

# IDAHO SECTION 401 CERTIFICATION GUIDANCE

*This document is intended to assist the Idaho Department of Environmental Quality (DEQ) in maintaining and implementing a consistent state-wide approach for 401 certification. This document does not create a right or benefit, substantive or procedural, enforceable at law or equity by any party vs. DEQ, its employees or any other person. This document provides guidance for conducting 401 certifications of federal permits or licenses. Section 401 certifications will be governed by existing requirements of the Clean Water Act (CWA), federal regulations, and the Idaho water quality standards (WQS). This document does not substitute for those provisions, regulations or rules. The recommendations in this guidance are not binding; DEQ may consider other approaches consistent with the CWA, federal regulations, and the WQS. Section 401 certification decisions will be made on a case-by-case basis, taking into account comments and information presented at that time by interested persons, the permit or license applicant, and the permitting or licensing agency. DEQ may vary from the recommended approach outlined in this document based upon site specific information and comments provided by the public, the permit or license applicant, and the permit or licensing agency. DEQ may change this guidance in the future.*

## I. Introduction

Section 401 of the federal Clean Water Act requires any applicant for a federal license or permit to conduct any activity which may result in a discharge into navigable waters to provide the licensing or permitting agency a certification from the state in which the discharge originates or will originate that the discharge will comply with applicable provisions of the Clean Water Act and state Water Quality Standards. This guidance document addresses 401 certifications for: National Pollutant Discharge Elimination System (NPDES) permits issued by the U.S. Environmental Protection Agency (EPA); permits issued by the U.S. Army Corps of Engineers (Corps) pursuant to section 404 of the Clean Water Act; and licenses for hydroelectric facilities issued by the Federal Energy Regulatory Commission (FERC). There may also be other permits and licenses for which DEQ must provide certification that are not addressed specifically by this guidance document.

Section 401 requires states to establish procedures for public notice in the case of all applications for certification and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.

Section 401 provides that the state must act on a request for certification within a reasonable period of time, which cannot exceed one year, after receipt of the request, or the certification requirement shall be waived.

Federal agencies have further defined the “reasonable period of time” within which a state must make its 401 certification decision. For both NPDES permits and permits issued pursuant to section 404 of the Clean Water Act, states generally have sixty (60) days to provide certification decisions, unless the federal agency agrees a longer period of time for certification is warranted. For licenses issued by FERC, states have one year from the date the request for certification is received to provide certification. With respect to NPDES and section 404 permits, notice that the

state of Idaho will consider 401 certification is included within the federal notice regarding the permit. No such notice is provided with respect to FERC licenses.

DEQ is the agency designated in the state of Idaho to make 401 certification decisions. In the fiscal year 2008, DEQ provided 611 certifications. Currently, the duties of this program are coordinated from the DEQ State Office and administered from six regional offices.

DEQ has set forth, in this guidance document, time frames and procedures it considers appropriate with respect to most 401 certifications. DEQ has worked with the Corps and EPA in establishing these interagency procedures. Through the implementation of this guidance document, it is DEQ's goal to ensure a consistent state-wide process that will provide adequate public notice and an opportunity to comment with respect to DEQ's 401 certification decisions.

This guidance document first sets forth guidance applicable to all the federal permits and licenses addressed by this document. Separate procedures and timelines for certification with respect to NPDES permits, FERC licenses and 404 permits are then described.

## **II. Guidance Applicable to all Federal Permits or Licenses**

### ***A. Information to Support the Request for 401 Certification***

In order to make its 401 certification decision, DEQ must have adequate information. It is the obligation of the permit or license applicant to provide sufficient information that establishes there is a reasonable assurance that the discharge will comply with applicable provisions of the Clean Water Act and state Water Quality Standards. The required information will depend upon the circumstances and permit or license involved.

DEQ will work with applicants and the federal licensing or permitting agency in order to ensure the receipt of information relevant to the 401 certification decisions. In certain circumstances, it will be particularly important that the federal licensing or permitting agency provide DEQ with the basis for the limits and requirements set forth in the permit or license. For example, EPA should provide to DEQ the basis for water quality based effluent limits in NPDES permits.

### ***B. DEQ 401 Certification Decision***

Section 401 of the Clean Water Act allows DEQ to waive certification (either expressly or by operation of law), deny the certification, grant the certification, or grant the certification with conditions.

