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This presentation does not:

- Impose any binding requirements
- Determine the obligations of the regulated community
- Change or substitute for any statutory provision or regulatory requirement
- Change or substitute for any Agency policy or guidance
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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.

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



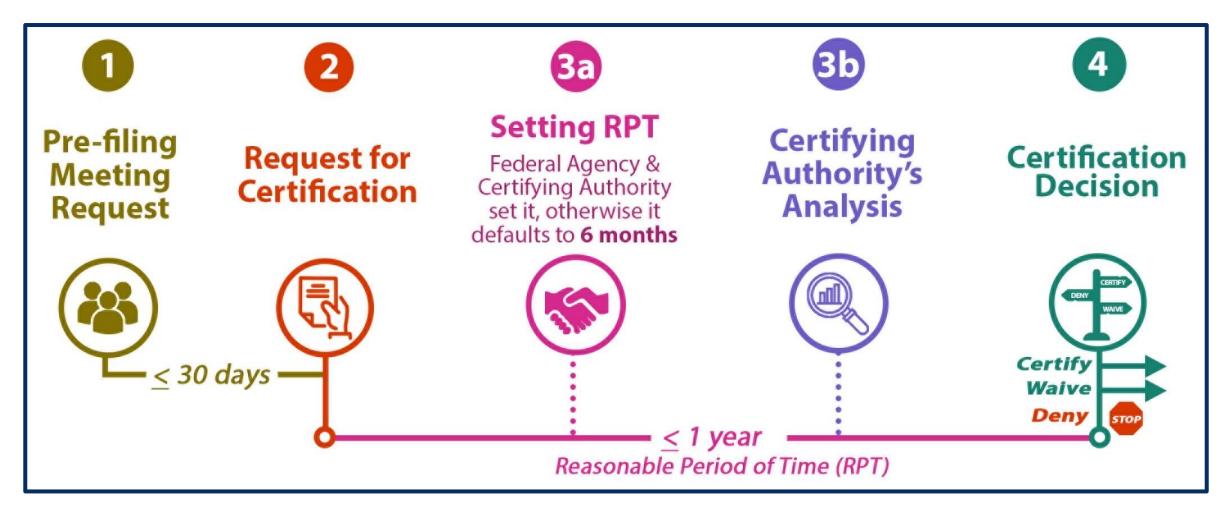
EPA acts as the certifying authority where there is no authorized tribe or state



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



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.

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

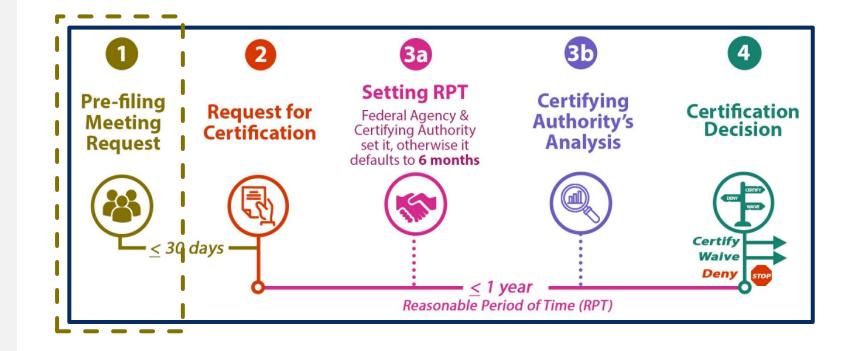






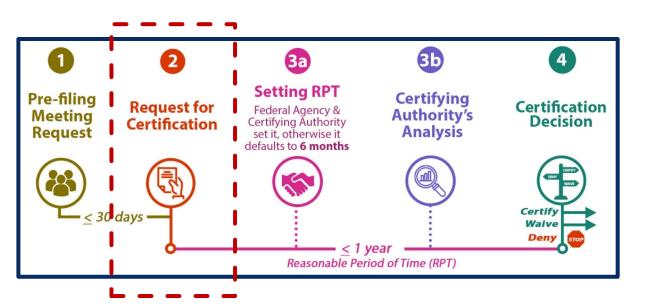
Section 121.4 requires all project proponents to request a pre-filing meeting with the appropriate certifying authority at least 30 days prior to submitting a request for certification, unless this requirement is shortened or waived by the certifying authority.

