

Clean Water Act Section 401 Certification Rule

State and Tribal Webinar 3

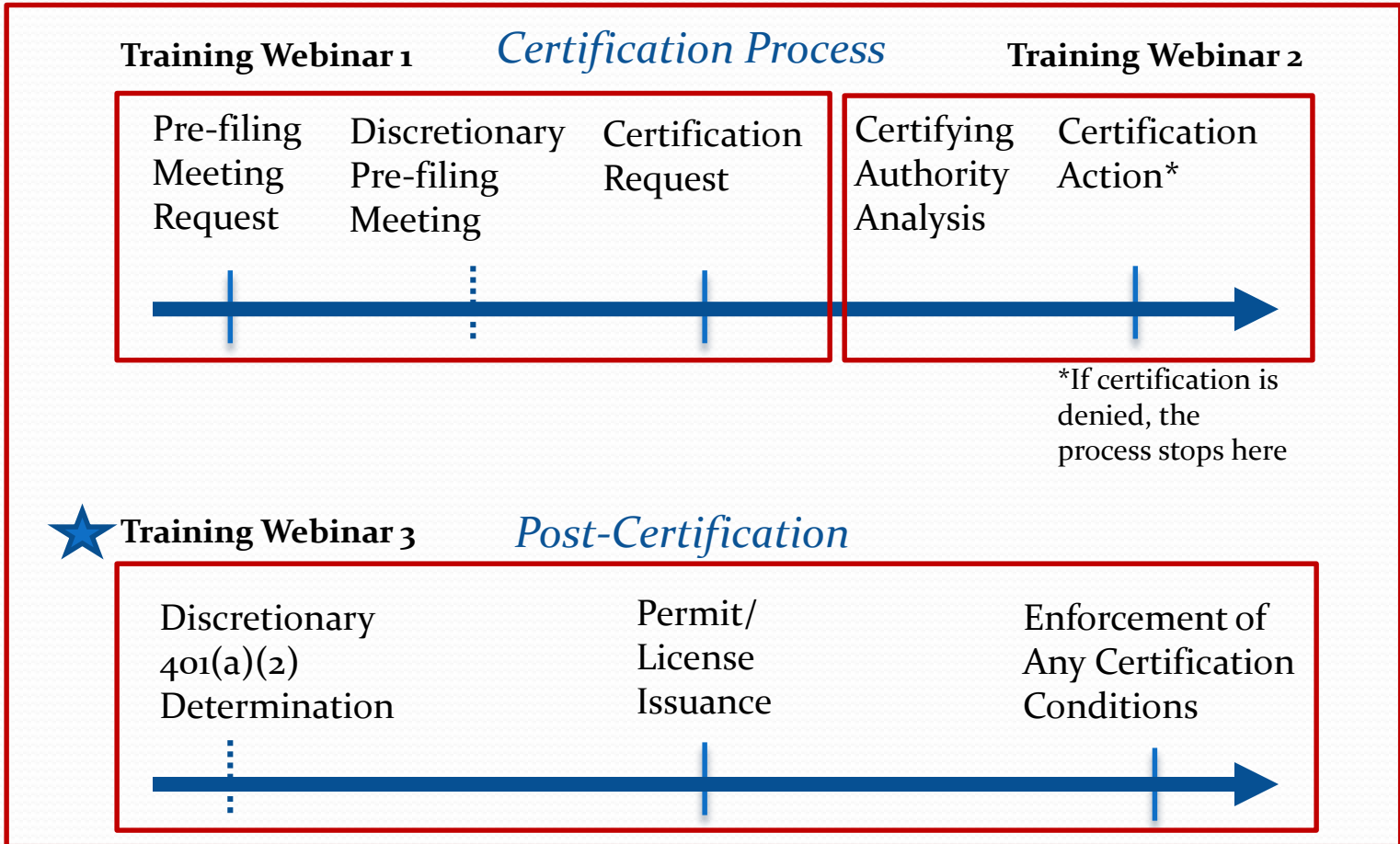
Office of Water
U.S. Environmental Protection Agency

