ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 123, 124, 232, and 233

[EPA–HQ–OW–2020–0276; FRL–6682–01–OW]

RIN 2040–AF83

Clean Water Act Section 404 Tribal and State Assumption Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is finalizing the Agency's first comprehensive revisions to the regulations governing Clean Water Act (CWA) section 404 Tribal and State programs since 1988. The primary purpose of the revisions is to respond to longstanding requests from Tribes and States to clarify the requirements and processes for the assumption and administration of a CWA section 404 permitting program for discharges of dredged and fill material. The revisions facilitate Tribal and State assumption and administration of CWA section 404, 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 ensuring flexibility to accommodate individual Tribal and State needs. In addition, the final rule clarifies the criminal negligence standard in the CWA section 404 program, as well as making a corresponding change in the section 402 program. Finally, the final rule makes technical revisions, including removing outdated references associated with the section 404 Tribal and State program regulations.

DATES: This rule is effective on January 17, 2025. The incorporation by reference of certain material listed in the rule is approved by the Director of the Federal Register as of January 17, 2025.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OW–2020–0276. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available in hard copy form. Publicly available docket materials are available electronically through *https://www.regulations.gov.*

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SUPPLEMENTARY INFORMATION:

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I. Executive Summary

Section 404 of the Clean Water Act (CWA) establishes a program to regulate the discharge of dredged or fill material into navigable waters, defined as ''waters of the United States.'' 33 U.S.C. 1344. The section 404 program, introduced in the 1972 amendments to the Federal Water Pollution Control Act, is generally administered by the U.S. Army Corps of Engineers (''Corps''). However, in 1977, Congress amended section 404 of the CWA to allow States to administer their own dredged or fill material permitting programs in certain waters of the United States within their jurisdiction, subject to EPA approval. *Id.* at 1344(g). A Tribe or State administering a section 404 program is responsible for permitting discharges of dredged and fill material, authorizing discharges under general permits, taking enforcement actions with respect to unauthorized discharges, and ensuring compliance with the terms and conditions of permits under the Tribe's or State's authority. EPA maintains oversight of Tribal and State section 404 programs.

In 1980, EPA promulgated regulations to establish procedures and criteria for approving or disapproving State programs under section 404(g) and for oversight of State programs after approval. 45 FR 33290 (May 19, 1980). EPA revised the regulations in 1988. 53 FR 20764 (June 6, 1988). The 1988 revisions updated procedures and criteria used in approving, reviewing, and withdrawing approval of section 404 State programs, as well as incorporating section 404 program definitions and section 404(f)(1) exemptions at 40 CFR part 232. Although the Agency made targeted revisions to 40 CFR part 233 in the early 1990s and 2000s in light of other statutory and regulatory changes (*e.g.,* new provisions addressing treatment of Tribes in a similar manner as States), the Agency has not comprehensively revised these regulations since 1988.

Nearly half of States and a few Tribes have expressed some level of interest to EPA over time in assuming the section 404 dredged and fill permit program, but only two States (Michigan and New Jersey) currently administer the program.[1] Tribes and States have identified several barriers to program assumption. One of the barriers they identified is uncertainty regarding the scope of assumable waters. To address this, the Agency convened the Assumable Waters Subcommittee in

[1] Florida obtained EPA's approval to assume the CWA section 404 program on December 17, 2020. On February 15, 2024, the U.S. District Court for the District of Columbia vacated EPA's approval of Florida's program. *Center for Biological Diversity* v. *Regan,* No. 21–119, 2024 WL 655368 (D.D.C.). Accordingly, only the impacts of this rule on the Michigan and New Jersey programs are discussed in this rule. An appeal of the district court's decision is pending. *See* No. 24–5101 (D.C. Cir.).

2015 to provide advice and develop recommendations as to how 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 final report of the Subcommittee was submitted to the National Advisory Council for Environmental Policy and Technology (NACEPT), which adopted the majority recommendation in the Subcommittee report. In its 2017 letter to the Administrator conveying this recommendation, NACEPT recommended that EPA develop regulations to clarify assumed and retained waters.[2]

In this rule, the Agency also responds to longstanding requests from Tribes and States to streamline and clarify the requirements and processes for the assumption and administration of a CWA section 404 program as well as EPA oversight.[3] The final rule facilitates Tribal and State assumption of the section 404 program, consistent with the policy of the CWA as described in section 101(b), by making program assumption procedures and requirements transparent and straightforward and addresses State-identified barriers to assumption. The final rule clarifies how Tribes and States can ensure their program meets the minimum requirements of the CWA while allowing for flexibility in the way these requirements may be met. It clarifies the criminal enforcement requirements for Tribal and State section 404 programs and makes a corresponding change in section 402 Tribal and State program requirements. The Agency is also finalizing other minor updates and technical revisions in 40 CFR parts 232, 233, and part 124 associated with Tribal and State section 404 programs. This rule is comprehensive in that EPA has updated all of the provisions in 40 CFR parts 232, 233, and 124 associated with Tribal and State 404 programs that it determined needed to be clarified or updated at this time. This rule does not reopen any other provisions in parts 232, 233, or 124.

II. General Information

A. What action is the agency taking?

Assumption enables Tribes and States to administer the CWA section 404 program, placing them in the primary decision-making position for permitting discharges of dredged or fill material into certain waters of the United States. EPA is revising and modernizing its regulations to clarify requirements for Tribal and State program assumption and administration, reduce barriers to assumption, and make technical corrections to facilitate Tribal and State assumption and administration of the section 404 program. This rule also addresses EPA's procedures and criteria for 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, with one corresponding clarification to CWA section 402 National Pollutant Discharge Elimination System (NPDES) Tribal and State section 402 permitting program requirements for criminal enforcement at 40 CFR 123.27.

B. 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 101, 301, 309, 402, 404, 501, and 518.

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

The costs and benefits are qualitatively discussed in the *Economic Analysis for the Clean Water Act Section 404 Tribal and State Program Regulation.* The benefits of the final rule are primarily attributable to establishing a process to develop a retained waters description, providing a program effective date, and providing opportunities for Tribal input. The incremental costs of the final rule are primarily attributable to a potential burden increase for Tribes to meet revised judicial review requirements and a potential burden increase to Tribes, States, and permittees from revisions that expand on existing Tribal opportunities to provide input. The Agency expects these benefits to justify the costs. The economic analysis does not quantify these potential incremental economic impacts, as there is very limited data associated with these changes on which to base estimates.

III. Background

A. Statutory and Regulatory History

1. CWA Section 404

In 1972, Congress amended the Federal Water Pollution Control Act (FWPCA), or the CWA as it is commonly called,[4] 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 1972 statutory scheme is ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' 33 U.S.C. 1251(a). To achieve this objective, Congress provided, ''[e]xcept 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 broadly to include ''any addition of any pollutant to navigable waters [5] from any point source,'' which includes the discharge of dredged or fill materials from a point source into waters of the United States. *Id.* at 1362(12).

Section 404 of the CWA establishes a permitting program to regulate the discharge of dredged or fill material from a point source into navigable waters, unless the discharge is associated with an activity exempt from section 404 permitting requirements under CWA section 404(f). *Id.* at 1344. Discharges of dredged materials, such as the redeposit of dredged material (other than incidental fallback), and discharges of fill materials, such as rock, sand, or dirt, 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(a) of the CWA authorizes the Secretary of the Army to issue permits after notice and opportunity for public hearings to discharge dredged or fill material into navigable waters at specified disposal sites. *Id.* at 1344(a). The Act specifies that the Secretary of the Army acts through the Chief of

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

[3] *See, e.g.,* letter from Thomas W. Easterly, Chair, Water Committee, The Environmental Council of States, Lucy C. Edmondson, Vice Chair, The Environmental Council of States, to Peter Silva, Assistant Administrator, Office of Water, U.S. Environmental Protection Agency. February 26, 2010; 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; Letter from Alexandria Dapolito Dunn, ECOS, Sean Rolland, ACWA, and Jeanne Christie, ASWM to Nancy K. Stoner, Acting Assistant Administrator, Office of Water, U.S. Environmental Protection Agency. April 30, 2014.

[4] 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.

[5] The CWA uses the term ''navigable waters,'' which the statute defines as ''the waters of the United States, including the territorial seas.'' 33 U.S.C. 1362(7).

Engineers, and thus the Corps generally administers the day-to-day permitting program under section 404, unless EPA approves a Tribe's or State's request to do so. *See id.* at 1344(d), (g).

The 1977 Amendments made the regulation of the discharge of dredged or fill material a shared responsibility of the States and the Federal Government.[6] This partnership is consistent with the policy of CWA section 101(b) that ''preserve[s] and protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.'' and provides for States to ''implement the permit programs under sections 1342 and 1344 of this title.'' [7] To facilitate State assumption of the section 404 program, Congress structured requirements and procedures to leverage States' existing authority to administer the CWA section 402 program.[8] *See* section III.A.4 of this preamble for further discussion on the specific statutory provisions that apply to assumed programs.

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 section 404(b)(1) Guidelines [9] or corresponding Tribal or State laws or regulations, 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 section 404(b)(1) Guidelines and may be issued on a nationwide, regional, or programmatic basis for discharges from specific categories of activities. General permits allow activities that meet specified conditions to proceed with little or no delay. 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 the CWA section 404(b)(1) guidelines.

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.[10] 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. In the context of section 404, the Corps does the day-to-day work of conducting jurisdictional determinations,[11] making permit decisions, ensuring compliance, and taking enforcement actions, as necessary for the implementation of the Federal section 404 program.

Under section 404, EPA establishes environmental criteria used in evaluating permit applications (*i.e.,* the CWA section 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)–(l)); may review and comment on general permits, authorization under general permits, and individual permit applications issued by Tribes, States, or the Corps; may prohibit, deny, or restrict the use of any defined area as a disposal site (section 404(c)); and may elevate Corps issued permits for resolution (section 404(q)).

2. Scope of Tribal and State CWA Section 404(g) Programs

When Congress enacted the CWA in 1972, the Corps had long been regulating ''navigable waters of the United States'' as defined under the Rivers and Harbors Act of 1899 (RHA). The CWA defined ''navigable waters'' to mean ''the waters of the United States, including the territorial seas.'' 33 U.S.C. 1362(7). The Corps' initial post-CWA regulations treated the two jurisdictional terms under the two different statutes interchangeably. 39 FR 12115, 12119 (April 3, 1974). In 1975, the U.S. District Court for the District of Columbia found that ''waters of the United States'' under the CWA exceeds the scope of jurisdiction under the RHA and ordered the Corps to adopt new regulations ''clearly recognizing the full regulatory mandate of the Water Act.'' *Nat. Res. Def. Council, Inc.* v. *Callaway,* 392 F. Supp. 685, 686 (D.D.C. 1975).

In July 1975, the Corps issued new regulations expanding 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 or 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 or 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 fill material into ''any navigable water [including intrastate lakes, rivers and streams . . .]'' *Id.* at 31326. The intent of the phased approach was to provide time for the Corps 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.'').

[6] *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 . . .''). The 1977 amendments also introduced exemptions and general permits. *See* 33 U.S.C. 1344(e)–(f).

[7] *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.'''').

[8] *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.''). A Tribe or State need not have an approved CWA section 402 program prior to seeking to assume administration of CWA section 404.

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

[10] 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.

[11] EPA decisions on jurisdiction do not constitute approved jurisdictional determinations as defined by the Corps regulations at 33 CFR 331.2. EPA has final administrative authority over the scope of CWA jurisdiction. Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act (''Civiletti Memorandum''), 43 Op. Att'y Gen. 197 (1979).

Thus, the phases did not mean all of the waters in the final regulation were not waters of the United States, but rather reflected when the Corps would have capacity to begin regulating activities within each type of jurisdictional water.

Some in Congress were concerned about breadth of the new interpretation of ''waters of the United States'' under the Corps' CWA dredged and fill regulatory program. In 1976, the House of Representatives passed H.R. 9560, which would have 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 addressed the desire for State control by passing a bill allowing 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).[12] After assumption, the Corps would retain section 404 permitting authority in Phase I waters. This general approach was codified in the final bill, H.R. 3199, referred to as the 1977 CWA Amendments: 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).[13] 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, other than waters that were historically used as a means 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 Corps-retained waters under section 404(g)(1) as ''waters already being regulated by the USACE,'' *i.e.,* those waters the Corps regulated under section 10 of the RHA, ''plus all adjacent wetlands to these waters.'' 42 FR 37122, 37124 (July 19, 1977). The legislative history suggests that the Senate expected widespread assumption of the section 404 program, leaving the Corps to regulate only RHA section 10 waters that are currently used as a means 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; *see* 33 U.S.C. 1344(g)(1).

3. Overview of CWA Section 404(g) Statutory Requirements for Program Administration and Implementation

Congress laid out general procedures for Tribal [14] and State submissions and EPA's approval, upon which EPA has further elaborated in regulation, as discussed in section III.A.4 of this preamble below. Pursuant to section 404(g), a Tribe or State seeking to assume the section 404 program must submit to the EPA Administrator a full and complete description of the proposed program and a statement from the attorney general (or attorney for Tribal or State agencies that have independent legal counsel) that it has adequate authority to establish and carry out the proposed program under Tribal or State law. 33 U.S.C. 1344(g)(1). The Administrator has up to ten days after the receipt of the program description and attorney general statement to provide copies to the Secretary of the Army and Secretary of the Interior (acting through the Director of the United States Fish and Wildlife Service), who in turn have up to 90 days from the Administrator's receipt of a complete program description and attorney general statement to provide comments to the Administrator.[15] *Id.* at 1344(g)(2)–(3).

Section 404(h) of the Act identifies eight authorities EPA must ensure a Tribe or State has prior to approving a request to assume and administer a section 404 program. *Id.* at 1344(h)(1)(A)–(H). First, a Tribe or State must have the authority to issue permits that apply and assure compliance with the requirements of section 404 (including but not limited to the CWA section 404(b)(1) Guidelines); issue permits for a set duration which cannot exceed five years; and terminate or modify an issued permit. *Id.* at 1344(h)(1)(A). Second, the Tribe or State must have the authority to inspect, monitor, enter and require reports in association with issued permits to the same extent as required under section 1318 of the Act. *Id.* at 1344(h)(1)(B). Third, the Tribe or State must have the authority to provide public notice, provide an opportunity to comment on proposed permits, and provide an opportunity for a public hearing. *Id.* at 1344(h)(1)(C). Fourth, the Tribe or State must have authority to assure EPA receives notice and a copy of each application (unless review is waived). *Id.* at 1344(h)(1)(D). Fifth, the Tribe or State must have authority to provide notice to Tribes and States whose waters may be affected by the permit and for the affected Tribe or State to provide written recommendations. *Id.* at 1344(h)(1)(E). Sixth, a Tribe or State must also have the authority to assure no permit will be issued if it would substantially impede anchorage and navigation of the navigable waters. *Id.* at 1344(h)(1)(F). Seventh, the Tribe or State must have authority to abate violations of permits and the program—including both civil and criminal penalties as well as other ways and means of enforcement. *Id.* at 1344(h)(1)(G). And lastly, the Tribe or State must have authority to assure continued coordination with Federal and Federal-State water-related planning and review processes. *Id.* at 1344(h)(1)(H).

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 State's request to assume the section 404 program. *Id.* at 1344(h)(2). If the Administrator fails to make a determination with respect to any

[12] 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).

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

[14] 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).

[15] Per the regulations, a copy is also provided to the National Marine Fisheries Service. *See* 40 CFR 233.15(d).

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. *Id.* at 1344(h)(3). The Act also provides for EPA to withdraw assumed programs that are not administered in accordance with the requirements of the Act. *Id.* at 1344(i).

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 jurisdiction.[16] For section 404 permitting purposes, the Tribe or State must exercise jurisdiction over all assumed waters subject to the CWA except those waters to be retained by the Corps. 33 U.S.C. 1344(g). The Corps retains CWA 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 CWA section 404 authority over Tribal waters or waters in lands of exclusive Federal jurisdiction. Tribal or State 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, but the Corps will remain the CWA 404 permitting authority for retained waters.

4. 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 to approve or disapprove State programs under section 404(g) and monitor State programs after approval. 45 FR 33290 (May 19, 1980).[17] On June 6, 1988, EPA revised these procedures and criteria used in approving, reviewing, and withdrawing approval of section 404 State programs and codified them at 40 CFR part 233. 53 FR 20764 (June 6, 1988). The 1988 regulations provided States with flexibility in program design and administration while still meeting the requirements and objectives of the CWA. They also incorporated section 404 program definitions and section 404(f)(1) exemptions at 40 CFR part 232.[18]

The regulations at 40 CFR part 233 described the assuming Tribe's or State's program requirements, EPA responsibilities, approval and oversight of assumed programs, and requirements for review, modification, and withdrawal of Tribal and State programs (as necessary). Subpart B of the 404 State Program Regulations sets forth the elements of program approval, including the program description, the Attorney General's statement, the Memorandum of Agreement between the Tribe or State and EPA, and the Memorandum of Agreement between the Tribe or State and the Secretary. It also establishes procedures for approving and revising Tribal or State programs. 40 CFR 233.10 through 233.16. Subpart C addresses Permit Requirements, subpart D lays out Program Operation Requirements, subpart E establishes requirements for Compliance Evaluation and Enforcement, and subpart F discusses Federal Oversight authority. *Id.* at 233.20–53. In subpart G, EPA lays out requirements and procedures for Tribal assumption, *id.* at 233.60–62, and subpart H codifies EPA's approval of Michigan and New Jersey's programs and incorporates certain State laws by reference. *Id.* at 233.70–71. These regulations implement key principles of Tribal and State assumption, including that an assumed program must be consistent with and no less stringent than the Act and implementing regulations, allow for public participation, ensure consistency with the CWA 404(b)(1) Guidelines, and have adequate enforcement authority.

Since 1988, the Agency has made several targeted revisions and additions to the CWA section 404 Tribal and State program regulations at 40 CFR part 233. 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. 57 FR 5320 (February 13, 1992). In 1993, the Agency added subpart G to 40 CFR part 233 pursuant to CWA section 518, which required EPA to promulgate regulations specifying how Indian Tribes may qualify for treatment in a similar manner as a State (TAS) for purposes of assuming the section 404 program. 58 FR 8172 (February 11, 1993).[19] The 1993 rule also revised 40 CFR part 232 by adding new definitions for ''Federal Indian reservation,'' ''Indian Tribe,'' and ''States.'' *Id.* The Agency further revised the subpart G regulations regarding Tribal eligibility at sections 233.60, 233.61, and 233.62 in 1994 to improve and simplify the process for Tribes to obtain EPA approval to assume the section 404 program. 59 FR 64339, 64345 (December 14, 1994). Under that rule, known as the Simplification Rule, a Tribe does not need to prequalify for TAS before requesting to assume the section 404 program. Instead, it can establish its TAS eligibility at the program approval stage, subject to EPA notice and comment procedures for State program approval. *Id.* at 64339–40. A 2005 rule on cross-media electronic reporting added section 233.39 on electronic reporting. 70 FR 59848 (October 13, 2005). EPA also codified 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) in subpart H of 40 CFR part 233.

B. Need for Rulemaking Revisions

Although nearly half of the States and a few Tribes have expressed some level of interest to EPA over time in assuming the Federal section 404 dredged and fill permit program, only two States currently administer the program.[20] In 2010 and 2011 letters to EPA, the Environmental Council of States

[16] 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.'') The conference report is available at *https://www.epa.gov/sites/production/files/2015-11/documents/1977_conf_rept.pdf.*

[17] 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 made no substantive changes to any of the affected sections. 48 FR 14146, 14208 (April 1, 1983).

[18] The 1988 regulations essentially recodified at 40 CFR part 232 the 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.

[19] 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. 58 FR 8183 (''*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.'').

[20] Florida obtained EPA's approval to assume the CWA section 404 program on December 17, 2020. On February 15, 2024, the U.S. District Court for the District of Columbia vacated EPA's approval of Florida's program. *Center for Biological Diversity* v. *Regan,* No. 21–119, 2024 WL 655368 (D.D.C.). An appeal of the district court's decision is pending. *See* No. 24–5101 (D.C. Cir.).

recommended further steps to encourage Tribal and State assumption of the program, remove barriers to assumption, and improve the efficiency of the program.[21] While some Tribes and States have considered assumption, they have expressed to EPA the need for further clarification regarding the regulations, including which waters a Tribe or State may assume and which waters the Corps retains. For example, in a 2014 letter to then-Acting Assistant Administrator Nancy Stoner,[22] 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 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, Tribal and 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 Administrator Scott Pruitt on June 2, 2017, with additional notations and recommendations, such as a preference for clarity through regulation. The ''Final Report of the Assumable Waters Subcommittee, May 2017,'' recommended that EPA develop policies, guidance, and regulations to clarify assumed and retained waters.[23]

In addition to the needs identified by Tribes and States, the Agency also recognized the need for other revisions, including several technical revisions to the regulations. For example, while the 1988 regulations recognized that the part 124 regulations do not apply to Tribal or State section 404 programs, the Agency did not make conforming revisions. The regulation also required other revisions throughout 40 CFR part 233 to update cross-references, ensure consistent use of terminology, and facilitate efficient program operation.

On June 11, 2018, the Agency published its 2018 Spring Unified Agenda of Regulatory and Deregulatory Actions [24] announcing the Agency was considering a rulemaking to provide the first comprehensive revisions to the section 404 Tribal and State program regulations since 1988.

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 regulation that could benefit from additional clarity and revision. Tribes and States provided input on various topics at Tribal and State engagement sessions, including requests for flexibility in assuming and administering the section 404 program and clarification on retained and assumed waters. *See* section V.E and F of this preamble for further discussion on Tribal and State engagement in this rule effort. In 2023, EPA held informational webinars for States on January 24 and for Tribes on January 2–5 and January 31. At these webinars, EPA provided Tribes and States with an update on the rulemaking effort and an overview of previously received Tribal and State input to EPA. EPA did not seek additional input from Tribes or States at the January 2023 webinars.

The Agency announced a proposed rule to revise the CWA section 404 Tribal and State program regulations on July 19, 2023; the Agency also posted a draft of the proposed rule on its website. On August 14, 2023, the Agency published the proposed rulemaking in the **Federal Register**, 88 FR 55276, which initiated a 60-day public comment period that lasted through October 13, 2023. EPA held a virtual public hearing on September 6, 2023, and hosted input sessions for interested State and Tribal parties throughout August 2023, including one State input session on August 24, 2023, and two Tribal input sessions on August 15 and 30, 2023. In finalizing the proposed rule, the Agency reviewed 44 comments received on the proposed rulemaking, in addition to input received during pre-proposal, at the public hearing, and at the Tribal and State input sessions. Commenters provided a range of feedback on the proposal. The Agency discusses comments received and responses in the applicable sections of this preamble to the rule. A complete response to comments document is available in the docket for the rule (Docket ID No. EPA–HQ–OW–2020–0276).

The rule addresses many of the issues raised by Tribes and States as challenges to assuming section 404, as well as drawing from EPA's experience working with Tribes and States pursuing assumption and in program oversight.

