

Clean Water Act Section 401 Certification Rule *State and Tribal Webinar 1*

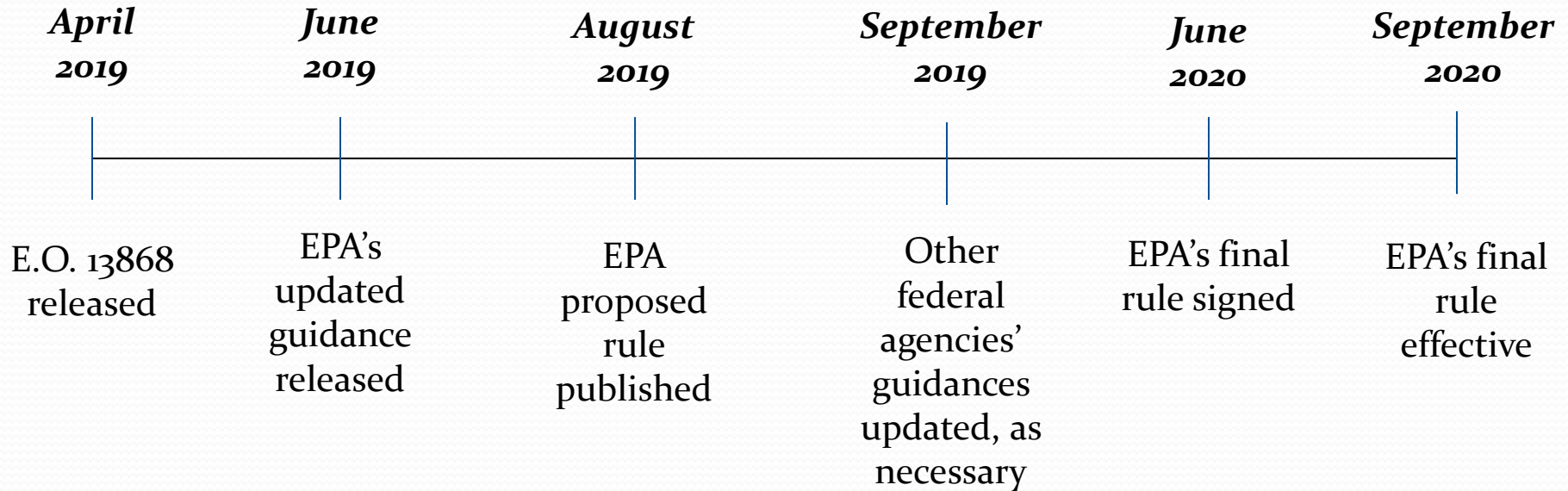
Office of Water
U.S. Environmental Protection Agency

August 25, 2020

Overview

- Introduction to Clean Water Act (CWA) Section 401
- Final Rule Topics
 - When Certification Is Required
 - Pre-filing Meeting Request
 - Certification Request
 - Reasonable Period of Time
- Questions

Executive Order 13868



Final Rule

- On June 1, 2020, EPA Administrator Wheeler signed EPA's final "Clean Water Act Section 401 Certification Rule" to modernize the Agency's existing regulations at 40 CFR 121 and make them consistent with the current CWA.
- The final rule will be effective on September 11, 2020:
 - Certification requests submitted *before* September 11, 2020 should be processed in accordance with the 1971 regulations.
 - Certification requests submitted *on or after* September 11, 2020 should be processed consistent with the final rule.

Clean Water Act Section 401

- Section 401 of the CWA requires that:
 1. any applicant for a federal license or permit
 2. which may result in a discharge into waters of the United States
 3. must obtain a water quality certification from the certifying authority
 4. that the discharge complies with all applicable water quality requirements.

Clean Water Act Section 401

- **Project proponent:** applicant for a federal license or permit or the entity seeking certification
- **Federal licensing or permitting agency:** any agency of the Federal Government to which application is made for a license or permit that is subject to Clean Water Act section 401
- **Certifying authority:** the agency responsible for certifying compliance with applicable water quality requirements in accordance with Clean Water Act section 401.
 - May include: 1) States, 2) Authorized tribes with “treatment as a state” for section 401, and 3) EPA when a state or tribe does not have authority to act on a request for certification.

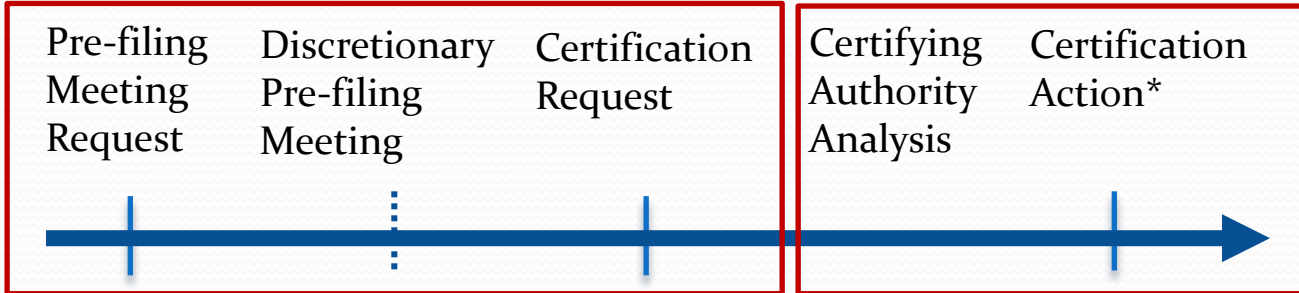
June 17, 2020 Public Webinar



Training Webinar 1

Certification Process

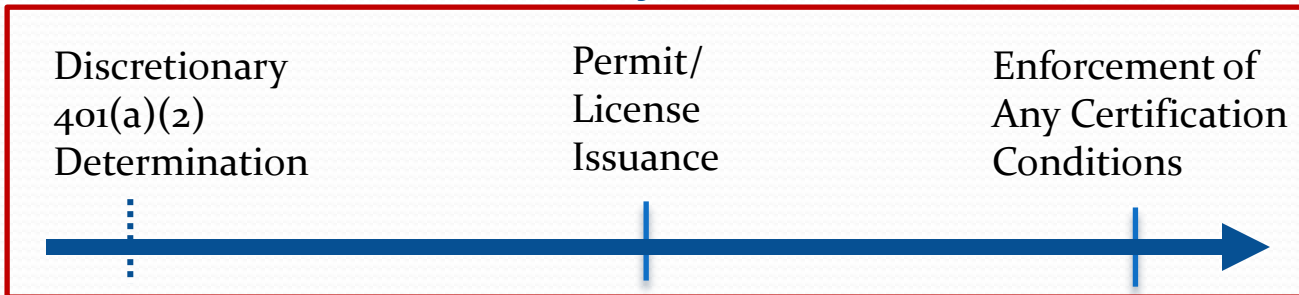
Training Webinar 2



*If certification is denied, the process stops here

Training Webinar 3

Post-Certification



June 17, 2020 Public Webinar



Training Webinar 1

Certification Process

Training Webinar 2

Pre-filing Meeting Request Discretionary Pre-filing Meeting Certification Request