September 9, 2020

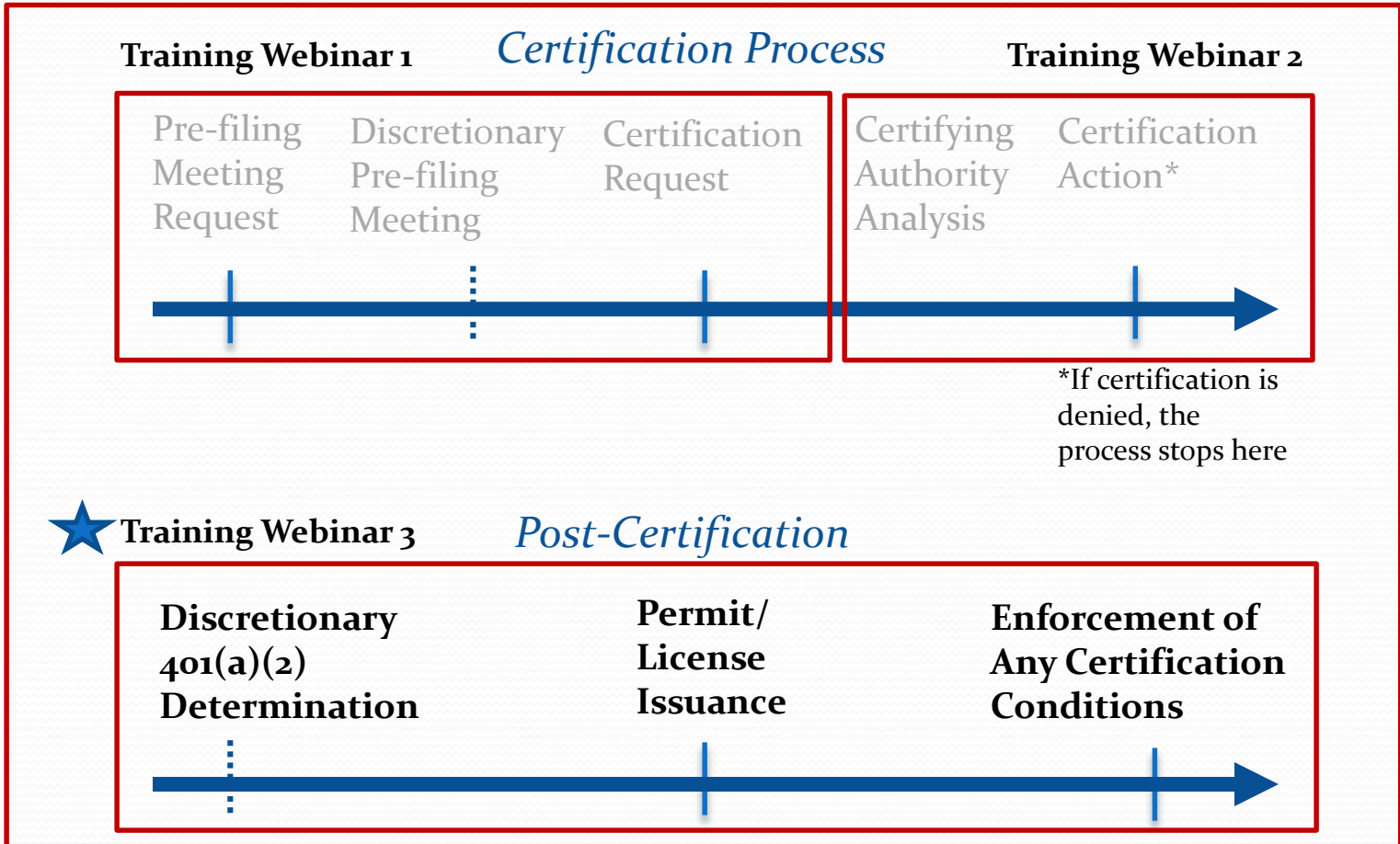
Overview

- Final Rule Topics
 - Neighboring Jurisdictions
 - Permit/License Issuance
 - Enforcement
 - EPA's Roles in Section 401
- Questions

