ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 123, 124, 232, and 233

[EPA–HQ–OW–2020–0276; FRL–6682–02–OW]

RIN 2040–AF83

Clean Water Act Section 404 Tribal and State Program Regulation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing the Agency's first comprehensive revision to the regulations governing Clean Water Act (CWA) section 404 Tribal and State programs since 1988. The primary purpose of the proposed revision is to respond to longstanding requests from Tribes and States to clarify the requirements and processes for assumption and administration of a CWA section 404 permitting program for discharges of dredged and fill material. The proposed revisions would facilitate Tribal and State assumption of the section 404 program, consistent with the policy of the CWA as described in section 101(b), by making the procedures and substantive requirements for assumption transparent and straightforward. It clarifies the minimum requirements for Tribal and State programs while allowing for flexibility in how these requirements are met. In addition, the proposed rule clarifies the criminal negligence standard for both the CWA section 402 and section 404 programs. Finally, the proposed rule makes technical revisions to remove outdated references associated with the section 404 Tribal and State program regulations.

DATES: Comments must be received on or before October 13, 2023October 13, 2023. Comments on the information collection provisions submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA) are best assured of consideration by OMB if OMB receives a copy of your comments on or before October 13, 2023. The EPA will hold a virtual public hearing on September 6, 2023. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on the public hearing.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OW–2020–0276, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: OW-Docket@epa.gov.* Include Docket ID No. EPA–HQ–OW–2020–0276 in the subject line of the message.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Water Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

The virtual public hearing will convene at 3:30 p.m. Eastern Daylight Time (EDT) and will conclude at 7:30 p.m. EDT on September 6, 2023. Refer to the **SUPPLEMENTARY INFORMATION** section below for additional information.

FOR FURTHER INFORMATION CONTACT: Kathy Hurld, Oceans, Wetlands, and Communities Division, Office of Water (4504–T), Environmental Protection Agency, Pennsylvania Avenue NW, Washington, DC 20460; telephone number: 202–564–5700; email address: *404g-rulemaking@epa.gov;* website: *https://www.epa.gov/cwa404g.*

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

The proposed rule would modernize EPA's 1988 Clean Water Act (CWA) section 404 Tribal and State program regulations. 53 FR 20764 (June 6, 1988). Section 404 of the CWA establishes a program to regulate the discharge of dredged or fill material into navigable waters, which are defined as ''waters of the United States.'' The section 404 program is generally administered by the U.S. Army Corps of Engineers (''Corps''); however, CWA section 404(g) authorizes Tribes and States to assume administration of the program over certain waters within their jurisdiction, except those waters retained by the Corps. If a program request is approved by EPA, the Tribe or State is responsible for permitting discharges of dredged and fill material into certain waters of the United States within the Tribe's or State's jurisdiction, authorizing discharges under general permits, enforcement of unauthorized discharges, as well as enforcing the terms and conditions of permits under the Tribe's or State's authority.

In this proposal, the Agency responds to longstanding requests from Tribes and States to clarify the requirements and processes for assumption and administration of a CWA section 404 program as well as EPA oversight. The proposed revisions would facilitate Tribal and State assumption of the section 404 program, consistent with the

policy of the CWA as described in section 101(b), by making the program assumption process and requirements transparent and straightforward. The proposed rule would also clarify how Tribes and States can ensure their program meets the minimum requirements of the CWA while allowing for flexibility in meeting these requirements.

Specifically, the proposal would facilitate the process of obtaining program approval by harmonizing program description requirements with program operation, compliance evaluation, and enforcement requirements; establishing a clear procedure for determining the extent of waters the Corps would retain following Tribal or State assumption; and delaying the effective date of EPA's program approval for a reasonable period of time to allow the assuming Tribe or State and the Corps time to complete preparations for implementation. It would clarify requirements for program implementation by addressing Tribal and State compensatory mitigation program requirements, explaining how Tribes and States could ensure compliance with the CWA section 404(b)(1) Guidelines at 40 CFR part 230, and stating that Tribal and State programs must allow for judicial review of issued permits. The proposal would streamline the procedure for permitting long-term projects, as well as make permitting more equitable by providing additional opportunities for Tribes to participate in the permitting process when another Tribe or State administers the section 404 program. It would clarify that States with approved section 402 and section 404 programs must authorize criminal prosecutions of violations based on a negligence standard and provide additional detail about the applicability of conflict of interest restrictions to the section 404 program. The proposal would provide Tribes and States with options for demonstrating that their programs are no less stringent than the Federal section 404 program. The proposal would also harmonize procedures for program withdrawal with the program approval process. Finally, the proposal would make certain additional minor updates to the section 404 Tribal and State program regulations, a minor update to 40 CFR part 232, and technical corrections to 40 CFR part 124 to reflect the 1988 section 404 Tribal and State program regulations.

II. Public Participation

A. Written Comments

Submit your comments, identified by Docket ID No. EPA–HQ–OW–2020–0276, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI), Proprietary Business Information (PBI), or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). Please visit *https://www.epa.gov/dockets/commenting-epa-dockets* for additional submission methods; the full EPA public comment policy; information about CBI, PBI, or multimedia submissions; and general guidance on making effective comments.

B. Participation in Virtual Public Hearing

EPA will begin pre-registering speakers for the virtual public hearing upon publication of this document in the **Federal Register**. To register to speak at the virtual hearing, please use the online registration form available at *https://www.epa.gov/cwa404g/current-efforts-regarding-assumption-under-cwa-section-404.* The last day to pre-register to speak at the hearing will be September 5, 2023. On September 6, 2023, EPA will post a general agenda for the hearing that will list pre-registered speakers in approximate order at: *https://www.epa.gov/cwa404g/current-efforts-regarding-assumption-under-cwa-section-404.*

EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearing to run either ahead of schedule or behind schedule.

Each commenter will have three minutes to provide oral testimony. EPA encourages commenters to provide EPA with a copy of their oral testimony electronically by emailing it to *404g-rulemaking@epa.gov.* EPA also recommends submitting the text of your oral comments as written comments to the rulemaking docket.

EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the public comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing are posted online at *https://www.epa.gov/cwa404g/current-efforts-regarding-assumption-under-cwa-section-404.* While EPA expects the hearing to go forward as set forth above, please monitor our website or contact Sarah Randall at *404g-rulemaking@epa.gov* to determine if there are any updates. EPA does not intend to publish a document in the **Federal Register** announcing updates.

If you require the services of an interpreter or special accommodations such as audio description, please pre-register for the hearing with Sarah Randall at *404g-rulemaking@epa.gov* and describe your needs by August 23, 2023. EPA may not be able to arrange accommodations without advance notice.

III. General Information

A. Does this action apply to me?

This proposed rule will potentially affect Tribes and States that have assumed or will in the future request to assume administration of the CWA section 404 program. In the section 404 Tribal and State program regulations, the term ''State'' includes any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands. For purposes of the section 404 Tribal and State Program regulations, the term ''State'' also includes eligible Federally recognized Indian Tribes and any interstate agency requesting program approval or administering an approved program. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

B. What action is the Agency taking?

EPA is proposing to revise and modernize its regulations for Tribal and State assumption and administration of the CWA section 404 program to provide greater clarity about the requirements, reduce barriers to assumption, and make technical

corrections to facilitate Tribal and State assumption of the section 404 program. Assumption provides Tribes and States the opportunity to administer the program, placing them in the decision-making position for permits of discharges of dredged or fill material into certain waters of the United States. This proposed rule would clarify the Tribal and State requirements for assumption and program administration as well as address the procedures EPA would follow, and the criteria EPA would apply, in approving, exercising oversight, and withdrawing Tribal and State programs under CWA section 404(g)–(k) and EPA's implementing regulations at 40 CFR part 233. The proposed rule, if finalized, would also serve to help achieve the policy of CWA section 101(b) that States implement CWA permit programs. 33 U.S.C. 1251(b).

C. What is the Agency's authority for taking this action?

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.,* including sections 309, 402, 404, 501, and 518.

D. What are the incremental costs and benefits of this action?

The costs and benefits are qualitatively discussed in the Economic Analysis for the Proposed Rule. Most of the changes associated with the action lead to either no economic impact or *de minimis* economic impacts. There are potential incremental economic impacts associated with the manner in which the proposed rule addresses the waters of the United States over which the Corps retains administrative authority, the effective date for approved Tribal and State programs, impacts to downstream States, and program withdrawal procedures. The economic analysis does not quantify these potential incremental economic impacts, as there is no data associated with these changes on which to base estimates.

IV. Background

A. Statutory and Regulatory History

1. CWA

Congress amended the Federal Water Pollution Control Act (FWPCA), or the CWA as it is commonly called,[1] in 1972 to address longstanding concerns regarding the quality of the nation's waters and the Federal Government's ability to address those concerns under existing law. The objective of the new statutory scheme was ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' 33 U.S.C. 1251(a). In order to meet that objective, Congress declared two national goals: (1) ''that the discharge of pollutants into the navigable waters be eliminated by 1985''; and (2) ''that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983 . . . .'' *Id.* at 1251(a)(1)–(2).

Congress passed the CWA to address the discharge of pollutants into ''navigable waters,'' defined as ''the waters of the United States.'' 33 U.S.C. 1362(7). Section 301 contains the key regulatory mechanism: ''Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.'' *Id.* at 1311(a). A ''discharge of a pollutant'' is defined to include ''any addition of any pollutant to navigable waters from any point source,'' and a ''point source,'' in turn, is ''any discernible, confined and discrete conveyance,'' such as a pipe or ditch. *Id.* at 1362(12), (14). The term ''pollutant'' means ''dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.'' *Id.* at 1362(6). Thus, it is unlawful to discharge pollutants into waters of the United States from a point source unless the discharge complies with certain enumerated sections of the CWA, including obtaining a permit. *See id.* at 1342, 1344.

2. CWA Section 404

Section 404 of the CWA establishes a program to regulate the discharge of dredged or fill material into navigable waters, defined as ''waters of the United States.'' Regulated discharges of dredged or fill material are defined in 40 CFR 232.2 and include any addition of dredged material, including the redeposit other than incidental fallback of dredged material, into waters of the United States and generally the addition of any fill material (*e.g.,* rock, sand, dirt) placed in waters of the United States which has the effect of replacing any portion of waters of the United States with dry land or changing the bottom elevation of any portion of waters of the United States. *See* 40 CFR 232.2. Such discharges may be associated with activities such as site development, erosion protection, bridges and piers, linear projects (such as pipelines), natural resource extraction, shoreline stabilization, and restoration projects.

Section 404 of the CWA requires a permit for discharges of dredged and/or fill material from a point source into waters of the United States unless the discharge is associated with an activity exempt from section 404 permitting requirements under CWA section 404(f). Section 404(a) of the CWA authorizes the Secretary of the Army to issue permits after notice and opportunity for public hearings, for the discharge of dredged or fill material into navigable waters at specified disposal sites. The Act specifies that the Secretary of the Army acts through the Chief of Engineers, and thus the Corps generally administers the day-to-day permitting program under section 404, except where Tribes or States have assumed this authority and administer a program approved by EPA as consistent with CWA section 404. Currently, Michigan, New Jersey, and Florida have assumed this program, and the Corps manages the day-to-day administration of the section 404 program in 47 States, all Tribal lands, U.S. Territories, and the District of Columbia, and in certain waters in Michigan, New Jersey, and Florida.

Under the section 404 program, discharges of dredged or fill material into waters of the United States are authorized by individual or general permits. Individual permits are processed by the permitting agency (*i.e.,* the Corps, or a Tribe or State with an approved program), which evaluates them for consistency with the environmental criteria outlined in the CWA 404(b)(1) Guidelines [2] or the Tribal or State environmental review criteria respectively. General permits developed by the permitting agency may authorize discharges that will have only minimal adverse effects, individually and cumulatively, to the aquatic environment. General permits must be consistent with the environmental review criteria set forth in the CWA 404(b)(1) Guidelines and may be issued on a nationwide, regional, or programmatic basis for discharges from specific categories of activities. The

[1] The FWPCA is commonly referred to as the CWA following the 1977 amendments to the FWPCA. Public Law 95–217, 91 Stat. 1566 (1977). For ease of reference, EPA will generally refer to the FWPCA in this document as the CWA or the Act.

[2] The CWA 404(b)(1) Guidelines are regulations that were established by EPA in conjunction wih the Corps and codified at 40 CFR part 230. The CWA 404(b)(1) Guidelines are the substantive environmental review criteria used to evaluate permits for discharges of dredged and/or fill material under CWA section 404.

general permit process allows these activities to proceed with little or no delay, provided that the conditions for the general permit are met. For example, a general permit can authorize discharges associated with minor road activities or utility line backfill, if the regulated activities under the general permit will cause only minimal adverse environmental effects when performed separately, will have only minimal cumulative adverse effects on the environment, and the discharge complies with the general permit conditions and is in compliance with the CWA 404(b)(1) guidelines.

The Act also expressly recognizes States' role in administering permitting programs, including under section 404 of the CWA:

> It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 [402] and 1344 [404] of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

33 U.S.C. 1251(b). Section 101(b) sets forth a policy focused on preserving the responsibilities and rights of States. Those responsibilities and rights are to prevent, reduce, and eliminate pollution, including, but not limited to implementing the Act's regulatory permitting programs, in partnership and with support from the Federal Government. Indeed, the Supreme Court has described, on numerous occasions, section 101(b) as creating a partnership between the Federal and State Governments in which the States administer provisions of the Act and are allowed to set standards more stringent than the Federal standards. *See, e.g., Int'l Paper Co.* v. *Ouellette,* 479 U.S. 481, 489–90 (1987) (describing section 101(b) as allowing the Federal Government to authorize administration of point source pollution permits by Tribes and States and allowing States to establish more stringent discharge limitations than Federal requirements); *Train* v. *Colo. Pub. Interest Grp.,* 426 U.S. 1, 16 & n.13 (1976) (describing section 101(b) as providing States authority to develop permit programs and establish standards more stringent than those under the CWA).

3. CWA Sections 404(g) and 404 (h–i)

In the 1977 Amendments to the CWA, Congress gave States the option of assuming the section 404 program in certain waters of the United States within the State's jurisdiction, subject to EPA approval. When Congress enacted the CWA in 1972, the Corps had long been regulating ''navigable waters of the United States'' under the Rivers and Harbors Act of 1899 (RHA). However, in the CWA, Congress defined ''navigable waters'' to mean ''the waters of the United States,'' which went beyond RHA authority. The Corps' initial post-CWA regulations treated the two jurisdictional terms interchangeably. 39 FR 12115, 12119 (April 3, 1974). In 1975, the U.S. District Court for the District of Columbia ordered the Corps to adopt new regulations in accordance with the broader water quality purposes of the CWA. *Nat. Res. Def. Council, Inc.* v. *Callaway,* 392 F. Supp. 685 (D.D.C. 1975).

In July 1975, the Corps issued new regulations outlining how they would expand the section 404 program in phases to cover all waters of the United States in compliance with the court's order. 40 FR 31320 (July 25, 1975). Phase I, which was effective immediately, regulated discharges of dredged material or of fill material into coastal waters or inland navigable waters of the United States and wetlands contiguous or adjacent to those waters. Phase II, effective on July 1, 1976, addressed discharges of dredged material or of fill material into primary tributaries and contiguous or adjacent wetlands, as well as lakes. Phase III, effective after July 1, 1977, addressed discharges of dredged material or of fill material into ''any navigable water.'' *Id.* at 31326. The Corps' intent with the regulatory phased-in approach was to provide time for them to increase staffing and resources to implement the expanded jurisdiction and workload. *Id.* at 31321 (''[i]n view of man-power and budgetary constraints it is necessary that this program be phased in over a two year period.'') Thus, the phases did not mean all of the waters in the final regulation were not waters of the United States, but rather established when the Corps would begin regulating activities within each type of jurisdictional water.

Some in Congress were concerned about this phased implementation of the definition of ''waters of the United States'' for the Corps' CWA dredged and fill regulatory program, and in 1976, the House of Representatives passed H.R. 9560, which redefined the CWA term ''navigable waters'' specifically for the section 404 program (but not the rest of the CWA) as follows:

> The term ''navigable waters'' as used in this section shall mean all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher high water mark on the west coast).

H.R. Rep. No. 94–1107, at 63 (1976). The House Committee explained that the new definition would mirror the longstanding RHA section 10 definition of ''navigable waters of the United States,'' except that it would omit the ''historical test'' of navigability. *Id.* at 19. The House thought that discharges of dredged or fill material occurring in ''waters other than navigable waters of the United States . . . are more appropriately and more effectively subject to regulation by the States.'' *Id.* at 22.

The Senate disagreed. It declined to redefine ''navigable waters'' for purposes of the section 404 program and the House bill was not enacted into law. Instead, the Senate passed a bill that allowed the States to assume section 404 permitting authority, subject to EPA approval, in Phase II and III waters (as defined in the Corps' 1975 regulations quoted above). S. Rep. No. 95–370, at 75 (1977).[3] After assumption, the Corps would retain section 404 permitting authority in Phase I waters. The final bill, H.R. 3199, referred to as the 1977 CWA Amendments, was a compromise: it did not change the definition of ''navigable waters'' for the section 404 program, but it allowed States to assume permitting authority in ''phase 2 and 3 waters after the approval of a program by [EPA].'' H.R. Rep. No. 95–830, at 101 (1977).[4] The final amendments included a parenthetical phrase in section 404(g)(1) that defined Corps-retained waters using the same language that the House Committee had used in its effort to limit the Corps' jurisdiction, with the exception of waters that were historically used to transport interstate or foreign commerce but no longer do so, and with the addition of ''wetlands adjacent thereto.'' H.R. Rep. No. 95–830, at 39. The preamble to the Corps' 1977 regulations described them as ''waters already being regulated by the USACE,'' *i.e.,* those waters the Corps regulated under section 10 of the RHA, plus adjacent wetlands. 42 FR 37122, 37124 (July 19, 1977). The legislative history of section 404(g) in both the House and the

[3] The Senate Report is reprinted in Comm. On Env't & Publ. Works, 95th Cong., 4 A Legislative History of the Clean Water Act of 1977 (Legis. History) at 635, 708 (October 1978).

[4] The House Report is reprinted in 3 Legis. History 1977, at 185, 285.

Senate suggests that Congress expected widespread assumption of the section 404 program, leaving only RHA section 10 waters, other than those only historically used to transport interstate or foreign commerce, and adjacent wetlands. S. Rep. No. 95–370, at 77–78, *reprinted in* 4 Legis. History 1977, at 710–11.

The 1987 amendments to the CWA added section 518 which authorizes EPA to treat eligible Indian Tribes in a manner similar to States for a variety of purposes, including administering each of the principal CWA regulatory programs such as CWA section 404. 33 U.S.C. 1377(e). To assume the section 404 program, Tribes and States are required to develop a dredged and fill material discharge permit program under Tribal or State authority consistent with the requirements of the CWA and implementing regulations at 40 CFR part 233 and submit a request to EPA to assume the program. Section 404(h)(2) of the CWA states that if the EPA Administrator determines that a Tribe or State that has submitted a program request under section 404(g)(1) has the authority set forth in section 404(h)(1) of the CWA, then the Administrator ''shall approve'' the Tribe's or States' request to assume the section 404 program. Under CWA section 404(h)(3), if the Administrator fails to make a determination with respect to any program request submitted by a Tribe or State within 120 days after the date of receipt of the request, the program shall be deemed approved.

A Tribe or State assuming the section 404 program must have authority under Tribal or State law to assume, administer, and enforce the program; EPA's approval does not delegate authority to issue a permit on behalf of the Federal Government. By assuming administration of the section 404 program under section 404(g), an eligible Tribe or State takes on the primary responsibility of permitting discharges of dredged and/or fill material into certain waters of the United States within its borders.[5] For section 404 permitting purposes, the Tribe or State must exercise jurisdiction over all assumed waters subject to the CWA except those waters retained by the Corps. 33 U.S.C. 1344(g). The Corps retains section 404 permitting authority for all non-assumed waters as well as RHA section 10 permitting authority in all waters subject to RHA section 10. For example, States generally do not assume authority over Tribal waters under CWA section 404. The term ''waters of the United States'' refers to the geographic extent of waters covered by the CWA's regulatory programs.[6] The scope of waters that may be assumed by Tribes or States under section 404(g) is a subset of waters of the United States. Tribes or States with assumed programs can also regulate waters that are retained by the Corps, or waters that are not waters of the United States, under Tribal or State law. This rulemaking addresses the division of authority under section 404 between the Federal Government and a Tribe or State with an approved program and does not alter the scope of CWA jurisdiction over waters of the United States.

Approved Tribal or State section 404 programs can be broader in scope or more stringent than the CWA requirements, or both. Where they have a broader scope of program coverage than what is required by the CWA section 404 program, the additional coverage is not considered part of the EPA-approved program.[7] A Tribe or State may not issue a permit if EPA has objected to or placed conditions on a permit until EPA's concerns are addressed. Tribes and States can charge permit fees to fund the permitting program. Tribes and States may authorize discharges of dredged or fill material by issuing individual permits or general permits, which are limited to five years.

To date, three States—Michigan, New Jersey, and Florida—administer an EPA approved section 404 program. Michigan's program was approved in 1984 (49 FR 38947, October 2, 1984); New Jersey's was approved in 1994 (59 FR 9933, March 2, 1994); and Florida's was approved in 2020 (85 FR 83553, December 22, 2020). At present, no Tribes administer the section 404 program. Several States are exploring the possibility of assuming the section 404 program, and about one-third of States have expressed some level of interest to EPA over time regarding assumption of the Federal section 404 dredged and fill permit program. At this time, EPA is unaware of any Tribes exploring seeking to assume the section 404 program.

4. EPA's Role in CWA Section 404

While the Corps is the Federal permitting agency and administers the Federal section 404 program on a day-to-day basis, EPA also plays an important role in the Federal section 404 program. Both agencies develop and interpret policy and guidance and have promulgated section 404 regulations. The substantive and procedural requirements applicable to section 404 are detailed in EPA's regulations at 40 CFR parts 230 through 233 and the Corps' regulations at 33 CFR parts 320, 323, 325–328, 330 through 333, and 335 through 338. Both EPA and the Corps have enforcement authorities pursuant to section 404, as specified in sections 301(a), 309, 404(n), and 404(s) of the CWA. A 1989 enforcement memorandum between the Department of the Army and EPA discusses the allocation of Federal enforcement for the section 404 program between EPA and the Corps.[8] In the context of section 404, the Corps does the day-to-day work of conducting jurisdictional determinations,[9] though EPA has final administrative authority over the scope of CWA jurisdiction.[10] EPA has approval and oversight authority for Tribal and State programs, including final authority and approval of the scope of assumed waters. *See* 33 U.S.C. 1344(g)–(*l*).

Under section 404, EPA also establishes environmental criteria used in evaluating permit applications (*i.e.,* the CWA 404(b)(1) Guidelines) in conjunction with the Corps; determines the applicability of section 404(f) exemptions; approves and oversees Tribal and State assumption of the section 404 program (sections 404(g)–(k)); reviews and comments on general permits and individual permit applications issued by a Tribe, State, or the Corps; has authority to prohibit,

[5] Legislative history makes clear that Congress did not intend Tribal or State assumption under section 404(g) to be a delegation of the permitting program. H.R. Rep. No. 95–830 at 104 (1977) (''The Conference substitute provides for the administration by a State of its own permit program for the regulation of the discharge of dredged or fill material. . . . The conferees wish to emphasize that such a State program is one which is established under State law and which functions in lieu of the Federal program. It is *not a delegation* of Federal authority.'') (emphasis added). The conference report is available at *https://www.epa.gov/sites/production/files/2015-11/documents/1977_conf_rept.pdf.*

[6] The agencies currently interpret ''waters of the United States'' consistent with the Supreme Court's decision in *Sackett* v. *EPA,* No. 21–454 (U.S. May 25, 2023).

[7] *See* 40 CFR 233.1(c) and 40 CFR 233.1(d).

[8] Memorandum Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act (January 19, 1989), available at: *https://www.epa.gov/cwa-404/federal-enforcement-section-404-program-clean-water-act.* A February 1994 memorandum modified the January 1989 memorandum to be effective indefinitely, unless modified or revoked by the agencies, *see https://www.epa.gov/sites/default/files/2015-07/documents/1994_enforcement_modification.pdf.*

[9] EPA decisions on jurisdiction are not approved jurisdictional determinations as defined and governed by the Corps regulations at 33 CFR 331.2.

[10] Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act (''Civiletti Memorandum''), 43 Op. Att'y Gen. 197 (1979).

deny, or restrict the use of any defined area as a disposal site (section 404(c)); and can elevate Corps permits for resolution (section 404(q)).

EPA's role with respect to section 404 Tribal and State programs includes working with Tribes and States prior to assumption; reviewing and approving or disapproving assumption requests; overseeing assumed programs; and coordinating Federal review of Tribal or State permit actions. EPA funding programs can also be used by Tribes and States to build capacity to assume the section 404 program (*e.g.,* Wetland Program Development Grants) or to implement assumed programs (*e.g.,* CWA section 106 funds). EPA retains final administrative authority over the scope of CWA jurisdiction for assumed programs under section 404(g). With respect to enforcement, EPA can commence a separate enforcement action under appropriate circumstances. 33 U.S.C. 1344(n); 40 CFR 233.41, Note.

5. EPA's Existing CWA Section 404 Tribal and State Program Regulations

In 1980, in response to the 1977 CWA Amendments, EPA promulgated regulations to establish procedures and criteria for approval or disapproval of State programs under section 404(g) and for monitoring State programs after program approval (45 FR 33290 (May 19, 1980)).[11] On June 6, 1988, EPA published in the **Federal Register** a final rule revising the procedures and criteria used in approving, reviewing, and withdrawing approval of section 404 State programs at 40 CFR part 233. 53 FR 20764 (June 6, 1988). The final rule also incorporated section 404 program definitions and section 404(f)(1) exemptions at 40 CFR part 232.[12] The 1988 regulations provide States with flexibility in program design and administration while still meeting the requirements and objectives of the CWA.

Several revisions and additions to the State program regulations in 40 CFR part 233 have been made since 1988. On February 13, 1992, EPA finalized a rule amending the regulations to reflect the newly created Environmental Appeals Board in Agency adjudications, including revising section 233.53 related to withdrawal of section 404 State program approval (57 FR 5320 (February 13, 1992)). On February 11, 1993, EPA published a final rule amending its section 404 State program regulations at 40 CFR part 233 by adding subpart G (''Treatment of Indian Tribes as States''), which contains procedures by which an Indian Tribe may qualify for treatment in a similar manner as a State (TAS) in order to be eligible to submit a request to assume the section 404 program (58 FR 8172, February 11, 1993).[13] The 1993 rule also revised 40 CFR part 232 by adding new definitions for ''Federal Indian reservation,'' ''Indian Tribe,'' and ''States.'' The 1993 rule was finalized to satisfy the statutory provisions in CWA section 518 with respect to the section 404 program. In a final rule published on December 14, 1994 (59 FR 64339, 64345 (December 14, 1994)), the subpart G regulations regarding Tribal eligibility at sections 233.60, 233.61, and 233.62 were revised to improve and simplify the process for Tribes to obtain EPA approval to assume the section 404 program. Under that rule, known as the Simplification Rule, a Tribe did not need to prequalify for TAS before requesting to assume the section 404 program, but instead could establish its TAS eligibility at the program approval stage, subject to the EPA notice and comment procedures for State program approval. A 2005 rule on cross-media electronic reporting (70 FR 59848, October 13, 2005) added section 233.39 on electronic reporting. EPA also codified in regulation the approval of the Michigan program on October 2, 1984 (49 FR 38947) and the New Jersey program on March 2, 1994 (59 FR 9933).

The existing regulations at 40 CFR part 233 describe the Tribe's or State's program requirements, EPA responsibilities, approval and oversight of assumed programs, and requirements for review, modification, and withdrawal of State programs (as necessary). The regulations also specify that a Tribal or State program must be consistent with and no less stringent than the Act and implementing regulations, allow for public participation, be consistent with the CWA 404(b)(1) Guidelines, and have adequate enforcement authority. The regulations outline requirements for Tribes to determine eligibility to assume the program. Lastly, part 233, subpart H contains the approved Tribal and State programs that EPA has codified.

B. Need for Rulemaking

Congress enacted the 1977 CWA Amendments to make the regulation of the discharge of dredged or fill material a shared responsibility of the States and the Federal Government.[14] The intent of this design is to use the strengths of State and Federal Governments in a partnership to protect the nation's water resources and to meet the policy of the CWA at section 101(b) that States ''implement the permit programs under sections 1342 and 1344 of this title'' and of ''preserv[ing] and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution. . . .'' [15] Congress also viewed State assumption of the section 404 program as complementing States' existing authority to administer the CWA section 402 program.[16]

Yet while CWA section 404 and EPA's implementing regulations provide for Tribes and States to assume the program, only three States—Michigan,

[11] In 1983, EPA reorganized the presentation of the permit programs in the CFR, including moving the regulations for 404 State programs to their current location at 40 CFR part 233, but this rule made no substantive changes to any of the affected sections (48 FR 14146, 14208, April 1, 1983). The rule did make minor technical changes.

[12] The final 1988 rule essentially recodified at 40 CFR part 232 the existing section 404 program definitions and section 404(f)(1) permit exemptions in a new, separate part to eliminate any confusion about their applicability. The section 404 program definitions at 40 CFR part 232 apply to both the Federal and State administered programs. This preamble and the proposed rule focus on EPA's regulations at 40 CFR part 233 regarding State programs under section 404(g), with one proposed minor change to a definition in 40 CFR part 232.

[13] The 1993 final rule revised the definition of ''State'' at section 233.2 to: ''*State* means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, or an Indian Tribe, as defined in this part, which meet the requirements of § 233.60. For purposes of this part, the word State also includes any interstate agency requesting program approval or administering an approved program.'' (58 FR 8183, February 11, 1993). Thus when the term ''State Program'' is used in the regulations, it refers to an approved program run by any of the entities described in the definition of ''State,'' including Tribes.

[14] *See, e.g.,* H.R. Report No. 95–830 at 52 (1977) (''Federal agencies are to cooperate with State and local agencies to develop solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources''). *See* also S. Report No. 95–370 at 78 (1977) (''Several States have already established separate State agencies to control discharges of dredge or fill materials'' and ''The amendment encourages the use of a variety of existing or developing State and local management agencies.''). *See also id.* at 11 (''The provision solves most real problems with section 404: (a) by providing general delegation authority to the States . . .'').

[15] *See* S. Report No. 95–370 at 77 (1977) (''The committee amendment is in accord with the stated policy of Public Law 92–500 of 'preserving and protecting the primary responsibilities and rights of States or [stet] prevent, reduce, and eliminate pollution.' '').

[16] *See id.* at 77 (''[The amendment] provides for assumption of the permit authority by States with approved programs for control of discharges for dredged and fill material in accord with the criteria and with guidelines comparable to those contained in 402(b) and 404(b)(1).''). *See* also *id.* at 77–78 (''By using the established mechanism in section 402 of Public Law 92–500, the committee anticipates the authorization of State management of the permit program will be substantially expedited. At least 28 State entities which have already obtained approval of the national pollutant discharge elimination system under the section should be able to assume the program quickly.'').

New Jersey, and Florida—have received approval to administer the program. In 2010 and 2011 letters to EPA, the Environmental Council of States recommended further steps to encourage Tribal and State assumption of the program, remove barriers to assumption, and improve the efficiency of the program.[17]

Tribes and States have identified uncertainty regarding the extent of assumable waters and wetlands as a key barrier to assumption. As noted above, the Tribes and States cannot assume all waters of the United States within their boundaries as the statute specifies that the Corps retains administrative authority in certain waters. While some Tribes and States have considered assumption, they have expressed to EPA the need for further clarification regarding which waters a Tribe or State may assume and which waters the Corps retains. In a 2014 letter to then-EPA Acting Assistant Administrator Nancy Stoner,[18] State associations asked EPA to clarify the scope of assumable waters, citing uncertainty on this issue as a barrier to assuming the program. In 2015, EPA formed the Assumable Waters Subcommittee under the auspices of the National Advisory Council for Environmental Policy and Technology (NACEPT) to provide advice and develop recommendations as to how the EPA could best clarify the scope of waters over which a Tribe or State may assume CWA section 404 permitting responsibilities, and the scope of waters over which the Corps retains CWA section 404 permitting responsibilities. The Subcommittee included 22 members representing States, Tribes, Federal agencies, industry, environmental groups, State associations, and academia. The Subcommittee presented its recommendations to NACEPT on May 10, 2017. NACEPT endorsed the Subcommittee report in its entirety and submitted it to former EPA Administrator Scott Pruitt on June 2, 2017, with additional notations and recommendations concerning a preference for clarity through regulation. The ''Final Report of the Assumable Waters Subcommittee, May 2017,'' recommended that EPA develop regulations to clarify assumed and retained waters.[19] This proposed rule responds to the Subcommittee's recommendations as discussed further in section V.A.2 of this preamble addressing retained waters. The proposal also responds to many of the additional issues raised by Tribes and States as challenges to assuming section 404 and draws from EPA's experience working with Tribes and States pursuing assumption and in program oversight. Aside from the 1993 Tribal additions, this proposed rule would be the first comprehensive update of the section 404 Tribal and State program regulations since 1988.

Several of the challenges that Tribes and States have identified regarding section 404 assumption cannot be resolved by this proposed rulemaking. For example, lack of funding and the financial cost of Tribal or State implementation of the section 404 program has been identified as a major impediment to program assumption [20] but is outside the scope of this rulemaking. Some States have also identified a lack of political will and lack of public support as challenges to assuming the section 404 program.

C. Summary of Pre-Proposal Tribal and State Outreach

On June 11, 2018, the Agency published its 2018 Spring Unified Agenda of Regulatory and Deregulatory Actions [21] announcing that the Agency was considering a rulemaking to provide the first comprehensive revision to the existing section 404 Tribal and State program regulations since 1988 and provide clarity on specific issues requested by the Tribes and States. The Agency's outreach and engagement efforts since that announcement are summarized below.

In September 2018, the Agency sent letters to Tribal leaders and State governors announcing opportunities for Tribes and States to provide input on areas of the existing regulation that could benefit from additional clarity and revision. EPA initiated formal consultation efforts under Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments regarding provisions that require clarification within the existing section 404 Tribal and State program regulations. The Agency sent notification of the consultation period to Tribes on October 18, 2018, and consultation ran from October 22, 2018, through December 21, 2018. On November 20, 2018, and November 29, 2018, EPA held Tribal informational webinars. See section VI.F of this preamble for further details on the Agency's Tribal consultation. During the consultation period, EPA participated in in-person meetings with Tribal associations, including a presentation for the National Tribal Water Council on October 24, 2018, and an informational session at the National Congress of American Indians 75th Annual Convention on October 24, 2018. The Agency also attended the EPA Region 9 Regional Tribal Operations Committee (RTOC) meeting on October 31, 2018, the EPA Region 6 RTOC meeting on November 28, 2018, and the EPA Region 7 Enhancing State and Tribal Programs Wetland Symposium on November 5, 2018. At the meetings and webinars, EPA provided a presentation and sought input on aspects of the existing section 404 Tribal and State program regulations and assumption process. The Agency sought input on the scope of assumable waters, partial assumption, calculating economic costs and benefits, and other issues.

Although the Agency does not view this rulemaking as having Federalism implications as defined in Executive Order 13132, the Agency sought pre-proposal input from States on plans to modernize the Agency's existing section 404 Tribal and State program regulations. The Agency invited written input from State agencies from November 12, 2018, through January 11, 2019,[22] and hosted an in-person meeting with State officials on December 6, 2018. At the in-person meeting, the Agency provided an overview of the rulemaking effort and the section 404(g) program and led themed discussions for input for the proposed rule, including clarifying assumed and retained waters and adjacent wetlands, enforcement and compliance, partial assumption, and calculating economic costs and benefits of the rule.

EPA considered all input received during the development of the proposed rule, including written input submitted during outreach efforts to Tribes and States. Written input and a summary of the in-person State meeting and the

[17] Letter from R. Steven Brown, Executive Director, The Environmental Council of States, to Nancy K. Stoner, Acting Assistant Administrator, Office of Water, U.S. Environmental Protection Agency. July 22, 2011. Subject: Progress Report and Recommended Actions to Further Clarify Section 404 Assumption Application Requirements and Implementation by Tribes and States.

[18] ECOS, ACWA, and ASWM Letter to Nancy Stoner, Acting Assistant Administrator for Water. April 30, 2014.

