Economic Analysis for the Final Clean Water Act Section 404 Tribal and State Program Rule

December 2024

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Abbreviations

CFR	Code of Federal Regulations
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
E.O.	Executive Order
EPA	U.S. Environmental Protection Agency
FR	*Federal Register*
FTE	Full-time Equivalent
ICR	Information Collection Request
IT	Information Technology
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NMFS	National Marine Fisheries Service
OMB	Office of Management and Budget
PRA	Paperwork Reduction Act
RHA	Rivers and Harbors Act
TAS	Treatment in a similar manner as a State
USACE	U.S. Army Corps of Engineers
USFWS	U.S. Fish and Wildlife Service

I Introduction

The U.S. Environmental Protection Agency (EPA) is finalizing the first comprehensive revisions to the Clean Water Act (CWA) section 404 "Tribal and State Assumption Program" regulations since 1988.[1] Section 404 of the CWA establishes a program to regulate the discharge of dredged or fill material into navigable waters, defined as "waters of the United States" (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 program 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, ensuring compliance with the terms and conditions of permits under the Tribe's or State's authority, and taking enforcement actions with respect to unauthorized discharges. EPA maintains oversight of Tribal and State section 404 programs.

About one-third 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. Tribes and States have identified several barriers to program assumption. Although the Agency made targeted revisions to the Section 404 State Assumption Regulations, at 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.

In this rule, the Agency 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. 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 the program assumption processes and requirements transparent and straightforward. 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. Because the final rule is a procedural federal rule that clarifies the requirements for assumption and administration of the section 404 program, the entities that are incurring costs are also receiving the benefits. 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

[1] 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. Throughout this document, we will refer to the 2023 version of the Code of Federal Regulations (CFR) when discussing prior regulations.

clarified or updated at this time. This rulemaking does not reopen any other provisions in parts 232, 233, or 124.

Pursuant to Executive Order (E.O.) 12866 (Regulatory Planning and Review) and E.O. 14094 (Modernizing Regulatory Review), EPA has prepared this economic analysis to inform the public of potential effects associated with this rulemaking. This analysis is not required by the CWA. In addition, EPA is submitting a rulemaking information collection request (ICR) that assesses incremental burden of the final rule and reports total burden of assumed section 404 programs.

This economic analysis supports the final rule by qualitatively assessing potential economic effects of the changes to the prior regulations. This economic analysis is organized into six sections:

- **Section II** presents a summary of the prior requirements associated with section 404 Tribal and State Program regulations at 40 CFR part 233 (2023) (Section II.A); outlines the approaches and data sources to describe costs associated with prior regulations, data sources, as well as the limitations and uncertainties (Section II.B). This information will be instrumental for the ICR (*see* also Section VII).
- **Section III** describes the final revisions made to section 404 Tribal and State program regulations and assesses potential economic impacts of each provision.
- **Section IV** summarizes potential incremental and cumulative impacts across all provisions of the final rule.
- **Section V** discusses environmental justice considerations of the final rule.
- **Section VI** summarizes uncertainties and limitations affecting the economic analysis.
- **Section VII** describes statutory and E.O. reviews relevant to the economic analysis.

II Overview of Prior Regulations Requirements and Associated Baseline Costs

Pursuant to CWA section 404(g), Tribes and States have the option of assuming administration of the section 404 program for certain waters within Tribal or State jurisdiction, subject to EPA approval. Section II.A provides additional details about the prior section 404 Tribal and State program regulations (40 CFR part 233 (2023)).[2] Within this economic analysis, the term "baseline" refers to the practices or costs associated with these prior regulations. Section II.B summarizes approaches to assessing baseline costs under the prior regulations, including data sources, interested parties, limitations and uncertainties, and descriptions of the baseline costs. Generally, an important early step in an economic analysis is to describe the baseline, which serves as the reference point against which to analyze the benefits and costs of the rule. The Agency will use much of the cost information described here in estimating ICR burden and costs in Section VII.

II.A Prior Assumption Requirements Summary

This section is intended to provide a high-level summary of requirements associated with the prior regulations set forth in 40 CFR part 233 (2023). These requirements are presented following the subpart structure of the 40 CFR part 233 (2023) regulations: general requirements (subpart A; Section II.A.1), program approval and revisions (subpart B; Section II.A.2), permit requirements, program operation, compliance and enforcement (subpart C-E; Section II.A.3), federal oversight (subpart F; Section II.A.4), and Tribal requirements for assumption and affected States process (subpart G; Section II.A.5).

II.A.1 General Requirements

Under the prior regulations, subpart A of 40 CFR part 233 (2023) establishes that a Tribe or State interested in assuming and administering a CWA section 404 program must establish a permitting program that would regulate all non-exempt discharges to all waters of the United States within its borders except for the subset of waters of the United States over which the Corps retains administrative authority pursuant to CWA section 404(g)(1). Under 40 CFR 233.1(b) (2023), "partial [Tribe or] State programs are not approvable under section 404" (henceforth partial assumption).

Subpart A further establishes that any approved Tribal or State program shall, at all times, be conducted in accordance with the requirements of the CWA and the implementing regulations at 40 CFR 233(d) (2023). The regulations require that a Tribal or State program must be consistent with and no less stringent than the CWA and implementing regulations, allow for public participation, be consistent with the CWA, including the 404(b)(1) Guidelines, and have adequate enforcement authority (40 CFR 233.1(d) (2023)). Nothing in 40 CFR 233.1(d) (2023) precludes a Tribe or State from adopting or enforcing requirements which are more stringent or from operating a program with greater scope than required under 40 CFR part 233 (2023). Where an approved Tribal or State program has a greater scope than required by federal law, the additional coverage is not part of the federally approved program and is not subject to federal oversight or enforcement.

[2] Reference footnote 1.

The regulations at 40 CFR 233.4 (2023) establish that a Tribal or State employee should not participate in or influence a permit decision if that employee has a direct personal or pecuniary interest in the permit decision. Any public officer or employee who identifies a conflict of interest is required to declare their interest in the official records of the agency and refrain from participating in any manner related to the permit decision (40 CFR 233.4 (2023)).

II.A.2 Program Approval and Revisions

Subpart B of 40 CFR part 233 (2023) specifies the procedures EPA follows, and the criteria EPA applies, in approving and reviewing approval of Tribal or State programs under CWA section 404. Subpart B also discusses procedures for revising programs. Tribes and States follow generally similar procedures when seeking program approval and revisions. Further discussion of Tribal eligibility is provided in Section II.A.5 in this economic analysis.

II.A.2.1 Program Approval

In approving a Tribe or State's assumption request, EPA must ensure that the Tribal or State program meets all applicable statutory and regulatory requirements for assumption. To assume the program, the Tribe or State must meet the following requirements: (1) have an equivalent scope of geographic jurisdiction for assumable waters as the federal program; (2) regulate at least the same activities as the federal program; (3) provide for sufficient public participation; (4) ensure compliance with the CWA section 404(b)(1) Guidelines, which provide environmental criteria for permit evaluation and decision; and (5) have adequate enforcement authority. Section 233.10 (2023) requires a Tribe or State seeking to administer a section 404 program to submit to the EPA Regional Administrator at least three copies of the following:

- A letter from the Governor of the State requesting program approval.
- A complete program description, as set forth in § 233.11 (2023).
- An Attorney General's statement, as set forth in § 233.12 (2023).
- A Memorandum of Agreement (MOA) with the EPA Regional Administrator, as set forth in § 233.13 (2023).
- A MOA with the Secretary, as set forth in § 233.14 (2023).
- Copies of all applicable State statutes and regulations, including those governing applicable State administrative procedures.

To assume the section 404 program, Tribes and States are required to submit a complete program description. The program description contains specific information about their program which allows for EPA to determine whether the Tribal or State program meets the regulatory requirements set forth in 40 CFR part 233 (2023). The required elements of a program description include (40 CFR 233.11 (2023)):

- Scope and structure of the State/Tribe's program, including extent of State/Tribal jurisdiction, activities regulated, anticipated coordination, permit review criteria, and the scope of permit exemptions (if any);
- Procedure for permitting, administrative; and judicial review;
- Structure and organization of the State/Tribal agencies responsible for program administration, including a description of interagency coordination;
- Available funding and staffing;
- Anticipated workload;
- Copies of permit application forms, permit forms, and reporting forms;
- The Tribe or State's compliance evaluation and enforcement programs, including coordination of enforcement with the Corps and EPA;
- Clarification of waters to be under State/Tribal jurisdiction and waters to remain under the jurisdiction of the Corps, including a comparison of State/Tribal and federal definition of wetlands; and
- A description of specific Best Management Practices proposed to satisfy exemption provisions for farm, forest, and temporary mining roads.

Along with the program submission, Tribes or States submit a statement from the Attorney General verifying that the laws and regulations of the Tribe or State provide adequate authority to carry out the program and meet the requirements of federal regulations (40 CFR 233.12 (2023)). Additionally, the MOA between the Tribe or State and EPA articulates the Tribal or State and federal responsibilities for program administration, oversight, and enforcement (40 CFR 233.13 (2023)). The Tribe or State also enters into a MOA with the Corps which describes those waters to be retained by the Corps, and the procedures for transferring general permits and pending permit applications from the Corps to the Tribe or State (40 CFR 233.14 (2023)). When more than one agency is responsible for administering the program, each agency must be party to the required MOAs with EPA and the Corps.