June 17, 2020 Public Webinar



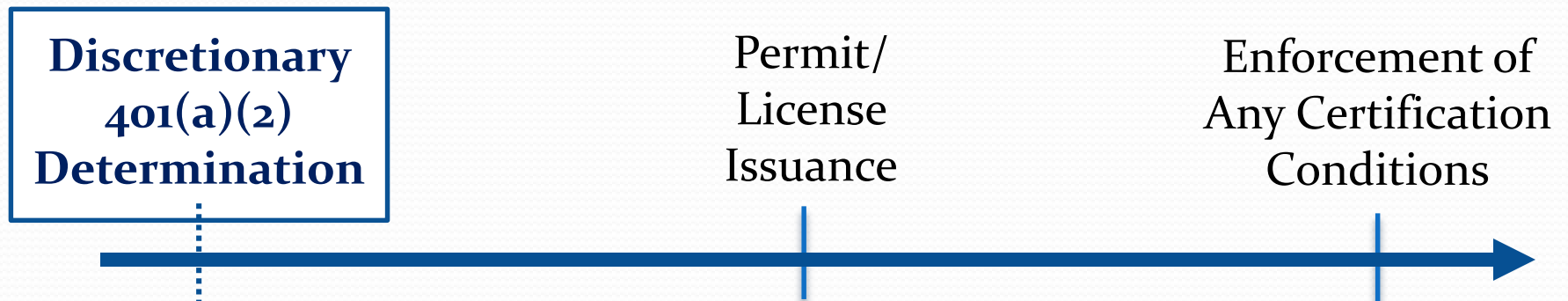
June 17, 2020 Public Webinar



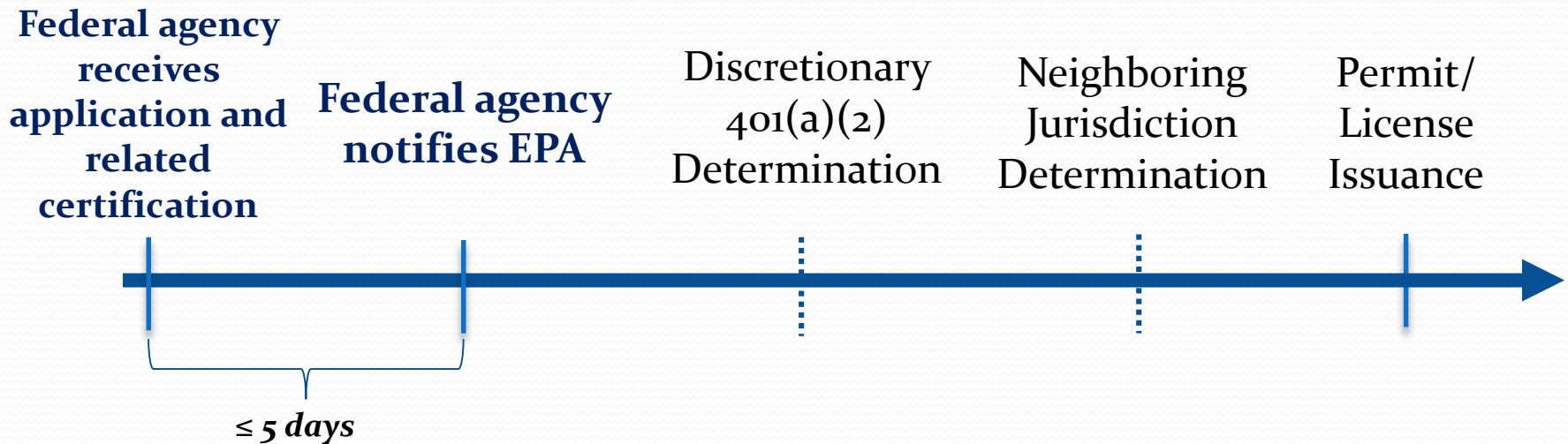
Final Rule:

Neighboring Jurisdictions

Post-Certification

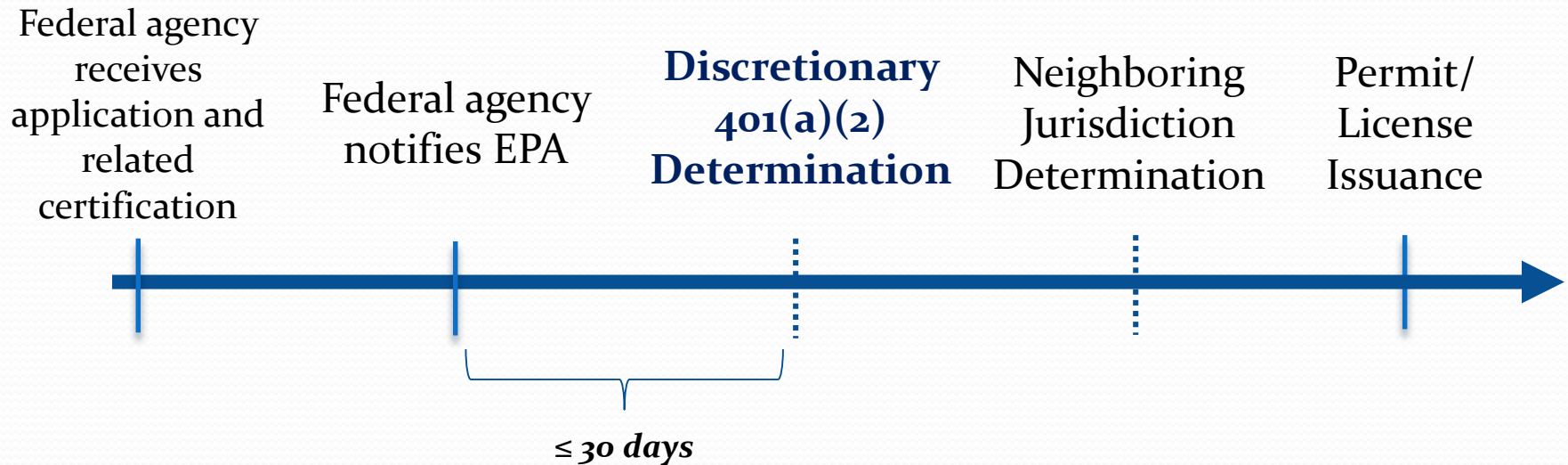


Neighboring Jurisdictions



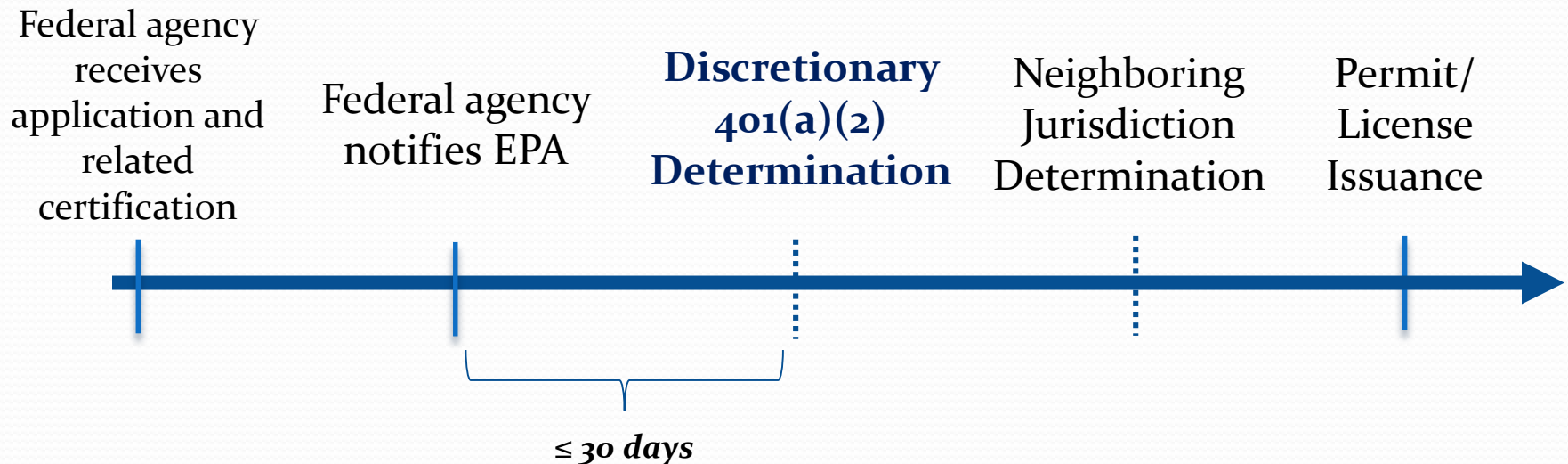
- The federal agency **must** notify the EPA within 5 days of receiving the license or permit application and related certification, for purposes of section 401(a)(2).

Neighboring Jurisdictions



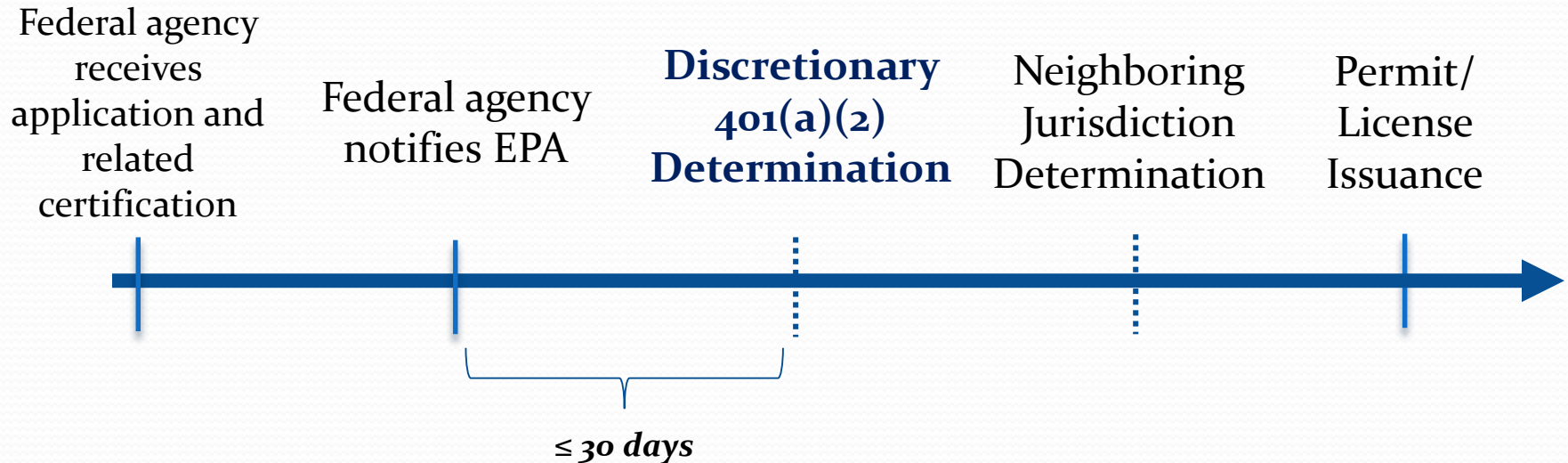
- **Within 30 days** after receiving notice from the federal agency, EPA may determine *in its discretion* whether the discharge from the certified project may affect the water quality in a neighboring jurisdiction.