Certifying Authority Analysis Certification Action*



*If certification is denied, the process stops here

Training Webinar 3

Post-Certification

Discretionary 401(a)(2) Determination

Permit/License Issuance

Enforcement of Any Certification Conditions





Final Rule:
***When Certification
Is Required***

When Certification Is Required

- A project proponent must request section 401 certification from the certifying authority where the discharge originates when there is the:
 - *potential for*
 - *the federally licensed or permitted activity*
 - *to result in a discharge from a point source*
 - *into a water of the United States*

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 - ***potential for***
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 - *potential for*
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 - *into a water of the United States*

When Certification Is Required

- A project proponent must request section 401 certification from the certifying authority where the discharge originates when there is the:
 - *potential for*
 - *the federally licensed or permitted activity*
 - *to result in a discharge from a point source*
 - ***into a water of the United States***

When Certification Is Required

- **Hypothetical Example 1:** A project proponent's activity requires only one federal permit, but the project proponent does not know whether that federally permitted activity will have an actual discharge into a water of the United States. However, the project proponent knows that federally permitted activity has a potential to result in a discharge from a point source into a water of the United States.
 - Does this project require a section 401 certification?

When Certification Is Required

- **Hypothetical Example 1:** A project proponent's activity requires only one federal permit, but the project proponent does not know whether that federally permitted activity will have an actual discharge into a water of the United States. However, the project proponent knows that federally permitted activity has a potential to result in a discharge from a point source into a water of the United States.
 - Does this project require a section 401 certification? **YES**

When Certification Is Required

- **Hypothetical Example 2:** A project proponent's activity requires only one federal permit and that federally permitted activity has the potential to result in a discharge from a point source into a water of the United States. However, the discharge would not contain any pollutants.
 - Does this project require a section 401 certification?

When Certification Is Required

- **Hypothetical Example 2:** A project proponent's activity requires only one federal permit and that federally permitted activity has the potential to result in a discharge from a point source into a water of the United States. However, the discharge would not contain any pollutants.
 - Does this project require a section 401 certification? **YES**

When Certification Is Required

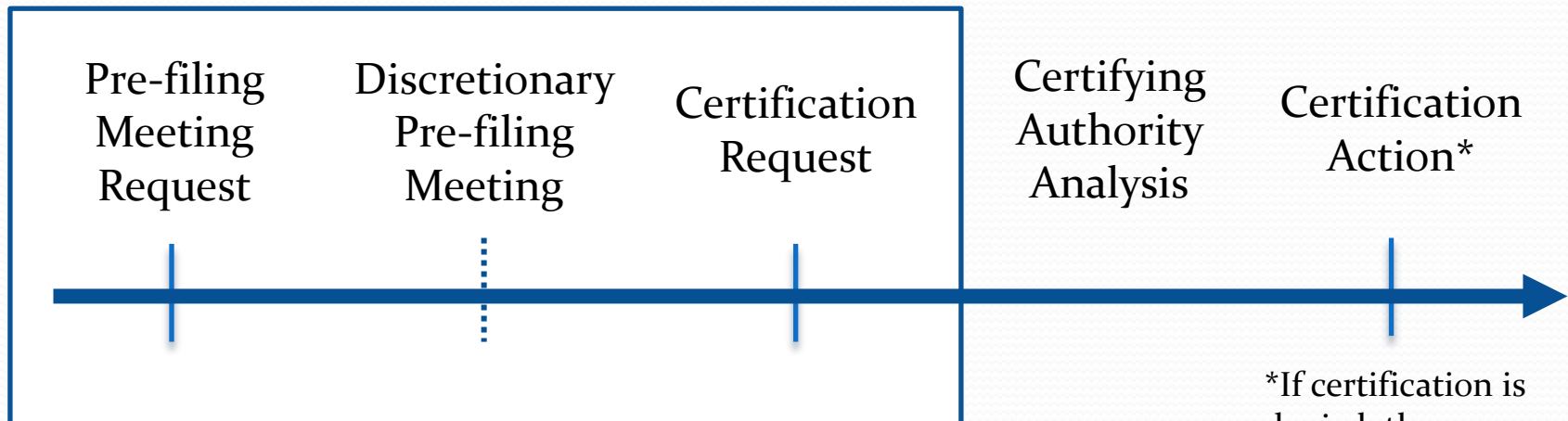
- **Hypothetical Example 3:** A project proponent's activity will not require any federal licenses or permits but the activity has the potential to result in a discharge from a point source into a state water.
 - Does this project require a section 401 certification?

When Certification Is Required

- **Hypothetical Example 3:** A project proponent's activity will not require any federal licenses or permits, but the activity has the potential to result in a discharge from a point source into a state water.
 - Does this project require a section 401 certification? **NO**

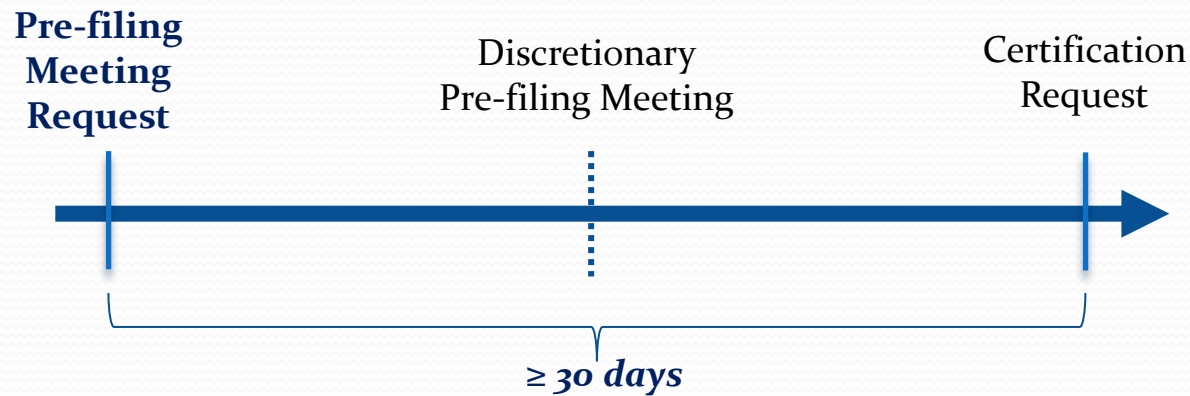
Final Rule: *Pre-filing Meeting Request Requirement*