[19] Available at *https://www.epa.gov/cwa-404/submission-assumable-waters-subcommittees-final-report* and in the docket for this proposed rule, Docket ID No. EPA–HQ–OW–2020–0276.

[20] See Association of State Wetland Managers and Environmental Council of the States, 2011, *Clean Water Act Section 404 Program Assumption: A Handbook for Tribes and States,* available at *https://www.aswm.org/pdf_lib/cwa_section_404_program_assumption.pdf.*

[21] Available at *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=2040-AF83.*

[22] Due to the lapse in Federal Government funding, EPA accepted comments from States until February 2019.

Tribal webinars are available in the docket for this proposed rule.

In 2023, EPA held informational webinars for States on January 24th, and for Tribes on January 25th and January 31st. At these webinars, EPA provided Tribes and States with an update on the rulemaking effort and reminded Tribes and States of the input they had previously provided to EPA. EPA did not seek additional input from Tribes or States at these 2023 webinars.

V. Proposed Rule

This section of the preamble describes EPA's proposed regulatory revisions and provides the Agency's rationale for those proposed revisions. EPA is proposing to revise the CWA section 404 Tribal and State program regulations at 40 CFR part 233 to provide additional clarity on program approval process and requirements, permit requirements including compensatory mitigation, program operations, compliance evaluation and enforcement, Federal oversight, dispute resolution, and conflict of interest provisions, as well as to provide other technical and minor updates. EPA is also proposing to revise its criminal enforcement requirements in 40 CFR 123.27 and 40 CFR 233.41, which apply to Tribes and States that are authorized to or that seek authorization to administer a CWA section 402 National Pollutant Discharge Elimination System (NPDES) permitting program or a section 404 program respectively. EPA proposes to provide technical edits to 40 CFR part 124 consistent with the Agency's intent to clarify that the part 124 regulations do not apply to Tribal or State section 404 programs. Finally, EPA proposes to clarify a definition in 40 CFR part 232 that is related to Tribal and State section 404 program assumption.

A. Program Approval

This section of the preamble includes topics that are generally related to EPA's approval of a Tribal or State section 404 program, including program assumption requirements, waters that are retained by the Corps, effective dates for approved or revised Tribal or State programs, and compensatory mitigation requirements.

1. Program Assumption Requirements

a. What is the Agency proposing?

EPA is proposing to revise the current requirements for the program descriptions that Tribes and States submit to EPA when they request approval to assume the section 404 program. First, the proposed revisions would clarify that the description of the funding and staff devoted to program administration and compliance evaluation and enforcement must demonstrate that the Tribe or State is able to carry out the existing regulatory requirements for permit review, program operation, and compliance evaluation and enforcement programs, provided in 40 CFR 233 subparts C through E. The proposal further specifies that in order to do so, the Tribe or State must provide in the program description staff position descriptions and qualifications, program budget and funding mechanisms, and any other information a Tribe, State, or EPA considers relevant. The proposed revision would ensure that when a Tribe or State submits a request to assume the section 404 program, its program submission would demonstrate the Tribe or State has the resources necessary to ensure that the permit decisions comply with permit requirements in 40 CFR 233 subpart C, as applicable; that its permitting operations would comply with the program operation requirements of 40 CFR 233 subpart D, as applicable; and that its compliance evaluation and enforcement operations would comply with the compliance evaluation and enforcement requirements of 40 CFR 233 subpart E, as applicable.

Similarly, the Agency proposes to revise the existing requirement that the Tribe or State program description include ''A description of the scope and structure of the State's program . . . [which] should include [the] extent of [the] State's jurisdiction, scope of activities regulated, anticipated coordination, scope of permit exemptions if any, and permit review criteria.'' 40 CFR 233.11(a). EPA proposes to clarify that this description ''must'' address all of the listed elements in 233.11(a). The proposal would also clarify that the description must provide sufficient information to demonstrate that the criteria are sufficient to meet the permit requirements in 40 CFR 233 subpart C. These proposed revisions would not substantively change the requirements for permit review, program operation, and compliance evaluation and enforcement programs. Rather, they would ensure that Tribes or States provide EPA with sufficient information to ensure that Tribal or State programs would be able to meet these requirements.

Finally, EPA proposes to revise the existing program description requirement that if more than one Tribal or State agency would be administering the program, the program description shall address inter-agency coordination. The revision would clarify that the description of inter-agency coordination must include coordination on enforcement and compliance.

b. Why is the Agency proposing this approach?

The Agency is proposing these changes to better harmonize its program approval requirements with program requirements in other sections of the CFR. Specifically, EPA seeks to update 40 CFR 233 subpart B to reflect the requirements of 40 CFR 233 subparts C through E and to better effectuate these regulations and CWA section 404(h).

To assume the section 404 program, a Tribe or State must be able to demonstrate that it can meet the requirements for permitting, program operation, and compliance evaluation and enforcement set forth in 40 CFR 233 subparts C through E and administer a program that is consistent with section 404. A program that lacks the resources to do so would not be able to carry out existing statutory and regulatory requirements. This proposed approach would not change these existing requirements, but would ensure that EPA receives information necessary to determine that Tribes and States can meet them. In the 1988 preamble to the existing section 404 Tribal and State program regulations, EPA stated that the program description Tribes and States must submit to EPA ''should provide the information needed to determine if the State has sufficient manpower to adequately administer a good program.'' 53 FR 20764, 20766 (June 6, 1988). However, 40 CFR 233 subpart B, which contains the requirements for program approval, does not explicitly state that Tribes and States must demonstrate that they have sufficient resources to meet the requirements for permit issuance, program operation, and compliance and enforcement outlined in subparts C through E. The existing regulations require that the program description contain ''a description'' of available funding and manpower (*i.e.,* staffing),[23] 40 CFR 233.11(d), but do not clearly indicate that the available funding and staffing must be sufficient to meet the requirements of subparts C through E. In addition, the current regulations provide that the program description include ''a description'' of the Tribe's or State's compliance evaluation and enforcement programs, including a description of how the Tribe or State will coordinate its enforcement strategy with the Corps and EPA, 40 CFR

[23] In this proposal, EPA is replacing the term ''manpower'' with ''staffing'' and will use the term ''staffing'' throughout this proposal.

233.11(g), but do not clearly indicate that the Tribe's or State's compliance evaluation and enforcement programs must be sufficient to meet the requirements for section 404 program compliance evaluation and enforcement in subpart E. In the absence of these clarifications, the regulations remain unclear about what kind of demonstration is needed by Tribes and States as they develop their programs. This proposal would ensure that a description of funding, staffing, or compliance evaluation and enforcement programs must satisfy the text of 40 CFR 233.11(d) and (g). The purpose of subpart B is to require Tribes and States to demonstrate that they in fact have the capacity to carry out subparts C through E, pursuant to the original intent of the current regulations, and these changes would more clearly effectuate that intent.

EPA specifically proposes to require the Tribe or State to identify position descriptions and qualifications as well as budget and funding mechanisms in the program description because this information is critical to understanding whether a Tribe or State will be able to administer subparts C through E. EPA must be able to determine that the Tribe or State will have sufficient qualified staff and a reliable and sufficient funding mechanism that will be commensurate with the responsibilities it seeks to assume. Given the importance of these elements, Tribes and States should have staffing and budget information readily available, and providing it in the program description should not impose a significant new burden.

Tribes and States should provide other information as well to the extent it is necessary to demonstrate that they will be able to carry out subparts C through E. In addition to providing the information EPA proposes to require in the regulations, Tribes and States may choose to demonstrate their capacity to implement subparts C through E by comparing the number of Corps staff that currently administer the section 404 program in Tribal areas or in a State to the number of Tribal or State staff that will implement the assumed program. Given differences in administrative structures, a direct comparison may not be feasible, however; for example, a Corps district may not be able to identify the number of staff focused solely on section 404 permitting or one State if its staff administers the section 10 and section 404 regulatory program for a number of States. Similarly, a Tribal or State program may incorporate other permitting into its 404 program such as permits to address potential flooding. These challenges could be compounded in States that include multiple Corps districts. An alternative approach could compare the average number of different types of section 404 permits (*i.e.,* individual versus general permits) Corps staff handle in a district to the average number of permits the Tribe or State has or anticipates its staff will handle in an assumed program.

CWA section 404(h) provides that before approving a Tribe's or State's section 404 program, EPA shall determine whether the Tribe or State has the authority to administer the program, including to issue permits that comply with the CWA 404(b)(1) Guidelines, to provide for public notice and opportunity for comment on permit applications, and to abate violations of the permit or permit program. *See* 33 U.S.C. 404(h)(1)(A), (C), (G). Section 404(h) refers to a Tribe's or State's ''authority,'' but legal authority would be meaningless without the capacity to implement it. Clarifying that EPA must ensure that Tribes and States have the resources and programs in place to implement their authority best carries out section 404(h).

This proposal does not prescribe a particular metric that Tribes or States must use to ensure sufficient funding, staffing, or compliance evaluation and enforcement programs. It also does not prescribe the specific position descriptions and qualifications a Tribe or State must have, a minimum budget, or a particular type of funding mechanism. The proposed rule would retain a certain amount of flexibility for Tribes and States, recognizing that the section 404 program needs of different Tribes and States can differ. Tribal or State agencies likely have varying procedures for determining sufficient staff and funding levels and may choose to organize their programs in different ways. Furthermore, the necessary section 404 program budget may differ as well depending on the anticipated workload for the Tribe or State. EPA is committed to working with Tribes and States to help their programs meet the proposed standard and may develop guidance in the future that Tribes and States could use to ensure sufficient program capacity. In adding a new clarification to better carry out the existing requirements of 40 CFR 233.11, this proposed revision would not reopen those existing requirements.

EPA's proposed clarification that as part of the program description, the Tribe or State must contain all of the listed program description elements and must demonstrate that its permit review criteria are sufficient to carry out the permitting requirements of 40 CFR 233 subpart C has the same goal as the program revisions described above of harmonizing the requirements for the program description with the requirements for program operation, and facilitate EPA's ability to ensure that Tribal and State permits will comply with the CWA 404(b)(1) Guidelines.

Finally, EPA's proposal that the description of Tribal and State agency coordination on program administration must address agency coordination on enforcement and compliance would enable EPA to ensure the Tribe or State is complying with the requirements of 40 CFR 233 subpart E, addressing enforcement and compliance requirements for assumed programs.

c. Request for Comment

The Agency requests comment on all aspects of the proposed revisions. The Agency specifically requests comment as to whether to make clarifying revisions to other provisions in 40 CFR 233.11 to ensure the Agency will be able to ensure a Tribe or State is equipped to carry out the requirements of 40 CFR 233 subparts C through E. EPA requests comment as to what additional types of information in section 233.11 Tribes or States must provide. EPA also requests examples of particular metrics that Tribes and States could use to determine funding and staff sufficiency, such as ratios of funding and staff to expected permit applications, and whether to specify any such metrics in regulation.

2. Retained Waters

a. What is the Agency proposing?

The Agency is proposing a procedure to facilitate determining the extent of waters over which the Corps would retain administrative authority following Tribal or State assumption of the section 404 program. Under the proposed procedure, before the Tribe or State submits its assumption request to EPA, the Tribe or State must submit a request to EPA that the Corps identify the subset of waters of the United States that would remain subject to Corps section 404 administrative authority following assumption. EPA is proposing to require that the Tribe or State submit specific additional information that should accompany the request to show that the Tribe or State has taken concrete and substantial steps toward program assumption. EPA is proposing to require that one of the following be included with the Tribe's or State's request that the Corps identify which waters would be retained: a citation or copy of legislation authorizing funding

to prepare for assumption, a citation or copy of legislation authorizing assumption, a Governor or Tribal leader directive, a letter from a head of a Tribal or State agency, or a copy of a letter awarding a grant or other funding allocated to investigate and pursue assumption. Under this proposal, within seven days of receiving the request for the retained waters description, EPA will review and respond to the request. If the request includes the required information, then EPA will transmit the request to the Corps.

If the Corps notifies the Tribe or State and EPA within 30 days of receiving the request transmitted by EPA that it will provide the Tribe or State with a retained waters description, the Corps would have 180 days from the receipt of the request transmitted by EPA to provide a retained waters description to the Tribe or State. The purpose of the 180-day period would be to allow the Corps time and opportunity to identify which waters the Corps will retain section 404 permitting authority over. If the Corps does not notify the Tribe or State and EPA within 30 days of receipt of the request that it intends to provide a retained waters description, the Tribe or State would prepare a retained waters description.

The Corps, Tribe, or State would start with the most recently published list of RHA section 10 waters (*see* 33 CFR 329.16) as the basis for the retained waters description. The Corps, Tribe, or State would place waters of the United States, or reaches of these waters, from the RHA section 10 list into the retained waters description if they are known to be presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce. To the extent feasible and to the extent that information is available, the Corps, Tribe, or State would add other waters or reaches of waters to the retained waters description that are presently used or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce. *See* 33 U.S.C. 1344(g)(1). The Corps, Tribe, or State would not place RHA section 10 list waters in the retained waters description if, for example, they were historically used as a means to transport interstate or foreign commerce, and are no longer susceptible to use as a means to transport interstate or foreign commerce. The description would also acknowledge that wetlands are to be retained if they are adjacent to Corps-retained waters. However, a specific list of adjacent wetlands is not required to be included in the retained waters description, because developing such a list would generally be impracticable at the time of program assumption. Finally, as recognized in EPA's existing regulations, in many cases, States lack authority to regulate activities in Indian country. *See* 40 CFR 233.1(b). Thus, the Corps will continue to administer the program in Indian country unless EPA determines that a State has authority to regulate discharges into waters in Indian country. *See id.*

To clarify the extent of adjacent wetlands over which the Corps retains administrative authority following Tribal or State assumption, EPA proposes that the Corps retain administrative authority over all jurisdictional wetlands ''adjacent'' to retained waters,[24] except that the geographic extent of the Corps' administrative authority would be limited by an agreed-upon administrative boundary (*e.g.,* a boundary established based on a specific distance from the ordinary high water mark for inland navigable waters or the mean high tide for coastal areas, or a boundary that relies on physical features such as a bluff line). The Corps would retain administrative authority over the jurisdictional adjacent wetlands waterward of the administrative boundary. The Tribe or State would assume administrative authority over any other adjacent wetlands landward of the administrative boundary. The administrative boundary between retained and assumed wetlands would be set jointly by the Tribe or State and the Corps, but a 300-foot administrative boundary would be established as a default if no other boundary between retained and assumed adjacent wetlands is established.

Some project proposals involving jurisdictional adjacent wetlands that straddle the administrative boundary may involve a discharge into the wetland on both sides of the administrative boundary. The Memorandum of Agreement between the Tribe or State and the Corps must articulate an approach for permitting projects involving such discharges that may occur in the adjacent wetland on both sides of the administrative boundary. Under any agreement, the Corps may not retain waters other than those described in the CWA section 404(g)(1) parenthetical.[25] If the Corps and Tribe or State do not agree on an alternative approach for permitting the projects which may cross the administrative boundary in the Memorandum of Agreement, under the default approach the Corps would issue a section 404 permit for the discharges to jurisdictional adjacent wetlands or portions of jurisdictional adjacent wetlands that are waterward of the administrative boundary, and the Tribe or State would issue a section 404 permit for discharges to jurisdictional adjacent wetlands or portions of jurisdictional adjacent wetlands that are landward of the administrative boundary.

In addition, EPA proposes to revise the provision in the existing regulations providing that modifications to the extent of the retained waters description always constitute substantial revisions to a Tribal or State program. Note, however, that under this proposal changes in geographic scope of an approved Tribal CWA section 404 program are substantial where the Tribe seeks to include additional reservation areas within the scope of its approved program. EPA is also proposing that the program description must specify that the Tribal or State program will encompass all waters of the United States not retained by the Corps at all times. Finally, EPA proposes to remove the term ''traditionally'' from the term 'traditionally navigable waters' in the following provision: ''[w]here a State permit program includes coverage of those traditionally navigable waters in which only the Secretary may issue 404 permits, the State is encouraged to establish in this MOA procedures for joint processing of Federal and State permits, including joint public notice and public hearings.'' 40 CFR 233.14(b)(2).

b. Why is the Agency proposing this approach?

Section 404(g) of the CWA authorizes Tribes and States to assume authority to administer the section 404 program in some, but not all, navigable waters within their jurisdiction. ''Navigable waters'' is defined at CWA section

[24] The agencies currently interpret the term ''adjacent'' consistent with the Supreme Court's decision in *Sackett* v. *EPA,* No. 21–454 (U.S. May 25, 2023).

[25] Adjacent wetlands are included in the waters described in the CWA 404(g)(1) parenthetical, and therefore the MOA can provide that the Corps would retain the entirety of the adjacent wetlands notwithstanding an administrative boundary when a project includes discharges on both sides of the administrative boundary. In contrast, when a permittee's activities include discharges into those waters described in the CWA section 404(g)(1) parenthetical as well as waters that must be assumed because they are not described by the CWA section 404(g)(1) parenthetical, the retained waters cannot be expanded to encompass those waters not described by the CWA section 404(g)(1) parenthetical. This distinction in what waters can be retained does not affect the authority of the Corps to permit activities under 40 CFR 233.50(j).

502(7) as ''waters of the United States, including the territorial seas.'' [26] The Corps retains administrative authority over a subset of these waters even after program assumption by a Tribe or State.[27] Specifically, section 404(g)(1) states that the Corps retains administrative authority over the subset of waters of the United States consisting of ''. . .waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark . . . including wetlands adjacent thereto.'' 33 U.S.C. 1344(g)(1). A Tribe or State assumes section 404 administrative authority over all waters of the United States within their jurisdiction that are not retained by the Corps.

EPA's existing regulations require that the program description that is part of a Tribal or State assumption request include ''[a] description of the waters of the United States within a State over which the State assumes jurisdiction under the approved program; a description of the waters of the United States within a State over which the Secretary retains jurisdiction subsequent to program approval; and a comparison of the State and Federal definitions of wetlands.'' 40 CFR 233.11(h). In addition, the existing regulations state that the Memorandum of Agreement between a Tribe or State and the Corps required as part of the assumption request shall include a description of the waters of the United States within the Tribe or State for which the Corps will retain administrative authority. 40 CFR 233.14(b)(1).

[26] The permitting provisions of the CWA (as well as other provisions), including CWA section 404, apply to ''navigable waters.'' *See* 33 U.S.C. 1311(a). CWA section 502(7) in turn defines ''navigable waters'' as ''waters of the United States, including the territorial seas.'' *Id.* section 1362(7).

[27] When a Tribe or State assumes administrative authority for the CWA section 404 program, it assumes authority to permit discharges of dredged and fill material to all waters of the United States within the meaning of CWA section 502(7) except for the subset of waters of the United States over which the Corps retains administrative authority. The scope of CWA jurisdiction is defined by CWA section 502(7) as ''waters of the United States,'' therefore, is distinct from and broader than the scope of waters over which the Corps retains administrative authority following Tribal or State assumption of the section 404 program. This proposal develops a process for identifying the subset of waters of the United States over which the Corps retains administrative authority following approval of a Tribal or State section 404 program. It in no way defines the broader set of waters of the United States within the scope of the CWA as defined by CWA section 502(7) and has no bearing on the scope of waters of the United States.

Prior to this proposed rule, EPA had not provided specific guidance on a process for identifying the subset of waters of the United States over which the Corps would retain administrative authority following Tribal or State assumption. Without a clear and practical process, individual States and Corps districts have had to interpret the extent of retained waters and the meaning of ''adjacent wetlands'' in the context of case-by-case development of State program descriptions and the Memoranda of Agreement that are negotiated between the Corps and the State as part of a complete program submission. Tribes and States have indicated that confusion about how best to identify the extent of retained waters and adjacent wetlands has been a barrier to assumption and have asked EPA to provide clarity.

As discussed in section IV.B of this preamble addressing Background, EPA convened the Assumable Waters Subcommittee under the auspices of the National Advisory Council for Environmental Policy and Technology (NACEPT) to provide advice and recommendations as to how EPA could best clarify the subset of waters of the United States over which the Corps retains administrative CWA section 404 authority when a Tribe or State assumes the section 404 program. NACEPT adopted the majority recommendation in the Subcommittee report and incorporated it into its recommendations provided to EPA in June 2017. Although at the time of the Subcommittee report, the Corps presented a separate view from the majority of the extent of retained waters and adjacent wetlands for which it would retain administrative authority, the Department of the Army subsequently sent a letter to the Corps supporting the majority recommendation clarifying the extent of retained waters and adjacent wetlands (though the letter did not define a specific administrative boundary for adjacent wetlands).[28] The Corps relied on this letter when identifying waters to be retained when Florida assumed the section 404 program in December 2020. NACEPT's recommendations, based on the Subcommittee majority recommendation that was subsequently endorsed by the Corps, are discussed below.

[28] R.D. James, Memorandum for Commanding General, U.S. Army Corps of Engineers: Clean Water Act Section 404(g)—Non-Assumable Waters (July 30, 2018). The memorandum states that it ''. . . is not intended to address future decisions to be made by EPA under Sections 404(g) or 404(h).'' *Id.* at 3.

i. Retained Waters

(1) Subcommittee's Recommendation

The Subcommittee majority recommended that for purposes of identifying the subset of waters of the United States over which the Corps would retain administrative authority following Tribal or State assumption of the CWA section 404 program, existing RHA section 10 lists [29] be used ''with two minor modifications: any waters that are on the Section 10 lists based solely on historic use (*e.g.,* based solely on historic fur trading) are not to be retained (based on the Congressional record and statute), and waters that are assumable by a tribe (as defined in the report) may also be retained by the USACE when a state assumes the program.'' Final Report of the Assumable Waters Subcommittee at v.[30] The Subcommittee also recognized that ''waters may be added to Section 10 lists after a state or tribe assumes the program, and recommends in that case, such waters may also be added to lists of USACE-retained waters at that time.'' *Id.* The majority recommendation was based on its analysis of the legislative history of section 404(g), which is discussed in section IV.A.3 of this preamble, addressing Background, in which the majority concluded that Congress intended that the Corps retain permitting authority over some RHA section 10 waters. *See id.* at 55–61 (Appendix F.) It was also based on an assessment of an approach that would be clear and easy to implement. *See id.* at 17–20.

With regard to Tribal considerations during assumption of the section 404 program, the Subcommittee found that ''Section 518 of the CWA, enacted as part of the 1987 amendments to the statute, authorizes the EPA to treat eligible Indian tribes in a manner similar to states (''treatment as a State'' or TAS) for a variety of purposes, including administering each of the principal CWA regulatory programs [including CWA section 404] and receiving grants under several CWA authorities (81 FR 30183, May 16, 2016).'' *Id.* at 3. The Subcommittee majority recommended that ''Tribal governments pursuing assumption of the 404 program will follow the same process as states, though it is expected

[29] The RHA section 10 lists are compiled and maintained by the Corps district offices for every State except Hawaii. 33 CFR 329.14 describes the process the Corps follows to make navigability determinations.

[30] Available at *https://www.epa.gov/sites/default/files/2017-06/documents/awsubcommitteefinalreprort_05-2017_tag508_05312017_508.pdf.*

that there will be some nuanced differences; for example, in addressing Tribal Indian Reservation boundaries'' and that ''[i]n a state-assumed program, states will generally not assume authority for administering the 404 program within Indian country; instead, such authority will generally be retained by the USACE unless the tribe itself is approved by the EPA to assume the 404 program.'' *Id.* The Subcommittee majority found that ''[b]ecause Tribal Indian Reservation boundaries are not static and precise definitions and considerations vary from state to state, it is essential that waters to be retained by the USACE on tribal lands be specifically addressed in any MOA developed between the USACE and a state assuming the program.'' *Id.*

The Subcommittee majority noted that its recommended approach is consistent with ''the plain language of Section 404(g) and the legislative history. Congress clearly intended that states and tribes should play a significant role in the administration of Section 404—as they do in other CWA programs—anticipating that many states would assume the Section 404 program.'' *See id.* at 19.

(2) EPA's Proposal

Taking into consideration the majority recommendation of the Subcommittee, EPA proposes that, taking current RHA section 10 list(s) as a starting point, the following steps would be taken to identify the subset of waters of the United States over which the Corps would retain administrative authority and develop the retained waters description:

—Place waters of the United States, or reaches of those waters, from the RHA section 10 list(s) into the retained waters description if they are known to be presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce;

—Add any other waters known by the Corps or the Tribe or State to be presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

—Add a description of wetlands that are adjacent to the foregoing waters consistent with the administrative boundary articulated in the Tribal-Corps or State-Corps Memorandum of Agreement (*see* section V.A.2.b.ii of this preamble on adjacent wetlands).

EPA recognizes that the available RHA section 10 lists may not cover all RHA section 10 waters in the Tribe's or State's jurisdiction and that they may not be updated to reflect current use and characteristics of listed waters. In addition, the Corps or assuming Tribes or States may not know all waters that are presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce at the time of assumption. However, requiring a comprehensive assessment of every water within the Tribe's or State's jurisdiction at the time of assumption to determine if it should be retained pursuant to the parenthetical in section 404(g)(1) could pose significant practical and budgetary challenges depending on the number of waters within the Tribe's or State's jurisdiction, potentially taking many years to complete the retained waters description. Therefore, EPA is proposing that the retained waters description encompass waters ''known'' by the Corps, Tribe, or State to meet these criteria. EPA's proposed regulation allows for this description and the Memorandum of Agreement between the Corps and Tribe or State to be modified if additional waters are identified after assumption, or if waters included in the description no longer meet the criteria. EPA is confident that geographic information systems technology and navigation charts, as well as other approaches, should enable the Corps, Tribe, or State to take significant steps in identifying waters in the Tribe's or State's jurisdiction that should be included in the retained waters description.

For the purposes of CWA section 404(g)(1), determining which waters are presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce is, to some extent, inherently a case-specific process. While determining whether a water is retained does not require compliance with the requirements for determining whether a water is subject to RHA section 10, and does not necessarily require a navigability study, the factors used to determine RHA section 10 jurisdiction may still be relevant to determining whether a water should be retained. As noted earlier, however, there are key distinctions between RHA section 10 waters and the scope of retained waters, including that Corps-retained waters do not include waters that are only used historically for the transport of interstate or foreign commerce but do include adjacent wetlands and, when a State is assuming the program, waters subject to Tribal authority.

As recognized in EPA's existing regulations, in many cases, States lack authority under the CWA to regulate activities covered by the section 404 program in Indian country. *See* 40 CFR 233.1(b). Thus, the Corps will continue to administer the program in Indian country unless EPA determines that a State has authority to regulate discharges into waters in Indian country and approves the State to assume the section 404 program over such discharges. *See id.* EPA proposes that the Memorandum of Agreement between the Corps and State address any waters in Indian Country which are to be retained by the Corps upon program assumption by a State. EPA also notes that the Corps would retain jurisdiction over waters located in lands of exclusive Federal jurisdiction (*e.g.,* some national parks, such as certain areas of the Denali National Park).

EPA's proposed process, similar to the one described by the Subcommittee majority, is clear and practical, is based on available and relatively stable and predictable information, and is able to be implemented efficiently at the time a Tribe or State seeks assumption. The process provides for clarity that will facilitate consistent and effective operation of an assumed section 404 program. It is also consistent with the text and history of section 404(g), which reflects Congress' intent that the Corps generally retain permitting authority over certain RHA section 10 waters. *See* section IV.A.3 of this preamble, addressing Background. Since the proposed approach does not conflict with the approved extent of the Michigan, New Jersey, and Florida programs, no changes to their existing program scope would be required.

The Subcommittee majority recommended that identification of the subset of waters of the United States over which the Corps would retain administrative authority be a collaborative process. EPA anticipates that, when a Tribe or State seeks assumption, the Tribe or State, the Corps, and EPA will engage collaboratively throughout the development of this description, regardless of whether the Corps chooses to provide a retained waters list to the Tribe or State during the initial proposed 180-day period. EPA's participation in these discussions could help ensure consideration of CWA requirements and related issues (*e.g.,* Tribal waters). The Subcommittee majority recommended that EPA and the Corps establish a clear dispute

resolution procedure to be followed if the Tribe or State and the Corps were not able to complete the retained waters description. Because EPA believes that the proposed approach lays out a clear process for establishing the description, EPA is not proposing to specify such a dispute resolution procedure by regulation. *See* section V.F.1 of this preamble, addressing Dispute Resolution. EPA encourages Tribes and States seeking to assume the section 404 program to work collaboratively with the Corps and EPA to resolve any issues.

While EPA anticipates that development of the retained waters description would involve collaboration between the Corps and the Tribe or State, the Corps remains the agency with sole responsibility for maintaining and modifying any RHA section 10 list. The Subcommittee majority recognized that there will be circumstances under which the Corps may add waters to section 10 lists after a Tribe or State assumes the program. The Subcommittee majority recommended that in that case, such waters may, if consistent with CWA section 404(g)(1), be added to lists of Corps-retained waters at that time. As is clear from the process described above and proposed in this rulemaking, a RHA section 10 list will not necessarily be co-extensive with the subset of waters of the United States over which the Corps would retain administrative authority (*i.e.,* retained waters description) following Tribal or State assumption of the CWA section 404 program.

In light of the requests by Tribes and States for clarity and early input from the Tribes and States on this rulemaking, EPA is proposing changes to the existing regulation, similar to the Subcommittee majority opinion's recommendation, that would establish a clear regulatory process with defined timelines for a Tribe or State to identify retained waters, either by obtaining a list from the Corps or developing the list consistent with the proposed process. Specifically, EPA is proposing to specify that before a Tribe or State provides an assumption request submission to EPA, the Tribal leader, State Governor, or Tribal or State Director must submit a request to EPA that the Corps identify the subset of waters of the United States over which the Corps would retain administrative authority.[31] In an effort to balance the Tribe's or State's need to know the extent of waters it could assume with the Corps' permitting workload, EPA is proposing to require that the Tribe or State submit the request with specific additional information that should accompany the request to show that the Tribe or State has taken concrete and substantial steps toward program assumption. EPA is proposing to require that one of the following be included with the Tribe's or State's request that the Corps identify which waters would be retained: a citation or copy of legislation authorizing funding to prepare for assumption, a citation or copy of legislation authorizing assumption, a Governor or Tribal leader directive, a letter from a head of a Tribal or State agency, or a copy of a letter awarding a grant or other funding allocated to investigate and pursue assumption. Under this proposal, within seven days of receiving the request for the retained waters description, EPA will review and respond to the request. If the request includes the required information, then EPA will transmit the request to the Corps. This proposed requirement is intended to provide assurance to the Corps that developing a retained waters description for purposes of program assumption is a worthwhile expenditure of its time and resources.

If the Corps notifies the Tribe or State and EPA within 30 days of receipt of the request transmitted by EPA that it intends to provide a retained waters description, the Corps would have 180 days from the receipt of the request transmitted by EPA to develop the description. During the 180-day period the Corps would be able to review the current RHA section 10 list(s); place waters of the United States or reaches of those waters from the RHA section 10 list into the retained waters description if they are known by the Corps or the Tribe or State to be presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce; and to the extent feasible and to the extent that information is available, add other waters or reaches of waters to the retained waters description that are presently used or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce. As discussed below, the description would also acknowledge that wetlands are to be retained if they are adjacent to Corps-retained waters pursuant to the proposed regulations at 40 CFR 233.11(i)(3) and (i)(5). However, a specific list of adjacent wetlands is not required to be included in the retained waters description, because developing such a list would generally be impracticable at the time of program assumption. The Tribe or State may provide information to the Corps during the 180-day period to aid in the Corps' development of the retained waters description.

If the Corps does not notify the Tribe or State and EPA within 30 days of receipt of the request transmitted by EPA that it intends to provide a retained waters description, the Tribe or State would prepare a retained waters description using the same approach outlined above for the Corps. Similarly, if the Corps had originally indicated that it would provide a retained waters description but does not provide one within 180 days, the Tribe or State may develop the retained waters description using the same approach described above. In general, the retained waters description should provide as much clarity as possible to maximize transparency for members of the public and the regulated community. Because the Agency's proposed approach, consistent with the Subcommittee majority's recommendation, effectuates the language and history of section 404(g) and achieves Congress' goal of providing an implementable approach for assumption, the Regional Administrator may presume that a retained waters description that uses this approach satisfies the statutory criteria for retained waters.

Even if the Corps does not provide a retained waters description to the Tribe or State, it may provide relevant information to the Tribe or State at any time during the Tribe's or State's development of the retained waters description. In addition, the Corps would have two formal opportunities to review the list of retained waters that is produced by the Tribe or State. First, the Memorandum of Agreement between the Corps and the Tribe or State includes a description of retained waters, and thus the Corps would have the opportunity to review the description of retained waters during the drafting process for that memorandum, and before signing that memorandum. Second, the Corps would have the opportunity to review and provide comments on the Tribe's or State's program submission materials, which includes the description of retained waters, after the Tribe or State submits a program request to EPA. Similarly, if the Corps provides a retained waters description to the Tribe

[31] EPA recognizes that in some cases, a Tribe's or State's boundaries may overlap with multiple Corps districts. Based on the Agency's experience with States pursuing assumption of a section 404 program, the Corps may designate a ''lead district'' to coordinate with the State. If the Corps designates a lead district, the Tribe or State would not need to request a retained waters description from all relevant Corps districts, but rather could coordinate directly with the lead district.

or State, the Tribe or State may still review to ensure that the retained waters description reflects waters presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide, as well as wetlands that are adjacent to the foregoing waters, to the extent feasible and to the extent that scope of waters is known. The public also has the opportunity to provide comment on the retained waters description when reviewing the Tribe's or State's program submission. To the extent the Tribe or State provide opportunities for public engagement as they develop their program submission, members of the public may be able to provide input during the development of the retained waters description.

ii. Adjacent Wetlands

(1) Subcommittee Recommendation

The Subcommittee majority recommended that the Corps retain administrative authority over all wetlands adjacent to retained waters landward to an administrative boundary agreed upon by the Tribe or State and the Corps. This boundary would pertain only to retained adjacent wetlands and not other waters of the United States to be assumed by the Tribe or State. This boundary, the recommendation added, ''could be negotiated at the state or tribal level to take into account existing state regulations or natural features that would increase practicability or public understanding; if no change were negotiated, a 300-foot national administrative default line would be used.'' Final Report of the Assumable Waters Subcommittee at vi. The Subcommittee majority opinion noted that ''large wetland complexes can extend tens or even hundreds of miles'' from the retained water in ''intricate and snakelike networks, which could result in a confusing pattern of USACE and state or tribal permitting authority across the landscape. For example, the St. Louis River (a tributary to Lake Superior) forms some of the boundaries of the Fond du Lac Indian Reservation in Minnesota where wetlands comprise 44% of the Reservation.'' *Id.* at 31. The report further explained that ''[w]etlands adjacent to the St. Louis River . . . are interconnected with other wetlands that extend tens of miles away from the river, well beyond other wetlands that are not connected or adjacent to the river.'' *Id.* The majority opinion also stated that some Tribes and States have already established various boundaries, lines, or demarcations in their Tribal or State programs for reasons such as protection of water quality or flood setbacks. These established lines, the majority opinion suggested, could be used to establish the administrative boundary between retained and assumable waters. *Id.*

(2) EPA's Proposal

In light of the request by Tribes and States for clarity, EPA is proposing changes to the existing regulation that are similar to the Subcommittee majority opinion's recommendation. EPA's proposal would allow Tribes or States to work with the Corps to establish a clear and reliable administrative boundary that demarks the permitting authority for adjacent wetlands. The boundary would be easily understood and implementable in the field, would facilitate coordination between the Tribe or State and the Corps, and would enable informed public comment during the assumption process and permit review. EPA is proposing that the Corps retain administrative authority over all jurisdictional wetlands adjacent to retained waters, *except* that, for purposes of administrative convenience, the geographic scope of the Corps' administrative authority would be limited by an agreed-upon administrative boundary. The Corps would retain administrative authority for purposes of section 404 permitting only over the adjacent wetlands waterward of the administrative boundary. The Tribe or State would assume section 404 permitting authority over any adjacent wetlands landward of the administrative boundary. This boundary would be negotiated between the Corps and the Tribe or State and take into account existing Tribal or State regulations or natural features that would facilitate implementation and clarity. This proposed provision is consistent with the Subcommittee majority opinion recommendation subsequently endorsed by the Army. This proposed administrative boundary does not modify or in any way affect the interpretation of the scope of those wetlands that are ''adjacent'' for purposes of the definition of waters of the United States, but rather simply draws a line through them for the sole purpose of maximizing clarity as to the relevant permitting authority for these waters of the United States and thus facilitating the administration and implementability of approved Tribal and State programs.