Neighboring Jurisdictions



- If EPA **does not** make a determination within 30 days of receiving notification from the federal agency:
 - The federal agency may resume processing the federal license or permit.

Neighboring Jurisdictions

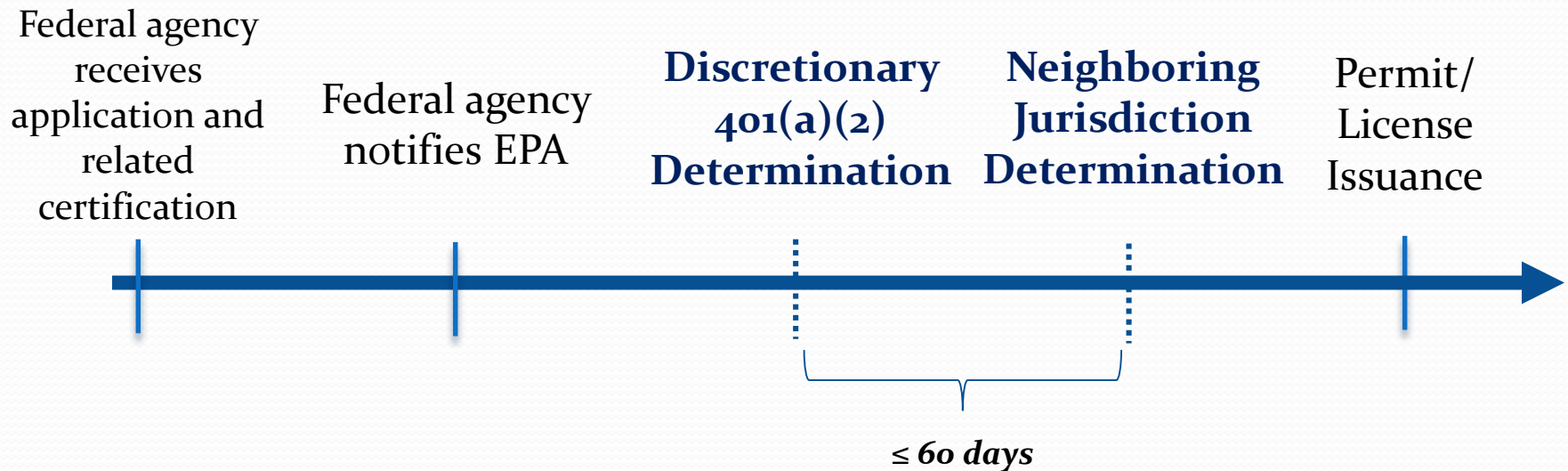


- If EPA **determines** that the discharge from the certified project may affect water quality in a neighboring jurisdiction:
 - EPA shall notify the neighboring jurisdiction, certifying authority, federal agency, and project proponent.

Neighboring Jurisdictions

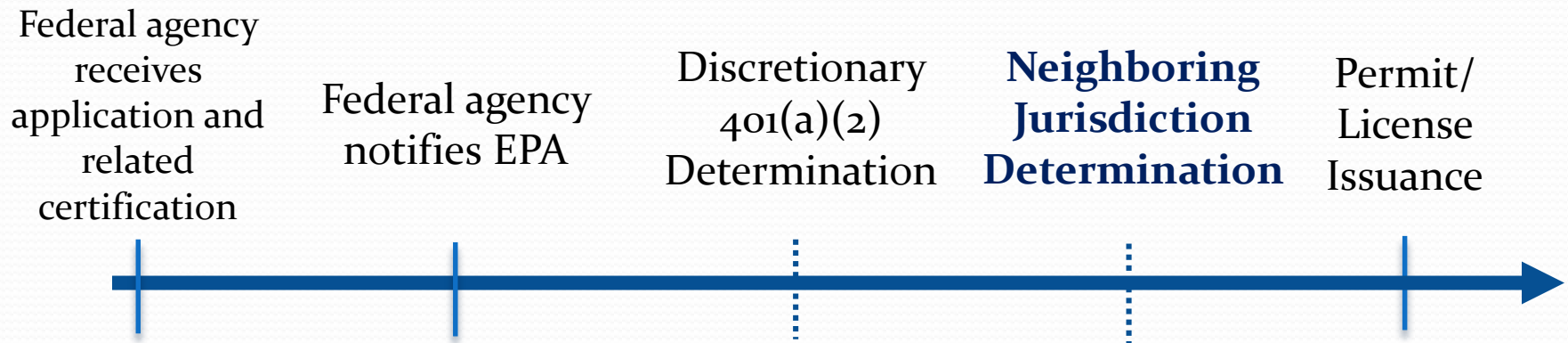
- If EPA determines that the discharge from a certified project may affect water quality in a neighboring jurisdiction, EPA's shall notify the neighboring jurisdiction, certifying authority, federal agency, and project proponent. The notification must be:
 - In writing;
 - Dated;
 - Identify the materials provided by the Federal agency; and
 - Inform the neighboring jurisdiction that it has **60 days**
 - To notify the EPA and the Federal agency, in writing, whether it has determined that the discharge will violate any of its water quality requirements,
 - To object to the issuance of the federal license or permit, and
 - To request a public hearing from the Federal agency.

