

Clean Water Act Section 401 Certification Rule

State and Tribal Webinar 2

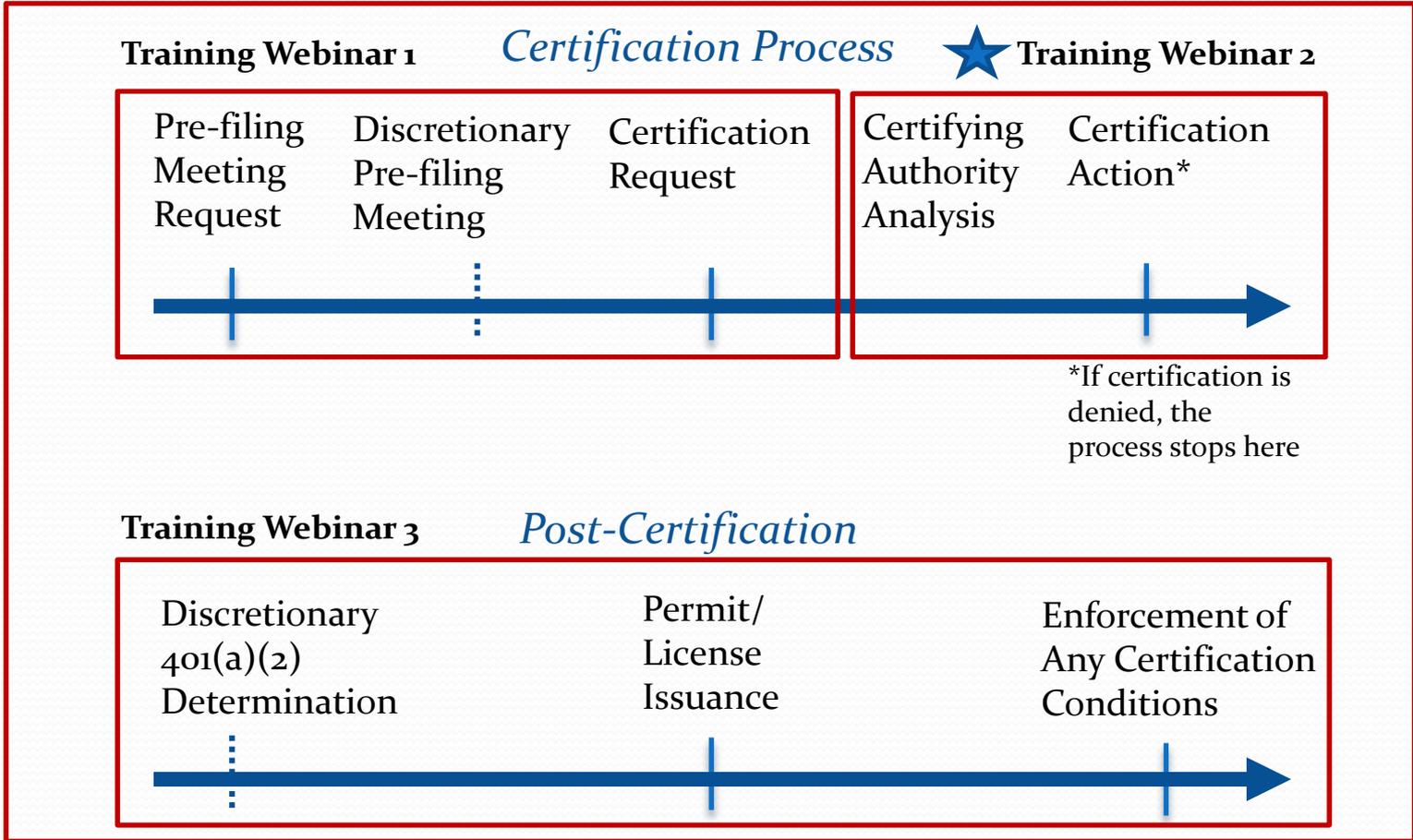
Office of Water
U.S. Environmental Protection Agency

