

Review of Current and Recent Rulemakings

Lauren Kasparek and Myra Price

EPA HQ - Office of Wetlands, Oceans and Watersheds

Overview

- ▶ Update on Clean Water Act Section 404(g) Rulemaking
- ▶ Brief Overview of 2023 Clean Water Act Section 401 Water Quality Certification Improvement Rule
- ▶ Additional EPA rulemakings

Update on Clean Water Act Section 404(g) Rulemaking

Background on CWA Section 404(g)

- ▶ Clean Water Act (CWA) Section 404 prohibits the discharge of dredged or fill material into “waters of the United States” (WOTUS) without a permit.
- ▶ Section 404(g) provides that Tribes and States may assume administration of the 404 program.
- ▶ The U.S. Army Corps of Engineers (Corps) retains 404 permitting for discharges into certain WOTUS - e.g., those used as a means to transport interstate and foreign commerce and adjacent wetlands.

Background: Previous Agency Actions on CWA Section 404(g)

- ▶ EPA last comprehensively updated the 404(g) assumption regulations in 1988.
- ▶ Since then, EPA has received requests for clarity on the assumption requirements and process, program administration, and which waters are assumable.
- ▶ Input received through early engagement:
 - ▶ Federal Advisory Committee - Retained waters description and process based upon FACA recommendations (2015-2017).
 - ▶ Early engagement meetings and consultation with Tribes (2018-2019).
 - ▶ Early engagement meetings with States (2018-2019).
 - ▶ Experience working with States pursuing assumption.

Proposed CWA Section 404 Tribal and State Program Regulation

- ▶ On **August 14, 2023**, EPA proposed revisions to the CWA section 404(g) regulations to:
 - ▶ Provide clarity regarding the procedures and substantive requirements for assumption and administration of the program.
 - ▶ Address key barriers identified by Tribes and States to assuming and administering a program and expand opportunities for Tribes to meaningfully engage in permitting actions.
 - ▶ Support the cooperative federalism principles central to the CWA - including Congress' recognition that it is the primary responsibility and right of Tribes and States to prevent pollution and manage their aquatic resources.

Outreach and Engagement

- ▶ EPA hosted multiple input sessions and a public hearing during August and September 2023. Please visit <https://www.epa.gov/cwa404g/current-agency-efforts-regarding-assumption-under-cwa-section-404> for more information on these events.
- ▶ The public comment period closed on **October 13, 2023**. EPA received 44 public comments (Docket ID No. EPA-HQ-OW-2020-0276).

Additional Information

- ▶ Visit <https://www.regulations.gov> to view the docket for this rulemaking, identified by Docket ID No. EPA-HQ-OW-2020-0276.
- ▶ For more information on CWA section 404(g) and this rulemaking, please visit <https://www.epa.gov/cwa404g>.
- ▶ If you have any questions, please send an e-mail to 404g-rulemaking@epa.gov.