The regulations at 40 CFR 233.15 (2023) outline the procedures for approving a program submission. After a Tribe or State submits their program description and required documents to EPA, EPA has 30 days to determine and notify the State if the submission is complete. If the program submission is incomplete, the 120-day statutory review period does not begin until EPA receives all the necessary information from the Tribe or State. EPA or the requesting Tribe or State may request to extend the 120-day statutory review period. EPA reviews the complete program submission, publishes a notice in the *Federal Register* (FR) and provides the public an opportunity to comment on all portions of the program submission. A public hearing is also held within the Tribe or State. EPA must provide copies of the program submission package to the Corps, U.S. Fish and Wildlife Service (USFWS), and National Marine Fisheries Service (NMFS); these federal agencies have the opportunity to provide comments to EPA on the program submission (within 90 days). Unless an extension is agreed to by EPA and the State, EPA must approve or disapprove the program within 120 days of receipt of the completed program

submission. If EPA approves a Tribal or State section 404 program submission, the Tribe or State assumes program administration and will begin administering the program on the effective date as noticed in the *Federal Register*. On the effective date, the Corps suspends processing of section 404 permits for discharges of dredged or fill material into "waters of the United States" within the relevant jurisdiction, except for those waters for which the Corps retain permitting authority.[3][4]

II.A.2.2 Program Revisions

Under prior regulations, if Tribes or States revise their programs following assumption, EPA is responsible for reviewing and approving the changes. EPA activities associated with the review of a Tribal or State revision, as specified in the regulation at 40 CFR 233.16 (2023), include the following actions:

1) The EPA Regional Administrator evaluates modified program descriptions and other documents submitted by the Tribe or State to determine if the proposed program revision(s) comply(ies) with the CWA and the implementing regulations.

2) If the changes are not substantial and the EPA Regional Administrator determines that the revisions are consistent with the Act and the implementing regulations, a notice of approval may be given by letter from the EPA Regional Administrator to the State governor or the designee.

3) If the EPA Regional Administrator determines that the proposed revisions are substantial,[5] the EPA Regional Administrator publishes and circulates notice of the proposed revision(s) to interested parties, provides opportunity for public hearing, and seeks comment from the Corps, USFWS, and NMFS.

4) For substantial program changes to become effective, the EPA Regional Administrator must provide approval, and notice of the approval must be published in the *Federal Register*.

EPA can also actively request information from Tribes and States if it suspects that circumstances have changed for their program, and the Tribes and States are required to provide the requested documents. EPA can request a supplemental Attorney General's statement, program description, or other information as necessary to evaluate the program's compliance with CWA requirements.

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[3] CWA section 404(g)(1) describes Corps-retained waters as "those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce, shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto."

[4] It should be noted that in assumed waters where both a CWA section 404 permit and a Rivers and Harbors Act (RHA) section 10 permit are required, the Tribe or State is the CWA section 404 permitting authority, and the Corps is the RHA section 10 permitting authority.

[5] See 40 CFR 233.16(d)(3) (2023) for list of substantial revisions under the prior regulations.

II.A.3 Permit Requirements, Program Operation, and Compliance and Enforcement

This section summarizes the prior regulatory requirements associated with permitting (subpart C), program operation (subpart D), and compliance evaluation and enforcement requirements (subpart E).

II.A.3.1 Permit Requirements

Section 233.20 of the prior regulations (2023) provides the circumstances under which the assumed Tribal or State program cannot issue a permit. These circumstances include:

1. When a permit does not comply with the requirements of the CWA or regulations, including the 404(b)(1) guidelines.
2. When the EPA Regional Administrator has objected to the issuance of the permit and the objection has not been resolved.
3. When the proposed discharges would be in an area which has been prohibited, withdrawn, or denied as a disposal site by the EPA Regional Administrator under CWA section 404(c), or when the discharge would fail to comply with a restriction imposed thereunder.
4. If the Secretary of the Army determines that anchorage and navigation of any navigable waters would be substantially impaired (after consultation with the Coast Guard).

Section 233.23 (2023) provides that the Tribe or State must establish conditions for each permit that assure compliance with all applicable statutory and regulatory requirements, including the 404(b)(1) guidelines, and meet or implement various requirements defined at section 233.23(c) (2023). These limitations 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. The regulations also provide requirements for the issuance of general permits (section 233.21 (2023)) and emergency permits (section 233.22 (2023)).

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)). The Agency codified this limitation in the permit conditions section of the prior regulations (40 CFR 233.23(b) (2023)).

II.A.3.2 Program Operation

Program operation requirements include, among others, a description of the elements required for a complete permit application, coordination and public notice requirements, decision making and issuance, permit modification, suspension or revocation procedures, signatures and reports, and continuation of expiring permits (40 CFR 233.30-233.39 (2023)). Tribes and States that assume the section 404 program are responsible for meeting the program operation requirements, although coordination requirements (40 CFR part 233.31 (2023)) also involve input from affected States and other federal, Tribal, or State agencies involved with "water related planning and review processes." Coordination requirements under the prior regulations are discussed further in Section II.A.4.

II.A.3.3 Compliance Evaluation and Enforcement

Subpart E of 40 CFR part 233 (2023) describes the requirements for compliance evaluation programs and enforcement authority. The CWA provides that Tribes and States seeking approval for a permitting program under 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. 1344(h)(1)(G)). The prior regulations provide that 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) (2023)).

The regulations 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 233.41(b)(2) (2023)).

II.A.4 Federal Oversight

Subpart F of 40 CFR part 233 (2023) addresses federal oversight of Tribal and State programs, including provisions for sharing information with EPA and EPA's waiver of review, procedures for EPA's review of and objection to Tribal and State permits, program reporting, and withdrawal of program approval.

II.A.4.1 Agency Review and Objection to State Permits

All section 404 permit applications received by a Tribe or State with an assumed program are subject to EPA review (40 CFR 233.50 (2023)). EPA may waive review of permits (40 CFR 233.51 (2023)). The Tribe's or State's MOA with their respective EPA Regional Administrator specifies the categories of Tribal or State permits for which EPA will waive federal review. EPA cannot waive review for projects with the potential to impact critical areas that support federally listed species, sites listed or eligible for listing under the National Historic Preservation Act, components of the National Wild and Scenic River System, and certain other categories of permits (40 CFR 233.51 (2023)).

EPA has the authority to review all permit applications received by the Tribe or State as part of Agency oversight of assumed programs. There are periods, such as during the first few years of assumption by a Tribe or State, when EPA may exercise its oversight authority to review a higher proportion of permit applications.

II.A.4.2 Agency Review of Program Reports

Each Tribe or State that has assumed the section 404 program is required to evaluate their programs annually and submit an annual report to EPA (40 CFR 233.52 (2023)). The reports evaluate administration of the program, including identifying problems encountered, steps taken to resolve these problems, and recommendations for resolving any outstanding problems along with a timeline for resolution. The starting date for the annual period is established in the MOA. In these annual reports, Tribes and States must comply with the program reporting requirements of 40 CFR 233.52 (2023). The minimum reporting requirements include:

1. An assessment of the cumulative impacts of the State's (or Tribe's) program on the integrity of the regulated waters;
2. Identification of areas of concern or interest;
3. The number and nature of individual and general permits issued, modified, and denied;
4. Number of violations identified, and number and nature of enforcement actions taken;
5. Number of suspected unauthorized activities reported, and number of actions taken;
6. An estimate of the extent of activities regulated by general permits; and
7. Number of permit applications received but not yet processed.

The annual report helps Tribes and States evaluate the assumed program, identify trends and/or problems, and propose solutions to any identified problems. If EPA determines that a Tribal or State assumed program is not administered in accordance with regulatory requirements, EPA works with the Tribe or State to address any deficiencies identified or, if necessary/warranted situations, initiates withdrawal of the assumed program.

II.A.4.3 Withdrawal

The prior regulations set out a formal adjudicatory process for the withdrawal proceedings (40 CFR 233.53 (2023)). The various circumstances that might warrant the withdrawal of the assumed program, including when the Tribe's or State's legal authority, program operation, or enforcement program no longer meets applicable requirements or when the Tribal or State program fails to comply with the terms of the MOA between the Tribe or State and EPA. A withdrawal proceeding can be commenced on the Administrator's initiative, or in response to a petition from an interested person alleging failure of the Tribe or State to comply with the requirements of the regulations. A Tribe or State may also voluntarily return the section 404 program responsibilities required by federal law back to the Secretary of the Army.

If the Administrator has determined that cause exists to commence proceedings, those proceedings are conducted as a formal adjudicatory hearing. The prior section 404 Tribal and State program regulations refer to EPA's 40 CFR part 22 regulations, which govern administrative adjudication of penalties assessed by EPA against alleged violators and are comparable to the rules for litigation in federal district court. The proceeding includes provisions for motion practice and the presentation of evidence with the process set forth in detail in the regulations. Within 60 days after the adjudicatory process, the Administrator reviews the record and issues their decision. If the Administrator finds that the Tribe or State has administered the program in conformity with the CWA and the regulations, the process is terminated. If the Administrator finds that the Tribe or State has failed to administer the program in conformity with the CWA and the regulations, the Administrator must list the deficiencies in the program and provide the Tribe or State with no more than 90 days to take required corrective action. *See* 33 CFR 1344(i). The Tribe or State must perform the corrective action and certify it has done so. If the Tribe or State does not take appropriate corrective action and file a certified statement in the time provided, the Administrator issues a supplementary order withdrawing approval of the program. Otherwise, the Administrator issues a supplementary order stating that approval of authority is not withdrawn.