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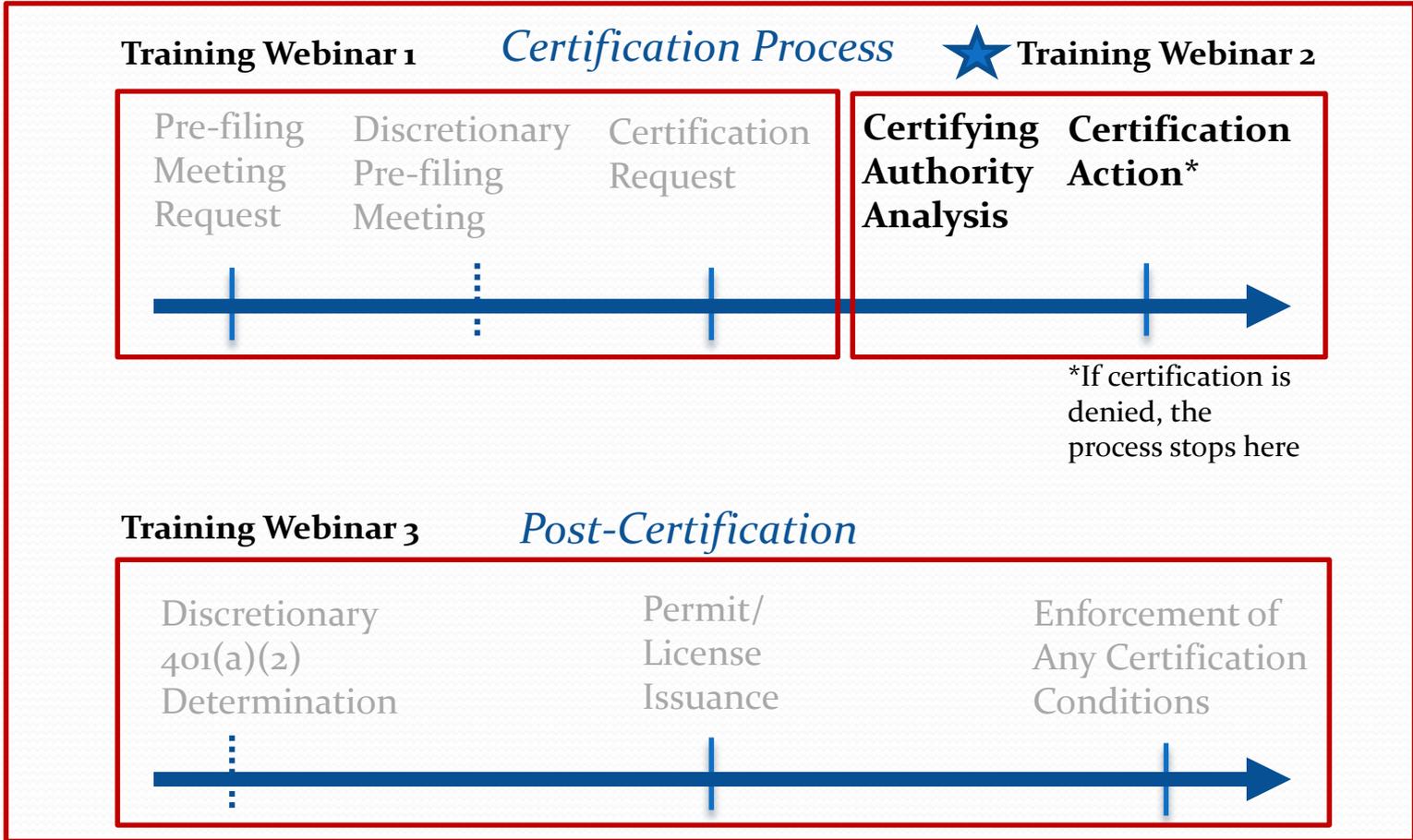
Overview