Certification Process



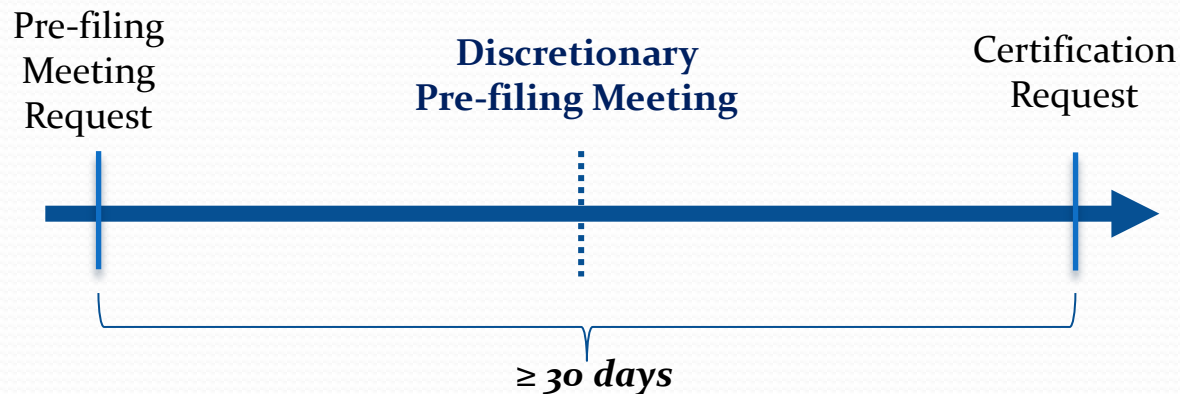
*If certification is denied, the process stops here

Pre-filing Meeting Request Requirement



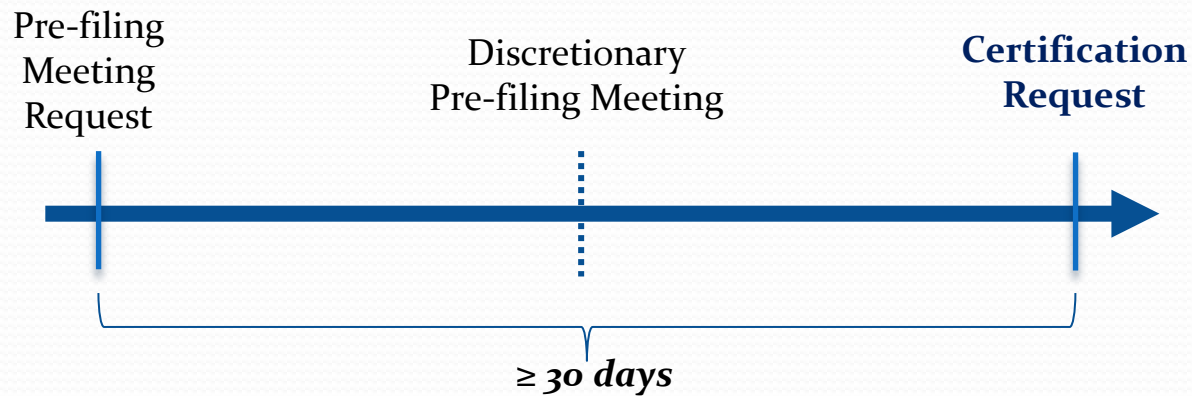
- All project proponents must submit a request for a meeting with the appropriate certifying authority ***at least 30 days*** prior to submitting a certification request.
- The meeting request provides advance notification to the certifying authority that a certification request may be forthcoming.

Pre-filing Meeting Request Requirement



- The certifying authority may accept the request at its discretion.
- Pre-filing meetings may be conducted in-person or remotely, as deemed appropriate by the certifying authority.
- The rule also includes recommendations for additional meeting procedures and engagement across agencies.

Pre-filing Meeting Request Requirement



- Documentation of the pre-filing meeting request must be included in any certification request filed with the certifying authority.
- EPA recommends submitting the pre-filing meeting request in writing.

Pre-filing Meeting Request Requirement

- **Hypothetical Example 1:** A project proponent submits a pre-filing meeting request to the appropriate certifying authority, but the certifying authority declines to hold the meeting. 30 days have elapsed since the project proponent submitted their pre-filing meeting request to the certifying authority. Assume the project proponent is complying with any applicable federal licensing or permitting agency requirements regarding certification request submission timing. Also assume the project proponent has prepared all the required information for their certification request.
 - Based on the rule's pre-filing meeting request requirement, can a project proponent submit their certification request?

Pre-filing Meeting Request Requirement

- **Hypothetical Example 1:** A project proponent submits a pre-filing meeting request to the appropriate certifying authority, but the certifying authority declines to hold the meeting. 30 days have elapsed since the project proponent submitted their pre-filing meeting request to the certifying authority. Assume the project proponent is complying with any applicable federal licensing or permitting agency requirements regarding certification request submission timing. Also assume the project proponent has prepared all the required information for their certification request.
 - Based on the rule's pre-filing meeting request requirement, can a project proponent submit their certification request? **YES**

Pre-filing Meeting Request Requirement

- **Hypothetical Example 2:** A project proponent submits a pre-filing meeting request to the appropriate certifying authority, but the certifying authority declines to hold the meeting. 120 days have elapsed since the project proponent submitted their pre-filing meeting request. Assume the project proponent is complying with any applicable federal licensing or permitting agency requirements regarding certification request submission timing. Also assume the project proponent has prepared all the required information for their certification request.
 - Based on the rule's pre-filing meeting request requirement, can the project proponent submit their certification request?

Pre-filing Meeting Request Requirement

- **Hypothetical Example 2:** A project proponent submits a pre-filing meeting request to the appropriate certifying authority, but the certifying authority declines to hold the meeting. 120 days have elapsed since the project proponent submitted their pre-filing meeting request. Assume the project proponent is complying with any applicable federal licensing or permitting agency requirements regarding certification request submission timing. Also assume the project proponent has prepared all the required information for their certification request.
 - Based on the rule's pre-filing meeting request requirement, can the project proponent submit their certification request? **YES**