II.A.5 Tribal Requirements for Assumption and Affected States Process

The requirements for Tribes to obtain treatment in a similar manner as a State (TAS) are provided in 40 CFR 233(g) (2023). These requirements are consistent with CWA section 518, which authorizes EPA to treat federally recognized Tribes in a similar manner as a State for purposes of implementing and managing various environmental functions under the statute.

To obtain TAS for purposes of assuming the section 404 program, Tribes must (1) be recognized by the Secretary of the Interior, (2) have a governing body carrying out substantial governmental duties and powers, (3) seek to carry out functions pertaining to the management and protection of reservation water resources, and (4) show capability in carrying out the functions of the provision at issue.

These eligible Tribes generally follow the same procedures and requirements as States that assume the section 404 program. Under the preceding regulations, a Tribe or State must (1) provide notice for each section 404 permit application to the public and any other Tribe or State whose waters may be affected, and (2) provide an opportunity for a public hearing before ruling on each application.

Additionally, affected States are provided an opportunity to submit written comments and suggest permit conditions within the public comment period. If the permitting State chooses not to implement the suggested permit conditions, the affected State and the EPA Regional Administrator must be notified of this decision and the rationale for the decision by the permitting State and EPA shall review the permit per the non-waiver provisions of the regulations. (40 CFR 233.50(d) (2023)).

II.B Approaches to Assessing the Baseline Costs

This section summarizes approaches to assessing baseline costs incurred by Tribes and States, permittees, and EPA under the prior regulations (40 CFR part 233 (2023)). This section describes the data sources that provided baseline cost information (Section II.B.1), defines key interested parties that may incur costs under the prior regulations (Section II.B.2), addresses limitations and uncertainties affecting the baseline (Section II.B.3), and describes baseline costs associated with prior regulation requirements (Section II.B.4). Much of this information is used in the ICR (*see* Section VII).

II.B.1 Data Sources

To describe costs associated with prior regulation practices, EPA leveraged qualitative and quantitative data from five sources: (1) program annual reports, (2) the 2017 Assumable Waters Subcommittee report, (3) State feasibility studies, (4) the supporting statement associated with the ICR, and (5) the number of section 404 permits issued by the Corps between 2013 and 2018. As discussed further in Section II.B.1.1.1, the most recently available State annual reports from Michigan (Michigan EGLE, 2022)[6], New Jersey (State of New Jersey, 2022)[7], and Florida (Florida Department of Environmental Protection, 2022)[8] were used to generate summaries of programmatic activities, including the number of permits

[6] Michigan EGLE (2022) is the annual report covering Fiscal Year 2020, or the time period between October 1, 2019, and September 30, 2020.

[7] State of New Jersey (2022) is the annual report for July 1, 2022 to June 30, 2023.

[8] Florida Department of Environmental Protection (2022) is a draft annual report covering the time period between July 1, 2021, and June 30, 2022.

issued. The Assumable Waters Subcommittee report[9] provided additional information on issued permits which was used to supplement Michigan and New Jersey programmatic summaries.

Seven States conducted feasibility studies as an initial step in the assumption process. State feasibility studies described the anticipated costs to assume and administer the program. The State feasibility studies described a range of needs, including staff and training needs, resources required to implement the program (*e.g.,* Information Technology Infrastructure), approaches to funding the program (*e.g.,* permit fees and other financial backing); the seven feasibility studies are described in Section II.B.1.1.3 and summarized in Table II-1. Information provided in State annual reports and in State feasibility studies were also used to describe baseline section 404 permit applicant costs (Section II.B.4.2.2).

Finally, the Supporting Statement associated with the ICR[10] for the CWA section 404 State-assumed programs regulations provides annual section 404(g)-related burden and labor cost estimates for Tribes, States, permit applicants or permittees, and EPA. Data sources, burden estimates, and factors used to extrapolate labor costs are described in the Supporting Statement associated with the ICR for the CWA section 404 State-assumed programs regulations (EPA ICR Number 0220.18, Office of Management and Budget (OMB) Control Number 2040-0168).[11] In summary, EPA leveraged information provided by State agencies to estimate the burden and labor costs associated with preparing a program submission package, reviewing permit applications, and developing their programmatic annual reports. The number of permits received and time to compete permit applicants were used to extrapolate costs to permittees. Input provided by EPA regional staff about their time spent reviewing permit applications was used to estimate costs incurred by the Agency.

II.B.1.1 Summaries of State Program Annual Reports and Feasibility Studies

Section II.B.1.1.1 summarizes programmatic activities, including the number of permits issued, from annual reports for the three States with an existing or formerly approved program. Section II.B.1.1.2 summarizes available information about fee structures under assumed programs. Section II.B.1.1.3 summarizes information provided by States that have expressed interest in program assumption via feasibility studies. No Tribes have assumed the CWA section 404 program or submitted a feasibility study.

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[9] Assumable Waters Subcommittee (2017) is a report that provides recommendations to the National Advisory Council for Environmental Policy and Technology regarding the delineation of waters for which section 404 permitting authority is retained by the Corps (*i.e.,* retained waters) versus waters for which a Tribe or State may assume section 404 permit responsibilities (*i.e.,* assumable waters).

[10] S*upporting Statement for EPA ICR 0220.18 Clean Water Act Section 404 State-Assumed Programs* (U.S. EPA, 2021b).

[11] Because the ICR covers the full burden associated with 404(g) assumption (in addition to the incremental cost of the final rule), these costs are used in the ICR burden estimates.

II.B.1.1.1 Program Annual Reports from States with an Existing or Formerly Approved Program

II.B.1.1.1.1 Michigan

In 1984, Michigan became the first State to assume the section 404 program (49 FR 38948, October 2, 1984). According to the most recently available annual report to EPA (2020 Fiscal Year), Michigan's Department of Environment, Great Lakes, and Energy (Michigan EGLE) received a total of 4,208 section 404 permit applications between October 1, 2019, and September 30, 2020 (Michigan EGLE, 2022). Michigan reported taking 361 compliance enforcement actions during the 2020 Fiscal Year (Michigan EGLE, 2022).

On average, Michigan processes approximately 3,000 to 4,000 section 404 permit applications each year, with 60 to 70 percent of those projects covered by the State's general permit categories (Assumable Waters Subcommittee, 2017).[12] However, the number and types of permits can vary greatly from year to year due to fluctuations in the economy and development interest. Michigan permitting staff investigates approximately 1,000 to 1,500 reports of non-compliance each year (Assumable Waters Subcommittee, 2017).

Michigan has procedures in place to coordinate with various agencies as needed, depending on the proposed project. For example, to account for potential impacts to listed historic properties, Michigan's permitting staff coordinates with the State Historic Preservation Office. To account for potential impacts on threatened and endangered species, permitting staff identify projects affecting areas with documented threatened and endangered species populations and coordinate with State endangered species staff. If State endangered species staff determine a potential impact on threatened and endangered species, the State sends the application to EPA, which shares it with the Corps, NMFS (as appropriate), and the USFWS for review. Based upon its review of the permit and any comments provided by other federal agencies, EPA may provide a comment letter to Michigan EGLE with comments, permit conditions and/or an objection to the proposed permit. The federal agencies may provide comments to EPA about potential impacts and avoidance/mitigation measures that they recommend be provided by EPA to the State.

II.B.1.1.1.2 New Jersey

In 1994, New Jersey became the second State to assume the section 404 program (59 FR 9933, March 2, 1994). According to New Jersey's annual report for July 1, 2022 to June 30, 2023, the New Jersey Department of Environmental Protection processed 150 permit applications during the 2022 Fiscal Year (State of New Jersey, 2022).[13] During the 2022 Fiscal Year, New Jersey's Enforcement Bureau reported 600 incidents, 368 of which led to field investigations, and 274 of which led to virtual investigations (State of New Jersey, 2022). New Jersey's Enforcement Bureau issued 60 violations during this time

[12] The Assumable Waters Subcommittee (2017) report conducted this analysis between October 2015 and April 2017. The report does not specify a date range for average annual permits values.

[13] New Jersey's section 404 program annual report does not provide details regarding the factors that may have influenced the relatively low number of permits processed during the 2022 Fiscal Year.

(State of New Jersey, 2022). On average, New Jersey's Enforcement Bureau has undertaken 1,000 actions annually on reports of noncompliance (Assumable Waters Subcommittee, 2017).[14]

In addition to entering into the required MOA with EPA identifying the permits for which federal review is not waived, New Jersey also entered into a three-way Memorandum of Understanding (MOU) with EPA and USFWS that requires the State to provide applications directly to USFWS for review if the activities would affect areas known to contain federally listed threatened and endangered species (Assumable Waters Subcommittee, 2017). On average each year, ten or fewer applications require review pursuant to the MOA with EPA as "major discharges," and 80 permits require coordination with USFWS consistent with the MOU (Assumable Waters Subcommittee, 2017). New Jersey also coordinates with the State Historic Preservation Office on 225 to 250 permits, on average each year, to account for potential effects on listed historic properties (Assumable Waters Subcommittee, 2017).