Neighboring Jurisdictions



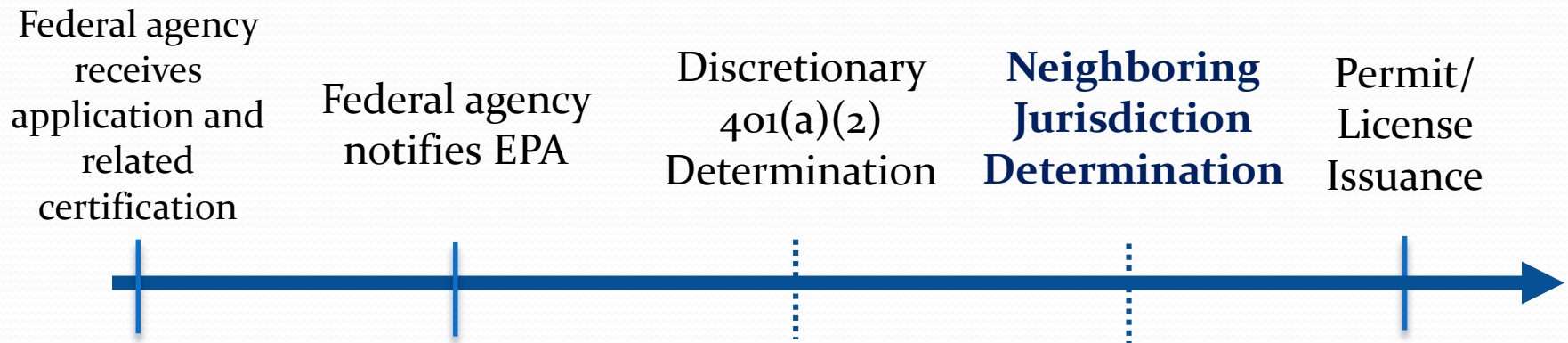
- If the neighboring jurisdiction objects to the issuance of the federal license or permit and requests a public hearing, its notification to EPA and the federal agency must:
 - Be in writing;
 - Identify the receiving waters it determined will be affected by the discharge; and
 - Identify the specific water quality requirements it determines will be violated by the certified project.

Neighboring Jurisdictions



- If the neighboring jurisdiction objects and requests a public hearing in accordance with section 121.21(c):
 - Federal agency shall hold the public hearing.
 - Federal agency shall notify EPA at least 30 days before the hearing takes place.
 - EPA must provide its evaluation and recommendations during the hearing.

Neighboring Jurisdictions



- After considering public hearing input:
 - The federal agency must condition the license or permit, as necessary, to assure that the discharge from the certified project will comply with the neighboring jurisdiction's water quality requirements.
 - If additional conditions cannot assure that the discharge from the certified project will comply with the neighboring jurisdiction's water quality requirements, the federal agency **cannot** issue the license or permit.

Neighboring Jurisdictions

- **Hypothetical Question 1:** EPA has received notice from a federal agency that it received a license application and its related certification. EPA does not make a “may affect” determination within 30 days of receipt of notification.
 - Does EPA have to notify the neighboring jurisdiction?

Neighboring Jurisdictions

- **Hypothetical Question 1:** EPA has received notice from a federal agency that it received a license application and its related certification. EPA does not make a “may affect” determination within 30 days of receipt of notification.
 - Does EPA have to notify the neighboring jurisdiction?
NO

Neighboring Jurisdictions

- **Hypothetical Question 2:** EPA has received notice from a federal agency that it received a license application and its related certification. EPA makes a “may affect” determination within 30 days of receipt of notification and notifies the neighboring jurisdiction in accordance with section 121.12(c)(1). The neighboring jurisdiction decides to object to the issuance of the federal license and requests a hearing in accordance with section 121.12(c)(2).
 - Can the federal agency issue the license before the conclusion of the neighboring jurisdiction process?