Pre-filing Meeting Request Requirement

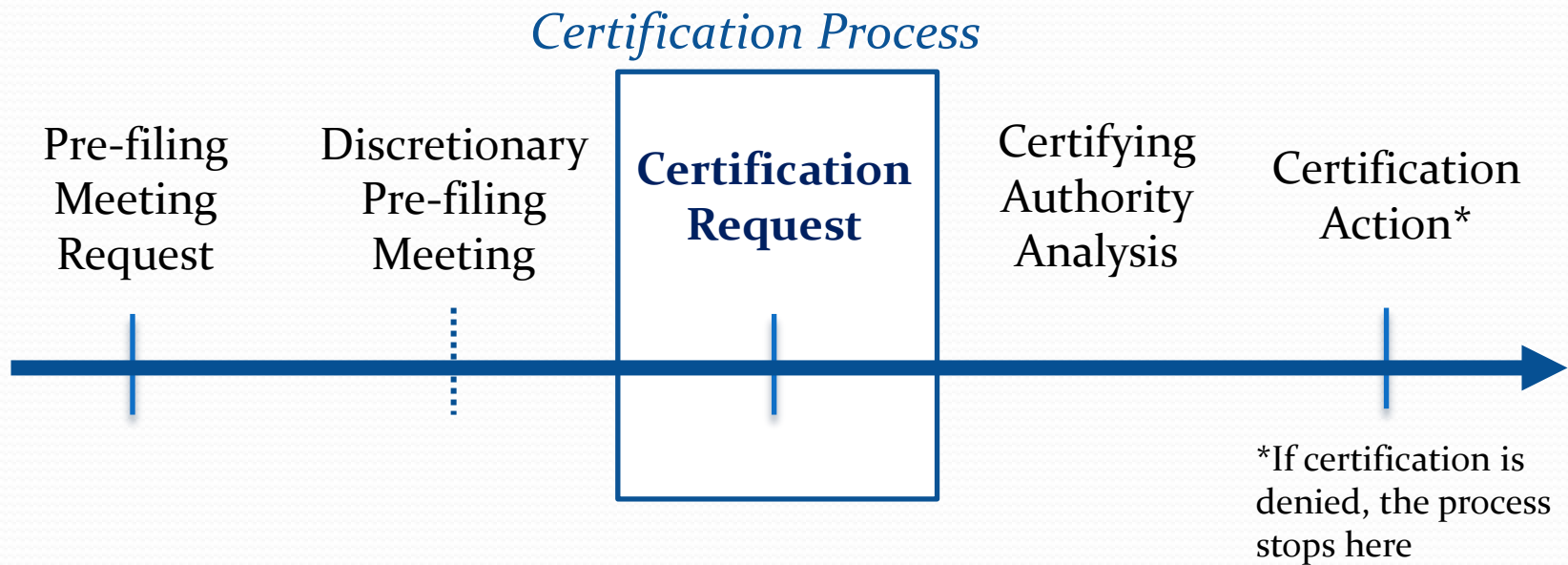
- **Hypothetical Example 3:** A project proponent would like to submit a certification request but failed to request a pre-filing meeting from the appropriate certifying authority and therefore does not have documentation of making such a request.
 - Based on the rule's pre-filing meeting request and certification request requirements, can the project proponent submit a certification request?

Pre-filing Meeting Request Requirement

- **Hypothetical Example 3:** A project proponent would like to submit a certification request but failed to request a pre-filing meeting from the appropriate certifying authority and therefore does not have documentation of making such a request.
 - Based on the rule's pre-filing meeting request and certification request requirements, can the project proponent submit a certification request? **NO**

Final Rule:

Certification Request



Certification Request



- A certification request is a written, signed, and dated communication from a project proponent to a certifying authority.
- A certification request must include the components listed in final rule section 121.5(b) for individual licenses and permits or 121.5(c) for the issuance of general licenses and permits.

Individual license or permit (121.5(b))	Issuance of a general license or permit (121.5(c))
Identify the project proponent(s) and a point of contact;	Identify the project proponent(s) and a point of contact;
Identify the proposed project;	Identify the proposed categories of activities to be authorized by the general license or permit for which certification is requested;
Identify the applicable federal license or permit;	Include the draft or proposed general license or permit;
Identify the location and nature of any potential discharge that may result from the proposed project and the location of receiving waters;	Estimate the number of discharges expected to be authorized by the proposed general license or permit each year;
Include a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge;	N/A
Include a list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals or denials already received;	N/A
Include documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request;	Include documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request;
Contain the following statement: ‘The project proponent hereby certifies that all information contained herein is true, accurate, and complete, to the best of my knowledge and belief’; and	Contain the following statement: ‘The project proponent hereby certifies that all information contained herein is true, accurate, and complete to the best of my knowledge and belief’; and
Contain the following statement: ‘The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.’	Contain the following statement: ‘The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.’

Certification Request



- The components in section 121.5(b) and 121.5(c) do not require subjective determinations by certifying authorities.
 - The only appropriate inquiry is whether all components have been provided in the request.
- If any components are missing from the certification request, the statutory reasonable period of time does not start.

Certification Request



- The components in 121.5(b) and 121.5(c) provide a sufficient baseline of information for the certifying authority to begin its review.
- A project proponent may submit, and a certifying authority may request, additional information within the reasonable period of time.

Certification Request



- The timeline for action on a section 401 certification begins “after receipt” of a certification request.
 - **Receipt** means “the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures.”
 - Certifying authorities may require hard copy or electronic submittals.
 - EPA recommends that project proponents confirm receipt of certification requests.

Certification Request



- The final rule does not prescribe a specific point in the federal licensing or permitting process when project proponents are required to submit a certification request.
- EPA recommends that project proponents:
 - Follow applicable federal agency regulations, or
 - Coordinate with federal agencies and certifying authorities in the absence of such regulations.

Certification Request



- If certain elements of the proposed project change materially after a project proponent submits a certification request, it may be reasonable to submit a new certification request.
- Administrative changes and minor changes should not warrant the submission of a new certification request.

Certification Request

- **Hypothetical Example 1:** A project proponent submits a certification request for an individual permit to the appropriate certifying authority in accordance with their applicable submission procedures. The certification request is written, signed, dated, and contains the elements listed at section 121.5(b)(1)-(7) and (b)(9). The certification request does not contain the following statement, *‘The project proponent hereby certifies that all information contained herein is true, accurate, and complete, to the best of my knowledge and belief’*, as listed in section 121.5(b)(8).
 - Is this a certification request?
 - Has the reasonable period of time begun?

Certification Request

- **Hypothetical Example 1:** A project proponent submits a certification request for an individual permit to the appropriate certifying authority in accordance with their applicable submission procedures. The certification request is written, signed, dated, and contains the elements listed at section 121.5(b)(1)-(7) and (b)(9). The certification request does not contain the following statement, *‘The project proponent hereby certifies that all information contained herein is true, accurate, and complete, to the best of my knowledge and belief’*, as listed in section 121.5(b)(8).
 - Is this a certification request? **NO**
 - Has the reasonable period of time begun? **NO**

Certification Request

- **Hypothetical Example 2:** A project proponent submits a certification request for an individual license or permit to the federal licensing or permitting agency, instead of the appropriate certifying authority. The certification request is written, signed, and dated, and contains all 9 elements listed at section 121.5(b).
 - Is the certifying authority in “receipt” of the certification request, as defined in the rule?
 - Has the reasonable period of time begun?

Certification Request

- **Hypothetical Example 2:** A project proponent submits a certification request for an individual license or permit to the federal licensing or permitting agency, instead of the appropriate certifying authority. The certification request is written, signed, and dated, and contains all 9 elements listed at section 121.5(b).
 - Is the certifying authority in “receipt” of the certification request, as defined in the rule? **NO**
 - Has the reasonable period of time begun? **NO**

Certification Request

- **Hypothetical Example 3:** A project proponent submits a certification request for an individual permit to the appropriate certifying authority in accordance with their applicable submission procedures. The certification request is written, signed, and dated, and contains all 9 elements listed at section 121.5(b). The certifying authority told the project proponent during the pre-filing meeting that they would need more information than the elements listed at section 121.5(b) to act on the certification request.
 - Is this a certification request?
 - Has the reasonable period of time begun?