IV. Final Rule

EPA is finalizing revisions to the CWA section 404 Tribal and State program regulations at 40 CFR part 233 to provide additional clarity on conflict of interest prohibitions, program approval procedures and requirements, permit requirements, program operations, compliance evaluation and enforcement, Federal oversight, and Tribal provisions. EPA is also finalizing revisions to the criminal enforcement requirements in 40 CFR 123.27 and 40 CFR 233.41, which apply to Tribes and States that administer the CWA section 402 National Pollutant Discharge Elimination System (NPDES) permitting program as well as the section 404 program.

This section of this preamble addresses changes to seven sub-sections in the existing subpart structure of the 40 CFR part 233 regulations: Subpart A—General, Subpart B—Program Approval, Subpart C—Permit Requirements, Subpart D—Program Operations, Subpart E—Compliance Evaluation and Enforcement, Subpart F—Federal Oversight, and Subpart G—Eligible Indian Tribes. Each sub-section contains topics covered under that subpart of the regulation. Within each topic, this preamble includes (1) an overview of the topic and its relevant final rule provision(s) and (2) a summary of the Agency's final rule rationale and public comments. Where applicable, some topics also address implementation considerations for the final rule provisions. This preamble is structured in a manner intended to clearly convey the relevant changes to the regulatory text. Following this preamble discussion on the final rule provisions, this section of this preamble also includes four sub-sections that discuss the impact of the final rule on existing programs, technical revisions,

[21] Letter from Thomas W. Easterly, Chair, Water Committee, The Environmental Council of States, Lucy C. Edmonson, Vice Chair, The Environmental Council of States, to Peter Silva, Assistant Administrator, Office of Water, U.S. Environmental Protection Agency. February 26, 2010; 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.

[22] Letter from Alexandria Dapolito Dunn, ECOS, Sean Rolland, ACWA, and Jeanne Christie, ASWM, to Nancy Stoner, Acting Assistant Administrator, Office of Water, U.S. Environmental Protection Agency. April 30, 2014.

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

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

incorporation by reference, and severability.

A. General

1. Conflict of Interest

a. Overview and What the Agency Is Finalizing

The Agency's 1988 regulations for the section 404 Tribal and State program provided a general prohibition that public officers or employees with direct personal or pecuniary interests in a decision must make the interest known and not participate in such decision. In the proposal to this rule, the Agency proposed to clarify to whom the provision applies. The proposal specified that individuals who exercise responsibilities over section 404 permitting and programs may not be involved in any matters in which they have a direct personal or pecuniary interest. The proposal also clarified that this provision applies to decisions by the Tribal or State permitting agency as well as any entity that reviews decisions of the agency.

After reviewing public comments, the Agency is finalizing the revisions to the conflict of interest provision as proposed. EPA is also affirming the importance of ensuring public confidence when a Tribe or State issues a permit to one of its agencies or departments, though has determined that codifying specific processes or requirements to address self-issuance of permits by assuming Tribes and States is unnecessary. This provision does not address or affect Federal or State court review of permitting actions.

b. Summary of Final Rule Rationale and Public Comment

CWA section 404 does not require EPA to establish guidelines on conflicts of interest for Tribal or State programs. In contrast, the CWA requires 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).

In 1984, EPA proposed to codify the section 402 provision in its revisions to the section 404 Tribal and State program regulations. 49 FR 39012 (October 2, 1984). 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 practical differences between the two programs. 53 FR 20764, 20766 (June 6, 1988). At that time, EPA noted that NPDES discharges are usually long-term discharges, often from certain specific types of industrial or municipal facilities. *Id.* In contrast, discharges authorized by section 404 typically tend to be one-time discharges and generated 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.'' *Id.* EPA 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. *Id.* Instead, EPA provided a general prohibition that public officers or employees with such interests in a decision shall make the interest known and not participate in such decision. *Id.*

Similar distinctions between the sections 402 and 404 programs apply today. 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. The Agency proposed to revise the section 404 conflict of interest provision, however, to further clarify to whom the provision applies. The purpose of this clarification was to ensure that individuals 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. The proposal also clarified that this provision applies to any section 404-related decisions by the agency as well as any entity that reviews these decisions. For 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 this conflict of interest provision even if they are not officers or employees of the Tribe or State agency.

Some commenters expressed concerns that the change in the conflict of interest provision weakens or injects uncertainty into the section 404 assumption process. A commenter argued that the language is too ''vague and [its] broad articulation makes it unclear to whom, exactly, this provision applies.'' EPA disagrees; as explained above, the final rule more clearly articulates who must provide notification of potential conflicts of interest and recuse themselves from any section 404 program decision for which they have a conflict of interest, not just decisions that exceed a monetary threshold. In EPA's view, this new language is clear and does not create uncertainty; EPA presumes that any person participating in a matter subject to a section 404 decision by the agency will be aware that they are doing so, and they should also be aware if they have personal or pecuniary interests in that matter. If a person is uncertain as to whether the conflict of interest provision applies, they can always seek guidance from the Tribal or State agency or from EPA.

With respect to Tribal and State permits being issued for Tribal or State projects, the Agency has determined that distinct procedures to address these types of permits are unnecessary, as all permits must comply with the section 404(b)(1) Guidelines and other requirements of CWA section 404. The CWA does not distinguish between a Tribe or State with an approved program as a permittee and other permittees. Most State permitting entities 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.[25] 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.

[25] 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.*

Likewise, to EPA's knowledge, the 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. The Florida Department of Environmental Protection did the same between December 2020 and February 2024 without significant conflict of interest issues, to EPA's knowledge. A common example of self-issuance by one State agency to another is when the State water quality 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 does not have—nor did commenters provide—any information that raises concerns on the part of EPA about the integrity and neutrality of these intra-governmental permitting processes.

The Agency did not propose any regulatory text on the self-issuance of permits. The Agency received one comment on this issue, expressing concern that conflicts of interest are presented when private developers or State agencies provide funding to the permitting agencies, which in turn allow the permitting agency to employ permit processers that will handle the permit applications submitted by the same private developers or State agencies. In effect, the commenter stated, the private developer or non-permitting State agency becomes the employer of their permit processor. This rule does require that all permits must comply with the section 404(b)(1) Guidelines and other requirements of CWA section 404. Tribes and States that assume the CWA section 404 program must also 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. To the extent EPA has concerns that permits are not compliant, whether based on its own analysis or based on comments from other agencies or interested parties, EPA may object to the issuance of permits.

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 Tribe or State could separate its permit-issuing function from departments or offices that apply for and receive permits or expand public participation requirements for self-issued permits. EPA and an assuming Tribe or State could also agree in the Memorandum of Agreement that EPA would exercise heightened oversight (*i.e.,* would not waive review) over permits issued by and to Tribal or State agencies or departments. EPA encourages Tribes and States to implement measures to ensure transparency in the permitting process based on the specific structures and procedures of their agencies. 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.

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

a. Overview and What the Agency Is Finalizing

The CWA section 404(b)(1) Guidelines are the substantive environmental criteria used to evaluate discharges of dredged and/or fill material under CWA section 404. EPA may approve a Tribal or State request for assumption only if EPA determines, among other things, that the Tribe or State has authority to issue permits that comply with the CWA 404(b)(1) Guidelines. 33 U.S.C. 1344(h)(1)(A)(i). The regulations already require that CWA section 404 permits issued by an assuming Tribe or State must comply with the CWA 404(b)(1) Guidelines. However, stakeholders have requested clarity regarding the way in which a Tribe or State wishing to assume the CWA section 404 program can demonstrate that it has authority to issue permits that ''apply, and assure compliance with'' the CWA 404(b)(1) Guidelines. *See id.* EPA did not propose any new regulatory text on compliance with the CWA 404(b)(1) Guidelines, because the Agency did not want to unintentionally constrain how Tribes and States can demonstrate their authority. But in response to stakeholder requests, EPA discussed 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 in this preamble to the proposed rule. After reviewing public comments, the Agency is finalizing its proposed approach.

b. Summary of Final Rule Rationale and Public Comment

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). . . .'' The CWA 404(b)(1) Guidelines also 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 would cause or contribute to violations of applicable water quality standards taking into account disposal site dilution and dispersion (40 CFR 230.10(b)(1)); if it would violate any applicable toxic effluent standard or prohibition (40 CFR 230.10(b)(2)); if it would 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)); or unless appropriate and practicable steps have been taken to minimize potential impacts of the discharge on the aquatic ecosystem. *See* 40 CFR 230 Subpart H; *see also* section IV.B.4 of this preamble for further discussion on mitigation.

Consistent with CWA section 404(h)(1)(A)(i), the 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)). Because the regulations already require that CWA section 404 permits issued by an assuming Tribe or State must comply with the CWA 404(b)(1) Guidelines, EPA did not propose adding to the regulatory text.

Several commenters asserted that the only way to ensure that Tribes and States have sufficient authority to issue permits that apply and assure compliance with the CWA 404(b)(1) Guidelines is to require Tribes and States to adopt the CWA 404(b)(1) Guidelines verbatim or incorporate them by reference into the Tribal or State program. To the extent these commenters assert that adoption or incorporation is the most straightforward way for a Tribe or State to demonstrate sufficient authority, EPA agrees. However, while a Tribe or State may choose to adopt verbatim or incorporate into their programs by reference the CWA 404(b)(1) Guidelines or other Federal requirements, nothing in the CWA requires that they do so. *See* 49 FR 39012, 39015 (October 2, 1984); *cf.* 40 CFR 123.25(a) Note.

Requiring Tribes and States to adopt or incorporate the CWA 404(b)(1) Guidelines would complicate efforts by Tribes and States to impose more stringent requirements as part of their CWA section 404 programs. By not requiring that Tribes and States adopt verbatim or incorporate by reference the CWA 404(b)(1) Guidelines, Congress allowed leeway for Tribes and States to craft a Tribal or State program consistent with circumstances specific to that Tribe or State, so long as their permits will assure compliance with the CWA 404(b)(1) Guidelines at least as stringently as permits issued by the Corps.

This flexibility is consistent with the nature of the CWA 404(b)(1) Guidelines themselves. Recognizing that a CWA section 404 permit may be required for a variety of discharges into a wide range of aquatic ecosystems, EPA explained in promulgating the CWA 404(b)(1) Guidelines that they are intended to provide ''a certain amount of flexibility,'' consisting of tools for evaluating proposed discharges, rather than numeric standards. 45 FR 85336, 85336 (December 24, 1980). EPA further explained in this preamble to the Guidelines: ''[c]haracteristics 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.'' *See id.; see also* 40 CFR 230.6.

EPA is not adding further regulatory text addressing how Tribes and States may ensure compliance with the CWA 404(b)(1) Guidelines. The section 404 Tribal and State program regulations as well as CWA section 404(h)(1)(A)(i) already require that Tribal and State permits and environmental review criteria apply and assure compliance with the CWA 404(b)(1) Guidelines while allowing for flexibility as to how Tribes and States wishing to assume implementation of the CWA section 404 program can demonstrate that they have sufficient authority to apply and assure compliance with the CWA 404(b)(1) Guidelines.

Tribes and States can choose to adopt verbatim or incorporate by reference the CWA 404(b)(1) Guidelines. To the extent a Tribe or State wishing to assume the CWA section 404 program desires to incorporate more stringent requirements or otherwise desires to craft a program more tailored to that Tribe's or State's circumstances, the Tribe or State should demonstrate clearly in its program description that it has sufficient authority to apply and assure compliance with the CWA 404(b)(1) Guidelines. For example, a Tribe or State could provide a crosswalk 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 applies 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 by demonstrating that the terms and conditions of permits for discharges into waters of the United States that were issued pursuant to the preexisting Tribal or State program complied with the CWA 404(b)(1) Guidelines comparably with or more stringently than Federal permits issued by the Corps for the same discharge.

Several commenters discussed the portion of the preamble to the proposed rule in which EPA suggested various ways that Tribes and States could demonstrate authority to issue permits that apply and assure compliance with the CWA 404(b)(1) Guidelines' prohibition on authorization of a discharge if the discharge would jeopardize the continued existence of listed endangered or threatened species under the Endangered Species Act of 1973 (listed species) or result in the likelihood of the destruction or adverse modification of designated critical habitat (40 CFR 230.10(b)(3)). Many of these commenters asserted that the final rule must ensure that listed species and critical habitat receive the same protections under a Tribal or State program as they would if the Corps had processed the permit and engaged in consultation with the U.S. Fish and Wildlife Service or National Marine Fisheries Service (the Services) pursuant to section 7 of the Endangered Species Act (ESA). These commenters proposed various ways of ensuring protection of listed species and critical habitat, including requiring the Tribes and States to undertake ESA section 7 consultation themselves or requiring EPA to consult with the Services on each Tribal or State permit as part of EPA's oversight. Several commenters asserted that EPA must consult with the Services prior to approving a Tribal or State program. A few commenters noted that Tribal and State permittees must comply with the take provisions of section 10 of the ESA, and one commenter recommended that EPA continue to pursue an approach similar to that associated with EPA's approval of Florida's section 404 program whereby EPA and the U.S. Fish and Wildlife Service engaged in a programmatic consultation under ESA section 7 resulting in an incidental take permit covering all permittees in Florida. Other commenters expressed concerns about the protection afforded listed species and critical habitat by Florida's or other State section 404 programs.

EPA's approval of Florida's section 404 program is the subject of ongoing litigation (*see Center for Biological Diversity* v. *Regan,* No. 24–5101 (D.C. Cir.), and will not be addressed here. EPA's obligation to undertake ESA section 7 consultation in connection with its approval and/or oversight of a Tribal or State CWA section 404 program is beyond the scope of this rulemaking.

To the extent commenters assert that assuming Tribal and State programs must incorporate the procedural requirements of the ESA, issuance of a permit by a Tribe or State pursuant to an assumed program under CWA section 404(g) is not a Federal action subject to the procedural requirements of the ESA. *See* H.R. Rep. No. 95–830 at 104 (1977) (''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''); *see also Chesapeake Bay Foundation* v. *Virginia State Water Control Bd.,* 453 F. Supp. 122 (E.D. Va. 1978).

Although decisions by Tribal and State section 404 programs do not trigger the Federal consultation process laid out in ESA section 7, Tribes and States must demonstrate that they have sufficient authority to issue permits that comply and assure compliance with 40 CFR 230.10(b)(3), which states that ''[no] discharge of dredged or fill material may be permitted if it . . . [j]eopardizes the continued existence of [threatened or endangered species listed under the ESA]'' or would adversely modify critical habitat. 40 CFR 230.10(b)(3). A few commenters asserted that the discussion in the preamble to the proposed rule regarding how Tribes and States could demonstrate compliance with this aspect of the CWA 404(b)(1) Guidelines was too generalized and/or insufficiently prescriptive or protective. On the other hand, one commenter asserted that EPA should defer to Tribal and State expertise. The discussion in the preamble to the proposed rule was not intended to be exhaustive or to provide a checklist. Tribes and States retain flexibility to tailor their programs consistent with the types of listed species and critical habitat within their jurisdictions.

EPA recommends that Tribes and States include in the program submission provisions and procedures to protect listed species and habitat. EPA recommends that Tribes and States develop a method for identifying the listed species and areas of designated critical habitat within their geographic boundaries and for determining whether federally listed species or critical habitat are present or would be affected by a particular discharge. Tribes and States also could develop processes for ensuring that their identification of federally listed species and designated critical habitat remains up to date as well as processes to avoid impacts to these resources.

EPA continues to encourage Tribes and States to proactively coordinate with the relevant Services' regional or field offices when developing their programs. To the extent that Tribes and States coordinate with the Services as they develop their programs, such work would help inform the Services' review opportunity to comment to EPA on a Tribal or State program submission. *See* 33 U.S.C. 1344(g)(2) and 1344(h)(1); *see also* 40 CFR 233.15(d) and (g). Such work would also facilitate EPA's coordination with the Services on permits for which EPA has not waived review. *See* 33 U.S.C. 1344(j).

Several Tribes expressed concern that the preamble to the proposed rule did not provide sufficient guidance regarding how a Tribe or State could demonstrate that it has sufficient authority to apply and assure compliance with subpart F of the CWA 404(b)(1) Guidelines. 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). These human use considerations encompass, among other things, uses and values of aquatic resources that are important to Tribes and local communities. 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.'' *Id.* at 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.'' *Id.* at 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.'' *Id.* at 230.54(b). Collectively or individually, significantly adverse effects of the discharge of pollutants on these human uses may contribute to the significant degradation of the waters of the United States. *Id.* at 230.10(c).

As with other aspects of the CWA 404(b)(1) Guidelines, Tribes and States have the option of adopting 40 CFR 230.50 through 230.54, but they are not required to do so. To demonstrate sufficient authority to apply and assure compliance with subpart F of the CWA 404(b)(1) Guidelines, a Tribe or State should include in its program description its process and permit review criteria for evaluating and addressing potential permit impacts on historic properties and properties with cultural significance. Such a process could include any agreements with and/or procedures for formal or informal coordination and communication with the State Historic Preservation Officer or Tribal Historic Preservation Office. The Tribe or State also could develop an agreement with the relevant State Historic Preservation Officer or Tribal Historic Preservation Office 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 permits, for which review has not been waived, and authorized program. *See* 40 CFR 233.31. The program description would contain any such agreement(s).

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 will avoid unnecessarily limiting Tribes and States by imposing a single vehicle or approach for implementing the CWA 404(b)(1) Guidelines. EPA 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. Such procedures would demonstrate the Tribe or State's ability to fulfill the intent of the human use characteristics provisions of the section 404(b)(1) Guidelines.

Some Tribes assert that compliance with the CWA 404(b)(1) Guidelines is not an adequate substitute for the input that Tribes can provide through consultation procedures of the National Historic Preservation Act. While the Federal consultation procedures under section 106 of the National Historic Preservation Act do not apply to permits issued by a Tribe or State,[26] the final rule expands upon existing opportunities for Tribal input. Section IV.F of this preamble provides detailed discussion on opportunities whereby Tribes may request that EPA review permits that may affect their Tribal rights or interests within or beyond reservation boundaries and Tribes that have status of treatment in a similar manner as a State (TAS) shall receive notice and an opportunity to provide recommendations as an ''affected State'' for purposes of 40 CFR 233.31. *See* section IV.F of this preamble. In addition, EPA review of Tribal or 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. . . .'' 40 CFR 233.51(b)(6). Moreover, as discussed above, Tribal and State permits must assure compliance with all applicable statutory and regulatory requirements, including the section 404(b)(1) Guidelines as described above. Finally, assuming Tribes and States must provide for judicial review of Tribe- or State-issued permits, which provides another opportunity for interested parties to raise concerns about a permit's failure to comply with the 404(b)(1) Guidelines. *See* section IV.C.2 of this preamble.

3. No Less Stringent Than

a. Overview and What the Agency Is Finalizing

The Agency's regulations provide that Tribes and States may not impose requirements less stringent than Federal requirements. 40 CFR 233.1(d). While Tribes and States have flexibility to determine how to best integrate sufficient authority into their programs, there are limits to this flexibility not explicitly spelled out in the prior regulations. Accordingly, the Agency proposed to codify its longstanding principle that a Tribe or State cannot comply with its obligation pursuant to section 510 of the CWA to impose requirements no less stringent than Federal requirements by making one requirement more stringent than federally required as a tradeoff for making another requirement less stringent. The Agency also proposed to clarify its interpretation 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 within its jurisdiction except for discharges to the subset of waters of the United States (''retained waters'') over which the Corps retains administrative authority pursuant to CWA section 404(g)(1). To clarify the role of Federal interpretive guidance in Tribal or State programs, such as the Corps' General Regulatory Policies in 33 CFR part 320 or Regulatory Guidance Letters, EPA further proposed to clarify that Tribes and States are not required to incorporate the Corps' or EPA's interpretive guidance into their CWA section 404 programs. Finally, EPA proposed to codify its long-held position that the Tribe or State is responsible for administering all portions of a CWA section 404(g) program. Specifically, where the CWA 404(b)(1) Guidelines or other regulations require that the District Engineer or the Corps of Engineers make certain decisions or take certain actions, the proposed rule provides that the Tribal or State agency will carry out those responsibilities for purposes of the assumed program. After reviewing public comments, the Agency is finalizing this approach as proposed.

b. Summary of Final Rule Rationale and Public Comment

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 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 an assuming Tribe or State will issue permits that assure compliance with the CWA at least as stringently as would 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 IV.A.2 of this preamble. In addition, Tribes and States must demonstrate that their section 404 programs will cover at least the same discharges as the CWA and will issue permits that are not less stringent than other aspects of the CWA beyond the CWA 404(b)(1) Guidelines.

Commenters generally agreed that permits issued by Tribes or States may not be less stringent than a permit for the same discharge if issued by the Corps of Engineers. One commenter characterized this concept as establishing a strong Federal ''floor'' for Tribal and State permits. As with the CWA 404(b)(1) Guidelines, Tribes and States seeking to assume the section 404 program may choose but are not required to adopt verbatim or incorporate by reference relevant portions of the CWA or its implementing regulations. Where a Tribe or State chooses not to adopt or incorporate by reference portions of the CWA or its implementing regulations, the Tribal or State program description should describe how the Tribal or State program is no less stringent than those provisions.

1. A Tribe or State Cannot Comply With Its Obligation Pursuant to Section 510 of the CWA To Impose Requirements No Less Stringent Than Federal Requirements by Trading Off More Stringent Requirements for Less Stringent Requirements

Most commenters supported EPA's proposal to codify the principle prohibiting tradeoffs between more lenient and more stringent requirements. However, one commenter did not support EPA's proposed approach and expressed concern that

[26] *See Menominee Indian Tribe of Wisconsin* v. *Envt'l Protection Agency,* 947 F.3d 1065, 1073–74 (7th Cir. 2020).

the proposed approach would deprive Tribes and States of flexibility. The Agency agrees that Tribes and States should have flexibility to determine how best to ensure that their permits will apply and assure compliance with the CWA 404(b)(1) Guidelines and be no less stringent than Federal requirements. That said, EPA has long stated that flexibility does not extend to tradeoffs among requirements, as discussed, in the 1988 preamble to the CWA section 404 Tribal and State program regulations. *See* 53 FR 20764, 20766 (June 6, 1988).

EPA is finalizing its proposal to codify this longstanding principle prohibiting tradeoffs between more lenient and more stringent requirements in its section 404 Tribal and State program regulations. As noted above, this clarification does not represent a change in EPA's longstanding position. Additionally, this principle is also articulated 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.

