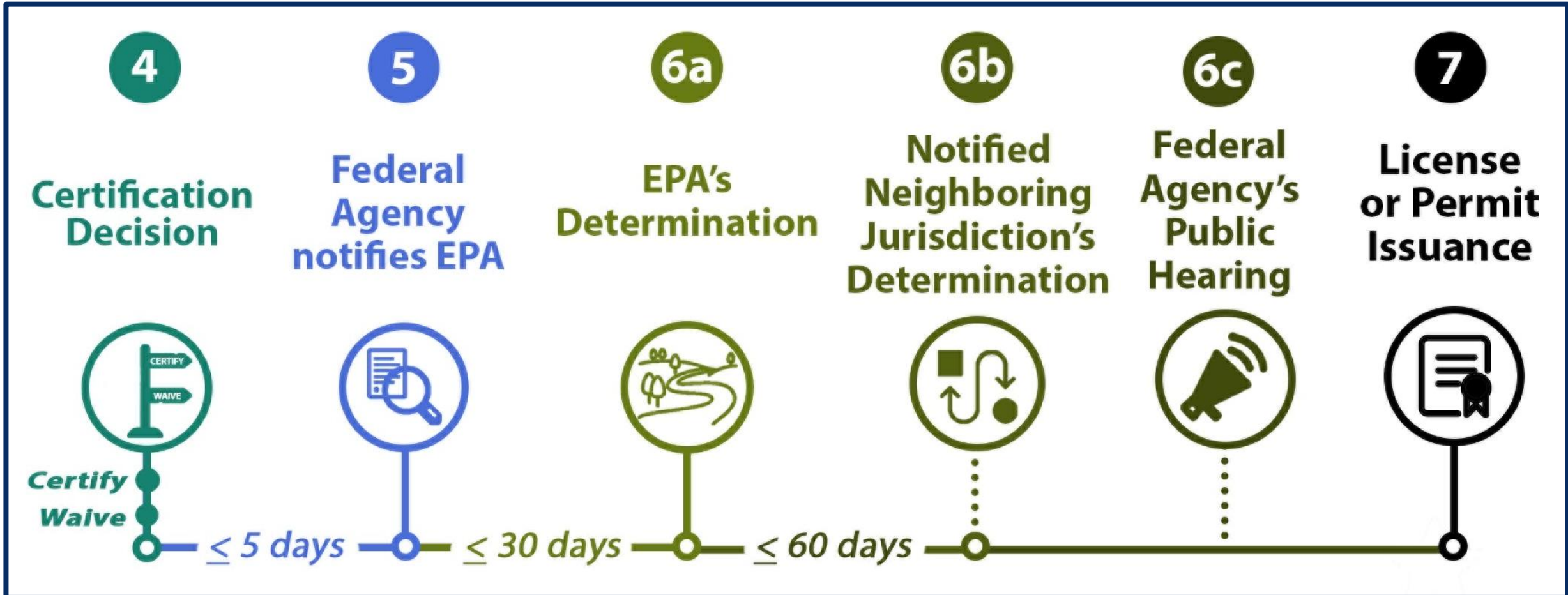
Federal agency review

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

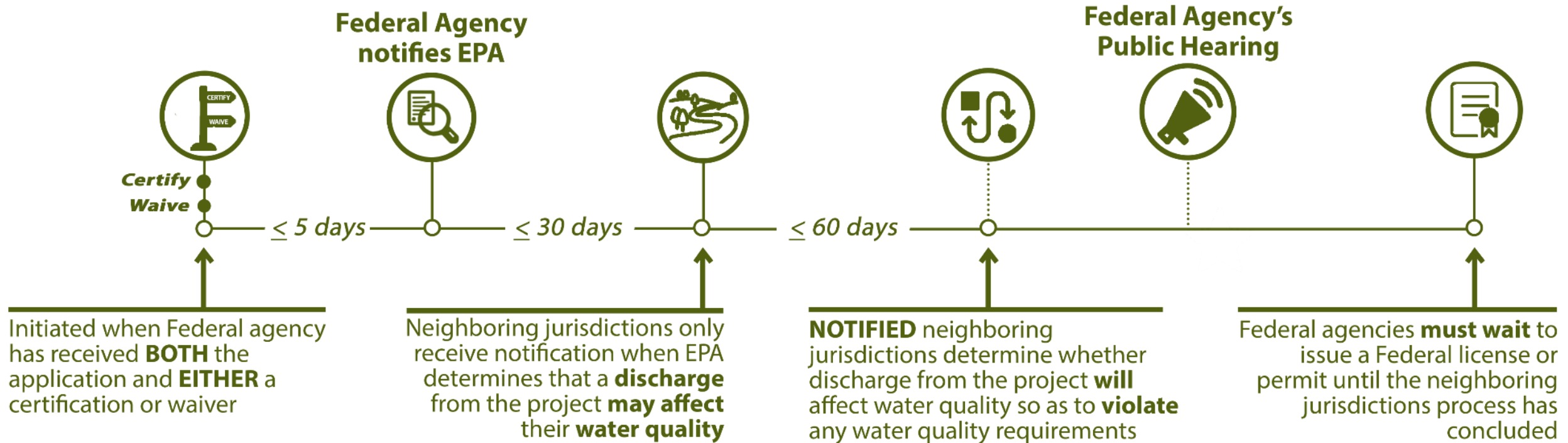
1. Whether the **appropriate certifying authority** issued the decision,
2. Whether the certifying authority confirmed it complied with its **public notice procedures** established pursuant to section 401(a)(1), and
3. Whether the certifying authority **acted** on the request for certification **within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



Final 2023 Rule: Post-Certification Process



Neighboring jurisdictions process



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

When certification is required

Pre-filing Meeting Process

Request for Certification

Reasonable Period of Time

Certifying Authority's Analysis

