

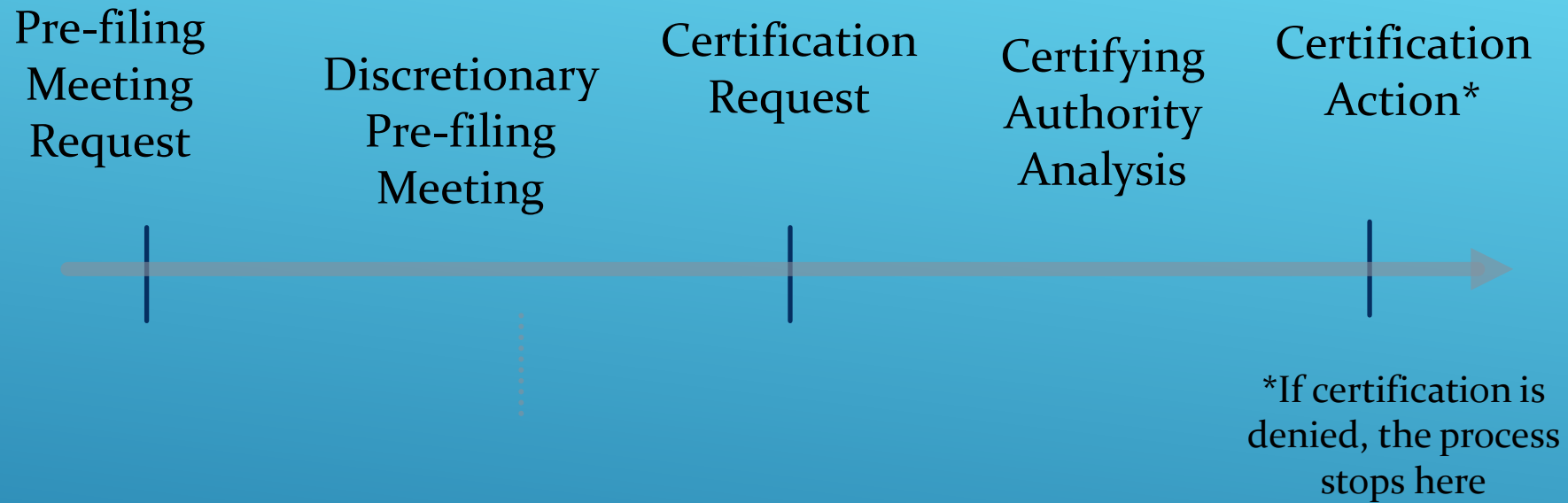
CWA 401 CERTIFICATIONS

EXAMPLES FOR DISCUSSION

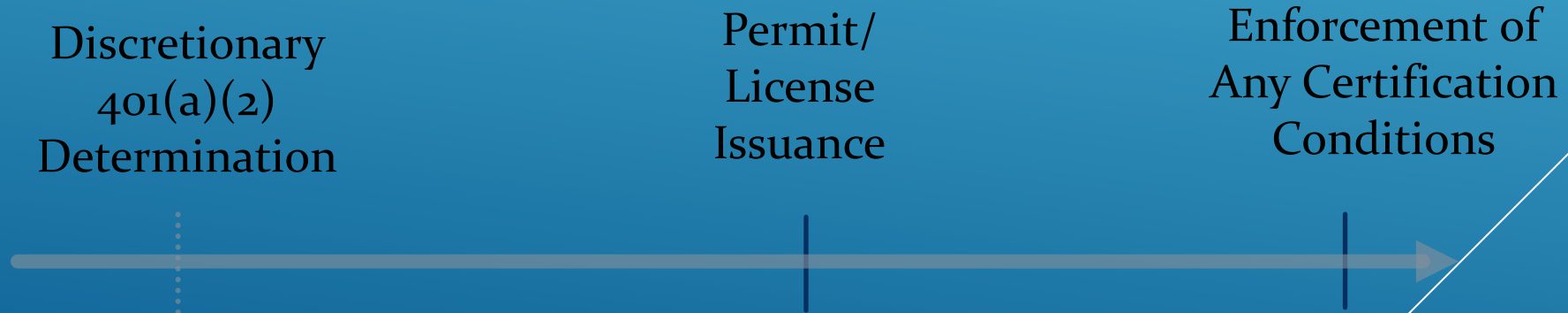
April 2021

Ellen Blake and Liz Goldmann, EPA Region 9

Certification Process



Post-Certification



Reasonable Period of Time

Under the 401 rule, a certifying authority must take action on a 401 certification request within the applicable reasonable period of time (RPT) (40 CFR 121.6).