II.B.1.1.1.3 Florida

In December 2020, Florida became the third State to assume the section 404 program (85 FR 83553, December 22, 2020). Prior to assuming the section 404 program, Florida had a prior State-level program under which works and activities that alter the surface of land required an environmental resource permit (ERP) from the Florida Department of Environmental Protection (Florida DEP) or one of the State's five water management districts. Florida DEP estimated that the federal section 404 permit and State ERP would overlap 85 percent of the time prior to assumption of the section 404 program and that assumption would reduce costs and potential delays for applicants by reducing two sets of permits for the same regulated activity to one joint application for both programs (Florida Department of Environmental Protection, 2020c). Florida signed a MOA with EPA to clarify the roles of both agencies under Florida's approved section 404 program, including EPA's oversight authority and identification of which permits the State is required to send to EPA for review (Florida Department of Environmental Protection, 2020a). The State also entered into a MOU with USFWS and the Florida Fish and Wildlife Conservation Commission (Florida FWC), which established a coordination framework through which Florida DEP or Florida FWC may engage with the USFWS for species coordination reviews. Additionally, an operating agreement between the Florida Division of Historical Resources and Florida DEP sets forth a coordination process for assessing the potential impacts on historic properties (Florida Department of Environmental Protection, 2020b). Lastly, Florida DEP signed a MOA with the Corps that addressed coordination between the two agencies, including those waters that the Corps retains for issuing section 404 permits (Florida Department of Environmental Protection & U.S. Army Corps of Engineers, 2020).

According to Florida's section 404 program draft annual report for the period between July 1, 2021, and June 30, 2022, the Florida DEP received over 6,000 section 404 program submissions, a much larger number than Florida had anticipated (Florida Department of Environmental Protection, 2022).[15] During the reporting period, Florida DEP reviewed 193 individual permit applications and 981 general permit applications, with 1,915 permit applications still under review (Florida Department of Environmental

[14] The Assumable Waters Subcommittee (2017) report conducted this analysis between October 2015 and April 2017. The report does not specify a date range for average annual permits or enforcement values.

[15] EPA notes that this information is taken from a *draft* copy of Florida's State 404 Program Annual Report, July 1, 2021 – June 30, 2022. As such, all quantitative estimates or qualitative statements made in reference to this report are subject to change.

Protection, 2022).[16] As of June 30, 2022, Florida DEP had 212 staff working within their section 404 program, and the department expected to hire an additional 33 staff to accommodate the additional workload (Florida Department of Environmental Protection, 2022). During the 2021-2022 reporting period, Florida DEP had 1,074 suspected cases of unauthorized activities, 191 confirmed violations, and 103 suspected cases of unauthorized activities remained under investigation (Florida Department of Environmental Protection, 2022). The Florida DEP issued 56 responses to confirmed violations (Florida Department of Environmental Protection, 2022).[17] On February 15, 2024, the District Court of the District of Columbia vacated EPA's approval of Florida's section 404 program . As a result, at this time only the Corps has authority to issue CWA section 404 permits in the State of Florida (*see Center for Biological Diversity v. Regan*, No. 21-119, 2024 WL 655368 (D.D.C.)).[18]

II.B.1.1.2 Permittee Fee Structures

The approaches that Michigan and New Jersey use (and that Florida used prior to program vacatur) for section 404 permit fees differ from the Corps' approach to fees. The Corps does not charge a fee for many general permits, and the fee for individual permits is $100 for commercial or industrial activity and $10 for non-commercial activity (USACE, n.d.). Permit fees charged by the Corps are set by Congress. Michigan charges between $50 and $2,000 for each section 404 permit, depending on the activity (Michigan EGLE, 2019). New Jersey charges $1,000 per general permit, $2,000 per individual permit for single-family homes or duplexes, and $5,000 plus $2,500 per acre of disturbed regulated area for individual permits for any activity other than single-family home or duplex construction (New Jersey Department of Environmental Protection, 2019). Florida charged no additional fees for the State section 404 program review; however, applicants had to pay the regularly required fee for the ERP review in the State DEP permitting process (Florida Department of Environmental Protection, 2023).

II.B.1.1.3 State Feasibility Studies

In addition to the existing or formerly approved State programs discussed above, thirteen other States (*e.g.,* Alaska, Arizona, Arkansas, Indiana, Kentucky, Maryland, Minnesota, Montana, Nebraska, North Dakota, Oregon, Virginia, and Wisconsin) have considered assumption. The most common reasons States provided for considering assumption were increased permit review efficiency, more consistent protection of resources, more consistent program administration, and direction to do so by State officials (Hurld & Linn, 2008). Some reasons States cited for not pursuing assumption included the fact that their prior State program is not consistent with CWA requirements, lack of implementation funds, a desire to assume part of the section 404 program but not the entire program, and challenges in coordinating with other (non-EPA) federal agencies to determine assumable waters and address federally listed species (Hurld & Linn,

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[16] Applications under review include 573 general permit notices, 764 individual permit applications, 13 exemption verification requests, 466 "no permit required" letter requests, 91 wetland determinations, 3 emergency authorizations, and 5 modifications (Florida Department of Environmental Protection, 2022).

[17] Responses to violations include 15 Compliance Assistance Offers, 25 warning letters, 1 notice of violation, 6 long form consent orders, 6 settlement agreements, and 3 post-enforcement permits issued (Florida Department of Environmental Protection, 2022)

[18] On April 12, 2024, the District Court of the District of Columbia denied Florida's motion for a limited stay of the program vacatur.

2008; U.S. EPA, 2019). EPA is not aware of any Tribes interested in pursuing assumption at this time. At least one State indicated to EPA that they were pausing assumption efforts until after this rulemaking is finalized.

While considering assumption, States often develop studies that discuss potential costs associated with assumption and other factors that may influence assumption feasibility. Among the States that have conducted section 404 assumption feasibility studies, Alaska, Arizona, Minnesota, Montana, Nebraska, Virginia, and Wisconsin provided detailed cost estimates for at least one aspect (*e.g.,* program submission development, labor, etc.) of section 404 program assumption or administration.

Sections II.B.1.1.3.1 through II.B.1.1.3.7 present available cost estimates for each of these seven States. Costs can vary between Tribes and States for myriad reasons, including but not limited to geographic size of Tribe or State; number, density, and type of aquatic resources; and how to access those resources (*e.g.,* by plane and helicopter in Alaska). Table II-1 summarizes the costs presented in the seven feasibility studies. A more detailed version of Table II-1 is presented in Appendix A (Table A-1).

Table II-1. Summary of variables discussed in each State Feasibility Study

Variable Discussed in Report	Alaska	Arizona	Minnesota	Montana	Nebraska	Virginia	Wisconsin
Year State Feasibility Study Published	(2023)	(2018)	(2017)	(2021)	(2021)	(2012)	(2022)
Annual costs to develop and administer the program	Yes	Yes	Yes	No	Yes	Yes	Yes
Timeframe for program development and approval	Yes	No	Yes	No	Yes	No	No
Described activities leading up to program approval	Yes	No	Yes	Yes	Yes	No	Yes
Program Staffing Needs	Yes	Yes	No	No	Yes	Yes	Yes
Staff Training Plan or Costs	Yes	No	No	Yes	No	No	No
Equipment/Supplies	Yes	No	No	No	No	No	No
Information Technology (IT)	No	No	Yes	No	No	Yes	No
Discusses Funding Sources to Sustain State Program	Yes	Yes	No	No	Yes	Yes	No
Permit Fee Structure	Yes	Yes	No	No	Yes	Yes	No
Estimated Annual Number of Permits	No	No	No	No	Yes	No	No

II.B.1.1.3.1 Alaska

Alaska's section 404 feasibility study stated that the shortest possible timeframe to achieve program approval would be two years (Alaska Department of Environmental Conservation, 2023). The first 18 months would focus on hiring staff, developing program tools, and developing the section 404 program

submission in coordination with EPA. The following six months would focus on building staff capacity in all disciplines necessary to implement the program and continuing to work with EPA to ensure a complete program submission to facilitate a timely review. Alaska anticipates assuming the program in the third year, and that the State program would cover approximately 75 percent of the Corps' permitting workload in Alaska (Alaska Department of Environmental Conservation, 2023).

The Alaska Department of Environmental Conservation (Alaska DEC) estimated the costs of administering the section 404 program, including developing the assumption application to EPA, drafting regulations and program tools, and hiring and training staff. The Alaska DEC estimated that, during the first year, these efforts would require an additional 28 full-time equivalent (FTE) positions and cost $5.0 million; during subsequent years, these efforts would require an additional 4 FTE positions, summing to a total of 32 FTE permanent positions, and cost $4.8 million annually (Alaska Department of Environmental Conservation, 2023). The Alaska DEC expected costs to decrease in the second year because one-time office equipment and supplies would already have been purchased for the 28 FTE positions during the first year.