Pre-filing meeting request





Request for certification

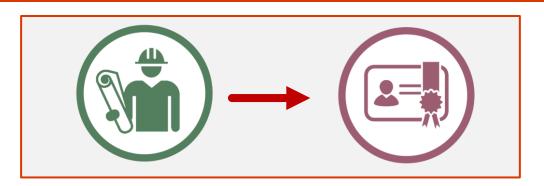


Section 121.5(a) defines **minimum contents** that must be in all requests for certification.

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

<u>HOWEVER</u>: 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)



INDIVIDUALFederal license or permit request

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

Issuance of a GENERALFederal license or permit request

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

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



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

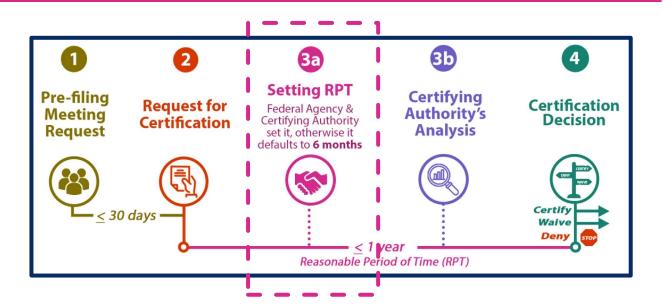
- A **description** of the **proposed activity**, including purpose of proposed activity and type(s) of discharge(s) that may result
- The **specific location of any discharge(s)** that may result from the proposed activity
- Map or diagram of the proposed activity site, including proposed activity boundaries in relation to local streets, roads, and highways
- Description of current activity site conditions, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation
- **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
- 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
- **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



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**.

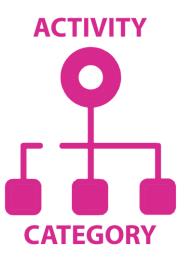


Setting the reasonable period of time

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)



(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.)

If the federal agency and certifying authority fail to set a reasonable period of time, it will default to 6 months.





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

Certification

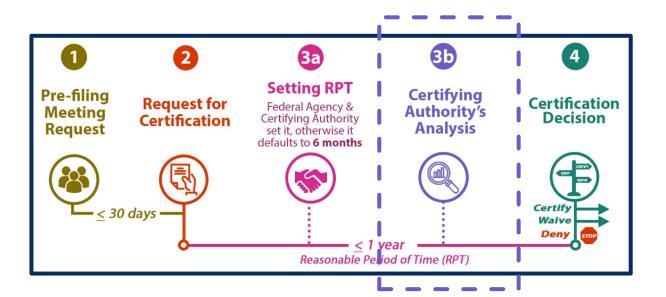
Decision



Public notice procedures

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

EPA 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.



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

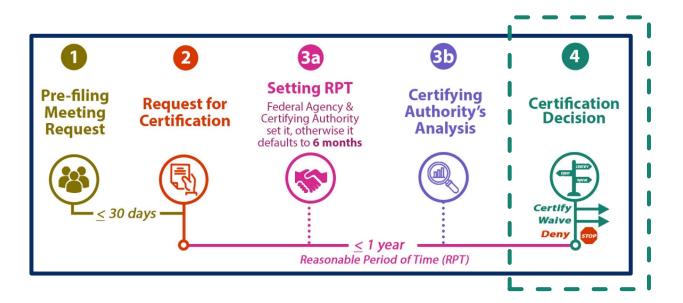
A certifying authority's analysis of any given activity is limited to adverse water quality-related **impacts** that may prevent compliance with water quality requirements.

Decision

Certifying



Certification Decisions



A certifying authority may act in one of four ways:

- 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).