The Federal agency (*e.g.*, Corps) establishes the period of time either categorically or on a case-by-case basis. The RPT shall not exceed one year from receipt of a 401 certification request.

The Federal agency may extend the RPT at the request of the certifying authority. An extension may be granted to provide for *unique or complex circumstances* that may reasonably require a longer period of time than was originally established.

- The request by the certifying authority must be in writing to the Federal agency; and
- If the Federal agency agrees to extend the reasonable period of time, the Federal agency shall notify the certifying authority and project proponent in writing.

Action on a Certification Request

Grant: Any grant of certification shall be in writing and shall include a statement that the proposed project's discharge will comply with water quality requirements (WQR).

Grant with Conditions: According to the new 401 rule, any grant of certification with conditions shall be in writing and shall for each condition include, at a minimum:

For certification conditions on a license or permit, (i) A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with WQR; and (ii) A citation to federal, state, or tribal law that authorizes the condition.

All certification conditions that satisfy the requirements of 121.7 will be incorporated into the federal license or permit (121.10).

Action on a Certification Request

Denial: According to the new 401 rule, any denial of certification shall be in writing and shall include:

(1) For denial of certification for an individual license or permit, (i) The specific WQR with which the discharge will not comply; (ii) A statement explaining why the discharge will not comply with the identified WQR; and (iii) 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 WQR.

If the tribe denies certification, the federal agency must provide written notice to the tribe and the project proponent that the denial satisfies the requirements of 121.7(e), and the license or permit cannot be granted (121.8).

Waiver: If a tribe waives the opportunity to certify, it means the federal permitting or licensing agency may continue with its own application evaluation process and issue the license or permit in the absence of an affirmative certification by the tribe.

There are also circumstances where a federal license or permit is deemed waived by the federal agency: 1) if the tribe fails or refuses to act within the reasonable period of time; and 2) if the federal agency believes the tribe has not satisfied the requirements under 121.7. The certification or specific conditions within the certification will be waived by the federal agency (121.9).

§401 CWA Certification: General Information

General Information does not constitute a certification condition(s) and is not enforceable by the federal agency. It can be added to a certification to ensure a project proponent complies with the terms and conditions of the 401 certification.

Example of General Information:

- This certification does not relieve the applicant of the responsibility to comply with applicable local, tribal, state, federal regulations or statutes, including regulations any discharge into waters of the U.S.
- Copies of this certification shall be kept on the job site and readily available for reference.
- Prior to work commencing, notify the appropriate Tribal Environmental Office.
- If the project is constructed and/or operated in a manner not consistent with the permit, the permittee may be in violation of this certification.
- Tribal representatives may inspect the authorized activity and any mitigation areas at any time deemed necessary to determine compliance with the terms and conditions of this 401 certification.

Examples of §401 CWA Certification Conditions

Conditions of Certification: This CWA Section 401 certification is granted with conditions. Included are the justifications and appropriate citations for each condition. EPA has determined that any discharge from the proposed project will comply with water quality requirements, as defined at 40 CFR 121.1(n), subject to the following conditions pursuant to Section 401(d):

Condition 1: When the project proponent is operating equipment or otherwise undertaking construction in aquatic resources, the following conditions shall apply:

- Work shall be completed in the dry, unless authorized by the Department of the Army permit.
- All equipment shall be cleaned prior to arriving on the project site. All equipment shall be inspected daily and prior to entering any streams or wetlands for oil, gas, diesel, anti-freeze, hydraulic fluid, and other petroleum leaks. All contaminated areas shall be cleaned promptly, and soil removed as necessary from the site or contained in enclosed containers. All equipment detected with leaks shall be repaired promptly or moved off site within 24 hours.