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

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

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

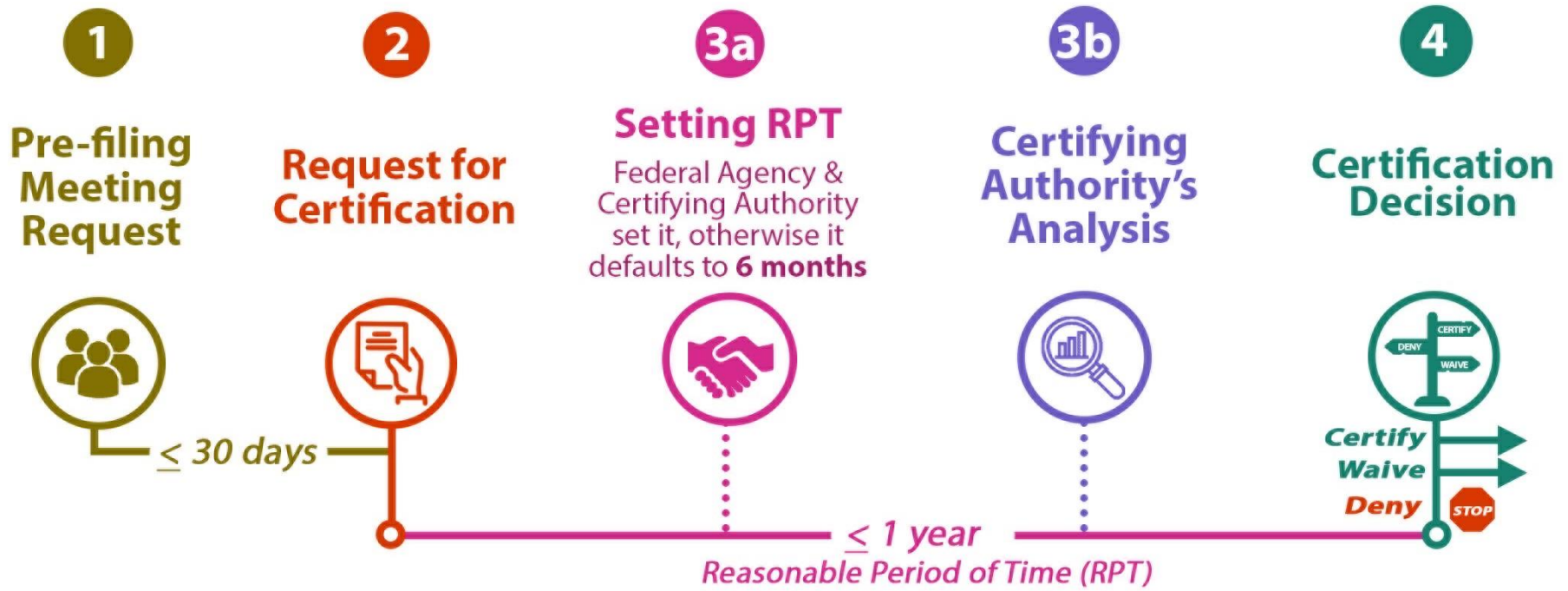
EPA acts as the certifying authority where there is no authorized tribe or state