- Final Rule Topics
 - Certifying Authority Analysis
 - Certification Actions
 - Federal Agency Review
- Questions

June 17, 2020 Public Webinar



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Final Rule:

Certifying Authority Analysis

Certification Process



*If certification is denied, the process stops here

Certifying Authority Analysis



- Scope of certification is limited to assuring that:
 - the discharge
 - from a federally licensed or permitted activity
 - will comply with
 - water quality requirements.
- Scope of certification applies to actions on a certification request

Certifying Authority Analysis



- Scope of certification is limited to assuring that:
 - *the discharge*
 - *from a federally licensed or permitted activity*
 - will comply with
 - water quality requirements.
- **Discharge** is defined as “a discharge from a point source into a water of the United States.”

Certifying Authority Analysis



- Scope of certification is limited to assuring that:
 - the discharge
 - from a federally licensed or permitted activity
 - ***will comply with***
 - water quality requirements.
- “**Will comply**” language does **not** require certifying authorities to provide absolute certainty that applicants for a federal license or permit will never violate water quality requirements.

Certifying Authority Analysis



- Scope of certification is limited to assuring that:
 - the discharge
 - from a federally licensed or permitted activity
 - will comply with
 - ***water quality requirements.***
- **Water quality requirements** means “applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States.”

Certifying Authority Analysis

- **CWA Section 301** – Effluent limitations
- **CWA Section 302** – Water quality related effluent limitations
- **CWA Section 303** – Water quality standards and implementation plans
- **CWA Section 306** – National standards of performance
- **CWA Section 307** – Toxic and pretreatment effluent standards

- **State or tribal regulatory requirements for point source discharges into waters of the United States**
 - Includes those provisions of State or Tribal law that are more stringent than federal law, as authorized in CWA section 510, but may not alter the “scope of certification”

Certifying Authority Analysis



- Certification conditions must be within the “scope of certification.”
- A **condition** must be necessary to assure that the discharge from a proposed federally licensed or permitted project will comply with water quality requirements.
 - Conditions that go beyond this are not authorized by section 401.
 - The final rule does not specify categorical exclusions or inclusions of certification conditions.

Certifying Authority Analysis



- Certification denials must also be within the “scope of certification.”
- A **denial** must be due to the inability of a certifying authority to determine that the discharge from the proposed project will comply with water quality requirements.
 - Denials that are outside of this scope are not authorized by section 401.

Certifying Authority Analysis



- A certifying authority may request additional information to inform their analysis of a certification request.
 - Components of a “certification request” are intended to be sufficient information to start the reasonable period of time.

Certifying Authority Analysis

- **Hypothetical Example 1:** A certifying authority is analyzing a certification request and after careful analysis, decides to grant certification with conditions. One certification condition states that “To provide additional recreational opportunities, the project proponent is responsible for ensuring that a bike path is developed in the local state park.” Assume the certification action complies with all procedural requirements of Section 401 and the final rule.
 - Is this condition within the scope of certification?

Certifying Authority Analysis

- **Hypothetical Example 1:** A certifying authority is analyzing a certification request and after careful analysis, decides to grant certification with conditions. One certification condition states that “To provide additional recreational opportunities, the project proponent is responsible for ensuring that a bike path is developed in the local state park.” Assume the certification action complies with all procedural requirements of Section 401 and the final rule.
 - Is this condition within the scope of certification?
NO

Certifying Authority Analysis

- **Hypothetical Example 2:** A certifying authority is analyzing a certification request and determines it needs additional information on the discharge from the federally licensed project to decide how to act on the certification request. Assume the certification request met the requirements of the final rule, the project proponent and certifying authority held a pre-filing meeting, and that there is still time left in the reasonable period of time.
 - May the certifying authority ask for more information?
 - Is the answer to this question at all affected by the fact that the certifying authority and project proponent held a pre-filing meeting?
 - Will the reasonable period of time stop or pause if the certifying authority requests additional information?