EPA is proposing that the administrative boundary between retained and assumed wetlands be set jointly by the Tribe or State and the Corps and that a 300-foot administrative boundary from the ordinary high water mark, mean high water mark, or mean higher high water mark on the west coast, of the retained water be set as a default when no other boundary between retained and assumed wetlands is established.

As the majority opinion in the Subcommittee report stated, ''[t]he establishment of a national administrative boundary to assign regulatory responsibility over adjacent wetlands should build on USACE authorities under the RHA. The RHA was enacted primarily to protect navigation and the navigable capacity of the nation's waters.'' Final Report of the Assumable Waters Subcommittee at 25–26. Section 10 of the RHA requires authorization from the Secretary of the Army, acting through the Corps, for the construction of any structure in or over any ''navigable water of the United States.'' Section 14 of the RHA provides that the Secretary of the Army, on the recommendation of the Chief of Engineers, may grant permission for the temporary occupation or use of any sea wall, bulkhead, jetty, dike, levee, wharf, pier or other work built by the United States. 33 U.S.C. 408. The Corps will always retain RHA section 10 and 14 permitting authorities in all waters subject to the RHA; it is the administrative authority to issue CWA section 404 permits in these waters which the Corps would not retain when a Tribe or State assumes the program.

Establishing that the Corps retains jurisdictional adjacent wetlands up to an agreed upon administrative boundary, with a default boundary of a 300-foot distance from retained waters, would preserve the Corps' authority over waters and wetlands to the extent necessary to allow the Corps to address activities that may adversely impact navigability, while ensuring certainty for the extent of waters assumed by the Tribal or State program and clarity for the regulated community. The sole purpose of the 300-foot default boundary is to facilitate efficient program administration, when an administrative boundary is not otherwise established. Requiring a clear boundary between permitting authorities is well within EPA's authority to help ensure that the Tribe or State permitting program can function smoothly and effectively, and to maximize transparency for the regulated community and others as to the relevant permitting authority. *See generally* 33 U.S.C. 1361(a); 1344(g)–(h). The Tribe or State and the Corps may decide that existing State-established

setbacks, buffers, a defined elevation (as in the case of New Jersey), other characteristics, or even the full extent of the adjacent wetlands should form the basis for the boundary, or they may use 300 feet as the default administrative boundary.

The Subcommittee majority found that ''[r]iparian buffers and setbacks are established by many states to, among other purposes, help store floodwaters and prevent sediment transport, directly supporting and preserving navigation. Thus, such state-established boundaries can provide both a practical and a logical basis for the establishment of a national administrative boundary between wetlands retained by the USACE and wetlands assumed by a state or tribe.'' Final Report of the Assumable Waters Subcommittee at 26. To the extent discharges into assumed waters may affect navigability, Federal review and oversight of permits issued by a Tribe or State under an approved section 404 program can address any such impacts. The statute and existing regulations provide that the Tribe or State shall not issue a permit if the Secretary determines that anchorage and navigation of the navigable waters would be substantially impaired. 33 U.S.C. 1344(h)(1)(F), 40 CFR 233.20(d); *see also* 40 CFR 233.50 (addressing Federal oversight of Tribe- or State-issued permits).

The proposed default administrative boundary would allow Tribes and States to adapt the section 404 program to the Tribe's or State's natural conditions and provide additional flexibility and efficiency by simplifying the process of identifying retained waters prior to assumption. EPA agrees with the Subcommittee majority's conclusion that a 300-foot administrative boundary, or comparable demarcation between the Tribe's or State's and the Corps' permitting authority, would provide clarity and avoid ''confusion or unnecessary duplication, while preserving the USACE's responsibility to protect and maintain navigation under the RHA as required by Congress.'' Final Report of the Assumable Waters Subcommittee at 26. The Subcommittee majority concluded that ''[s]ince the boundary defines the landward extent of the adjacent wetlands retained by the USACE, it eliminates the need to determine the extent and connectivity of large wetland systems to allocate administrative authority between the USACE and a state or tribe.'' *Id.* EPA agrees with the Subcommittee majority's conclusion that a 300-foot default boundary is reasonable, especially since the Corps still has the opportunity to provide comment on Tribe- or State-issued permits and retains permitting authority pursuant to RHA sections 10 and 14 for all Tribal or State assumed waters subject to those provisions.

EPA recognizes that some project proposals that straddle the administrative boundary may involve a discharge into the waters on both sides of the administrative boundary. The extent of impacts associated with projects that straddle the boundary could be minimal or extensive, as in the case of linear projects or housing developments. In order to respond to the interests of Tribes and States in facilitating the assumption process, reducing costs, and increasing the consistency and efficiency of assumed programs, EPA is recommending that a process for determining the allocation of permitting authority in this situation be addressed in the program description and the Memorandum of Agreement between the Tribe or State and the Corps, to allow for regional differences and to best meet the conditions of individual Tribes and States. In developing the Memorandum of Agreement, the Tribe or State and the Corps should consider and memorialize permitting approaches for various project types where the project proposal may involve discharges on both sides of the administrative boundary.

EPA also recognizes that the Corps, Tribes, and States would benefit from additional clarity as to how project proposals that cross the administrative boundary should be permitted, absent an alternative approach being developed by the Corps and the Tribe or State. Under the default approach in this proposed rule, the Corps shall issue a section 404 permit for the discharges to jurisdictional adjacent wetlands or portions of such wetlands that are waterward of the administrative boundary. The Tribe or State shall issue a section 404 permit for discharges to jurisdictional adjacent wetlands or portions of such wetlands that are landward of the administrative boundary. Note that EPA is not suggesting that, when a proposed project crosses the administrative boundary, each individual discharge should be permitted separately. Such an approach would be inconsistent with the existing regulatory requirement that ''[a]ll activities which the applicant plans to undertake which are reasonably related to the same project should be included in the same permit application.'' 40 CFR 233.30(b)(5). Rather, the default in the proposed rule is that the Corps and Tribe or State shall each permit all discharges to adjacent wetlands related to a proposed project on their respective sides of the administrative boundary. In such cases, EPA recommends that the Corps and the Tribe or State coordinate on permitting activities such as public notices and joint public hearings to the extent feasible to facilitate assessment of cumulative impacts.

The approved Michigan, New Jersey, and Florida CWA section 404 programs are also consistent with the proposed approach. EPA briefly summarizes the approaches taken by these States to provide examples of possible approaches that are consistent with the proposed rule. In the Memorandum of Agreement between New Jersey and the Corps, the Corps retained regulatory authority over those wetlands that are: ''. . . partially or entirely located within 1000 feet of the ordinary high water mark or mean high tide of the Delaware River, Greenwood Lake, and all water bodies which are subject to the ebb and flow of the tide.'' Memorandum of Agreement between the State of New Jersey and the Department of the Army at 2 (March 4, 1993). State-administered waters in turn are generally determined by superimposing head of tide data on the State's freshwater wetlands quarter quadrangles that are at a scale of one-inch equals 1000 feet. A line was established parallel to and 1000 feet from the ordinary high-water mark or mean high tide of the waters described above. The Corps retains permitting authority over all wetlands that are waterward of, or intersected by, the administrative boundary described above. Because New Jersey regulates all wetlands and other waters under the same statute, it rarely must determine whether a wetland is assumable or non-assumable for purposes of a State permit.[32]

In Michigan, the extent of adjacent wetlands over which the Corps retains authority generally includes wetlands within the influence of the ordinary high water mark of retained waters. The State and the Corps coordinate permitting of projects that involve discharges into both assumed and retained waters to ensure the permit requirements do not conflict.[33]

In Florida, the Corps retains responsibility for waters that are identified in the retained waters

[32] For further information, see the Memorandum of Agreement between the Corps and the New Jersey Department of Environmental Protection and Energy, signed by the Division Engineer on March 4, 1993.

[33] For further information, see the Memorandum of Agreement between the Corps and the Michigan Department of Natural Resources, signed by the Commander, North Central Division, on March 27, 1984.

description, as well as all waters subject to the ebb and flow of the tide shoreward to their mean high water mark that are not specifically listed in the retained waters description, including wetlands adjacent thereto landward to an administrative boundary. The Memorandum of Agreement defines the administrative boundary as 300 feet from the ordinary high water mark or mean high tide line of the retained water. The Memorandum of Agreement also contains protocols for addressing projects that involve discharges of dredged or fill material both waterward and landward of the 300-foot boundary. The Corps provided geographic information system (GIS) layers that reflect the extent of retained waters and updates them as necessary. The Memorandum of Agreement states that the GIS layers are a tool, but not the final determining factor regarding who is the permitting authority for any particular waterbody. The Memorandum of Agreement also states that the Corps shall retain responsibility for waters of the United States within ''Indian country,'' as that term is defined at 18 U.S.C. 1151.[34]

iii. Modifying the Extent of Retained Waters

EPA proposes to revise the provision in the existing regulations that currently states that modifications that affect the area of jurisdiction always constitute substantial revisions to a Tribal or State program. The existing regulations provide that EPA may approve non-substantial revisions by letter, but require additional procedures, including public notice, inter-agency consultation, and **Federal Register** publication, of substantial revisions. 40 CFR 233.16(d)(2)–(4). Changes to the area of jurisdiction could include changes to the retained waters description. Such changes may sometimes have limited scope and impact and therefore may be non-substantial. As described above, this proposal would clarify that the retained waters description looks initially to those waters on existing RHA section 10 lists. As such, the process set forth in proposed 40 CFR 233.11(i)(3) should be followed to identify whether changes to the RHA section 10 list warrant changes to the retained waters description for a given Tribal or State section 404 program.

EPA recognizes that changes to RHA section 10 lists do not always warrant changes to the retained waters description, or only warrant minimal changes. For example, if the Corps adds to its RHA section 10 list a water which was historically used in interstate or foreign commerce but is no longer used or susceptible to use for that purpose, that water would not be added to the retained waters description. As another example, if the Corps made a relatively minor adjustment to the head of navigation for a RHA section 10 listed water, the new extent to which this water is retained would be shown on a revised retained waters list but may be considered as a non-substantial change in the retained waters description.

However, if a large water or a significant number of waters are proposed to be added to or removed from the retained waters description, that change could be a substantial revision to the Tribal or State program. Under the proposal, EPA would have discretion to determine whether changes to the area of jurisdiction, which includes the extent of retained waters, are substantial or non-substantial and approve the modification to the retained waters description and extent of the Tribal or State program consistent with the procedures in 40 CFR 233.16.

Note, however, that EPA is proposing to clarify that changes in geographic scope of an approved Tribal CWA section 404 program that would add reservation areas to the scope of its approved program are substantial program revisions. Where a Tribe seeks to include additional reservation areas within the scope of its approved program, the Regional Administrator must determine that the Tribe meets the TAS eligibility criteria for the additional areas and waters. The substantial modification process involves circulating notice to ''those persons known to be interested in such matters.'' 40 CFR 233.16(d)(3). In the case of a change in geographic scope of a Tribal program, known interested persons would typically include representatives of Tribes, States, and other Federal entities located contiguous to the reservation of the Tribe which is applying for TAS. *See, e.g.,* Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 FR 64876, 64884 (December 12, 1991). This clarification is necessary because as discussed above, the Agency proposes to clarify that revisions that affect the area of jurisdiction are not always substantial. However, revising a Tribal program to add new reservation land and waters of the United States on that land is substantial because it requires a determination that the Tribe meets the TAS eligibility criteria for such areas, pursuant to 40 CFR part 233, subpart G.

EPA is further proposing to amend the procedures associated with approval of program revisions to require EPA to notify the Corps of all approvals of program modifications whether they are substantial or non-substantial. EPA is also requiring that other Federal agencies be notified of these program modification approvals as appropriate.

iv. Additional Clarifications

EPA also proposes to clarify that in the program description of an assumption request, the description of waters of the United States assumed by the Tribe or State must encompass all waters of the United States not retained by the Corps. All discharges of dredged or fill material into waters of the United States must be regulated either by the Tribe or State or the Corps; at no time can there be a gap in permitting authority for any water of the United States. *See* discussion of this principle in section V.E.1 of this preamble.

Finally, EPA proposes to remove the term ''traditionally'' from the term ''traditionally navigable waters'' in the following provision: ''Where a State permit program includes coverage of those traditionally navigable waters in which only the Secretary may issue 404 permits, the State is encouraged to establish in this MOA procedures for joint processing of Federal and State permits, including joint public notices and public hearings.'' 40 CFR 233.14(b)(2). EPA proposes to remove the term ''traditionally'' to align the reference to retained waters with the rest of the preamble and regulations, which refer to retained waters using the statutory language in the section 404(g) parenthetical, and do not refer to retained waters as ''traditionally'' or ''traditional navigable waters.'' ''Traditional navigable waters'' are defined in the definition of waters of the United States, and are not addressed by this proposed rule. *See* 40 CFR 120.2(a)(1)(i).

c. Request for Comment

EPA solicits comments on all aspects of the proposal laid out above. EPA solicits comment on whether the term ''retained waters description'' should be used when referring to how retained waters are identified in a Tribal or State program description or if the term ''retained waters list'' or some other term should be used instead and why such term is preferable over ''retained waters description.''

With respect to determinations of the extent of retained waters, EPA solicits comment on the appropriate

[34] For further information, see the Memorandum of Agreement between the Corps and the Michigan Department of Natural Resources, signed by the Assistant Secretary of the Army (Civil Works), on August 5, 2020.

information that the letter from the Tribal leader, Governor, or Tribal or State Director should provide to demonstrate the Tribe's or State's commitment to pursuing assumption, including whether the Tribe or State should submit additional documentation or evidence of that commitment. EPA also solicits comment on whether the regulation should specify a time period for EPA review of the request for the retained waters description, and the length of that time period. The proposal currently provides EPA with 7 days to review and respond to the request for the retained waters description, but EPA solicits comment on alternative time periods such as 14 days. EPA solicits comment on alternative time periods that the Tribe or State must provide the Corps to prepare the description of retained waters, such as 90 days, 120 days, 150 days, or 270 days. The Agency also solicits comment on alternative periods of time within which the Corps may inform the Tribe or State whether it intends to prepare the description of retained waters. EPA solicits comment regarding ways to further shorten or simplify the process for determining the extent of retained waters. Additionally, the Agency solicits comment on whether the regulatory text should include a provision that allows for an extension to the default time period for the Corps to prepare the description of retained waters, contingent on mutual agreement from the Corps and the Tribe or State.

The Agency solicits comment on how to increase transparency for the public regarding the development of the retained waters description. For example, EPA solicits comment on an approach whereby when the Tribe or State submits its request to the Corps to develop a retained waters description, the Tribe or State must publish public notice of that request, in an effort to increase transparency and maximize opportunities for public input. The Agency also solicits comment on alternative ways to increase opportunities for public participation in the development of the description, in addition to the existing opportunity for public comment after the Tribe or State submits a program request to EPA for approval.

The Agency solicits comment on all aspects of the proposed approach to determining the extent of retained adjacent wetlands as well as alternative approaches, including whether the 300-foot administrative default should be codified in regulatory text, whether another default, such as 500 feet or 1,000 feet, should be recommended or codified, whether an administrative boundary should be an optional recommendation rather than a requirement, and any alternative approaches to establishing a boundary and to determining which ''adjacent wetlands'' are retained by the Corps.

The Agency also solicits comment on all aspects of the proposed approach to modifying the extent of retained waters, including whether these modifications should be substantial or non-substantial and whether to modify or specify any other procedures, including public notifications, for such modifications. EPA specifically solicits comment on its proposal to remove the specification that changes to the area of jurisdiction, which includes the retained waters description, are always substantial changes to approved Tribal or State programs. EPA requests comment on alternative approaches, including whether to instead provide that reductions in the scope of Federal jurisdiction, such as the removal of waters from the retained waters description, are always substantial program revisions.

EPA solicits comment as to whether to require the program description and the Memorandum of Agreement between the Tribe or State and the Corps to specifically address the process for permitting projects that may involve discharges both waterward and landward of the administrative boundary. EPA also solicits comment on the proposed default permitting approach for projects that would lead to discharges to jurisdictional adjacent wetlands crossing the administrative boundary.

EPA requests comment on specific ways EPA could be involved in resolving any disagreements regarding the extent of retained waters, and whether the regulations should provide a specific procedure through which EPA could provide input on the retained waters description while it is being developed. Note that EPA already has the opportunity to provide input upon review of the Tribal or State program submission, as well as when changes are proposed to an approved retained waters description. Finally, the Agency solicits comment as to whether to require that the retained waters description should be revisited at certain intervals, such as annually, biennially, or triennially, to allow for any necessary modifications, or if any such review should be handled in the Memoranda of Agreement between EPA and the Tribe or State or between the Corps and the Tribe or State.

3. Mitigation

a. What is the Agency proposing?

EPA is proposing to require that the program description that Tribes or States submit to EPA when seeking to assume the section 404 program include a description of the Tribe's or State's proposed approach to ensuring that all permits issued by the Tribe or State will apply and ensure compliance with the substantive criteria for compensatory mitigation consistent with the requirements of subpart J of the CWA 404(b)(1) Guidelines at 40 CFR part 230. The provision would clarify that the Tribe's or State's approach may deviate from the specific requirements of subpart J to the extent necessary to reflect Tribal or State administration of the program as opposed to Corps administration, but may not be less stringent than the substantive criteria of subpart J. For example, a Tribal or State program may choose to provide for mitigation in the form of banks and permittee responsible compensatory mitigation but not establish an in-lieu fee program. EPA is proposing that if the Tribe or State establishes third party compensation mechanisms as part of their section 404 program (*e.g.,* banks or in-lieu-fee programs), instruments associated with these compensatory mitigation approaches must be sent to EPA, the Corps, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service for review prior to approving the instrument, as well as to any Tribal or State resource agencies to which the Tribe or State committed to send draft instruments in the program description. Note that this requirement does not include permittee-responsible mitigation instruments as those would be reviewed as part of the permit conditions. Tribes and States may also send draft instruments to other relevant Tribal or State resource agencies for review. The proposed rule provides a time frame for receiving comments from the reviewing agencies. In the event that the Regional Administrator has commented that the instrument is not consistent with the description of the Tribe's or State's proposed approach to ensuring compliance with the substantive criteria for compensatory mitigation, the Tribe or State shall not approve the final compensatory mitigation instrument until the Regional Administrator notifies the Director that the final instrument is consistent with this approach.

b. Why is the Agency proposing this approach?

The CWA and EPA's implementing regulations provide that every permit issued by a Tribe or State must apply and ensure compliance with the guidelines established under CWA section 404(b)(1).[35] 33 U.S.C. 1344(h)(1)(A)(i); 40 CFR 233.20(a). The CWA 404(b)(1) Guidelines at 40 CFR part 230 are the substantive criteria used to evaluate discharges of dredged and/or fill material under CWA section 404. Subpart J of the CWA 404(b)(1) Guidelines addresses Compensatory Mitigation for Losses of Aquatic Resources. *See* 40 CFR 230.91 through 98. Tribes and States must also ensure that their programs are no less stringent than the requirements of the CWA and implementing regulations. 40 CFR 233.1(d). Therefore, Tribes and States must ensure that the permits they issue comply with the substantive criteria for compensatory mitigation set forth in subpart J.

Under the CWA 404(b)(1) Guidelines, impacts should be avoided and minimized to the maximum extent practicable before considering compensatory mitigation for unavoidable impacts. In this context, the term ''compensatory mitigation'' means the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved. In 2008, the Corps and EPA issued joint regulations, ''Compensatory Mitigation for Losses of Aquatic Resources'' (''2008 Mitigation Rule'') (33 CFR 325.1(d)(7), 332; 40 CFR part 230, subpart J) [36] describing the compensatory mitigation requirements for activities authorized by section 404 permits issued by the Corps. The language in the 2008 Mitigation Rule focuses on Federal concerns regarding permits issued by the Corps; for example, it references the ''DA [Department of the Army] permits'' and the ''district engineer'' and does not refer to or account for Tribe- or State-issued permits. *See* 73 FR 19594, 19650 (April 10, 2008).

States have requested clarification as to how a Tribe or State can demonstrate that it has authority to issue permits that apply and ensure compliance with the substantive criteria for compensatory mitigation set forth in subpart J of the CWA 404(b)(1) Guidelines. States have also requested clarification about the respective roles and responsibilities of the Tribe or State and the Federal agencies in connection with compensatory mitigation for impacts to assumed waters.

The 2008 Mitigation Rule established performance standards and criteria for three mechanisms: permittee-responsible compensatory mitigation, mitigation banks, and in-lieu fee programs. These standards and criteria were established to improve the quality and success of compensatory mitigation projects for activities authorized by section 404 permits issued by the Corps. EPA proposes to add a new provision to the section 404 Tribal and State program regulations to codify its interpretation that Tribal and State section 404 programs must issue permits that are no less stringent than and consistent with the substantive criteria for compensatory mitigation described in 40 CFR part 230, subpart J.

EPA recognizes that unlike other subparts of 40 CFR part 230, some terminology and discussion in subpart J refers to the Corps as the permitting authority. When a Tribe or State assumes the section 404 program, references to the Corps as the permitting authority (such as references to the ''District Engineer'' or ''DA Permits'') in subpart J are to be considered as applying to the Tribal or State permitting agency or decision maker. In addition, the Tribe or State may exercise necessary discretion in reconciling the provisions in subpart J with the fact that the Tribe or State will be administering the program, using its administrative structures, and in determining whether and how to incorporate mitigation banking and/or an in-lieu fee program as mechanisms for compensatory mitigation. EPA proposes to clarify in this provision that the Tribe's or State's approach may deviate from the specific requirements of subpart J to the extent necessary to reflect Tribal or State administration of the program as opposed to Corps administration of the program. For example, a Tribal or State program may choose to provide for mitigation in the form of banks and permittee responsible compensatory mitigation but not establish an in-lieu fee program. As another example, in the context where the Corps is the permitting agency, the Tribe or State often provides the required financial assurance for mitigation banks approved by the Corps. In the context where the Tribe or State will be administering the mitigation program, they may also be providing the financial assurance (*e.g.,* a Department of Transportation banking instrument). Flexibility is needed to allow the Tribe or State to develop a program where they may be both issuing the instrument approval and providing the financial assurance for the bank or in-lieu-fee program. The Tribe or State should prioritize transparency when developing the program especially with respect, but not limited to financial assurances. On no account may the Tribal or State approach result in mitigation that is less stringent than the requirements of subpart J.

EPA proposes to require that the Tribal or State program description explain the approach to ensuring that all permits issued by the Tribe or State will apply and ensure compliance with the substantive criteria for compensatory mitigation set out in subpart J. This explanation is necessary so that EPA can fully evaluate the Tribe's or State's proposed approach to compensatory mitigation to ensure its consistency with the substantive criteria of subpart J. It would also ensure that EPA can assist the Tribe or State in ensuring that its approach is practicable and implementable.

Finally, EPA is proposing that if the Tribe or State establishes third party compensation mechanisms as part of their section 404 program (*e.g.,* banks or in-lieu-fee programs), instruments associated with these compensatory mitigation approaches must be sent to EPA, the Corps, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service for review prior to approving the instrument, as well as to any Tribal or State resource agencies to which the Tribe or State committed to send draft instruments in the program description. This requirement does not include permittee-responsible compensatory mitigation because those instruments would be included in individual permit applications. The Tribe or State may also send draft instruments to other relevant Tribal or State resource agencies for review on a case-by-case basis. Federal, Tribal, or State resource agencies have special expertise that may be important in facilitating the development of the compensatory mitigation instruments. For example, EPA anticipates that Tribes or States will circulate draft compensatory mitigation instruments to State wildlife agencies where species concerns may be

[35] See section V.B.1 of this preamble for a discussion on how a Tribe or State can demonstrate that it has the authority to issue permits that apply and assure compliance with aspects of the CWA 404(b)(1) Guidelines other than compensatory mitigation.

[36] 33 CFR part 332 and 40 CFR part 230, subpart J contain identical text. For ease of reference, this preamble refers to compensatory mitigation requirements in 40 CFR part 230, subpart J or ''subpart J.''

present within or adjacent to the mitigation site or if the site will be established for the purpose of providing habitat for a particular threatened or endangered species that is addressed by these agencies. Their review would include an opportunity for these agencies to provide comment on the draft instrument.

If EPA, the Corps, the U.S. Fish and Wildlife Service, or the National Marine Fisheries Service intend to comment on the draft instrument, they must notify the Tribe or State of their intent within 30 days of receipt. If the Tribe or State has been so notified, the instrument must not be effective until after the receipt of such comments or 90 days after the agencies' receipt of the proposed instrument. The Tribe or State must consider and respond to any comments provided by EPA, the Corps, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, or any Tribal or State resource agencies to which they committed to send draft instruments in the program description before the instrument can become effective for purposes of the State or Tribal assumed section 404 program. The purpose of providing the opportunity for this review and feedback is to ensure that the structure of the instrument, design of the proposed projects, impacts for which the instrument would provide compensation, and criteria for credit release of the approved instrument will result in a successful bank or in-lieu-fee program capable of mitigating for loss resulting from permitted activities. If EPA has commented that the instrument fails to apply or ensure compliance with the approach outlined in the program description for compliance with subpart J, the Tribe or State may not approve the final compensatory mitigation instrument until EPA notifies it that the final instrument ensures compliance with this approach. The procedure for EPA review implements EPA's oversight authority over Tribal and State section 404 programs. The Agency also expects that this process will be familiar to Tribes and States because it is modeled on, and similar to, procedures for EPA review of permits. The proposed process is also intended to facilitate input from other relevant agencies, which is analogous to how the Interagency Review Team that oversees mitigation for Corps-issued permits facilitates input from other relevant agencies. *See, e.g.,* 33 U.S.C. 1344(g), (h); 40 CFR 233.20(b) (''No permit shall be issued . . . [w]hen the Regional Administrator has objected to issuance of the permit . . .''); 40 CFR part 233 generally; 40 CFR 230.98(b) (describing Interagency Review Team procedures).

c. Request for Comment

EPA requests comment on all aspects of the proposed new provision, including whether EPA should provide additional specificity as to whether or how particular provisions of subpart J should or should not apply to Tribal or State programs. EPA requests comment on its proposal that if a Tribe or State establishes third party compensation mechanisms as part of their section 404 program (*e.g.,* banks or in-lieu-fee programs), instruments associated with these compensatory mitigation approaches must be sent to EPA, the Corps, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service for review prior to approving the instrument, as well as to any Tribal or State resource agencies to which the Tribe or State committed to send draft instruments in the program description. EPA requests comment as to whether Tribal or State agencies should be required to provide draft instruments only to EPA, the Corps, and the U.S. Fish and Wildlife Service, or whether they should be required to provide such instruments to particular Tribal or State agencies as well. EPA also requests comment regarding which instruments may be appropriate for such review and the specific process and time frames for review of the instruments. EPA requests comment as to whether the time frames listed are appropriate, whether they should be shorter or longer (*e.g.,* provide 60 or 120 days for review) or if the regulations should be silent regarding the time frames and simply provide that specific review procedures for draft instruments should be addressed in the Memorandum of Agreement between the Tribe or State and EPA.

EPA also requests comment regarding whether the proposed provisions would provide sufficient oversight for Tribal or State compensatory mitigation instruments, and whether to condition the Tribe's or State's issuance of the instrument on their addressing all comments received from EPA, the Corps, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service. EPA requests comment as to whether to establish a time frame for EPA's notification to the Director that objections have been resolved, such as 60 or 90 days. EPA also requests comment regarding the agencies to whom Tribes and States should circulate draft instruments for review, and the extent to which they must address comments from reviewing agencies.

4. Effective Date for Approved Programs

a. What is the Agency proposing?

EPA is proposing to modify and more clearly define the effective date of the transfer of section 404 program administration from the Corps to a Tribe or State following EPA program approval. Specifically, EPA proposes to revise 40 CFR 233.11 and sections 233.13 through 233.15 of the existing regulations to provide that the transfer of an approved section 404 program to a Tribe or State takes effect 30 days after publication of the notice of EPA's program approval appears in the **Federal Register,** except where EPA and the Tribe or State have established a later effective date, not to exceed 120 days from the date of notice in the **Federal Register.** Additionally, EPA is proposing to increase transparency and provide early notice to interested parties by requiring that decisions to approve Tribal and State programs and revisions be posted on the EPA website as well as in the **Federal Register.**

b. Why is the Agency proposing this approach?

Section 404(h) of the CWA addresses the transfer of permitting authority and pending permit applications from the Corps to the Tribe or State following EPA notice of program approval but does not specify an effective date. The existing regulations provide that the transfer of permitting authority to a Tribe or State shall not be considered effective until notice of EPA's program approval appears in the **Federal Register**. 40 CFR 233.15(h).

EPA proposes to establish a presumptive effective date for program assumption of 30 days from the date of publication of the notice of EPA's program approval in the **Federal Register**. Establishing a short, clearly defined period of time between program approval and Tribal or State assumption of program administration benefits the public and regulated community by providing advance notice of the date of program transfer and supporting the smooth transition of program functions, while limiting any uncertainty that could arise with a more extended transition period.

Taking into consideration the input EPA has received from some States in the past, EPA also proposes that a Tribe or State may request a later effective date for the transfer of an approved section 404 program, up to 120 days from the date that the notice of EPA's program approval is published in the **Federal Register**. EPA proposes to allow more than 30 days only when a Tribe's or State's specific circumstances justify

the need for additional time before assuming administration of the program. In all cases, that effective date would be set forth in the Memorandum of Agreement between a Tribe or State and EPA required by 40 CFR 233.14(b)(2) and published in the **Federal Register**.

Several States that have contemplated assumption of the section 404 program indicated that a transition period between EPA's approval decision and the date of transfer of responsibility from the Corps to the State would enable them to more effectively prepare for the transition, including securing and allocating the necessary resources to successfully implement the assumed permitting program if their program is approved. These States include some with existing surface water or wetlands protection programs authorized under State law that would be expanded or adapted to incorporate the section 404 program for State-regulated waters, and others without any existing similar State programs. In both cases, but especially the latter, Tribes and States may need to reorganize, assign, and train staff, and purchase and employ new equipment for data processing before they are fully able to administer a section 404 program. Tribes and States without a similar program will presumably need to initiate these steps well before EPA completes its program review and determination, but some may not be fully prepared to administer the program 30 days after notice of program approval (*e.g.,* if funding is made available by the State legislature contingent upon program approval by EPA).

EPA would expect a Tribe or State to be prepared to implement any final steps quickly and therefore proposes that the amount of time between publication of notice of program approval and transfer of the program to the Tribe or State not exceed 120 days. For example, a Tribe or State should not wait until EPA approves the program before initiating hiring and training processes for staff that were committed in the program description. The effective date would be specified in the Memorandum of Agreement between EPA and the Tribe or State, and the program description should specify the steps the Tribe or State will take, if any, after EPA approval to fully administer its program, such as specifying the timeline for any assignment and training of staff and ensuring program funding is accessible by the effective date.

This proposal would revise and clarify the language in 40 CFR 233.11 and sections 233.13 through 233.15 of the existing section 404 Tribal and State program regulations, which address the contents of a Tribe's or State's program description, the EPA and Corps Memoranda of Agreement with Tribes and States, and the procedures for approving Tribal and State programs. The existing regulations require a Tribe or State and the Corps to include procedures for transferring pending section 404 permit applications and other relevant information to the Tribe or State in their Memorandum of Agreement. 40 CFR 233.14(b)(2). The regulations provide that the transfer of permitting authority to a Tribe or State shall not be considered effective until notice of EPA's program approval appears in the **Federal Register**. The Corps shall suspend the issuance of section 404 permits in State-regulated waters ''on such effective date.'' 40 CFR 233.15(h). Section 404(h)(2)(A) of the CWA, however, specifies that after EPA has notified the Tribe or State and Corps of its program approval, the Corps shall suspend issuance of permits in Tribal or State-regulated waters ''upon subsequent notification from such State that it is administering such program.'' 33 U.S.C. 1344(h)(2)(A). Read together, the language in the statute and EPA's regulations may create confusion regarding when the Corps shall suspend the issuance of permits.

Section 404(h)(4) of the CWA provides that ''[a]fter the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.'' 33 U.S.C. 1344(h)(4). Once the State has received those permit applications, and signals to the Corps that it is ready to assume permitting activity, *see* 33 U.S.C. 1344(h)(2), permitting responsibility should transfer. Thus, the administrative process envisioned by Congress is that EPA receives a program request, reviews, and approves or rejects the application, then notifies the parties of an approval decision, after which the Corps begins to transfer existing permitting materials. Under this framework, it is clear that some reasonable transition period is permissible, although Congress anticipated that transfer would happen relatively quickly.

EPA is proposing to modify the regulatory text to clarify when and how the section 404 program transfers to the Tribe or State following EPA's approval, and that the presumptive date of transfer should be 30 days from the date of notice of program approval in the **Federal Register**, but that Tribes and States that satisfactorily demonstrate a need for more than 30 days to assume and be prepared to fully administer the program can request an effective date of up to 120 days from the date of notice. EPA also proposes that if a Tribe or State requests to assume administration of the program more than 30 days after EPA's approval, the program description will include a description and schedule of the actions that will be taken following EPA approval for the Tribe or State to begin administering the program. This description would help to support the Tribe's or State's request and demonstrate why the Tribe or State considers the additional time necessary.

EPA proposes that the Memorandum of Agreement between a Tribe or State and EPA include the effective date for transfer of the program from the Corps to the Tribe or State, identified as the number of days following the date of publication of program approval in the **Federal Register**. This will provide for the efficient development and administration of the Tribal or State program, while also making the process more predictable for the regulated community and the public. The Corps would continue to process permit applications and begin the transfer of permits under review prior to the effective date of that program approval, but the Tribe or State would not be authorized to process these permits until the effective date.

EPA recognizes that setting an effective date more than 30 days after program approval could create uncertainty. It is possible that with a longer time period and certain steps yet to be taken by the Tribe or State, events could occur after program approval which could delay a Tribe's or State's ability to fully implement its program and potentially lead to a situation in which it is no longer certain when or whether the Tribe or State will begin to fully administer its program. However, such a situation could be addressed under the existing and proposed amended regulations, if it becomes necessary, by approving a revision of a Tribe's or State's program pursuant to 40 CFR 233.16(d), by the Tribe or State voluntarily relinquishing its legal authority and leaving the program with the Corps, or by EPA initiating the process to withdraw a program approval for failure to comply with the requirements of 40 CFR part 233. 40 CFR 233.53(b).

c. Request for Comment

EPA seeks comment on whether the section 404 Tribal and State program

regulations should include a default effective date for transfer of the section 404 program from the Corps to an approved Tribe or State; whether the regulations should allow for Tribes or States and EPA, on a case-by-case basis, to set the effective date later than 30 days but no more than 120 days from date of publication of program approval in the **Federal Register**; or whether the Agency should not set a new effective date as proposed, but rather retain the existing regulations that simply specify that ''transfer of the program shall not be considered effective until such notice appears in the **Federal Register**.'' 40 CFR 233.15(h).

With respect to EPA's proposed approach, EPA seeks comment on whether a presumptive effective date should be longer than 30 days, such as 60 or 90 days. EPA also seeks comment on whether the regulatory text should explicitly limit the allowable effective date to 120 days from the date of EPA's program approval, or whether a shorter or longer limit would be appropriate. EPA requests comment on whether it should specify particular information that the Tribe or State must provide in the program description if the Tribe or State requests to assume administration of the program more than 30 days after EPA's approval, such as a schedule for assigning or training staff or procuring resources. EPA also requests comment as to the circumstances under which EPA might disapprove a Tribe's or State's submission because its plan for implementation is inadequate. EPA requests comment on potential problems with deferring the effective date beyond 30 days and how EPA or a Tribe or State might address them. Finally, EPA requests comment on whether a proposed effective date may be modified after program approval is published in the **Federal Register**, and if so, the circumstances and procedural mechanisms for doing so.

B. Permit Requirements

This section of the preamble includes topics that are generally related to Tribal and State section 404 program requirements, including compliance with the CWA 404(b)(1) Guidelines and requirements for judicial review and rights of appeal.

1. Compliance With the CWA 404(b)(1) Guidelines

a. What is the Agency proposing?