If DEQ denies certification, the federal agency cannot issue the federal license or permit. Depending upon the circumstances and the applicable federal requirements and time lines, DEQ may deny the certification without prejudice, allowing the applicant to request certification again. As explained below, this may be appropriate when insufficient information is provided to allow DEQ to make its certification decision.

DEQ may grant certification with conditions. Pursuant to section 401(d), the certification may include any effluent limitations and other limitations and monitoring requirements necessary to

ensure that the applicant for the federal license or permit will comply with applicable sections of the Clean Water Act and state Water Quality Standards and with any other appropriate requirement of state law. Any such conditions shall become a condition on the federal license or permit.

With respect to NPDES permits, DEQ may also include in its certification a statement indicating the manner in which the permit can be made less stringent and still comply with state Water Quality Standards. This may include alternative limitations or requirements.

DEQ cannot provide certification unless it has sufficient information to establish there is a reasonable assurance the discharge will comply with state Water Quality Standards and the applicable sections of the Clean Water Act. DEQ will attempt to work with the federal agencies and applicants in order to receive adequate relevant information. However, DEQ may deny certification if such information is not provided in a timely manner. Under certain circumstances, and depending upon the federal time lines and requirements, the denial may be without prejudice allowing the applicant to develop additional information and reapply for certification. The applicant may withdraw the request for certification in order to develop additional information and then reapply for 401 certification, dependent upon federal restrictions.

DEQ's final decision regarding 401 certification may be appealed by the applicant or "other aggrieved person" pursuant to the Idaho Environmental Protection and Health Act, Idaho Code § 39-107(5) and the Idaho Administrative Procedure Act. Such an appeal is a prerequisite to any district court action and must be initiated by filing a petition for a contested case in accordance with the Rules of Administrative Procedure Before the Board of Environmental Quality (IDAPA 58.01.23) within thirty-five (35) days of the date of DEQ's decision regarding the 401 certification.

### **III. Guidance for Specific Permit Decisions**

#### **A. NPDES Permits**

##### **1. Federal Law and Regulations**

The Clean Water Act regulations (40 CFR 124.53) provide that if the state has not provided 401 certification by the time EPA issues its draft NPDES permit, then EPA shall send the state a copy of the draft permit and a statement that the state will be deemed to have waived its right to certify unless that right is exercised within a specified reasonable time not to exceed sixty (60) days from the date the draft permit is mailed to the state, unless the EPA regional administrator finds that unusual circumstances require a longer time.

40 CFR 124.53(e) provides that the state certification shall include: (1) conditions which are necessary to assure compliance with the applicable provisions of the Clean Water Act, state water quality standards and appropriate requirements of state law; (2) any conditions more stringent than those in the draft permit which the state finds necessary to meet the requirements under the Clean Water Act, state water quality standards or other appropriate state law; and (3) a statement of the extent to which each condition of the draft permit can be made less stringent

without violating the requirements of state law, including state water quality standards.

40 CFR 124.55(c) provides that a state may not condition or deny a certification on the grounds that state law allows a less stringent permit condition.

40 CFR 124.55(d) provides that recertification may be required when a condition in a draft permit is changed in a manner that is not consistent with the certification provided by the state.

## **2. DEQ 401 Certification Procedures**

DEQ intends to provide the public with the opportunity to review and comment on draft 401 certification decisions. Typically, DEQ will rely upon EPA Region 10 public notice practices; however, there may be instances where DEQ issues its own public notice regarding certification decisions. DEQ certification procedures for NPDES permits are outlined in the narrative below and in the attached flow chart.

Step 1. It is beneficial to include DEQ as early as possible in the permit development process. EPA may seek input from DEQ staff in identifying water quality concerns and implementation of Idaho water quality standards.

Step 2. Under EPA's Region 10 current practices, DEQ often receives a preliminary draft NPDES permit and request for water quality certification prior to EPA issuance of the draft permit for public comment. EPA typically requests that DEQ provide a draft water quality certification decision within 30 days. DEQ may provide comments and/or a draft certification to EPA regarding the preliminary draft permit.

Step 3. EPA is required to publish notice to the public and provide an opportunity for the public to comment on the draft permit. The public comment period is a minimum of thirty (30) days. If DEQ provides a draft water quality certification in Step 2, DEQ will request EPA append the draft certification to the Fact Sheet (Step 3a). DEQ also requests that EPA include in their public notice and fact sheet a statement that the draft certification is available for review and DEQ will accept public comments through the end of the draft permit comment period.