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

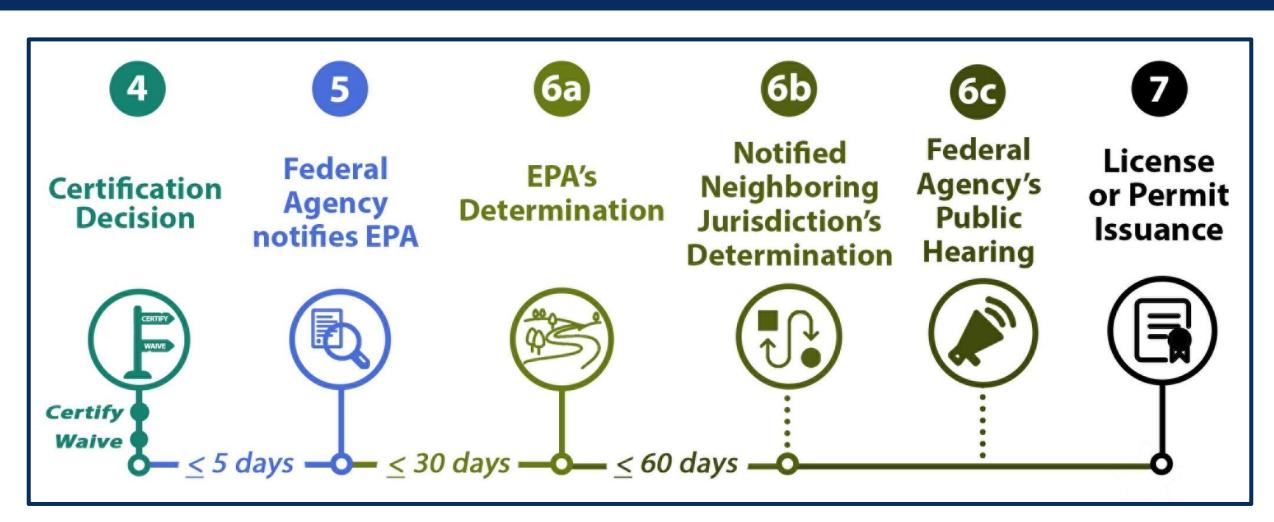


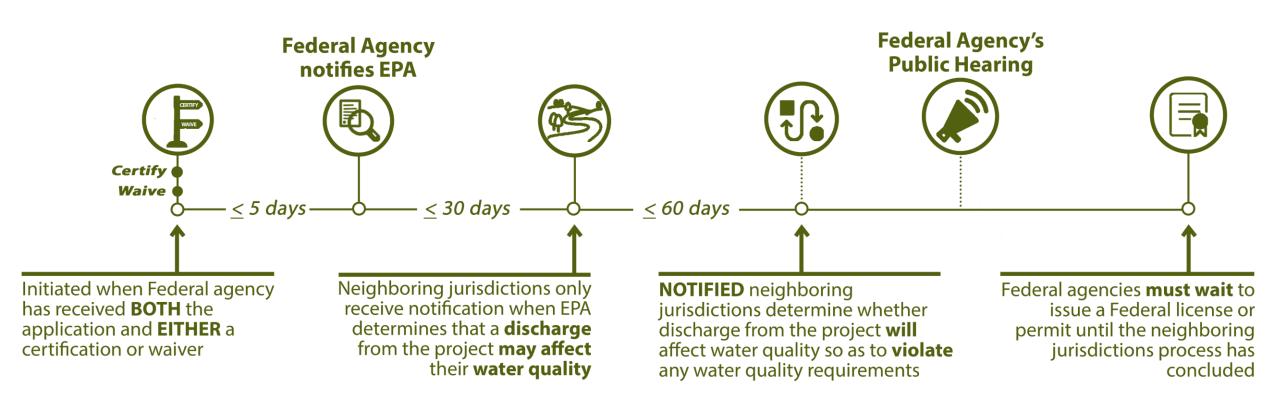
A federal agency *may* verify compliance with the requirements of section 401:

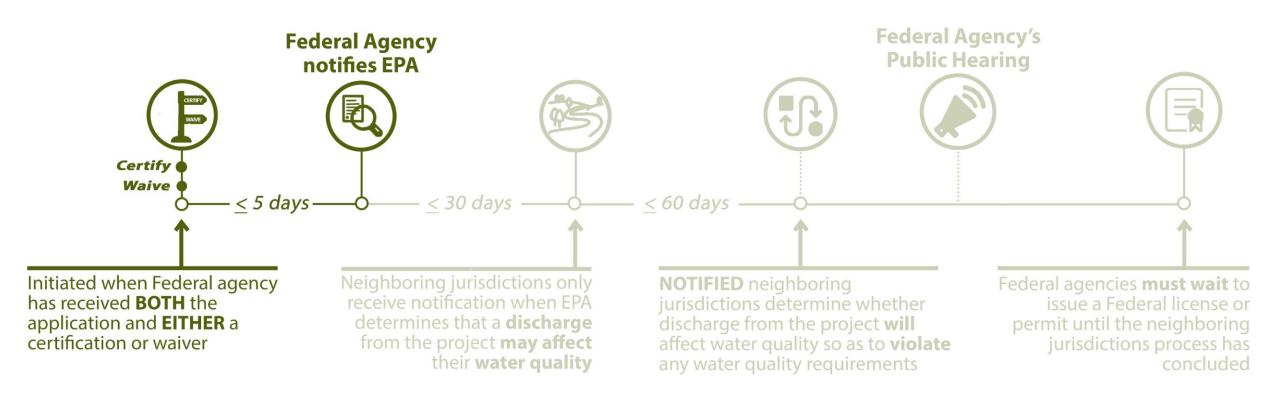
- 1. Whether the appropriate certifying authority issued the decision,
- 2. Whether the certifying authority confirmed it complied with its public notice procedures established pursuant to section 401(a)(1), and
- 3. Whether the certifying authority acted on the request for certification within the reasonable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