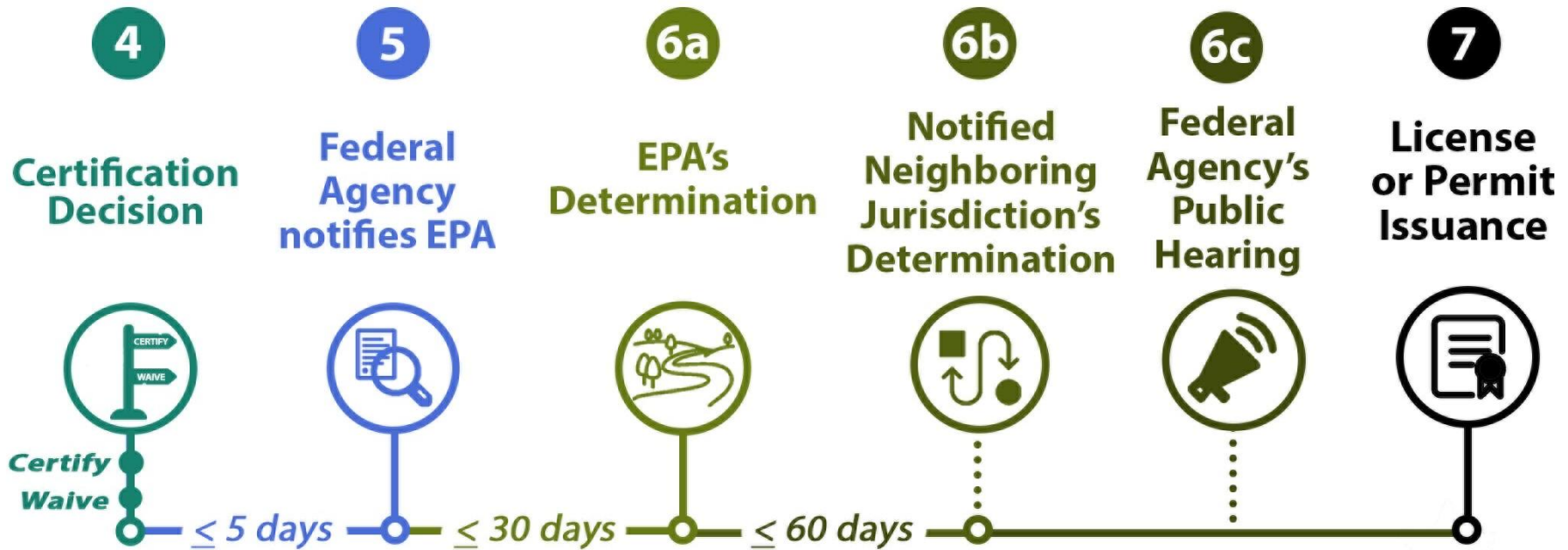
FEDERAL LICENSING OR PERMITTING AGENCY

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

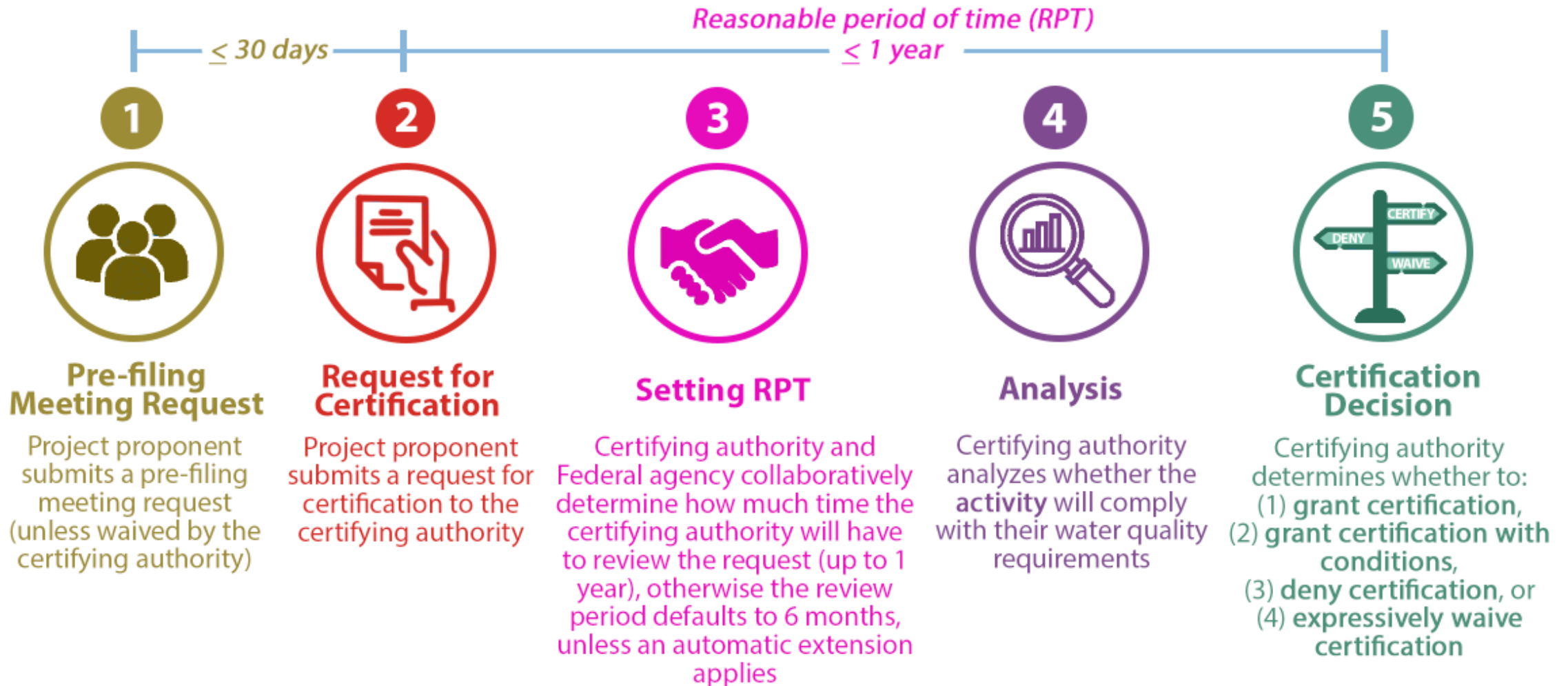
Certification



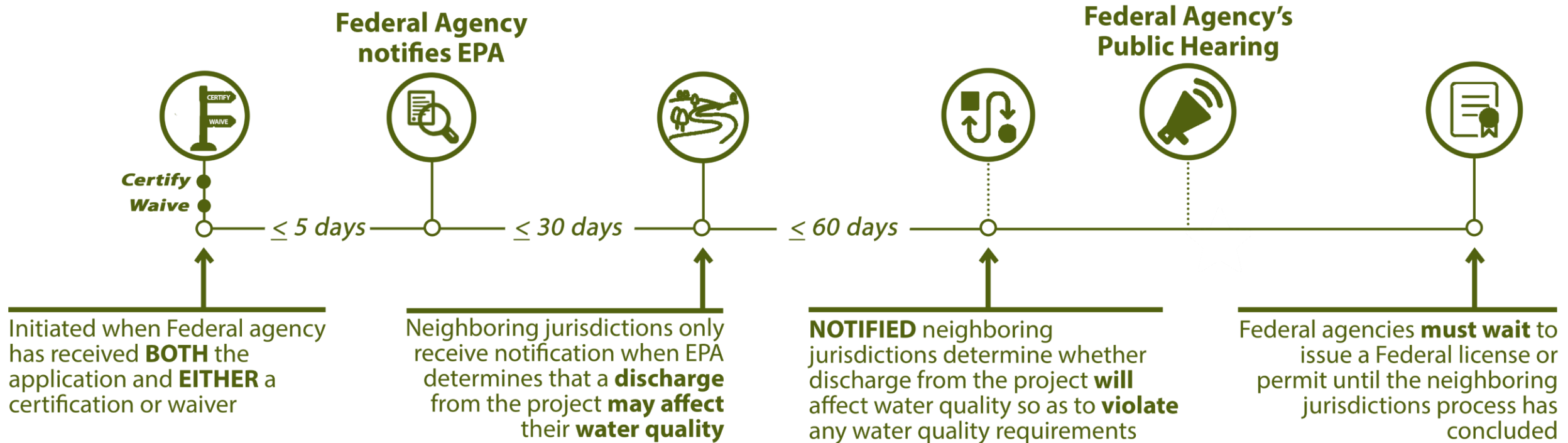
Post-Certification



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.



TAS for the section 401 program



Session on (TAS) Opportunities
through the 2023 CWA Section
401 Rule

Wednesday, March 6, 2023
8-9:30am
Rio Grande Room



FINAL 2023 RULE

A Tribe may obtain TAS for section 401 **without** obtaining TAS for CWA section 303(c) water quality standards. A Tribe may also obtain TAS solely for section 401(a)(2) to participate as a neighboring jurisdiction.