If DEQ did not provide a draft water quality certification in Step 2, EPA will send a copy of the draft permit and fact sheet to DEQ and request water quality certification within 30-days (Step 3b). DEQ will prepare a draft certification and issue an electronic news release. The draft certification will be made available for review on DEQ's Web site and the public will be given 30-days to submit comments.

Step 4. EPA will send a copy of the proposed final permit to DEQ and request final water quality certification within 30 days. DEQ will consider public comments and prepare a final certification based upon the proposed final permit. If substantial changes were made to the permit, DEQ may provide a second public comment opportunity if its certification has changed substantially.

If DEQ is not provided with a proposed final permit, DEQ will provide its final certification decision based upon the draft permit. In the event the final NPDES permit is inconsistent with

the state certification, DEQ shall require EPA submit the permit for recertification. DEQ will provide notice for the final certification decision.

Step 5. EPA will incorporate DEQ's water quality certification conditions where appropriate and issue a final permit.

Step 6. DEQ will post final water quality certifications for general NPDES permits on its Web site. Final certifications for individual NPDES permits will generally not be posted on DEQ's Web site.

If a public hearing for the NPDES permit is provided, DEQ may coordinate with EPA so that the public hearing addresses both permit and certification issues.

The process described above will depend upon coordination and agreement with EPA Region 10 NPDES permit staff. DEQ will not be able to implement this procedure unless EPA allows DEQ sufficient time to issue a draft 401 decision and receive comments on that decision prior to the expiration of the deadline to provide a 401 certification decision. DEQ may request an extension of the 401 certification period from EPA in order to implement this guidance.

## ***B. FERC Relicensing***

### **1. Federal Law and Regulations**

The Federal Energy Regulatory Commission (FERC) generally has authority to license non-federal hydroelectric projects located on navigable waters. Because such facilities include a discharge to surface water, a 401 certification is required for the issuance of the FERC license. Most hydroelectric projects in the United States are operating under a license that was issued for a period of thirty (30) to fifty (50) years. In order to operate beyond the original license period, the facility must obtain a new license from FERC. A number of facilities in Idaho are in or soon will be in the process of obtaining such a new license.

FERC regulations provide for several different relicensing processes, including the traditional licensing process, the integrated licensing process and the alternative licensing process. Under the traditional licensing process or integrated licensing process, within sixty (60) days from the date of issuance of the notice of ready for environmental analysis, the applicant must provide FERC with either: (a) a copy of the state's 401 water quality certification; (b) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (c) evidence of waiver of certification (18 CFR 4.34(b)(5)(i) and 18 CFR 5.23(b)(1)). If the alternative licensing process is allowed, then 18 CFR 4.34(b)(5)(ii) provides that the applicant must provide FERC with the above-described information upon issuance of notice that the Commission has accepted an application as provided in 18 CFR 4.32(d).

A state is deemed to have waived the certification requirements if the state has not granted or denied certification by one year after the date the state received a written request for certification (18 CFR 4.34(b)(5)(iii) and 18 CFR 5.23(b)(2)).

FERC provides no specific notice to the public that the state is considering 401 certification.

## **2. DEQ 401 Certification Procedures**

DEQ intends to provide the public with the opportunity to review and comment on draft 401 certification decisions. Because FERC does not provide notice to the public, DEQ will issue its own public notice regarding certification decisions. DEQ certification procedures for hydroelectric facility licenses are outlined in the narrative below and in the attached flow chart.

The one-year deadline for issuing a 401 certification for a hydroelectric facility begins the day DEQ receives a request for 401 certification from the operator. Within a reasonable time after receiving a request for certification (normally within thirty (30) days), DEQ shall provide notice to the public regarding the receipt of the request. The notice shall be provided by posting the 401 certification application to the DEQ Web site.

The notice will also indicate the time lines for DEQ to issue a draft certification decision, for public comment and the opportunity to request a hearing as set forth below. The notice shall also indicate where documents relating to the license and 401 certification can be reviewed by the public.

Ninety (90) days prior to the date DEQ must provide its certification, DEQ shall provide notice to the public that it has made its preliminary decision regarding the 401 certification. If DEQ's decision is to issue a 401 certification, a copy of the draft certification will be posted on DEQ's Web site. The notice will be provided to the public in the manner described above. The notice will describe the public's opportunity for comment and the right to a hearing as described below.