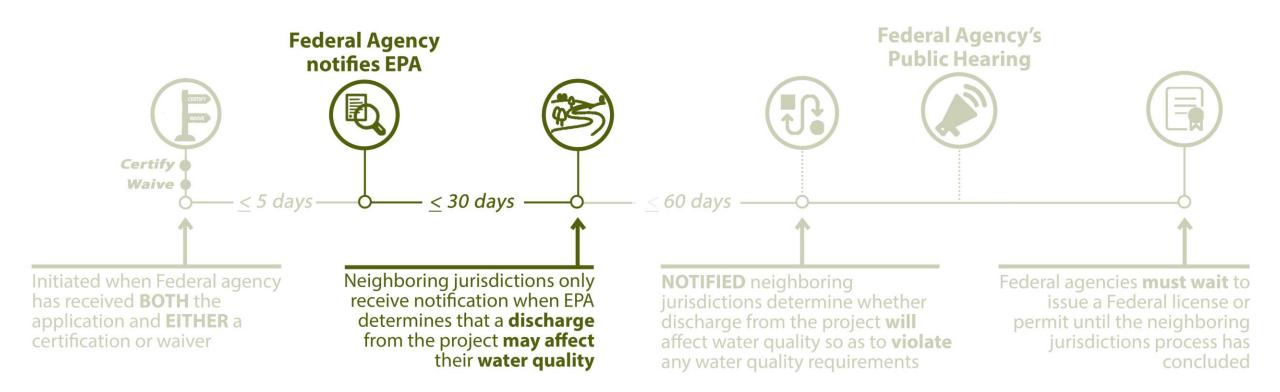


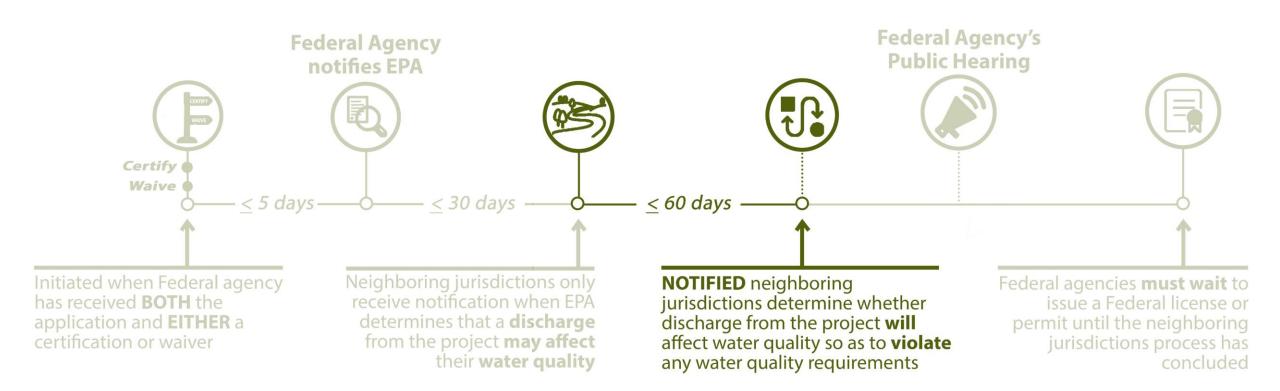
Final 2023 Rule: Post-Certification Process