Certifying Authority Analysis

- **Hypothetical Example 2:** A certifying authority is analyzing a certification request and determines it needs additional information on the discharge from the federally licensed project to decide how to act on the certification request. Assume the certification request met the requirements of the final rule, the project proponent and certifying authority held a pre-filing meeting, and that there is still time left in the reasonable period of time.
 - May the certifying authority ask for more information? **YES**
 - Is the answer to this question at all affected by the fact that the certifying authority and project proponent held a pre-filing meeting? **NO**
 - Will the reasonable period of time stop or pause if the certifying authority requests additional information? **NO**

Certifying Authority Analysis

- **Hypothetical Example 3:** A certifying authority is analyzing a certification request and determines that it will deny certification. The certifying authority has determined that the discharge from the proposed project will not meet the water quality standards for the water of the United States that it is discharging into. Assume all other procedural requirements of section 401 and the final rule are met by the certification denial.
 - Is this denial within the scope of certification?

Certifying Authority Analysis

- **Hypothetical Example 3:** A certifying authority is analyzing a certification request and determines that it will deny certification. The certifying authority has determined that the discharge from the proposed project will not meet the water quality standards for the water of the United States that it is discharging into. Assume all other procedural requirements of section 401 and the final rule are met by the certification denial.
 - Is this denial within the scope of certification? **YES**

Final Rule:

Certification Action

Certification Process



*If certification is denied, the process stops here

Certification Action



- When a certifying authority receives a certification request, it may take one of four actions pursuant to its section 401 authority:
 - Grant certification
 - Grant certification with conditions
 - Deny certification
 - Waive its opportunity to provide certification

Certification Action



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 - **Grant certification**
 - Grant certification with conditions
 - Deny certification
 - Waive its opportunity to provide certification

Certification Action

- The grant of certification must be:
 - in writing; and
 - include a statement that the discharge will comply with water quality requirements.
- Effect of granting certification: federal agency may proceed with issuing the license or permit.

Certification Action



- When a certifying authority receives a certification request, it may take one of four actions pursuant to its section 401 authority:
 - Grant certification
 - **Grant certification with conditions**
 - Deny certification
 - Waive its opportunity to provide certification

Certification Action

- For certification conditions for an *individual license or permit*, **each** condition must include two factors:
 - Statement explaining *why* the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements, and
 - Citation to federal, state or tribal law that authorizes the condition.

Certification Action

- For certification conditions on *issuance of a general license or permit*, **each** condition must include two factors:
 - Statement explaining *why* the condition is necessary to assure that the discharge authorized under the general license or permit will comply with water quality requirements, and
 - Citation to federal, state or tribal law that authorizes the condition.

Certification Action

- Effect of granting certification with conditions: conditions must be incorporated into the federal license or permit, if issued, and shall become federally enforceable.
 - The condition must be incorporated into the federal license or permit in its entirety, as drafted by the certifying authority.

Certification Action



- When a certifying authority receives a certification request, it may take one of four actions pursuant to its section 401 authority:
 - Grant certification
 - Grant certification with conditions
 - **Deny certification**
 - Waive its opportunity to provide certification

Certification Action

- Denials of certification for *individual licenses or permits* must include:
 - The specific water quality requirements with which the discharge will not comply;
 - A statement explaining why the discharge will not comply with the identified water quality requirements; and
 - If the denial is due to insufficient information, the denial must describe the specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project will comply with water quality requirements.

Certification Action

- Denials of certification for *issuance of a general license or permit* must include:
 - The specific water quality requirements with which discharges that could be authorized by the general license or permit will not comply;
 - A statement explaining why discharges that could be authorized by a general license or permit will not comply with the identified water quality requirements; and
 - If the denial is due to insufficient information, the denial must describe the specific water quality data or information, if any, that would be needed to assure that the range of discharges from potential projects will comply with water quality requirements.