2. An Assuming Tribe or State Must Regulate at Least All Non-Exempt Discharges to Navigable Waters Within Its Jurisdiction, Except for Discharges to Waters Retained by the Corps

In addition to codifying its longstanding principle against tradeoffs, EPA is clarifying that 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 Tribal 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 retained waters. This means that a Tribal or State program may not exempt discharges other than those exempted pursuant to CWA section 404(f). Similarly, when a Tribe or State assumes administration of the CWA section 404 program, it assumes administrative authority to permit discharges to all waters of the United States within its jurisdiction except for the subset of retained waters.[27] *See* 33 U.S.C. 1344(g)(1). As noted earlier, EPA has final administrative authority over the scope of ''waters of the United States.'' *See Civiletti Memorandum.*

The subset of waters of the United States over which the Corps retains administrative authority pursuant to CWA section 404(g)(1) is identified in the Memorandum of Agreement between the assuming Tribe or State and 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). *See* section IV.B.2 of this preamble for further discussion on retained waters. To the extent the coverage of the CWA as defined by the term ''waters of the United States'' [28] changes following court decisions or rulemaking, assumption of the section 404 program by a Tribe or State 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 all non-exempt 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 IV.A.2 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 (40 CFR 233.10(c) and 233.12) those provisions of Tribal or State law that will ensure that the Tribe or State will at all times 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. A Tribal or State section 404 program may regulate discharges into Tribal or State waters in addition to the jurisdictional CWA waters as well as issue permits for discharges into waters retained by the Corps; however, the Corps remains the CWA section 404 permitting authority for retained waters.

3. Tribes and States May Adopt Federal Interpretive Guidance and the Corps' General Regulatory Policies, But Are Not Required To Do So

EPA also is clarifying here the role of Federal interpretive guidance in Tribal or State programs, 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 issued by the Corps and/or EPA. Federal agency interpretive guidance may often be helpful in providing transparency, clarity, and consistency in implementation of the Federal program. However, it does not have the effect of legally binding regulation and may not necessarily be applicable, for example, where Tribal or State requirements are more stringent than Federal requirements or the guidance references a procedure not part of the Tribal or State program. Moreover, Federal agency interpretive guidance may evolve over time with changes in case law and other circumstances.

Accordingly, while assuming Tribes and States may consider relevant Federal agency interpretive guidance and may choose to adopt it to aid in program implementation, they are not required to formally adopt Federal agency interpretive guidance. 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 will consider Federal agency interpretative guidance.

Several commenters asserted that, in order to issue permits that are not less stringent than permits that would be issued by the Corps for the same discharge, Tribes and States assuming the section 404 program must incorporate the procedural and substantive provisions of the Endangered Species Act, the National Historic Preservation Act, the National Environmental Protection Act and other statutes that apply generally to Federal actions, including to permits issued by the Corps under CWA section 404. Issuance of a permit by a Tribe or State pursuant to an assumed program under CWA section 404(g), however, is not subject to the requirements for Federal actions under those statutes. *See* H.R. No. 95–830 at 104 (1977) (''The conferees wish to emphasize that such a State program is one which is established under State law and which

[27] 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 20764, 20766 (June 6, 1988) (emphasis added). As described elsewhere in this preamble, Tribes and States may not assume *less* than what is required under the CWA.

[28] *See* 33 U.S.C. 1311(a), 1362(7).

functions in lieu of the Federal program''); *See Chesapeake Bay Foundation* v. *Virginia State Water Control Bd.,* 453 F. Supp. 122 (E.D. Va. 1978). That said, while the Federal statutory procedural requirements may not apply directly to Tribal or State actions, CWA section 404(h)(1)(A)(i) requires that Tribal and State programs have authority to issue permits that apply and assure compliance with the CWA 404(b)(1) Guidelines, including those provisions that limit permit issuance to the least environmentally damaging practicable alternative, prohibit permitting of a discharge that would jeopardize the continued existence of listed endangered or threatened species under the Endangered Species Act, and require consideration of 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.'' *See* section IV.A.2 of this preamble for further discussion on compliance with the CWA 404(b)(1) Guidelines.

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. The CWA makes no reference to the Corps' General Regulatory Policies, which, by their own terms, apply to a range of the Corps' regulatory authority, including, but not limited to, CWA section 404 (*see* 33 CFR 320.2). As described elsewhere, 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.

4. Tribes and States That Assume the CWA Section 404 Program Are Responsible for Administering All Portions of the Section 404 Program

Finally, EPA is codifying 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. EPA is clarifying that, when a Tribe or State assumes administration of the section 404 program, the Tribe or State becomes responsible for all of the actions under section 404 for which the Corps would be responsible if it were to issue the permit. The rule clarifies that it is the assuming Tribe or State that is responsible for administering all sections of the approved section 404 program. *See* section IV.B.4 of this preamble for further discussion on mitigation.

EPA also clarifies here 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, such as counties or municipalities. 33 U.S.C. 1344(g)(1); 40 CFR 233.2 (definition of ''State'').

B. Program Approval

1. Partial Program Assumption

a. Overview and What the Agency Is Finalizing

Under 40 CFR 233.1(b), assuming Tribes or States must have authority to regulate all non-exempt discharges to all waters of the United States within their 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). Although some 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's or State's jurisdiction, the Agency proposed to maintain its longstanding position that the statute does not authorize partial assumption. After considering public comments, EPA is finalizing its proposed approach to maintain the text at section 233.1(b) which clarifies that partial programs are not approvable under section 404.

b. Summary of Final Rule Rationale and Public Comment

In 1987, Congress added section 402(n) to the CWA, specifically authorizing EPA to approve partial Tribal and 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 CWA 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's or State's jurisdiction. While some commenters supported the status quo, others supported some form of partial assumption, or encouraged the Agency to explore options to provide additional flexibility. One commenter noted that partial assumption in States with more stringent or protective section 404 programs could advance environmental protection, and another noted that partial assumption of program activities could allow for more Tribal oversight and input in the permitting process.

EPA carefully considered the comments received, evaluating potential approaches to partial assumption, but ultimately concluded that it would 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 increase the footprint or impacts of their proposed project in order 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 EPA and the Corps. And partial assumption based on activity would pose challenges because the Agency was unable to devise a comprehensive and clear way to define potential activities. Dividing functions between the Federal and Tribal or State governments would also be confusing for the regulated public.

EPA also considered phased assumption of program responsibilities, whereby the Tribe or State would ultimately assume the full program, but 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 withdrawal of the entire program.

Tribes and States not interested in full assumption can already take on a major role in managing their aquatic resources and in the permitting process even without assuming the section 404 program. A Tribe or State may develop their own dredged or fill material permitting program. Alternatively, 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 1977, Congress amended section 404 to allow the Corps to issue certain types of general permits, including State Programmatic General Permits (SPGPs). 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. 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, these permits 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.

In sum, EPA has concluded that continuing to interpret the CWA to prohibit partial assumption reflects the best reading of the text of the CWA and will enable the most transparent and consistent implementation of the section 404 program across the nation. This approach provides the most clarity to the public and the regulated community as to which waters are being assumed and whether applicants need a Tribal or State permit or a Federal permit. Conversely, partial assumption would be more likely to cause confusion among interested parties and be more difficult to implement consistently across the country for the reasons discussed earlier in this section.

2. Retained Waters

a. Overview and What the Agency Is Finalizing

As discussed in section III.B.2 of this preamble, the Corps retains authority over certain waters and wetlands adjacent to those waters when a Tribe or State assumes permitting authority. States and Tribes have expressed to EPA the need for further clarification regarding which waters a Tribe or State may assume and which waters the Corps retains. The Agency is finalizing as proposed a procedure for determining the extent of waters over which the Corps would retain administrative authority following Tribal or State assumption of the section 404 program, with certain minor modifications based on comments received. Under the 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 the Corps' section 404 administrative authority following assumption. The Tribe or State must submit one of the following documents with the request to show that it has taken concrete and substantial steps toward program assumption: 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. 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. EPA will also notify members of the public of that transmission and invite input to the Corps and to the Tribe or State within a 60-day period that the Corps may consider in developing its description.

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 has 180 days from the receipt of the request to provide a retained waters description to the Tribe or State. The purpose of the 180-day period is to allow the Corps time and opportunity to follow the process at 40 CFR 233.11(i) to identify those waters over which the Corps will retain section 404 permitting authority while providing a timeframe within which the Tribe or State can expect to receive a retained waters description. 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 may prepare a retained waters description. Similarly, if the Corps had originally indicated that it would provide a retained waters description but does not provide one within 180 days of EPA's transmission to the Corps, the Tribe or State may develop the retained waters description using the same approach described above. Alternatively, the Tribe or State and the Corps may mutually agree to extend the period of time for the Corps to develop the list.

The most recently published list of RHA section 10 waters (*see* 33 CFR 329.16) would be the starting point 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. *See* 33 U.S.C. 1344(g)(1). 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 id.* 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 such with reasonable improvement.

The description would also describe retained wetlands. The default understanding is that the Corps would retain administrative authority over all jurisdictional wetlands ''adjacent'' to retained waters, as that term is defined in 40 CFR 120.2(c). A Tribe or State may choose to negotiate an agreement with the Corps to establish an administrative boundary through jurisdictional adjacent wetlands, landward of which the Tribe or State would assume administrative authority. If the Tribe or State and the Corps reach agreement on such a boundary, EPA may consider it when it is submitted with the program submission. As a default, however, the Corps would retain all wetlands adjacent to retained waters. The retained waters description does not need to include a specific list of adjacent wetlands or provide mapping or a description of the lateral extent of those wetlands.

As recognized in EPA's 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 another jurisdiction has authority to regulate discharges into waters in Indian country. *See id.*

EPA is changing the regulatory provision stating that modifications to the extent of the retained waters description always constitute substantial revisions to a Tribal or State program. 40 CFR 233.16(d)(3) (2023). The new provision is more limited in scope: it states that removals of waters from the retained waters description, other than *de minimis* removals, are substantial revisions. In addition, revisions to an approved Tribal CWA section 404 program are substantial where they would add reservation areas to the scope of its approved program. EPA is also providing that the Memorandum of Agreement between the Corps and the Tribe or State must outline procedures whereby the Corps will notify the Tribe or the State of changes to the RHA section 10 list as well as the extent to which these changes implicate the statutory scope of retained waters as described in CWA section 404(g)(1) and therefore necessitate revisions to the retained waters description. The Tribe or State would incorporate the revisions that the Corps has identified, pursuant to the modification provisions agreed upon in the Memorandum of Agreement.

EPA is modifying the program description requirements to provide that the Tribal or State program will encompass all waters of the United States not retained by the Corps at all times. 40 CFR 233.11(i)(6). EPA is also removing 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 Memorandum of Agreement procedures for joint processing of Federal and State permits, including joint public notice and public hearings.'' *Id.* at 233.14(b)(2).

b. Summary of Final Rule Rationale and Public Comments

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 502(7) as ''waters of the United States, including the territorial seas.'' The Corps retains administrative authority over a subset of these waters even after program assumption by a Tribe or State.[29] 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 its jurisdiction that are not retained by the Corps.

EPA's prior 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) (2023). In addition, the prior 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) (2023).

Prior to this rule, EPA had not provided 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 the Corps districts have had to interpret the extent of retained waters and the meaning of ''wetlands adjacent thereto'' in the context of case-by-case development of Tribal and State program descriptions for prospective programs and the Memoranda of Agreement that are negotiated between the Corps and the State as part of a 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 III.B of this preamble, EPA convened the Assumable Waters Subcommittee under the auspices of the 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 as to the extent of retained waters and adjacent wetlands (though the letter did not define a specific administrative boundary for

[29] 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 is required to retain administrative authority under Section 404(g). The scope of CWA jurisdiction is defined by CWA section 502(7) as ''waters of the United States,'' and 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 rule 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 does not define the broader set of ''waters of the United States'' within the scope of CWA section 502(7).

adjacent wetlands).[30] NACEPT's recommendations, based on the Subcommittee majority recommendation that was subsequently endorsed by the Corps, are discussed below.

i. 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[31] be used ''with two minor modifications: any waters that are on the section 10 lists based solely on historic use (*e.g.,* historic fur trading routes) 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.[32] 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 text and legislative history of section 404(g), which is discussed in the Background description in section III of this preamble, 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.) The majority thought this approach had the benefit of being clear and easy to implement. *See id.* at 17–20.

The Subcommittee majority also addressed the scope of retained adjacent wetlands. It 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, the recommendation added, ''could be negotiated at the state or tribal level . . . 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 far from the retained water. *Id.* at 31. Without such an administrative line, the Subcommittee majority noted, assumption could lead to a confusing pattern of USACE and State or Tribal permitting authority across the landscape.

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 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 EPA to assume the 404 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.

ii. Final Rule Approach to Retained Waters

1. Contents of the Retained Waters Description

Taking into consideration the majority recommendation of the Subcommittee as well as stakeholder input on the proposed rule, the subset of waters of the United States over which the Corps would retain administrative authority would include the following:

—Waters of the United States, or reaches of those waters, from the RHA section 10 list(s) that 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;
—Other waters known by the Corps or identified by the Tribe or State as 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; and
—Retained wetlands that are adjacent to the foregoing waters.

As recognized in EPA's 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.* The Memorandum of Agreement between the Corps and State must 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 in relevant respects (*e.g.,* certain national parks identified in 16 U.S.C. Chapter 1 as having lands of exclusive Federal jurisdiction, such as Denali National Park).

Some commenters supported this approach, outlined in the proposed rule. Others critiqued the Agency's reliance on the RHA section 10 lists as a starting point for identifying retained waters, stating that these lists can be out of date and often lack current information or supporting documentation. Some commenters suggested that RHA section 10 lists should only be relied upon if they have been comprehensively updated within the previous five years. Some commenters would require that the Corps review all judicial determinations involving the subject State to identify additional retained waters.

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. However, EPA agrees with the recommendation of the Assumable Waters Subcommittee that these lists provide a useful starting point for determining the scope of retained waters, given the clear indication in the

[30] 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).

[31] 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 pursuant to the RHA.

[32] Available at *https://www.epa.gov/sites/default/files/2017-06/documents/awsubcommittee finalreprort_05-2017_tag508_05312017_508.pdf.*

legislative history that Congress intended the Corps to generally retain RHA section 10 waters, with some modifications, and that an approach that starts with existing lists will be clear and easy to implement. No commenters proposed implementable alternatives to the RHA section 10 lists as a starting point. Comprehensively reviewing and revising RHA section 10 lists is a multi-year, resource-intensive and relatively rare undertaking, so excluding from use those lists not comprehensively updated within the past five years would cause significant delays in assumption. However, to ensure the retained waters descriptions remain as current and accurate as is feasible, EPA has modified the final rule to provide that whenever RHA section 10 lists are updated, an orderly process exists for incorporating those changes, as appropriate, into a Tribe's or State's retained waters description. Specifically, EPA now requires that the Memorandum of Agreement between the Corps and the Tribe or State outline procedures whereby the Corps will notify the Tribe or the State of changes to the RHA section 10 list that implicate the statutory scope of retained waters and the Tribe or State will incorporate those changes into its retained waters description.

With respect to the suggestion to require review of all judicial decisions related to navigability during the development of the retained waters description, EPA agrees that these should be viewed as resources during the development of the description, as well as information submitted by interested parties, navigability analyses the Corps has conducted since last updating its RHA section 10 list, and other sources of information. However, EPA is declining to define the sources of information for the development of the retained waters description in the regulations because it would be unnecessarily prescriptive and limit the flexibility of the Corps or the relevant Tribe or State.

Some commenters argued that the retained waters description must include waters that have been historically navigable, as historical navigability often indicates whether the waterway can be navigable in its natural condition or with reasonable improvement, which is the statutory criteria for retained waters in section 404(g). EPA agrees that historical navigability can sometimes indicate that a water is navigable in its natural condition or with reasonable improvement. Yet this is not always the case. Sometimes historically navigable waters have been modified—as a result of dams, water diversions for irrigation, climate change, or other circumstances—and cannot be restored to navigability with reasonable improvements. EPA therefore retains the proposed rule approach, based on the statutory language and consistent with the recommendation of the Assumable Water Subcommittee, which would remove waters or reaches of waters that were historically navigable but that are not currently used as a means to transport interstate or foreign commerce in their natural condition or with reasonable improvement.

EPA also received comments stating that the starting point for the scope of the Corps-retained waters must be documented traditional navigable waters (TNWs) as opposed to RHA section 10 lists. The Corps' minority recommendation in the Assumable Waters Subcommittee Final Report advocated for this approach. *See* Final Report at 21–22. The majority rejected reliance on documented TNWs as a starting point on the basis that using the RHA section 10 lists is clearer and easier to implement as well as more consistent with the legislative history of section 404(g). *See id. at* 17. The majority explained that RHA section 10 lists are ''well established, and can be relatively easily labeled on regional maps or GIS systems . . .'' thereby allowing members of the public ''to readily determine which agency is responsible for Section 404 regulation at a specific location.'' *See id.* at 18. In contrast, the majority expressed concerns that the extent of documented TNWs is confusing and less transparent, as they are documented in ''multiple regulations, guidance, and procedures,'' rather than in one central, public location. *See id.* The majority also noted that because most TNWs have not yet been identified as such and thus lists of documented TNWs could easily and regularly increase, using RHA section 10 lists provides greater certainty and predictability regarding the scope of the Tribal or State program. *See id* at 19. In addition, the majority viewed Congress as intending to retain Corps authority over RHA section 10 waters, with certain minor exceptions. *See id.* at 55–61; *see also* section III of this preamble. For all of the reasons that the Subcommittee cited, EPA has decided to establish RHA section 10 lists as a starting point for retained waters, rather than documented TNWs. EPA notes that ultimately the Department of the Army transmitted to the Corps its support for the majority recommendation's reliance on RHA section 10 lists. *See* section IV.B.2.b of this preamble.

The retained waters description would acknowledge that wetlands are to be retained if they are adjacent to Corps-retained waters. As noted above, the default understanding is that the Corps would retain administrative authority over all jurisdictional wetlands ''adjacent'' to retained waters. Some Tribes and States may choose to negotiate with the Corps to establish an administrative boundary through jurisdictional adjacent wetlands, landward of which the Tribe or State would assume administrative authority. If they do so, EPA may consider that part of the program description when it is submitted with the program submission. The default approach, however, is that the Corps would retain all adjacent wetlands. A specific list of all retained 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.

EPA had proposed that Tribes or States and the Corps establish an administrative boundary through adjacent wetlands to delineate between retained and assumed wetlands, and that the default boundary be 300 feet from retained waters. Some commenters expressed support for this approach, stating that it would allow needed flexibility for Tribes, States, and the Corps to develop Tribal or State programs and that the proposal is authorized by the CWA. The significant majority of comments received during the public comment period, however, expressed concerns about an administrative boundary default approach, both with respect to implementation and legal authority.

Concerns expressed about implementation included the lack of a scientific basis for the 300-foot default boundary and the lack of a methodology for applying the default boundary. Some commenters pointed out that an administrative boundary would fragment the permitting in large wetlands complexes, leading to stakeholder confusion, and bifurcate the environmental review process, thereby making it difficult to ensure a holistic evaluation of impacts. These commenters stated that because an administrative boundary would sometimes require two permitting agencies to issue different permits for two parts of the same project, it would unnecessarily duplicate effort on the part of permittees, State agencies, and members of the public. Commenters further noted that it would also burden those seeking to challenge permits, who might need to litigate two separate

permits in two separate fora, potentially on different timelines depending on the State or Tribe's judicial review procedures. Commenters also argued that, because the scope of ''adjacent wetlands'' significantly narrowed following the Supreme Court's May 2023 decision in *Sackett* v. *EPA* and the Agency's subsequent August 29, 2023, rulemaking conforming the definition of ''waters of the United States'' to that case, 88 FR 3004, an administrative boundary is no longer necessary. EPA finds the practical concerns raised by commenters valid. Given the challenges involved in implementing the administrative boundary concept and the reduced need for it, as identified by commenters, EPA decided not to finalize the proposed approach.

Commenters also raised legal objections to the administrative boundary approach. These commenters stated that CWA section 404(g)(1) provides that adjacent wetlands may not be assumed by a State or Tribe and that EPA lacks the authority to approve an administrative boundary that would allow a State to assume authority over any part of wetlands that are adjacent to a retained water. Because EPA has decided not to finalize the administrative boundary proposal due to implementation concerns, addressing the scope of the Agency's legal authority to approve such a boundary is unnecessary. If a State or Tribe chooses to negotiate an administrative boundary with the Corps when developing an assumption request, and the parties reach agreement, EPA may consider issues related to the scope of their proposed program at that time.

A number of commenters asked that EPA provide more clarity as to the ''universe of waters that would be retained,'' including the information and data that the Corps and State or Tribe would use to assess the scope of retained waters. As noted previously, however, these commenters did not generally provide specific suggestions as to how EPA could provide additional clarity. The approach EPA is outlining adopts the recommendation of the Assumable Waters Subcommittee, which spent several years assessing how EPA could best clarify the scope of retained waters.

Moreover, 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, as well as the scope of adjacent wetlands 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. Specifically, unlike RHA section 10 waters, 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.

EPA's approach to determining the retained waters description reflects its attempt to balance the competing priorities of providing an efficient process for program assumption versus guaranteeing a fully comprehensive and precise description. When a Tribe or State is preparing to request assumption, the Corps or assuming Tribe or State 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 they should be retained pursuant to the parenthetical in CWA 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, developing a comprehensive retained waters description could take many years and reduce the Corps' ability to carry out its regulatory obligations. EPA attempts to strike a balance by using the RHA section 10 list as a starting point and by stating that the retained waters description must encompass waters ''known'' by the Corps, Tribe, or State to meet the statutory criteria.

Further, as discussed in section IV.B.2.b.ii.2 of this preamble below, EPA has added an opportunity for public input. EPA is confident that geographic information systems technology and navigation charts, review of judicial decisions, public input, past jurisdictional determinations, and other sources of information 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. As discussed further below, moreover, EPA's regulation allows for the retained waters 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 statutory criteria.

2. Procedures for Developing the Retained Waters Description

EPA is facilitating clarity and efficiency in the program assumption process by establishing defined timeframes for the development of the retained waters description. 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. The Tribe or State must 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. One of the following must 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. 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 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.

One commenter opposed the requirement that a Tribe or State provide supporting documentation for its request, stating that knowing the scope of assumed waters is a foundational, and preliminary, piece of information that States need before taking concrete and substantial steps toward assumption. EPA recognizes the importance of understanding the scope of assumed waters to Tribes and States before they consider assumption. EPA seeks to balance the desire of Tribes and States to assess the scope of a potential program prior to embarking on such a program, however, with the desire to

avoid unnecessarily imposing workload burdens on the Corps. If EPA did not impose such a prerequisite, the Corps could be asked to embark upon lengthy assessments of the scope of retained waters at the request of State environmental agency staff, for example, only to find out after having expended significant resources that the State legislature or governor has no intention of pursuing program assumption. EPA is therefore finalizing its requirement that a Tribe or State document it has taken concrete and substantial steps toward program assumption before submitting its request for a retained waters description.

In addition to seeking to facilitate the clarity and efficiency of the program assumption process, EPA also seeks to increase public participation and transparency. To that end, EPA is providing that, upon transmitting a request for a retained waters description to the Corps, the Agency will also post a public notice of that transmission on its website and notify members of the public known to be interested in these matters of that transmission, inviting public input to the Corps as well as the State or Tribe on the scope of the retained waters description within a 60-day period. The Corps (or the Tribe or State if the Corps declines to define the description) may consider submitted information in developing its description. If the Corps were to develop the description, the Tribe or State may provide information to the Corps during that 60-day period. Similarly, if the Tribe or State were to develop the list, the Corps may provide information to the Tribe or State before the end of that 60-day period. Regardless of which entity develops the retained waters description, the Corps and Tribe or State will likely maintain regular communication regarding its development. Yet providing data at the beginning of the description development process will ensure that it can be adequately considered.