Certification Request

- **Hypothetical Example 3:** A project proponent submits a certification request for an individual permit to the appropriate certifying authority in accordance with their applicable submission procedures. The certification request is written, signed, and dated, and contains all 9 elements listed at section 121.5(b). The certifying authority told the project proponent during the pre-filing meeting that they would need more information than the elements listed at section 121.5(b) to act on the certification request.
 - Is this a certification request? **YES**
 - Has the reasonable period of time begun? **YES**

Certification Request

- **Hypothetical Example 4:** A project proponent submits a certification request for an individual license or permit to the certifying authority through mail, but the certifying authority's applicable submission procedures require certification requests to be delivered through e-mail. The certification request is written, signed, and dated, and contains all 9 elements listed at section 121.5(b).
 - Is the certifying authority in "receipt" of the certification request, as defined in the rule?
 - Has the reasonable period of time begun?

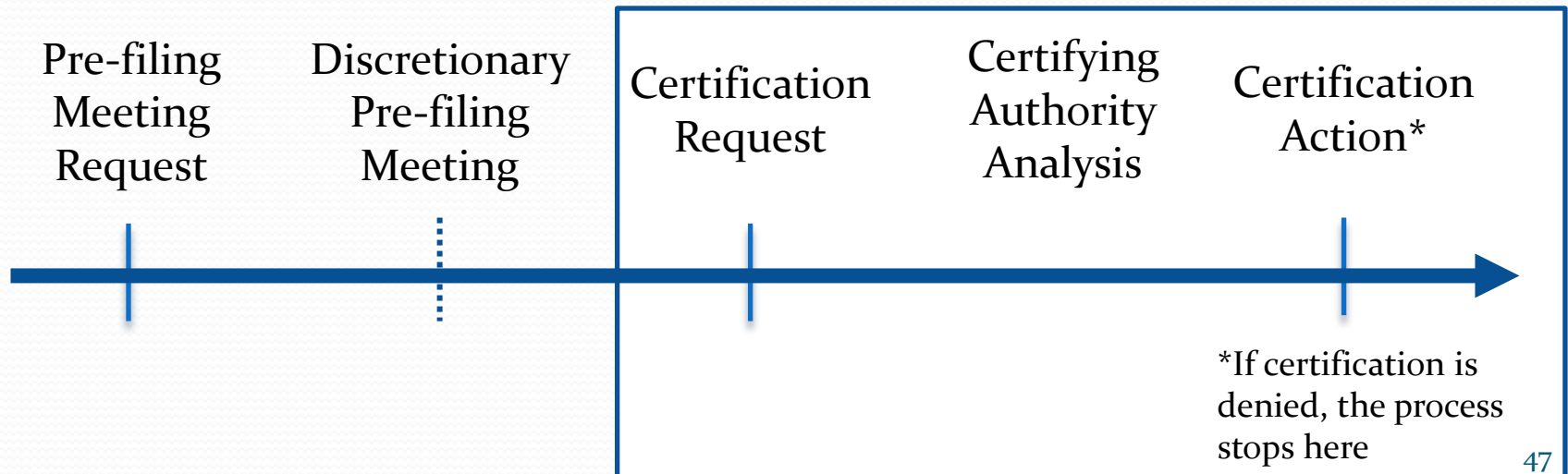
Certification Request

- **Hypothetical Example 4:** A project proponent submits a certification request for an individual license or permit to the certifying authority through mail, but the certifying authority's applicable submission procedures require certification requests to be delivered through e-mail. The certification request is written, signed, and dated, and contains all 9 elements listed at section 121.5(b).
 - Is the certifying authority in "receipt" of the certification request, as defined in the rule? **NO**
 - Has the reasonable period of time begun? **NO**

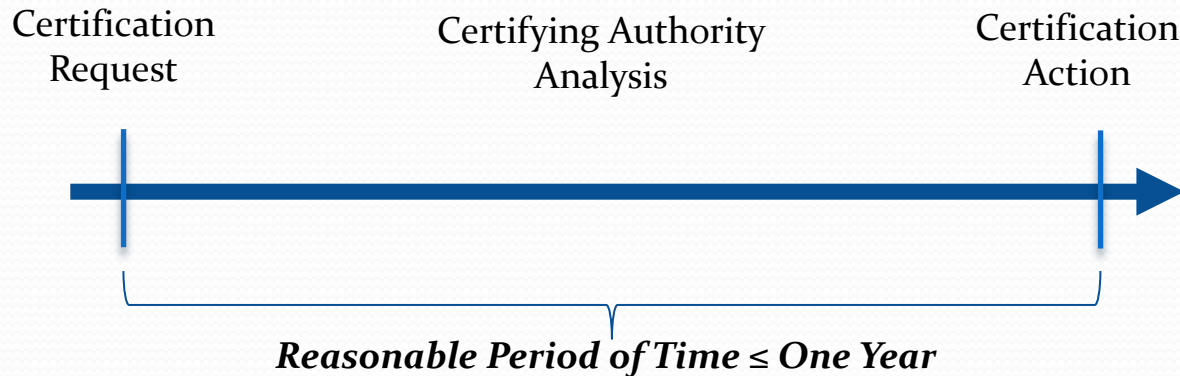
Final Rule:

Reasonable Period of Time

Certification Process

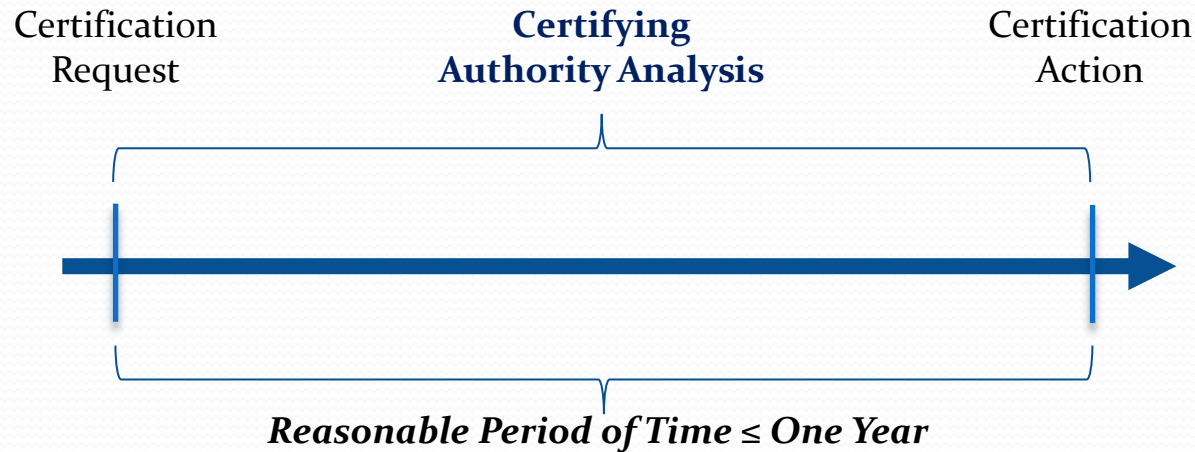


Reasonable Period of Time



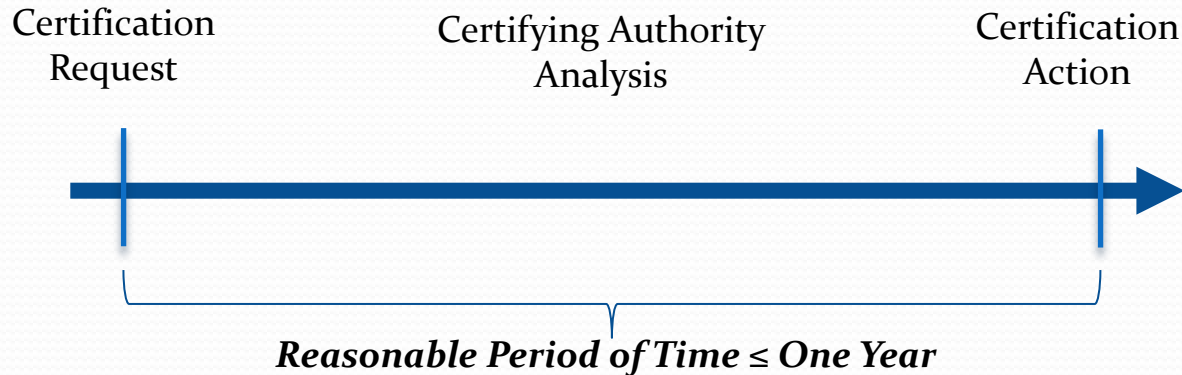
- **Reasonable period of time** means the time period during which a certifying authority may act on a certification request, established in accordance with section 121.6 of the final rule.
 - The reasonable period of time ***begins*** when a certifying authority receives a certification request from a project proponent in writing.
 - The reasonable period of time ***ends*** when 1) the certifying authority acts on a certification request or 2) the reasonable period of time expires.

Reasonable Period of Time



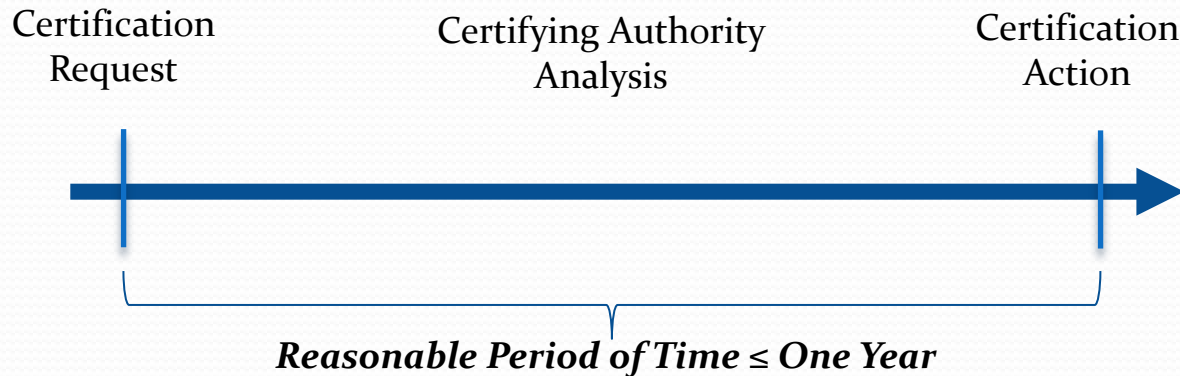
- A certifying authority must act on a request for certification **within the reasonable period of time**, which *shall not exceed one year*, as determined by the federal licensing or permitting agency.

Reasonable Period of Time



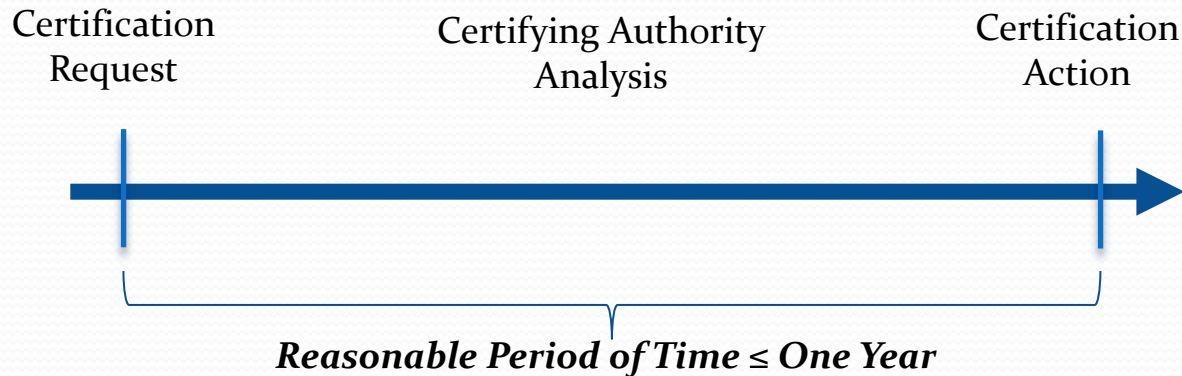
- Federal agencies determine the reasonable period of time:
 - Categorically, or
 - On a case-by-case basis.