Certification Action

- Effect of a denial of certification: the federal agency may not issue a license or permit for the proposed project
 - A project proponent may submit a new certification request if a previous request is denied.

Certification Action



- When a certifying authority receives a certification request, it may take one of four actions pursuant to its section 401 authority:
 - Grant certification
 - Grant certification with conditions
 - Deny certification
 - **Waive its opportunity to provide certification**

Certification Action

- Two ways to waive certification:
 1. A certifying authority may waive certification expressly.
 2. A certifying authority may also waive certification by failing or refusing to act, specifically by:
 - failure or refusal to act on a certification request within the reasonable period of time;
 - failure or refusal to comply with other procedural requirements of section 401;
 - failure or refusal to satisfy the requirements of section 121.7(c); or
 - failure or refusal to satisfy the requirements of section 121.7(e).

Certification Action

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 2. A certifying authority may also waive certification by failing or refusing to act, specifically by:
 - failure or refusal to act on a certification request within the reasonable period of time;
 - failure or refusal to comply with other procedural requirements of section 401;
 - failure or refusal to satisfy the requirements of section 121.7(c); or
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Certification Action

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 - **failure or refusal to act on a certification request within the reasonable period of time;**
 - **failure or refusal to comply with other procedural requirements of section 401;**
 - **failure or refusal to satisfy the requirements of section 121.7(c); or**
 - **failure or refusal to satisfy the requirements of section 121.7(e).**

Certification Action

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 - failure or refusal to comply with other procedural requirements of section 401;
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Certification Action

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 - failure or refusal to act on a certification request within the reasonable period of time;
 - **failure or refusal to comply with other procedural requirements of section 401;**
 - failure or refusal to satisfy the requirements of section 121.7(c); or
 - failure or refusal to satisfy the requirements of section 121.7(e).

Certification Action

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 1. A certifying authority may waive certification expressly.
 2. **A certifying authority may also waive certification by failing or refusing to act, specifically by:**
 - failure or refusal to act on a certification request within the reasonable period of time;
 - failure or refusal to comply with other procedural requirements of section 401;
 - **failure or refusal to satisfy the requirements of section 121.7(c); or**
 - failure or refusal to satisfy the requirements of section 121.7(e).

Certification Action

- Two ways to waive certification:
 1. A certifying authority may waive certification expressly.
 2. **A certifying authority may also waive certification by failing or refusing to act, specifically by:**
 - failure or refusal to act on a certification request within the reasonable period of time;
 - failure or refusal to comply with other procedural requirements of section 401;
 - failure or refusal to satisfy the requirements of section 121.7(c); or
 - **failure or refusal to satisfy the requirements of section 121.7(e).**

Certification Action

- A certifying authority may also waive a certification *condition*.
 - A condition for a license or permit shall be waived upon the certifying authority's failure or refusal to act in accordance with the requirements of section 121.7(d).
- Effect of waiving a certification condition: waiver of a specific certification condition does **not** waive the entire certification, just the specific certification condition.
 - Waived condition is **not** included in the license or permit

Federal Agency Review



- Federal agency review is limited to determining whether the certification action was taken in accordance with procedural requirements.
 - E.g., including all required information in a certification, condition, or denial.

Federal Agency Review



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Federal Agency Review



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 - **E.g., including all required information in a certification, condition, or denial**

Federal Agency Review

- **Grant of Certification**

- If the certification is **in writing** and **includes** a statement that the discharge from the proposed project will comply with water quality requirements:
 - The federal license or permit may issue.
- If the certification is **not in writing** or **does not include** the required statement:
 - The certification requirement is waived and the federal license or permit may issue.