This public notice and input provision responds to some commenters' requests for additional opportunities for public participation in the development of the retained waters description, while also retaining the efficiency in the description development process that other commenters requested. EPA is not establishing a public notice and comment period on the final retained waters description distinct from the other procedural steps, as that would lengthen the time period for seeking assumption and impose a substantial burden on the Corps, the assuming State or Tribe, and EPA. A 60-day public input period, however, would increase public participation in the process of determining which waters the Corps would retain and the Tribe or State would assume, without delaying the assumption process. The Corps (or the Tribe or State) would not be obligated to respond directly to this input but could consider it in compiling its description of retained waters.

Members of the public have another opportunity to provide comment on the retained waters description when reviewing the Tribe's or State's program submission. Some commenters requested a separate public notice and comment process specifically if a State takes on the development of the retained waters description. EPA expects that the public input opportunity offered when EPA transmits a request for a retained waters description to the Corps will be sufficient to provide the Tribe or State with information to assist in developing the description. Moreover, a Tribe or State may provide opportunities for public engagement as it develops its program submission, which would again allow members of the public to provide input on the retained waters description.

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 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.

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 may 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 of EPA's transmission to the Corps, the Tribe or State may develop the retained waters description using the same approach described above. Alternatively, the Tribe or State and the Corps may also mutually agree to provide the Corps additional time to provide a retained waters description.

EPA received a number of comments on the time frame and coordination process outlined in the proposed rule, which it is finalizing in this rule. Some commenters stated that the Corps should be allowed one year to develop a retained waters description to allow sufficient time to conduct the assessments needed to compile a complete description, particularly given that some RHA section 10 lists may be outdated. Some commenters also stated that under no circumstances should a Tribe or State have the opportunity to develop a retained waters description, contending that States lack the authority and expertise to make these determinations. Other commenters stated that 180 days was too long a period to require a State or Tribe to wait prior to finalizing their program submission, and that Congress did not intend States and Tribes to have to wait for this length of time.

EPA decided to finalize its proposed approach of allowing the Corps 180 days to develop a list, which it views as striking a balance between the desire of States and Tribes to understand the scope of a potential program as quickly as possible, and the time the Corps needs to complete the resource-intensive process of assessing those waters that meet the statutory criteria to be retained. Moreover, in response to those commenters who urged EPA to allow the Corps additional time, EPA added a provision that would extend the 180-day time frame if the requesting Tribe or State agrees with the Corps on an extension. In response to the commenters that stated that Tribes or States may never develop a retained waters description, EPA views this rule as providing ample opportunity and encouragement to the Corps to develop the description. However, allowing a Tribe or State opportunity to develop a list if the Corps chooses not to do so is a backstop that is consistent with and helps to implement the statute's intent of facilitating Tribal and State assumption. Nothing in the CWA prohibits the Tribe or State from developing a retained waters description. The Act requires that the Tribe or State submit a description of assumed waters, and it is reasonable for the Agency to allow a Tribe or State to submit such a description for EPA

approval with their program request, if the Corps declines to develop a retained waters description.

EPA disagrees with those commenters who expressed concerns that allowing the Corps 180 days to develop a retained waters description would unduly hamper Tribal or State efforts to develop a program submission. In EPA's experience, States that have considered seeking assumption typically spend at least several years preparing their submissions. Allowing the Corps to spend 180 days developing the description (or more, if an extension is jointly agreed upon) would therefore be unlikely to impede Tribal or State efforts. Moreover, the Corps may need 180 days to allocate staff to this project and conduct the reviews and analyses needed to determine which waters meet the statutory criteria to be retained by the Corps.

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 of retained waters to be submitted with the program request package for review.

Even if the Corps does not provide a retained waters description to the Tribe or State, the Corps 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 or State, the Tribe or State would presumably review it 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 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 specifying such a dispute resolution procedure by regulation. *See* section IV.E.1 of this preamble for further discussion on dispute resolution. EPA encourages Tribes and States seeking to assume the section 404 program to work collaboratively with the Corps to resolve any issues, and EPA may participate in these discussions to advise and facilitate development of the description.

EPA's 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. 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 III.A of this preamble. Because the Agency's 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, generally speaking, a retained waters description that uses this approach will satisfy the statutory criteria for retained waters. However, the Regional Administrator retains the ultimate authority to determine whether to approve a Tribal or State program. As this approach does not conflict with the approved extent of the Michigan and New Jersey programs, no changes to their existing program scope would be required.

3. Modifying the Extent of Retained Waters

EPA is revising the provision in the prior regulations that currently states that modifications that affect the area of jurisdiction (such as modifications to the retained waters description) always constitute substantial revisions to a Tribal or State program. The prior 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, for substantial revisions. 40 CFR 233.16(d)(2)–(4) (2023). EPA is modifying this provision to provide that all removals, except *de minimis* removals, from the retained waters description are ''substantive,'' and therefore trigger the notice requirements for ''substantive'' program changes.'' In addition, 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.

EPA had proposed removing the provision stating that modifications affecting the area of jurisdiction always constitute substantial revisions, though also providing 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. The proposed change was based on EPA's experience that retained waters descriptions sometimes require minor tweaks (such as minor modifications to the head of navigation of a particular waterbody) and that requiring a full **Federal Register** notice for such changes is unnecessarily burdensome. Commenters expressed concern, however, that pursuant to the proposed revision waters could be reassigned to State jurisdiction without any public notice or opportunity to comment. These commenters therefore asked that all removals from the retained waters description be viewed as substantial revisions. EPA is accepting this recommendation and finalizing this approach, with the qualification that *de minimis* removals are not substantial. Examples of *de minimis* removals may include a reduction in the length of a retained portion of a waterbody by a hundred feet prompted by a new navigability study or changes resulting from a water infrastructure project, or the removal from the retained waters description of an oxbow lake that sedimentation has severed from a Corps-retained river. EPA thinks this approach will achieve EPA's goal of removing unnecessarily burdensome procedures while providing transparency for interested parties.

While development of the retained waters description involves 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 the Corps may add waters to RHA section 10 lists after a Tribe or State assumes the program. The Subcommittee majority recommended that in such cases, Tribes or States may revise their retained waters descriptions to add these waters, if consistent with CWA section 404(g)(1). As discussed above, an RHA section 10 list will not necessarily be co-extensive with the retained waters description and changes to RHA section 10 lists do not always warrant changes to the retained waters description. 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.

If, however, the Corps were to add waters to its RHA section 10 list that are used or susceptible to use in interstate or foreign commerce, the relevant Tribe or State would add these waters to the retained waters description. To provide a predictable and transparent procedure for such modifications, and to address commenters' concerns that many RHA section 10 lists are not currently up to date, the final rule provides that the Memorandum of Agreement between the Corps and the Tribe or State must outline procedures whereby the Corps will notify the Tribe or the State of changes to the RHA section 10 list as well as the extent to which these changes implicate the statutory scope of retained waters. Pursuant to the Memorandum of Agreement, the Tribe or State would incorporate the changes the Corps has identified as implicating the scope of retained waters into its retained waters description.

Under the final rule, EPA would have discretion to determine whether additions to the area of jurisdiction, which includes the extent of retained waters, are substantial or non-substantial. EPA may then decide whether to approve the modification to the retained waters description consistent with the procedures in 40 CFR 233.16.

This rule clarifies 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, provide opportunity for a public hearing, and consult with the Corps, FWS, and NMFS.'' 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, additions 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 amending 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.

4. Additional Clarification

EPA is removing 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 Memorandum of Agreement procedures for joint processing of Federal and State permits, including joint public notices and public hearings.'' 40 CFR part 233.14(b)(2). EPA is removing the term ''traditionally'' to align the reference to retained waters with the rest of this 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 rule. *See* 40 CFR part 120.2(a)(1)(i).

3. Program Assumption Requirements

a. Overview and What the Agency Is Finalizing

The Agency proposed changes to better harmonize its program approval requirements with program requirements in other sections of the CFR. 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, compliance evaluation and enforcement, and administer a program that is consistent with section 404. EPA is revising the requirements for the program descriptions that Tribes and States submit to EPA when they request approval to assume the section 404 program. First, the revisions 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 part 233 subparts C through E. 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 revisions 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 part 233 subpart C, as applicable; that its permitting operations would comply with the program operation requirements of 40 CFR part 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 part 233 subpart E, as applicable.

EPA is also revising the requirement that currently provides that if more than one State agency is responsible for the administration of the program, the program description shall address the responsibilities of each agency and how the agencies intend to coordinate administration, compliance, enforcement, and evaluation of the program. This rule adds that the program description must address additional program budget and funding mechanisms for each of these agencies, and how the agencies intend to coordinate program funding.

Similarly, the Agency is revising the 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 part 233.11(a) (2023). EPA is clarifying that this description ''must'' address all of the listed elements in 233.11(a). The rule is also clarifying 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 revisions do not substantively change the requirements for permit review, program operation, and compliance evaluation and enforcement programs. Rather, they 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 is revising the 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 clarifies that the description of inter-agency coordination must include coordination on enforcement and compliance.

b. Summary of Final Rule Rationale and Public Comment

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. 1344(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).

EPA's existing regulations effectuate section 404(h) by imposing program requirements for permitting, program operation, and compliance evaluation and enforcement set forth in 40 CFR part 233 subparts C through E to administer a program that is consistent with section 404. A program that lacks the resources to meet these requirements would not be able to carry out its statutory and regulatory obligations. This rule would not change these existing requirements; rather, it would ensure that the program submission provides information necessary to determine that Tribes and States can meet them.

In the 1988 preamble to the section 404 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 part 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 regulations require that the program description contain ''a description'' of available funding and manpower (*i.e.,* staffing),[33] 40 CFR 233.11(d) (2023), but did not clearly state that the available funding and staffing must be sufficient to meet the requirements of subparts C through E. In addition, the regulations provide that the program description must 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 233.11(g) (2023), but did not clearly state 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 did not provide sufficient guidance as to what kind of demonstration is needed by Tribes and States as they develop their programs. This revision would clarify the subpart B descriptions Tribes or States must submit, consistent with the goal of this rulemaking, to provide more clarity on the program assumption process for Tribes and States. *See* section III.B of this preamble. 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 better reflect that intent.

This rule requires the program description to identify position descriptions and qualifications as well as budget and funding mechanisms for all responsible Tribal or State agencies 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.

Some commenters opposed these revisions, as presented in the proposed rule, arguing that such requirements could result in unnecessary delays or confuse Tribes or States preparing assumption submissions. These commenters also stated that such revisions are unnecessary. For example, one commenter argued that to the extent EPA were to find, for example, staffing levels described in the program description insufficient, the 120-day review period for program submissions would not provide time for a Tribe or State to increase those levels. EPA disagrees with these commenters and has decided to finalize these revisions for the reasons discussed above. In response to the commenter that said that information about staffing levels would not aid EPA, EPA thinks that requiring transparency about staffing levels will encourage Tribes and States to ensure that their staffing levels will be sufficient to carry out their program. Without adequate staff to draft protective permits and inspect and review dredged and fill activity, it is not possible for a program to comply with CWA requirements. For example, EPA cannot assess a Tribe's or State's ability to administer CWA section 404 if it does not know whether the Tribe or State will have two permit writers or twenty. Moreover, EPA typically provides extensive technical support to Tribes and States that are preparing program submissions, and Tribes and States may discuss staffing levels with EPA at any time prior to their program submission.

Many commenters supported the revisions in this section. Some asked EPA to require additional information from Tribes or States. One suggested addition was to require budget and funding information for all Tribal or State agencies with program

[33] In this revision, EPA is replacing the term ''manpower'' with ''staffing'' and will use the term ''staffing'' throughout this preamble.

administration responsibilities, not just the lead agency. This suggested requirement is consistent with the budget and funding information EPA proposed to require, and simply addresses a potential ambiguity by clarifying that the budget and funding information EPA requests applies to all Tribal or State agencies with a role in the section 404 program, not just the lead agency. EPA is therefore adopting this suggested requirement in the final rule.

Other program description requirements that commenters asked EPA to finalize include, but are not limited to: Tribes or States seeking to reallocate existing resources must describe the duties that existing staff will no longer perform and the skills and expertise staff have that apply to reallocated tasks; Tribal or State budget descriptions must account for all aspects of the section 404 program, including administrative work, human resources, information technology, training, guidance, leadership, enforcement, compliance, scientific personnel, on-site activities and legal personnel; and Tribes or States must demonstrate that any existing CWA-authorized programs are adequately funded and staffed. EPA considered requiring some or all of the suggested information of Tribes and States, but ultimately concluded that requiring this level of detail is unnecessary. EPA will not always need each of these pieces of information to determine whether a program submission meets the requirements of the CWA. Codifying information requirements with this degree of specificity could limit flexibility on the part of Tribes or States and EPA to design and approve program descriptions reflecting their particular circumstances. However, EPA views this suggested information as helpful guidance to Tribes or States as they assess how best to demonstrate that they have the capacity to administer the section 404 program. Tribes and States are welcome to submit this type of information, and if they do so, it will likely aid EPA's review of the program submission.

EPA recommends that Tribes and States provide other information to the extent it is necessary to demonstrate that they will be able to carry out subparts C through E. Some commenters suggested that if a Tribal or State program submission commits to conduct the same activities as the Corps but with a lower budget or fewer staff people, the submission must provide detailed documentation demonstrating how they will be able to successfully administer the section 404 program. In fact, one commenter noted that Tribes or States should allocate more money to assumption than the Corps in the first few years of assumption, given the additional costs of starting a program. To the extent Tribes or States can compare resource levels with the Corps', EPA agrees with the commenter that this information would be useful, and strongly encourages Tribes and States to provide such comparisons. EPA is not codifying this requirement, however, as differences in administrative structures may render a direct comparison between Tribe or State funding or staff and Corps funding or staff infeasible. For example, a Corps district may not be able to identify the number of staff focused solely on section 404 permitting or on a single State, if its staff administers the section 404 regulatory program as well as RHA section 10 or other types of permitting programs, and/or if the staff manages permitting for a number of States. The difficulties with direct comparisons 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.

The rule 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 rule therefore retains 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 depending on the anticipated workload in the particular Tribe or State, such as the number of permits typically sought, the extent and types of aquatic resources assumed, and the types of compensatory mitigation mechanisms used. In adding clarification to better carry out the requirements of 40 CFR 233.11, this revision does not reopen those requirements.

EPA's clarification, that as part of the program description, the Tribe or State must demonstrate that its permit review criteria are sufficient to carry out the permitting requirements of 40 CFR part 233 subpart C, has the same goal as the program revisions described above: it would harmonize 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, requiring that the description of Tribal and State agency coordination on program administration must address enforcement and compliance will enable EPA to ensure the Tribe or State can comply with the requirements of 40 CFR part 233 subpart E, which prescribes the enforcement and compliance requirements for assumed programs.

4. Mitigation

a. Overview and what is the Agency finalizing?

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).[34] 33 U.S.C. 1344(h)(1)(A)(i); 40 CFR 233.20(a), 233.23(c)(9) (2023). Under CWA 404(b)(1) Guidelines, impacts to waters of the United States should be avoided and minimized to the maximum extent practicable before considering compensatory mitigation.[35] 40 CFR 230.10(a), (d). In 2008, the Corps and EPA issued joint regulations [36] requiring performance standards and establishing criteria for all types of compensatory mitigation including: (1) on- and off-site permittee-responsible compensatory mitigation, (2) mitigation banks, and (3) in-lieu fee programs, to ''offset unavoidable impacts to waters of the United States authorized through the issuance of permits by the U.S. Army Corps of Engineers (Corps) pursuant to

[34] See section IV.A.2 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.

[35] 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.'' 40 CFR 230.92.

[36] ''Compensatory Mitigation for Losses of Aquatic Resources'' 73 FR 19594 (April 10, 2008). (Commonly referred to or known as the ''2008 Mitigation Rule''). The 2008 Mitigation Rule was adopted into both EPA and the Corps regulations. *See* 33 CFR 325.1 and 332.1 through 332.8 and 40 CFR 230.91 through 230.98. The Agency refers to EPA's regulations located at 40 CFR 230.91–98 as subpart J of the 404(b)(1) Guidelines throughout this final rule.

section 404 of the Clean Water Act.'' 40 CFR 230.91(a)(1).

The prior regulations reaffirmed that all permits issued by Tribal and State programs must accord with the requirements of the Act or regulations thereunder. 40 CFR 233.1(d), 233.20(a) (2023). As previously described in section IV.A.2 of this preamble, Congress allowed leeway for Tribes and States to craft a Tribal or State program consistent with circumstances specific to that Tribe or State, so long as their permits will assure compliance with the CWA 404(b)(1) Guidelines at least as stringently as permits issued by the Corps. EPA further explained in promulgating the CWA 404(b)(1) Guidelines that they are intended to provide ''a certain amount of flexibility,'' consisting of tools for evaluating proposed discharges, rather than numeric standards. 45 FR 85336, 85336 (December 24, 1980).

While 40 CFR 233.1(d) of the prior regulations reemphasized that approved Tribe and State programs ''may impose more stringent requirements'' but ''may not impose any less stringent requirements for any purpose,'' the regulations did not provide any detail as to how a Tribe or State can demonstrate and ensure compliance with the substantive criteria and requirements of subpart J of the 404(b)(1) Guidelines, as subpart J was developed more than a decade after the Tribal and State section 404 program regulations were revised in 1988. Additionally, the language used in subpart J of the 404(b)(1) Guidelines 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 19650. These Corps-related references have created confusion. As a result, States have requested clarity on how a Tribe or State can demonstrate that it has authority to issue permits that apply and assure 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 Federal agencies in connection with compensatory mitigation for impacts to assumed waters.

With respect to subpart J of the 404(b)(1) Guidelines, EPA recognized some terminology and discussion refers to the Corps as the permitting authority. EPA proposed modifying section 233.1(e) to clarify that references to the Corps as the permitting authority (such as references to the ''District Engineer'' or ''DA Permits'') are to be considered as applying to the Tribal or State permitting agency or decision maker as appropriate. The final rule codifies this proposed approach. 40 CFR 233.1(e).

Secondly, EPA proposed a new provision codifying its interpretation that the Tribe's or State's approach may deviate from the specific requirements to the extent necessary to reflect Tribal or State administration of the program as opposed to the Corps' administration, but that these programs may not be less stringent than the substantive criteria of subpart J. Furthermore, the new provision requires Tribes or States to submit in their program description the Tribe's or State's proposed approach to ensuring that all permits they issue 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. EPA is finalizing what was proposed without modification in section 233.11(k).

Finally, EPA proposed to add a new provision to section 233.50 to address EPA's oversight responsibilities where Tribe or State programs are establishing third-party compensation mechanisms (*i.e.,* mitigation banks or in-lieu fee programs) as part of their section 404 program.[37] The proposed process also intended to incorporate input from other relevant agencies, which is analogous to the way the Interagency Review Team (IRT) that oversees mitigation for Corps-issued permits incorporates 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). The Agency also proposed to revise the section title for section 233.50 to read ''Review of and objection to State permits and review of compensatory mitigation instruments.'' This revision was intended to reflect the Agency's role in reviewing Tribal or State compensatory mitigation instruments.

The new provision (*i.e.,* section 233.50(k)) outlines a process which requires Tribes or States to transmit a copy of each draft instrument to EPA, the Corps, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service for review prior to approving the final 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. In the event that EPA has commented that the instrument is not consistent with the 404(b)(1) Guidelines (see section 233.11(k)), the Tribe or State shall not approve the final compensatory mitigation instrument until EPA notifies the Director that the final instrument is consistent with the Guidelines. EPA is finalizing the proposed process along with specific time frames for receiving comments from the reviewing agencies in section 233.50(k).

[37] This requirement does not include permittee-responsible mitigation plans as those would be reviewed as part of the permit conditions. If the Tribe or State uses permittee-responsible mitigation, the mitigation plan would be reviewed as part of the permit process. After approval, all specifications generally would be presented as permit conditions.

b. Summary of Final Rule Rationale and Public Comment

i. Clarifying Authority

The final rule, consistent with the proposal, clarifies in the new provision 233.1(e) that 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 and being implemented by the Tribal or State permitting agency or decision maker. EPA received no comments on this issue.

ii. Ensuring Consistency and Compliance With Subpart J

The new provision 40 CFR 233.11(k) accomplishes three objectives. First, the new provision requires that Tribes or States submit in their program description their approach to ensure that all permits issued will satisfy and be consistent with the substantive standards and criteria of the compensatory mitigation set out in subpart J. This description allows EPA to evaluate whether the Tribe's or State's approach can implement a compensatory mitigation program consistent with the requirements of the CWA. Second, the new provision at section 233.11(k) clarifies 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. For example, a Tribal or State program may choose to provide for mitigation in the form of banks and permittee responsible compensatory mitigation but may choose not to establish an in-lieu fee program. Lastly, the new provision at section 233.11(k) codifies EPA's 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. The new provision is consistent with CWA section 404(h)(1)(a), 40 CFR 233.1(e), and 40 CFR 233.20(a).

Commenters were divided on the Agency's proposed approach to this new provision. Commenters opposing the Agency's proposed approach asked the Agency to require Tribes and States to adopt verbatim or by reference the requirements of subpart J of the section 404(b)(1) Guidelines. These commenters asserted that verbatim adoption or incorporation by reference of the mitigation requirements set forth in subpart J would ensure consistency with the 404(b)(1) Guidelines and ''promote consistency and ease for the EPA, permittees and citizens.'' Commenters supporting the proposed approach (*i.e.,* allowing Tribal and State programs to deviate from the substantive criteria of subpart J) asserted that Tribes and States are in a better position to make decisions and design appropriate mitigation approaches for their Tribe or State than the Corps. Some commenters requested that EPA provide clearer direction on its expectations for resource mitigation, including banking and in-lieu fee proposals, greater specificity as to the standards EPA will use to review an applicant's proposed mitigation program, and require additional requirements in mitigation proposals.

The Agency considered these comments and decided to finalize the proposed approach for several reasons. First, while nothing in this rule prohibits Tribes or States from adopting or incorporating the CWA 404(b)(1) Guidelines, requiring Tribes and States to adopt or incorporate the CWA 404(b)(1) Guidelines, including subpart J, would conflict with the leeway Congress provided to Tribes and States to craft a Tribal or State program consistent with circumstances specific to that Tribe or State, so long as their permits will assure compliance with the CWA 404(b)(1) Guidelines at least as stringently as permits issued by the Corps. Recognizing that a CWA section 404 permit may be required for a variety of discharges into a wide range of aquatic ecosystems, EPA explained in promulgating the CWA 404(b)(1) Guidelines that they are intended to provide ''a certain amount of flexibility,'' consisting of tools for evaluating proposed discharges, rather than numeric standards. 45 FR 85336, 85336 (December 24, 1980). Similarly, as described in section IV.A.2 of this preamble, requiring Tribes or States to adopt or incorporate subpart J would complicate efforts by Tribes and States to impose more stringent requirements as part of their CWA section 404 programs. *See* section IV.A.2 of this preamble for further discussion on 404(b)(1) Guidelines.