Stakeholders have requested clarity regarding the way in which a Tribe or State wishing to assume the CWA section 404 program can satisfy CWA section 404(h)(1)(A)(i) by demonstrating that it has authority to issue permits that ''apply and assure compliance with'' the CWA 404(b)(1) Guidelines (found at 40 CFR part 230). *See* 33 U.S.C. 1344(h)(1)(A)(i). Because the existing regulations already require that CWA section 404 permits issued by an assuming Tribe or State must comply with the CWA 404(b)(1) Guidelines, and EPA does not want to unintentionally constrain how Tribes and States can demonstrate their authority, EPA is not proposing to add to the regulatory text. In response to stakeholder requests, EPA discusses below various approaches that Tribes and States can undertake to demonstrate that they have sufficient authority to issue permits that apply and assure compliance with the CWA 404(b)(1) Guidelines.[37]

b. Why is the Agency proposing this approach?

The CWA 404(b)(1) Guidelines are the substantive criteria used to evaluate discharges of dredged and/or fill material under CWA section 404. Pursuant to CWA section 404(h)(1)(A)(i), EPA may approve a Tribal or State request for assumption only if EPA determines, among other things, that the Tribe or State has authority ''[t]o issue permits which—(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection [404](b)(1). . . .'' Among other things, the CWA 404(b)(1) Guidelines direct that ''no discharge of dredged or fill material shall be permitted'' if there is a less environmentally damaging practicable alternative, so long as the alternative does not have other significant adverse environmental consequences (40 CFR 230.10(a)); if it causes or contributes to violations of applicable water quality standards taking into account disposal site dilution and dispersion (40 CFR 230.10(b)(1)); if it will cause or contribute to significant degradation of waters of the United States (40 CFR 230.10(c)); or if it would jeopardize the continued existence of listed endangered or threatened species under the Endangered Species Act of 1973 or result in the likelihood of the destruction or adverse modification of designated critical habitat (40 CFR 230.10(b)(3)).

Consistent with CWA section 404(h)(1)(A)(i), the existing section 404 Tribal and State program regulations require that assuming Tribes and States may not impose conditions less stringent than those required under Federal law (40 CFR 233.1(d)); that Tribes and States may not issue permits that do not comply with the requirements of the Act or this part of the regulations, including the CWA 404(b)(1) Guidelines (40 CFR 233.20(a)); that ''[f]or each permit the Director shall establish conditions which assure compliance with all applicable statutory and regulatory requirements, including the 404(b)(1) Guidelines . . .'' (40 CFR 233.23(a)); and that ''The Director will review all applications for compliance with the 404(b)(1) Guidelines and/or equivalent State environmental criteria as well as any other applicable State laws or regulations'' (40 CFR 233.34(a)).

Recognizing that a CWA section 404 permit may be required for a variety of discharges into a wide range of aquatic ecosystems, the CWA 404(b)(1) Guidelines provide ''a certain amount of flexibility,'' consisting of tools for evaluating proposed discharges, rather than numeric standards. As EPA explained in the preamble to the CWA 404(b)(1) Guidelines: ''Characteristics of waters of the United States vary greatly, both from region to region and within a region . . . As a result, the Guidelines concentrate on specifying the tools to be used in evaluating and testing the impact of dredged or fill material discharges on waters of the United States rather than on simply listing numerical pass-fail points.'' 45 FR 85336, 85336 (December 24, 1980). *See also* 40 CFR 230.6.

With respect to Tribes or States seeking to assume administration of the CWA section 404 program, EPA finds that the existing section 404 Tribal and State program regulations, including 40 CFR 233.1(d); 40 CFR 233.20(a); 40 CFR 233.23(a); and 40 CFR 233.34, appropriately require that Tribal and State environmental review criteria be consistent with the CWA 404(b)(1) Guidelines. At the same time, the existing regulations appropriately avoid a ''one size fits all'' approach and afford assuming Tribes and States necessary flexibility as to how best to craft a Tribal or State program that would issue permits that apply and assure compliance with the Guidelines. Accordingly, EPA does not propose to revise the regulations implementing CWA section 404(h)'s requirement that Tribes and States have authority sufficient to issue permits that apply and assure compliance with the CWA 404(b)(1) Guidelines.

EPA notes that there are a variety of means by which a Tribe or State

[37] See section V.A.3 of this preamble for a discussion on how a Tribe or State can demonstrate that it has the authority to issue permits that apply and assure compliance with the portion of the CWA 404(b)(1) Guidelines addressing compensatory mitigation (40 CFR part 230, subpart J).

wishing to assume implementation of the CWA section 404 program may demonstrate that it has sufficient authority to issue permits that apply and assure compliance with the CWA 404(b)(1) Guidelines. Nothing in CWA section 404(h) requires that Tribes and States adopt verbatim or incorporate into their programs by reference the CWA 404(b)(1) Guidelines. *See* 49 FR 39012, 39015 (October 2, 1984). Clearly, a Tribe or State can demonstrate sufficient authority to issue permits that apply and assure compliance by choosing to adopt verbatim or incorporate into its program by reference those portions of the CWA 404(b)(1) Guidelines that provide the substantive environmental criteria and analyses used for evaluating discharges of dredged and/or fill material under CWA section 404. That said, EPA continues to recognize that adoption and incorporation by reference are not the sole means by which an assuming Tribe or State can demonstrate sufficient authority to issue permits that apply and assure compliance with the CWA 404(b)(1) Guidelines.

A Tribe or State wishing to assume administration of the CWA section 404 program, for example, could demonstrate that it has sufficient authority to apply and assure compliance with the CWA 404(b)(1) Guidelines using a cross-walk between the Tribal or State program and the CWA 404(b)(1) Guidelines or a similar written analysis of the Tribal or State program authority, which it could include in its request to assume the program. A Tribe or State also could develop and include with its program submission a permit checklist or other documentation to be used in connection with each permit decision to document on a case-by-case basis how each permit decision is consistent with the CWA 404(b)(1) Guidelines. Where a Tribe's or State's request for assumption relies upon an already established and ongoing dredged and fill permit program under Tribal or State law, that Tribe or State could supplement its program description with a demonstration-type approach, showing, for example, that the terms and conditions of permits for discharges into waters of the United States that were issued pursuant to the Tribal or State program were consistent with permits issued by the Corps for the same discharge.

EPA is aware that demonstrating authority to issue permits that apply and assure compliance with certain aspects of the CWA 404(b)(1) Guidelines may be challenging. For example, the CWA 404(b)(1) Guidelines direct that no discharge of dredged or fill material shall be permitted if it will jeopardize the continued existence of listed endangered or threatened species under the Endangered Species Act of 1973 or result in the likelihood of the destruction or adverse modification of designated critical habitat (40 CFR 230.10(b)(3)). To demonstrate compliance with this aspect of the CWA 404(b)(1) Guidelines, Tribes and States could identify the listed species and areas of designated critical habitat within their geographic boundaries, the types of discharges that are likely to be permitted, and other unique Tribal or State factors, and include in the program submission provisions and procedures to protect listed species and habitat. Tribes and States also could develop processes for ensuring that their identification of listed species and designated critical habitat remains up-to-date as well as processes to avoid impacts to these resources.

EPA also encourages Tribes and States to consider proactively coordinating with the relevant National Marine Fisheries Service or U.S. Fish and Wildlife Service (''the Services'') regional or field offices when developing their program submissions. To the extent that Tribes and States work with the Services to develop their programs, such work would facilitate EPA's compliance with its obligations under CWA sections 404(g)(2) and 404(h)(1) to provide the Services with an opportunity to comment on a Tribal or State program submission and to consider those comments when determining whether the Tribe or State has the requisite authority to implement the CWA section 404 program. *See* 33 U.S.C. 1344(g)(2) and 1344(h)(1); *see also* 40 CFR 233.15(d) and (g).

Similarly, demonstrating that the Tribe or State has sufficient authority to implement subpart F of the CWA 404(b)(1) Guidelines may be challenging. Pursuant to subpart F (40 CFR 230.50 through 230.54), the permit issuing authority should consider potential effects on human use characteristics, including ''areas designated under Federal and State laws or local ordinances to be managed for their aesthetic, educational, historical, recreational, or scientific value,'' when making the factual determinations and the findings of compliance or non-compliance under the Guidelines. 40 CFR 230.54(a).

To demonstrate sufficient authority to apply and assure compliance with subpart F of the CWA 404(b)(1) Guidelines, a Tribe or State should consider including in its program description its process for evaluating and addressing potential permit impacts on historic properties. Such a process could include formal or informal coordination and communication with the State Historic Preservation Officer or Tribal Historic Preservation Office (SHPO or THPO). The Tribe or State also could consider developing an agreement with the relevant SHPO or THPO to establish a process to identify historic properties that may be impacted by the Tribe's or State's issuance of section 404 permits and a process for resolving adverse effects. Such an agreement could include the identification of relevant parties with an interest in potential impacts on historic properties (these could correspond to entities that would have a consultative role under the National Historic Preservation Act regulations), duties and responsibilities of the identified parties, and a description of the process to consider any impacts, including the determination and resolution of adverse effects on historic properties. Such an agreement could facilitate EPA's review of a Tribal or State permit's impacts on historic properties, consistent with EPA's oversight of the authorized program.[38]

EPA also recommends that an assuming Tribe or State consider incorporating into its program description ways to identify and consider impacts to other human use characteristics, such as impacts to waters that support subsistence fishing by the local population or that may have significance for religious or treaty purposes. These could include, for example, formalizing a process for coordinating with local communities to identify and understand how waters that may be affected by discharges of dredged or fill material are used for subsistence fishing, religious purposes, or other uses important to the local community.

In pre-proposal outreach for this rulemaking, some Tribes asked how a State that has assumed the section 404 program would consider potential impacts on Tribes or Tribal interests when making permit decisions. In addition to the proposed provision for coordinating with downstream Tribes in section 233.31 described in section V.C.2 of this preamble, and the addition of EPA review of a permit, upon request from a Tribe in section 233.51, EPA notes that complying with the CWA

[38] *See* 40 CFR 233.51(b)(6) (providing that EPA review of State permit applications may not be waived for ''[d]ischarges within critical areas established under State or Federal law, including but not limited to . . . sites identified or proposed under the National Historic Preservation Act. . . .'')

404(b)(1) Guidelines currently provides an opportunity for States to consider potential impacts of proposed section 404 permits on aquatic resources and uses important to Tribes.

These human use considerations encompass, among other things, uses and values of aquatic resources that are important to Tribes. For example, section 230.51 in subpart F describes considerations regarding potential impacts of dredged or fill material on recreational and commercial fisheries, consisting of ''harvestable fish, crustaceans, shellfish, and other aquatic organisms.'' 40 CFR 230.51(a). Section 230.52 includes considerations regarding the impact of dredged or fill material on water-related recreation, including harvesting of resources and non-consumptive activities such as canoeing on the water. Section 230.53 addresses potential impacts on aesthetic values of aquatic ecosystems and notes that: ''The discharge of dredged or fill material can mar the beauty of natural aquatic ecosystems by degrading water quality, creating distracting disposal sites, including inappropriate development, encouraging unplanned and incompatible human access, and by destroying vital elements that contribute to the compositional harmony or unity, visual distinctiveness, or diversity of an area.'' 40 CFR 230.53(b). Section 230.54 discusses considerations regarding ''national and historical monuments, national seashores . . . and similar preserves'' and where the discharge may ''modify the aesthetic, educational, historical, recreational and/or scientific qualities thereby reducing or eliminating the uses for which such sites are set aside and managed.'' 40 CFR 230.54(b).

The CWA 404(b)(1) Guidelines at section 233.31–33 require that the Tribal or State permitting authority coordinate with affected States prior to permit issuance, and provide for public notice and hearings related to permit applications, preparation of draft general permits, and similar actions. As mentioned above, EPA considers the human use effects under subpart F of the CWA 404(b)(1) Guidelines to encompass impacts of proposed discharges on Tribal interests, including impacts on fisheries and other aquatic resources, aesthetics, and historic and cultural uses. As noted in section V.C.2 of this preamble, the proposed rule would require States to consider comments from eligible Tribes and suggested conditions on permit applications in the same way that potentially affected States' comments are currently considered under section 233.31. In addition, Tribes would have an opportunity to request EPA review of permit applications that may affect rights and resources of importance to the Tribe.

The foregoing, of course, are only examples, and there are likely other means by which a Tribe or State could demonstrate that it has sufficient authority to issue permits that comply and assure compliance with the CWA 404(b)(1) Guidelines. EPA seeks to avoid unnecessarily limiting Tribes and States by imposing a single vehicle or approach for implementing the CWA 404(b)(1) Guidelines.

c. Request for Comment

EPA requests comment on whether the existing regulations provide appropriate clarity and leeway for Tribes and States to ensure that the permits they issue under an assumed program assure consistency with the CWA 404(b)(1) Guidelines. EPA also seeks comment on ways that Tribes and States wishing to assume the CWA section 404 program can demonstrate they have sufficient authority to assure consistency with the CWA 404(b)(1) Guidelines, including but not limited to, identifying the least environmentally damaging alternative, avoiding significant degradation, and considering impacts to threatened and endangered species, critical habitat, and human use characteristics, including but not limited to historic properties and Tribal interests.

2. Judicial Review and Rights of Appeal

a. What is the Agency proposing?

EPA proposes to clarify that States seeking to assume the section 404 program must provide for judicial review of decisions to approve or deny permits. The proposed language is similar to the language added to the CWA section 402 NPDES State program regulations in 1996, with one modification to specify that State requirements that provide for the losing party in a challenge to pay all attorneys' fees, regardless of the merit of their position, are an unacceptable impingement on the accessibility of judicial review. This proposed provision does not apply to Tribal programs.

b. Why is the Agency proposing this approach?

The Agency is proposing this approach because it would give effect to the CWA's requirements for public participation in the permitting process and that State programs comply with all requirements of section 404, as well as the regulatory requirement that Tribal and State programs be no less stringent than the Federal section 404 program. The current regulations require the program description to include a description of the Tribe's or State's judicial review procedure but do not explicitly require a particular standard for that procedure. In addition, EPA expects that States will have the authority and experience to implement this requirement because it is similar to the section 402 requirement that States authorize judicial review.

In 1996, EPA promulgated the following regulation providing that States administering the CWA section 402 program must allow for State court review of decisions to approve or deny permits:

> All States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see § 509 of the Clean Water Act). A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.) This requirement does not apply to Indian Tribes.

Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act, 61 FR 20972 (May 8, 1996), *codified at* 40 CFR 123.30.

Like permits issued under section 402, permits issued under section 404 fall within the processes that are subject to the congressional directive of CWA section 101(e), which states:

> Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

33 U.S.C. 1251(e). Permits are a key mechanism through which the regulations, standards, and effluent limitations of the CWA are implemented because they establish specific limitations applicable to individual dischargers. *See* 61 FR 20973 (May 8, 1996). This proposal would effectuate

CWA section 101(e) by requiring that States allow meaningful public participation in the permit development process by authorizing judicial review.

As EPA explained in promulgating the section 402 judicial review provision, the United States Court of Appeals for the Fourth Circuit has agreed that ''broad availability of judicial review is necessary to ensure that the required public comment period serves its proper purpose. The comment of an ordinary citizen carries more weight if officials know that the citizen has the power to seek judicial review of any administrative decision harming him.'' *Com. of Virginia* v. *Browner,* 80 F.3d 869, 879 (4th Cir. 1996) (upholding EPA's denial of Virginia's proposed permitting program under Title V of the Clean Air Act).

When citizens lack the opportunity to challenge executive agency decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as public comments and public hearings on proposed permits, may be compromised. Citizens may perceive that a State administrative agency is not addressing their concerns about section 404 permits because the citizens have no recourse to an impartial judiciary, which would have a chilling effect on all the remaining forms of public participation in the permitting process. Without the possibility of judicial review by citizens, public participation before a State administrative agency could become less meaningful. For example, State officials may spend less time considering and responding to the comments of parties who have no standing to sue as opposed to the comments of parties who can challenge the final administrative decision to issue or deny the permit in court. *See id.*

The legislative history underlying section 101(e) further emphasizes the importance of a vigorous public participation process in implementing and enforcing clean water protections. 33 U.S.C. 1251(e). Congress included the provisions relating to public participation in section 101(e) because, as the Senate Report noted, it recognized that ''[a] high degree of informed public participation in the control process is essential to the accomplishment of the objectives we seek—a restored and protected natural environment.'' S. Rep. 414, 92d Cong., 2d Sess. 12 (1972), *reprinted in* A Legislative History of the Water Pollution Control Act Amendments of 1972, Cong. Research Service, Comm. Print No. 1, 93d Cong., 1st Sess. (1973) (hereinafter cited as 1972 Legis. Hist.) at 1430.

The Senate Report also observed that the implementation of water pollution control measures would depend, ''to a great extent, upon the pressures and persistence which an interested public can exert upon the governmental process. The Environmental Protection Agency and the State should actively seek, encourage and assist the involvement and participation of the public in the process of setting water quality requirements and in their subsequent implementation and enforcement.'' *Id; see also* 1972 Legis. Hist. at 1490 (''The scrutiny of the public . . . is extremely important in insuring . . . a high level of performance by all levels of government and discharge sources.'').

Similarly, the House directed EPA and the States ''to encourage and assist the public so that it may fully participate in the administrative process.'' H. Rep. 911, 92d Cong., 2d Sess. 79, 1972 Legis. Hist. at 766. The House also noted, ''steps are necessary to restore the public's confidence and to open wide the opportunities for the public to participate in a meaningful way in the decisions of government;'' therefore, public participation is ''specifically required,'' and the Administrator is ''directed to encourage this participation.'' *Id.* at 819. Congressman Dingell, a leading sponsor of the CWA, characterized CWA section 101(e) as applying ''across the board.'' 1972 Legis. Hist. at 108.

Section 404(h)(1)(C) of the CWA provides support for this provision as well. Section 404(h)(1)(C) provides that EPA may disapprove a State section 404 program if adequate authority does not exist to ensure that the public ''receive[s] notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.'' *Id.* at 1344(h)(1)(C). Given the language and history of CWA section 101(e), Congress intended the public hearing required by CWA section 404(h)(1)(C) to be a meaningful exercise.

Finally, this proposed approach is consistent with the CWA's requirement that States issue permits that ''apply, and assure compliance with, any applicable requirements'' of section 404, 33 U.S.C. 1344(h)(1)(A)(i); and the regulatory provision providing that ''[a]ny approved State Program shall, at all times, be conducted in accordance with the requirements of the Act and of this part'' and that States ''may not impose any less stringent requirements for any purpose.'' 40 CFR 233.1(d). As citizens are authorized to challenge the issuance of section 404 permits when the Federal Government administers the program, challenges must also be authorized when a State has assumed the program in order to assure compliance with the applicable requirements of section 404 and to ensure that the State program is not less stringent than the Federal program. Allowing citizens the opportunity to challenge permits is not the type of technical discharge limitation that first comes to mind as a more or less ''stringent'' requirement of section 404, but this opportunity is a vital backstop that can ensure permits incorporate sufficiently stringent requirements. Permitting authorities are likely to be particularly careful to address citizen input and ensure that issued permits comply with CWA requirements if they know such permits may be challenged by a broad range of citizen stakeholders. Therefore, ensuring that States provide an opportunity for judicial review that is the same as that available to obtain judicial review in Federal court helps to ensure compliance with section 404 and all requirements of the CWA.

This proposal for the section 404 State program regulations would effectuate EPA's policy interest in deferring to State administration of authorized section 404 programs in the same way that EPA defers to State administration of section 402 programs. *See* 61 FR 20974 (May 8, 1996). EPA supports State assumption of the section 404 program and is just as committed to ensuring robust opportunity for citizen participation in that program. In authorizing State programs to act in lieu of the Federal Government, EPA must ensure that the implementation of the State program will be procedurally fair and consistent with the intent of the CWA. This proposed rule would provide additional assurance of State program adequacy and fairness by ensuring opportunities for judicial review.

While EPA's existing regulations require the program description to provide a description of the Tribe's or State's judicial review procedures, *see* 40 CFR 233.11(b), EPA's proposed application of the CWA standard for judicial review of permits to section 404 programs is new and not the only potential reading of the CWA. Yet EPA views this proposed requirement as the best interpretation of the sections 101 and 404 for the reasons outlined above.

Like the parallel provision in the section 402 regulations, a State will meet this standard if it allows an opportunity for judicial review that is the same as that available to obtain judicial review in Federal court of a

Federally-issued NPDES permit. *See* 61 FR 20975 (May 8, 1996). Section 509(b)(1) of the CWA governs the availability of judicial review of Federally-issued NPDES permits. The term ''interested person'' in section 509(b) is intended to embody the injury-in-fact rule of the Administrative Procedure Act, as set forth by the Supreme Court in *Sierra Club* v. *Morton,* 405 U.S. 727 (1972). *Montgomery Environmental Coalition* v. *Costle,* 646 F.2d 568, 576–78 (D.C. Cir. 1980); *accord Trustees for Alaska* v. *EPA,* 749 F.2d 549, 554–55 (9th Cir. 1984); *see also Roosevelt Campobello Int'l Park Comm'n* v. *EPA,* 711 F.2d 431, 435 (1st Cir. 1983); S. Conference Rep. No. 1236, 92d Cong, 2d Sess. 146 (1972), 1972 Legis. Hist. at 281, 329.

With respect to the nature of the injury that an ''interested person'' must show to obtain standing, the Supreme Court held in *Sierra Club* v. *Morton* that harm to an economic interest is not necessary to confer standing. 405 U.S. at 734–35. A party may also seek judicial review based on harm to that party's aesthetic, environmental, or recreational interest. *Id.* The Supreme Court affirmed this holding in *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services, Inc.,* 528 U.S. 167, 183 (2000) (''environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity'') (internal citations omitted); and in *Lujan* v. *Defenders of Wildlife,* 504 U.S. 555, 562–63 (1992) (''[o]f course, the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing.'').

EPA recognizes that CWA section 509(b)(1) does not authorize judicial review of Federally-issued section 404 permits, which are administered by the Corps. Rather, section 404 permits may be challenged under the Administrative Procedure Act. *See National Ass'n of Mfrs.* v. *Dep't of Def.,* 138 S. Ct. 617, 626–27 (2018) (''EPA actions falling outside the scope of § 1369(b)(1) . . . are typically governed by the APA.'') Nonetheless, establishing the same standards and expectations for standing to challenge the section 404 program that EPA has already established for the section 402 program would presumably enhance the efficiency and predictability of State efforts to assume and operate the section 404 program. Many States that administer the section 402 program already have systems in place to provide for judicial review pursuant to 40 CFR 123.30, consistent with the Agency's interpretation of the scope of that provision. Moreover, as noted above, the CWA ''interested person'' standard applicable to review of section 402 permits was initially derived from the Administrative Procedure Act, the statute under which citizens may challenge section 404 permits. The standard is therefore appropriate to apply to section 404 permitting. For these reasons, distinguishing between the standards for judicial review of State-issued section 402 and 404 permits is not necessary.

Furthermore, nothing about State-issued section 404 permits necessitates a distinct set of expectations for judicial review of those permits. The Corps' regulations address the extent to which final permit decisions are subject to judicial review. *See* 33 CFR 331.10, 331.12. However, EPA is not the agency charged with implementing or interpreting these provisions governing judicial review of Corps-issued section 404 permits. Therefore, for the sake of consistency and ease of implementation, EPA proposes to use the CWA section 509(b) standard as a benchmark for State section 404 programs as well as State section 402 programs.

The proposed rule would provide that a State does not ''provide for, encourage, and assist'' public participation in the permitting process if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, or if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review). As EPA made clear in the preamble to 40 CFR 123.30, broad standing to judicially challenge State-issued NPDES permits is necessary to ensure that public participation before the State permitting agency will serve its intended purpose. This provision is also intended to ensure that ordinary citizens will be in a position of substantial parity with permittees with respect to standing to bring judicial challenges to State permitting decisions. 61 FR 20975 (May 8, 1996).

The proposed rule would also provide that a State does not ''provide for, encourage, and assist'' public participation in the permitting process if State law or regulation requires that attorneys' fees must be imposed in favor of any prevailing party and against the losing party, notwithstanding the good faith or merit of the litigant's position. This form of ''fee shifting'' would form a barrier to court access for litigants unable to risk an adverse fee award, no matter the strength of their case. Prohibitions against narrow standing restrictions and mandatory fee-shifting are only examples of such deficiencies in State programs. The proposed provision does not only prohibit these provisions, but any others that would limit access to judicial review beyond the scope of judicial review available in Federal court for review of Federally-issued NPDES permits.

EPA interprets the proposed provision to preclude State laws that would limit associational standing to a greater extent than Federal law. Under Federal law, an association may bring a challenge on behalf of a single member's harms resulting from a challenged action. *See Sierra Club* v. *Johnson,* 436 F.3d 1269, 1279 (11th Cir. 2006) (associational standing of Sierra Club satisfied by affidavit of one member who suffered injury in fact). State requirements that establish a higher bar for associational standing than Federal law, such as requirements providing that an association only has standing if a substantial number of an association's members would be injured by the challenged action, would be inconsistent with this proposal.

As with the section 402 regulations, the proposed rule would apply to final actions with respect to modification, revocation and reissuance, and termination of permits, as well as the initial approval or denial of permits. EPA would consider the opportunities for judicial review of State-issued section 404 permits provided by State law on a case-by-case basis when determining whether to approve a State program to ensure that the State adequately ''provides for, encourages, and assists'' public participation in the section 404 permitting process. EPA would also look to the State Attorney General to provide a statement that the laws of the State meet the requirements of the regulation. *See* 40 CFR 233.12.

Standing to judicially challenge permits should be distinguished from requirements that potential litigants must exhaust administrative remedies to preserve their opportunity to bring judicial challenges. This proposed amendment would not affect the ability of States to require that potential litigants must exhaust administrative remedies to preserve their opportunity to bring judicial challenges, including by participating in the submittal of public comments, or similar reasonable requirements.

EPA is not proposing that this requirement apply to Tribes, consistent with EPA's approach in the parallel

section 402 provision that ''[t]his requirement does not apply to Indian Tribes'' as well as EPA's decision not to require Tribes to provide for judicial review in the same manner as States for purposes of the Clean Air Act Title V Operating Permits Program. *See* 40 CFR 123.30; Indian Tribes: Air Quality Planning and Management, 63 FR 7254, 7261–62 (February 12, 1998). While EPA does not, as a general matter, feel that Tribal procedures should be less rigorous with respect to public participation than State procedures, a specific requirement that Tribes provide judicial review as the sole option for citizen recourse would raise issues regarding Federal Indian policy and law.

In promulgating the Clean Air Act Tribal rule, EPA recognized that while many Tribes have distinct judicial systems analogous to State judicial systems, some well-qualified Tribes may not have a distinct judiciary and may use appropriate non-judicial mechanisms for citizen recourse. *See* 63 FR 7261–62 (February 12, 1998). EPA considered that requiring Tribes to waive sovereign immunity to judicial review of permitting decisions would be a significant disincentive to Tribes to assume the Clean Air Act Title V program. *See id.* EPA recognizes the importance of encouraging Tribal implementation of environmental programs and avoiding creating unnecessary barriers to assumption. EPA's proposal seeks to strike a balance by ensuring that an appropriate means of citizen recourse is available in any approved Tribal section 404 program, while not restricting qualified Tribes to a single judicial option that may not fit existing Tribal governmental structures. EPA wishes to be clear that in all cases, some appropriate form of citizen recourse for applicants and others affected by Tribe-issued permits would be needed to ensure meaningful public participation in the permitting process. EPA would consider whether appropriate citizen recourse has been provided in the context of reviewing Tribal program applications.

EPA also encourages Tribes and States to establish an administrative process for the review and appeal of permit decisions pursuant to their approved section 404 programs and encourages the Tribe and State to describe such process in the program description. These procedures can conserve resources on the part of permittees, stakeholders, and permitting agencies, by resolving permitting disagreements without the need for litigation in court. However, EPA is not proposing to require a specific administrative review procedure because the Agency recognizes that existing Tribal and State administrative procedures may differ across the country.

c. Request for Comment

EPA solicits comment on all aspects of this judicial review provision, including whether to provide any greater specificity with respect to the standards for judicial review that States are expected to provide, or additional examples of what could constitute an unacceptable narrowing of the class of persons who may challenge the approval or denial of permits. The Agency also requests comment as to whether this requirement should apply to Tribal section 404 programs and if so, to what extent.

In addition, EPA requests comment on whether to explicitly state in the regulatory text that State laws limiting associational standing to a greater extent than Federal law would run afoul of the proposed provision. EPA also requests comment on whether to require that States provide ''any interested person an opportunity for judicial review in State court of the final approval or denial of permits by the State.'' EPA initially proposed adding this language to the section 402 regulations, though ultimately decided to use the approach that EPA now proposes to add to the section 404 regulations, on the grounds that the more flexible proposed language is sufficient to provide for meaningful public participation in the permitting process. *See* 60 FR 14588, 14592 (March 17, 1995); 61 FR 20972, 20975 (May 8, 1996).

Additionally, EPA seeks comments on whether the Agency should require Tribal and State section 404 programs to include an administrative appeals process for permit decisions, including any potential benefits or challenges to including such a requirement.

C. Program Operation

This section of the preamble includes topics that are generally related to the operation of approved Tribal or State programs, including five-year permit limits and long-term projects as well as opportunities for Tribes to comment on permits.

1. Five-Year Permits and Long-Term Projects

a. What is the Agency proposing?

The Agency is proposing a process for permitting long-term projects that is consistent with the statutory limitation that permits not exceed five years in duration,[39] yet increases predictability for permittees and provides sufficient information for the Tribe or State to consider the full scope of impacts to the aquatic environment as it reviews the permit application for compliance with the CWA 404(b)(1) Guidelines. For projects[40] with a planned construction schedule which may extend beyond the five-year permit period, the Agency is proposing that the applicant submit a 404(b)(1) analysis showing how the project complies with the environmental review criteria set forth in the CWA 404(b)(1) Guidelines for the full project when they submit the application for the first five-year permit. The proposal would allow the applicant to modify the 404(b)(1) analysis, as necessary, when submitting applications for subsequent five-year permits. As part of this permitting approach, this section of the preamble discusses the criteria that the Tribe or State must consider when determining whether the 404(b)(1) analysis needs to be modified.

Consistent with CWA requirements, pursuant to this proposal, a new permit application must be submitted for projects that exceed a five-year schedule (*e.g.,* based on construction plans), and all aspects of the permit application, public notice, and Tribal or State review requirements set forth in 40 CFR 233.30, 233.32, and 233.34, respectively, apply. The Agency is proposing that an applicant seeking a new five-year permit should apply for the new permit at least 180 days prior to the expiration of the current permit.

b. Why is the Agency proposing this approach?

Certain projects by their nature may not be completed within the five-year CWA statutory limitation, such as some residential or commercial developments, linear project transportation corridors, and energy or mining projects, and will therefore need more than one five-year permit to authorize all impacts to waters of the United States associated with the project. To minimize unnecessary effort and paperwork, and to provide the Tribe or State and the public with information that can assist with the successful permitting of a project, the Agency is proposing that applicants for projects with a planned schedule which may extend beyond the initial five-year permit application period submit a 404(b)(1) analysis for the full project with the application for the first five-

[39] 33 U.S.C. 404(h)(1)(A)(ii).

[40] Per 40 CFR 233.30(b)(5), all activities which the applicant plans to undertake which are reasonably related to the same project should be included in the same permit application.

year permit. That way, the applicant would only need to modify the 404(b)(1) analysis to the extent necessary when submitting applications for subsequent five-year permits. This approach would improve environmental protections by ensuring that the scope of impacts associated with a complete project is factored into the permitting decision for each five-year permit. This approach will help ensure consistency in permitting decisions associated with the project, thereby providing the applicant with more regulatory certainty than without such a plan.

Under the proposed approach, all aspects of the permit application, public notice, and Tribal or State or Federal review requirements set forth in 40 CFR 233.30, 233.32, 233.34, and 233.50, respectively, still apply to each permit application for projects that exceed a five-year schedule, consistent with CWA section 404(h)(1)(A)(ii). However, EPA expects that the permit application process for permits after the initial five-year permit application would be easier and simpler because the applicant and Tribe or State would have already analyzed the full project. Further details about the Agency's proposal for permitting long-term projects are provided below.

i. Permitting Long-Term Projects

Congress limited CWA section 404 permits issued by Tribes or States that assume the section 404 program to five years in duration. 33 U.S.C. 1344(h)(1)(A)(ii).[41] The Agency codified this limitation in the permit conditions section of the existing section 404 Tribal and State program regulations. 40 CFR 233.23(b). However, certain projects by their nature cannot be completed within the five-year limitation and will therefore need more than one five-year permit. Examples of these long-term projects include some residential or commercial developments, linear projects such as transportation corridors, and energy or mining projects. The Agency is concerned that if applicants with long-term projects only submit information about activities that will occur during one five-year period of their project in their permit application, the permitting agency and members of the public will not have sufficient information to assess the scope of the entire project.

For example, an applicant seeking permit coverage for a 15-year, multi-phase housing development project would provide information about all phases of the project, covering its full 15-year term, in its permit application. If this project were anticipated to involve the construction of two hundred homes in years 0–5, two hundred homes in years 5–10, and two hundred homes in years 10–15, the permit application would provide information about the construction of all six hundred homes. This approach is consistent with the Agency's long-standing position that activities related to the same project should not be split into multiple permits, which can undermine efforts to ensure a complete alternatives analysis, an accurate accounting of all cumulative impacts, an appropriate mitigation plan, and that the public is sufficiently on notice of forthcoming dredged and fill activities. *See* 40 CFR 233.30(b)(5). This approach is also similar to the Corps' requirement that all activities that are reasonably related to the same project be included in the same permit application. 33 CFR 325.1(d)(2). Providing information about all phases of the project does not authorize dredged and fill activity beyond the five-year permit term. Moreover, unless there has been a change in circumstance related to an authorized activity, the same information should be provided in subsequent applications for later stages of the long-term project, such as applications authorizing activity in years 6–10 of the project, years 11–15 of the project, and so forth. See section V.C.1.b.ii. of this preamble.

All projects seeking authorization under Tribal or State section 404 permits must comply with the environmental review criteria set forth in the CWA 404(b)(1) Guidelines at 40 CFR part 230. To provide the Tribe or State and the public with information that can assist with the successful permitting of long-term projects, the Agency is proposing that applicants for projects for which the planned schedule extends beyond five years at the time of the initial five-year permit application submit a 404(b)(1) analysis for the full term of the project with the application for the first five-year permit and modify the 404(b)(1) analysis, as necessary, for subsequent five-year permits.

As proposed, the 404(b)(1) analysis must provide information demonstrating that the project meets each element of the CWA 404(b)(1) Guidelines for the full term of the project. This information includes, but is not limited to: (i) information describing the purpose, scope, and timeline for the entire project; (ii) an alternatives analysis for the entire project; (iii) information sufficient to demonstrate appropriate and practicable steps that will be taken to avoid and minimize impacts from the entire project; (iv) information sufficient to demonstrate that the project will not cause or contribute to significant degradation of waters of the Unites States, including factual determinations, evaluations, and tests for the entire project; (v) an assessment of cumulative and secondary effects of the entire project; (vi) information sufficient to demonstrate that the project will not violate applicable state water quality standards or toxic effluent standards, jeopardize the continued existence of federally listed species or adversely modify or destroy critical habitat, or violate protections for marine sanctuaries designated under the Marine Protection, Research, and Sanctuaries Act of 1972; and (vii) a description of compensatory mitigation proposed to offset all unavoidable impacts associated with the entire project. *See generally* 40 CFR part 230.

The issuance of Tribal or State section 404 permits for projects that exceed a five-year schedule constitutes authorization for discharges associated with the project occurring in the five-year period identified in the permit. Permittees for long-term projects must submit a new permit application for each subsequent five-year permit term. The issuance of a subsequent five-year permit for the same project does not constitute a continuance or modification of the previous permit and nothing in the Agency's proposal affects the process for continuing or modifying permits set forth in an approved Tribal or State section 404 program.

The Agency recognizes that some permittees may expect that a project will be completed within the five-year permit term but ultimately the project takes longer. The Tribe or State administering the section 404 program should make reasonable efforts to verify that all activities that are reasonably related to the same project have been included in the same permit and to evaluate whether a project's schedule extends beyond five years at the time of the initial five-year permit application.