Federal Agency Review

- **Certifications with Conditions**
 - If the certification is **in writing** and the conditions **include** the required information:
 - Federal agency must include conditions in the federal license or permit.
 - If the certification is **not in writing** or the conditions **do not include** the required information:
 - Deficient conditions are considered waived and should not be included in the federal license or permit.
 - A deficient condition does not waive the rest of the certification.

Grant with Conditions

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graph LR; A[Grant with Conditions] --> B[Federal agency review determines conditions include the required information]; A --> C[Federal agency review determines conditions do not include the required information]; B --> D[Conditions must be incorporated into federal license or permit]; C --> E[Deficient condition waived];
```

Federal agency review determines conditions **include** the required information

Conditions must be incorporated into federal license or permit

Federal agency review determines conditions **do not include** the required information

Deficient condition waived

Federal Agency Review

- Denials:
 - If a denial is **in writing** and **includes** the required information:
 - The federal license or permit does not issue.
 - If a denial is **not in writing** or **does not include** the required information:
 - The certification requirement is waived and the federal license or permit may issue.

Denial

```
graph LR; Denial[Denial] --> Includes[Federal agency review determines denial includes the required information]; Denial --> DoesNotInclude[Federal agency review determines denial does not include the required information]; Includes --> License[Federal license or permit may not issue]; DoesNotInclude --> Waived[Certification waived; federal license or permit may issue];
```

Federal agency review determines denial **includes** the required information

Federal license or permit may not issue

Federal agency review determines denial **does not include** the required information

Certification waived; federal license or permit may issue

Federal Agency Review

- The final rule does **not** include a process for remedying deficient certifications or denials.
- Federal licensing or permitting agencies are **not** precluded from developing procedures in their own certification regulations that may allow certifying authorities to remedy deficient certifications or denials.

Certification Action and Federal Agency Review

- **Hypothetical Example 1:** A certifying authority analyzed a certification request for an individual permit and decided that it will grant certification with conditions. One condition is missing a citation to a federal, state, or tribal law that authorizes the condition. Assume all other procedural requirements of Section 401 and the final rule have been met. The federal agency is now reviewing the certification.
 - Is this condition waived?
 - Is this certification requirement waived?
 - If there is a waiver of a certification or condition, will the certifying authority be notified?

Certification Action and Federal Agency Review

- **Hypothetical Example 1:** A certifying authority analyzed a certification request for an individual permit and decided that it will grant certification with conditions. One condition is missing a citation to a federal, state, or tribal law that authorizes the condition. Assume all other procedural requirements of Section 401 and the final rule have been met. The federal agency is now reviewing the certification.
 - Is this condition waived? **YES**