Commenters noted that mitigation requirements are tiered (or hierarchical) and insisted EPA should not allow State programs to ''pick and choose'' between the allowable forms of mitigation (*e.g.,* permittee responsible, mitigation banks, and in-lieu fees). A commenter stated that State programs which ''do not provide for all and follow the established hierarchy for their use would have less stringent compensatory mitigation requirements as compared to the federal program.'' EPA disagrees with this commenter. Tribes and States may not impose requirements less stringent than Federal requirements. Accordingly, Tribes and States must follow the hierarchical approach laid out in subpart J of the 404(b)(1) Guidelines. *See* 40 CFR 230.93(b). But following this approach does not require the establishment of all three mechanisms listed in the hierarchy. Rather, Tribes and States, like the Corps, must apply the hierarchy to available mechanisms to determine the appropriate type of compensatory mitigation.

iii. Third Party Compensatory Mitigation Instrument Oversight and Approval

EPA is finalizing the proposed process, which will implement the Agency's oversight responsibilities of third-party compensatory mitigation instrument approvals (*i.e.,* mitigation banks and in-lieu fee programs), as well as provide opportunities for other agencies to review and comment on third-party compensatory instruments prior to approval. 40 CFR 233.50(k). Under the final process, a Tribe or State must provide EPA, the Corps, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service an opportunity to review and comment on any draft compensatory mitigation instruments before the Tribe or State may establish the proposed instrument. The Tribe or State may also commit in their program description to include Tribal or State resource agencies in the circulation of draft instruments for approval. If EPA comments that the instrument fails to apply or ensure compliance with the section 404(b)(1) Guidelines, the Tribe or State may not approve the final compensatory mitigation instrument until they address EPA's comments and EPA notifies it that the final instrument ensures compliance with this approach.

The Agency expects this instrument review process would be familiar to Tribes and States because it is modeled on, and similar to, the procedures for EPA review of permits, but does not replicate them. This process also facilitates input from other relevant agencies, similar to how an Interagency Review Team provides input to the Corps from other relevant Federal and State agencies on compensatory mitigation instruments. *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). Overall, the Agency believes this review process provides sufficient oversight for Tribal or State compensatory mitigation instruments and provides opportunity for multiple agencies to provide input on the draft compensatory instrument before it is approved. The Agency believes the final requirements outlined in the new provision 233.50(k) strike a balance between Federal oversight responsibility of draft compensatory mitigation instruments while allowing Tribes and States flexibility to solicit input from additional resource agencies.

No commenters opposed the proposed approach. However, one commenter cautioned EPA not to implement a rigid process that would limit Tribes' or States' flexibility in designing their own compensatory mitigation approach. EPA believes that this provision provides such flexibility.

One commenter requested that the Agency expand the list of mitigation instrument reviewers to include relevant Tribal and State agencies (*e.g.,* Tribal- or State-level fish and wildlife services) to the list. The Agency agrees with the commenter and believes that additional reviews from relevant resource agencies would be advantageous by providing local expertise and helping assess the applicability of the mitigation instrument (*e.g.,* including but not limited to the structure of the instrument, design of the proposed projects, proposed loss and benefits, and evaluation of successful instrument), thereby promoting positive outcomes for environmental protections.

The Agency is not requiring circulation to ''relevant Tribal or State agencies'' because the criteria for ''relevancy'' is vague. What constitutes a ''relevant'' agency is susceptible to differing interpretations, especially as Tribes and States organize their authorities under differing or even multiple agencies (*e.g.,* some regulate

wetlands under the State Department of Lands, others regulate them under the State water quality agency). Therefore, imposing mandatory circulation to this category of agencies would create confusion and implementation challenges for the Tribal or State authority. Furthermore, the Agency believes the new provision at section 233.50(k) provides Tribes and States the opportunity to identify and commit to additional instrument reviews from other Tribal or State agencies in their program description. The new provision also allows a Tribe or State to invite other resource agencies not identified in their program description to participate in draft instrument review on a case-by-case basis.

The Agency received one comment requesting that EPA provide clearer direction on its expectations for resource mitigation, including banking and in-lieu fee proposals, and greater specificity as to the standards EPA will use to review an applicant's proposed mitigation program. The commenter also asked that EPA require additional requirements in mitigation proposals. EPA is not reopening the section 404(b)(1) Guidelines in this rule and does not have the authority to impose substantive mitigation requirements on Tribes and States that are more stringent than the mitigation requirements in the section 404(b)(1) Guidelines.

5. Effective Date for Approved Programs

a. What is the Agency finalizing?

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 prior regulations provided that the transfer of permitting authority could only take effect after notice of EPA's program approval appeared in the **Federal Register**. 40 CFR 233.15(h) (2023). 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 section 404 permitting program if their program is approved.

EPA proposed 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**. The proposal also provided that if requested and supported by a Tribe or State in its request to assume the program, EPA may specify a later effective date, not to exceed 120 days from the date of notice in the **Federal Register**. A Tribe or State which seeks a later transfer date must provide a sufficient explanation of its need for the additional time as part of its program submission. In all cases, that effective date must 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**. EPA also proposed to require that decisions to approve Tribal and State programs and revisions be posted on EPA's website in addition to publication in the **Federal Register**. After reviewing public comments, the Agency is finalizing its approach as proposed with one modification to allow Tribes or States and EPA to establish a later effective date not to exceed 180 days from the date of notice in the **Federal Register**.

b. Summary of Final Rule Rationale and Public Comments

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, permitting responsibility should transfer. *Id.* at 1344(h)(2). Thus, the administrative process envisioned by Congress is that EPA receives a program request, reviews and approves or denies the program request, then notifies the parties of an approval decision, after which the Corps begins to transfer existing permitting materials. The contrast between the specific time frames the statute provides for EPA's approval of a program and the absence of a time frame for the transfer of permit applications from the Corps suggests that Congress intended some flexibility in the transition to Tribal or State program implementation. However, the fact that the statute describes the transfer of permits as the immediate next step following program approval indicates that Congress intended the transfer to happen relatively quickly.

EPA proposed 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 would 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 could request an effective date of up to 120 days from the date of notice. EPA also proposed that if a Tribe or State requests to assume administration of the program more than 30 days after EPA's approval, the program description must 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.

A number of commenters supported EPA's proposal to allow for more than 30 days for program transfer. Most of these commenters, however, requested that the maximum time be longer than EPA's proposed maximum of 120 days, or not specifically limited. These commenters agreed that some Tribes and States, especially smaller ones, may need more time to effectively prepare for program implementation, such as training staff, to successfully implement the assumed section 404 permitting program if their program is approved. One commenter stated that no more than 120 days should be needed if a Tribe or State were sufficiently prepared to assume the program.

EPA finds that a short, clearly defined period of time between program approval and the Tribe or State's assumption of program administration benefits the public and regulated community by providing advance notice of the date of program transfer and supports the smooth transition of program functions. However, EPA agrees that extending the maximum period of time to 180 days could reduce the burden for some Tribes and States, without significantly increasing the uncertainty that might arise from lengthier transition periods.

The final rule allows the effective date to be more than 30 days following approval (though no more than 180 days), when a Tribe or State identifies specific circumstances which support the need for additional time. If the Tribe or State takes advantage of this option to delay the effective date, the Tribe or State's program description should set forth the steps it will take upon program approval, such as specifying the timeline for any assignment and training of staff and ensuring program funding is accessible by the effective date. Generally speaking, a Tribe or State should not wait until EPA approves its

program before initiating hiring and training processes for staff that are committed in its program description and the Tribe or State should be prepared to implement the final steps soon after program approval.

The Agency is finalizing the requirement 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. As with the prior regulations, the Corps will continue to process permit applications up until the effective date, but they will also use the time between approval and the effective date to begin transferring permits under review. The Tribe or State would not be authorized to process these permits until the effective date of program transfer. The Tribe or State and the Corps will 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).

C. Program Operations

1. Five-Year Permits and Long-Term Projects

a. Overview and What the Agency Is Finalizing

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).[38] The Agency codified this limitation in the permit conditions section of the prior section 404 Tribal and State program regulations. 40 CFR 233.23(b) (2023). However, certain projects by their nature cannot be completed within five years and 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, or cumulative impacts of the entire project.

To minimize unnecessary effort and paperwork, and provide the Tribe or State and the public with information that can assist with the successful permitting of long-term projects, the Agency proposed that applicants for projects for which the planned schedule extends beyond five years at the time of the initial five-year permit application must submit a 404(b)(1) analysis for the full scope and 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. The proposed rule preamble discussed the criteria that the Tribe or State must consider when determining whether the 404(b)(1) analysis needs to be modified. 88 FR 55303. If there has been a change in circumstance related to an authorized activity following approval of the previous five-year permit, the applicant must modify the 404(b)(1) analysis for subsequent five-year permits. If there have been no changes in circumstances related to an authorized activity following approval of the previous five-year permit, the applicant's new permit application may rely upon the most recent 404(b)(1) analysis. Consistent with CWA requirements, the proposal also required that 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. To avoid a stoppage in work, the proposal required 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.

In response to public comments, the Agency is revising its proposed approach to require that the permit application and public notice for a subsequent five-year permit application must indicate whether the 404(b)(1) analysis has been updated and that the Tribe or State must provide a written explanation if it does not require an updated 404(b)(1) analysis for a subsequent five-year permit(s). Additionally, EPA is authorizing the Tribe or State to grant permission to submit an application less than 180 days prior to the expiration of the current permit but no later than the permit expiration date.

b. Summary of Final Rule Rationale and Public Comments

i. Permitting Long-Term Projects

The Agency is finalizing a process for permitting long-term projects in waters assumed by a Tribal or State section 404 program 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 a project's impacts to the aquatic environment. When applying for a permit to discharge dredged or fill material associated with projects [40] with a planned construction schedule which may extend beyond the five-year permit period, applicants must submit an analysis that demonstrates compliance with the 404(b)(1) Guidelines showing how the complete long-term project complies with the environmental review criteria set forth in the CWA 404(b)(1) Guidelines when they submit the application for the first five-year permit. 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.[41] For example, under this approach, 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

[38] Corps-issued individual 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). General permits issued by the Corps are limited to five years. *See* 33 U.S.C. 1344(e)(2).

[39] 33 U.S.C. 1344(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.

[41] 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.

10–15, the permit application would provide information about the construction of all six hundred homes.

Some commenters supported the proposed rule approach without modification. Several commenters supported the proposed rule approach requiring an applicant to submit a 404(b)(1) analysis for the entirety of the project as part of the first five-year permit review period but recommended modifying the proposed rule approach to require an automatic update to the 404(b)(1) analysis at least every five-year permit cycle. According to these commenters, projects may change as they move forward and even small changes may have an impact on water quality, as well as on Tribal rights and resources. Some of these commenters supported a requirement that a written explanation be provided in the event the permitting authority does not require an updated section 404(b)(1) analysis.

EPA has evaluated these comments and concluded that an automatic update to the 404(b)(1) analysis every five-year permitting cycle is unnecessary. Instead, for subsequent five-year permits, EPA is requiring that Tribes or States provide a written explanation if they do not determine that a ''change in circumstance'' has occurred requiring an updated 404(b)(1) analysis. Adding this requirement provides transparency and ensures the Tribe or State engages in a meaningful analysis of why there has not been a ''change in circumstance.'' EPA believes this approach strikes the right balance of providing more regulatory certainty for subsequent five-year permits, while also ensuring that the scope of impacts associated with a complete project is factored into the permitting decision for each five-year permit.

One commenter asked EPA to require that sufficient information related to planned impacts for future permitting phases be included in an initial permit application. The rule modifies previous language in 40 CFR 233.30(b)(5), which stated that ''[a]ll activities which the applicant plans to undertake which are reasonably related to the same project *must* be included in the same permit application.'' (emphasis added). The final rule expands upon this provision and requires, ''[f]or 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.'' The final rule also requires that, ''[a]pplicants for subsequent five-year permits must update the 404(b)(1) Guidelines analysis if there has been a change in circumstance related to the project following approval of the previous five-year permit.''

Some commenters opposed any regulatory changes related to long-term projects. One commenter argued that requiring a comprehensive 404(b)(1) analysis would present a barrier to State assumption and questioned the legality of that approach. EPA disagrees with this commenter. Each State that has assumed the section 404 program has at times expressed interest in allowing for a full project analysis at the time of the first permit application and allowing expediencies in subsequent rounds of permitting for the same project, as a means of both ensuring comprehensive water quality protections and protecting permit applicants against wasted financial resources. As a legal matter, requiring an analysis of the full project scope is consistent with section 404(b)(1)(A), which provides that Tribes and States must have the authority to issue permits which apply and assure compliance with the 404(b)(1) Guidelines. The Guidelines, in turn, require an evaluation of the potential for adverse impacts on the aquatic ecosystems posed by dredged or fill material discharge activities. 40 CFR 230.10.

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) (2023). 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 seeking authorization for activity in years 6–10 of the project, years 11–15 of the project, and so forth. Additionally, this approach will 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 also help ensure consistency in permitting decisions associated with the project, thereby providing the applicant with more regulatory certainty than without such a plan. Evaluating the impacts of only the first stage of a long-term project does not make business sense. For example, if a permitting authority evaluating a second- or third-round permit for a mine's construction or operation were to deny the permit based on those previously unevaluated impacts, the investments made during the first round or two of permit coverage would have been wasted. Foregoing an initial long-term plan would therefore be extremely inefficient.

The issuance of Tribal or State section 404 permits for projects that exceed a five-year schedule only authorizes discharges 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. Nothing in the final rule 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 are 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 requiring that an applicant seeking a new five-year permit must 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. However, consistent with other CWA programs which have a similar 180-day advance application requirement (*e.g.,* 40 CFR 122.21(d)), upon special request the Tribe or State may grant permission to reapply less than 180 days prior to the expiration of the current permit but no later than the permit expiration date. This approach provides time for a

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

This final rule approach to five-year permits presents both environmental and financial advantages. It promotes 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.

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, plans for 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 description of the project may therefore be required. If there has been a change in circumstance related to an authorized activity following approval of the previous five-year permit, the Agency is finalizing as proposed that the applicant must modify the 404(b)(1) analysis for subsequent five-year permits. A change in circumstance related to the authorized activity includes, but is not limited to, 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;
—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 related to an authorized activity following approval of the previous five-year permit, the applicant's new permit application may rely upon the most recent 404(b)(1) analysis. As discussed above, the permit application and public notice for a subsequent five-year permit application must indicate whether the 404(b)(1) analysis has been updated. 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, at the request of Federal agency reviewers providing comments via EPA or at the request of 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. If the Tribe or State does not require an update to the 404(b)(1) analysis, it must provide a detailed written explanation in the record of decision for the permit based on the ''change in circumstance'' factors listed above and any additional factors identified in the Tribe or State's program description. The Tribe or State must provide this detailed written explanation for not requiring an update to the 404(b)(1) analysis regardless of whether it received a request from Federal agency reviewers or the public.

iii. Clarification Regarding Long-Term Projects

The Agency is finalizing as proposed a clarification 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). EPA expects that the permit application process for permits after the initial five-year permit application will be easier and simpler because the applicant and Tribe or State will have already analyzed the full project.

All public notices for long-term permits must satisfy the public notice requirements in 40 CFR 233.32(d). In addition, 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. Nor may a Tribe or State limit the scope of comments the public may submit in response to the public notice, or public hearing if a hearing is held, to impacts arising from one five-year permit of a long-term project as opposed to impacts from the entirety of the long-term project.

2. Judicial Review and Rights of Appeal

a. Overview and What the Agency Is Finalizing

The prior regulations require the program description to describe the Tribe's or State's judicial review procedure but did not contain an explicit corresponding substantive requirement for Tribal or State programs. The Agency proposed to codify a substantive requirement to match the prior descriptive requirement. After considering comments urging EPA to ensure that States facilitate public participation in the permitting process, EPA is finalizing a provision that would require States seeking to assume the section 404 program to 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. EPA did not propose any judicial review requirement relevant to Tribes in the regulatory text. In a change from proposal, EPA is codifying a requirement that Tribes must provide a commensurate form of citizen recourse for applicants and others affected by Tribe-issued permits.

b. Summary of Final Rule Rationale and Public Comment

This provision gives meaning to the existing regulatory requirement that State program descriptions describe their judicial review procedures. *See* 40 CFR 233.11(b). EPA interprets the existing requirement that States provide ''a description of the State's . . . judicial review . . . procedures'' to suggest that States must authorize judicial review. The new substantive requirement that States allow for judicial review sufficient to provide for, encourage, and assist public participation in the permitting process makes explicit that States must have authorities in place to form the basis for the existing description requirement.

The provision also carries out the requirement that States have the authority to ''abate violations of the . . . permit program'' through ''ways and means of enforcement.'' 33 U.S.C. 1344(g). Potential violations of the permit program may include State

permitting actions, such as the issuance of a permit that does not assure compliance with the section 404(b)(1) Guidelines or that has not provided public notice and an opportunity for a hearing. S*ee* 33 U.S.C. 1344(h)(1)(A)(i), (h)(1)(C). One of the most effective ways to abate such violations is to allow members of the public to challenge them. Given that EPA has limited resources to expend on oversight of State permitting actions, citizen challenges are a critical complementary tool for abating violations of the permit program.

The judicial review provision also gives meaning to the requirement that States must have adequate authority 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.'' 33 U.S.C. 1344(h)(1)(C). As EPA explained in promulgating a requirement for judicial review in the section 402 program, the United States Court of Appeals for the Fourth Circuit has agreed that ''[t]he 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.'' 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, *citing Com. of Virginia* v. *Browner,* 80 F.3d 869, 879 (4th Cir. 1996).

Without the possibility of judicial review by citizens, public participation before a State administrative agency could become less meaningful. *See also* 33 U.S.C. 1251(e) (''Public participation in the . . . 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.''); A Legislative History of the Water Pollution Control Act Amendments of 1972, Comm. Print No. 1, 93d Cong., 1st Sess. 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.'').

Finally, the 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.'' 40 CFR 233.1(e). 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. Permitting authorities are likely to be particularly careful to address citizens' input and ensure that issued permits comply with CWA requirements if such permits may be challenged by such citizens. Therefore, ensuring that States provide an opportunity for judicial review helps to ensure compliance with section 404 and all requirements of the CWA. Any of the provisions in 404(g) cited above as authority for the judicial review provision would be independently sufficient to justify finalizing this provision.

EPA proposed the language that it is codifying in this rule, except for the regulatory requirement that Tribes provide a commensurate form of citizen recourse for those affected by permitting decisions. The proposal had also stated that a State would meet the required judicial review standard if it allowed 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. Further, the proposal stated that a State would not meet this standard if it either narrowly restricted the class of persons who could challenge the approval or denial of permits (such as by limiting standing to people who would suffer pecuniary injury from the permitting decision or to people who own property close to the discharge or receiving waters) or if the State required the losing party to pay attorneys' fees notwithstanding the merit of its position. *See* 88 FR 55326.

A number of commenters expressed support for the proposed provision. Some commenters asked that EPA establish broader or more detailed limitations on restrictions or disincentives to judicial review. These commenters emphasized the importance of ensuring that the public has access to courts and discussed the significant chilling effects of State limitations on citizen suit challenges, such as fee-shifting provisions that make the ''loser pay'' (whether in full, in part, or at the judge's discretion) and requirements to exhaust administrative remedies that can deplete prospective plaintiffs' resources before they even initiate a State court challenge. These commenters asked EPA to prohibit certain requirements more clearly, including any form of fee-shifting and excessive administrative exhaustion requirements.

Other commenters expressed concerns about the proposed rule provision, stating that it would be a significant impediment, if not a complete barrier, to States seeking assumption. These commenters also argued that, as a legal matter, nothing in the CWA authorizes EPA to require judicial review opportunities for section 404 permits. They stated that while Congress does provide for judicial review by any interested person of EPA's issuance or denial of section 402 permits pursuant to CWA section 509(b)(1), it is silent with respect to judicial review of section 404 permits. This omission, in the commenters' view, indicates that Congress intentionally did not require a heightened level of review for section 404 permits.

EPA has finalized the requirement that States must provide for judicial review of State-issued permits or permit denials that is sufficient to provide for, encourage, and assist public participation in the permitting process. 40 CFR 233.24. The final requirement is shorter than the proposed requirement and does not specifically detail various examples of unacceptable barriers to judicial review. As noted above, it simply codifies the substantive corollary to the existing program description requirement that States describe their judicial review procedures. EPA disagrees with the commenters that stated EPA lacks authority to impose this requirement. As discussed above, the final requirement is consistent with 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 State programs be no less stringent than the Federal section 404 program. 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.

EPA removed from the final rule the examples of the ways in which States can demonstrate that they provide for judicial review of State-issued permits or permit denials that is sufficient to provide for, encourage, and assist public participation in the permitting process. Commenters made clear that States can either facilitate or impede judicial review of State-issued permits in a wide variety of ways. Specifically listing just a few of those examples in the regulations would be under-inclusive, but a longer and more prescriptive list

risks intruding into the operations of State courts and State civil procedure, areas traditionally subject to State control. EPA will therefore evaluate State judicial review provisions as part of program submissions on a case-by-case basis to determine whether they provide for judicial review of State-issued permits or permit denials that is sufficient to provide for, encourage, and assist public participation in the permitting process. Finally, in omitting the explicit requirement that States provide judicial review opportunities commensurate with those available for section 402 permits under CWA section 509(b), the provision no longer implicates the commenters' argument that it conflicts with Congress' intentional omission of section 404 permits from the scope of section 509(b) review.

EPA would also look to the State Attorney General's statement to certify that the laws of the State meet the requirements of the regulation. *See* 40 CFR 233.12. States with expansive judicial review opportunities, such as those that allow standing to challenge permits on the part of interested citizens and citizen groups, and that do not require parties who lose lawsuits brought in good faith to pay other parties' legal fees, should meet the regulatory judicial review requirement. As with the section 402 regulations, the provision applies to final actions with respect to modification, revocation and reissuance, and termination of permits, as well as the initial approval or denial of permits.

The final rule approach for the section 404 State program regulations effectuates 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 rule provides additional assurance of State program adequacy and fairness by ensuring opportunities for judicial review.

In the proposed rule, EPA stated that the judicial review requirement did not apply to Tribes and did not include any requirement relevant to Tribes in the regulatory text. The preamble to the proposed rule explained that Tribes would need to provide appropriate recourse for citizens seeking to challenge Tribal permitting actions. One commenter requested clarity on the type of recourse Tribes would need to provide. A few commenters raised concerns that EPA was arbitrarily treating Tribes differently from States. These commenters stated that EPA's concern that requiring Tribes to waive sovereign immunity to judicial review of permitting decisions would disincentivize Tribal assumption applies equally to States. One commenter argued that disappointed permittees or other affected persons would have no recourse from unlawful permitting actions on the part of assuming Tribes if EPA did not require some form of recourse.