The Alaska feasibility study stated that the State could pay for the program through General Funds, fees, or a combination of the two (Alaska Department of Environmental Conservation, 2023). Alaska expected that General Funds would be used to cover program assumption materials, development, and the first year of implementation (approximately three years total), and that General Funds could be partially offset by fees in subsequent years. The Alaska DEC recommended establishing a hybrid fee approach which would involve a flat fee for specific types of actions and authorizations under specific General Permits and a base fee (plus an hourly fee for time spent over the base fee) for Individual Permits (Alaska Department of Environmental Conservation, 2023). However, the feasibility study noted that the program may remain largely funded via General Funds in the long-term as permitted projects support economic development in the State, and the permits serve to protect water resources on behalf of all Alaskans.

II.B.1.1.3.2 Arizona

The Arizona Department of Environmental Quality (Arizona DEQ) estimated that administering the section 404 program would cost approximately $2.1 million annually (Arizona Department of Environmental Quality, 2018). This estimate was based on needing 10 full-time employees and $220,000 for legal support services from the Arizona Attorney General. Arizona DEQ also estimated the section 404 permit fees required to cover costs of implementing the section 404 program and make the program entirely self-funded. Arizona estimated an individual permit fee of $125,000, a fee of $32,353 for Regional General Permits and Programmatic General Permits, and a fee of $2,423 for the use of Corps nationwide permits that the State intended to incorporate into its program (Arizona Department of Environmental Quality, 2018). Arizona DEQ acknowledged that the estimated permit fees would be cost prohibitive for permittees, especially compared to the Corps' prior fee structure for section 404 permits.

II.B.1.1.3.3 Minnesota

Minnesota has comprehensive State-level water resource protection programs in place to comply with the following State laws: (1) the Wetlands Conservation Act,[19] which prohibits wetlands from being drained or filled, unless they are replaced by restoring or creating wetland areas of at least equal public value, and (2) the Public Waters Law,[20] which requires permits for projects that could impact wetlands and other public waters. Minnesota's feasibility study discussed how permit applicants would benefit if the State assumed the section 404 program by not having to prepare separate State and federal permit applications or devote staff time to separate permit processes, except for projects involving waters for which the Corps retains regulatory jurisdiction (Minnesota Department of Natural Resources & Minnesota Board of Water and Soil Resources, 2017). Minnesota estimated that revising State laws to match section 404 requirements would take at least two years and cost approximately $150,000 per year. The feasibility study also discussed technology upgrades needed for section 404 assumption, which would entail a one-time cost of $3 million to set up an online permitting and reporting system (Minnesota Department of Natural Resources & Minnesota Board of Water and Soil Resources, 2017).

Minnesota noted in its 2017 feasibility study (Minnesota Department of Natural Resources & Minnesota Board of Water and Soil Resources, 2017) that the extent of waters assumable by the State, relative to the waters remaining under Corps jurisdiction, is one of the most significant factors affecting the feasibility of section 404 assumption. Minnesota provided additional detail about this statement in a 2018 supplement to the feasibility study (Minnesota Department of Natural Resources & Minnesota Board of Water and Soil Resources, 2018). A mapping analysis showed that, except for first- and second-order streams, relatively few waters in Minnesota would be assumable by the State based on understanding regarding the extent of retained waters at the time of the analysis. Minnesota recognized that some uncertainties remained about the extent of assumable waters but also stated that the Corps' use of case-by-case determinations to identify retained waters diminishes the potential gains in permitting efficiency from State assumption (Minnesota Department of Natural Resources & Minnesota Board of Water and Soil Resources, 2018). Minnesota argued that the subcommittee recommendations to clarify the extent of assumable waters would significantly improve the feasibility of section 404 assumption in the State and clarify and simplify the identification of Corps-retained waters while providing a reasonable number of waters for States to assume (Minnesota Department of Natural Resources & Minnesota Board of Water and Soil Resources, 2018).

II.B.1.1.3.4 Montana

Montana's section 404 assumption feasibility study described staff training needs and associated costs prior to program assumption (State of Montana, 2021). The report described the need to hire 8 to 10 project managers who would train with the Corps for about 20 to 24 months[21] before they could begin issuing permits (Montana Water Policy Interim Committee, 2016). Montana's data portal shows that

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[19] Ch. 354, 1991 Minn. Laws 2794 (codified at MINN. STAT. § § 84 & 103 (Supp.1991))

[20] Minnesota Administrative Rules, Chapter 6115 Public Water Resources (MINN. STAT. §§ 103G)

[21] EPA notes that while Montana sought to work with the Corps to train their staff, such an approach is not a requirement and would need to be coordinated between individual States and Corps Districts.

project management specialists at the Montana Department of Environmental Quality earn an average hourly wage of $34.83, or approximately $72,446 per year (2021$[22]; State of Montana, 2021). After accounting for benefits,[23] total compensation equals $115,914 per person (2021$). Depending on the number of trainees, total training costs over the expected two-year period would thus be between $1.9 million and $2.3 million.

II.B.1.1.3.5 Nebraska

The Nebraska Department of Environment and Energy (Nebraska DEE) analyzed the potential cost of section 404 assumption using Corps data of section 404 permitting activities from 2010 to 2019 (Nebraska Department of Environment and Energy, 2021). Nebraska DEE estimated that 30.7 full-time employees would be needed to administer the program and process 871 permits annually.[24]

The total cost to administer the section 404 program was estimated at $2.6 million annually (Nebraska Department of Environment and Energy, 2021). However, the feasibility study noted that total costs do not account for the department's ability to share resources among all permitting programs as well as from process improvements utilizing prior agency infrastructure and the development of permitting software (Nebraska Department of Environment and Energy, 2021). The feasibility study also noted that total costs do not include the agency's cost from working with the Attorney General's Office on enforcement actions for repeat or extreme permit violations (Nebraska Department of Environment and Energy, 2021). These factors would lower and raise section 404 program assumption costs, respectively.

Nebraska DEE estimated potential options to provide sustainable funding for section 404 program assumption, including a "chargeable impact" option (permitting fees based on the amount of environmental impact) and an "hourly rate" option (permitting fees based on the total amount of hours required for staff to review and process the application) (Nebraska Department of Environment and Energy, 2021). Nebraska DEE estimated that, to cover total annual costs, the former would require a fee of $296.80 (assuming 10 acres or linear feet of impact for all 871 permits) (Nebraska Department of Environment and Energy, 2021). In comparison, the latter would require a fee of $67.07 per hour (assuming an estimated 38,547 billable hours dedicated towards section 404 permit reviews) to cover the total annual program cost.

The Nebraska DEE section 404 assumption feasibility study also included a timeframe for assumption (Nebraska Department of Environment and Energy, 2021). The timeframe included the time required to (1) build a new team, (2) develop permit application forms, (3) develop MOAs with the Corps, the Nebraska State Historic Preservation Office, and the EPA Regional Administrator, (4) develop compliance evaluation procedures and enforcement, (5) assure the authority of laws and regulations, and

[22] Annual wages based on 2,080 hours worked per year.

[23] To obtain the loaded wage rate that accounts for benefits, we multiplied wages by a 1.6 overhead factor. The 1.6 overhead factor is the standard ratio used in government analyses and is based on the ratio of total compensation to wages/salaries for government employees.

[24] The annual number of section 404 permits was based on an average of 8 individual permits, 448 general permits, and 415 jurisdictional determinations (although not technically permits, they were counted as such) (Nebraska Department of Environment and Energy, 2021).

(6) provide public notice for stakeholder input. The entire process, from Nebraska DEE's initial assumption investigation to the program submission to EPA for review and approval, was expected to take approximately 4.5 years to complete.[25]

II.B.1.1.3.6 Virginia

The Virginia Department of Environmental Quality (DEQ) estimated total section 404 assumption costs of $3.4 million in year one, $4.0 million in year two, $3.8 million in year three, and $3.4 million annually thereafter (Virginia Department of Environmental Quality, 2012). Virginia DEQ estimated needing 40 additional full-time staff members and information technology (IT) infrastructure updates to implement the section 404 program. The feasibility study stated that database and information technology infrastructure upgrades necessary to run the section 404 program would cost approximately $2 million in year one, $1 million in year two, and $0.5 million in year three, or roughly $3.5 million in total (Virginia Department of Environmental Quality, 2012). Virginia DEQ did not account for legal costs in their estimates, but meeting notes included in the report described a stakeholder recommendation to add legal fees to their cost estimates in a subsequent draft, as additional staff may be needed in the Attorney General's office to cover additional litigation after assumption of the section 404 program (Virginia Department of Environmental Quality, 2012). However, Virginia DEQ may not anticipate needing additional legal services since Virginia already administers a State-level dredged or fill permitting program (U.S. EPA and Army, 2022) and could transition legal staff from the State program to the section 404 program following program assumption.

Virginia DEQ estimated the section 404 permit fees required to cover costs of implementing the section 404 program at $300 per general permit but did not provide a standard fee estimate for individual permits (Virginia Department of Environmental Quality, 2012). Since Virginia already has a State dredged and fill program (U.S. EPA and Army, 2022) and has State general funding available to support the program, Virginia's estimated fee amounts are not intended to fund the entire section 404 program. Rather, Virginia DEQ estimated section 404 permit fee amounts to cover 10 to 25 percent of program costs, or the percentage of costs priorly covered by fees for the prior State dredged and fill program (Virginia Department of Environmental Quality, 2012).[26]

The Virginia section 404 assumption feasibility study discussed potential pros and cons for permittees if Virginia assumed the section 404 program (Virginia Department of Environmental Quality, 2012). When States have State-level dredged and fill programs but do not assume the section 404 program, permit applicants must work with both the State agency and the Corps. The report mentioned stakeholder statements that State assumption of the section 404 program would create a more efficient permitting process because permit applicants would only deal with one agency contact instead of trying to resolve

[25] The total length of time required for section 404 program assumption is based on the '404 Assumption Gantt Chart' in Appendix A of Nebraska Department of Environment and Energy (2021).