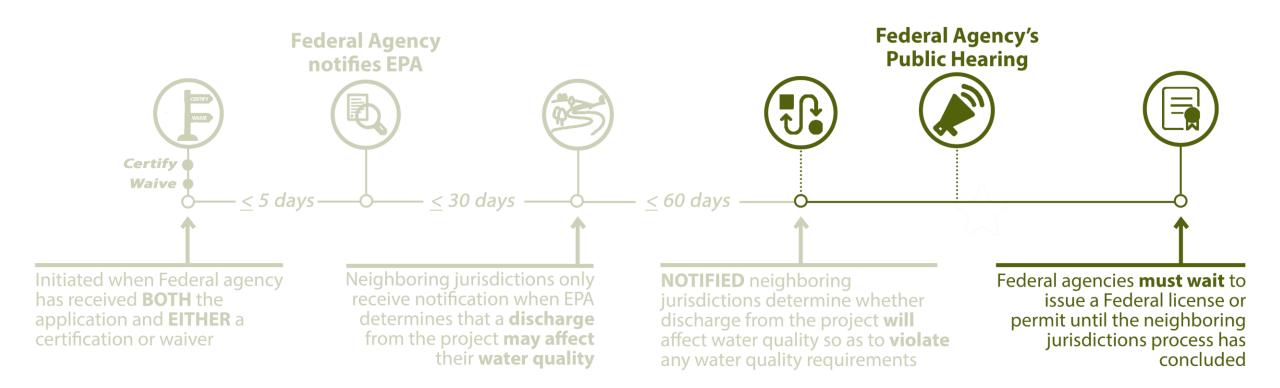














Modifications to certifications



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

[&]quot;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.



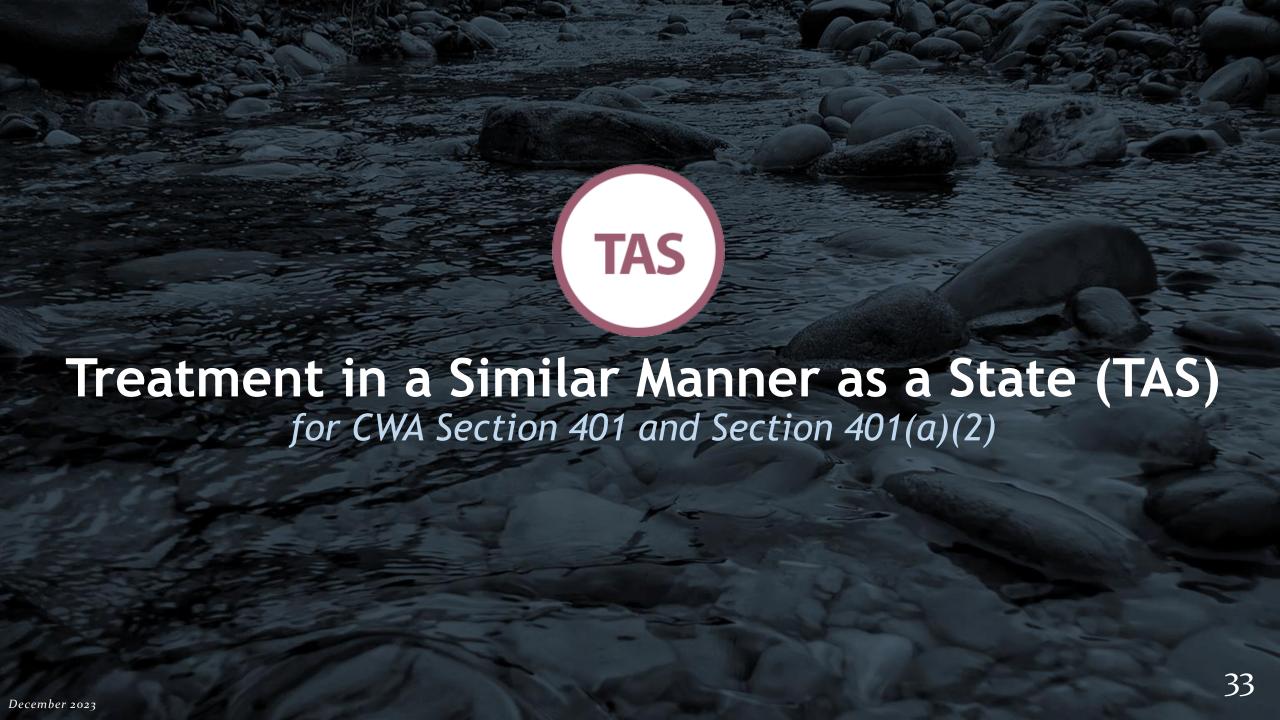
Can federal agencies enforce certification conditions?