§401 CWA Certification Condition 1 (continued)

Why the condition is necessary to ensure the proposed project will comply with water quality requirements: This condition is necessary to ensure water quality is not degraded by oil, grease, gasoline, or other types of fluids used to operate and maintain equipment used to complete the project, and allows for clean-up of potential spills before entering waters. This condition also helps protect the water quality and native biology of the impacted waters by preventing the spread of invasive or nuisance species. This condition minimizes equipment contact with water.

Citation that authorizes the condition: 40 CFR 230.10(b)-(d); 40 CFR 230.70; 40 CFR 230.72; 40 CFR 230.74, Southern Ute Indian Tribe Water Quality Standards (SUIT) (WQS) adopted in 1996. SUIT WQS section IV; WQS Sections (V)(A); and (VI)(A).

Condition 2: The project proponent shall submit a sediment and erosion control plan to EPA, a minimum of two weeks prior to initiating construction on the project. The project proponent can start construction as soon as the plan is approved by EPA or two weeks after submittal of the plan to EPA. BMPs shall be used to fully maintain and protect all existing water uses throughout the duration of the project to minimize turbidity and sedimentation in the waterbody. All sediment and erosion control measures shall be in place prior to the onset of construction or prior to work in a waterbody. The sediment and erosion control plan shall identify:

- Measures to minimize onsite sedimentation and erosion during and after construction.
- What types and locations of sediment and erosion control features shall be used onsite. Project proponent shall actively maintain these features during construction.
- Measures to restore disturbed aquatic resources and upland areas, where they abut the aquatic resource area.
- Access roads. The project proponent shall construct access roads outside of waters/wetlands, unless otherwise permitted.

§401 CWA Certification Condition 2 (continued)

Why the condition is necessary to ensure the proposed project will comply with water quality requirements:

This condition is necessary to protect water quality because it ensures that the project proponent is using planning and construction practices that will maintain the integrity of the site hydrology and maintain the aquatic resource functions and values. This condition is necessary to minimize turbidity and sediment caused by construction activities. This condition is necessary to protect and maintain existing uses and quality of Tribal aquatic resources, including prevent the introduction of invasive and noxious species into SUIT waters.

Citation that authorizes the condition: 40 CFR 230.10(b)-(d); 40 CFR 230.70; 40 CFR 230.72; 40 CFR 230.74; 40 CFR 230.75 SUIT Water Quality Standards (WQS) adopted in 1996. SUIT WQS section IV; WQS Sections (V)(A); and (VI)(A). Fishing Proclamation for the Southern Ute Indian Reservation; and Tribal Wildlife Conservation Code 13-3-116.

Example of Denial of §401 CWA Certification

EPA R9 denial of twelve NWP:

On behalf of the 125 federally recognized tribes with tribal lands within EPA Region 9, EPA Region 9 cannot certify that the range of discharges from potential projects authorized under the following proposed NWPs will comply with water quality requirements, as defined in 40 CFR 121.1(n). Therefore, CWA Section 401 water quality certification is denied for NWPs 3, 12, 13, 14, 29, 39, 40, 42, 44, 51, C and D, and applicants must request an individual water quality certification, consistent with 40 CFR 121.5.

Certification denial is due to insufficient information. 40 CFR 121.7(e)(2)(iii). In EPA's unique role certifying on behalf of a tribe, in a tribal jurisdiction where EPA is not the regulator, EPA lacks important information about tribal water resources. In the case of the 125 federally recognized tribes with tribal lands within EPA Region 9, EPA Region 9 lacks sufficient information on sensitive resources that may exist on these tribal lands, potential impaired waters on these tribal lands, and potential cultural importance of the water resources on these tribal lands. Additional information on these specific subjects would be needed for EPA Region 9 to assure that the range of discharges from potential projects authorized under NWPs 3, 12, 13, 14, 29, 39, 40, 42, 44, 51, C, and D will comply with water quality requirements, as defined in 40 CFR 121.1(n).

This information would also be necessary for EPA Region 9 to identify specific water quality requirements and evaluate whether the range of discharges from potential projects will comply with such requirements, in accordance with CWA section 401(a)(1) and 40 CFR 121.7(b). Lacking this information, EPA Region 9 is therefore denying certification.