 - Is this certification requirement waived? **NO**
 - If there is a waiver of a condition or certification, will the certifying authority be notified? **YES**

Certification Action and Federal Agency Review

- **Hypothetical Example 2:** A certifying authority analyzed a certification request for an individual permit and decided that it will grant certification with conditions. Assume all procedural requirements of Section 401 and the final rule have been met. The federal agency is now reviewing the certification and disagrees that one of the conditions is necessary to comply with water quality requirements.
 - Is the condition waived?
 - Is the certification requirement waived?

Certification Action and Federal Agency Review

- **Hypothetical Example 2:** A certifying authority analyzed a certification request for an individual permit and decided that it will grant certification with conditions. Assume all procedural requirements of Section 401 and the final rule have been met. The federal agency is now reviewing the certification and disagrees that one of the conditions is necessary to comply with water quality requirements.
 - Is the condition waived? **NO**
 - Is the certification requirement waived? **NO**

Certification Action and Federal Agency Review

- **Hypothetical Example 3:** A certifying authority analyzed a certification request for an individual permit and decided that it will deny certification. The denial includes all listed components from section 121.7(e)(1). Assume all other procedural requirements of Section 401 and the final rule have been met. The federal agency is now reviewing the certification and disagrees with the certifying authority's rationale for denying certification.
 - Is the certification requirement waived?

Certification Action and Federal Agency Review

- **Hypothetical Example 3:** A certifying authority analyzed a certification request for an individual permit and decided that it will deny certification. The denial includes all listed components from section 121.7(e)(1). Assume all other procedural requirements of Section 401 and the final rule have been met. The federal agency is now reviewing the certification and disagrees with the certifying authority's rationale for denying certification.
 - Is the certification requirement waived? **NO**

Certification Action and Federal Agency Review

- **Hypothetical Example 4:** A certifying authority is analyzing a certification request for an individual permit and has not acted yet because it determined that it needs additional information to decide how to act on the certification request. The reasonable period of time has ended. Assume the certification request met the requirements of the final rule and the reasonable period of time was determined and communicated in accordance with section 121.6.
 - Has the certifying authority waived certification?

Certification Action and Federal Agency Review

- **Hypothetical Example 4:** A certifying authority is analyzing a certification request for an individual permit and has not acted yet because it determined that it needs additional information to decide how to act on the certification request. The reasonable period of time has ended. Assume the certification request met the requirements of the final rule and the reasonable period of time was determined and communicated in accordance with section 121.6.
 - Has the certifying authority waived certification? **YES**

Certification Action and Federal Agency Review