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Modifications to certifications



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

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

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

Enforcing certifications and conditions

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



Can federal agencies enforce certification conditions?

Yes, but federal agencies have enforcement discretion.



Can state and tribal certifying authority enforce certification conditions?

Yes, if authorized under state or tribal law.

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 on **November 27, 2023**.

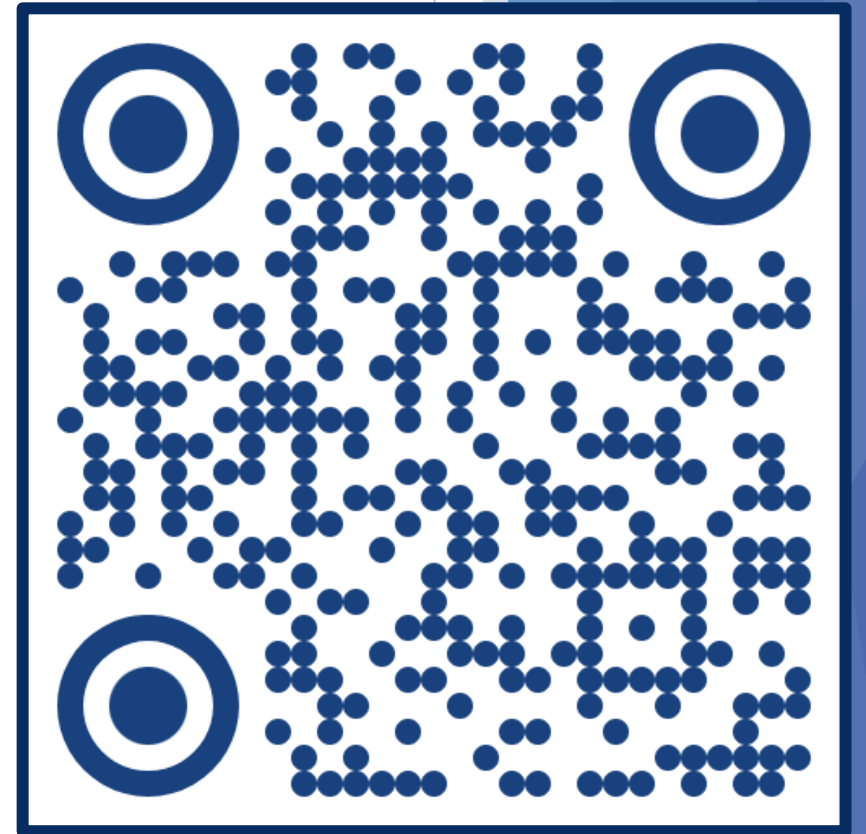


As of the effective date of this final rule, all actions taken as part of the section 401 certification process must be taken pursuant to the final rule.