[26] The percentage of Virginia's prior dredged and fill program costs covered by permit fees has ranged from 25 percent in 2010 to 10 percent in 2012, a fluctuation due primarily to the effect of the economic slowdown in the construction industry (Virginia Department of Environmental Quality, 2012).

disagreements between two points of contact. However, permittees expressed concern about the potential for higher fees to cover the costs (or portions of the costs) of Virginia assuming the section 404 program.

II.B.1.1.3.7 Wisconsin

The Wisconsin Department of Natural Resources' (Wisconsin DNR) section 404 assumption feasibility study estimated annual costs of program assumption to be $1.4 million in the short-term (first four years) and $1.0 million in the long-term (State of Wisconsin, 2022). Wisconsin DNR expected costs to be higher in the short term because of the increased work to develop the section 404 program and train staff. Short-term program development included the need to coordinate public and stakeholder input, develop State statutes and administrative codes, prepare the assumption application, and update permit applications and online information. Wisconsin DNR determined that the primary cost associated with assumption was additional staff. The feasibility study estimated an initial need of 16.4 additional full-time staff in the short-term to be reduced to 11.9 full-time staff in the long-term (State of Wisconsin, 2022).

Wisconsin DNR also estimated the initial cost of developing the program submission by assuming an additional 0.5 staff for application development (State of Wisconsin, 2022). When applying the feasibility study's estimated staff salary of $53,000 and overhead cost factor of 1.6[27], Wisconsin's cost for application development is $42,400.

II.B.2 Interested Parties

Costs associated with the requirements of the prior regulations may vary by interested party. Key groups for Tribal and State assumption of the section 404 program include the Tribe or State seeking assumption, permit applicants for projects within the Tribe's or State's jurisdiction (henceforth referred to as permittees), and federal agencies. Throughout this economic analysis, EPA refers to members of the regulated community, including entities subject to section 404 programs, as permittees or permit applicants. Federal agencies include: (1) the Corps, or the agency responsible for section 404 operation prior to Tribal or State assumption, (2) EPA, which provides federal oversight for Tribal and State section 404 programs (Section II.A.4), and (3) other cooperating federal agencies who opt to review programmatic materials, such as USFWS and NMFS, or with whom the Tribe or State has a MOA or MOU in relation to section 404 program operation.

Section II.B.4 discusses baseline costs of the prior regulations for these interested parties. Baseline costs primarily incurred by Tribes and States, including to complete the assumption process and to implement the program, include program approval (Section II.B.4.1.1.1), initial implementation costs (Section II.B.4.1.1.2), program revisions (Section II.B.4.1.1.3), program staffing (Section II.B.4.2.1.1), and development of the annual report (Section II.B.4.2.1.2). Tribes may experience additional costs to obtain TAS for purposes of assuming the section 404 program (Section II.B.4.4). Section II.B.4.2.2 summarizes baseline costs incurred by permit applicants. Baseline costs primarily incurred by federal agencies include costs to review program submissions and revisions (Section II.B.4.1.1.4) and federal oversight (Section II.B.4.3).

[27] The 1.6 overhead factor represents compensation and wages.

For an assessment of impacts resulting from the final rule for each interested party, *see* Sections III and IV.

II.B.3 Limitations and Uncertainties

The baseline cost assessment, which is provided as background information, has several limitations. First, the list of potential baseline costs is based on the small sample size of States that have completed the assumption process (Michigan, New Jersey, Florida) as well as States that provided detailed cost estimates in their feasibility studies (Alaska, Arizona, Minnesota, Montana, Nebraska, Virginia, and Wisconsin). States that have already assumed the section 404 program have already incurred the cost burden associated with assumption investigation and program submission (Section II.B.4.1.1.1.1) and initial implementation costs (Section II.B.4.1.1.2). Thus, such States should only incur ongoing annual costs (Section II.B.4.2.1), unless program revisions (Section II.B.4.1.1.3) are required. These States' experiences of onboarding section 404 programs can be used to inform cost estimates for other Tribes or States interested in assuming section 404 program responsibilities. Feasibility studies allow the Agency to estimate costs associated with program assumption and initial program implementation; however, while some elements of the seven feasibility studies describe similar aspects of the program (*e.g.,* staff needs), other studies consider different variables that may be specific to their program needs and not generalizable across Tribes and States interested in pursuing assumption (*e.g.,* IT, legal fees, funding sources).

EPA recognizes that program cost estimates under the prior regulations, including hiring and staff needs, are inherently tied to the scope of assumable waters and the number of permits issued by the Tribe or State. On May 25, 2023, the Supreme Court issued a decision in Sackett *v.* Environmental Protection Agency. In this case, the Court concluded that the CWA's use of "waters" encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes. The Court also held that adjacent wetlands are "waters of the United States" only when the wetlands have a continuous surface connection to bodies that are "waters of the United States" in their own right. Thus, there is no clear demarcation between "waters" and wetlands. Following the Sackett decision, EPA and the Department of the Army amended the regulatory definition of "waters of the United States" to conform to the Supreme Court's interpretation. Revised Definition of ''Waters of the United States''; Conforming, 88 Fed. Reg. 61,964 (Sept. 8, 2023). The Court's decision, as reflected in the Conforming Rule, has reduced the overall scope of jurisdictional waters of the United States. As related to the section 404(g) rule, Tribes and States also now have fewer waters of the United States available to be assumed under the CWA section 404(g) dredged and fill program.

Section VI discusses the uncertainties and limitations of the potential impacts arising from the final rule, including more details about data limitations that also affected the characterization of baseline costs under the prior regulations.

II.B.4 Baseline Costs Associated with Prior Regulations by Provision

This section describes baseline costs associated with prior regulation requirements. Each part of this section provides dollar values when available or otherwise discusses costs qualitatively. Discussion of these baseline costs are presented by provision, and within each provision, costs incurred by key interested parties are described.

II.B.4.1 General Requirements

As described in Section II.A.1, subpart A of 40 CFR part 233 (2023) specifies general requirements for Tribal and State programs, including that such programs must: (1) regulate all assumable waters within their jurisdiction, (2) be consistent with and no less stringent than the CWA and implementing regulations, (3) allow for public participation, (4) be consistent with the CWA, including the 404(b)(1) Guidelines, (5) have adequate enforcement authority, and (6) account for potential conflict of interest concerns of public officers or employees who make permitting decisions. The baseline costs of these general requirements are difficult but important to quantify since they are an integral component of assumed programs that Tribes and States consider during the entire assumption process. Thus, the costs of general requirements are distributed among the costs described in the remainder this section, including assumption investigation (Section II.B.4.1.1.1.1), program submission (Section II.B.4.1.1.1.3), initial implementation costs (Section II.B.4.1.1.2), and full-time staffing needs (Section II.B.4.2.1.1).

II.B.4.1.1 Program Approval and Revisions

Relying on cost estimates provided by States, EPA discusses costs under the prior regulations for Tribes and States to assume and revise their approved programs. This section describes baseline costs using the subpart headings of 40 CFR part 233 (2023), including program approval (Section II.B.4.1.1.1), program revisions (Section II.B.4.1.1.3), permit requirements, program operation, and compliance evaluation and enforcement (Section II.B.4.2), and federal oversight (Section II.B.4.3). These categories largely focus on costs to Tribes and States, but burden and costs incurred by the Agency (Sections II.B.4.1.1.4 and II.B.4.3) and permit applicants (Section II.B.4.2.2) are described in this section as well because they are a result of the actions of program approval. EPA assumes Tribes are likely to incur similar costs to administer and revise their section 404 program but recognizes their initial costs may be slightly higher due to the additional requirement to obtain TAS prior to assumption. These additional costs to Tribes to assume the program under the prior regulations are described in Section II.B.4.4.

II.B.4.1.1.1 Program Approval

II.B.4.1.1.1.1 Assumption Investigation and Program Submission Costs

Costs associated with assumption investigation, development of the program submission, and initial steps to implement the program may be incurred upfront or divided over the first few years before and after program assumption. For example, Wisconsin estimated that annual costs for section 404 program implementation would be 40 percent greater (or an additional $0.4 million annually) during the first four years after program assumption than in subsequent years (State of Wisconsin, 2022). Apart from differences in the cost to complete the program submission (Section II.B.4.1.1.1.3), EPA assumes Tribes are likely to incur similar initial, recurring, and other costs to administer and revise their section 404 program, but recognizes their initial costs may be slightly higher due to the additional requirement to obtain TAS prior to assumption. These additional costs to Tribes to assume the program under the prior regulations are described in Section II.B.4.4.