In response to these commenters, EPA is codifying the requirement that Tribes must provide a commensurate level of citizen recourse to the judicial review opportunities States must provide for those seeking to challenge permitting actions. Consistent with the requirement applicable to States, it should be sufficient to provide for, encourage, and assist public participation in the permitting process. EPA is not specifying precisely what form this recourse must take, given the diverse forms that Tribal decision-making entities may take. If a Tribe has a judicial system analogous to a State judiciary, the Tribe must provide for judicial review of section 404 permits. If, instead, a Tribe uses another type of decision-making entity to address disputes, that entity must be able to hear permit challenges. Requiring Tribes to provide for citizen recourse commensurate with the judicial review opportunities required of States provides more clarity than the proposal offered and ensures that persons affected by Tribal permitting actions will have recourse.

EPA's decision not to specifically require all Tribal section 404 programs to provide for judicial review of Tribal permitting actions is consistent with EPA's approach in the section 402 judicial review 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); 40 CFR 49.4(p). While EPA does not, as a general matter, think 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 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. In this rule, EPA seeks to strike a balance by ensuring that citizen recourse is available in any approved Tribal section 404 program commensurate with the judicial review opportunities required of State programs, while not restricting qualified Tribes to a single judicial option that may not fit existing Tribal governmental structures. EPA would consider whether commensurate citizen recourse has been provided in the context of reviewing Tribal program applications.

Finally, EPA 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 to describe any 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. EPA is not requiring or prohibiting any specific administrative review procedures, however, because the Agency recognizes that existing Tribal and State administrative procedures may differ across the country.

D. Compliance Evaluation and Enforcement

1. Overview and What the Agency Is Finalizing

The CWA provides for criminal liability based on simple negligence. EPA has determined that the prior 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 the best interpretation of the statute. After reviewing public comments, EPA is revising its criminal enforcement requirements in 40 CFR 123.27 and 40

CFR 233.41 to provide that Tribes and States that administer the CWA section 402 NPDES permitting program or the CWA section 404 dredged and fill permitting program, or that seek approval 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. Summary of Final Rule Rationale and Public Comment

The prior 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 the best interpretation of the statute. EPA interprets the CWA to authorize the approval of Tribal or State section 402 or 404 programs that allow for prosecution based on a *mens rea* of any form of negligence, including gross negligence. These regulatory revisions more clearly articulate this interpretation.

These amendments provide clarity for Tribes and States that have been approved to administer or seek to obtain EPA's approval to administer their own section 402 or 404 programs under the CWA. EPA anticipates that States that already administer these CWA programs will not need to change their legal authority. Instead, these regulatory clarifications will generally assure approved States that existing negligence *mens rea* authorities comport with the *mens rea* applicable to Tribal and State CWA sections 402 and 404 programs. Additionally, these revisions provide those Tribes and States seeking to administer CWA sections 402 and 404 programs 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, pursuant to EPA's current regulations any Tribal or State agency administering a section 404 program must 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).[42]

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). 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), the general criminal enforcement section of the CWA specifically authorizes misdemeanor criminal liability for violations of federally issued or State-issued section 402 and 404 permits 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, four Federal 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); *U.S.* v. *Maury,* 695 F.3d 227, 259 (3d Cir. 2012).[43] 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). 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's criminal enforcement actions are subject to a simple negligence standard, the court determined that EPA violated its regulations 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 *mens rea* standard 'no greater than' simple negligence, such as strict liability or simple negligence.'' *Idaho Conservation League,* 820 Fed. Appx. at 628.

b. Statutory and Regulatory Framework

The general enforcement provisions of the CWA section 309(c)(1), 33 U.S.C. 1319(c)(1), as interpreted by the courts, authorize criminal prosecutions of violations of section 402 and 404 permits committed with a simple negligence *mens rea.* However, the CWA does not state that Tribal or State section 402 or 404 programs must demonstrate such authority as a criterion for program approval to Tribal or State. The CWA provides a list of the authorities Tribes and States must have in order to qualify for section 402 or 404

[42] Under the section 402 program, EPA's regulations provide that ''[t]o the extent that an Indian Tribe is precluded from asserting criminal enforcement authority as required under § 123.27, the Federal Government will exercise primary criminal enforcement responsibility. The Tribe, with the EPA Region, shall develop a procedure by which the Tribal agency will refer potential criminal violations to the Regional Administrator, as agreed to by the parties, in an appropriate and timely manner. This procedure shall encompass all circumstances in which the Tribe is incapable of exercising the enforcement requirements of § 123.27. This agreement shall be incorporated into a joint or separate Memorandum of Agreement with the EPA Region, as appropriate.'' 40 CFR 123.34. The section 404 regulations contain a nearly identical provision at 40 CFR 233.41(f).

[43] Simple negligence is a failure to use care as a reasonably prudent and careful person would use under similar circumstances. As relevant here, it is used interchangeably with ''ordinary negligence.'' *See, e.g., U.S.* v. *Maury,* 695 F.3d 227, 260 (''we are now confronted with a slowly expanding body of law from our sister circuits which indicates that simple or ordinary negligence may be the appropriate standard of *mens rea* under § 1319(c)(1).'') Gross negligence is sometimes defined as the extreme indifference to or reckless disregard for the safety of others.

program approval, respectively, and authority to prosecute criminal violations committed with a simple negligence *mens rea* is not on either list. Rather, with respect to enforcement authorities, the CWA requires that EPA ''shall approve'' a Tribe or State's submission to administer a section 402 or 404 program if it demonstrates that it has 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). For the reasons described herein, EPA has concluded that the best reading of these statutory provisions is that they do not establish specific *mens rea* requirements for Tribal and State section 404 programs.

In addressing the criminal 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 Tribe- or 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 Tribes and 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). By contrast, 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 criminal enforcement. *See* 33 U.S.C. 1342 (b)(7). EPA proposed to clarify that CWA sections 402 and 404 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 required that Tribes and States be able to implement the text of section 309(c), requiring authority to prosecute crimes committed with some form of negligence.

Some commenters on the proposed rule agreed with EPA's interpretation of the statute. Other commenters disagreed, arguing that the simple negligence criminal prosecution authority in CWA section 309(c) applies to Tribal and State programs. These commenters stated that CWA section 309(c) establishes misdemeanor criminal liability for anyone who violates a CWA section 402 or 404 permit issued by EPA or a State with a *mens rea* of simple negligence. According to the commenters, nothing in CWA section 309 limits this authority to EPA as opposed to State programs.

EPA disagrees with commenters' arguments that the CWA does not authorize EPA to approve Tribal or State programs that lack authority to prosecute criminal violations committed with a simple negligence *mens rea.* While EPA acknowledges that CWA section 309(c)(1) does mention negligent violations of State permits, that provision provides authority for *Federal* prosecutions, including enforcement of State permit requirements; it does not require or address *State or Tribal* enforcement programs or the standard for approval or assumption for Tribal and State programs. Moreover, when section 309(c)(1) is read alongside sections 402(b) and 404(h)(1), which set forth the requirements for Tribal and State programs, the more specific Tribal and State requirements in sections 402(b) and 404(h)(1) prevail over the CWA's general enforcement provision in section 309(c). *See RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank,* 566 U.S. 639, 645 (2012) (''[I]t is a commonplace of statutory construction that the specific governs the general.'') (internal citations omitted.) As described above, the general language used to describe the criminal enforcement authorities Tribe and States must have indicates Congressional intent to allow greater flexibility for Tribes and States in the criminal enforcement context than they have, for example, in permitting and inspections. This provides appropriate ''respect'' for ''state autonomy in the criminal sector.'' *NRDC* v. *U.S. EPA,* 859 F.2d 156, 180–181 (D.C. Cir. 1988).

Some commenters argued that executive branch agencies may not modify criminal intent standards absent express Congressional authorization. Modifying Congressionally authorized criminal liability standards, in the commenters' view, is not a power left to the executive branch. EPA disagrees with the premise of this comment; as discussed above, Congress did not mandate that Tribes and States have authority to prosecute criminal violations committed with a simple negligence *mens rea,* so this rule does not modify Congressionally established standards, which continue to apply to Federal enforcement.

EPA's interpretation that it has the flexibility to approve Tribal or State programs with the authority to prosecute violations committed with a *mens rea* of any form of negligence 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 (internal citations omitted).

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 the State 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.

Some commenters argued that the *NRDC* and *Akiak Native Comm'ty* cases are inapposite. Because the *NRDC* case involved penalties and *Akiak Native Comm'ty* was about enforcement mechanisms, they argue neither of these cases bears on criminal intent standards. Commenters also stated that *NRDC* is distinguishable because the court relied on an express Congressional amendment authorizing EPA to allow for certain Tribal and State program departures from CWA statutory civil enforcement monetary penalties, and the CWA contains no such amendment regarding *mens rea.* In their view, the absence of a similar Congressional authorization for the Administrator to depart from criminal liability standards applicable to Tribal and State programs shows that Congress did not grant the Administrator such authority.

Commenters also noted that *NRDC* decision ignored CWA section 402(a)(3), which provides that EPA's permit program ''shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.'' 33 U.S.C. 1342(a)(3). These commenters view this language as prohibiting Tribes or States from implementing a program that is any less stringent than a federally run program, including a program lacking authority to prosecute criminal violations committed with a simple negligence *mens rea.* Commenters state that the fact that neither the plaintiffs in that case nor D.C. Circuit considered section 402(a)(3) renders the *NRDC* precedent less persuasive.

Finally, commenters stated that the court in *NRDC* emphasized the importance of State programs being ''administered in such a manner that . . . [approval will] provide a much more effective program'' than the Federal Government would otherwise administer. 859 F.2d at 175. Commenters emphasized that this language reflects the court's view that Congress wanted to create more protective State programs.

EPA disagrees with the commenters stating that *NRDC* and *Akiak Native Comm'ty* do not support the Agency's view of its authority. These cases hold that EPA may approve State programs if these programs lack certain enforcement authorities that the CWA provides to EPA; this precedent is highly germane to these revisions, even if the precise authorities at issue in those cases were not criminal intent standards. EPA also disagrees that *NRDC* is distinguishable because it did not address CWA section 402(a)(3). The fact that neither the plaintiffs nor the court addressed section 402(a)(3) may merely indicate that they did not find that provision relevant. Nor does EPA. Section 402(a)(3) applies to the terms, conditions, requirements, and permits of a State permit program; the criminal negligence *mens rea* that States are authorized to prosecute is none of these. Section 402(a)(3) is most clearly read to address the permitting process, not the state of mind of criminal violators. Moreover, clearly this provision would not implicate section 404 permits.

As to the 1987 amendments to the CWA, which noted that Tribal and State programs do not need to have the same maximum allowable penalty amount as EPA (*see* Water Quality Act of 1987, Title III, § 313(b)(2), Public Law 100–4, 101 Stat. 45), the D.C. Circuit in *NRDC* characterized the amendment as simply ''*confirmation* of the broad authority the Administrator *already* enjoyed in crafting state program requirements.'' *NRDC,* 859 F. 2d at 180 (emphasis added). In other words, this amendment is additional evidence in support of the Court's interpretation of the statutory structure that, regardless of the amendment, allows EPA certain flexibility in determining which of its criminal enforcement authorities Tribes and States must adopt if they wish to administer CWA permitting programs.

Finally, EPA agrees with commenters and the D.C. Circuit in *NRDC* about the importance of effective and protective State programs. In this rule EPA is maintaining and strengthening many provisions to help achieve this goal. Specifically with respect to criminal enforcement, EPA views the other requirements for Tribal and State enforcement authority in 40 CFR 123.26, 123.27 and 233.41 as sufficient to ensure that Tribes and States 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.'' These other provisions require, among other things, that a Tribe or State must 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 discussed in section IV.B.3 of this preamble, EPA's modifications to program assumption requirements would further buttress the requirements of 40 CFR 233.41.

EPA has previously argued that Tribes and States do not need authority to prosecute criminal violations based on a simple negligence *mens rea,* including in *Idaho Conservation League.* 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 to adopt the best reading of the statute. *See 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).

Though under this rule EPA is not requiring Tribes or States to have the same criminal intent standard 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(c). 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(c). The absence of any citation to CWA section 309(c) 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 criminal 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 criminal enforcement, and consistent with the regulatory requirements for Tribal and State criminal enforcement authority. *See* 33 U.S.C. 1342(b)(7), 1344(h)(1)(G); 40 CFR 233.41. Furthermore, Tribes and States may certainly continue to authorize criminal prosecutions based on a simple

negligence *mens rea.* Tribes or States with that authority may describe it in their program submissions to demonstrate the adequacy of their criminal enforcement programs.

This 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, they 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 criminal 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 Tribes and States to seek to administer the CWA section 402 or 404 programs consistent with section 101(b) of the statute.

This rule 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 administer permit programs. 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 adding 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 is also removing 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 123.27(a)(3) and 233.41(a)(3), which currently require Tribes and States to have the authority to assess or sue to recover ''civil penalties and to seek criminal remedies,'' EPA is replacing 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 changes described in this paragraph are intended to change the substantive effect of the regulations.

E. Federal Oversight

1. Dispute Resolution

a. Overview and What the Agency Is Finalizing

The Agency recognizes that Tribes or States seeking to assume administration of the section 404 permitting program may encounter disputes or disagreements when developing a program or administering an approved section 404 program. For example, Tribes and States could 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. Specifically, such disputes may occur during the development of the retained waters description, development of a transfer plan for permits currently under review by the Corps, through efforts to address endangered species and historic properties during permit review, and in determining whether a discharge affects another State, as well as in other situations. However, while the prior regulations provided several mechanisms for resolving certain types of disagreements (*e.g.,* addressing EPA's comments, conditions, or objections to potential Tribal or State permits), the prior regulations did not provide a general dispute resolution mechanism or clarify EPA's role in such disputes. Several Tribes and States have requested that EPA help resolve disputes encountered between themselves and other States, Tribes, or the Federal Government.

The Agency proposed to add a general provision to the purpose and scope section at section 233.1 that would clarify EPA's role in facilitating the resolution of potential disputes between the Federal agencies and the Tribe or State seeking to assume and/or administer a section 404 program. 88 FR 55323. The proposed rule would also provide for resolution or elevation procedures to be specifically articulated in the Tribal or State Memoranda of Agreement or on a case-by-case basis. The provision reaffirms, however, that any dispute resolution or elevation process described in the regulations or in the Tribal or State Memoranda of Agreement must be followed. After reviewing public comments, the Agency is finalizing the dispute resolution provision as proposed at section 233.1(f).

b. Summary of Final Rule Rationale and Public Comment.

The Agency sees facilitating resolution of disputes as critical to establishing and sustaining viable Tribal and State section 404 permitting programs. 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. In this rule, EPA seeks to elucidate its role in resolving such disputes. Rather than attempt to articulate in the regulations all potential areas where a dispute may arise, EPA is adding a general provision to section 233.1 to affirm 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 EPA. EPA views this clarification as consistent with its program approval and oversight authority in CWA sections 404(h)–(j).

Commenters generally supported this clarification of EPA's role in assisting in the resolution of disputes. Some commenters raised concerns that EPA does not articulate any specific ''mechanism or final authority,'' and asked that EPA articulate specific procedures to be included in the Memorandum of Agreement. Another commenter generally encouraged flexibility. One commenter objected to the proposal, arguing that it is not needed. After reviewing public comments, EPA is finalizing the general dispute resolution as proposed, as it provides requested clarity on EPA's role

while maintaining flexibility in the form such assistance may take. EPA is declining to define a specific mechanism or procedures for dispute resolution to accommodate differing Tribal and State program structures and account for the individual circumstances and complexities of a potential disagreement.

Flexibility is also important in light of the various scenarios in which EPA may help facilitate resolution of disputes that may arise between a Tribe or State and other Tribes or States or Federal agencies as they seek to assume and administer a section 404 permit program. For example, EPA may assist in resolving issues raised about the scope of retained waters or situations where 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.

Nothing in this new dispute resolution provision alters existing provisions addressing the Agency's review of and objection to State permits located at section 233.50. 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 Tribal 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 regulations also establish processes whereby a Tribe or State may address EPA's comments, conditions, or objections to potential Tribal or State permits. *Id.*

2. Withdrawal Provisions

a. Overview and What the Agency Is Finalizing

Section 404(i) provides for EPA to withdraw assumed programs that are not administered in accordance with the requirements of the Act. 33 U.S.C. 1344(i). The prior regulations, promulgated in 1992, set out a formal adjudicatory process for the withdrawal proceedings. The Agency proposed to simplify the process used by the Agency when withdrawing an assumed section 404 program from a previously authorized Tribe or State. 88 FR 55310. The proposed process at section 233.53 provided 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.

After reviewing public comments, the Agency is finalizing the approach as proposed, with one revision to require EPA to decide whether to proceed with withdrawal within 90 days after the conclusion of the hearing process. This final rule approach replaces the adjudicatory hearing process with a public notice and hearing process modeled on the procedures for withdrawal of the Underground Injection Control program as discussed below.

b. Summary of Final Rule Rationale and Public Comments

The previous section 404 Tribal and State program regulations, promulgated in 1992, set out a formal adjudicatory process for the withdrawal proceedings. This formal adjudication process is not required by the statute and its length and complexity impose an unnecessary resource burden and other challenges for the Agency, Tribes and States, and stakeholders. The Agency proposed a streamlined process that is both easier to understand and to administer and encourages participation by interested parties. The process is modeled on the withdrawal procedures for Tribal and State Underground Injection Control programs at 40 CFR 145.34 and revised to accommodate the requirements of section 404. EPA views the Underground Injection Control program's approach as more transparent and efficient than the prior section 404 program withdrawal procedures.

EPA requested comments on all aspects of the revision. Multiple commenters supported the proposed approach as providing a more meaningful backstop to ensure that Tribal or State programs address water pollution consistent with the requirements of section 404. Some commenters opposed the proposed approach, stating that the text of the statute indicates that Congress supports State assumption and intended withdrawal to be an extended adjudicatory process providing maximum due process to the State. These commenters expressed concern that an ''easy out'' would undermine the stability of program approval and could lead to economic waste of the substantial investments States make in their programs. These commenters also noted that a streamlined withdrawal process could disincentivize Tribal and State assumption generally.

EPA has decided to finalize the proposed approach. As commenters in support of the proposed revision noted, the final rule allows EPA to respond quickly where there are concerns regarding Tribal or State compliance with the assumed program. By eliminating the adjudicatory requirements, it allows both EPA and the Tribe or State to focus on the

substantive requirements of the program. In response to commenters' concerns, the substantive requirements of the final rule are comparable to the prior one but will enhance efficiency of the withdrawal process and better align with EPA's section 404 program approval procedures. Nothing in the CWA requires the Agency to maintain inefficient and burdensome procedures for their own sake. Enhancing administrability does not mean that EPA intends to take program withdrawal lightly, and EPA's experience with both CWA and Underground Injection Control 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.

Several commenters asked that EPA add a deadline by which time EPA must decide whether to proceed with withdrawal after the conclusion of the hearing process. These commenters suggested a deadline of no more than 60 days. EPA considered this suggestion and concluded that a deadline for decision would add predictability to the withdrawal process and avoid leaving the relevant Tribe or State and stakeholders in a lengthy state of uncertainty as to whether the Tribe or State will continue to administer the program. However, EPA decided to provide the Agency 90 days to make this decision, rather than 60 days, to allow sufficient time for consideration of concerns raised and the Tribe or State's capacity to address these concerns. The final rule therefore provides for a 90-day mandatory time frame for EPA to make its decision after the conclusion of the hearing process.

3. Program Reporting

a. Overview and What the Agency Is Finalizing

EPA's prior section 404 Tribal and State program regulations require the Tribe or State to provide a self-assessment in an annual report, which must include, among other information, ''an assessment of the cumulative impacts of the State's permit program on the integrity of the State regulated waters'' and numbers of permits issued and enforcement actions taken. 40 CFR 233.52(b) (2023). The annual report is meant to provide a robust overview of the Tribe's or State's program and implementation and support continuous improvement such that EPA can ensure the program remains consistent with the Act and these regulations. However, some of the self-assessment requirements for the annual report in the prior regulation lacked the necessary details for a Tribe or State to know EPA's expectations for the annual report.

EPA proposed several revisions at section 233.52(b) to clarify information not previously explicitly required, including specific metrics about compensatory mitigation, program resources and staffing, and a discussion as to how issues identified in the previous annual report or other problems the program has encountered have been resolved. 88 FR 55311. Additionally, the Agency proposed to add the word ''final'' between ''Regional Administrator's'' and ''comments'' in 40 CFR 233.52(e) to acknowledge that some discussion may occur between the Tribe or State and EPA as the annual report is being finalized. Finally, the Agency also proposed to require that the Director make the final annual report publicly available. After reviewing public comments, the Agency is finalizing these revisions as proposed, with one non-substantive revision to replace ''as well as'' with ''and'' in the series of items the State must evaluate in the draft annual report located at section 233.52(b).

b. Summary of Final Rule Rationale and Public Comment

EPA requested comment on all aspects of the proposed revision to the annual report requirements. EPA received few comments on this provision. The majority of comments were general in nature, expressing support for the added clarity in the proposal. One commenter opposed the additional requirements, stating that they would increase the burden on States to assume and implement the program. EPA considered these comments and has decided to finalize the regulatory text as proposed, because it adds clarity to what Tribes and States are expected to provide, giving them clear expectations for the annual report and reducing the need for follow-up questions from the Agency as it conducts its program oversight. EPA therefore thinks the revisions will assist Tribes and States, rather than burdening them.

A few commenters requested that EPA require additional reporting about the costs of administering the program and litigation involving the Tribal or State program. The Agency finds that the proposed requirement to document ''resources and staffing'' will be sufficient to provide information EPA needs about program budgets. In addition, EPA decided that it does not need a litigation update in order to fulfill its oversight obligations; information already required about unauthorized activities and enforcement actions taken should, as a general matter, provide the litigation-related information most relevant to EPA's oversight. To the extent EPA decides that it needs litigation information on a case-by-case basis, that information would be easy to research or request of the Tribe or State. Thus, the Agency finds it unnecessary to modify the proposed text in light of these comments.

The final rule clarifies and updates the requirements for a Tribe's or State's annual reporting by clarifying that it must identify implementation challenges along with solutions to address the challenges, that evaluations of the program components must include any quantitative reporting, and that it must provide specific metrics related to compensatory mitigation, resources, and staffing. EPA expects these revisions will support a more streamlined process for the State's annual report submittal, EPA's comments and approval, and the State's final report publication. The clarifications will also ensure transparency as to the state of Tribal and State programs and facilitate annual discussions between the Tribe or State and EPA about program implementation and challenges. For EPA, the revisions will improve the Agency's ability to ensure that program operation is consistent with the Act.