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 empowers states, territories, and Tribes with a tool to prevent major new or altered projects that could result from federally licensed or permitted projects. The final 2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule (2023 Rule) updates the fundamental authority granted to Congress to states, territories, and Tribes to protect water resources that are essential to healthy people and thriving communities. The 2023 Rule is a key component that, alongside other federal 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. States, territories, and Tribes will **certify activities that decide when a pre-filing meeting request will lead to a more efficient certification process.**
- Expediting the process necessary to start the certification process – The 2023 Rule creates a **bright-line approach** to expediting this request and streamlines the certification, **expediting the project approval, notification of state, territory, and Tribal certifying authorities to define the water quality information necessary to start the certification process.**
- Ensuring actions occur within the 1-year statutory deadline – The 2023 Rule allows certifying authorities to collaborate with federal agencies to determine the deadline for review, up to 180 days, from the statutory maximum. To ensure timely action, cert regulations, the 2023 Rule creates a **newly defined** calendar (full of the statutory maximum) if the certifying authority and federal agency do not agree on a deadline.
- Including on the water quality related impacts of federal projects – The 2023 Rule revises the scope of section 401 certification with nearly 10 years of established practice that preceded the 2023 Rule. Some features of the 2023 Rule address state, territory, or Tribal requests such as expanding that states, territories, and Tribes **may only consider the adverse water quality impacts from the water.**
- Allowing projects to seek early and predictable pre-filing meeting – The 2023 Rule does not allow states, territories, and Tribes to unilaterally modify certification, but it does allow them to collaborate with federal agencies to do so. This balances certifying authority needs for flexibility to protect water quality over the life of a project and the potential for agency.

For more information, visit [www.epa.gov/cwa401](#). For more information, visit [www.epa.gov/cwa401](#). For more information, visit [www.epa.gov/cwa401](#).

Appendix A. Rule Provision Comparison

Table A-1 compares major rule provisions, in plain language, under the 1971 Rule, the 2003 Rule, and the final rule.

1971 Rule and Practice	2003 Rule	Final Rule
<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. 1971b was added in 2013 Rule, came from the 8th Circuit held that only a permit for a discharge triggers section 401 (344th & DeWolfe, 171 F.3d 2012 (8th Cir. 2015)). 	<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 a water of the United States, consistent with CWA. 	<ul style="list-style-type: none"> Same as 2017 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. Regulate provides that a discharge for purposes of section 401 is a discharge from a point source into waters of the United States, consistent with CWA.
<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.
<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 other 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 writing, signed, and dated, not dated. If the request for certification is for an individual license or permit, it must include a copy of the license or permit application or a copy of a federal agency approval.

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

EPA is final 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) expedites 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 empowers states, territories, and Tribes with a tool to prevent 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. Certain authorities are responsible for certifying activities that result in a discharge from a point source into waters of the United States (CWA).

Federal licenses will permit that they receive under 401 water quality certification include, but are not limited to, CWA section 401 (discharge of pollutants) from the Army Corps of Engineers (ACEC), National Oceanic and Atmospheric Administration (NOAA), and CWA section 401 (discharge of pollutants) from the U.S. Environmental Protection Agency (EPA). A broad range of activities and projects may require CWA section 401 certification, including those that are permitted, 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 activities.

Stakeholders in this process include:

- Certifying authorities:** The states, territories, or Tribes with the authority to discharge from the proposed facility licensed or permitted project or state, 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 using a section 401 certificate, including project sponsors and federal officials for the issuance of their general licenses and permits.

When a water quality certification is issued, it will remain in effect until the CWA section 401 Certification Rule (2023 Rule) expires. Under the CWA section 401 Certification Rule (2023 Rule), the 2023 Rule will expire on 10/1/2028. EPA will continue to issue CWA section 401 certificates until the Agency announces its intention to issue the 2028 Rule. In the interim, the Agency announced its intention to issue the 2028 Rule on 10/1/2028, and Tribes under section 401. The Rule's continuing effect will be announced.

[Recorded Webinar: Final Rule Overview](#)

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

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

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

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[Recorded Webinar: Implementation Considerations](#)

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

Implementation Considerations

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

Final 2023 CWA Sec. 401 Water Quality Certification Improvement Rule – Implementation Considerations

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Questions?

Please send questions to
CWA401@epa.gov