II.B.4.1.1.1.2 Assumption Feasibility Study Costs

States typically spend resources investigating the feasibility of assuming the section 404 program and documenting findings in a feasibility study report prior to completing the program submission. The feasibility study entails activities such as assessing required State legislative changes, determining the

methodology for demonstrating permit compliance with section 404(b)(1) Guidelines, and estimating permit fees needed to administer the program. Feasibility study costs are expected to vary widely by State based on prior processes and programs, the extent of assumable waters, anticipated section 404 permit volume, and other factors (*e.g.,* staff and technology infrastructure needs). EPA anticipates that Tribes under the prior regulations would incur similar feasibility study costs as States after accounting for differences in jurisdiction size, annual average permit volume, and extent of "waters of the United States." EPA Wetland Program Development Grant opportunities are available to support Tribal and State feasibility study development (U.S. EPA, 2023b).[28]

II.B.4.1.1.1.3 Program Submission

To assume the section 404 program under the prior regulations, Tribes and States must submit a program submission containing the information and documents described in 40 CFR 233.10 (2023) to EPA. Burden associated with developing the program submissions may vary by Tribe or State, depending on whether the Tribe or State has completed a feasibility study, whether the Tribe or State has its own dredged and fill program, and other factors.

II.B.4.1.1.2 Initial Implementation Costs

Initial implementation costs are costs that Tribes and States may incur under the prior regulations when initiating implementation of an assumed program, such as hiring costs (Section II.B.4.1.1.2.1), training costs (Section II.B.4.1.1.2.2), and technology infrastructure costs (Section II.B.4.1.1.2.3). Such costs are likely to vary by Tribe or State. For example, States with prior State-level dredged and fill programs may have smaller (or no) initial implementation costs relative to States without existing programs.

II.B.4.1.1.2.1 Hiring Costs

Several States described in their feasibility studies (Section II.B.1.1.3) that they would need to hire staff to implement the section 404 program (*i.e.,* conduct on-site assessments, process permits, and enforce section 404 requirements). Most Tribes and States will need to hire additional staff to cover section 404 responsibilities that the Corps previously handled, but staffing needs will vary based on factors such as the possibility of reassigning employees from other programs, anticipated permit volume, and extent of assumed waters. For example, Florida originally anticipated that the 212 employees administering their State Environmental Resource Permit program could simultaneously manage the section 404 permitting workload and did not hire additional staff during initial program implementation. However, as described in Florida's draft annual report, Florida received a larger than anticipated number of section 404 permit applications after approval of its program and sought to hire an additional 33 staff members (Florida Department of Environmental Protection, 2022). Montana's feasibility study (Section II.B.1.1.3.4) described hiring eight to ten project managers (Montana Water Policy Interim Committee, 2016).

Recruiting, interviewing, and hiring qualified candidates for a Tribal or State section 404 program can be an expensive and time-consuming process, especially when searching for a large number of candidates with specific credentials (*e.g.,* engineers or environmental scientists with master's degrees or bachelor's

[28] Although the use of CWA grant funds would reduce the cost burden of feasibility studies on Tribes and States, from an economic perspective, the use of grant funds is simply a transfer and does not reduce the overall social costs of feasibility studies.

degrees with equivalent years of experience, wetland delineators, etc.). None of the State feasibility studies specifically discussed hiring costs in their cost estimates. A 2021 Society for Human Resource Management Survey found that the average cost-per-hire (sum of internal and external recruiting costs divided by the number of hires) for companies is $4,683 (SHRM, 2022). This number is not specific to State governments but provides a benchmark for the potential hiring burden for each position.

Hiring costs under the baseline for each Tribe and State will vary depending on total staffing needs, which will vary based on numerous factors including whether the Tribe or State has a prior water resource protection program, the number of prior staff with time available for the section 404 program, average annual permit volume (both general and individual), and enforcement demands. States with high average annual section 404 permit volume (*e.g.,* Pennsylvania, Texas) would need to hire more staff than States with low average annual section 404 permit volume (*e.g.,* Hawaii, Rhode Island; *see* Appendix B), unless prior staff have time availability to add section 404 permitting responsibilities. The estimated staffing needs in the feasibility studies for Arizona (Section II.B.1.1.3.2) and Virginia (Section II.B.1.1.3.6), taken in context with each state's annual average permit volume (*see* Appendix B), support the expectation that States with higher permit volume may require more staff; Virginia's average permit volume is nearly five times higher than Arizona's, and Virginia estimated needing four times more new staff than Arizona (Virginia Department of Environmental Quality, 2012; Arizona Department of Environmental Quality, 2018).

II.B.4.1.1.2.2 Training Costs

Staff at Tribal and State agencies may require training on how to administer the section 404 program. Florida's draft section 404 annual report described the length of their staff training pre-assumption and post-assumption as of June 30, 2022. Florida's staff training pre-assumption consisted of training webinars over a five-month period (from August 11, 2020 to December 8, 2020) and field delineation training over a three-year period (Florida Department of Environmental Protection, 2022). Florida's staff training post-assumption consisted of weekly training webinars over a six-month period (from December 22, 2020 to June 30, 2021) and field delineation training over a twelve-month period (from July 1, 2021 to June 30, 2022) (Florida Department of Environmental Protection, 2022). Montana's feasibility study (Section II.B.1.1.3.4) noted that the eight to ten project managers hired to administer the program would need to train with the Corps for about 20 to 24 months before they could begin issuing permits (Montana Water Policy Interim Committee, 2016). While Montana's anticipated training strategy involved training staff with the Corps, Tribes and States are not required to train with Corps staff and may explore different training approaches.

Training costs under the baseline will vary by Tribe or State depending on the number of staff who would require training, the type of training, and the length of the training. The number of trainees will likely increase for States with high permit volumes and States that do not already have dredged or fill permitting programs; similarly, the number of trainees will likely decrease for States with low permit volumes and States with prior dredged and fill permitting programs. EPA assumes staff at States with prior dredged or fill permitting programs may require less training since they can focus on learning the differences, if any, between their prior program and the approved section 404 program. EPA also expects that other factors may influence the amount of training required, such as prior experience of the trainees, environmental factors (*e.g.,* special resources within the Tribe's or State's jurisdiction), and enforcement history (*e.g.,* extent to which prior Tribal or State programs required enforcement actions) within the Tribe or State.

II.B.4.1.1.2.3 Information Technology Infrastructure Costs

Tribes and States may need to update their IT infrastructure or establish new infrastructure to administer the section 404 program. Two States included cost estimates for IT infrastructure or technology upgrades required to administer the section 404 program in their feasibility studies (Section II.B.1.1.3). Minnesota estimated a one-time cost of $3 million to set up an online permitting and reporting system (Minnesota Department of Natural Resources & Minnesota Board of Water and Soil Resources, 2017), while Virginia estimated IT infrastructure upgrade costs of approximately $3.5 million over three years (Virginia Department of Environmental Quality, 2012). IT infrastructure costs may vary by Tribe or State. Factors that may influence IT infrastructure costs under the baseline include prior infrastructure, permit volume (*i.e.,* processing speed and memory space required for the anticipated volume of permits), and desired system complexity. Tribes and States that anticipate upgrading their IT infrastructure to administer the section 404 program can apply for grants under CWA section 104(b)(3) to cover part or all of the costs.[29,30]

II.B.4.1.1.2.4 Effect of Prior State-Level Water Resource Protection Programs on Initial Costs

Forty-four States have some form of dredged and fill permitting programs or regulatory mechanisms for protecting State waters (U.S. EPA and Army, 2022). State-level programs vary in comprehensiveness and scope of waters covered, with some focused on protecting special resources and others protecting waters not currently defined as "waters of the United States" (*i.e.,* not covered under the CWA). The two States currently administering the section 404 program (Michigan and New Jersey) have authority to issue permits for dredged and fill activities affecting a broader scope of waters than "waters of the United States" (U.S. EPA and Army, 2022). Additionally, 84 Tribes have TAS for a Water Quality Standards Program under CWA section 303(c), and 83 Tribes have section 401 TAS (U.S. EPA, 2023a4).

The effect of prior water resource protection programs on section 404 assumption costs is uncertain. Tribes and States with prior programs may be more familiar with environmental permitting processes, which may help reduce initial assumption and administration costs. An investigation into section 404 assumption obstacles determined that many States without prior programs in place did not progress as far into the assumption process as States with prior programs (Hurld & Linn, 2008). However, revising prior laws to meet section 404 requirements can take years (*e.g.,* as summarized in Section II.B.1.1.3.3 above, Minnesota estimates two years). Because prior water resource programs are highly variable and State-specific, EPA cannot quantify the effect of such programs on section 404 assumption costs.

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[29] 40 CFR part 35.600(b) describes how, under CWA section 104(b)(3), "EPA awards Water Quality Cooperative Agreements for investigations, experiments, training, demonstrations, surveys, and studies relating to the causes, effects, extent, prevention, reduction, and elimination of water pollution. EPA issues guidance each year advising EPA regions and headquarters regarding appropriate priorities for funding for this program. This guidance may include such focus areas as National Pollutant Discharge Elimination System watershed permitting, urban wet weather programs, or innovative pretreatment programs and biosolids projects."

[30] Although the use of CWA grant funds would reduce the cost burden of IT infrastructure upgrades on Tribes and States, from an economic perspective, the use of grant funds is simply a transfer and does not reduce the overall social costs of IT infrastructure upgrades.