- **Hypothetical Example 5:** A certifying authority has analyzed a certification request and decided that it will deny certification. The federal agency reviewed the denial and determined it met all the procedural requirements of Section 401 and the final rule. The project proponent received the denial and has submitted a new pre-filing meeting request.
 - Can the project proponent submit a new certification request?
 - If the project proponent can submit a new certification request, when can it submit a new certification request?

Certification Action and Federal Agency Review

- **Hypothetical Example 5:** A certifying authority has analyzed a certification request and decided that it will deny certification. The federal agency reviewed the denial and determined it met all the procedural requirements of Section 401 and the final rule. The project proponent received the denial and has submitted a new pre-filing meeting request.
 - Can the project proponent submit a new certification request? **YES**
 - If the project proponent can submit a new certification request, when can it submit a new certification request? **At least 30 days after requesting a pre-filing meeting**

Certification Action and Federal Agency Review

- **Hypothetical Example 6:** A certifying authority has analyzed a certification request for an individual permit and decided that it will deny certification. In its denial, the certifying authority indicates that the denial is due to insufficient information and describes the specific information that would be needed to assure that the discharge will comply with water quality requirements. Assume the denial meets all other procedural requirements of Section 401 and the final rule.
 - May a certifying authority deny certification because of insufficient information?

Certification Action and Federal Agency Review

- **Hypothetical Example 6:** A certifying authority has analyzed a certification request for an individual permit and decided that it will deny certification. In its denial, the certifying authority indicates that the denial is due to insufficient information and describes the specific information that would be needed to assure that the discharge will comply with water quality requirements. Assume the denial meets all other procedural requirements of Section 401 and the final rule.
 - May a certifying authority deny certification because of insufficient information? **YES**

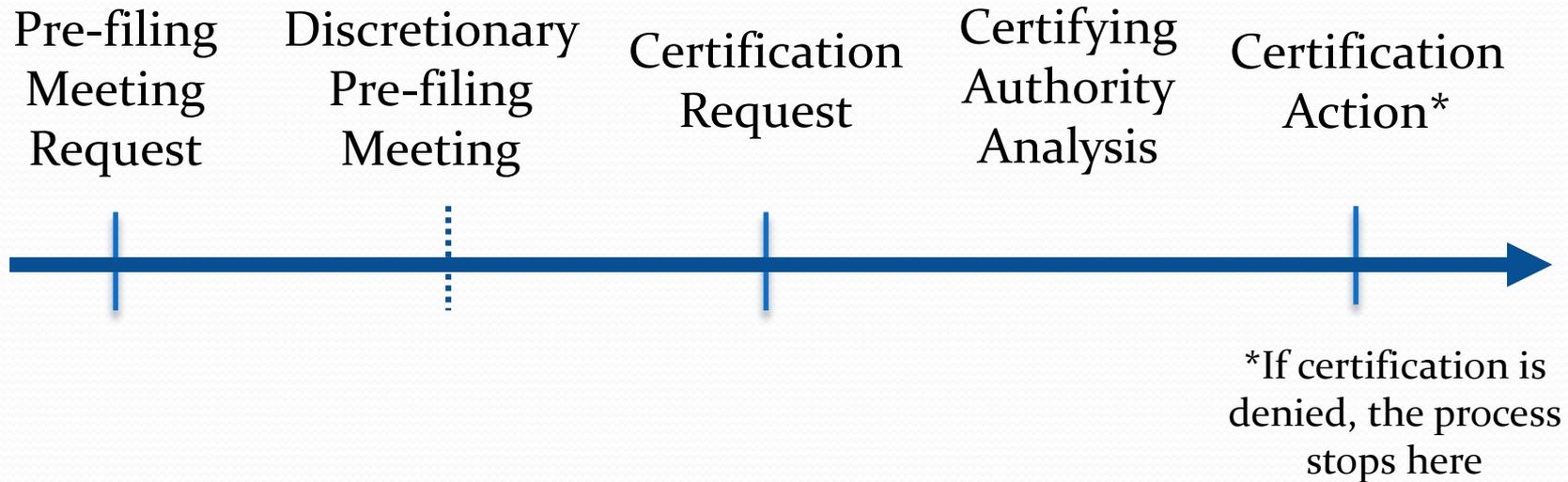
Certification Action and Federal Agency Review

- **Hypothetical Example 7:** A certifying authority analyzed a certification request for an individual permit and decided that it would deny certification. The denial does not contain a statement explaining why the discharge will not comply with the identified water quality requirements. The federal agency determines the denial is procedurally inadequate and notifies the certifying authority of the waiver in accordance with section 121.9.
 - Does the final rule provide a remedy for a deficient denial?

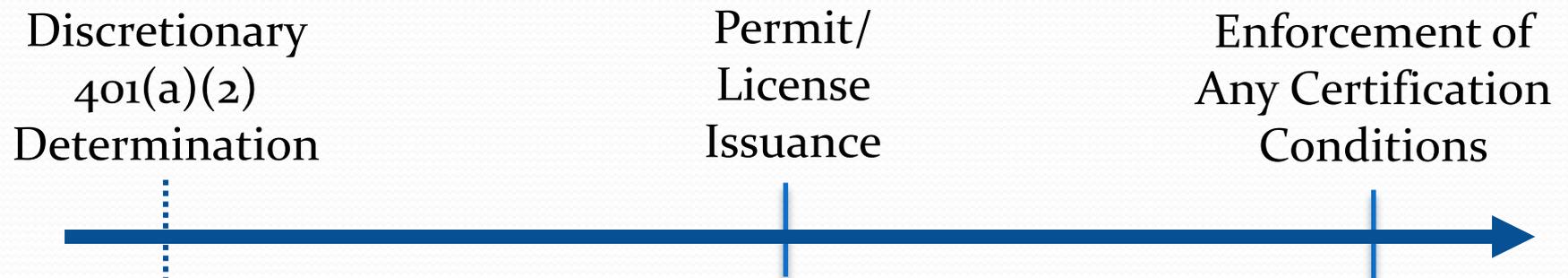
Certification Action and Federal Agency Review

- **Hypothetical Example 7:** A certifying authority analyzed a certification request for an individual permit and decided that it would deny certification. The denial does not contain a statement explaining why the discharge will not comply with the identified water quality requirements. The federal agency determines the denial is procedurally inadequate and notifies the certifying authority of the waiver in accordance with section 121.9.
 - Does the final rule provide a remedy for a deficient denial?
NO

Certification Process



Post-Certification





Questions?

Upcoming Webinars

- **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.