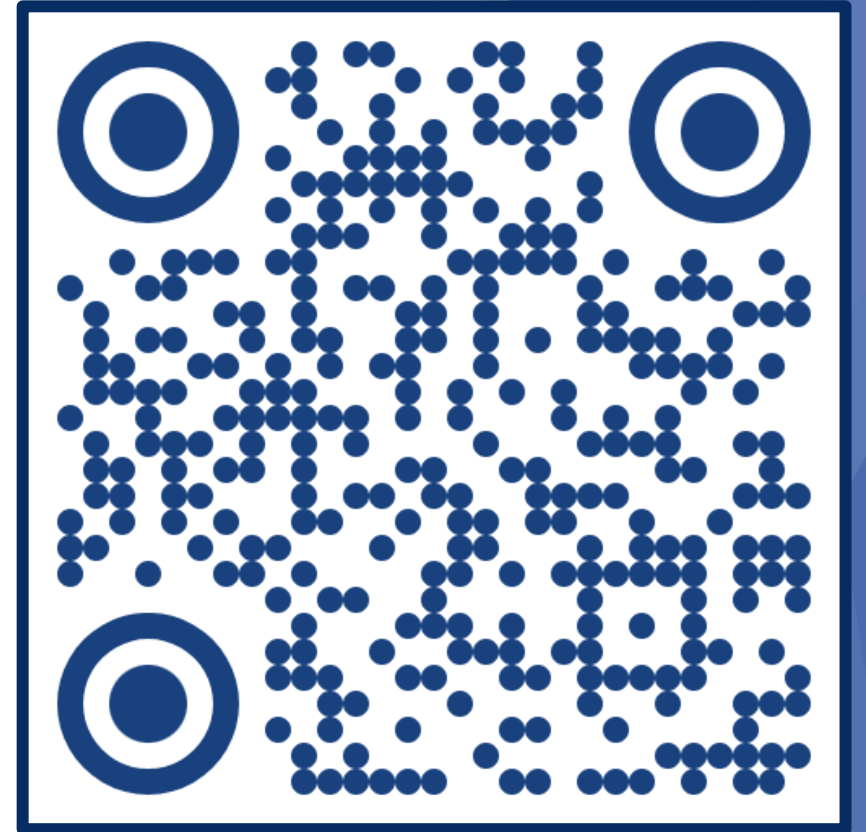
PRE-FINAL 2023 RULE

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

More Information

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

Please send questions to
CWA401@epa.gov




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 Implementations, Frequently Asked Questions, and fact sheets (in English and Spanish) can be found at [Regulations and Information](#).

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 other relevant information.



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).

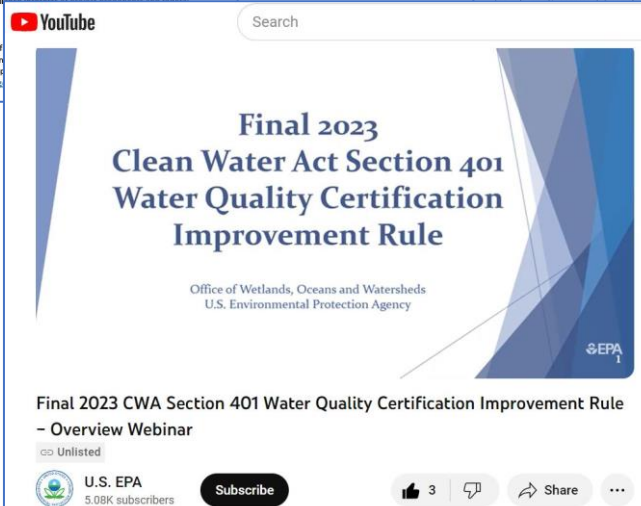
Federal licenses and permits that may require section 401 water quality certification include, but are not limited to, CWA section 404 dredge and fill permits from the Army Corps of Engineers (Corps), hydroelectric licenses from the Federal Energy Regulatory Commission (FERC), and CWA section 402 pollutant 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.

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. The Agency announced its intention to revise the 2020 Rule to 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

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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Additional EPA Rulemaking

- ▶ Draft Guidance for Future National Pollutant Discharge Elimination System Permitting of Combined Sewer Systems
 - ▶ Draft guidance highlights the available paths forward for permitting communities with CSOs as they complete the projects planned under the 1994 CSO Control Policy and plan future efforts to meet Clean Water Act goals.
 - ▶ **Comments on the draft Guidance must be received on or before March 21, 2024**
- ▶ Proposed Sixth Unregulated Contaminant Monitoring Rule
 - ▶ Requesting public input on drinking water analytical methods for emerging contaminants in drinking water, particularly those listed on the agency's Fifth Contaminant Candidate List.
 - ▶ **Comments must be received on or before April 8, 2024**