Neighboring Jurisdictions

- **Hypothetical Question 2:** EPA has received notice from a federal agency that it received a license application and its related certification. EPA makes a “may affect” determination within 30 days of receipt of notification and notifies the neighboring jurisdiction in accordance with section 121.12(c)(1). The neighboring jurisdiction decides to object to the issuance of the federal license and requests a hearing in accordance with section 121.12(c)(2).
 - Can the federal agency issue the license before the conclusion of the neighboring jurisdiction process? **NO**

Final Rule:

Permit/License Issuance



Permit/License Issuance

- Federal license or permit **may issue:**
 - Grant of certification or certification with conditions
 - Passes federal agency review of procedural requirements
 - Neighboring jurisdiction process concludes, assuming that the federal agency concludes that the discharge will comply with the neighboring jurisdiction's water quality requirements, even if additional conditions may be necessary
 - Waiver
- Federal license or permit **may not issue:**
 - Denial of certification
 - Passes federal agency review of procedural requirements
 - Grant of certification or certification with conditions
 - Neighboring jurisdiction process results in the federal agency determining that additional conditions cannot assure that the discharge will comply with the neighboring jurisdiction's water quality requirements

Permit/License Issuance

- Once a certification is issued, the conditions are incorporated into the federal license or permit for implementation and enforcement.
- Modifications:
 - No statutory basis in section 401 for EPA oversight role for certifications generally, or modifications to certifications.
 - No authority in section 401 for certifying authorities to unilaterally modify certifications after issuance.
 - The final rule does not preclude federal agencies from establishing procedures in their 401 regulations to clarify how modifications could be handled in certain scenarios.

Permit/License Issuance

- **Hypothetical Example 1:** A certifying authority has granted certification for a federally permitted project. The project proponent changes the point of contact associated with the project.
 - Can the certifying authority unilaterally modify the certification to add the new point of contact?
 - Does the final rule require the project proponent to submit a new certification request in this scenario?

Permit/License Issuance

- **Hypothetical Example 1:** A certifying authority has granted certification for a federally permitted project. The project proponent changes the point of contact associated with the project.
 - Can the certifying authority unilaterally modify the certification to add the new point of contact? **NO**
 - Does the final rule require the project proponent to submit a new certification request in this scenario? **NO**

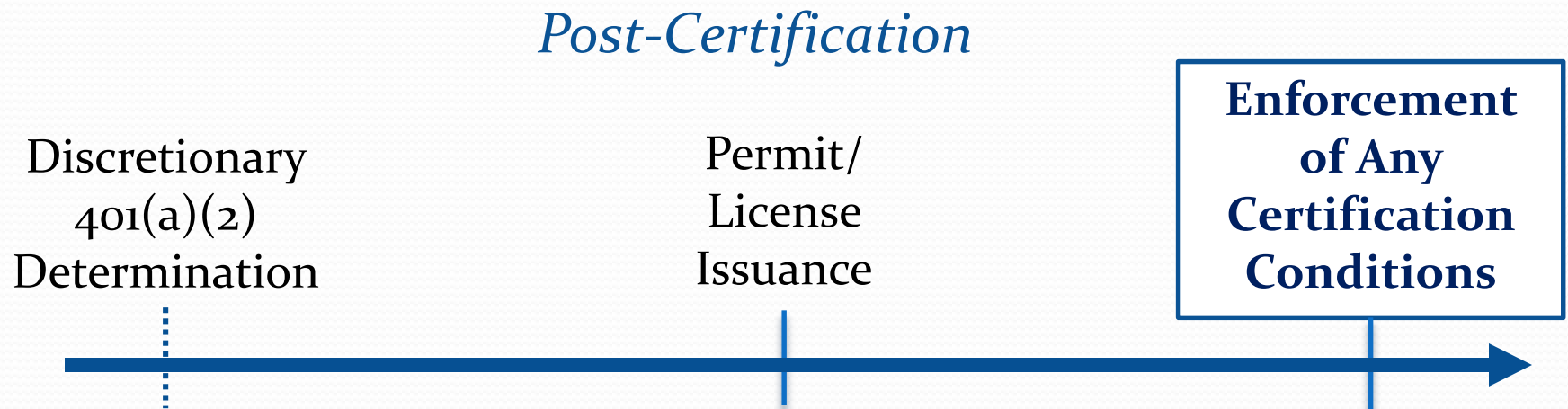
Permit/License Issuance

- **Hypothetical Example 2:** A certifying authority has granted certification for a federally permitted project. The project proponent makes changes to the project such that the federal permit with which the certification is associated must be modified.
 - Can the certifying authority unilaterally modify the certification?
 - Does the final rule require the project proponent to submit a new certification request in this scenario?

Permit/License Issuance

- **Hypothetical Example 2:** A certifying authority has granted certification for a federally permitted project. The project proponent makes changes to the project such that the federal permit with which the certification is associated must be modified.
 - Can the certifying authority unilaterally modify the certification? **NO**
 - Does the final rule require the project proponent to submit a new certification request in this scenario? **Possibly**

Final Rule: *Enforcement*



Enforcement



- All certifying authorities may inspect the facility or activity *prior to initial operation* in order to determine if the discharge from the certified project will violate the certification.
- After inspection, if the certifying authority determines the discharge from the certified project will violate the certification, it shall:
 - Notify the project proponent and federal agency in writing; and
 - Recommend remedial measures necessary to bring the certified project into compliance with the certification.