Yes, but federal agencies have enforcement discretion.



Can state and tribal certifying authority enforce certification conditions?

Yes, if authorized under state or tribal law.





Treatment in a similar manner as a state (TAS)

What is it?

CWA section 518 authorizes EPA to treat eligible Tribes with reservations (which includes both all lands within formal reservations and tribal trust lands located outside of a formal reservation) in a similar manner to states. The final rule includes provisions for Tribes to obtain TAS solely for section 401 and/or section 401(a)(2).



Treatment in a similar manner as a state (TAS)

Upon receiving TAS for section 401, Tribes have two roles:



 Responsible for acting as a certifying authority for projects that may result in a discharge into waters of the United States on their Indian reservations

As certifying authorities, Tribes with TAS may **grant**, **grant with conditions**, **deny**, or **waive** certification based on whether a federally licensed or permitted project will comply with sections 301, 302, 303, 306, and 307 of the CWA and any other appropriate requirements of Tribal law.



 Accorded the status of "neighboring jurisdiction" for purposes of section 401(a)(2):

If EPA makes a "may affect" finding, the notified neighboring jurisdiction may object to the issuance of the Federal license or permit if they determine that a discharge from the project "will violate" any of its water quality requirements and request a public hearing from the Federal licensing or permitting agency

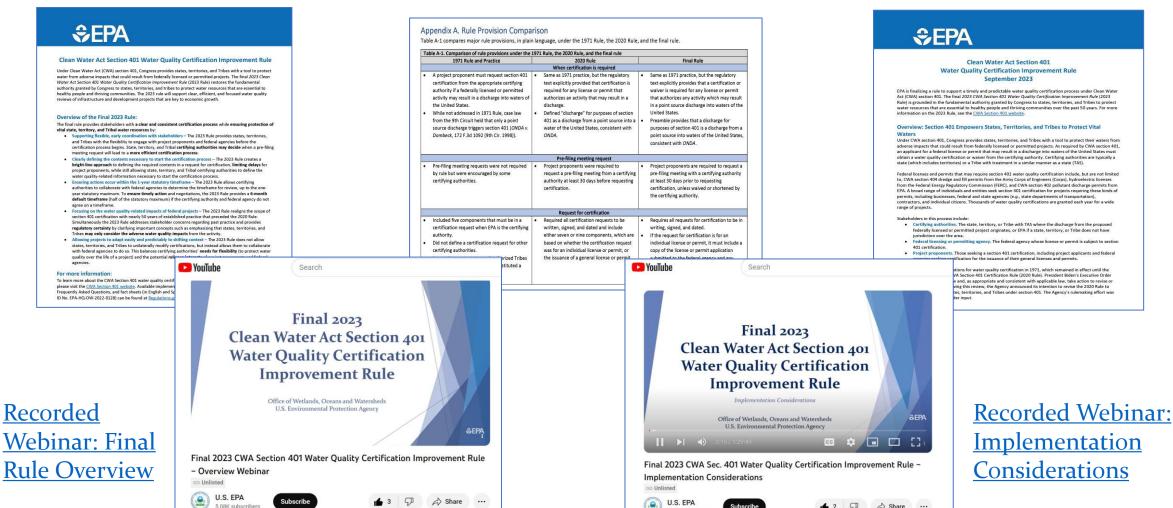
Available Resources

One-page Fact sheet (in <u>English</u> and <u>Spanish</u>)

Rule Provision Comparison

Overview Fact sheet (in **English** and **Spanish**)

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Section 401 certifications or waivers are necessary only for activities federally licensed or permitted under the Clean Water Act.



Section 401 certifications or waivers are necessary only for activities federally licensed or permitted under the Clean Water Act.

False. Certification is required for *any* federal license or permit that may result in any discharge from a point source into waters of the U.S., so some licenses or permits may fall under the CWA, like section 402 or 404 permits, but other federal licenses or permits may fall under other provisions, such as FERC's hydropower and natural gas pipeline licenses.