In the event a project anticipated to be completed within five years is not completed during that time, the applicant must apply for a new five-year permit. To avoid a stoppage in work, the Agency is proposing that an applicant seeking a new five-year permit should apply for the new permit at least 180 days prior to the expiration of the current permit to allow sufficient time for the application to be processed. This approach is consistent with other CWA programs and provides time for a public

[41] Corps-issued permits are not limited to five years. *See* 33 CFR 325.6(b), (c) (authorizing certain types of permits for an ''indefinite duration'' or else a ''limited duration'' but with no five-year limitation period).

comment period and any required EPA review of the new permit application.

ii. Criteria for Modification of 404(b)(1) Analyses

The Agency recognizes that changes in circumstances related to an authorized activity may occur over time. For example, descriptions of subsequent phases of a long-term project may lack detail at the time an applicant submits a 404(b)(1) analysis for the first five-year permit and adjustments to the purpose or scope of the project may therefore be required. If there has been a change in circumstance related to an authorized activity following approval of a five-year permit, the Agency is proposing that the applicant modify the 404(b)(1) analysis for subsequent five-year permits. A change in circumstance related to the authorized activity includes, without limitation, the following:

—Change in project purpose;
—Change in project boundary;
—Change in scope of waters impacted;
—Change in secondary or cumulative impacts;
—Change affecting compensatory mitigation proposal;
—Change in site conditions, including new alternatives or opportunities for minimization of impacts;
—Change in environmental conditions, including the presence or new listing of threatened or endangered species or critical habitat; or
—Change to applicable statutes, regulations, or guidance.

If there have been no changes in circumstances from the description of the full project provided with the application for the previous five-year permit, the applicant's new permit application may rely upon the most recent 404(b)(1) analysis. A Tribe or State may require that a 404(b)(1) analysis be updated based on a change in circumstances, either on their own motion, or at the request of Federal agency reviewers or the public. Federal agency reviewers or members of the public who submit such a request must provide information supporting a change in circumstances for the Tribe or State to consider the request. A change in circumstances may be significant enough that the project no longer meets conditions for approval. Other factors may also weigh in favor of permit denial such as an applicant's non-compliance with the previous permit.

The proposed approach would improve environmental protections by ensuring that the scope of impacts associated with a complete project are factored into the permitting decision for each five-year permit. Tribal or State review of a 404(b)(1) analysis for a five-year permit does not constitute pre-approval of subsequent five-year permits for the project and there is no guarantee that an applicant for a long-term project will receive all of the five-year permits needed to complete the project. That said, including a 404(b)(1) analysis for the full scope of the project with the application for the first five-year permit and modification of the 404(b)(1) analysis, as necessary, for subsequent five-year permits will help ensure consistency in permitting decisions associated with the project, thereby providing the applicant with more regulatory certainty than without such a plan.

iii. Clarification Regarding Long-Term Projects

The Agency is proposing to clarify that all aspects of the permit application, public notice, and Tribal or State review requirements set forth in 40 CFR 233.30, 233.32, and 233.34, respectively, apply to each permit application, including for projects that exceed a five-year schedule. Such clarification will help ensure that applicants, Tribes, and States comply with the five-year permit limitation set forth in CWA section 404(h)(1)(A)(ii). The Agency proposes to add language to 40 CFR 233.30(a) to make it clear that applicants for projects that take more than five years to complete must submit a complete application for each five-year permit. All public notices for such permits must contain the information provided in 40 CFR 233.32(d). In addition, the Agency is clarifying that the scope of information the Tribe or State may consider when reviewing a permit application may not be limited for any application, including applications for each five-year permit of a project that takes more than five years to complete. The Agency is also clarifying that the scope of comments the public may submit in response to the public notice, or public hearing if a hearing is held, may not be limited for any application, including applications for each five-year permit of a project that takes more than five years to complete.

c. Request for Comment

The Agency solicits comments on all aspects of the proposal laid out above. With respect to the process for permitting long-term projects, the Agency also solicits comments on an alternative approach based on project phase. Under the alternative approach, the applicant divides the project into phases that can reasonably be accomplished within five years but still submits with the application for the first five-year phase a 404(b)(1) analysis for the full scope of the project and modifies the 404(b)(1) analysis, as necessary, for subsequent five-year phases. In the case of the 15-year housing development project example above, under the alternative approach the first five-year permit would include a 404(b)(1) analysis addressing the full 15-year project scope, but would authorize discharges associated with the 200 houses intended for construction during the first five-years of the project. The discharges associated with the 400 houses intended to be constructed in the subsequent ten years would be authorized under second and third-round permits.

2. Tribes as Affected Downstream States

a. What is the Agency proposing?

EPA is proposing three changes to certain comment and review provisions as they relate to Tribal interests. First, any downstream Tribe that has been approved by EPA for treatment in a similar manner as a State (TAS) for any CWA provision would have an opportunity to suggest permit conditions for section 404 permits issued by upstream States and authorized Tribes that may affect the biological, chemical, or physical integrity of their reservation waters. The commenting Tribe would receive notice and an explanation if the permit-issuing Tribe or State does not address their comments. Currently only States and Tribes with TAS to assume the section 404 program have this comment opportunity. 40 CFR 233.31(a); 40 CFR 233.2.[42] Second, the Agency proposes to enable Tribes that have not yet been approved for TAS for any CWA provision to apply for TAS solely for the purpose of commenting as a downstream Tribe on section 404 permits proposed by States or other authorized Tribes. Finally, the Agency proposes to provide an opportunity for Tribes to request EPA review of permits that may affect Tribal rights or interests, even if Federal review has been waived. These proposed changes would increase the opportunities for Federally recognized Tribes to engage in the permitting process to protect their resources.

b. Why is the Agency proposing this approach?

Sections 404(h)(1)(C) and (E) of the CWA provide that a State, with respect

[42] For the sake of convenience, this proposal will refer to Tribes whose reservation waters could be affected by pending permits as ''downstream Tribes.''

to issuing a permit, must provide notice of each permit application to the public, and any other State whose waters may be affected, and provide an opportunity for a public hearing before ruling on each application. EPA's existing regulation at 40 CFR 233.31 contains a similar provision: ''if a proposed discharge may affect the biological, chemical, or physical integrity of the waters of any State(s) other than the State in which the discharge occurs, the Director shall provide an opportunity for such State(s) to submit written comments within the public comment period and to suggest permit conditions.'' Both the CWA and EPA's implementing regulations further provide that, if recommendations from the State whose waters may be affected are not accepted by the permitting State, the permitting State must notify the affected State and EPA Regional Administrator of its decision not to accept the recommendations and reasons for doing so. 33 U.S.C. 1341(1)(E); 40 CFR 233.31(a).

EPA's regulation at 40 CFR 233.2 defines the term ''State'' to include an Indian Tribe which meets the requirements of 40 CFR 233.60. Section 233.60 lists the eligibility requirements for a Tribe to assume the section 404 program. This definition could be read to limit the requirement in section 233.31 for States to coordinate with only those Tribes that meet the requirements for section 404 program assumption. No Tribe has yet applied for eligibility to assume the section 404 program, and, in pre-proposal outreach, many Tribes commented that they lack resources to assume the program. However, nearly half of Federally recognized Tribes have been approved for TAS for other CWA provisions and may have relevant water quality information that could inform the permitting decisions of upstream States. These Tribes may be interested in engaging with States on permitting decisions that may affect Tribal resources.[43] Consistent with the Federal trust responsibility and the policies underlying CWA section 518, EPA seeks to increase the opportunities of Tribes to comment and coordinate on proposed State CWA section 404 permits that could impact their waters and resources.

EPA notes that other mechanisms already exist that would require Tribal and State permitting authorities to protect Tribal interests, which this proposal does not implicate. For example, CWA section 404 permits for discharges must comply with all applicable state water quality standards (including standards in a downstream jurisdiction) in effect under the CWA. *See* 33 U.S.C. 1311(b)(1)(C); 40 CFR 230.10(b)(1) and 233.20(a). To the extent designated uses require consideration of cultural or traditional uses of water that may be important to Tribes, Tribal or State section 404 programs must consider those during the permitting process.

The following sections of this preamble discuss the three ways that EPA is proposing to expand opportunities for Tribes to provide input and identify concerns about permits that could affect Tribal waters and resources.

i. Enable Tribes With TAS for any CWA Provision To Comment as an Affected State

40 CFR 233.31(a) currently affords specific consideration of comments and suggested permit conditions on draft permits by an affected State and provides an avenue of review if a State with an assumed program chooses not to accept the suggested permit conditions. Under the current regulatory definition of ''State''—which includes Tribes that have obtained TAS for purposes of assuming the section 404 program—arguably no Tribes would presently be eligible to be considered an affected State, as no Tribes have yet obtained TAS status for purposes of assuming the section 404 program. EPA views all Tribes that have TAS status for any CWA purpose as entitled to participate in matters that may affect the chemical, physical, or biological integrity of reservation waters. EPA is proposing that Tribes that have already been approved for TAS by EPA to administer other CWA programs, such as a water quality standards (WQS) program under CWA section 303(c), and/or have been approved for TAS for any other CWA purpose, such as receiving section 106 grants to establish and administer programs for the prevention, reduction, and elimination of water pollution, should also have the opportunity to comment on draft permits in the same manner as affected States. This proposed provision would enable more Tribes, whose waters may be affected by an upstream dredge or fill project, to comment on permits to be issued by a permitting State in the same manner as other affected States.

Section 518 of the CWA expressly provides opportunities for Tribes to play essentially the same role in implementing the CWA on their reservations that States do outside of Indian country, authorizing EPA to treat eligible Federally recognized Tribes in a similar manner as a State for purposes of implementing and managing various environmental functions under the statute. The requirements for TAS are established in section 518 and are reflected in EPA regulations for various CWA provisions. Generally, the Tribes must be Federally recognized, have a governing body that carries out substantial governmental duties and powers, seek to carry out functions pertaining to the management and protection of reservation water resources, and be capable of carrying out the functions of the particular provision at issue. Of the 574 Federally recognized Tribes, over 285 have been granted TAS status for one or more CWA provisions. EPA maintains a website which lists all Tribes approved for TAS, which is updated bi-annually.[44]

This provision, if finalized, would mean that permitting States must consider comments from Tribes with TAS for any CWA provision whose reservation waters may be affected by a proposed discharge, in addition to any Tribes that have been approved for TAS to assume the section 404 program. Under the proposed revisions to section 233.31(a), a permitting State would need to provide an opportunity for Tribes with TAS for any CWA provision to submit written comments within the public comment period and suggest permit conditions. If the recommendations are not accepted by the permitting State, the permitting State would have to notify the affected Tribe and EPA Regional Administrator of its decision not to accept the recommendations and reasons for doing so. The Regional Administrator would then have time to comment upon, object to, or make recommendations regarding the Tribal concerns set forth in the original comment.

ii. Create TAS Option Specifically for the Ability To Comment as an Affected State

For the reasons described above, EPA also proposes a further opportunity for Tribes that lack TAS for any CWA provision to participate as affected downstream Tribes by establishing a regulatory provision for Tribes to apply for TAS for the sole purpose of commenting on Tribe- or State-issued CWA section 404 permits in the same manner as an affected State. Tribes that obtain TAS for this purpose would

[43] TAS information is updated bi-annually and can be found at *https://www.epa.gov/tribal/tribes-approved-treatment-state-tas.*

[44] Tribes with TAS for regulatory programs and administrative functions can be found at *https://www.epa.gov/tribal/tribes-approved-treatment-state-tas*; Tribes with TAS for section 319 grants can be found at *https://www.epa.gov/nps/current-tribal-ss319-grant-information.*

benefit from the same notification requirements that apply to any other commenting affected ''State.'' This would provide an avenue for Tribes that do not have the resources or the desire to assume the section 404 program and have not obtained TAS for other CWA purposes, to provide input and request consideration of suggested permit conditions for potential impacts of upstream permits on their reservation waters.

This approach is similar to approaches taken in other EPA programs. For example, the Agency's regulations under the Clean Air Act provide opportunities for interested Tribes to seek TAS authorization for distinct severable elements of programs under that statute. *See* 40 CFR 49.7(c). Under that authority, EPA has authorized TAS for the procedural comment opportunity provided in connection with issuance of certain permits by upwind permitting authorities, without requiring those Tribes to seek authorization for the entire relevant program. *See* 42 U.S.C. 7661d(a)(2).

EPA finds that it is appropriate to enable Tribes seeking to protect their aquatic resources to apply for TAS status for the distinct purpose of commenting in the same manner as an affected State, and to do so even if the Tribes do not take on the greater responsibility to administer a section 404 program. Nothing in the language of section 404 precludes this approach. These proposed revisions would relate solely to the coordination requirements set forth in section 233.31(a). The opportunity to provide comments and suggest permit conditions established in CWA sections 404(h)(1)(C) and (E) and the existing regulation at 40 CFR 233.31 does not involve any exercise of regulatory authority by the downstream affected entity, whether a State, a Tribe with an assumed section 404 program, or a Tribe that seeks TAS solely for the downstream commenting function. Due to the limited nature of TAS solely for purposes of commenting as an affected State, EPA anticipates that the application burden on interested Tribes would, in most circumstances, be minimal and that the process for review of Tribal applications would be straightforward. As with other TAS applications, interested Tribes would submit relevant information demonstrating that they meet the TAS eligibility criteria to the appropriate Regional Administrator, who would process the application in a timely manner. Because, as described above, commenting in the same manner as an affected State does not involve any exercise of regulatory authority by the applicant Tribe, no issues regarding Tribal regulatory authority should be raised or decided in this limited TAS context. In this sense, TAS applications for this purpose would be similar to TAS applications for the purpose of receiving grants, a process that many Tribes have undergone and with which EPA has substantial experience. Similarly, Tribes interested in this TAS opportunity would need to demonstrate their capability solely for the limited purpose of submitting comments as a downstream Tribe. They would not need to demonstrate capability to administer an assumed section 404 program. The proposed regulatory revision would expand the number of Tribes able to participate in this comment opportunity.

iii. Opportunity for Tribes To Request EPA Review of Permits That May Affect Tribal Rights or Interests

Finally, EPA proposes to revise section 233.51 to codify Tribes' opportunity to request EPA review of permits that Tribes view as potentially affecting Tribal rights or interests.[45] This may include rights or interests both in and outside of a Tribe's reservation and would facilitate EPA's review of permits that have the potential to impact waters of significance to Tribes. This provision is intended to be an opportunity for coordination on potential impacts to Tribal rights and resources not covered by any other commenting option. Given the expanded TAS provisions, EPA anticipates that Tribes will use this opportunity in limited circumstances and that this will not be used for every permit application under public notice.

This provision would provide that a Tribe may notify EPA within 20 days of public notice of a permit application that the application potentially affects Tribal rights or interests, including those beyond reservation boundaries, even if Federal review has been waived. If a Tribe does so, EPA will request the public notice and will proceed in accordance with section 233.50, including providing a copy of the public notice and other information needed for review of the application to the Corps, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service. Pursuant to section 233.50, if EPA objects to a draft permit, the State may not issue the permit unless it has taken steps required by EPA to eliminate an objection.

EPA is proposing to add this regulatory provision explicitly providing Tribes the opportunity to request EPA's review of permit applications on a case-specific basis to address input from Tribes that EPA received during pre-proposal outreach. Several Tribal stakeholders expressed concern that their aquatic and cultural resources outside of their reservations may be affected by activities permitted under assumed section 404 programs. Some Tribes expressed concern that there is no reliable instrument for coordination with States assuming the section 404 program regarding potential impacts on historical and cultural sites or Tribal natural resource rights located outside of reservation lands. Tribes referenced the Federal trust responsibility to Federally recognized Tribes, which forms an important element of the Tribal-Federal relationship but which does not apply to States that assume the section 404 program, as well as other aspects of Federal law. Tribes expressed an interest in creating a mechanism that requires EPA to consider and protect Tribal resources, specifically those off reservation. Additionally, some Tribes have raised concerns over resource limitations for review of all permit applications statewide. The proposed approach would afford protection to Tribal resources by virtue of EPA's oversight of permit applications that Tribes have identified as having a potential impact on Tribal resources.

c. Request for Comment

EPA is seeking comment on these proposed approaches and solicits suggestions of other approaches for providing additional appropriate opportunities for involvement by Tribes whose waters and interests both on and off reservation may be affected by a proposed State permit.

[45] On December 5, 2022, EPA issued a proposed rule entitled ''Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights.'' 87 FR 74361 (December 5, 2022). That rule proposes to amend EPA's existing water quality standards (WQS) regulation, 40 CFR 131 *et seq.,* to, in pertinent part, define ''tribal reserved rights'' for WQS purposes as ''any rights to aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of federal law.'' 87 FR 74361, 74378. The proposed revisions to section 233.51 would enable Tribes to request EPA's review of permits that may affect both rights reserved through treaties, statutes, executive orders, or other sources of Federal law, as well as Tribal interests in resources that may not be reflected in Federal law but are nonetheless of significance—*e.g.,* of cultural significance—to Tribes. The proposed provision at section 233.51 would apply whenever a Tribe asserts that issuance of a particular permit would affect its rights or resources; however, EPA's review of a permit pursuant to proposed section 233.51 would not constitute a recognition by EPA that any particular Tribe holds reserved rights, as defined in EPA's proposed WQS rule, in that area.

D. Compliance Evaluation and Enforcement

1. What is the Agency proposing?

EPA proposes to amend its criminal enforcement requirements in 40 CFR 123.27 and 40 CFR 233.41 to provide that Tribes and States that are authorized to administer the CWA section 402 NPDES permitting program and/or the CWA section 404 dredged and fill permitting program, or that seek authorization to do so, are required to authorize prosecution based on a *mens rea,* or criminal intent, of any form of negligence, which may include gross negligence.

2. Why is the Agency proposing this approach?

The existing regulations describing the *mens rea* applicable to Tribal and State programs at 40 CFR 123.27(a)(3)(ii) and 40 CFR 233.41(a)(3)(ii) do not clearly articulate EPA's current interpretation of the statute. EPA interprets the CWA to authorize it to approve Tribal or State programs that allow for prosecution based on a *mens rea* of any form of negligence, including gross negligence. This proposal sets forth regulatory revisions that are consistent with this interpretation. EPA proposed the identical regulatory revisions in the **Federal Register** on December 14, 2020, 85 FR 80713. Seven unique comments were received by EPA on this proposal: five comments were in support of the proposed rulemaking and two were opposed. Since the revisions proposed in 2020 were the same as those in the current proposal, EPA plans to respond to those comments along with any comments that are received on the current proposed rule.

The proposed amendments provide clarity for Tribes and States that have been approved to administer or are interested in obtaining EPA approval to administer their own section 402 or 404 program under the CWA. EPA anticipates that States that already administer these CWA programs will not need to make any changes to their legal authority. Instead, these regulatory clarifications will generally assure approved States that their current negligence *mens rea* authorities comport with EPA's interpretation of the *mens rea* applicable to authorized Tribal and State CWA sections 402 and 404 programs. Additionally, this clarification will provide those Tribes and States interested in seeking approval to administer the CWA sections 402 and 404 programs, respectively, with clarity regarding the legal authorities required for approval by EPA.

a. Background

The CWA provides that Tribes and States seeking approval for a permitting program under CWA section 402 or CWA section 404 must demonstrate adequate authority ''[t]o abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.'' 33 U.S.C. 1342(b)(7) and 1344(h)(1)(G). EPA's regulations currently provide that a Tribal or State agency administering a program under CWA section 402 must provide for criminal fines to be levied ''against any person who willfully or negligently violates any applicable standards or limitations; any NPDES permit condition; or any NPDES filing requirement.'' 40 CFR 123.27(a)(3)(ii). Similarly, EPA's regulations currently provide that any Tribal or State agency administering a program under section 404 of the CWA shall have authority to seek criminal fines against any person who ''willfully or with criminal negligence discharges dredged or fill material without a required permit or violates any permit condition issued in section 404. . . .'' 40 CFR 233.41(a)(3)(ii).

The regulations implementing both statutory programs also provide that the ''burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must bear when it brings an action under the Act.'' 40 CFR 123.27(b)(2); 40 CFR 233.41(b)(2). Additionally, the implementing regulations for CWA section 402 include a note, not present in the CWA section 404 implementing regulations, which states, ''[f]or example, this requirement is not met if State law includes mental state as an element of proof for civil violations.'' 40 CFR 123.27(b)(2).

In contrast to the statutory language of CWA sections 402 and 404, section 309(c) specifically provides EPA with enforcement authority to establish misdemeanor criminal liability in subsection (c)(1) and a range of penalties for ''[n]egligent violations'' of specified provisions. It also authorizes felony liability and a higher range of penalties for ''knowing violations'' of the CWA in subsection (c)(2). Beginning in 1999, three circuit courts of appeal determined that criminal negligence under CWA section 309(c)(1) is ''ordinary negligence'' rather than gross negligence or any other form of negligence. *U.S.* v. *Hanousek,* 176 F.3d 1116, 1121 (9th Cir. 1999); *U.S.* v. *Ortiz,* 427 F.3d 1278, 1282 (10th Cir. 2005); *U.S.* v. *Pruett,* 681 F.3d 232, 242 (5th Cir. 2012). These courts did not address whether this provision implicates Tribal or State programs administering CWA section 402 or 404 programs.

On September 10, 2020, the Ninth Circuit Court of Appeals issued an unpublished decision that granted in part and denied in part a petition by the Idaho Conservation League for review of EPA's approval of Idaho's NPDES permitting program. *Idaho Conservation League* v. *U.S. EPA,* 820 Fed. Appx. 627 (9th Cir. 2020)(''*Idaho Conservation League*''). The League challenged EPA's approval of Idaho's program in part on the grounds that Idaho lacks authority to bring enforcement actions based on a simple negligence *mens rea,* which the League alleged EPA's regulations require. Relying on the Ninth Circuit case law noted above, which holds that EPA enforcement actions are subject to a simple negligence standard, the court determined that EPA abused its discretion in approving a program authorizing a *mens rea* of gross negligence because it is ' ''greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action . . . '40 CFR 123.27(b)(2).'' While the court recognized that ''a State program need not mirror the burden of proof and degree of knowledge or intent EPA must meet to bring an enforcement action,'' citing EPA's Consolidated Permit Regulations, 45 FR 33290, 33382 (May 19, 1980), the court nevertheless held that EPA's current regulations at 40 CFR 123.27(b)(2) require a State plan to employ a standard ''no greater than'' simple negligence, such as strict liability or simple negligence. *Idaho Conservation League* at 628.

b. Statutory and Regulatory Framework for EPA's Interpretation

While EPA's own enforcement authority in CWA section 309(c)(1), 33 U.S.C. 1319(c)(1), as interpreted by the courts, requires only proof of ordinary negligence, that provision does not apply as a requirement for approval to Tribal or State programs. For section 402 and 404 programs, the CWA instead requires that EPA ''shall approve'' a State's application if it determines that the State demonstrates the authority to ''abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.'' 33 U.S.C. 1342(b)(7); 1344(h)(1)(G). These statutory provisions do not establish specific *mens rea* requirements or penalties for Tribal and State programs.

In addressing the enforcement requirements for State programs, Congress did not require Tribes and States to have identical enforcement authority to EPA's. Congress did not use the words ''all applicable,'' ''same,'' or any phrase specific to any *mens rea* standard, let alone the Federal standard, as it did in other parts of CWA sections 404(h) or 402(b). *See* 33 U.S.C. 1344(h), 1342(b). When ''Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'' *Sebelius* v. *Cloer,* 569 U.S. 369, 378 (2013) (internal quotations omitted). In contrast to the broad authority that CWA sections 404(h)(1)(G) and 402(b)(7) provide to determine whether Tribes and States have demonstrated adequate authority to abate violations, other aspects of Tribal and State programs are explicitly required to have authority that is equivalent to or more stringent than EPA's authority.

For example, States must have the authority ''[t]o inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.'' 33 U.S.C. 1344(h)(1)(B); 1342(b)(2)(B). Similarly, CWA section 404(h)(1)(B) requires State-issued permits to ''apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title.'' 33 U.S.C. 1344(h)(1)(A)(i); and CWA section 402(b)(1)(A) requires States to issue permits in compliance with ''sections 1311, 1312, 1316, 1317, and 1343 of this title.'' 33 U.S.C. 1342(b)(1)(A). The more general language used to require Tribes and States to demonstrate adequate authority to abate violations indicates that Congress intended to allow for some flexibility in EPA's ability to approve Tribal and State approaches to certain aspects of enforcement. *See* 33 U.S.C. 1342 (b)(7). EPA interprets CWA sections 402 and 404 to allow for approved Tribal and State programs to have a somewhat different approach to criminal enforcement than the Federal Government's approach, namely, that Tribal and State programs do not need authority to prosecute based on a simple negligence *mens rea.* However, the proposed approach would require that Tribes and States be able to implement the text of section 309, requiring authority to prosecute based on a negligence *mens rea.*

EPA's interpretation is consistent with case law. In *NRDC* v. *U.S. EPA,* the petitioner challenged the validity of 40 CFR 123.27(a)(3) on the theory that it did not require States to have the same maximum criminal penalties as the Federal program. 859 F.2d 156 (D.C. Cir. 1988). The court reasoned that the petitioner's argument involved a ''logical infirmity'' because it ''presume[d] an unexpressed congressional intent that state requirements must mirror the federal ones,'' which is ''inconsistent with the elements of the statutory scheme limiting operation of the provisions to enforcement efforts at the national level and explicitly empowering the Administrator to set the prerequisites for state plans.'' *Id.* at 180 (discussing 33 U.S.C. 1314(i)(2)(C)). The D.C. Circuit recognized EPA's ''broad[ ] discretion to respect state autonomy in the criminal sector'' and that the regulations ''reflect the balancing of uniformity and state autonomy contemplated by the Act.'' *Id.* at 180–81. The court declined to ''disturb this 'reasonable accommodation of manifestly competing interests,' '' and upheld the agency's penalty regulations. *Id.* at 181 (citing *Chevron U.S.A.* v. *NRDC,* 467 U.S. 837, 865 (1984)).

EPA's interpretation is also consistent with the Ninth Circuit's decision in *Akiak Native Community* v. *EPA,* where that court declined to require that States have authority to impose administrative penalties identical to Federal authority. *See Akiak Native Community,* 625 F.3d 1162, 1171–72 (9th Cir. 2010). In that case, the petitioner argued that the State of Alaska did not have adequate authority to abate violations because Alaska had to initiate a legal proceeding to assess civil penalties, whereas EPA could do so administratively. *Id.* at 1171. The Court held that because ''[t]here is no requirement in the CWA . . . that state officials have the authority to impose an administrative penalty'' and ''[t]he language of the statute says nothing about administrative penalties,'' ''there is no reason to conclude that Alaska lacks adequate enforcement authorities.'' *Id.* 1171–72.

Finally, EPA's interpretation that CWA sections 402 and 404 do not require Tribes and States to have authority identical to EPA's to prosecute violations based on simple negligence under CWA section 309 is consistent with the Ninth Circuit's acknowledgement in *Idaho Conservation League* v. *EPA* that ''a state program need not mirror the burden of proof and degree of knowledge or intent EPA must meet to bring an enforcement action.'' 820 Fed. Appx. 627, 628, citing Consolidated Permit Regulations, 45 FR at 33382 (May 19, 1980).

This proposed rulemaking would clarify the criminal intent requirements for existing and prospective Tribal and State enforcement programs under CWA sections 402 and 404. As discussed above, this proposed rulemaking would codify EPA's interpretation of Tribal and State criminal intent requirements that the Agency presented to the Ninth Circuit in *Idaho Conservation League* v. *EPA,* 820 Fed. Appx. 627 (9th Cir. 2020), which is itself consistent with EPA's interpretation that Tribal and State programs are not required to have the identical enforcement authority to EPA's under CWA section 309.

EPA views the other existing requirements for enforcement authority in 40 CFR 123.26, 123.27, and 233.41, which require, among other things, that a Tribe or State maintain a program designed to identify persons subject to regulation who have failed to obtain a permit or to comply with permit conditions, engage in inspections and information gathering, and have the authority to sue to enjoin or seek penalties for violations of sections 402 and 404, as sufficient to indicate that Tribes and States must operate compliance and enforcement programs that satisfy the language and purpose of CWA 402(b)(7) and 404(h)(1)(G) to ''abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.'' Indeed, section V.A.1 of this preamble, Program Assumption Requirements, would further buttress the requirements of 40 CFR 233.41.

EPA has previously asserted its interpretation that Tribes and States do not need authority to prosecute criminal violations based on a simple negligence *mens rea,* including in *Idaho Conservation League* v. *EPA.* 820 Fed. Appx. 627 (9th Cir. 2020). Yet to the extent EPA's interpretation is viewed as different from any earlier interpretations of CWA sections 402 and 404 and implementing regulations, EPA has ample authority to change its interpretation of ambiguous statutory language. An ''initial agency interpretation is not instantly carved in stone.'' *Chevron,* 467 U.S. at 863; *see also Encino Motorcars, LLC* v. *Navarro,* 136 S. Ct. 2117, 2125 (2016) (''[A]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change.'') (citations omitted). Rather, a revised rulemaking based on a change in interpretation of statutory authorities is

well within Federal agencies' discretion. *Nat'l Ass'n of Home Builders* v. *EPA,* 682 F.3d 1032, 1038 (D.C. Cir. 2012) (citing *FCC* v. *Fox Television Stations,* Inc., 556 U.S. 502, 515 (2009)). The agency must simply explain why ''the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.'' *Fox Television Stations,* 566 U.S. at 515. This preamble meets this standard, providing a reasoned explanation for EPA's proposal and its consistency with the CWA.

Though under this proposal EPA is not requiring Tribes or States to have the same criminal enforcement authority that courts have interpreted EPA to have, the Tribal or State standard would still be based on the term ''negligence'' in the text of CWA section 309. Allowing Tribes or States flexibility in the degree of negligence for which they are authorized to bring criminal cases balances the CWA's priorities of allowing for Tribal or State autonomy with adherence to the purposes of the Act. As noted above, neither CWA section 402(b)(7) nor CWA section 404(h)(1)(G) requires States to abate violations in the same manner as required under CWA section 309. The absence of any citation to CWA section 309 in CWA sections 402(b) and 404(h) indicates that some degree of variability may be permitted between Federal and Tribal or State approaches to enforcement.

This variability does not detract from the obligation for Tribes and States to operate meaningful programs to abate permit program violations, including through penalties and other ways and means of enforcement, and consistent with the regulatory requirements for Tribal and State enforcement authority. *See* 33 U.S.C. 1342(b)(7), 1344(h)(1)(G); 40 CFR 233.41. Moreover, Tribes and States may of course continue to authorize criminal prosecutions based on a simple negligence *mens rea.* EPA may consider the presence of that authority as one factor when comprehensively assessing the adequacy of the Tribe's or State's enforcement program in its program submission.

The proposed regulatory clarification reflects EPA's experience in approving and overseeing CWA State programs for over thirty years. Many States administering or seeking to administer the programs do not currently have authority to prosecute based on a simple negligence *mens rea,* and indeed, may have statutory or other legal barriers to such standards. EPA is unaware of any concrete evidence indicating that the absence of a simple negligence *mens rea* for criminal violations has served as a bar to effective State enforcement programs, and the requirement to have such a standard could dissuade Tribes and States from seeking to administer these programs in the future or potentially motivate States to return their approved programs to EPA. Clarifying that Tribes and States do not need authority to prosecute based on a simple negligence *mens rea* in their criminal enforcement programs therefore advances the purposes of CWA sections 402(b) and 404(g) to balance the need for uniformity with Tribal and State autonomy, *see NRDC,* 859 F.2d at 181 (D.C. Cir. 1988), and to encourage Tribal and State assumption of Federal programs under the CWA consistent with section 101(b) of the statute.

This proposal does not change the standard applicable to EPA's criminal enforcement of the CWA. Under CWA section 309, EPA retains its civil and criminal enforcement authority, including where Tribes and States have assumed a permit program. Notwithstanding Tribe or State *mens rea* authorities, Federal prosecutions are governed by the *mens rea* standards that Congress wrote into the statute in 1987, including that misdemeanor penalties apply to violations resulting from simple negligence and that felony penalties apply to violations resulting from knowing conduct.

Consistent with the CWA's requirement that Tribes and States administering CWA sections 402 or 404 permitting programs have the authority to abate civil and criminal violations, EPA is proposing to add language to 40 CFR 123.27(a) and 233.41(a)(3) indicating that Tribes and States must have the authority to ''establish violations,'' as well as ''to assess or sue to recover civil penalties and to seek criminal penalties,'' which these provisions already state. This new language simply confirms EPA's interpretation of the effect of its current regulations. EPA also proposes to remove the term ''appropriate'' from the current references to the degree of knowledge or intent necessary to provide when bringing an action under the ''appropriate Act'' from the CWA sections 402 and 404 regulations, as these regulations only refer to actions under the CWA and no other statute. Therefore, the term ''appropriate'' is unnecessary. Finally, in 40 CFR 233.41(a)(3), which currently requires Tribes and States to have the authority ''[t]o establish the following violations and to assess or sue to recover civil penalties and to seek criminal remedies,'' EPA proposes to replace the word ''remedies'' with ''penalties,'' as ''penalties'' is a more precise description of the type of relief sought in criminal enforcement actions. None of the proposed changes listed in this paragraph are intended to change the substantive effect of the regulations.

3. Request for Comment

EPA solicits comment on all aspects of this proposed change, including the extent to which States have implemented or relied upon the authority to prosecute violations of the section 402 or 404 programs based on simple negligence.

E. Federal Oversight

This section of the preamble includes topics that are generally related to EPA oversight of approved Tribal or State section 404 programs, including the requirement that programs be no less stringent than the CWA and implementing regulations, as well as program withdrawal procedures.

1. No Less Stringent Than

a. What is the Agency proposing?

The Agency's existing regulations provide that Tribes and States may not impose requirements less stringent than Federal requirements. EPA proposes to clarify this provision by codifying its longstanding principle that Tribes and States may not compensate for making one requirement more lenient than required under these regulations by making another requirement more stringent than required. The Agency also clarifies in the discussion below that an assuming Tribe or State must demonstrate that it will—at all times—have authority to issue permits for all non-exempt discharges of dredged and fill material to all waters of the United States [46] within its jurisdiction except for discharges to the subset of waters of the United States over which the Corps retains administrative authority pursuant to CWA section 404(g)(1). EPA clarifies that Tribes and States are not required to incorporate Corps or EPA interpretive guidance, such as Corps General Regulatory Policies in 33 CFR part 320 or Regulatory Guidance Letters, into their programs as a prerequisite to assuming administration of the CWA section 404 program. Finally, EPA is adding regulatory language to codify its long-held position that the Tribe or

[46] The permitting provisions of the CWA (as well as other provisions), including CWA section 404, apply to ''navigable waters.'' *See* 33 U.S.C. 1311(a). CWA section 502(7) in turn defines ''navigable waters'' as ''waters of the United States, including the territorial seas.'' *Id.* section 1362(7). The reference above to ''waters of the United States'' refers to the term in CWA section 502(7).

State is responsible for administering all portions of a CWA 404(g) program.

b. Why is the Agency proposing this approach?

Section 510 of the CWA provides: ''[i]f an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State . . . may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent. . . .'' 33 U.S.C. 1370. Consistent with CWA section 510, EPA's existing regulations at 40 CFR 233.1(d) require: ''Any approved State Program shall, at all times, be conducted in accordance with the requirements of the Act and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.'' *See also* 33 U.S.C. 1344(h)(1)(a)(i); 40 CFR 233.20(a), 233.23(a), 233.34(a).

Broadly stated, the goal of those portions of the CWA and its implementing regulations that govern Tribal and State assumption of the CWA section 404 program is to ensure that a permit issued by an assuming Tribe or State will be consistent with the CWA to the same extent as a permit for the same discharge if issued by the Corps. Section 404(h)(1)(A)(i) of the CWA and 40 CFR 233.1(d), 233.20(a), 233.23(a), and 233.34(a) expressly require that permits issued by an assuming Tribe or State must apply and assure compliance with the CWA 404(b)(1) Guidelines, as discussed in section V.B.1 of this preamble, addressing Compliance with the CWA 404(b)(1) Guidelines.

Assuming Tribes and States should have flexibility to determine how best to integrate sufficient authority into their programs. That said, flexibility does not extend to tradeoffs among requirements. EPA addressed this limitation in the 1988 preamble to the CWA section 404 Tribal and State program regulations:

> ''Those parts of the State's program that go beyond the scope of Federal requirements for an approvable program are not subject to Federal oversight or federally enforceable. Of course, while States may impose more stringent requirements, they may not compensate for making one requirement more lenient than required under these regulations by making another requirement more stringent than required. . . . . A State's program must be at least as stringent and extensive as the Federal program.''