Existing programs may make minor revisions to address this change. For example, the 2011 Memorandum of Agreement between Michigan and EPA lists requirements of the annual reports, but the list does not specifically include compensatory mitigation or resources and staffing, which are included in the final regulatory text. The 2011 Michigan EPA Memorandum of Agreement list does not preclude the State reporting other information; however, the Memorandum of Agreement list could be updated to reference section 233.52(b) or match the updated regulatory text. The New Jersey and EPA Memorandum of Agreement includes annual reporting requirements, but references section 233.52(b) rather than listing the requirements, so it may not require distinct updates.

F. Eligible Indian Tribes

a. Overview and What the Agency Is Finalizing

Prior to issuing a permit, a Tribe or State with an approved section 404 program must provide notice to another Tribe or State if a proposed discharge may affect the biological, chemical, or physical integrity of the other Tribal or State waters and provide an opportunity for the Tribe or State to submit written comments and suggest permit conditions. 40 CFR 233.31; *see* 33 U.S.C. 1344(h)(1)(C), (E). If recommendations from the State whose waters may be affected are not accepted by the Tribe or State issuing the permit, the Tribe or State issuing the section 404 permit must notify the affected State and EPA of its decision not to accept the recommendations and reasons for doing so. 40 CFR 233.31(a); *see* 33 U.S.C. 1341(1)(E). EPA's regulation at 40 CFR 233.2 defines the term ''State'' to include an Indian Tribe which meets the eligibility requirements for a Tribe to assume the section 404 program. Accordingly, these provisions could be read to limit the coordination requirement in section 233.31 to only those affected Tribes that meet the requirements for section 404 program assumption. To date, no Tribe has applied for eligibility to assume the section 404 program, and many Tribes lack the resources to assume the program. However, nearly half of federally recognized Tribes have been approved for TAS for other CWA provisions (*i.e.,* TAS for CWA section 106, section 319, and sections 303(c) and 401) and may have relevant water quality information that could inform the permitting decisions of Tribes or States administering a section 404 program.

In the proposal, the Agency considered three ways to further facilitate Tribal engagement in permitting decisions that may affect Tribal resources. First, the Agency proposed to expand the aforementioned coordination requirement to include affected Tribes that have been approved by EPA for TAS for any CWA provision, as opposed to only Tribes with TAS to assume the section 404 program. Second, the Agency proposed a new TAS opportunity solely for the purpose of receiving a heightened comment opportunity on section 404 permits proposed by other Tribes or States that may affect the biological, chemical, or physical integrity of their reservation waters. Finally, the Agency proposed 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. After reviewing public comments, the Agency is finalizing all three changes as proposed. These revisions are consistent with EPA's authority under CWA sections 404 and 518, as well as the Federal trust relationship and responsibilities to federally recognized Tribes, the policies underlying CWA section 518, and EPA's policies to facilitate Tribal opportunities to actively engage in managing their waters and resources.

In addition to the approaches summarized above to facilitate Tribal engagement in permitting decisions, EPA is also clarifying 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.

b. Summary of Final Rule Rationale and Public Comment

i. Enabling Tribes With TAS for Any CWA Provision To Comment as an Affected State

As discussed above, 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 Tribe or 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—no Tribes are presently eligible to be considered an affected State, as no Tribes have yet obtained TAS status for purposes of assuming the section 404 program.

Section 518 of the CWA authorizes 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 CWA 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. 33 U.S.C. 1377(e). Of the 574 federally recognized Tribes, over 285 have been granted TAS status for one or more CWA provisions.[44]

The Agency proposed to revise the coordination requirements at section 233.31 to expressly provide that Tribes that have already been approved for TAS by EPA to administer any other CWA programs, such as a water quality standards (WQS) program under CWA section 303(c), 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.

Most commenters supported effective coordination with Tribes on permits that may affect Tribal aquatic resources. EPA agrees with these commenters and finds this provision at 233.31 will enable more Tribes whose waters may be affected by a dredge or fill project to comment on permits to be issued by a Tribe or State in the same manner as other affected States. A Tribe or State with an approved section 404 program will also have 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 as provided in section 233.31(a) of the regulations. As finalized, Tribes and States with an approved section 404 program must consider comments from Tribes with TAS for any CWA provision whose reservation waters may be affected by a proposed discharge. If the recommendations are not accepted by the approved Tribe or State program, the approved Tribe or State program would have to notify the affected Tribe and EPA of its decision not to accept the recommendations and its reasons for not doing so. EPA would then have time to comment upon, object to, or make recommendations regarding the Tribal concerns set forth in the original comment. This is the same opportunity and process provided to affected States.

[44] EPA maintains a website that lists all Tribes approved for TAS, which is updated bi-annually. 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 106 grants can be found at *https://www.epa.gov/water-pollution-control-section-106-grants/tribal-grants-under-section-106-clean-water-act*; Tribes with TAS for section 319 grants can be found at *https://www.epa.gov/nps/current-tribal-ss319-grant-information.*

Some commenters asked EPA to codify specific timelines and notification requirements to ensure such coordination occurs. EPA is declining to mandate a specific process. Rather, EPA has determined that individual Tribes and States should have the flexibility to establish the procedures and coordination approaches that work best for them. EPA encourages States to work together with Tribes whose reservation waters may be affected by a proposed discharge prior to proposal of the relevant permit. Such efforts will improve permitting, protect interests, and build relationships. For example, existing State section 404 programs are already coordinating with affected Tribes per their Memorandum of Agreement with EPA.

Some commenters expressed concern that this provision creates a new authority allowing for Tribes to engage in State permitting in a way that could result in confusion, while another commenter suggested that such opportunity be limited to Tribes with TAS for water quality standards and section 401 certification. EPA disagrees with these commenters. First, EPA disagrees that this provision will result in confusion. Under CWA sections 404 and 518 and EPA's existing regulations, Tribes were already afforded the enhanced opportunity to provide comment as an affected State through the TAS process for section 404. Second, EPA views any Tribe that has TAS status for any CWA purpose as both capable of participating in matters that may affect the chemical, physical, or biological integrity of reservation waters through the enhanced opportunity for comment, and as an appropriate entity to be afforded that opportunity. By receiving TAS for another provision of the CWA, a Tribe has already demonstrated they have met the TAS requirements as articulated in section 518 of the Act and that they are engaged in water quality protection activities under the Act. Accordingly, EPA concludes that Tribes that have already been approved for TAS by EPA to administer other CWA program(s) are capable of commenting on draft permits in the same manner as affected States and are relevant entities to provide input regarding the potential effects on their reservation waters of Tribal and State 404 permitting.

ii. Providing TAS Opportunity Specifically for the Ability To Comment as an Affected State

EPA is finalizing as proposed a process whereby Tribes may 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 benefit from the same notification requirements that apply to any other commenting affected ''State.'' This rule enables Tribes that have neither assumed the section 404 program nor have obtained TAS for other CWA programs to obtain TAS solely to provide input on section 404 permits that may affect 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). Nothing in the language of section 404 precludes creating this new TAS opportunity. This provision 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 40 CFR 233.31 do not require any exercise of regulatory authority by the affected Tribe. 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 an affected Tribe. These Tribes would not need to demonstrate capability to administer an assumed section 404 program.

Many commenters supported this provision to fill gaps and facilitate Tribal engagement in permitting that may affect their waters within Indian Country. EPA agrees with these commenters and is finalizing the process as proposed to eliminate unnecessary barriers to Tribal engagement in the 404 process as contemplated by CWA section 518. Some commenters raised a concern that EPA lacks authority to create new Tribal authorities. However, EPA is not creating a new Tribal authority. The CWA and section 404 program regulations already provide Tribes the ability to obtain TAS for the section 404 program and to comment as an affected State. 33 U.S.C. 1377(e). As discussed above, Tribes do not need to have the authorities and resources to fully administer a section 404 program, including issuing permits and enforcing violations, in order to comment as an affected State. Such a requirement would be unnecessarily burdensome with no benefit to Tribes or the environment. Thus, EPA is finalizing this provision to obtain TAS for the sole purpose of commenting on Tribe or State issued section 404 permits.

One commenter suggested that specifically enabling Tribes to request to review all permits within a specified geographic area, including areas outside of reservation land, as the most efficient way of ensuring Tribal engagement in the permit issuance process for areas with cultural and ecological significance. Tribes are free to submit such requests to the permitting authority, and EPA encourages Tribes and States to provide for notifications of permitting in such areas through mechanisms established in regulation, a Memorandum of Understanding, or through the State Historic Preservation Officer and Tribal Historic Preservation Office. EPA is not adding any regulatory revisions on this point as such requests are most efficiently addressed on a case-by-case basis.

Some commenters raised concerns that this provision would allow any Tribe to comment on any permit issued by any State. As stated above, any member of the public, including Tribes, may already comment on any draft permit. This provision simply provides an additional mechanism for eligible Tribes to engage in the same heightened comment process on draft permits that is already available to States and to

Tribes that obtain TAS for the purpose of assuming the section 404 program. Tribes obtaining TAS for this limited purpose would be able to comment in the same manner as affected States on only those permits that may affect the biological, chemical, or physical integrity of the Tribe's waters. Providing a mechanism to obtain TAS for this limited commenting opportunity is consistent with CWA sections 404 and 518, as well as the Federal trust responsibility to federally recognized Tribes and EPA's various Tribal policies seeking to facilitate Tribal opportunities to actively engage in managing their waters and resources and to eliminate unnecessary barriers to such Tribal involvement.

Lastly, some commenters argued that this provision provides Tribes with an opportunity to comment on permits that does not exist in the Federal section 404 program. As discussed above, 40 CFR 233.31(a) already afforded specific consideration of comments and suggested permit conditions on draft permits by an affected State, which includes Tribes that have obtained TAS for purposes of assuming the section 404 program. This final rule merely provides that Tribes may 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. Moreover, under the Corps' administration as well as Tribal or State program administration, any entity may comment on any draft permit.

Some commenters asked EPA to conduct outreach to inform Tribes about the opportunity to apply for TAS for the sole purpose of commenting on 404 permits. EPA agrees that such outreach would be useful and intends to work with Tribes and States to develop implementation tools and conduct outreach informing Tribes, States, and others about this rule, including the opportunity to apply for TAS to comment on 404 permits.

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

EPA is also revising section 233.51 to codify an opportunity for Tribes to request EPA review of permits potentially affecting Tribal rights or interests. These may include rights or interests both inside 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. The revisions to section 233.51 enable Tribes to request EPA's review of permits that may affect both rights reserved through treaties, statutes, or executive orders, as well as Tribal interests in resources that may not be reflected in Federal law, such as those with historical or cultural significance to Tribes. Section 233.51 applies whenever a Tribe asserts that issuance of a particular permit potentially affects its rights or resources; however, EPA's review of a permit pursuant to section 233.51 would not constitute a recognition by EPA that any particular Tribe holds reserved rights.[45]

EPA anticipates that this provision will help address Tribal concerns about the loss of Federal consultation opportunities when permitting authority transfers from the Corps to a Tribe or State. Additionally, this provision will allow coordination on potential impacts to Tribal rights and resources not covered by any other commenting option discussed above in sections IV.F.b.i and IV.F.b.ii of this preamble. Given the TAS provisions discussed above, EPA anticipates that Tribes will use this opportunity in limited circumstances.

Under this provision, 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 issuing Tribe or State may not issue the permit unless it has taken steps required by EPA to eliminate the objection. Once EPA removes its objection, EPA may send a copy of the letter removing EPA's objections to a permit at a Tribe's request or pursuant to a prior agreement with the Tribe (or other stakeholders).

Several commenters supported the proposed provision, noting it helps to fill a gap and provide Tribes a mechanism to help ensure an opportunity to raise concerns regarding potential impacts to Tribal aquatic and cultural resources outside of their reservations. Some commenters expressed concern that there is no reliable instrument for coordinating 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. These commenters 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. Additionally, some commenters raised concerns over resource limitations and that following assumption a Tribe would need to take on the burden of reviewing all permit applications statewide for those that may affect Tribal resources. EPA encourages Tribes to work with Tribes and States with approved section 404 programs to develop mechanisms (*e.g.,* Memoranda of Understanding) for notifying Tribes at appropriate times, and EPA may participate in such discussions to aid in coordination efforts, if appropriate.

This rule does not affect other mechanisms that require Tribal and State permitting authorities to protect Tribal interests. 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.

A few commenters raised a concern that this provision creates an opportunity to comment on permits beyond Indian Country that does not currently exist when the Corps is the permitting authority. As noted above, any member of the public is currently able to comment on any draft permit, and EPA has the authority to review and comment on any draft permit. *See* 33 U.S.C. 1344(h)(1)(C), (j). In addition, the scope of the Corps' Federal section 404 program is outside the scope of this rulemaking. Regardless of the scope of the Corps' engagement with Tribal stakeholders, facilitating Tribal engagement in permitting decisions that affect Tribal resources is a priority to EPA. In its oversight role, EPA is able to review and object to permits; this

[45] On May 2, 2024, EPA published a final rule entitled ''Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights.'' 89 FR 35717 (May 2, 2024). That rule amends EPA's water quality standards regulation, 40 CFR part 131 *et seq.,* to, in pertinent part, define ''Tribal reserved rights'' for WQS purposes as ''any rights to CWA-protected aquatic and/or aquatic-dependent resources reserved by right holders, either expressly or implicitly, through Federal treaties, statutes, or Executive orders.'' 89 FR 35717. The Tribal Reserved Rights rulemaking does not affect section 233.51 of this section 404 rulemaking, nor does anything in this section 404 rulemaking depend on the Tribal Reserved Rights rulemaking.

provision provides an additional way to inform the Agency as it determines whether to review and object to a potential permit.

G. Impacts to Existing Programs

This preamble section identifies parts of this 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 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 part 233.16.

Final rule provisions that could affect existing programs include a provision ensuring opportunity for judicial review of agency decisions (section IV.C.2 of this preamble), updates to the compensatory mitigation requirements for Tribal and State section 404 programs (section IV.B.4 of this preamble), and a revised approach to addressing the five-year limit on permits (section IV.C.1 of this preamble). In addition, clarification as to how Tribes and States can demonstrate that their programs are no less stringent than the Federal section 404 program (section IV.A.3 of this preamble), modification of the conflict of interest prohibition (section IV.A.1 of this preamble), and updated annual reporting requirements (section IV.E.3 of this preamble) may affect existing State programs.

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 regulatory changes as undermining serious reliance interests that outweigh the benefits of these changes. EPA's regulations contain detailed procedures for revising an approved section 404 program. 40 CFR part 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 and finalizing 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.

H. Technical Revisions

In addition to revising 40 CFR part 233, EPA is also finalizing technical edits to clarify that the 40 CFR part 124 regulations do not apply to Tribal or State section 404 programs. Specifically, EPA is making targeted revisions and deletions to specific provisions of the regulations at 40 CFR parts 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. 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 40 CFR part 124 regulations 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 did not provide conforming edits to 40 CFR part 124 to remove references to 40 CFR part 233. This rule removes the outdated references to 40 CFR part 233 in part 124. The removal of these references has no substantive impact on the section 404 assumption process or on Tribal or State section 404 programs. They also do not implicate or affect aspects of the part 124 regulations addressing other EPA permit programs, including the Resource Conservation and Recovery Act (RCRA), Underground Injection Control, and NPDES programs.

EPA is also revising the definitions located at 40 CFR part 233.2 for consistency and clarity. EPA is defining ''Indian lands'' consistent with the Agency's long-standing interpretation of ''Indian lands'' as synonymous with ''Indian country'' as defined at 18 U.S.C. 1151. *See e.g.,* 40 CFR part 144.3 (defining ''Indian lands'' as ''Indian country'' as defined at 18 U.S.C. 1151); 40 CFR part 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 Program 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 [Underground Injection Control] 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 also revising the definition of ''State 404 program'' or ''State program'' to clarify that Tribes and interstate agencies may also have an approved program. The Agency is removing the ''(p)'' associated with the cross-reference to 40 CFR part 233.2 in the definition of ''State 404 program'' or ''State program'' as the definitions in 40 CFR part 233.2 are no longer listed by letter. Finally, EPA is clarifying the definition for ''State regulated waters'' in 40 CFR part 232 by replacing the in-text description of retained waters with a reference to the relevant regulatory text at 40 CFR part 233.11(i).

EPA is also finalizing several technical edits throughout 40 CFR part 233 to update cross-references, ensure consistent use of terminology, and facilitate efficient program operation. First, EPA is updating section 233.10(a) and section 233.16(d)(2) to include the term ''Tribal leader'' where the term ''Governor'' is referenced. Second, EPA is also removing the use of the masculine pronouns ''he'' and ''his'' throughout 40 CFR part 233 and replacing them with ''they,'' ''their,'' ''the Administrator,'' ''the Regional Administrator,'' or ''Director'' as appropriate. 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. Third, EPA is changing references to assumption ''application'' to terms including ''request to assume,'' ''program submission,'' or ''assumption request materials'' to more clearly distinguish between permit applications and requests to assume the program throughout the regulations. Fourth, EPA is revising section 233.1(b) to remove the term ''individual'' from the reference to ''State permits,'' as States may also regulate discharges using general permits. Fifth, the Agency is changing the ''Note'' in section 233.1(c) to become section 233.1(d) and adding a cross-reference to the process to identify retained waters and the retained waters description at 233.11(i). Section 233.1(d) will be renumbered as 233.1(e). Sixth, EPA is clarifying in section 233.14(b)(3) that when a State intends to administer general permits issued by the Secretary, any Tribal or State conditions and/or certifications of those general permits transfer when the Tribe or State assumes the program. Seventh, EPA is also adding an effective date for the approved non-substantial program revisions in the letter from the Regional Administrator to the Governor requirement in section 233.16(d)(2). Finally, EPA is also clarifying 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 must also submit the transition plan. The Agency is adding 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 the Corps' administration of the program. The rule requires 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. The Agency requested comment on whether to revise the regulations to clarify that electronic mail is an acceptable method of transmitting public notices or documents, in addition to mail. Instead of changing, for example, the word ''mail'' to ''send'' throughout the regulations, the Agency wishes to clarify that that both electronic mail and mail are acceptable methods of transmitting public notices or documents.

I. Incorporation by Reference

Currently, 40 CFR part 233.70 incorporates by reference Michigan's regulatory and statutory authorities applicable to the State's approved CWA section 404 program, and 40 CFR part 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 updating the incorporation by reference of the Michigan laws in the State's approved CWA section 404 program as follows:

- The Michigan Administrative Procedures Act of 1969, MCL § 24–201, *et seq.,* in effect as of February 13, 2024 (addresses the effect, processing, promulgation, publication and inspection of State agency determinations, guidelines and rules);
- The Natural Resources and Environmental Protection Act 451 of 1994:
  - Part 31 Water Resources Protection, MCL § 324.31 *et seq.,* in effect as of September 29, 2023 (provides regulatory authority and describes Michigan's water quality provisions);
  - Part 301 Inland Lakes and Streams, MCL § 324.301 *et seq.,* in effect as of October 20, 2021 (provides authority for Michigan's inland lakes and streams rules and regulations for the streams and inland lakes portion of the water resources permitting and enforcement program);
  - Part 303 Wetland Protection, MCL § 324.303 *et seq.,* in effect as of April 27, 2019 (provides authority for Michigan's wetlands rules and regulations for the wetlands portion of the water resources permitting and enforcement program);
  - Part 307 Inland Lake Levels, MCL § 324.307 *et seq.,* in effect as of October 16, 2020 (provides authority for Michigan regulating water levels in inland lakes);
  - Part 315 Dam Safety, MCL § 324.315 *et seq.,* in effect as of September 10, 2004 (provides authority for Michigan regulating dam safety);
  - Part 323 Great Lakes Shorelands Protection and Management, MCL § 324.323 *et seq.,* in effect as of October 20, 2021 (allows the State to issue permit and violation fees); and
  - Part 325 Great Lakes Submerged Lands, MCL § 324.325 *et seq.,* in effect as of October 20, 2021 (provides for and describes regulating activities in Great Lakes Submerged Lands).

Additionally, EPA is incorporating the most recent versions of Michigan Administrative Code, Department of Environmental Quality, as follows:

- Land and Water Management:
  - Great Lakes Shorelands, R 281.21 through R 281.26 inclusive, in effect as of 2000;
  - Wetlands Protection, R 281.921 through R 281.925 inclusive, in effect as of 2006;
  - Wetland Mitigation Banking, R 281.951 through R 281.961 inclusive, in effect as of 1997;
  - Dam Safety, R 281.1301 through R 281.1313 inclusive, in effect as of 1993; and
- Water Resources Division, Inland Lakes and Streams, R 281.811 through R 281.846 inclusive, in effect as of 2015.

This material contains Michigan's rules for shoreline protection, inland lakes and streams, wetlands protection, wetland mitigation banking, and dam safety. EPA is updating 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 also updating the description of EPA and Michigan Memorandum of Agreement in section 233.70(c)(1) to reflect the current Memorandum, signed in 2011.

EPA is updating the incorporation by reference of the New Jersey state laws in the State's approved CWA section 404 program as follows: Freshwater Wetlands Protection Act, New Jersey Statutes Annotated, Title 13: Conservation and Development—Parks and Reservations; Chapter 9B: Freshwater Wetlands, N.J.S.A.13:9B–1 *et seq.,* effective as of December 23, 1993 (provides the New Jersey Department of Environmental Protection with the authority to regulate and permit activities in freshwater wetlands). Additionally, EPA is incorporating the most recent version of the Freshwater Wetlands Protection Act Rules as follows: Freshwater Wetlands Protection Act Rules, New Jersey Administrative Code, N.J.A.C. 7:7A, amended November 7, 2022 (contains regulations to implement the Freshwater Wetlands Protection Act).

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 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 *www.legislature.mi.gov/* and *www.michigan.gov/lara/bureau-list/moahr/admin-rules;* at the Water Division, Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, IL 60604 (telephone number: 800–621–8431); or at the Michigan Department of Environment, Great Lakes, and Energy office at 525 W Allegan St., Lansing, MI 48933 (telephone number: 800–662–9278). Copies of the materials incorporated by reference for New Jersey's program can also be accessed at *www.epa.gov/cwa404g/us-interactive-map-state-and-tribal-assumption-under-cwa-section-404#nj;* at the Library of the Region 2 Regional Office, Ted Weiss Federal Building, 290 Broadway, New York, NY 10007; or at the New Jersey Department of Environmental Protection at 401 East State St., Trenton, NJ 08625 (telephone number: 609–777–3373). EPA is updating the docket location and EPA Region 2 Regional Office location cited at 40 CFR part 233.71(b) to reflect their current addresses.

J. Severability

The purpose of this section is to clarify EPA's intent with respect to the severability of provisions of the final rule. Each provision and interpretation in this rule is capable of operating independently. Once effective, if any provision or interpretation in this 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 rule invalid. Likewise, if the application of any aspect of this rule to a particular circumstance were determined to be invalid, the Agency intends that the rule would remain applicable to all other circumstances. None of the provisions in this rule depend upon any other for effectiveness. Taking as examples the provisions listed at the beginning of this preamble, if the new ''conflict of interest'' revisions were deemed invalid, the absence of those revisions would in no way affect or undermine the rationale for or the operation of the provisions addressing compliance with the 404(b)(1) Guidelines or being ''no less stringent than'' Federal requirements. Similarly, taking an example from the end of this preamble, if the Agency's provisions addressing Tribal engagement were deemed invalid, the new program reporting requirements would retain their utility.