Enforcement



- The federal agency issuing the applicable federal license or permit is responsible for enforcing certification conditions that are incorporated into a federal license or permit.
- After commencement of operations, all inspections and enforcement is to be conducted by the federal agency issuing the license or permit.

Enforcement



- CWA section 401 does **not** authorize States and Tribes to independently enforce a certification or specific certification conditions.

Enforcement

- **Hypothetical Example 1:** A certifying authority granted certification for a federally licensed project. Initial operations for the project have **not** begun.
 - May the certifying authority inspect the project to determine if the discharge from the certified project will violate the certification?

Enforcement

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 - May the certifying authority inspect the project to determine if the discharge from the certified project will violate the certification? **YES**

Enforcement

- **Hypothetical Example 2:** A certifying authority granted certification for a federally licensed project. Initial operations for the project have begun.
 - Under the final rule, may the certifying authority inspect the project to determine if the discharge from the certified project will violate the certification?

Enforcement

- **Hypothetical Example 2:** A certifying authority granted certification for a federally licensed project. Initial operations for the project have begun.
 - Under the final rule, may the certifying authority inspect the project to determine if the discharge from the certified project will violate the certification? **NO**

Enforcement

- **Hypothetical Example 3:** A State certifying authority granted certification with conditions for a federally licensed project. Initial operations for the project have begun. The project proponent is violating one of the conditions of the certification.
 - May the State certifying authority enforce the certification condition in question under federal law?

Enforcement

- **Hypothetical Example 3:** A State certifying authority granted certification with conditions for a federally licensed project. Initial operations for the project have begun. The project proponent is violating one of the conditions of the certification.
 - May the State certifying authority enforce the certification condition in question under federal law?
NO

Final Rule:

EPA's Roles in Section 401

- The EPA has three roles:
 1. To act as the certifying authority when a state or tribe does not have authority to act on a request for certification;
 2. To provide technical assistance to project proponents, certifying authorities, or federal agencies upon request; and
 3. At the Agency's discretion, to determine whether a discharge may impact the water quality of a neighboring jurisdiction.

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EPA's Roles in Section 401

- Currently, EPA acts as the certifying authority in two scenarios:
 1. On behalf of federally-recognized tribes who do not have treatment as a state for section 401
 2. On lands of exclusive federal jurisdiction.
- The final rule has two additional requirements that apply **only** when EPA acts as the certifying authority:
 - EPA must issue public notice within 20 days of receipt of the certification request; and
 - EPA may request additional information from a project proponent but only if the initial request is made within 30 days of receipt of the certification request.

EPA's Roles in Section 401

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EPA's Roles in Section 401

- Federal agencies, certifying authorities, and project proponents *may request assistance* from the Administrator to provide relevant information and assistance regarding the meaning, content, application, and methods to comply with water quality requirements.
 - This technical advice is **not** a final agency action and does **not** render EPA a decisionmaker for purposes of the certification action or subsequent action of the federal agency.

EPA's Roles in Section 401

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 3. **At the Agency's discretion, to determine whether a discharge may impact the water quality of a neighboring jurisdiction.**

EPA's Roles in Section 401

- **Hypothetical Example 1:** A project proponent needs a federal permit for a project that may result in a point source discharge into a water of the United States. The project is entirely located in a national park that is under exclusive Federal jurisdiction and not State jurisdiction.
 - Does this project require section 401 certification?
 - If yes, who is the appropriate certifying authority?

EPA's Roles in Section 401

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 - Does this project require section 401 certification? **YES**
 - If yes, who is the appropriate certifying authority? **EPA**

EPA's Roles in Section 401

- **Hypothetical Example 2:** A project proponent submitted a grant of certification with conditions to a federal agency. One condition provides for monitoring of a potential discharge of a pollutant from the project into a water of the United States. Assume the federal agency has conducted its review and the neighboring jurisdiction process has concluded.
 - The federal agency is unsure of how to interpret this condition. Where can the federal agency obtain technical assistance with this condition?

EPA's Roles in Section 401

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 - The federal agency is unsure of how to interpret this condition. Where can the federal agency obtain technical assistance with this condition? **EPA**



Questions?

Additional Information

- Visit **<https://www.regulations.gov>** to view the docket for this rulemaking, identified by **Docket ID No. EPA-HQ-OW-2019-0405**.
- For more information on CWA section 401 and this rulemaking, please visit **<https://www.epa.gov/CWA-401>**.
- If you have any questions, please send an e-mail to **cwa401@epa.gov**.