The public may provide written comments to DEQ regarding the 401 certification. The comment period shall extend for forty-five (45) days after the date DEQ issues notice of its preliminary decision. Within fifteen (15) days of the date of notice of the preliminary decision, any person may request a public hearing or meeting in order to submit oral comments to DEQ. If DEQ determines a public hearing or meeting is appropriate, the meeting or hearing shall be held within the forty-five (45) day comment period, unless a later date is warranted.

DEQ will issue its final decision regarding the 401 certification within one year of the date DEQ received the request for certification. DEQ will provide notice to those parties that commented on the preliminary decision regarding its final decision and will post its final decision on DEQ's Web site.

## **C. 404 PERMITS**

### **1. Federal Law and Regulations**

Section 404 of the Clean Water Act provides authority to issue permits for the discharge of dredged or fill material into waters of the United States, including wetlands. This authority is implemented by the Army Corps of Engineers (Corps).

The Corps may issue individual or general permits (33 CFR 325.5(a)(1)). Within 15 days of receiving an application for an individual 404 permit, the Corps must make a determination regarding whether the application is complete, and if the application is complete, the Corps must issue a public notice of the receipt of a complete application (33 CFR 325.1(d)(9) and 33 CFR

325.2(a)(2). If the activity requires a 401 certification, the public notice must include a statement concerning the 401 certification requirements (33 CFR 325.2(b)(1)(i) and 33 CFR 325.3(a)(8)).

If certification is required, the Corps' district engineer shall notify the applicant that 401 certification is necessary (33 CFR 325.2(b)(1)). The certification requirement will be deemed waived if the state does not act on the 401 certification request within sixty (60) days of its receipt, unless the Corps determines a shorter or longer period is reasonable for the state to act. If a longer period of time is determined reasonable, based upon information provided by the state, the Corps may allow a longer period of time to certify, not to exceed one year (33 CFR 325.2(b)(1)(ii)).

With respect to Corps activities for the discharge of dredged or fill material, the public notice regarding the activity constitutes the request to the state for 401 certification (33 CFR 336.1(b)(8)).

## **2. DEQ 401 Certification Procedures**

DEQ intends to provide the public with the opportunity to review and comment on draft 401 certification decisions. Because of the timelines established in the federal regulations, DEQ and the Corps will not typically be able to run concurrent public notice processes. DEQ will issue its own public notice regarding certification decisions. DEQ certification procedures for activities authorized by 404 permits are outlined in the narrative below and in the attached flow chart.

Step 1. For larger projects, the Corps typically involves DEQ early on in the permitting process and DEQ has opportunities to participate in project meetings with the applicant and other federal and state agencies. Early involvement allows DEQ to identify potential water quality concerns and to work with the Corps and the applicant in addressing those concerns. The Corps is responsible for determining whether an application for a 404 permit is complete and will determine if additional information is needed.

Step 2. The Corps determines which type of 404 permit is needed for the project. If the project may be covered by a Nationwide or Regional Permit that already has a certification, then the Corps will complete their permitting obligations and no additional approval from DEQ is required. If the project may be covered by a nationwide permit that requires an individual 401 certification from DEQ, then the Corps will work with DEQ in obtaining a certification. If the project requires an individual permit, then the Corps is required to issue a public notice. The public notice regarding the 404 permit application includes a statement that DEQ must provide a 401 certification decision within a specified period of time, or the certification will be considered waived. The Corps generally provides DEQ with 60 days to issue a certification decision (33 CFR 325.2(b)(1)(ii)).

Step 3. For individual permits, the 401 certification clock begins when the Corps issues their public notice of a permit application. In addition to the public notice, the Corps will typically send DEQ a copy of the application materials for DEQ to review. For nationwide permits requiring a 401 certification, the certification time period begins when DEQ receives the application materials and request for certification from the Corps.

Step 4. DEQ will review the information provided by the Corps and determine if it is sufficient to make a 401 certification decision. If the information is insufficient, DEQ will work with the Corps and the applicant to obtain all the necessary information.

Step 5. Once sufficient information is provided, DEQ will post a draft certification on DEQ's Web site. If the project, as proposed will not comply with water quality standards, DEQ will work with the Corps and the applicant in modifying the activity such that it can comply with water quality standards.