V. 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 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. EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis, the Economic Analysis for the Final Rule, is available in the docket for this action (Docket ID No. EPA–HQ–OW–2020–0276) and is briefly summarized below.

The Economic Analysis for the Final Rule is qualitative in nature due to numerous data limitations and uncertainties regarding the potential impacts resulting from the final rule. See Section VI of the Economic Analysis for the Final Rule for further discussion on data limitations and uncertainties. Section IV of the Economic Analysis for the Final Rule summarizes the incremental and cumulative costs and benefits of the final rule for different interested parties, including Tribes, States, permittees, and EPA. Benefits of the final rule are mainly positive impacts resulting from clarification of assumption procedures and substantive requirements. These benefits accrue to Tribes, States, permittee, Federal agencies, and the public. Tribes, States, permittees, and Federal agencies may experience both incremental costs and cost savings as a result of the final rule.

B. Paperwork Reduction Act (PRA)

The information collection activities in this rulemaking have been submitted for approval to the Office of Management and Budget (OMB) under the PRA. The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR number 0220.17. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized below. The information collection requirements are not enforceable until OMB approves them.

The type and frequency of information requested varies by respondent group and activity. For this information collection, EPA classified respondents into one of four categories: (1) States or Tribes seeking program assumption; (2) States or Tribes with an approved program and administering the program; (3) Permittees; and (4) Tribes seeking TAS for the sole purpose of commenting as an affected State. The ICR does not require the collection of any information of a confidential nature or status.

Respondents/affected entities: States or Tribes seeking program assumption; States or Tribes with an approved program and administering the program; Permittees; and Tribes seeking TAS for the sole purpose of commenting as an affected State.

Respondents' obligation to respond: Voluntary (States or Tribes seeking program assumption); Required for program operation and maintenance (States or Tribes with an approved program and administering the program); Required to submit an application to obtain a section 404 permit (Permittee); Voluntary (Tribes seeking TAS for the sole purpose of commenting as an affected State).

Estimated number of respondents: 1 State over 3 years (seeking program assumption); 3 States/year (with an approved program and administering the program, except for program modification); 2 States over 3 years (modifications to an approved program); 1,693 Permittees/year for 3 approved programs; 1 Tribe/year over 3 years (seeking TAS for the sole purpose of commenting as an affected State).

Frequency of response: Once (States or Tribes seeking program assumption); Variable (for States or Tribes with an approved program and administering the program); for each permit application (for Permittees); once (for Tribes seeking TAS for the sole purpose of commenting as an affected State).

Total estimated burden to respondents: 130,725 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost to respondents: $6,972,139 (per year), includes $930,831 annualized capital and start-up costs and $6,041,308 program 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 EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the

approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this final rule 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. Section 404(g) of the CWA allows for Tribes and States to assume the section 404 permitting program, and the final rule clarifies assumption requirements for Tribes and States to ensure compliance with CWA 404(b)(1) Guidelines. Without the final rule, entities (both large and small) would still have to comply with the CWA 404(b)(1) Guidelines, regardless of whether the Tribe or State assumes the section 404 program or not and regardless of the changes in the final rule.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate of $100 million (annually adjusted for inflation) or more (in 1995 dollars) 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 Final 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 (64 FR 43255, August 10, 1999), EPA has determined that this rulemaking does not have federalism implications. EPA believes, however, this rulemaking may be of significant interest to State and local governments. Consistent with EPA's policy to promote communications between EPA and State 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.

EPA is finalizing updates to clarify and facilitate the process of State assumption of the section 404 program. This rule does not impose any new costs or other requirements on States, preempt State law, or limit States' policy discretion. 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.

The Agency invited written input from State agencies from November 12, 2018, through February 11, 2019,[46] 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. A summary of stakeholder engagement and written input from States on this action is available in the docket for this final rule. After publishing the proposed rule in the **Federal Register**, stakeholders were encouraged to submit comment letters during a 60-day public comment period and EPA held a public hearing on September 6, 2023, for all stakeholders to provide public comment on the proposed rule. Additionally, EPA hosted one input session specifically for State government representatives on August 24, 2023. Summaries of the public hearing session and of the input received during the State input session can be found in the docket for this rulemaking. Furthermore, EPA reviewed and responded to the public comment letters from State and local governments in a Response to Comments document that can also be found in the docket for this rulemaking. All comment letters and recommendations received by EPA during the public comment period from State and local governments are included in the docket for this action (Docket ID No. EPA–HQ–OW–2020–0276).

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

This action may have implications for Tribal governments. 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 ''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. EPA has developed a document which further describes EPA's efforts to engage with Tribal representatives and is available in the docket for this rulemaking.

As required by section 7(a), EPA's Tribal Consultation Official has certified that the requirements of the executive order have been met in a meaningful and timely manner. A copy of this certification is included in the docket for this action.

The Agency initiated a Tribal consultation and coordination process before proposing a rule by sending a ''Notification of Consultation and Coordination'' letter, dated October 19, 2018, to all Tribes federally recognized at that time. The letter invited Tribal leaders and designated representatives to participate in the Tribal consultation and coordination process for this rulemaking. The Agency engaged with Tribes over a 60-day consultation period that concluded on December 21, 2018, including two Tribes-only informational webinars on November 20 and 29, 2018. During this 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 sought input on aspects of the section 404 Tribal and State program regulations and assumption process. The Agency initiated a second Tribal consultation and coordination period on July 18, 2023. The Agency engaged with Tribes over a 60-day period that concluded on September 17, 2023, including two Tribal input sessions on August 15 and 30, 2023. During this consultation period, EPA participated in various meetings with Tribal associations, continued outreach and engagement with Tribes, and sought other opportunities to provide information and hear feedback from Tribes at national and regional Tribal meetings during and after the end of the consultation period. The Agency notes that two Tribes requested government-to-government consultation. However, no responses were received to schedule

[46] The Agency invited written input from State agencies from November 12, 2018, through January 11, 2019. Due to the lapse in Federal Government funding, EPA accepted input from states until February 2019.

the consultations.[47] All Tribal and Tribal organization letters and a summary of the Tribal consultation and coordination effort may be found in the docket for this action.

After publishing the proposed rule in the **Federal Register**, stakeholders were encouraged to submit comment letters during a 60-day public comment period and EPA held a public hearing on September 6, 2023, for all stakeholders to provide public comment on the proposed rule. Summaries of the public hearing and of the input received during the Tribal input sessions can be found in the docket for this rulemaking. Furthermore, EPA reviewed and responded to the public comment letters from Tribal representatives in a Response to Comment document that can also be found in the docket for this rulemaking.

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 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 and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

EPA believes that the human health and environmental conditions that exist prior to this action do not result in disproportionate and adverse effects on communities with environmental justice concerns. The final rule creates more transparency and clarity for Tribes and States with existing section 404 programs and for those seeking to assume. Environmental justice considerations are potentially addressed through the following topics in the final rule: (1) public notice and hearings, (2) no less stringent than, (3) long-term permitting, (4) judicial review, (5) affected States, and (6) opportunities for Tribes.

First, within the final rule and assumption process, there are multiple opportunities for public engagement through public notice and hearings, including for communities with environmental justice concerns. Second, the 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. Third, the final rule provides an improved ability for communities with environmental justice concerns to participate in the section 404 permitting process for long-term projects. Fourth, the requirements for State-assumed section 404 programs allow for judicial review in State courts, which is an opportunity for affected stakeholders to address concerns through judicial review.

Lastly, EPA additionally identified and addressed potential environmental justice concerns by expanding Tribes' ability to utilize TAS for purposes of commenting as ''affected States'' and developing an avenue for EPA review of permits that may impact Tribal rights and resources. The final rule will enable Tribes to have a more significant role in the permit decision-making process than under prior practice. *See* Section V of the Economic Analysis for the Final Rule for additional information on the final regulations.

The information supporting this Executive Order review is contained in Section V of the Economic Analysis for the Final Rule, which is available in the docket for this action.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and EPA will submit a rule report to each House of Congress and to the Comptroller General of the United States. This action does not meet the criteria as defined by 5 U.S.C. 804(2).

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 this preamble, EPA amends 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.*

■ 2. Section 123.27 is amended by:
■ a. Revising paragraphs (a) introductory text and (a)(3) introductory text;
■ b. Removing the note immediately following 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:

* * * * *

[47] During the consultation period prior to the development of the final rule, two requests for government-to-government consultation were received. On July 25, 2023, EPA sent both the Mille Lacs Band of Ojibwe and the Grand Portage Band of Lake Superior Chippewa an invitation to schedule consultation. No responses were received to the invitation to schedule consultation.

(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.

Note 3 to paragraph (b)(2): For example, this requirement is not met if State law includes mental state as an element of proof for civil violations.

* * * * *

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 this part must be adopted by States in order to gain EPA approval to operate RCRA, UIC, and NPDES permit programs. These requirements are listed in 40 CFR 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 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA)). This part 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 40 CFR 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'', and ''SDWA''; and

■ iii. Removing the definition for ''Section 404 program or State 404 program or 404''*;* and

■ 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 40 CFR 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 40 CFR 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'' (40 CFR 270.60), RCRA emergency permit (40 CFR 270.61), RCRA standardized permit (40 CFR 270.67), UIC area permit (40 CFR 144.33), UIC emergency permit (§ 144.34), and NPDES ''general permit'' (40 CFR 122.28). Permit does not include RCRA interim status (40 CFR 270.70), UIC authorization by rule (40 CFR 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 40 CFR 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 40 CFR 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) heading, and paragraphs (a)(1) and (3) to read as follows:

§ 124.3 Application for a permit.

(a) *Applicable to State programs, see 40 CFR 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 40 CFR 270.1 (RCRA), 144.1 (UIC), 40 CFR 52.21 (PSD), and 122.1 (NPDES). Applications are not required for RCRA permits by rule (40 CFR 270.60), underground injections authorized by rules (40 CFR 144.21 through 144.26), and NPDES general permits (40 CFR 122.28).

* * * * *

(3) Permit applications (except for PSD permits) must comply with the signature and certification requirements of 40 CFR 122.22 (NPDES), 144.32 (UIC), and 270.11 (RCRA).

* * * * *

■ 7. Amend § 124.5 by:

■ a. Revising paragraph (a), paragraph (c) heading, and paragraphs (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 40 CFR 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 40 CFR 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 40 CFR 270.41(b)(3) or 40 CFR 270.42(c) (RCRA)), he or she shall prepare a draft permit under 40 CFR 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 subpart G of this part for RCRA standardized permits.

* * * * *

(3) ''Minor modifications'' as defined in 40 CFR 122.63 (NPDES), and 144.41 (UIC), and ''Classes 1 and 2 modifications'' as defined in 40 CFR 270.42 (a) and (b) (RCRA) are not subject to the requirements of this section.

* * * * *

■ 8. Amend § 124.6 by:
■ a. Revising paragraphs (a) and (c), paragraph (d) heading and introductory text, paragraphs (d)(1) through (3);
■ b. Removing paragraph (d)(4)(iv);
■ c. Redesignating paragraph (d)(4)(v) as paragraph (d)(4)(iv); and
■ d. Revising the paragraph (e) heading.

The revisions read as follows:

§ 124.6 Draft permits.

(a) (*Applicable to State programs, see 40 CFR 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 40 CFR 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 40 CFR 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 40 CFR 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 40 CFR 122.47 (NPDES), 144.53 (UIC), or 270.33 (RCRA) (except for PSD permits);

(3) All monitoring requirements under 40 CFR 122.48 (NPDES), 144.54 (UIC), or 270.31 (RCRA) (except for PSD permits); and

* * * * *

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

* * * * *

■ 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 40 CFR 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 (40 CFR 122.28 of this subchapter), for every NPDES draft permit that incorporates a variance or requires an explanation under 40 CFR 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 paragraph (a)(1);
■ b. Revising the paragraph (b) heading;
■ c. Revising the introductory text of paragraph (c), and paragraphs (c)(1)(i), (ii), and (iv);
■ d. Removing paragraph (c)(1)(vi);
■ e. Redesignating paragraphs (c)(1)(vii) through (xi) as paragraphs (c)(1)(vi) through (x);
■ f. Revising paragraph (c)(2)(i);
■ g. Revising the paragraph (d) heading, and paragraphs (d)(1)(ii) and (iii);
■ h. Removing paragraph (d)(1)(viii);
■ i. Redesignating paragraphs (d)(1)(ix) and (x) as paragraphs (d)(1)(viii) and (ix);
■ j. Adding at the end of paragraph (d)(2)(ii) the word ''and'' after the semi-colon;
■ k. Removing the text ''; and'' at the end of paragraph (d)(2)(iii) and adding a period in its place;
■ l. Removing paragraph (d)(2)(iv); and
■ m. Revising paragraph (e).

The revisions read as follows:

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

(a) * * *

(1) The Director shall give public notice that the following actions have occurred:

(i) A permit application has been tentatively denied under § 124.6(b);

(ii) (*Applicable to State programs, see 40 CFR 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 40 CFR 123.25 (NPDES), 145.11 (UIC), and 271.14 (RCRA)).*) A hearing has been scheduled under § 124.12; or

(iv) An NPDES new source determination has been made under § 122.29 of this subchapter.

* * * * *

(b) *Timing (applicable to State programs, see 40 CFR 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 1 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 40 CFR 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 40 CFR 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 40 CFR 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 40 CFR 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 paragraph (a) heading to read as follows:

§ 124.12 Public hearings.

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

* * * * *

■ 13. Amend § 124.17 by revising the paragraph (a) heading, and paragraphs (a)(2) and (c) to read as follows:

§ 124.17 Response to comments.

(a) (*Applicable to State programs, see 40 CFR 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 40 CFR 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 40 CFR 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 40 CFR 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.*

■ 17. Amend § 233.1 by:

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

■ b. Removing the note that appears 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 (40 CFR part 230) 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 ''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 address, 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.

■ 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 40 CFR 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 and additional budget and funding mechanisms of each agency and how the agencies intend to coordinate administration, funding, 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 40 CFR 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 40 CFR 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 Regional Administrator determines that the request includes the required information, within seven days of receiving the State's request, the Regional Administrator shall transmit the request for the retained waters description to the Corps. Transmitting the request to the Corps 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)(4) of this section, if the Corps chooses to do so.

(2) When the Regional Administrator transmits a request for the retained waters description to the Corps, the Regional Administrator shall notify the public of this transmission by posting a notice on its website and circulating notice to those persons known to be interested in such matters of its transmission, inviting public input to the Corps and the State for the subsequent 60 days on the development of the description.

(3) 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 may develop a retained waters

description pursuant to the process described in paragraph (i)(4) of this section. Alternatively, the State and the Corps may mutually agree to extend the time period in which the Corps may develop the retained waters description.

(4) 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 description that the State prepares pursuant to paragraph (i)(3) 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 retained wetlands that are adjacent to the foregoing waters. A specific listing of each wetland that is retained is not required.

(5) As a general matter, descriptions of retained waters compiled in accordance with the process in paragraph (i)(4) of this section will satisfy the statutory criteria for retained waters. The Regional Administrator ultimately determines whether to approve a State program submission, however.

(6) The State assumes permitting authority over all waters of the United States not retained by the Corps as described in paragraph (i)(4) of this section. The State does not assume permitting authority over waters of the United States in Indian Country and Lands of Exclusive Federal Jurisdiction, as these are outside of the State's jurisdiction. 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 40 CFR 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 180 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).

(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 into State regulated waters and other relevant information not already in the possession of the Director.

Note 1 to paragraph (b)(2): 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 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.

(4) Procedures whereby the Secretary would notify the State of changes to its RHA section 10 list that implicate waters 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 the State would then incorporates these changes into its retained waters description, pursuant to the procedures in § 233.16(d).

■ 24. Amend § 233.15 by:

■ a. Revising the first sentence of the introductory text of paragraph (e);

■ b. Revising the second sentence of paragraph (g); and

■ c. Revising paragraph (h).

The revisions 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 notice 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 remove waters from the retained waters description (other than *de minimis* removals), as well as 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.

■ 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 subpart C 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. Indian Tribes must provide a commensurate form of citizen recourse for permit applicants and others affected by Tribe-issued permits.

■ 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 must apply for the new permit at least 180 days prior to the expiration of the current permit. The Tribe or State may grant permission to submit an application less than 180 days prior to the expiration of the current permit but no later than the permit expiration date. 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. Applicants for subsequent five-year permits must update the 404(b)(1) Guidelines analysis if there has been a change in circumstance related to the project following approval of the previous five-year permit, and clearly indicate whether the 404(b)(1) Guidelines analysis has been updated.

* * * * *

■ 30. Revise and republish § 233.31 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 in writing prior to permit issuance 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.

(b) State section 404 permits shall be coordinated with the Federal and Federal-State water related planning and review processes.

(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) and paragraph (d)(6) 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):

* * * * *

(d) * * *

(6) A paragraph describing the various evaluation factors, including the 404(b)(1) Guidelines or State-equivalent criteria, on which decisions are based. For projects with a planned schedule that extends beyond five years at the time of the initial five-year permit application, the public notice for subsequent five-year permits must indicate whether the 404(b)(1) Guidelines analysis has been updated.

* * * * *

■ 32. Amend § 233.33 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. For projects with a planned schedule that extends beyond five years at the time of the initial five-year permit application, if the Director decides not to require an update to the 404(b)(1) Guidelines for a subsequent five-year permit, the Director must provide a detailed written explanation of the decision not to require an update in its determination for the subsequent five-year permit. 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 revising 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.

■ 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.

* * * * *

■ 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 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 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, and 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 or interest within the State; the number and nature of individual and general permits issued, modified, and denied; the number of violations identified and number and nature of enforcement actions taken; the number of suspected unauthorized activities reported and nature of action taken; an estimate of the 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 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, within 90 days of the public hearing 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.

* * * * *

§ 233.60 [Amended]

■ 41. Amend § 233.60 paragraph (c) by removing 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. Revise and republish § 233.62 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.

(b) The Regional Administrator shall follow the procedures described in § 233.15 in processing a Tribe's request to assume the 404 dredge and fill permit program.

(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 or fill material 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.

■ 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 Michigan statutes and regulations cited in paragraphs (a)(1) and (2) of this section are incorporated by reference as part of the applicable section 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. To enforce any edition other than that specified in this section, 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 EPA and at the National Archives and Records Administration (NARA). Copies of this IBR material also may be obtained from EPA. Contact EPA at: EPA Docket Center Reading Room, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004 (phone: 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* or email *fr.inspection@nara.gov.* The material may be obtained from the Michigan Department of Environment, Great Lakes, and Energy office at 525 W Allegan St., Lansing, MI 48933, phone: 800–662–9278.

(1) Michigan Statutes Applicable to the State's Approved Clean Water Act Section 404 program (available at *www.legislature.mi.gov*), as follows:

(i) The Michigan Administrative Procedures Act of 1969, MCL § 24–201 *et seq.,* in effect as of February 13, 2024.

(ii) Natural Resources and Environmental Protection Act 451 of 1994:

(A) Part 31 Water Resources Protection, MCL § 324.31 *et seq.,* in effect as of September 29, 2023.

(B) Part 301 Inland Lakes and Streams, MCL § 324.301 *et seq.,* in effect as of October 20, 2021.

(C) Part 303 Wetland Protection, MCL § 324.303 *et seq.,* in effect as of April 27, 2019.

(D) Part 307 Inland Lake Levels, MCL § 324.307 *et seq.,* in effect as of October 16, 2020.

(E) Part 315 Dam Safety, MCL § 324.315 *et seq.,* in effect as of September 10, 2004.

(F) Part 323 Great Lakes Shorelands Protection and Management, MCL § 324.323 *et seq,* in effect as of October 20, 2021.

(G) Part 325 Great Lakes Submerged Lands, MCL § 324.325 *et seq.,* in effect as of October 20, 2021.

(2)(i) Michigan Regulations Applicable to the State's Approved Clean Water Act Section 404 program (*www.michigan.gov/lara/bureau-list/moahr/admin-rules*), Michigan Administrative Code, Department of Environmental Quality, as follows:

(A) Land and Water Management:

(1) Great Lakes Shorelands, R 281.21 through R 281.26 inclusive, in effect as of 2000.

(2) Wetlands Protection, R 281.921 through R 281.925 inclusive, in effect as of 2006.

(3) Wetland Mitigation Banking, R 281.951 through R 281.961 inclusive, in effect as of 1997.

(4) Dam Safety, R 281.1301 through R 281.1313 inclusive in effect as of 1993.

(B) Water Resources Division, Inland Lakes and Streams, R 281.811 through R 281.846 inclusive, in effect as of 2015.

(ii) This material contains Michigan's rules for shoreline protection, inland lakes and streams, wetlands protection, wetland mitigation banking, and dam safety.

(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.* The following memoranda, although not incorporated by reference also are part of the approved State-administered program:

(1) The Memorandum of Agreement between EPA Region V and the Michigan Department of Natural Resources, signed by 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 5 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.* The following documents, although not incorporated by reference, also are part of the approved State administered program:

(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 introductory text and paragraph (a);
■ b. Removing paragraph (b); and
■ c. Redesignating paragraphs (c) through (e) as paragraphs (b) through (d).

The revisions read as follows:

§ 233.71 New Jersey.

The applicable regulatory program for discharges of dredged or fill material into waters of the United States in New Jersey 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 New Jersey Department of Environmental Protection and Energy, approved by EPA, pursuant to section 404 of the CWA. Notice of this approval was published in the **Federal Register** on March 2, 1994; the effective date of this program is March 2, 1994. 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 New Jersey statues and regulations cited in paragraphs (a)(1) and (2) of this section are incorporated by reference as 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. To enforce any edition other than that specified in this section, 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 EPA and at the National Archives and Records Administration (NARA). Copies of this IBR material also may be obtained from EPA. Contact EPA at: EPA Docket Center Reading Room, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004 (phone: 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* or email *fr.inspection@nara.gov.* The materials may be obtained from the New Jersey Department of Environmental Protection at 401 East State St., Trenton, NJ 08625; website: *www.epa.gov/cwa404g/us-interactive-map-state-and-tribal-assumption-under-cwa-section-404#nj.*

(1)(i) New Jersey Statutes Applicable to the State's Approved Clean Water Act Section 404 program as follows:

(A) Freshwater Wetlands Protection Act, New Jersey Statutes Annotated, Title 13: Conservation and Development—Parks and Reservations; Chapter 9B: Freshwater Wetlands, N.J.S.A.13:9B–1 *et seq.,* effective as of December 23, 1993.

(B) [Reserved]

(ii) The Freshwater Wetlands Protection Act provides the New Jersey Department of Environmental Protection with the authority to regulate and permit activities in freshwater wetlands.

(2)(i) New Jersey Regulations Applicable to the State's Approved Clean Water Act Section 404 program as follows:

(A) Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A, amended November 7, 2022.

(B) [Reserved]

(ii) This chapter contains regulations to implement the Freshwater Wetlands Protection Act.

* * * * *

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