Under section 401, EPA is the certifying authority for all Federal licenses and permits.



Under section 401, EPA is the certifying authority for all Federal licenses and permits.

False. EPA only acts as the certifying authority where no state or Tribe has the authority to issue certification.



A state or Tribal certifying authority cannot define additional contents for a request for certification.



A state or Tribal certifying authority cannot define additional contents for a request for certification.

False. A state or Tribal certifying authority may define additional contents that must be included in a request for certification, as long as they are relevant to the water quality-related impacts from the activity and are identified prior to when the request for certification is made.



It is possible for a state or Tribe to waive their opportunity to issue a certification decision simply by taking too long to review a request for certification.



It is possible for a state or Tribe to waive their opportunity to issue a certification decision simply by taking too long to review a request for certification.

True. A state or tribe may waive certification if it fails or refuses to act on a request for certification within the reasonable period of time, which shall not exceed one year from the date the request for certification was received.



Multiple Choice

In reviewing a request for certification, the certifying authority may consider whether the activity will comply with applicable water quality requirements, including which of the following?

- A. Effluent limitations for conventional and non-conventional pollutants
- B. Water quality standards
- C. New source performance standards
- D. Toxic pollutant limitations
- E. Any other water quality related requirements of state or tribal law



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Since section 401 certifications apply to Federal licenses or permits, the state or Tribe may not consider any requirements of state or Tribal laws that are more stringent than Federal implementing regulations.



Since section 401 certifications apply to Federal licenses or permits, the state or Tribe may not consider any requirements of state or Tribal laws that are more stringent than Federal implementing regulations.

False. The state or Tribe may consider any other water quality-related requirements of state or Tribal law, including those that are more stringent than Federal regulations.



If the project is located in *Jurisdiction A* but EPA determines that a discharge from the project may affect the water quality of *Jurisdiction B*, *Jurisdiction B* can object to the issuance of the Federal license or permit.



If the project is located in *Jurisdiction A* but EPA determines a discharge from the project may affect the water quality of *Jurisdiction B*, *Jurisdiction B* can object to the issuance of the Federal license or permit.

True. Jurisdiction B can object to the issuance of the Federal license or permit and request a public hearing if it determines that a discharge from the project will violate their water quality requirements. Based on the input at the hearing and recommendations from Jurisdiction B and EPA, the Federal agency will determine whether it needs to incorporate more certification conditions into its Federal license or permit or, if additional certification conditions cannot assure that a discharge from the project will comply with Jurisdiction B's water quality requirements, the Federal agency shall not issue the license or permit.



Which of the following is correct?

When EPA reviews a certification or waiver during the neighboring jurisdiction process, EPA may do which of the following?

- A. Request a public hearing
- B. Submit its evaluation and recommendations
- C. Override the certifying authority's decisions if it was arbitrary and capricious
- D. Notify other jurisdictions if a discharge from the project may affect water quality in a neighboring jurisdiction



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B and *D*. A state or authorized Tribe may request a public hearing.



If a Tribe has TAS for section 401, the Tribe must have EPA-approved water quality standards to act on a request for certification.



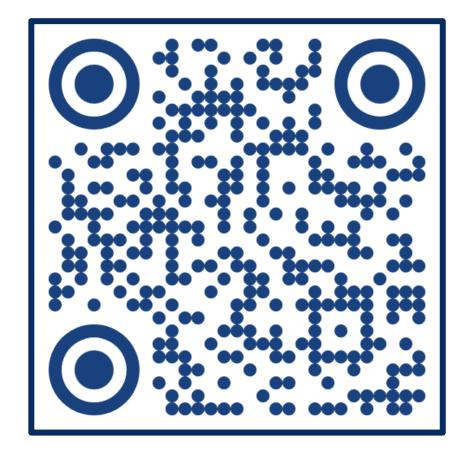
If a Tribe has TAS for section 401, the Tribe must have EPA-approved water quality standards to act on a request for certification.

False. Section 401 is not limited to ensuring compliance with CWA section 303(c) water quality standards. Rather a certifying authority must ensure compliance with water quality requirements. 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, which can include water quality standards that are not EPA-approved.

More Information

Please visit the CWA Section 401 website,

https://www.epa.gov/cwa-401



Questions?

Please send questions to

CWA401@epa.gov