53 FR 20764, 20766 (June 6, 1988). EPA proposes to codify this principle prohibiting ''tradeoffs'' between more lenient and more stringent requirements in its section 404 Tribal and State program regulations to enhance clarity. This clarification exists in EPA's regulations governing the section 402 program. *See* 40 CFR 123.25(a), Note. EPA sees no reason not to provide similar clarity for section 404 programs.

Tribes and States wishing to assume the section 404 program must demonstrate consistency with aspects of the CWA beyond the CWA 404(b)(1) Guidelines. While a Tribe or State may regulate discharges that are not covered by the CWA, a Tribe or State program must regulate *at least* all non-exempt discharges of dredged and fill material to all navigable waters as defined by CWA section 502(7) (''waters of the United States'') within the Tribe's or State's jurisdiction except for discharges to the subset of waters of the United States over which the Corps retains administrative authority pursuant to CWA section 404(g)(1). This means that a Tribe or State wishing to assume administration of the CWA section 404 program may not exempt discharges other than those exempted pursuant to CWA section 404(f). It also means that when a Tribe or State assumes administration of the CWA section 404 program, the assuming Tribe or State assumes administrative authority to permit discharges to all waters of the United States within its jurisdiction except for the subset of waters of the United States over which the Corps retains administrative authority pursuant to CWA section 404(g)(1).[47] *See* 33 U.S.C. 1344(g)(1) (''The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction . . .''). The assuming Tribe or State enters into a Memorandum of Agreement with the Corps which, among other things, includes a ''description of waters of the United States within the State over which the Secretary retains jurisdiction.'' 40 CFR 233.14(b)(1).

To the extent the scope of waters of the United States changes, following court decisions or rulemaking, an assuming Tribe or State must at all times have authority to issue permits for discharges to all waters within its jurisdiction that are waters of the United States, except for discharges to the subset of waters of the United States over which the Corps retains administrative authority pursuant to CWA section 404(g)(1). Assumption of the section 404 program cannot result in a situation in which neither the assuming Tribe or State nor the Corps has authority to issue a permit for discharges to a water of the United States. The requirement that Tribes or States at all times have authority to issue permits for discharges to all waters of the United States within their jurisdiction is therefore generally not governed by 40 CFR 233.16(b), which addresses the modification of Federal statutes or other regulations.

As with the CWA 404(b)(1) Guidelines (*see* section V.B.1 of this preamble), Tribes and States seeking to assume the section 404 program need not adopt verbatim or incorporate by reference relevant portions of the CWA or its implementing regulations, though they may do so. EPA recommends that Tribes and States identify in the program description (40 CFR 233.10(b) and 233.11) and Attorney General Statement (*Id.* sections 233.10(c) and 233.12) those provisions of Tribal or State law that will ensure that the Tribe or State—at all times—will have sufficient authority to issue permits for non-exempt discharges to all waters of the United States within its jurisdiction except for discharges to the subset of waters of the United States over which the Corps retains administrative authority following assumption. Although a Tribal or State section 404 program must at all times cover all waters of the United States, except those retained by the Corps, the program can regulate discharges into Tribal or State waters in addition to the jurisdictional CWA waters.

Another question raised by stakeholders is the role in Tribal or State programs of interpretive guidance, such as the Corps' Regulatory Guidance Letters or other interpretive statements issued by the Corps and/or EPA. Nothing in the CWA or 40 CFR part 233 requires that Tribes or States wishing to assume the section 404 program formally adopt or incorporate into their programs Regulatory Guidance Letters or other formal interpretive statements

[47] As noted in the 1988 preamble, ''States may have a program that is *more . . . extensive* than what is required for an approvable program.'' 53 FR at 20766, June 6, 1988 (emphasis added). As described elsewhere in this preamble, Tribes and States may not assume *less* than what may be assumed under the CWA.

issued by the Corps and/or EPA. While helpful in providing transparency, clarity, and aiding in implementation of the Federal program, Federal agency interpretive guidance does not have the effect of regulation. Moreover, Federal agency interpretive guidance may evolve as regulators gain experience. Accordingly, while assuming Tribes and States may consider relevant Federal interpretive guidance and may choose to adopt it to aid in program implementation, they are not required to formally adopt Federal interpretive guidance as a prerequisite to assumption of the section 404 program. EPA recommends that Tribes and States provide transparency by describing as part of the Tribal or State program description (40 CFR 233.10(b) and 233.11) if and how they considered or will consider Federal interpretative guidance in the development of their program.

Tribal or State adoption of the Corps' General Regulatory Policies (33 CFR part 320) (including the Corps' ''public interest review'' at 33 CFR 320.4(a)) is also not required for program assumption. The CWA makes no reference to the Corps General Regulatory Policies, which by their own terms apply to a range of Corps regulatory authority, including, but not limited to, CWA section 404 (*see* 33 CFR 320.2). As previously described, the substantive environmental criteria used to evaluate discharges of dredged and fill material under CWA section 404 are set forth in the CWA 404(b)(1) Guidelines. *See* 40 CFR 230.2. Tribes or States are free, however, to incorporate elements of the Corps' General Regulatory Policies into their permitting procedures if they choose to do so.

Finally, EPA is adding regulatory language to codify its long-held position that the Tribe or State is responsible for administering all portions of a section 404(g) program. Certain regulations implementing CWA section 404 were drafted to refer to the authority of the Corps of Engineers without accounting for Tribal or State assumption of the section 404 program. When a Tribe or State assumes administration of the section 404 program, the Tribe or State becomes responsible for many of the actions that certain regulations attribute to the Corps of Engineers or District Engineer. This addition is clarifying that it is the assuming Tribe or State that is responsible for administering all sections of the approved section 404 program. It is important to note that only Tribal, State, or interstate agencies may assume administration of the section 404 program. While a Tribe or State may establish general permits for discharges of dredged or fill material for categories of similar activities that will cause only minimal adverse environmental effects individually or cumulatively, they may not delegate permitting responsibility to non-Tribal or non-State entities. 33 U.S.C. 1344(g)(1); 40 CFR 233.2 (definition of ''State'').

c. Request for Comment

EPA requests comment regarding its proposed codification of the longstanding principle that Tribes and States may not compensate for making one requirement more lenient than required under these regulations by making another requirement more stringent than required. EPA also requests comment regarding its view that Tribal and State programs must at all times have authority to issue permits for non-exempt discharges to waters of the United States within Tribal or State borders except for discharges to the subset of waters of the United States over which the Corps retains administrative authority pursuant to CWA section 404(g)(1). EPA requests comment as to any obstacles that this clarification might present to Tribe or State implementation of the section 404 program and suggestions as to ways of overcoming such obstacles.

EPA requests comments addressing the way in which Tribes and States wishing to assume administration of the CWA section 404 program can best demonstrate they have the authority to administer the approved program. In addition, EPA seeks comment on how EPA can clarify ways for Tribes and States to demonstrate that permits issued by the Tribe or State will be no less stringent than a permit for the same discharge if issued by the Corps. See further requests for comment in section V.B.1 of this preamble, addressing consistency with the CWA 404(b)(1) Guidelines.

2. Withdrawal Procedures

a. What is the Agency proposing?

EPA is proposing to simplify the process used by the Agency when withdrawing an assumed section 404 program from a previously authorized Tribe or State. The proposed revision provides that if the Regional Administrator finds that a Tribe or State is not administering the assumed program consistent with the requirements of the CWA and 40 CFR part 233, then the Regional Administrator shall inform the Tribe or State as to the alleged noncompliance and give the Tribe or State 30 days to demonstrate compliance. If compliance is demonstrated within those 30 days, then the Regional Administrator will so notify the Tribe or State and take no further action. If the Tribe or State fails to adequately demonstrate compliance within 30 days, the EPA Administrator will schedule a public hearing to discuss withdrawal of the Tribal or State program. Notice of the hearing will be widely disseminated and will identify the Administrator's concerns. The hearing will be held no less than 30 days and no more than 60 days after publication of the notice of the hearing and all interested parties will have the opportunity to make written or oral presentations. If, after the hearing, the Administrator finds that the Tribe or State is not in compliance, the Administrator will notify the Tribe or State of the specific deficiencies in the Tribal or State program and the necessary remedial actions. The Tribe or State will have 90 days to carry out the required remedial actions to return to compliance or the Administrator will withdraw program approval. If the Tribe or State completes the remedial action within the allotted time, or EPA concludes after the hearing that the Tribe or State is in compliance, the Tribe or State will be notified and the withdrawal proceeding concluded. Where the Administrator determines that the assumed program should be withdrawn, that decision will be published in the **Federal Register**, the Corps will resume permit decision-making under section 404 in all waters of the United States in the affected Tribe or State, and any provision in the CFR addressing that Tribe's or State's assumption will be rescinded.

b. Why is the Agency proposing this approach?

The existing section 404 Tribal and State program regulations, promulgated in 1992, set out a formal adjudicatory process for the withdrawal proceedings. The first section of the existing regulations at 40 CFR 233.53 addresses the situation where a Tribe or State voluntarily returns program responsibilities required by Federal law back to the Secretary of the Army. The next paragraph lists the various circumstances that might occasion the withdrawal of the assumed program, including when the Tribe's or State's legal authority, program operation, or enforcement program no longer meets applicable requirements or when the Tribal or State program fails to comply with the terms of the Memorandum of Agreement between the Tribe or State and EPA. The subsequent provisions of the existing regulations set forth the procedures to be followed to determine

whether to withdraw approval of a Tribal or State program. A withdrawal proceeding can be commenced on the Administrator's initiative, or in response to a petition from an interested person alleging failure of the Tribe or State to comply with the requirements of the regulations. Once the Administrator has determined that cause exists to commence proceedings, those proceedings are conducted as a formal adjudicatory hearing. The existing section 404 Tribal and State program regulations refer to EPA's 40 CFR part 22 regulations, which govern administrative adjudication of penalties assessed by EPA against alleged violators and are comparable to the rules for litigation in Federal district court. The proceeding includes provisions for motion practice and the presentation of evidence with the process set forth in detail in the regulations.

The last section of the existing regulations sets out the time frame for the Administrator's decision. Within 60 days after the adjudicatory process, the Administrator reviews the record and issues his or her decision. If the Administrator finds that the Tribe or State has administered the program in conformity with the CWA and the regulations, the process is terminated. If the Administrator finds that the Tribe or State has failed to administer the program in conformity with the CWA and the regulations, the Administrator must list the deficiencies in the program and provide the Tribe or State with no more than 90 days to take required corrective action. The Tribe or State must perform the corrective action and certify it has done so. If the Tribe or State does not take appropriate corrective action and file a certified statement in the time provided, the Administrator issues a supplementary order withdrawing approval of the program. Otherwise, the Administrator issues a supplementary order stating that approval of authority is not withdrawn.

This formal adjudication process is not required by the statute and its length and complexity would impose an unnecessary resource burden and other challenges for the Agency, Tribes and States, and stakeholders. EPA is therefore proposing a streamlined process that is easier to understand and administer, and that encourages participation by interested parties. The substantive requirements of the proposed process are comparable to the existing one, but the proposed procedures would be less time—and resource—intensive and better aligned with EPA's section 404 program approval procedures. It is reasonable to establish withdrawal procedures that are more similar to the procedures used for approval than the existing approach in order to enhance efficiency of the withdrawal process. The proposed process is modeled on the withdrawal procedures for Tribal and State Underground Injection Control (UIC) programs at 40 CFR 145.34, and has been revised to accommodate the requirements of section 404. EPA views the UIC program's approach as more transparent and efficient than the existing section 404 program withdrawal procedures.

Enhancing administrability does not mean that EPA intends to take program withdrawal lightly, and EPA's experience with CWA programs reflects that this process has been carefully and rarely used. Consistent with EPA's longstanding practice, the Agency will first seek to resolve program concerns and help enable Tribes and States to administer the section 404 program consistent with the requirements of the CWA and its implementing regulations. EPA is committed to working with Tribes and States through mechanisms such as annual program report reviews, informal program reviews, and formal program reviews to identify program challenges and recommended steps for resolution.

c. Request for Comment

EPA requests comment on all aspects of this proposed revision. EPA is particularly interested in any recommendations to modify the proposed withdrawal procedure. For example, EPA welcomes any suggestions to extend or shorten deadlines for the Tribe or State to come into compliance with the CWA or implementing regulations, such as limiting the Tribe or State to a 60-day remediation period or to either remove or lengthen the initial 30-day notice period in section 233.53(1) to 60 or 90 days. EPA also welcomes suggestions for modifying the proposed opportunities for public input.

3. Program Reporting

EPA is proposing to specify in section 233.52(b) that the Tribal or State program annual report requires certain information not in the existing regulations. The proposal would clarify that the self-assessment should be an overview of the Tribal or State program including the identification of implementation challenges along with solutions that will address the challenges. The self-assessment should evaluate the program components as well as provide any quantitative reporting required in the existing regulations. The intent is to provide a robust overview and picture of the Tribe's or State's program and implementation and support continuous improvement. The Agency also proposes to add a requirement that the program annual report include specific metrics related to compensatory mitigation and resources and staffing. These revisions would clarify expectations for the program annual reports, facilitate EPA's review of the annual report, and support the Agency's oversight responsibilities to ensure program operation is consistent with the Act. Additionally, the Agency is proposing to revise section 233.52(e) to add the word ''final'' between ''Regional Administrator's'' and ''comments'' to acknowledge that some discussion may occur between the Tribe or State and the EPA as the annual report is being finalized. Finally, the Agency is proposing to require that the Director make the final annual report publicly available. EPA requests comment on all aspects of this proposed revision to program reporting requirements and processes.

F. General

This section of the preamble includes additional topics related to Tribal and State program assumption including partial assumption, dispute resolution procedures, and conflict of interest provisions.

1. Dispute Resolution

a. What is the Agency proposing?

EPA proposes to add a general provision to the purpose and scope section of the regulations that would clarify EPA's role in facilitating the resolution of potential disputes between the Tribe or State and Federal agencies and provide for resolution or elevation procedures to be specifically articulated in the Tribal or State Memoranda of Agreement or resolved on a case-by-case basis.

b. Why is the Agency proposing this approach?

The Agency recognizes that Tribes or States seeking to assume administration of the section 404 permitting program may encounter disputes or disagreements unique to implementing that program. For example, Tribes and States could potentially encounter disputes with permittees or other affected parties regarding permitting decisions, as well as disagreements with Federal agencies that could arise in the assumption process or program implementation concerning issues such as the appropriate permitting authority

or conditions to avoid or minimize impacts to historic properties, threatened or endangered species, or critical habitat. Several Tribes and States have requested that EPA help to resolve such disputes about issues including, but not limited to, the development of the retained waters list, development of a transfer plan for permits currently under review by the Corps, addressing endangered species and historic properties during permit review, and determining whether a discharge affects a downstream State. EPA's engagement as a third party in such discussions can help to resolve impasses and ensure the program is administered consistent with CWA requirements.

The existing CWA section 404 Tribal and State program regulations provide several mechanisms for resolving certain types of disagreements. For example, a Tribe or State must provide for administrative and judicial review procedures. 40 CFR 233.10(b). The existing regulations at 40 CFR 233.50 establish processes for addressing EPA's comments, conditions, or objections to potential Tribal or State permits. EPA is not proposing changes to these existing processes, but proposes to further clarify the provisions regarding judicial review and rights of appeal that States provide on final permit decisions (*see* section V.B.2 of this preamble).

A Tribe or State may interact with other Tribes or States or Federal agencies besides EPA both while seeking to assume and when administering a section 404 permit program. Those interactions may result in disagreements. Congress authorized EPA to serve an oversight role for Tribal and State section 404 programs. EPA's authority encompasses the coordination of Federal comments on draft Tribe or State-issued permits and the ability to review, comment on, or object to these draft permits. 40 CFR 233.50. In this role, EPA, as a practical matter, works to resolve differences between Tribes or States and Federal agencies, particularly when reviewing draft permits.

The CWA specifies that the Corps retains permitting authority for certain waters even after a Tribe or State has assumed the section 404 program. In this rulemaking, EPA is proposing to clarify how retained waters are identified (*see* section V.A.2 of this preamble); however, EPA may still assist in resolving issues raised about the scope of retained waters. For example, the Tribe or State may disagree with the Corps about whether a proposed project would result in discharges to assumed or retained waters. As EPA is responsible for approving the jurisdictional scope of a Tribal or State section 404 program, EPA can help resolve such disputes. Potential disagreements could also arise in other aspects of section 404 programs, including proper approaches to joint project permitting, administration of a compensatory mitigation program (such as mitigation banking or in-lieu fee programs), the determination as to whether a particular permit application implicates a discharge into waters of the United States, and program conditions to avoid or minimize impacts to threatened or endangered Federally listed species or historic properties.

The Agency sees facilitating resolution of disputes as critical to establishing and sustaining viable Tribal and State section 404 permitting programs. Rather than attempt to articulate in the regulations all potential areas where a dispute may arise, EPA proposes to add a general provision to the Purpose and Scope section of the regulations to clearly articulate that EPA may facilitate resolution to potential disputes between the Tribe or State and Federal agencies and provide for resolution or elevation procedures to be specifically articulated in the Tribal or State Memoranda of Agreement or resolved on a case-by-case basis through discussions convened by the EPA. EPA views this clarification as consistent with its program approval and oversight authority in CWA sections 404(h)–(j).

c. Request for Comment

EPA solicits public comment on other approaches to dispute resolution, including the particular role EPA can play in relation to Tribes and States as well as other Federal agencies; omitting the proposed provision; or requiring a provision addressing dispute resolution in Memoranda of Agreement between a Tribe or State and interested Federal agencies. EPA solicits comment as to whether these approaches or other alternatives would be more appropriate or effective for resolving potential disputes. EPA also solicits comment more generally regarding the role EPA should play in dispute resolution.

2. Conflict of Interest

a. What is the Agency proposing?

EPA is proposing to revise the regulatory prohibition against conflicts of interest in matters subject to decision by a Tribal or State permitting agency by clarifying that it applies to any individual with responsibilities related to the section 404 permitting program, as well as any entity that reviews decisions of the agency.

EPA also clarifies in this section of the preamble the importance of ensuring public confidence that permittees are treated consistently in circumstances where a Tribe or State issues a permit to one of its agencies or departments. However, EPA does not find that it is necessary to include in this proposed regulation specific processes or requirements to address self-issuance of permits by assuming Tribes and States.

b. Why is the Agency proposing this approach?

EPA's existing section 404 Tribal and State program regulations require that ''[a]ny public officer or employee who has a direct personal or pecuniary interest in any matter that is subject to decision by the agency shall make known such interest in the official records of the agency and shall refrain from participating in any manner in such decision.'' 40 CFR 233.4.

EPA is proposing to revise this regulatory prohibition against conflicts of interest to clarify, first, that this provision applies to any individual with responsibilities related to the section 404 program. The purpose of this clarification is to ensure that any individuals who may not be public officers or employees, but who exercise responsibilities over section 404 permitting and programs, are not involved in any matters in which they have a direct personal or pecuniary interest. Second, EPA is proposing to revise the provision to clarify that it applies to decisions by the agency as well as any entity that reviews decisions of the agency. As an example, if a Tribe or State has established boards or other bodies to advise, oversee, or review appeals of agency decisions, members of such boards would be subject to the conflict of interest provision, even if they are not officers or employees of the Tribe or State agency.

EPA's proposed revised conflict of interest provision would read:

> Any public officer, employee, or individual with responsibilities related to the section 404 permitting program who has a direct personal or pecuniary interest in any matter that is subject to decision by the agency shall make known such interest in the official records of the agency and shall refrain from participating in any manner in such decision by the agency or any entity that reviews agency decisions.

This provision does not address and would not affect Federal or State court review of permitting actions.

EPA considered codifying the conflict of interest provision from the section 402 regulations. The CWA required EPA to establish guidelines for section 402 State programs that prohibit any entity

which approves permit applications from having members who receive, or have during the previous two years received, a significant portion of their income from permit holders or applicants for a permit. 33 U.S.C. 1314(i)(D). EPA's section 402 regulations, accordingly, provide that ''State NPDES programs shall ensure that any board or body which approves all or portions of permits shall not include as a member any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.'' 40 CFR 123.25(c). The provision then defines the terms ''board or body,'' ''significant portion of income,'' ''permit holders or applicants for a permit,'' and ''income.'' *See id.* at § 123.25(c)(1).

EPA had proposed codifying the section 402 provision in its revisions to the section 404 Tribal and State program regulations in 1988. However, EPA ultimately decided not to hold Tribe and State section 404 programs to the same conflict of interest standards as State NPDES programs because of factual differences between the two programs. EPA noted that NPDES discharges are usually long-term discharges, often from certain specific types of industrial or municipal facilities. In contrast, discharges authorized by section 404 typically tend to be one time, of shorter duration, and by a broader range of dischargers than NPDES, ''ranging from private citizens to large corporations, from small fills for boat docks or erosion prevention to major development projects.'' 53 FR 20766 (June 6, 1988). EPA therefore concluded that an absolute ban on anyone with a financial interest in a permit from serving on a board that approves permits is likely to be more difficult to comply with under the section 404 program because so many people would be considered to be financially interested in section 404 permits and therefore eliminated from the pool of potential board members.

Similar distinctions between the sections 402 and 404 programs apply today, and the rationale in the 1988 preamble for not codifying the section 402 conflict of interest provision remains valid. For example, if an individual needed a section 404 permit for the discharge of fill material into one lake to install a boat ramp at one point in time, EPA does not think it necessary to permanently preclude that individual from participating in any section 404-related decision-making. In addition, the existing conflict of interest prohibition, with the proposed modification, provides sufficient safeguards to avoid conflicts of interest. It ensures that anyone with a direct personal or pecuniary interest in a particular permit decision or other program approval must make such interest known and must not participate in that permit decision. This new language allows more latitude in who may serve on a board than the NPDES conflict of interest provision, but still provides that there not be a conflict of interest or appearance of conflict of interest in any particular decision associated with the administration of a section 404(g) program.

EPA is not proposing to codify regulatory language to address concerns about potential conflicts of interest related to the issuance of permits by Tribal or State permitting agencies to authorize activities by those same agencies, or activities by other Tribal or State agencies or departments. During the early outreach process with Tribes and States for this proposed rule, some expressed concern that a Tribal or State agency may not be impartial when regulating itself. For example, they were concerned that a State department of transportation issuing a permit to itself for discharges of dredged or fill material associated with transportation-related projects or the State environmental agency issuing a permit to a State parks agency for discharges of dredged or fill material associated with a dock on a recreational lake may not scrutinize the permit application as rigorously as they might review an outside party's application. It is important to ensure public confidence that permittees are treated consistently in circumstances where a Tribe or State issues a permit to one of its agencies or departments. However, EPA concludes that it is not necessary to codify any new requirements to address self-issuance of permits by assuming Tribes and States.

The CWA does not distinguish between a Tribe or State with an approved program as a permittee and other permittees. Most States have experience issuing permits to other agencies within that respective State. For example, States that implement the section 402 program routinely issue NPDES permits to various departments and agencies within that State.[48] To the extent the courts have considered this matter, they have found no legal impediment to issuance of an NPDES permit by an authorized State to itself. *See, e.g., West Virginia Highlands Conservancy, Inc.* v. *Huffman,* 625 F.3d 159 (4th Cir. 2010). EPA is unaware of any significant concerns arising from the issuance of NPDES permits by States to other agencies or departments within that respective State.

Likewise, to EPA's knowledge, the environmental agencies in Michigan and New Jersey have been issuing section 404 permits to authorize the agencies' own activities and activities of other agencies within those States for many years without encountering any significant issues of which EPA is aware. The Florida Department of Environmental Protection has been doing the same for over two years. A common example of self-issuance by one State agency to another is when the State environmental agency issues a permit to the State department of transportation for aquatic resource impacts associated with the construction of a State road. Similarly, the Corps issues CWA section 404 permits to other Federal agencies, and EPA has not seen any reason to doubt that these intra-governmental permitting processes maintain full integrity and neutrality. When the Corps is engaging in civil works projects, the Corps undertakes a process that is substantially similar to the CWA section 404 permit process, including preparation of a Section 404(b)(1) Evaluation Document, obtaining a State CWA section 401 certification, and engaging in public notice and comment.[49]

Tribes and States that assume the CWA section 404 program must follow public notice and comment procedures for permit applications, thereby ensuring transparency and providing the public with an opportunity to submit input to address any concerns. Additionally, the CWA provides EPA with oversight authority of Tribes' and States' assumed section 404 permits, allowing Federal review of assumed programs in general and applications for particular proposed permits, including self-issued permits. For all of these reasons, EPA does not find that it is necessary to include in this regulation any additional processes or requirements to address self-issuance of permits by assuming Tribes and States and is not proposing any modifications to this existing regulatory text to address Tribal and State self-issuance.

[48] One territory, the Virgin Islands, and all states except Massachusetts, New Hampshire, New Mexico, are authorized to implement at least some portion of the NPDES program. See *https://www.epa.gov/npdes/npdes-state-program-information.*

[49] The process is summarized in the Corps Planning Guidance Notebook (Engineer Regulation ER 1105–2–100), which provides overall direction by which civil works projects are formulated, evaluated and selected for implementation. *Available at: https://planning.erdc.dren.mil/toolbox/library/ERs/entire.pdf.*

EPA notes that Tribes, States, and EPA have the discretion to implement additional measures if, in a particular circumstance, they desire to further ensure public confidence that certain permits are consistent with the CWA and not the subject of special considerations. For example, an assuming State could maintain separation of the permit-issuing function from State departments, agencies, and sections that apply for and receive permits. An assuming State also could include within its regulations other processes to promote transparency, such as by voluntarily expanding public participation requirements for self-issued permits. EPA and an assuming State could also agree in the Memorandum of Agreement that EPA would retain heightened oversight (*i.e.,* would not waive review) over permits issued to State agencies or departments.

c. Request for Comment

EPA solicits comment on the proposed revision to the conflicts of interest regulatory prohibition. EPA also solicits comment from the public regarding its determination that no amendment to the regulations is warranted regarding Tribal and State permit self-issuance. EPA requests input from the public about any situations that have posed concerns about the ability of Tribes and States to self-issue permits in a neutral manner. EPA welcomes suggestions on specific procedures that Tribes, States, or EPA could establish to ensure public confidence in self-issued permits in addition to those articulated above, including creating distinct offices to focus solely on Tribe or State issued permits or specific protocols that would ensure such permits or agency decisions are processed in a manner consistent with the requirements of the CWA and are insulated from any special considerations.

3. Partial Assumption

The Agency is proposing not to revise the statement at 40 CFR 233.1(b), which clarifies that partial programs are not approvable under section 404.

Under the current regulations at 40 CFR 233.1(b), the assuming Tribe or State must have authority to regulate all non-exempt discharges to all waters of the United States within its borders except for the subset of waters of the United States over which the Corps retains administrative authority pursuant to CWA section 404(g)(1). This approach provides the most clarity to the public and the regulated community as to which waters are being assumed. It ensures consistency across the nation because permit applicants will be able to readily determine whether they need a Tribal or State permit or a Federal permit. Three states have already successfully assumed the program in this manner. Providing that assumption must encompass all waters of the United States except those waters that the Corps retains is also the approach most consistent with the CWA.

In 1987, Congress added section 402(n) to the CWA, specifically authorizing EPA to approve partial Tribal/State NPDES permit programs that ''cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program. . . .'' That provision specifies the scope of partial State section 402 programs that may be approved. Congress did not amend section 404 to add a parallel provision authorizing a Tribe or State to assume the authority to issue section 404 permits for just a portion of discharges into assumable waters. Given the absence of a provision in the section 404 program authorizing partial assumption parallel to the provision in the section 402 program, EPA maintains its longstanding interpretation that the best reading of the CWA ''requir[es] State programs to have full geographic and activities jurisdiction (subject to the limitation in section 404(g)).'' 53 FR 20764 (June 6, 1988). Because of the special status of Indian country, a lack of State authority to regulate activities on Indian lands will not cause the State's program to be considered a partial program. *See id.*

In addition to concluding that the statute does not authorize partial assumption, EPA also determined that partial assumption would be extremely difficult to implement. Numerous States have expressed an interest in being able to assume the authority to issue section 404 permits for just a portion of the section 404 regulated activities, or a portion of the assumable waters within the Tribe or State. Given this level of interest in partial assumption, EPA took a close look at potential approaches but found each to be difficult to implement. Partial assumption based on a size threshold for a project would be unworkable because the 'footprint' of a project may change during the execution of the project, which could result in the shifting of jurisdiction between the Federal and the assumed program. This outcome could conceivably encourage permittees to not reduce the footprint or impacts of their proposed project to remain with the Corps for the permit review process. Partial assumption based on a geographic area would also be challenging to implement, because Tribes and States could potentially divide watersheds or create a checkerboard of authority that could create problems in determining jurisdiction, as well as mitigation and enforcement. Partial assumption based on type of waterbody would pose difficulties because it might require a waterbody-by-waterbody determination to identify permitting authority, and a project might impact more than one waterbody, creating confusion as to whether the permitting authority is the Corps or the Tribe or State. Partial assumption that would allow for the assumption of certain aspects of the program, such as a Tribe or State taking on permitting but not enforcement, or vice versa, would cause unavoidable duplication of effort between the Tribe or State and the EPA and Corps. Dividing functions between the Federal and Tribal or State governments would also be confusing for the regulated public.

Another approach suggested by some Tribes and States is the phased assumption of program responsibilities, where the Tribe or State would ultimately assume the full program; however, it would be done in stages or phases. EPA considered this approach but concluded that implementing a phased approach would present all of the challenges listed above regarding identification of the permitting authority. Additionally, there are no tools available to the Agency to ensure that a Tribe or State continues to phase in all portions of the program, or to determine how much time should be allowed for the process; the only mechanism available to the Agency to address a failure to complete phasing-in the full program would be the withdrawal of the entire program.

Tribes and States not interested in full assumption can already take on a major role in the permitting process even without assuming the section 404 program. The Federal section 404 program provides mechanisms that allow for Tribal and State input in developing permits for specific activities or specific geographic areas within Tribal or State jurisdiction. In general, individual permits are issued by the Corps for projects that will have more than minimal individual and cumulative adverse environmental impacts. But most discharges of dredged or fill material covered by section 404 are permitted via general permits. In 1977, Congress amended section 404 to allow the Corps to issue Nationwide General Permits (NWPs), Regional

General Permits (RGPs), and State Programmatic General Permits (SPGPs). NWPs are defined by regulation, authorize activities across the country, and are issued for projects with minimal individual and cumulative adverse environmental impacts. *See* 33 U.S.C. 1344(e)(1). RGPs are general permits issued by the Corps with certain conditions that pertain to a limited (regional) geographic area. *See id.* SPGPs are general permits issued by the Corps that provide section 404 authorization for certain discharge activities if the permittee has secured a State permit for that same activity. *See id.* Some States have worked with the Corps to develop SPGPs, which create permitting efficiencies for certain projects within the State. While the Corps is still the section 404 permitting authority for SPGPs, they give the Tribe or State the ability to be actively involved, as well as the opportunity to create more stringent requirements than the Federal section 404 permitting program, without the burden of assuming and administering the section 404 program.

G. Potential Impacts of the Proposed Regulatory Changes on Existing State Section 404 Programs

This preamble section identifies parts of this proposed rule that may affect existing State-assumed section 404 programs by requiring them to modify their procedures or potentially expand the scope of their authority. Whether these proposed changes would require revisions to existing State-assumed programs depends on the existing authority of the States that have assumed the program and their implementation procedures, as well as the interpretation of these authorities and processes by State Attorneys General or State courts. These States may already have some or all of the authority or procedures in place that these provisions require. States that do not have the authority required to administer the provisions of the final rule would need to submit a program revision for EPA approval after issuance of the rule in accordance with 40 CFR 233.16.

EPA recognizes that ''[w]hen an agency changes course . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'' *Department of Homeland Security* v. *Regents of the University of California,* 140 S. Ct. 1891, 1913 (2020) (citations and internal quotation marks omitted.) EPA does not view the proposed regulatory changes as undermining serious reliance interests that outweigh the benefits of these changes. EPA's existing regulations contain detailed procedures for revising an approved section 404 program. 40 CFR 233.16. States seeking approval would therefore be well aware that program revisions may be necessary following assumption. Moreover, the program revision regulations specifically address revisions needed as a result of a change to the section 404 regulations, or to any other applicable statutory or regulatory provision. *Id.* at § 233.16(b). The regulations allow Tribes and States one year to make such revisions, or two years if statutory changes are required. *Id.* The 1–2 year revision period supplements the lengthy preliminary period for proposing this rule and soliciting and responding to public comments. Tribes and States therefore should anticipate the potential need to revise their programs based on Federal regulatory revisions following assumption. Finally, nothing in CWA section 404 suggests that EPA's approval of a Tribal or State program terminates the Agency's ability to update relevant regulations when necessary to effectively administer the Act. The Agency does not think Congress would have intended approvals to carry such a drastic consequence without saying so.

Proposed provisions that could affect existing programs include a provision ensuring opportunity for judicial review of agency decisions (section V.B.2 of this preamble), updates to the compensatory mitigation requirements for Tribal and State section 404 programs (section V.A.3 of this preamble), and a revised approach to addressing the five-year limit on permits (section V.C.1 of this preamble). In addition, a proposed clarification as to how Tribes and States can demonstrate that their programs are no less stringent than the Federal section 404 program (section V.E.1 of this preamble) and a proposed modification of the conflict of interest prohibition (section V.F.2 of this preamble) may affect existing State programs. The following discussion of certain elements of the proposal provides further details.

1. Judicial Review

EPA proposes to amend the existing regulations to clarify that States seeking to assume the section 404 program must provide for judicial review of decisions to approve or deny permits to the same extent that permittees can obtain judicial review in a Federal court of a Federally-issued NPDES permit (*see* CWA section 509). A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review), or if it requires the imposition of attorneys' fees against the losing party notwithstanding the merit of the litigant's position. This proposed provision could affect existing State section 404 programs if they do not meet this standard.

As noted above, EPA does not view this change as undermining reliance interests that outweigh its benefits. Furthermore, as discussed in section V.B.2 of this preamble, EPA has long required States to provide a description of their judicial review procedures in the program description. EPA has also long explicitly made clear that States seeking to assume the section 402 program must provide for judicial review of decisions to approve or deny permits to the same extent that permittees can obtain judicial review in a Federal court of a Federally-issued NPDES permit, and has never indicated that this requirement is uniquely suited to the section 402 program as distinguished from the section 404 program. Every State with an approved section 404 program also administers a section 402 program. Therefore, these States know that CWA programs have required the availability of judicial review akin to that available for Federally-issued permits, and EPA anticipates that ensuring this opportunity is available for their section 404 programs as well would be feasible.

EPA requests comment on this provision in section V.B.2 of this preamble. EPA also requests comment on the extent to which this provision would require changes to existing State programs.

2. Compensatory Mitigation

EPA is proposing to require that the program description that Tribes or States submit to EPA when seeking to assume the section 404 program include a description of the Tribe's or State's proposed approach to ensuring that all permits issued by the Tribe or State will apply and ensure compliance with the substantive criteria for compensatory mitigation consistent with the requirements of subpart J of the CWA 404(b)(1) Guidelines at 40 CFR part 230. The provision would clarify that the Tribe's or State's approach may deviate from the specific requirements of subpart J to the extent necessary to reflect Tribal or State administration of the program as opposed to Corps

administration, but may not be less stringent than the substantive criteria of subpart J. Subsequent to a review of the final rule, Michigan, New Jersey, or Florida may determine a program revision is necessary to ensure that any permits they issue will apply and ensure compliance with the substantive criteria for compensatory mitigation in subpart J and may not be less stringent than those criteria.

EPA is also proposing that if the Tribe or State establishes third party compensation mechanisms as part of their section 404 program (*e.g.,* banks or in-lieu-fee programs), instruments associated with these compensatory mitigation approaches must be sent to EPA, the Corps, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service for review prior to approving the instrument, as well as to any Tribal or State resource agencies to which the Tribe or State committed to send draft instruments in the program description. Note that this requirement does not include permittee-responsible compensatory mitigation. Tribes or States may also send draft instruments to other relevant Tribal or State resource agencies for review. If the Regional Administrator has commented that the instrument is not consistent with the description of the Tribe's or State's proposed approach to ensuring compliance with the substantive criteria for compensatory mitigation, the Tribe or State shall not approve the final compensatory mitigation instrument until the Regional Administrator notifies the Director that the final instrument is consistent with this approach. As noted above, while States with existing programs will not be committing to send draft instruments to particular Tribal or State resource agencies in program descriptions, they would have to comply with the remaining parts of this proposed provision, namely, sending draft compensatory mitigation instruments to EPA, the Corps, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, and any Tribal or State resource agencies to which the Tribe or State committed to send draft instruments in the program description. They would also need to address reviewer comments as the proposed rule outlines. States with existing programs may need to modify their procedures to comply with this provision.