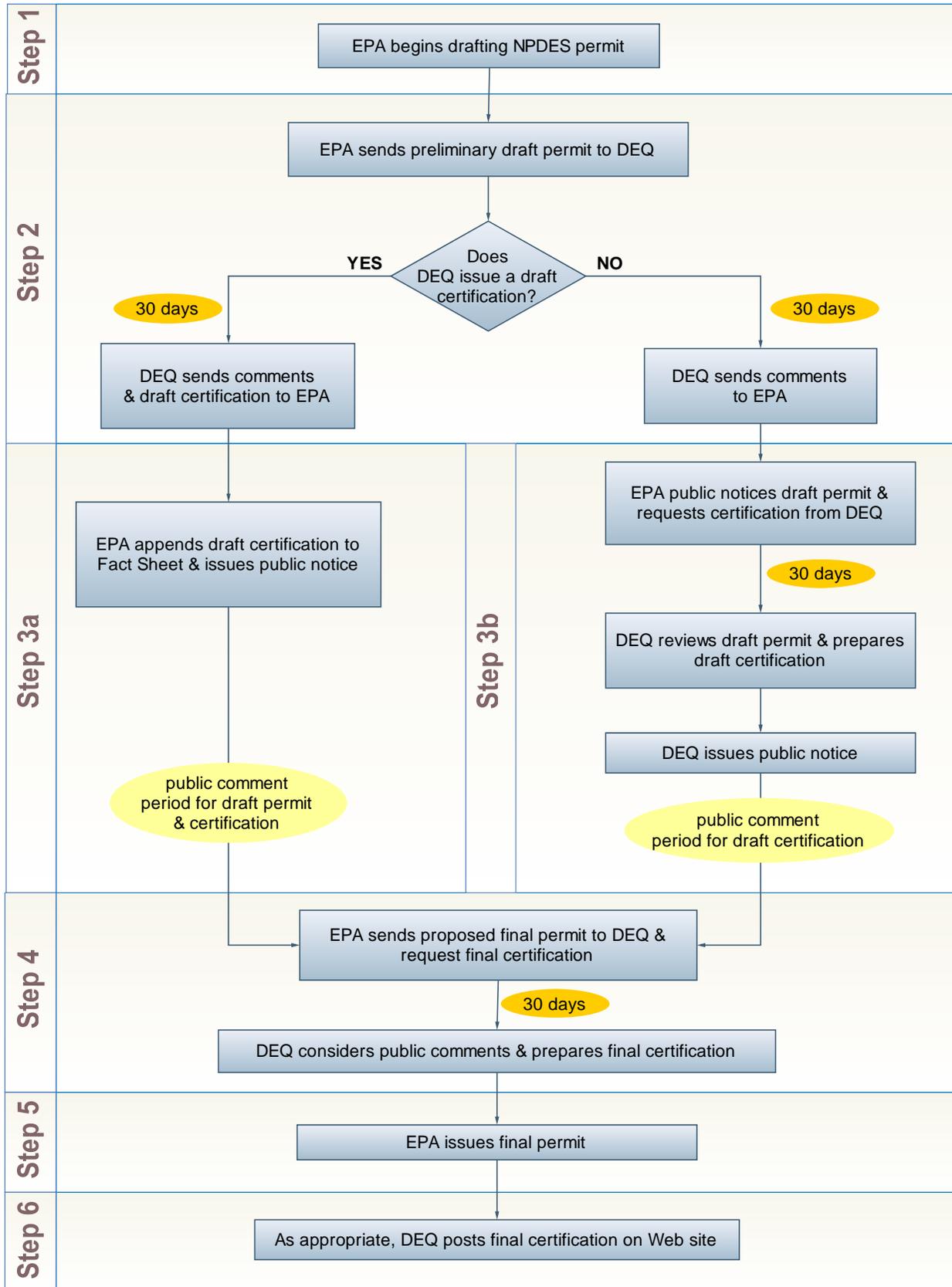
Step 6. The draft certification will be open to public comment for at least 21-days.

Step 7. At the close of the public comment period, DEQ will consider any comments received and will make a final 401 certification decision. The final certification decision will be posted on DEQ's Web site. If DEQ determines the project will not comply with water quality standards, then DEQ will deny certification.

Step 8. The Corps strives to issue a letter of verification for activities that may be covered under a nationwide permit within forty-five (45) days of receipt of a complete pre-construction notification. For activities that require an individual permit, the Corps' goal is to issue an individual permit within 120 days from receipt of a complete application. DEQ will strive to complete the certification process within these time periods as well as within the time period specified in the request for certification. However, if DEQ is unable to make a final certification decision within this time period, then DEQ will ask the Corps for an extension.