Reasonable Period of Time



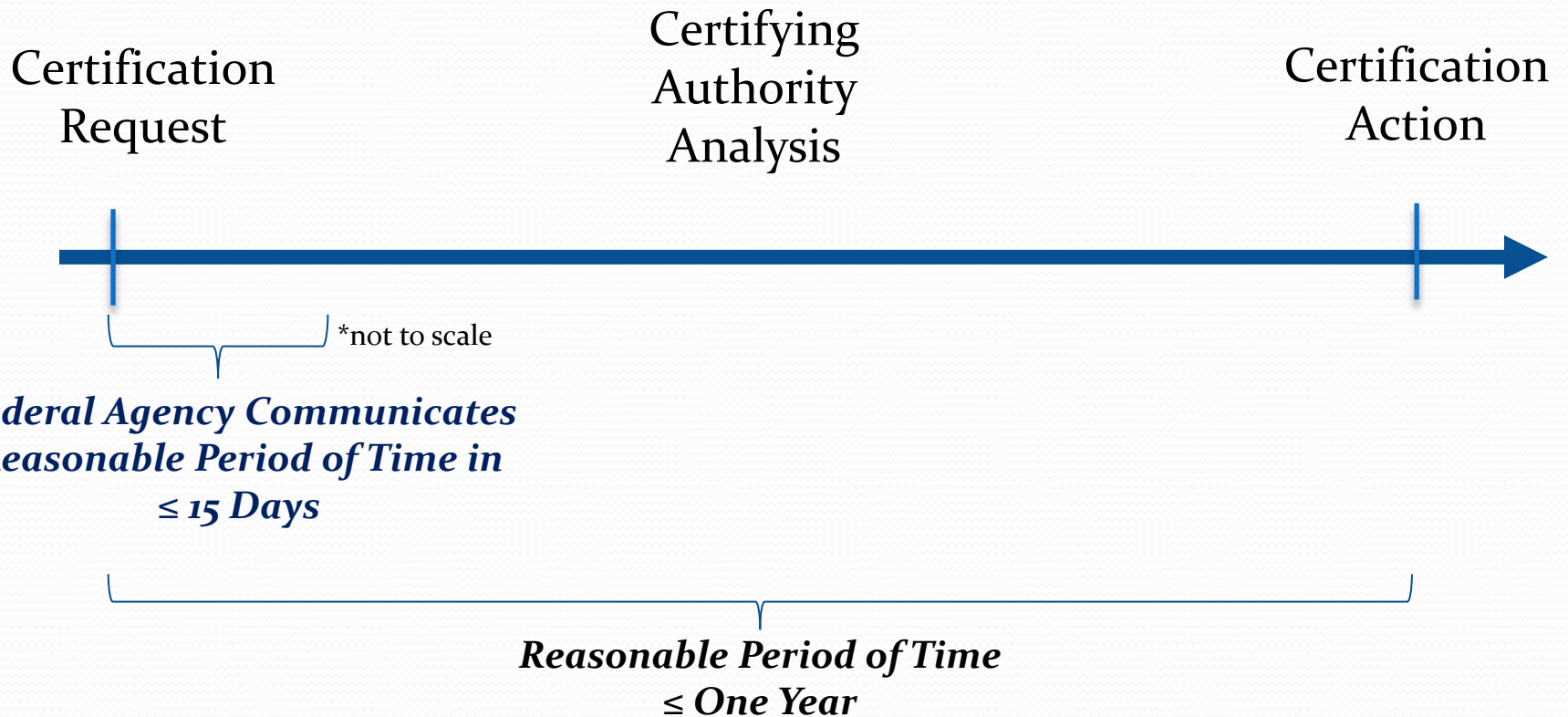
- When establishing the reasonable period of time, federal agencies must consider:
 - Complexity of the proposed project;
 - Nature of any potential discharge; and
 - Potential need for additional study or evaluation of water quality effects from the discharge.
- Federal agencies may establish standardized timeframes.

Reasonable Period of Time

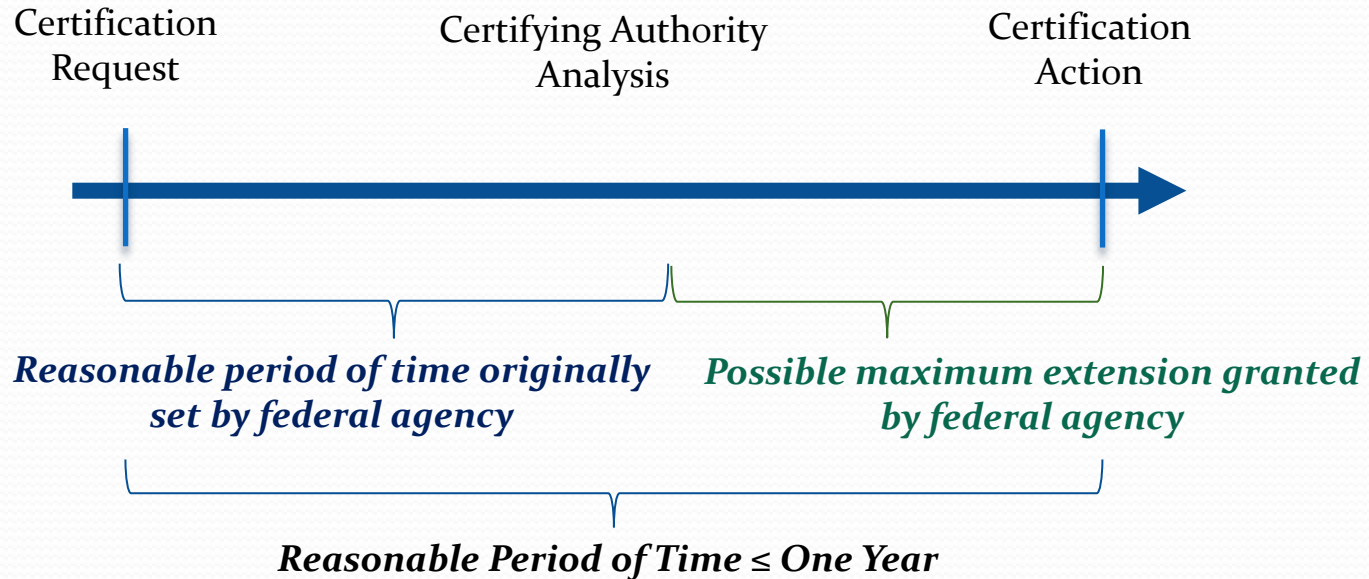


- The project proponent must provide the certification request to the federal agency concurrently when it submits it to the certifying authority.
- Within 15 days, the federal agency must provide to the certifying authority:
 - 1) The date of receipt; 2) the applicable reasonable period of time to act on the certification request; and 3) the date upon which waiver will occur if the certifying authority fails or refuses to act.