EPA requests comment on this provision in section V.A.3 of this preamble. EPA also requests comment on the extent to which this provision would require changes to existing State programs.

3. Five-Year Permits and Long-Term Projects

The Agency is proposing that for projects with a planned schedule that may extend beyond the initial five-year permit application, the permit applicant must submit a 404(b)(1) analysis of how the project complies with the environmental review criteria set forth in the CWA 404(b)(1) Guidelines for the full project with the application for the first five-year permit and modify the 404(b)(1) analysis, as necessary, when submitting applications for subsequent five-year permits. The Agency is also proposing to clarify that all aspects of the permit application, public notice, Tribal or State review, and EPA review requirements set forth in 40 CFR 233.30, 233.32, 233.34, and 233.50 respectively, apply to each permit application for projects that exceed a five-year schedule. This proposed provision would apply to existing State programs, but the extent to which these programs might need to expand the scope of their authority or modify their procedures to address this provision may vary depending on the programs' existing authorities and procedures. EPA requests comment on this provision in section V.C.1 of this preamble. EPA requests comment on the extent to which this provision would require changes to existing State programs.

4. Program Scope

This proposal clarifies that the geographic scope of an approved section 404 program must—at all times—cover all waters of the United States except those retained by the Corps to ensure there will be no gap in permitting authority. This proposed provision would apply to existing programs, and it represents EPA's interpretation of both the statute and existing regulations in 40 CFR 233.1(d) (which require a State program to at all times be conducted in accordance with the Act). EPA requests comment on this provision in section V.A.1 of this preamble, and expects that, if finalized, this provision may impact one or more existing State programs. EPA requests comment confirming the extent to which this provision would require changes to existing State programs.

5. Conflict of Interest

This proposal addresses potential scenarios where there may be an actual or perceived conflict of interest in the permitting process by a Tribal or State agency. EPA is clarifying that the prohibition against participating in matters subject to decision by a Tribal or State permitting agency, if one has a conflict of interest, applies to any individual with responsibilities related to the section 404 permitting program, as well as any entity that reviews decisions of the agency. This proposed provision would apply to existing programs. EPA requests comment on this provision in section V.F.2 of this preamble. EPA requests comment confirming the extent to which this provision would require changes to existing State programs.

H. Other

1. Technical and Minor Updates

a. What is the Agency proposing?

EPA is proposing several editorial and certain minor updates to 40 CFR parts 232 and 233 to update outdated citations, update EPA office locations, and make other non-substantive changes. None of the proposed updates would have a substantive impact on program approval procedures or requirements.

- EPA is proposing to revise section 233.1(b) to remove the term ''individual'' from the reference to ''State permits,'' as States may also regulate discharges using general permits.
- EPA is proposing to change the ''Note'' in section 233.1(c) to become section 233.1(d), as well as cross-reference this section to the process to identify waters to be retained by the Corps and the retained waters description at 233.11(i). Section 233.1(d) will be renumbered as 233.1(e).
- For consistency and clarity, EPA is proposing to add a definition of ''*Indian lands*'' for Tribal and State CWA section 404 programs. Consistent with the Agency's long-standing interpretation of ''Indian lands'' as synonymous with ''Indian country,'' EPA is proposing to add a definition clarifying that ''Indian lands'' means ''Indian country'' as defined at 18 U.S.C. 1151. *See e.g.,* 40 CFR 144.3 (defining ''Indian lands'' as ''Indian country'' as defined at 18 U.S.C. 1151); 40 CFR 258.2 (adopting the definition of 18 U.S.C. 1151 for ''Indian lands''); U.S. EPA, *Underground Injection Control Program: Federally-Administered Programs,* 49 FR 45292, 45294 (November 15, 1984) (Defining ''Indian lands'' as used in EPA's Safe Drinking Water Act Underground Injection Control regulations as ''Indian country,'' explaining that ''EPA believes this definition is most consistent with the concept of Indian lands as the Agency has used it in regulations and UIC program approvals to date.''); *Wash. Dep't of Ecology* v. *EPA,* 752 F.2d 1465, 1467 n.1 (9th Cir. 1985) (Noting EPA's position that ''Indian lands'' is

''synonymous with 'Indian country', which is defined at 18 U.S.C. []1151'').

• EPA is proposing to revise the definition of ''*State 404 program*'' or ''*State program*'' to remove the term ''state'' within the definition to clarify that Tribes and interstate agencies may also have an approved program. EPA also proposes to remove the ''(p)'' associated with the cross reference to 40 CFR 233.2 as the definitions in 40 CFR 233.2 are no longer listed by letter.

• EPA is proposing to update section 233.10(a) and section 233.16(d)(2) to include the term ''Tribal leader'' where the term ''Governor'' is referenced.

• EPA is proposing to clarify in section 233.14(b)(3) that when a State intends to administer general permits issued by the Secretary, any Tribal conditions and/or certifications of those general permits transfer when the State assumes the program. The proposed revision divides the existing provision into two sentences to accommodate this clarification.

• EPA is proposing to add a requirement in section 233.16(d)(2) to include an effective date for the approved non-substantial program revisions in the letter from the Regional Administrator to the Governor. This addition to the letter will clarify the date upon which such program changes become effective.

• EPA is proposing to clarify in section 233.53(a)(1) that when the Tribe or State notifies the Administrator and the Secretary of its intent to voluntarily transfer program responsibilities back to the Secretary, the Tribe or State shall also submit the transition plan required in the existing regulations. The Agency is also proposing to add the words ''no less than'' before the advance notice requirement to clarify that Tribes and States may provide more than 180 days' notice of intent to transfer the program. An extended transition time would allow the Tribe or State, the Corps, and EPA to discuss any gaps in the plan and ensure a smooth transition from the Tribe or State to Corps administration of the program. EPA is also proposing that files associated with ongoing investigations, compliance orders, and enforcement actions be provided to the Secretary to ensure compliance with these orders and minimize disruptions in administration of section 404 programs.

• EPA is proposing to add a provision to clarify that when Tribes seek to administer the program in areas where they have not already assumed the section 404 program, Tribes must demonstrate that they meet the TAS criteria for those additional areas. This is a non-substantive clarification because subpart G already provides a process whereby Tribes seeking to assume the section 404 program address the TAS criteria, and this provision would simply clarify that the same TAS application applies if Tribes seek to add a new area to their program.

• EPA is proposing to update the docket location and EPA Region 2 Regional Office location to reflect their current addresses in section 233.71(b).

• EPA is proposing to update the name of the implementing State agency to reflect that the current agency implementing the approved Michigan assumed program is the Michigan Department of Environment, Great Lakes, and Energy rather than the Department of Natural Resources in section 233.70. EPA is proposing to update the description of the EPA and Michigan Memorandum of Agreement in section 233.70(c)(1) to reflect the current Memorandum, signed in 2011.

• EPA is proposing to remove the use of the masculine pronouns ''he'' and ''his'' throughout 40 CFR part 233 and replace them with ''they,'' ''their,'' ''the Administrator,'' ''the Regional Administrator,'' or ''Director'' as appropriate.

• Additionally, to clarify the difference between a permit application and a request to assume the program, throughout the regulations, EPA is proposing to change references to assumption ''application'' to terms including ''request to assume,'' ''program submission,'' or ''assumption request materials.''

• EPA is proposing certain other non-substantive procedural changes to facilitate efficient program operation.

• EPA is proposing other minor updates to cross-references, as appropriate, and to ensure consistency in terminology.

b. Why is the Agency proposing this approach?

The current regulations were last comprehensively updated in 1988. Since then, there have been changes to Federal laws and regulations, changes in practice, and changes in location of EPA offices, all of which warrant updating the regulations to ensure consistency and provide clarity. EPA has also gained experience in program oversight, which has revealed the need to clarify certain requirements or procedures. The purpose of the updates identified below is to acknowledge these non-substantive changes and assist Tribes and States in developing and administering a CWA section 404 program. The purpose of changing masculine pronouns or terms to neutral pronouns and other neutral terms is to acknowledge the diversity of people who may hold the positions of ''the Administrator,'' ''the Regional Administrator,'' ''Director,'' and program staff. Finally, certain terms are changed to enhance consistency. The 1988 regulations sometimes used synonyms to avoid repeated use of the same undefined term throughout the regulations; the use of synonyms has led to questions as to whether the different words differ in meaning. Where no difference is intended, EPA proposes to use one term to improve clarity. EPA is also proposing certain other non-substantive procedural changes to facilitate efficient program operation. These changes have no substantive effect; rather they are technical, editorial, and minor updates to provide clarity, reflect technological changes, and ensure accuracy of citations.

c. Request for Comment

EPA requests comment on all aspects of these proposed minor updates. EPA is particularly interested in the identification of additional technical corrections, which should be considered to ensure clarity regarding the assumption requirements, the approval process, administration of, and oversight of Tribal and State CWA section 404 programs. EPA also seeks comment on proposed changes in section 233.53, especially on the transfer of ongoing investigations, compliance orders, and enforcement actions.

Several provisions of the existing section 404 Tribal and State program regulations specify that public notices or documents should be ''mailed.'' For example, the regulations indicate that after determining that a State program submission is complete, the Regional Administrator shall ''mail notice'' to persons known to be interested in such matters. 40 CFR 233.15(e). EPA seeks comment on whether to revise the existing regulations to clarify that electronic mail is an acceptable method of transmitting such information, for example by changing the word ''mail'' to ''send'' or adding explicit references to ''electronic mail.''

2. Part 124

a. What is the Agency proposing?

The Agency proposes to provide technical edits to 40 CFR part 124 consistent with the Agency's intent to clarify that the part 124 regulations do not apply to Tribal or State section 404 programs. The consolidated permit regulations at 40 CFR part 124 address several separate EPA permit programs, including the Resource Conservation and Recovery Act (RCRA), UIC, and

NPDES programs. EPA is not proposing to revise the aspects of the part 124 regulations addressing these programs. Specifically, EPA is proposing to make targeted revisions and deletions to specific provisions of the regulations at 40 CFR 124.1 through 124.3, 124.5, 124.6, 124.8, 124.10 through 124.12, and 124.17 to remove any references to 40 CFR part 233.

b. Why is the Agency proposing this approach?

Prior to 1988, the State section 404 program regulations included references to 40 CFR part 124, which contains consolidated permitting regulations for a variety of programs that EPA administers. *See* 49 FR 39012 (October 2, 1984). The preamble to the 1988 section 404 Tribal and State program regulation clearly stated that the Agency intended for the 40 CFR part 124 regulations to no longer apply to Tribal or State section 404 programs and announced the Agency's intention to publish technical edits in the future. 53 FR 20764 (June 6, 1988) (''It is the agency's intent that 40 CFR part 124 no longer applies to 404 State programs. We will be publishing technical, conforming regulations in the future.''). Although the Agency modified 40 CFR part 233 to remove all references to part 124 in 1988, the Agency has not yet provided conforming edits to part 124 to remove references to part 233. As such, the current part 124 regulations include references to an outdated version of the part 233 regulations, which may cause confusion to stakeholders regarding the applicability of part 124 to Tribal or State section 404 programs and assumption efforts. This proposed rule would finally remove the outdated references to part 233 in part 124 and would have no substantive impact on the section 404 assumption process or on Tribal or State programs.

c. Request for Comment

EPA is requesting comment on whether the Agency has identified all changes to the part 124 regulations that reference the outdated version of the part 233 regulations or Tribal or State section 404 programs.

3. Incorporation by Reference

Currently, 40 CFR 233.70 incorporates by reference Michigan's regulatory and statutory authorities applicable to the State's approved CWA section 404 program, and 40 CFR 233.71 incorporates by reference New Jersey's regulatory and statutory authorities applicable to the State's approved CWA section 404 program. EPA codified in regulation the approval of the Michigan program on October 2, 1984 (49 FR 38947) and the New Jersey program on March 2, 1994 (59 FR 9933). EPA is proposing to update the incorporation by reference of the Michigan laws in the State's approved CWA section 404 program, which were updated in 1994, with the exception of the Michigan Administrative Procedures Act of 1969 (MCL § 24–201 *et seq.*), which was not updated. Additionally, EPA is proposing to incorporate the most recent versions of Michigan administrative code. EPA is not proposing to update any of the materials currently incorporated by reference for New Jersey's program. Materials that have been incorporated by reference are reasonably made available to interested parties. Copies of materials incorporated by reference may be obtained or inspected at the EPA Docket Center Reading Room, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004 (telephone number: 202–566–1744), or send mail to Mail Code 5305G, 1200 Pennsylvania Ave. NW, Washington, DC 20460. Copies of the materials incorporated by reference for Michigan's program can also be accessed at the Water Division, Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, IL 60604 (telephone number: 1–800–621–8431), at the Michigan Department of Environment, Great Lakes, and Energy office at 525 W Allegan St., Lansing, MI 48933 (telephone number: 800–662–9278), or at *http://www.legislature.mi.gov/*. Copies of the materials incorporated by reference for New Jersey's program can also be accessed at the Library of the Region 2 Regional Office, Ted Weiss Federal Building, 290 Broadway, New York, NY 10007, at the New Jersey Department of Environmental Protection at 401 East State St., Trenton, NJ 08625 (telephone number: 609–777–3373), or at *https://www.epa.gov/cwa404g/us-interactive-map-state-and-tribal-assumption-under-cwa-section-404#nj.*

EPA is requesting comment on whether the Agency has identified all changes to the State laws and regulations incorporated by reference in 40 CFR 233 subpart H.

I. Severability

The purpose of this section is to clarify EPA's intent with respect to the severability of provisions of the proposed rule. Each provision and interpretation in this proposed rule is capable of operating independently. Once finalized, if any provision or interpretation in this proposed rule were to be determined by judicial review or operation of law to be invalid, that partial invalidation would not render the remainder of this proposed rule invalid. Likewise, if the application of any aspect of this proposed rule to a particular circumstance were determined to be invalid, the Agency intends that, if finalized, the proposed rule would remain applicable to all other circumstances.

VI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review; and Executive Order 14094: Modernizing Regulatory Review

This action is a ''significant regulatory action'' as defined in Executive Order 12866, as amended by Executive Order 14094. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to Executive Order 12866 review is available in the docket for this action. The EPA prepared an economic analysis of the potential impacts associated with this action. This analysis is contained in the Economic Analysis for the Proposed Rule, which is available in the docket for this action.

The Economic Analysis for the Proposed Rule is qualitative in nature due to the paucity of data associated with both existing and potential future Tribal and State section 404 programs. Baseline conditions are described in the analysis based on a review of existing programs and feasibility studies carried out by States assessing potential assumption of a section 404 program. Potential impacts of the proposed rule described in the analysis focus on those portions of the proposed rule with potential substantive economic impacts, followed by those portions with expected *de minimis* economic impacts and those with no economic impacts. The Agency expects that provisions addressing retained waters, Tribal or State program effective dates, Tribes as affected downstream States, and program withdrawal procedures could have potential substantive impacts—much of which would be in the form of cost savings to Tribes and States. Provisions addressing program assumption requirements, compensatory mitigation, and five-year permits and long-term projects are expected to have *de minimis* impacts. Provisions with no expected economic impacts include

those relating to compliance with the CWA 404(b)(1) Guidelines, conflict of interest, criminal negligence standard, dispute resolution, the ''no less stringent than'' requirements, and judicial review. EPA solicits comments on all aspects of the economic analysis for the proposed rule.

B. Paperwork Reduction Act (PRA)

The information collection activities in this proposed rule have been submitted for approval to OMB under the PRA. The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR number 0220.16. You can find a copy of the ICR in the docket for this proposed rule, and it is briefly summarized here.

The ICR associated with this rulemaking is functioning simultaneously as a renewal of the standing ICR for the section 404(g) program. The ICR accounts for changes to the existing three categories of information collection (IC) within the standing ICR in place for the section 404(g) program, as well as an additional IC. These categories include requests for information associated with program assumption requests, substantial program modifications, and withdrawal procedures; permit application information; annual reports and program information; and Tribes applying for TAS status for the purpose of commenting as downstream States. The ICR does not require the collection of any information of a confidential nature or status.

Respondents/affected entities:

- *Request for Program Assumption, Substantial Program Modifications, and Withdrawal Procedures:* Tribes or States requesting program assumption are the anticipated respondents for this IC.
- *Permit application information:* States with existing assumed programs under section 404(g) and permittees requesting permits in those States under section 404 of the CWA are the anticipated respondents for this IC.
- *Annual reports and program information:* States with existing assumed programs under section 404(g) are the anticipated respondents for this IC.
- *Tribes applying for TAS:* Tribes seeking TAS status for the sole purpose of commenting as downstream States are the anticipated respondents for this IC.

Respondents' obligation to respond:

- *Request for Program Assumption, Substantial Program Modifications, and Withdrawal Procedures:* Tribes and States voluntarily request program assumption.
- *Permit application information:* Permittees are required to submit an application to obtain a section 404 permit.
- *Annual reports and program information:* Tribes and States with assumed programs are required to submit an annual report and program information, and EPA is required to review Tribal and State annual reports and program information.
- *Tribes applying for TAS:* Tribes voluntarily apply for TAS status.

Estimated number of respondents:

- *Request for Program Assumption, Substantial Program Modifications, and Withdrawal Procedures:* EPA estimates that two States could request program assumption in the next three years. While Tribes can request program assumption, none are expected to do so in the next three years.
- *Permit application information:* Three States presently have assumed programs, and EPA estimates that two additional States could apply for program assumption in the next three years; thus, five States are considered in the ICR for this rulemaking. Estimated hours and numbers of permits are reflected below. Burden and costs to permittees within Tribes or States that may assume the program during the period of this ICR are currently captured by the Corps ICR.
- *Annual reports and program information:* Three States presently have assumed programs, and EPA estimates that two States could apply for program assumption in the next three years; thus, five States are considered in the ICR for this rulemaking.
- *Tribes applying for TAS:* The Agency is estimating that three Tribes could apply for TAS status in the next three years; thus, three Tribes are considered in the ICR for this rulemaking.

Frequency of response: This collection of information is separated into four parts. The annual public reporting and record keeping burden for this collection is estimated to average 970 hours to request program assumption (spread over three years), 12.7 hours for a State to review a permit application, 11 hours for a permittee to complete a permit application, 110 hours for a State to prepare the annual report, and 113 hours for a Tribe to apply for TAS status.

Total estimated burden to respondents: 109,084 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost to respondents: $5,808,918 (per year), includes $0 annualized capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden to the EPA using the docket identified at the beginning of this rule. The Agency is particularly seeking comment on the burden estimate associated with the information collection for Tribes applying for TAS status. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs using the interface at *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. OMB must receive comments no later than October 13, 2023.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. Small entities are not subject to the requirements of this proposed rule.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–38, and does not significantly or uniquely affect small governments. This action imposes no enforceable duty on any State, local, or Tribal governments or the private sector. *See* the Economic Analysis for the Proposed Rule in the docket for this action for further discussion on UMRA.

E. Executive Order 13132: Federalism

Under the technical requirements of Executive Order 13132, agencies must conduct a federalism consultation as outlined in the Executive Order for regulations that (1) have federalism implications, that impose substantial direct compliance costs on State and local governments, and that are not required by statute; or (2) that have federalism implications and that preempt State law. Executive Order paras. (6)(b)–(c). The Agency has concluded that compared to the status quo, this rule does not impose any new costs or other requirements on States, preempt State law, or limit States' policy discretion; rather, it helps to

clarify and facilitate the process of State assumption of the section 404 program. This action does not have federalism implications and will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Consistent with EPA's policy to promote communications between EPA and State and local governments, EPA engaged with State officials early in the process of developing the proposed rule to permit them to have meaningful and timely input into its development. The Agency invited written input from State agencies from November 12, 2018, through February 11, 2019, and hosted an in-person meeting with State officials on December 6, 2018. *See* section IV.C of this preamble for further discussion of pre-proposal Tribal and State engagement on this rulemaking effort. A summary of stakeholder engagement and written input from States on this action is available in the docket for this proposed rule.

All comment letters and recommendations received by EPA during the comment period of this proposed rulemaking from State and local governments will be included in the docket for this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action may have Tribal implications. However, it will neither impose substantial direct compliance costs on Federally recognized Tribal governments, nor preempt Tribal law. This action would expand Tribes' ability to utilize TAS for purposes of commenting as downstream ''affected States,'' and would develop an avenue for EPA review of permits that may impact Tribal rights and resources.

EPA consulted with Tribal officials under the EPA Policy on Consultation and Coordination with Indian Tribes early in the process of developing this regulation to permit Tribes to have meaningful and timely input into its development. A summary of that consultation is provided in the docket for this action.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. Therefore, this action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk. Since this action does not concern human health, EPA's Policy on Children's Health also does not apply.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color and/or Indigenous peoples) and low-income populations.

EPA believes that the human health and environmental conditions that exist prior to this action do not result in disproportionate and adverse effects on people of color, low-income populations, and/or Indigenous peoples. The existing section 404 Tribal and State regulations require that Tribes or States with an approved section 404 program may not impose conditions less stringent than those required under Federal law, so the environmental impacts of permitted projects would not increase due to this transfer of authority. *See* Section III of the Economic Analysis for the Proposed Rule for additional information on the existing regulations.

EPA finds that this action is not likely to result in new disproportionate and adverse effects on people of color, low-income populations, and/or Indigenous peoples. The proposed section 404 Tribal and State program regulations would require that Tribes and States with an approved section 404 program may not impose conditions less stringent than those required under Federal law, so the environmental impacts of permitted projects would not increase due to this transfer of authority.

EPA additionally identified and addressed potential environmental justice concerns by proposing to expand Tribes' ability to utilize TAS for purposes of commenting as downstream ''affected States'' and develop an avenue for EPA review of permits that may impact Tribal rights and resources. The proposed rule would enable Tribes to have a more significant role in the permit decision-making process than under current practice. *See* Section III of the Economic Analysis for the Proposed Rule for additional information on the proposed regulations.

The information supporting this Executive Order review is contained in section V.C.2 of this preamble and Section III of the Economic Analysis for the Proposed Rule, which is available in the public docket for this action.

List of Subjects

40 CFR Part 123

Environmental protection, Flood control, Water pollution control.

40 CFR Part 124

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous waste, Indians—lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 232

Environmental protection, Intergovernmental relations, Water pollution control.

40 CFR Part 233

Environmental protection, Administrative practice and procedure, Incorporation by reference, Indians—lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

Michael S. Regan,

Administrator.

For the reasons set forth in the preamble, the EPA proposes to amend 40 CFR parts 123, 124, 232, and 233 as follows:

PART 123—STATE PROGRAM REQUIREMENTS

■ 1. The authority citation for part 123 continues to read as follows:

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

Subpart B—State Program Submissions

■ 2. Amend § 123.27 by:

■ a. Revising paragraphs (a) introductory text and (a)(3) introductory text;
■ b. Removing the note that appears after paragraph (a)(3)(ii); and
■ c. Revising paragraph (b)(2).
The revisions read as follows:

§ 123.27 Requirements for enforcement authority.

(a) Any State agency administering a program shall have the authority to establish the following violations and have available the following remedies and penalties for such violations of State program requirements:
* * * * *
(3) To assess or sue to recover in court civil penalties and to seek criminal penalties as follows:
* * * * *
(b) * * *
(2) The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the Act, except that a State may establish criminal violations based on any form or type of negligence.
* * * * *

PART 124—PROCEDURES FOR DECISIONMAKING

■ 3. The authority citation for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.;* Safe Drinking Water Act, 42 U.S.C. 300f *et seq.;* Clean Water Act, 33 U.S.C. 1251 *et seq.;* Clean Air Act, 42 U.S.C. 7401 *et seq.*

■ 4. Amend § 124.1 by revising paragraphs (e) and (f) to read as follows:

§ 124.1 Purpose and scope.

* * * * *
(e) Certain procedural requirements set forth in part 124 must be adopted by States in order to gain EPA approval to operate RCRA, UIC, and NPDES permit programs. These requirements are listed in §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA) and signaled by the following words at the end of the appropriate part 124 section or paragraph heading: (applicable to State programs see §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA)). Part 124 does not apply to PSD permits or 404 permits issued by an approved State.
(f) To coordinate decision-making when different permits will be issued by EPA and approved State programs, this part allows applications to be jointly processed, joint comment periods and hearings to be held, and final permits to be issued on a cooperative basis whenever EPA and a State agree to take such steps in general or in individual cases. These joint processing agreements may be provided in the Memorandum of Agreement developed under §§ 123.24 (NPDES), 145.24 (UIC), and 271.8 (RCRA).
■ 5. Amend § 124.2 by:
■ a. In paragraph (a):
■ i. Revising the introductory text ;
■ ii. Revising the definitions for ''*Facility or activity*'', ''*General permit*'', ''*Major facility*'', ''*Owner or operator*'', ''*Permit*'', ''*SDWA*'';
■ iii. Removing the definition for ''*Section 404 program or State 404 program or 404*'';
■ iv. Revising the definition for ''*Site*''; and
b. Revising paragraph (b).
The revisions read as follows:

§ 124.2 Definitions.

(a) In addition to the definitions given in §§ 122.2 and 123.2 (NPDES), 501.2 (sludge management), 144.3 and 145.2 (UIC), and 270.2 and 271.2 (RCRA), the definitions below apply to this part, except for PSD permits which are governed by the definitions in § 124.41. Terms not defined in this section have the meaning given by the appropriate Act.
* * * * *
Facility or activity means any ''HWM facility,'' UIC ''injection well,'' NPDES ''point source'' or ''treatment works treating domestic sewage'', or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the RCRA, UIC, or NPDES programs.
* * * * *
General permit (NPDES) means an NPDES ''permit'' authorizing a category of discharges or activities under the CWA within a geographical area. For NPDES, a general permit means a permit issued under § 122.28.
* * * * *
Major facility means any RCRA, UIC, or NPDES ''facility or activity'' classified as such by the Regional Administrator, or, in the case of ''approved State programs,'' the Regional Administrator in conjunction with the State Director.
Owner or operator means owner or operator of any ''facility or activity'' subject to regulation under the RCRA, UIC, or NPDES programs.
Permit means an authorization, license or equivalent control document issued by EPA or an ''approved State'' to implement the requirements of this part and parts 122, 123, 144, 145, 270, and 271 of this chapter. ''Permit'' includes RCRA ''permit by rule'' (§ 270.60), RCRA emergency permit (§ 270.61), RCRA standardized permit (§ 270.67), UIC area permit (§ 144.33), UIC emergency permit (§ 144.34), and NPDES ''general permit'' (§ 122.28). Permit does not include RCRA interim status (§ 270.70), UIC authorization by rule (§ 144.21), or any permit which has not yet been the subject of final agency action, such as a ''draft permit'' or a ''proposed permit.''
* * * * *
SDWA means the Safe Drinking Water Act (Pub. L. 95–523, as amended by Pub. L. 95–1900; 42 U.S.C. 300f *et seq.*).
Site means the land or water area where any ''facility or activity'' is physically located or conducted, including adjacent land used in connection with the facility or activity.
* * * * *
(b) For the purposes of part 124, the term Director means the State Director or Regional Administrator and is used when the accompanying provision is required of EPA-administered programs and of State programs under §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA). The term Regional Administrator is used when the accompanying provision applies exclusively to EPA-issued permits and is not applicable to State programs under these sections. While States are not required to implement these latter provisions, they are not precluded from doing so, notwithstanding use of the term ''Regional Administrator.''
■ 6. Amend § 124.3 by revising paragraph (a) introductory text and paragraphs (a)(1) and (3) to read as follows:

§ 124.3 Application for a permit.

(a) *Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*
(1) Any person who requires a permit under the RCRA, UIC, NPDES, or PSD programs shall complete, sign, and submit to the Director an application for each permit required under §§ 270.1 (RCRA), 144.1 (UIC), 40 CFR 52.21 (PSD), and 122.1 (NPDES). Applications are not required for RCRA permits by rule (§ 270.60), underground injections authorized by rules (§§ 144.21 through 144.26), and NPDES general permits (§ 122.28).
* * * * *
(3) Permit applications (except for PSD permits) must comply with the signature and certification requirements of §§ 122.22 (NPDES), 144.32 (UIC), and 270.11 (RCRA).
* * * * *
■ 7. Amend § 124.5 by:

■ a. Revising paragraphs (a), (c) introductory text, (c)(1) and (3);
■ b. Removing paragraph (f); and
■ c. Redesignating paragraph (g) as paragraph (f).

The revision reads as follows:

§ 124.5 Modification, revocation and reissuance, or termination of permits.

(a) (*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*) Permits (other than PSD permits) may be modified, revoked and reissued, or terminated either at the request of any interested person (including the permittee) or upon the Director's initiative. However, permits may only be modified, revoked, and reissued or terminated for the reasons specified in §§ 122.62 or 122.64 (NPDES), 144.39 or 144.40 (UIC), and 270.41 or 270.43 (RCRA). All requests shall be in writing and shall contain facts or reasons supporting the request.

* * * * *

(c) (*Applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA)*).

(1) If the Director tentatively decides to modify or revoke and reissue a permit under 40 CFR 122.62 (NPDES), 144.39 (UIC), or 270.41 (other than § 270.41(b)(3)) or § 270.42(c) (RCRA), he or she shall prepare a draft permit under § 124.6 incorporating the proposed changes. The Director may request additional information and, in the case of a modified permit, may require the submission of an updated application. In the case of revoked and reissued permits, other than under 40 CFR 270.41(b)(3), the Director shall require the submission of a new application. In the case of revoked and reissued permits under 40 CFR 270.41(b)(3), the Director and the permittee shall comply with the appropriate requirements in 40 CFR part 124, subpart G for RCRA standardized permits.

* * * * *

(3) ''Minor modifications'' as defined in §§ 122.63 (NPDES), and 144.41 (UIC), and ''Classes 1 and 2 modifications'' as defined in § 270.42 (a) and (b) (RCRA) are not subject to the requirements of this section.

* * * * *

■ 8. Amend § 124.6 by:
■ a. Revising paragraphs (a), (c), (d) introductory text, (d)(1) through (3);
■ b. Removing paragraph (d)(4)(iv);
■ c. Redesignating paragraph (d)(4)(v) as paragraph (d)(4)(iv); and
■ d. Removing in paragraph (e) the text ''(*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA).*)'' and adding in its place the text ''(*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*)''.

The revisions read as follows:

§ 124.6 Draft permits.

(a) (*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*) Once an application is complete, the Director shall tentatively decide whether to prepare a draft permit or to deny the application.

* * * * *

(c) (*Applicable to State programs, see § 123.25 (NPDES).*) If the Director tentatively decides to issue an NPDES general permit, he or she shall prepare a draft general permit under paragraph (d) of this section.

(d) (*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*) If the Director decides to prepare a draft permit, he or she shall prepare a draft permit that contains the following information:

(1) All conditions under §§ 122.41 and 122.43 (NPDES), 144.51 and 144.42 (UIC), or 270.30 and 270.32 (RCRA) (except for PSD permits));

(2) All compliance schedules under §§ 122.47 (NPDES), 144.53 (UIC), or 270.33 (RCRA) (except for PSD permits);

(3) All monitoring requirements under §§ 122.48 (NPDES), 144.54 (UIC), or 270.31 (RCRA) (except for PSD permits); and

* * * * *

■ 9. Amend § 124.8 by revising the introductory text and paragraph (a) to read as follows:

§ 124.8 Fact sheet.

(*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*)

(a) A fact sheet shall be prepared for every draft permit for a major HWM, UIC, or NPDES facility or activity, for every Class I sludge management facility, for every NPDES general permit (§ 122.28), for every NPDES draft permit that incorporates a variance or requires an explanation under § 124.56(b), for every draft permit that includes a sewage sludge land application plan under 40 CFR 501.15(a)(2)(ix), and for every draft permit which the Director finds is the subject of wide-spread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The Director shall send this fact sheet to the applicant and, on request, to any other person.

* * * * *

■ 10. Amend § 124.10 by:
■ a. Revising paragraphs (a)(1)(ii) and (iii);
■ b. Removing paragraph (a)(iv);
■ c. Redesignating paragraph (a)(v) as (a)(iv);
■ d. Revising the introductory text of paragraph (b);
■ e. Revising the introductory text of paragraph (c), and paragraphs (c)(1)(i), (ii), and (iv);
■ f. Removing paragraph (c)(1)(vi);
■ g. Redesignating paragraphs (c)(1)(vii) through (xi) as paragraphs (c)(1)(vi) through (x);
■ h. Revising paragraph (c)(2)(i);
■ i. Revising the introductory text of paragraph (d), and paragraphs (d)(1)(ii) and (iii);
■ j. Removing paragraph (d)(1)(viii);
■ k. Redesignating paragraphs (d)(1)(ix) and (x) as paragraphs (d)(1)(viii) and (ix);
■ l. Removing the ''; and'' at the end of paragraph (d)(2)(iii) and adding a period in its place;
■ m. Removing paragraph (d)(2)(iv); and
■ n. Revising paragraph (e).

The revisions read as follows:

§ 124.10 Public notice of permit actions and public comment period.

(a) * * *

(1) * * *

(ii) (*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*) A draft permit has been prepared under § 124.6(d);

(iii) (*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*) A hearing has been scheduled under § 124.12; or

* * * * *

(b) *Timing (applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA)).*

* * * * *

(c) Methods (applicable to State programs, see 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA)). Public notice of activities described in paragraph (a)(1) of this section shall be given by the following methods:

(1) * * *

(i) The applicant (except for NPDES general permits when there is no applicant);

(ii) Any other agency which the Director knows has issued or is required to issue a RCRA, UIC, PSD (or other permit under the Clean Air Act), NPDES, sludge management permit, or ocean dumping permit under the Marine Research Protection and Sanctuaries Act for the same facility or activity (including EPA when the draft permit is prepared by the State);

* * * * *

(iv) For NPDES permits only, any State agency responsible for plan

development under CWA section 208(b)(2), 208(b)(4) or 303(e) and the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service;

* * * * *

(2) (i) For major permits, NPDES general permits, and permits that include sewage sludge land application plans under 40 CFR 501.15(a)(2)(ix), publication of a notice in a daily or weekly newspaper within the area affected by the facility or activity; and for EPA-issued NPDES general permits, in the **Federal Register;**

Note to paragraph (c)(2)(i): The Director is encouraged to provide as much notice as possible of the NPDES draft general permit to the facilities or activities to be covered by the general permit.

* * * * *

(d) *Contents (applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA))*—

(1) * * *

(ii) Name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit, except in the case of NPDES draft general permits under § 122.28;

(iii) A brief description of the business conducted at the facility or activity described in the permit application or the draft permit, for NPDES general permits when there is no application;

* * * * *

(e) (*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*) In addition to the general public notice described in paragraph (d)(1) of this section, all persons identified in paragraphs (c)(1)(i) through (iv) of this section shall be mailed a copy of the fact sheet or statement of basis (for EPA-issued permits), the permit application (if any) and the draft permit (if any).

■ 11. Revise § 124.11 to read as follows:

§ 124.11 Public comments and requests for public hearings.

(*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*) During the public comment period provided under § 124.10, any interested person may submit written comments on the draft permit and may request a public hearing, if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in § 124.17.

■ 12. Amend § 124.12 by revising the introductory text of paragraph (a) to read as follows:

§ 124.12 Public hearings.

(a) (*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*)

* * * * *

13. Amend § 124.17 by revising the introductory text of paragraph (a) and paragraphs (a)(2) and (c) to read as follows:

§ 124.17 Response to comments.

(a) (*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*)

* * * * *

(2) Briefly describe and respond to all significant comments on the draft permit raised during the public comment period, or during any hearing.

* * * * *

(c) (*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA).*) The response to comments shall be available to the public.

PART 232—404 PROGRAM DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

■ 14. The authority citation for part 232 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 15. Amend § 232.2 by revising the definition of ''State regulated waters'' to read as follows:

§ 232.2 Definitions.

* * * * *

State regulated waters means those waters of the United States in which the Corps suspends the issuance of section 404 permits upon program assumption by a State, which exclude those identified as retained waters pursuant to § 233.11(i). All waters of the United States other than those identified as retained waters in a State with an approved program shall be under jurisdiction of the State program, and shall be identified in the program description as required by part 233.