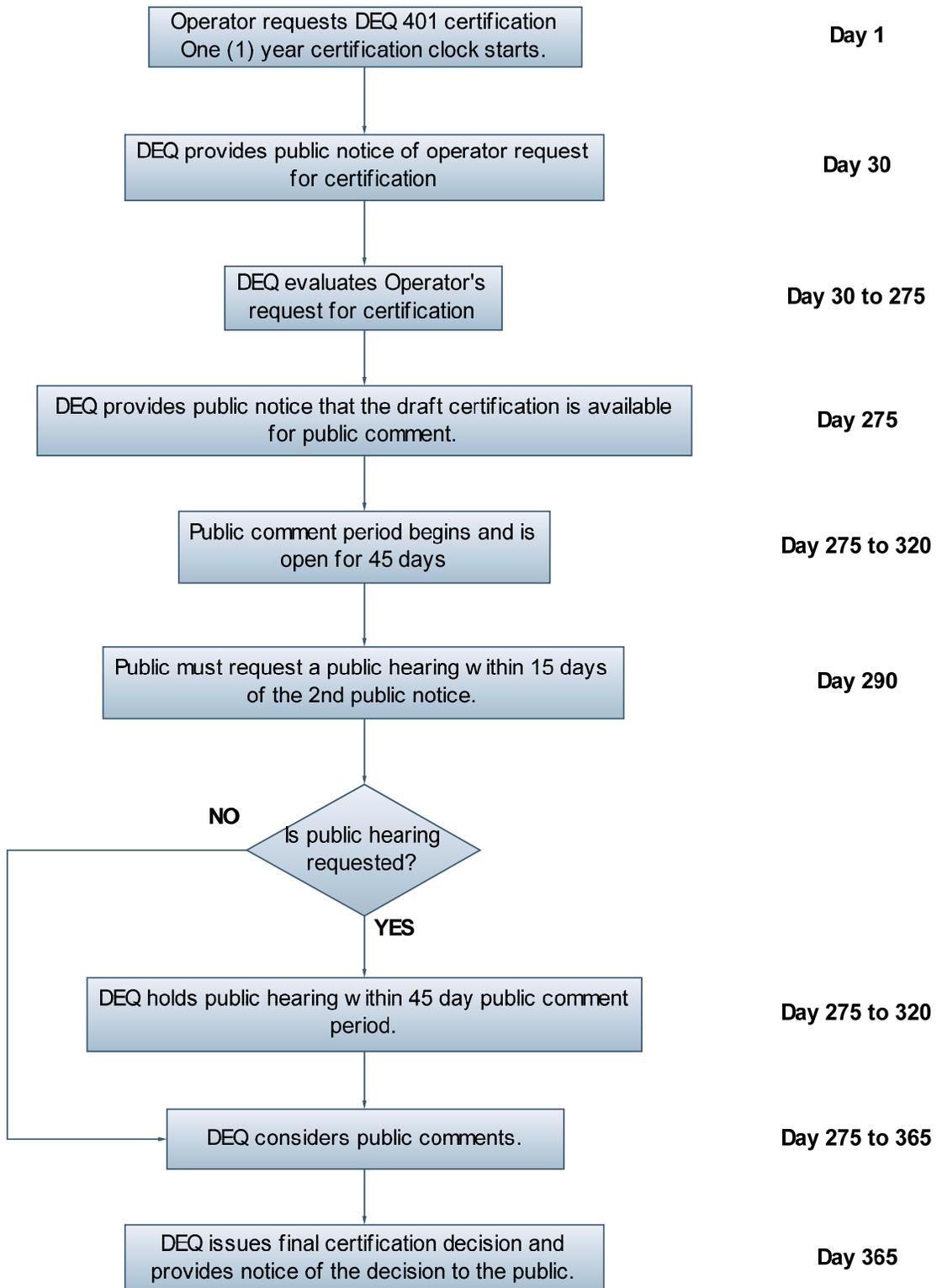
The process described above will depend upon coordination and agreement with the Corps. If the Corps declines to provide an extension for 401 certification as described herein, then DEQ shall issue its final 401 certification decision within the time provided, without any opportunity for public comment.

## NPDES 401 Certification Process



# FERC 401 Certification Process

## CERTIFICATION CLOCK



# 401 Certification Process for 404 Permits