Reasonable Period of Time

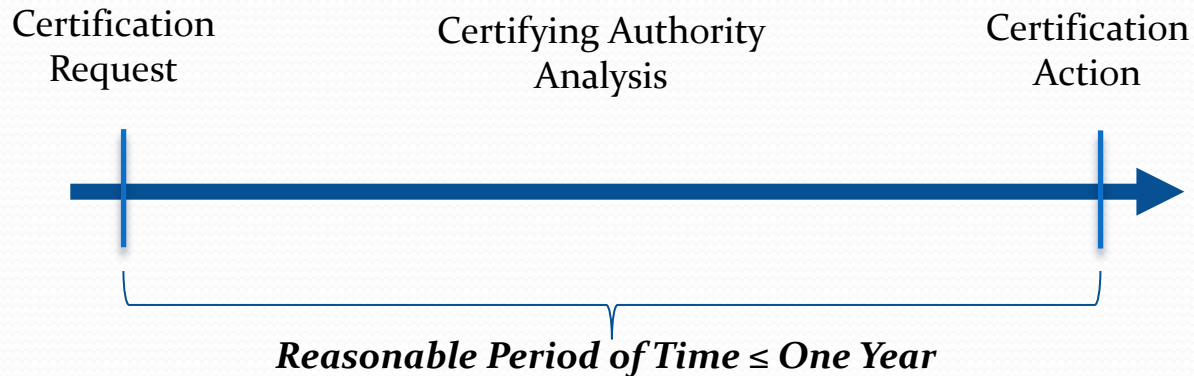


Reasonable Period of Time



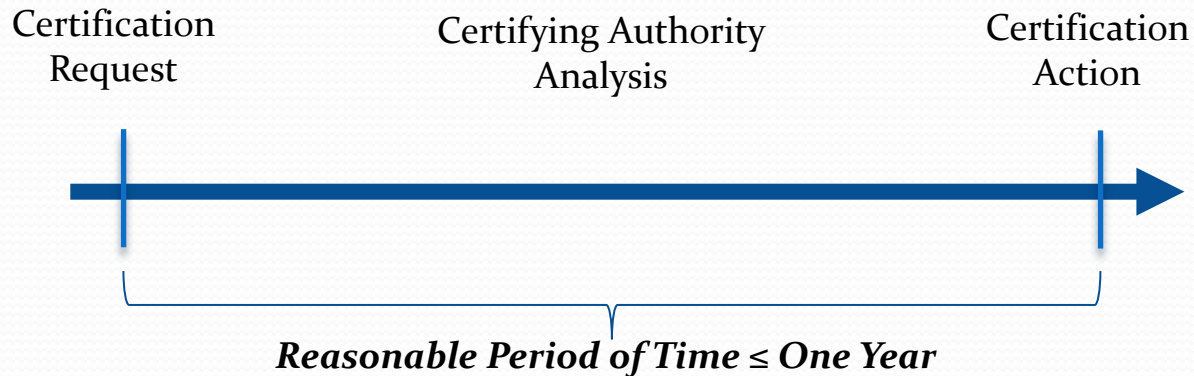
- The federal agency may ***extend*** (but not shorten) the reasonable period of time, as long as it is reasonable and does not exceed one year from original receipt of the request for certification.

Reasonable Period of Time



- The reasonable period of time does **not** stop or pause for any reason once the certification request is received.
- The certifying authority is not authorized to:
 - Request the project proponent to withdraw a certification request, or
 - Take any action to extend the reasonable period of time other than specified in section 121.6(d).

Reasonable Period of Time



- Project proponents can voluntarily withdraw requests of their own accord during the reasonable period of time.
 - In such cases, the certifying authority no longer has an obligation to act on that request.
 - Withdrawn requests do not toll or pause the reasonable period of time; any resubmitted request initiates a new reasonable period of time.

Reasonable Period of Time

- **Hypothetical Example 1:** The certifying authority received a certification request for an individual license or permit in accordance with their applicable submission procedures on January 1st. The certification request was written, signed, and dated, and contained all 9 elements listed at section 121.5(b). The certifying authority documented it as received on January 1st. The federal agency communicates the reasonable period of time to the certifying authority on January 12th, in accordance with section 121.6(b). The federal agency determines the reasonable period of time is 180 days.
 - When did the reasonable period of time begin?
 - When will the reasonable period of time end?

Reasonable Period of Time

- **Hypothetical Example 1:** The certifying authority received a certification request for an individual license or permit in accordance with their applicable submission procedures on January 1st. The certification request was written, signed, and dated, and contained all 9 elements listed at section 121.5(b). The certifying authority documented it as received on January 1st. The federal agency communicates the reasonable period of time to the certifying authority on January 12th, in accordance with section 121.6(b). The federal agency determines the reasonable period of time is 180 days.
 - When did the reasonable period of time begin? **January 1st**
 - When will the reasonable period of time end? **June 30th (unless the certifying authority acts before that date OR the certifying authority asks for, and is granted, an extension)**

Reasonable Period of Time

- **Hypothetical Example 2:** The certifying authority received a certification request for an individual license or permit in accordance with their applicable submission procedures on January 1st. The certification request was written, signed, and dated, and contained all 9 elements listed at section 121.5(b). The certifying authority documented it as received on January 1st. The federal agency fails to communicate the reasonable period of time to the certifying authority within 15 days of receiving notice of the certification request from the project proponent, in accordance with section 121.6(b). The federal agency does not have a default reasonable period of time in their section 401 implementing regulations.
 - When did the reasonable period of time begin?
 - When will the reasonable period of time end?

Reasonable Period of Time

- **Hypothetical Example 2:** The certifying authority received a certification request for an individual license or permit in accordance with their applicable submission procedures on January 1st. The certification request was written, signed, and dated, and contained all 9 elements listed at section 121.5(b). The certifying authority documented it as received on January 1st. The federal agency fails to communicate the reasonable period of time to the certifying authority within 15 days of receiving notice of the certification request from the project proponent, in accordance with section 121.6(b). The federal agency does not have a default reasonable period of time in their section 401 implementing regulations.
 - When did the reasonable period of time begin? **January 1st**
 - When will the reasonable period of time end? **The certifying authority may assume January 1st of the next year (unless the certifying authority acts before that date)**

Reasonable Period of Time

- **Hypothetical Example 3:** The certifying authority receives a certification request for an individual permit in accordance with applicable submission procedures. The certification request was written, signed, and dated, and contained all 9 elements listed at section 121.5(b). The federal agency determines the reasonable period of time is 60 days and communicates the reasonable period of time to the certifying authority within 15 days of receiving notice of the certification request from the project proponent, in accordance with section 121.6(b). The certifying authority would like a longer reasonable period of time.
 - Can the certifying authority unilaterally extend the reasonable period of time?
 - Can the certifying authority request an extension from the federal agency?
 - Is the federal agency required to grant the extension?

Reasonable Period of Time

- **Hypothetical Example 3:** The certifying authority receives a certification request for an individual permit in accordance with applicable submission procedures. The certification request was written, signed, and dated, and contained all 9 elements listed at section 121.5(b). The federal agency determines the reasonable period of time is 60 days and communicates the reasonable period of time to the certifying authority within 15 days of receiving notice of the certification request from the project proponent, in accordance with section 121.6(b). The certifying authority would like a longer reasonable period of time.
 - Can the certifying authority unilaterally extend the reasonable period of time? **NO**
 - Can the certifying authority request an extension from the federal agency? **YES**
 - Is the federal agency required to grant the extension? **NO**

Reasonable Period of Time

- **Hypothetical Example 4:** During the reasonable period of time, the certifying authority receives notice from the project proponent that they are voluntarily withdrawing their certification request because their project is no longer planned.
 - Does the reasonable period of time continue after the project proponent withdraws?
 - Is the certifying authority still required to act on the certification request?

Reasonable Period of Time

- **Hypothetical Example 4:** During the reasonable period of time, the certifying authority receives notice from the project proponent that they are voluntarily withdrawing their certification request because their project is no longer planned.
 - Does the reasonable period of time continue after the project proponent withdraws? **NO**
 - Is the certifying authority still required to act on the certification request? **NO**



Questions?

Upcoming Webinars

- **Tuesday, September 1 at 1:30 PM EDT:** This webinar focuses on the scope of analysis for certification decisions and the required elements of certification decision documents.
- **Wednesday, September 9 at 3:30 PM EDT:** This webinar focuses on the neighboring jurisdiction notification and coordination process under CWA section 401(a)(2), EPA's roles under section 401, and enforcement of certification conditions and modifications to certifications.
- Webinar presentations will be recorded and posted on EPA's CWA 401 website at <https://www.epa.gov/cwa-401/outreach-and-engagement-cwa-section-401-certification>.

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.