* * * * *

PART 233—404 STATE PROGRAM REGULATIONS

■ 16. The authority citation for part 233 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

Subpart A—General

■ 17. Amend § 233.1 by:

■ a. Revising the fourth sentence of paragraph (b);

■ b. Removing the note after paragraph (c);

■ c. Revising paragraph (d); and

■ d. Adding paragraphs (e) and (f).

The revisions and additions read as follows:

§ 233.1 Purpose and scope.

* * * * *

(b) * * * The discharges previously authorized by a Corps' general permit will be regulated by State permits. * * *

* * * * *

(d) State assumption of the section 404 program is limited to certain waters, as provided in section 404(g)(1) and as identified through the process laid out in § 233.11(i). The Federal program operated by the Corps of Engineers continues to apply to the remaining waters in the State even after program approval. However, this does not restrict States from regulating discharges of dredged or fill material into those waters over which the Secretary retains section 404 jurisdiction.

(e) Any approved State Program shall, at all times, be conducted in accordance with the requirements of the Act and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose. States may not make one requirement more lenient than required under these regulations as a tradeoff for making another requirement more stringent than required. Where the 404(b)(1) Guidelines (part 230 of this chapter) or other regulations affecting State 404 programs suggest that the District Engineer or Corps of Engineers is responsible for certain decisions or actions (*e.g.,* approving mitigation bank instruments), in an approved State Program the State Director carries out such action or responsibility for purposes of that program, as appropriate.

(f) EPA may facilitate resolution of disputes between Federal agencies, Tribes, and States seeking to assume and/or administer a CWA section 404 program. Where a dispute resolution or elevation process is enumerated in this part or in an agreement approved by EPA at the time of assumption or program revision, such process and procedures shall be followed.

■ 18. Amend § 233.2 by:

■ a. Adding in alphabetical order the definitions for ''Indian lands'', ''Retained waters description'', and ''RHA section 10 list''; and

■ b. Revising the definition for ''State 404 program or State program''.

The additions and revision read as follows:

§ 233.2 Definitions.

* * * * *

Indian lands means ''Indian country'' as defined under 18 U.S.C. 1151. That section defines Indian country as:

(1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(2) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and

(3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

* * * * *

Retained waters description: The subset of waters of the United States over which the Corps retains administrative authority upon program assumption by a State as identified through the process at § 233.11(i). The description shall also address the administrative boundary associated with adjacent wetlands and in the case of State assumption, the extent to which waters on Indian lands are retained.

RHA section 10 list: The list of waters determined to be navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act and 33 CFR part 329 and that are maintained in Corps district offices pursuant to 33 CFR 329.16.

* * * * *

State 404 program or *State program* means a program which has been approved by EPA under section 404 of the Act to regulate the discharge of dredged or fill material into all waters of the United States except those identified in the *retained waters description* as defined in § 233.2.

■ 19. Revise § 233.4 to read as follows:

§ 233.4 Conflict of interest.

Any public officer, employee, or individual with responsibilities related to the section 404 permitting program who has a direct personal or pecuniary interest in any matter that is subject to decision by the agency shall make known such interest in the official records of the agency and shall refrain from participating in any manner in such decision by the agency or any entity that reviews agency decisions.

Subpart B—Program Approval

■ 20. Amend § 233.10 by revising paragraph (a) to read as follows:

§ 233.10 Elements of a program submission.

* * * * *

(a) A letter from the Governor of the State or Tribal leader requesting program approval.

* * * * *

■ 21. Revise § 233.11 to read as follows:

§ 233.11 Program description.

The program description as required under § 233.10 shall include:

(a) A description of the scope and structure of the State's program. The description must include the extent of the State's jurisdiction, scope of activities regulated, anticipated coordination, scope of permit exemptions if any, permit review criteria, and a description as to how the permit review criteria will be sufficient to carry out the requirements of part 233 subpart C.

(b) A description of the State's permitting, administrative, judicial review, and other applicable procedures.

(c) A description of the basic organization and structure of the State agency (agencies) which will have responsibility for administering the program. If more than one State agency is responsible for the administration of the program, the description shall address the responsibilities of each agency and how the agencies intend to coordinate administration, compliance, enforcement, and evaluation of the program.

(d) A description of the funding and staffing which will be available for program administration, including staff position descriptions and qualifications as well as program budget and funding mechanisms, sufficient to meet the requirements of part 233, subparts C through E.

(e) A description and schedule of the actions that will be taken following EPA approval for the State to begin administering the program if the State makes a request to assume administration of the program more than 30 days after EPA's approval.

(f) An estimate of the anticipated workload, including but not limited to number of discharges, permit reviews, authorizations and field visits, and decisions regarding jurisdiction.

(g) Copies of permit application forms, permit forms, and reporting forms.

(h) A description of the State's compliance evaluation and enforcement programs, including staff position descriptions and qualifications as well as program budget and funding mechanisms, sufficient to meet the requirements of part 233, subpart E, and an explanation of how the State will coordinate its enforcement strategy with that of the Corps and EPA.

(i) A description of the waters of the United States within a State over which the State assumes jurisdiction under the assumed program; a description of the waters of the United States within a State over which the Secretary retains administrative authority subsequent to program approval; and a comparison of the State and Federal definitions of wetlands.

(1) Before a State provides a program submission to the Regional Administrator, the Governor, Tribal leader, or Director shall submit a request to the Regional Administrator that the Corps identify the subset of waters of the United States that would remain subject to Corps administrative authority to include in its program submission. The request shall also include one of the following elements of required information: a citation or copy of legislation authorizing funding to prepare for assumption, a citation or copy of legislation authorizing assumption, a Governor or Tribal leader directive, a letter from the head of a State agency, or a copy of a letter awarding a grant or other funding allocated to investigate and pursue assumption. If the request includes the required information, then within seven days of receiving the State's request, the Regional Administrator shall transmit the request for the retained waters description to the Corps. This is intended to allow the Corps time to review its RHA section 10 list(s) and prepare a description of retained waters based on that list(s), in accordance with paragraph (i)(3) of this section, if the Corps chooses to do so;

(2) If the Corps does not notify the State and EPA that it intends to provide a retained waters description within 30 days of receiving the State's request transmitted by EPA, or if it does not provide a retained waters description within 180 days of receiving the State's request transmitted by EPA, the State shall develop a retained waters description pursuant to the process described in paragraph (i)(3) of this section;

(3) The program description in the State's program request to the Regional Administrator shall include a description of those waters of the United States over which the Corps retains administrative authority. The description may be a retained waters description that the Corps provides the State pursuant to paragraph (i)(1) of this section, or, if the Corps did not provide a list to the State, a list that the State prepares pursuant to paragraph (i)(2) of

this section. The retained waters description prepared by either the Corps or the State shall be compiled as follows:

(i) Using the relevant RHA section 10 list(s) as a starting point;

(ii) Placing waters of the United States, or reaches of these waters, from the RHA section 10 list into the retained waters description if they are known to be presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce;

(iii) To the extent feasible and to the extent that information is available, adding other waters or reaches of waters to the retained waters description that are presently used or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce; and

(iv) Adding a description of wetlands that are adjacent to the foregoing waters pursuant to paragraph (i)(5) of this section. This description does not require a specific listing of each wetland that is retained;

(4) The Regional Administrator may presume that a retained waters description that meets the criteria in paragraph (i)(3) of this section satisfies the statutory criteria for retained waters;

(5) The Secretary shall retain administrative authority over all jurisdictional wetlands adjacent to retained waters, waterward of the administrative boundary described in the Memorandum of Agreement with the Secretary. The extent of retained adjacent wetlands shall be identified in the retained waters description developed in accordance with paragraph (i)(3) of this section:

(i) The administrative boundary defines the landward extent of the adjacent wetlands to be retained by the Corps. The administrative boundary shall be jointly negotiated by the Director and the Corps. A 300-foot default boundary shall be used if no other boundary is negotiated; and

(ii) The Memorandum of Agreement with the Secretary shall articulate an approach for permitting projects which may cross the administrative boundary;

(6) The State assumes permitting authority over all waters of the United States not retained by the Corps as described in paragraph (i)(3) of this section. All discharges of dredged or fill material into waters of the United States must be regulated either by the State or the Corps; at no time shall there be a gap in permitting authority for any water of the United States.

(j) A description of the specific best management practices proposed to be used to satisfy the exemption provisions of section 404(f)(1)(E) of the Act for construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment.

(k) A description of the State's approach to ensure that all permits issued satisfy the substantive standards and criteria for the use of compensatory mitigation consistent with the requirements of part 230, subpart J. The State's approach may deviate from the specific requirements of subpart J to the extent necessary to reflect State administration of the program using State processes as opposed to Corps administration. For example, a State program may choose to provide for mitigation in the form of banks and permittee-responsible compensatory mitigation but not establish an in-lieu fee program. A State program may not be less stringent than the requirements of subpart J.

■ 22. Amend § 233.13 by adding paragraph (b)(5) to read as follows:

§ 233.13 Memorandum of Agreement with Regional Administrator.

* * * * *

(b) * * *

(5) Provisions specifying the date upon which the State shall begin administering its program. This effective date shall be 30 days from the date that notice of the Regional Administrator's decision is published in the **Federal Register**, except where the Regional Administrator has agreed to a State's request for a later effective date, not to exceed 120 days from the date of publication of the decision in the **Federal Register**.

■ 23. Amend § 233.14 by revising paragraph (b) to read as follows:

§ 233.14 Memorandum of Agreement with the Secretary.

* * * * *

(b) The Memorandum of Agreement shall include:

(1) A description of all navigable waters within the State over which the Corps retains administrative authority. Retained waters shall be identified in accordance with procedures set forth in § 233.11(i), and shall include a description of the administrative boundary demarcating the adjacent wetlands over which administrative authority is retained by the Corps and an approach for permitting projects which cross the administrative boundary. The default administrative boundary when no other boundary is negotiated shall be a 300-foot administrative boundary from the ordinary high water mark, mean high water mark, or mean higher high water mark on the west coast, of the retained water. The default approach for permitting projects which cross the administrative boundary, when no other approach is negotiated, is that the Corps will exercise permitting authority for discharges into wetlands adjacent to a retained water waterward of the administrative boundary and the State will exercise permitting authority for discharges into adjacent wetlands landward of the administrative boundary. The State and the Corps are encouraged to coordinate permitting procedures or to conduct joint processing of Federal and State permits pursuant to § 233.14.

(2) Procedures whereby the Secretary will, prior to or on the effective date set forth in the Memorandum of Agreement with the Regional Administrator, transfer to the State pending section 404 permit applications for discharges in State regulated waters and other relevant information not already in the possession of the Director.

Note: Where a State permit program includes coverage of those navigable waters in which only the Secretary may issue section 404 permits, the State is encouraged to establish in this Memorandum of Agreement procedures for joint processing of Federal and State permits, including joint public notice and public hearings.

(3) An identification of all general permits issued by the Secretary the terms and conditions of which the State intends to administer and enforce upon receiving approval of its program, and a plan for transferring responsibility for these general permits to the State, including procedures for the prompt transmission from the Secretary to the Director of relevant information not already in the possession of the Director. The information to be transferred includes but is not limited to support files for permit issuance, conditions and certifications placed on the Corps general permits, compliance reports, and records of enforcement actions.

■ 24. Amend § 233.15 by revising the first sentence in the introductory text of paragraph (e), the second sentence of paragraph (g) and paragraph (h) to read as follows:

§ 233.15 Procedures for approving State programs.

* * * * *

(e) After determining that a State program submission is complete, the Regional Administrator shall publish notice of the State's program submission in the **Federal Register** and in enough

of the largest newspapers in the State to attract statewide attention. * * *

* * * * *

(g) * * * The Regional Administrator shall prepare a responsiveness summary of significant comments received and the Regional Administrator's response to these comments. * * *

(h) If the Regional Administrator approves the State's section 404 program, the Regional Administrator shall notify the State and the Secretary of the decision, publish notice in the **Federal Register**, and post on EPA's website. The program for State-assumed waters shall transfer to the State on the date established in the Memorandum of Agreement between the State and Regional Administrator. The Secretary shall suspend the issuance by the Corps of section 404 permits in State regulated waters on such effective date.

* * * * *

■ 25. Amend § 233.16 by revising paragraphs (d)(2) and (3) and (e) to read as follows:

§ 233.16 Procedures for revision of State programs.

* * * * *

(d) * * *

(2) Notice of approval of program changes which the Regional Administrator determines are not substantial revisions may be given by letter from the Regional Administrator to the Governor or the Tribal leader and are effective upon the date in the approval letter. The Regional Administrator will notify the Secretary of the approval of any approved program modifications. The Regional Administrator will also notify other Federal agencies of approved program modifications as appropriate. The Regional Administrator shall post any such approval letters on the relevant pages of EPA's website.

(3) Whenever the Regional Administrator determines that the proposed revision is substantial, the Regional Administrator shall publish and circulate notice to those persons known to be interested in such matters, provide opportunity for a public hearing, and consult with the Corps, FWS, and NMFS. The Regional Administrator shall approve or disapprove program revisions based on whether the program fulfills the requirements of the Act and this part, and shall publish notice of the decision in the **Federal Register**. For purposes of this paragraph, substantial revisions include, but are not limited to, revisions that affect the scope of activities regulated, criteria for review of permits, public participation, or enforcement capability. Revisions to an Indian Tribe's assumed program that would add a new geographic area to the approved program require that the Regional Administrator determine that the Tribe meets the eligibility criteria in § 233.60 with regard to the new geographic area and constitute substantial revisions.

* * * * *

(e) Whenever the Regional Administrator has reason to believe that circumstances have changed with respect to a State's program, the Regional Administrator may request and the State shall provide a supplemental Attorney General's statement, program description, or such other documents or information as are necessary to evaluate the program's compliance with the requirements of the Act and this part.

Subpart C—Permit Requirements

■ 26. Amend § 233.21 by revising paragraphs (b) and (e)(2) to read as follows:

§ 233.21 General permits.

* * * * *

(b) The Director may issue a general permit for categories of similar activities if the Director determines that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment. Any general permit issued shall be in compliance with the section 404(b)(1) Guidelines.

* * * * *

(e) * * *

(2) Once the Director notifies the discharger of the Director's decision to exercise discretionary authority to require an individual permit, the discharger's activity is no longer authorized by the general permit.

■ 27. Amend § 233.23 by revising the introductory text of paragraph (c)(8) to read as follows:

§ 233.23 Permit conditions.

* * * * *

(c) * * *

(8) Inspection and entry. The permittee shall allow the Director, or the Director's authorized representative, upon presentation of proper identification, at reasonable times to:

* * * * *

■ 28. Add § 233.24 to read as follows:

§ 233.24 Judicial review.

All States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in Federal court of a Federally-issued NPDES permit (see section 509 of the Clean Water Act). A State will not meet this standard if, for example, it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review), or if it requires the imposition of attorneys' fees against the losing party, notwithstanding the merit of the litigant's position. This requirement does not apply to Indian Tribes.

Subpart D—Program Operation

■ 29. Amend § 233.30 by revising paragraphs (a) and (b)(5) to read as follows:

§ 233.30 Application for a permit.

(a) Except when an activity is authorized by a general permit issued pursuant to § 233.21 or is exempt from the requirements to obtain a permit under § 232.3, any person who proposes to discharge dredged or fill material into State regulated waters shall complete, sign, and submit a permit application to the Director. Applicants for projects that take more than five years to complete must submit a complete application for each five-year permit, and an applicant seeking a new five-year permit should apply for the new permit at least 180 days prior to the expiration of the current permit. Persons proposing to discharge dredged or fill material under the authorization of a general permit must comply with any reporting requirements of the general permit.

(b) * * *

(5) All activities which the applicant plans to undertake which are reasonably related to the same project must be included in the same permit application. For projects for which the planned schedule extends beyond five years at the time of the initial five-year permit application, the application for both the first and subsequent five-year permits must include an analysis demonstrating that each element of the 404(b)(1) Guidelines is met, consistent with 40 CFR part 230, for the full term of the project.

* * * * *

■ 30. Amend § 233.31 by revising paragraph (a) and adding paragraphs (c) and (d) to read as follows:

§ 233.31 Coordination requirements.

(a) If a proposed discharge may affect the biological, chemical, or physical integrity of the waters of any State(s) other than the State in which the discharge occurs, the Director shall provide an opportunity for such State(s) to submit written comments within the public comment period and to suggest permit conditions. If these recommendations are not accepted by the Director, the Director shall notify the affected State and the Regional Administrator prior to permit issuance in writing of the Director's failure to accept these recommendations, together with the Director's reasons for so doing. The Regional Administrator shall then have the time provided for in § 233.50(d) to comment upon, object to, or make recommendations.

* * * * *

(c) For the purposes of § 233.31(a), the definition of ''State'' in § 233.2 includes Indian Tribes that have been approved by EPA under CWA section 518 and applicable regulations for eligibility to administer any CWA provision as well as Indian Tribes that have been approved by EPA under paragraph (d) of this section for eligibility for the purpose of commenting under § 233.31(a).

(d) An Indian Tribe may apply to the Regional Administrator for a determination that it meets the statutory criteria of section 518 of the CWA, 33 U.S.C. 1377, to be treated in a manner similar to that in which EPA treats a State, for purposes of the coordination requirements of sections 404(h)(1)(C) and (E), 33 U.S.C. 1344(h)(1)(C) and (E), of the CWA and paragraphs (a) and (c) of this section.

(1) The Tribe's application shall concisely describe how:

(i) The Indian Tribe is recognized by the Secretary of the Interior;

(ii) The Indian Tribe has a governing body carrying out substantial governmental duties and powers;

(iii) The functions to be exercised by the Indian Tribe pertain to the management and protection of water resources which are held by an Indian Tribe, held by the United States in trust for Indians, held by a member of an Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and

(iv) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the CWA and applicable regulations.

(2) The Regional Administrator shall promptly notify the Indian Tribe of receipt of an application submitted under this section and shall process such application in a timely manner.

■ 31. Amend § 233.32 by revising the introductory text of paragraph (c)(1) to read as follows:

§ 233.32 Public notice.

* * * * *

(c) * * *

(1) By mailing a copy of the notice to the following persons (any person otherwise entitled to receive notice under this paragraph (c)(1) may waive their rights to receive notice for any classes or categories of permits):

* * * * *

■ 32. Amend § 233.33 is amended by revising paragraph (b) to read as follows:

§ 233.33 Public hearing.

* * * * *

(b) The Director shall hold a public hearing whenever the Director determines there is a significant degree of public interest in a permit application or a draft general permit. The Director may also hold a hearing, at the Director's discretion, whenever the Director determines a hearing may be useful to a decision on the permit application.

* * * * *

■ 33. Amend § 233.34 by revising paragraph (c) to read as follows:

§ 233.34 Making a decision on the permit application.

* * * * *

(c) After the Director has completed review of the application and consideration of comments, the Director will determine, in accordance with the record and all applicable regulations, whether or not the permit should be issued. No permit shall be issued by the Director under the circumstances described in § 233.20. The Director shall prepare a written determination on each application outlining the Director's decision and rationale for the decision. The determination shall be dated, signed, and included in the official record prior to final action on the application. The official record shall be open to the public.

■ 34. Amend § 233.36 by revising the introductory text of paragraph (a) and paragraph (c)(1) to read as follows:

§ 233.36 Modification, suspension or revocation of permits.

(a) *General.* The Director may reevaluate the circumstances and conditions of a permit either on the Director's own motion or at the request of the permittee or of a third party and initiate action to modify, suspend, or revoke a permit if the Director determines that sufficient cause exists. Among the factors to be considered are:

* * * * *

(c) * * *

(1) The Director shall develop procedures to modify, suspend, or revoke permits if the Director determines cause exists for such action (§ 233.36(a)). Such procedures shall provide opportunity for public comment (§ 233.32), coordination with the Federal review agencies (§ 233.50), and opportunity for public hearing (§ 233.33) following notification of the permittee. When permit modification is proposed, only the conditions subject to modification need be reopened.

* * * * *

■ 35. Revise § 233.37 to read as follows:

§ 233.37 Signatures on permit applications and reports.

The application and any required reports must be signed by the person who desires to undertake the proposed activity or by that person's duly authorized agent if accompanied by a statement by that person designating the agent. In either case, the signature of the applicant or the agent will be understood to be an affirmation that the applicant or the agent possesses or represents the person who possesses the requisite property interest to undertake the activity proposed in the application.

Subpart E—Compliance Evaluation and Enforcement

■ 36. Amend § 233.41 by revising paragraph (b)(2) to read as follows:

§ 233.41 Requirements for enforcement authority.

* * * * *

(b) * * *

(2) The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the Act, except that a State may establish criminal violations based on any form or type of negligence.

* * * * *

Subpart F—Federal Oversight

■ 37. Amend § 233.50 by:

■ a. Revising the section heading;

■ b. Revising paragraphs (d), (e), (f), and (h)(1); and

■ c. Adding paragraph (k).

The revisions and additions read as follows:

§ 233.50 Review of and objection to State permits and review of compensatory mitigation instruments.

* * * * *

(d) If the Regional Administrator intends to comment upon, object to, or make recommendations with respect to a permit application, draft general permit, or the Director's failure to accept the recommendations of an affected State submitted pursuant to § 233.31(a), the Regional Administrator shall notify the Director of the Regional Administrator's intent within 30 days of receipt. If the Director has been so notified, the permit shall not be issued until after the receipt of such comments or 90 days of the Regional Administrator's receipt of the public notice, draft general permit, or Director's response (§ 233.31(a)), whichever comes first. The Regional Administrator may notify the Director within 30 days of receipt that there is no comment but that the Regional Administrator reserves the right to object within 90 days of receipt, based on any new information brought out by the public during the comment period or at a hearing.

(e) If the Regional Administrator has given notice to the Director under paragraph (d) of this section, the Regional Administrator shall submit to the Director, within 90 days of receipt of the public notice, draft general permit, or Director's response (§ 233.31(a)), a written statement of the Regional Administrator's comments, objections, or recommendations; the reasons for the comments, objections, or recommendations; and the actions that must be taken by the Director in order to eliminate any objections. Any such objection shall be based on the Regional Administrator's determination that the proposed permit is:

(1) The subject of an interstate dispute under § 233.31(a); and/or

(2) Outside requirements of the Act, these regulations, or the 404(b)(1) Guidelines. The Regional Administrator shall make available upon request a copy of any comment, objection, or recommendation on a permit application or draft general permit to the permit applicant or to the public.

(f) When the Director has received an EPA objection or requirement for a permit condition to a permit application or draft general permit under this section, the Director shall not issue the permit unless the Director has taken the steps required by the Regional Administrator to eliminate the objection.

* * * * *

(h) * * *

(1) If the Regional Administrator withdraws the objection or requirement for a permit condition, the Director may issue the permit.

* * * * *

(k) If the State establishes third-party compensation mechanisms as part of its section 404 program (*e.g.,* banks or in-lieu fee programs), the Director must transmit a copy of instruments associated with these compensatory mitigation approaches to the Regional Administrator, the Corps, FWS, and NMFS for review prior to issuance, as well as to any other State agencies to the extent the State committed to do so in the program description pursuant to § 233.11(k). To the extent the State deems appropriate, the Director may also send these draft instruments to other relevant State resource agencies for review. This transmission and review requirement does not apply to permittee-responsible compensatory mitigation. If the Regional Administrator, the Corps, FWS, or NMFS intend to comment upon such instruments they must notify the Director of their intent within 30 days of receipt. If the Director has been so notified, the instrument must not be issued until after the receipt of such comments or after 90 days of receipt of the proposed instrument by the Regional Administrator, the Corps, the FWS, or NMFS. The Director must respond to any comments received within 90 days from the Regional Administrator, the Corps, FWS, NMFS, or State agencies that received the draft instruments pursuant to the State program description and inform the commenting agency of any comments or recommendations not accepted prior to approving the final compensatory mitigation instrument. In the event that the Regional Administrator has commented that the instrument fails to apply or ensure compliance with the requirements of § 233.11(k), the Director must not approve the final compensatory mitigation instrument until the Regional Administrator notifies the Director that the final instrument ensures compliance with § 233.11(k).

■ 38. Amend § 233.51 by adding paragraph (d) to read as follows:

§ 233.51 Waiver of review.

* * * * *

(d) If within 20 days of public notice of a permit application, pursuant to § 233.32, a Tribe notifies EPA that the application potentially affects Tribal rights or interests, including those beyond reservation boundaries, EPA will request a copy of the public notice for the permit application, even if Federal review of the relevant category of discharge has been waived, and the Regional Administrator and the Director shall then proceed in accordance with § 233.50.

■ 39. Amend § 233.52 by revising paragraphs (b) and (e) to read as follows:

§ 233.52 Program reporting.

* * * * *

(b) The Director shall submit to the Regional Administrator within 90 days after completion of the annual period, a draft annual report evaluating the State's administration of its program identifying problems the State has encountered in the administration of its program, steps taken to resolve these problems, as well as recommendations for resolving any outstanding problems along with a timeline for resolution. Items that shall be addressed in the annual report include an assessment of the cumulative impacts of the State's permitting program on the integrity of the State regulated waters; identification of areas of particular concern and/or interest within the State; the number and nature of individual and general permits issued, modified, and denied; number of violations identified and number and nature of enforcement actions taken; number of suspected unauthorized activities reported and nature of action taken; an estimate of extent of activities regulated by general permits; the number of permit applications received but not yet processed; and an assessment of avoidance, minimization, and compensation required for permits issued, including the type and quantity of resources impacted, type and quantity of compensation required (including quantification and rationale for out-of-kind or compensation provided outside the watershed), and a description of why compensation was not required, if applicable. The Annual Report shall briefly summarize resolution of issues identified in the previous Annual Report. Additionally, to the extent appropriate, the Annual Report should analyze program resources and staffing, including staffing changes, training, and vacancy rate since approval or the previous Annual Report.

* * * * *

(e) Within 30 days of receipt of the Regional Administrator's final comments, the Director will finalize the annual report, incorporating and/or responding to the Regional

Administrator's comments, and transmit the final report to the Regional Administrator. The Director shall make a copy of the final annual report, accepted by the Regional Administrator, publicly available.

* * * * *

■ 40. Amend § 233.53 by revising paragraphs (a)(1) and (c) to read as follows:

§ 233.53 Withdrawal of program approval.

(a) * * *

(1) The State shall give the Administrator and the Secretary no less than 180 days' notice of the proposed transfer. With the notice, the State shall submit a plan for the orderly transfer of all relevant program information not in the possession of the Secretary (such as permits, permit files, reports, permit applications, as well as files regarding ongoing investigations, compliance orders, and enforcement actions) which are necessary for the Secretary to administer the program. The notice shall include the proposed transfer date.

* * * * *

(c) The following procedures apply when the Administrator orders the commencement of proceedings to determine whether to withdraw approval of a State program:

(1) *Notice to State.* If the Regional Administrator has cause to believe that a State is not administering or enforcing its assumed program in compliance with the requirements of the CWA and this part, the Regional Administrator shall inform the Director of the State agency administering the approved program in writing of the specific areas of alleged noncompliance. If the State demonstrates to the Regional Administrator within 30 days of such notification that the State program is in compliance, the Regional Administrator shall take no further action toward withdrawal, and shall so notify the State in writing.

(2) *Public hearing.* If the State has not demonstrated its compliance to the satisfaction of the Regional Administrator within 30 days of notification, the Regional Administrator shall inform the Director of that finding. The Administrator shall then schedule a public hearing to solicit comments on the administration of the State program and its compliance with the Act and this part. Notice of such public hearing shall be published in the **Federal Register**, on EPA's website, and in enough of the largest newspapers and/or news websites in the State to attract statewide attention and mailed or emailed to persons on appropriate Tribal, State, and EPA mailing lists. This hearing shall be convened not less than 30 days or more than 60 days following the date of publication of the notice of the hearing in the **Federal Register**. Notice of the hearing shall identify the Administrator's concerns. All interested parties shall be given opportunity to make written or oral presentations on the State's program at the public hearing.

(3) *Notice to State of findings.* If the Administrator finds, after the public hearing, that the State is not in compliance, the Administrator shall notify the State via letter of the specific deficiencies in the State program, including administration and enforcement, and of necessary remedial actions. Within 90 days of receipt of the above letter, the State shall either carry out the required remedial action(s) or the Administrator shall withdraw program approval. If the State performs all required remedial action(s) in the allotted time or, if the Administrator determines as a result of the hearing that the State is in compliance, the Administrator shall so notify the State in writing and conclude the withdrawal proceedings. If the Administrator makes the determination that the assumed program should be withdrawn, then such determination will be published in the **Federal Register,** and the Administrator shall remove from the CFR, as appropriate, any provision addressing that State's assumed program. The effective date of the withdrawal, and the date upon which the Corps shall be the permitting authority, shall be 30 days after publication of the Administrator's decision in the **Federal Register.**

(4) *Determination to withdraw.* The Administrator's determination to withdraw program approval shall constitute final Agency action within the meaning of 5 U.S.C. 704.

* * * * *

Subpart G—Eligible Indian Tribes

§ 233.60 [Amended]

■ 41. Amend § 233.60 by removing in paragraph (c) the word ''Untied'' and adding in its place the word ''United.''

■ 42. Amend § 233.61 by revising paragraph (e) to read as follows:

§ 233.61 Determination of Tribal eligibility.

* * * * *

(e) The Administrator may, at the Administrator's discretion, request further documentation necessary to support a Tribal application.

* * * * *

■ 43. Amend § 233.62 by revising paragraph (a) and adding paragraph (c) to read as follows:

§ 233.62 Procedures for processing an Indian Tribe's application.

(a) The Regional Administrator shall process an application of an Indian Tribe submitted pursuant to § 233.61 in a timely manner. The Regional Administrator shall promptly notify the Indian Tribe of receipt of the application.

* * * * *

(c) The Regional Administrator shall follow the procedures for substantial program revisions described in § 233.16 in processing a Tribe's request to add additional geographic area(s) to its assumed 404 dredged and fill permit program that would add reservation areas to the scope of its approved program. A Tribe making such a request shall provide an application meeting the requirements of § 233.61 that describes how the Tribe meets the eligibility criteria in § 233.60 for the new area.

Subpart H—Approved State Programs

■ 44. Revise § 233.70 to read as follows:

§ 233.70 Michigan.

The applicable regulatory program for discharges of dredged or fill material into waters of the United States in Michigan that are not presently used, or susceptible for use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to the ordinary high water mark, including wetlands adjacent thereto, except those on Indian lands, is the program administered by the Michigan Department of Environment, Great Lakes, and Energy (previously named Department of Natural Resources, Department of Environmental Quality, and Department of Natural Resources and Environment), approved by EPA, pursuant to section 404 of the CWA. Notice of this approval was published in the **Federal Register** on October 2, 1984; the effective date of this program is October 16, 1984. This program consists of the following elements, as submitted to EPA in the State's program submission and subsequently revised.

(a) *Incorporation by reference.* The requirements set forth in the State statutes and regulations cited in this paragraph are hereby incorporated by reference and made a part of the applicable 404 Program under the CWA for the State of Michigan. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and *1 CFR part 51.* Material is incorporated as it exists on [Effective DATE of final rule]. To enforce any edition other than that specified in this

section, the EPA must publish a document in the **Federal Register** and the material must be available to the public. This incorporation by reference (IBR) material is available for inspection at the EPA and at the National Archives and Records Administration (NARA). Copies of this IBR material also may be obtained from the EPA. Contact the EPA at: EPA Docket Center Reading Room, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004 (telephone number: 202–566–1744), or send mail to Mail Code 5305G, 1200 Pennsylvania Ave. NW, Washington, DC 20460, and at the Water Division, Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, IL 60604. For information on the availability of this IBR material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations.html* or email *fr.inspection@nara.gov.* Copies of the materials incorporated by reference for Michigan's program can also be accessed at the Michigan Department of Environment, Great Lakes, and Energy office at 525 W Allegan St., Lansing, MI 48933, or at *http://www.legislature.mi.gov/.*

(1) Natural Resources and Environmental Protection Act 451 of 1994, Part 323 Great Lakes Shorelands Protection and Management, MCL § 324.323 and Part 325 Great Lakes Submerged Lands, MCL § 324.325 *et seq.*

(2) Natural Resources and Environmental Protection Act 451 of 1994, Part 31 Water Resources Protection, MCL § 324.31 *et seq.*

(3) Natural Resources and Environmental Protection Act 451 of 1994, Part 303 Wetland Protection, MCL § 324.303 *et seq.*

(4) Natural Resources and Environmental Protection Act 451 of 1994, Part 301 Inland Lakes and Streams, MCL § 324.301 *et seq.*

(5) The Michigan Administrative Procedures Act of 1969, MCL § 24–201 *et seq.*

(6) Natural Resources and Environmental Protection Act 451 of 1994, Parts 307 Inland Lake Levels and 315 Dam Safety, MCL § 324.307 *et seq.* and MCL § 324.315 *et seq.*

(7) R 281.21 through R 281.26 inclusive, R 281.811 through R 281.846 inclusive, R 281.921 through R 281.925 inclusive, R 281.951 through R 281.961 inclusive, and R 281.1301 through R 281.1313 inclusive of the Michigan Administrative Code.

(b) *Other Laws.* The following statutes and regulations, although not incorporated by reference, also are part of the approved State-administered program:

(1) Administrative Procedures Act, MCL 24.201 *et seq.*

(2) Freedom of Information Act, MCL 15.231 *et seq.*

(3) Open Meetings Act, MCL 15.261 *et seq.*

(4) Natural Resources and Environmental Protection Act 451 of 1994, Part 17 Michigan Environmental Protection Act, MCL 324.17 *et seq.*

(c) *Memoranda of Agreement.*

(1) The Memorandum of Agreement between EPA Region V and the Michigan Department of Natural Resources, signed by the EPA Region V Administrator on December 9, 1983. The 1983 Memorandum of Agreement has subsequently been replaced by a Memorandum of Agreement between EPA Region V and the Michigan Department of Environmental Quality (now referred to as the Michigan Department of Environment, Great Lakes, and Energy) signed on November 9, 2011.

(2) The Memorandum of Agreement between the U.S. Army Corps of Engineers and the Michigan Department of Natural Resources, signed by the Commander, North Central Division, on March 27, 1984.

(d) *Statement of Legal Authority.* (1) ''Attorney General Certification section 404/State of Michigan'', signed by Attorney General of Michigan, as submitted with the request for approval of ''The State of Michigan 404 Program'', October 26, 1983.

(e) The Program description and any other materials submitted as part of the original submission or supplements thereto.

■ 45. Amend § 233.71 by:

■ a. Revising the last sentence of the introductory paragraph and paragraph (a); and

■ b. Removing and reserving paragraph (b).

The revisions read as follows:

§ 233.71 New Jersey.

* * * This program consists of the following elements, as submitted to EPA in the State's program submission:

(a) *Incorporation by reference.* The requirements set forth in the State statutes and regulations cited in this paragraph are hereby incorporated by reference and made a part of the applicable 404 Program under the CWA for the State of New Jersey. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and *1 CFR part 51.* Material is incorporated as it exists as of 1 p.m. on March 2, 1994. To enforce any edition other than that specified in this section, the EPA must publish a document in the **Federal Register** and the material must be available to the public. This incorporation by reference (IBR) material is available for inspection at the EPA and at the National Archives and Records Administration (NARA). Copies of this IBR material also may be obtained from the EPA. Contact the EPA at: EPA Docket Center Reading Room, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004 (telephone number: 202–566–1744), or send mail to Mail Code 5305G, 1200 Pennsylvania Ave. NW, Washington, DC 20460, and at the Library of the Region 2 Regional Office, Ted Weiss Federal Building, 290 Broadway, New York, NY 10007. For information on the availability of this IBR material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations.html* or email *fr.inspection@nara.gov.* Copies of the materials incorporated by reference for New Jersey's program can also be accessed at the New Jersey Department of Environmental Protection at 401 East State St., Trenton, NJ 08625, or at *https://www.epa.gov/cwa404g/us-interactive-map-state-and-tribal-assumption-under-cwa-section-404#nj.*

(1) New Jersey Statutory Requirements Applicable to the Freshwater Wetlands Program, 1994.

(2) New Jersey Regulatory Requirements Applicable to the Freshwater Wetlands Program, 1994.

(b) [Reserved]

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[FR Doc. 2023–15284 Filed 8–11–23; 8:45 am]

BILLING CODE 6560–50–P