II.B.4.1.1.3 Program Revisions

If Tribes or States revise their programs following assumption, they will incur additional costs to meet the requirements in the prior regulations at 40 CFR 233.16 (2023). The Agency currently estimates it would take a State or Tribe 385 hours to complete program revisions. Based on information provided in the supporting statement and adjusting for salary inflation (2024 revised hourly wage of $34.76; 1.6 overhead multiplier), if approved programs required revisions, the estimated baseline cost for a single program to complete program modifications is $21,412 (EPA ICR Number 0220.18, OMB Control Number 2040-0168).

Beyond official program revisions, EPA can also actively request information from Tribes and States if it suspects that circumstances have changed for their program. Upon receipt of such a request, Tribes and States are required to provide the requested documents. EPA can also request a supplemental Attorney General's statement, program description, or other information as necessary to evaluate the program's compliance with CWA requirements. Responding to such information requests from EPA, if applicable, would impose additional burden on Tribal and State programs. These efforts are captured in the estimates above.

II.B.4.1.1.4 Federal Costs to Review Program Submissions and Revisions

EPA incurs costs as a result of reviewing the program submission package and revisions. Under the prior regulations, the Agency estimated 400 hours to review a single program submission. Based on an hourly wage of $49.55[31], the estimated labor cost for the Agency to review a program submission package (which includes a 1.6 overhead multiplier[32]) for a single program is $31,712.[33] The costs associated with this activity are a one-time cost per program. The Agency costs to review a program submission package are dependent on the completeness of the Tribe or States program submission package.

EPA estimated that it would take approximately 55 hours to review non-substantial revisions and 111 hours to review substantial program modifications. Based on an hourly wage of $49.55 (2024 GS-13 federal hourly wage and accounting for the 1.6 overhead multiplier), the labor costs for the Agency to review non-substantial and substantial program revisions for a single program are $4,360 and $8,800, respectively.

II.B.4.2 Permit Requirements, Program Operation, and Compliance and Enforcement

This section describes annual baseline costs that Tribes and States incur to implement the section 404 program under the prior regulations. Estimates from feasibility studies in this section are intended to include only ongoing, annual costs of implementing the section 404 program. However, it is important to note that estimates provided in a State's feasibility study may also capture some initial costs (*e.g.,* average

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[31] 2024 Federal employee hourly wages for GS-13 Step 1 were sourced from Office of Personnel Management at https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/24Tables/html/RUS_h.aspx.

[32] Overhead factor estimates total compensation (wages and employment benefits).

[33] EPA ICR Number 0220.16, OMB Control Number 2040-0168 (U.S. EPA, 2021a). All baseline estimates for federal burden in Section II.B.4 of this economic analysis are from this prior version of the ICR for CWA section 404 State-assumed programs.

staffing needs estimates that account for higher staffing needs during the first few years of program implementation). These studies do not account for changes in assumable waters following the *Sackett* opinion (*see* Section II.B.3). The Agency anticipates that, due to changes in assumable waters following the *Sackett* opinion, States that have assumed the section 404 program or explored assumption via feasibility studies prior to the *Sackett* opinion may have fewer section 404 permits to process moving forward relative to permit volume in previous years. It is unclear whether the reduction in section 404 permits would lead to a reduction in staff needs, however, as Tribes and States may still issue permits for these discharges under Tribal or State law. As a result, the estimates summarized in this section may overestimate ongoing, annual staffing needs and costs.

II.B.4.2.1 Tribe and State Annual Costs

II.B.4.2.1.1 Full-time Staffing Needs

The main recurring cost for Tribes and States after assuming the section 404 program is for the staff needed to issue and process permits as well as enforce permit requirements. Michigan, for example, budgets for 82 FTE staff to administer their section 404 program (Michigan EGLE, 2020). In another example, Florida originally anticipated that the 212 employees administering their State Environmental Resource Permit program could simultaneously manage the section 404 permitting workload; however, as described in Florida's draft annual report, Florida received a larger than anticipated number of section 404 permit applications after approval of its program and sought to hire an additional 33 staff members (Florida Department of Environmental Protection, 2022). Several State feasibility studies (Section II.B.1.1.3) estimated the number of additional staff needed to administer the section 404 program: 10 for Arizona (Arizona Department of Environmental Quality, 2018), 30.7 for Nebraska (Nebraska Department of Environment and Energy, 2021), 40 for Virginia (Virginia Department of Environmental Quality, 2012), and 11.9 for Wisconsin (State of Wisconsin, 2022).[34] Staffing needs for each Tribe and State will vary based on numerous factors, including the number of prior staff with time available for the section 404 program, average annual permit volume, enforcement demands, and average permit review time. Staffing needs may also vary over time, with more staff needed shortly after assuming the program versus after program implementation methods are well-established (*e.g.,* Wisconsin; see Section II.B.1.1.3).

Some permits will require more staff time to process than others. For example, permits for large, complex projects typically require more staff time than small projects with minimal mitigation requirements. Corps permit staff often engage with permit applicants early in the planning process for large, complex projects to avoid delays later in the process (USACE, n.d.). General permits typically require less processing time than individual permits. Tribes and States where nearly all issued section 404 permits are general permits (*e.g.,* Pennsylvania, West Virginia) may require less staff than Tribes and States with higher proportions of individual permits (*e.g.,* Florida, Louisiana; *see* Appendix B). However, since Appendix B shows the number of general and individual section 404 permits issued by the Corps in both assumable and retained waters, the proportions of individual and general permits that States would issue after assuming the program may differ after accounting for waters retained by the Corps and the associated permit volume.

[34] The Wisconsin feasibility study clearly indicated that staffing needs would be higher in the first four years of program implementation (16.4 additional staff) than in subsequent years (11.9 additional staff).

In addition to staff for permit issuance, Tribes and States may require legal support to enforce permit requirements and address non-compliance issues (*see* Section II.A.3).

Tribal or State assumption of the section 404 program would likely require staff increases at the Tribal or State agency to process and review applications, issue permits, and enforce permit requirements (*see* Section II.B.4.2.1.1). Transferring section 404 permitting authority to a Tribe or State allows Corps staff to focus on other tasks.

II.B.4.2.1.2 Development of the Annual Program Report

Tribes or States that have assumed the section 404 program must submit an annual report summarizing and assessing their program to EPA. Michigan and New Jersey estimated it takes approximately 120 and 100 hours annually, respectively, to develop their annual reports (*See* Supporting Statement for the ICR for the Final Rule) (EPA ICR Number 0220.18, OMB Control Number 2040-0168). Using an average burden estimate of 110 hours, an updated hourly wage of $34.76, and an overhead multiplier of 1.6, the estimated baseline cost per State to develop an annual report is $6,118, or $18,354 for three States at 110 hours each.[35]

II.B.4.2.2 Baseline Costs Incurred by Permittees

States that have assumed section 404 programs have set section 404 permit fees that are higher than the Corps' fees (Section II.B.1.1.2). States that assessed permit fee structures in their feasibility study (*e.g.,* Alaska, Arizona, Nebraska, and Virginia) stated that their section 404 permit fees would need to be higher than the Corps' fees if they assumed the program (Section II.B.1.1.3). Overall, permittees will likely pay higher permit fees when Tribes or States assume the section 404 program.[36] However, in some cases permittees have indicated a willingness to pay higher fees to gain other potential benefits of Tribal- or State-administered section 404 programs, including faster permit processing time, reduced duplication of application materials, increased consistency in permit decisions, application of local knowledge, and a single point of contact (Hurld & Linn, 2008; Virginia Department of Environmental Quality, 2012).

Permittees in Michigan view the higher permit fees as part of the cost of doing business. When EPA reviewed Michigan's section 404 program and identified several deficiencies that required corrective actions (U.S. EPA, 2008), Michigan's Wetland Advisory Council—which was comprised of stakeholders representing local government, wetland and conservation organizations, farm organizations, businesses, and the general public—was unanimous in its preference that Michigan should retain its approved section 404 program (Wetland Advisory Council, 2012). Michigan permittees advocated for Michigan to retain the program when the State considered returning the program to the federal government due to budgetary

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[35] 2024 Federal employee hourly wages for GS-11 Step 1 were sourced from Office of Personnel Management at https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/24Tables/html/RUS_h.aspx.

[36] However, permittees may not necessarily face higher fees from Tribal and State program assumption and could even experience lower fees in certain cases. For example, Tribes or States that charge permit fees as part of a prior water resource protection program may choose not to increase permit prices upon assumption of the section 404 program (*e.g.,* Florida; *see* Section II.B.1.1.2). In such cases, section 404 permittees would experience small cost savings for permits on waters that previously required both federal and Tribal or State permits since they would no longer need to pay the application fee to the Corps.

issues, stating that they would rather pay higher fees than have the program returned to the federal government (Association of State Wetland Managers, 2010).

II.B.4.3 Federal Oversight

EPA is responsible for oversight of assumed Tribal and State programs to ensure that the programs are consistent with applicable requirements of the CWA and that Tribal and State permit decisions adequately consider, minimize, and compensate for anticipated impacts as per the 404(b)(1) Guidelines. This section describes baseline costs associated with reviewing a Tribe or States program submission and revisions, permit applications and program's annual report, and actions associated with program withdrawal.

II.B.4.3.1 Review of Non-Waived Permits

The Tribe or State and EPA will include categories of permits for which EPA will not waive review in the joint MOA. Among States with assumed section 404 programs, EPA retains the authority to review all permit applications received by the Tribe or State as part of Agency oversight of assumed programs. During the first few years of assumption by a Tribe or State, EPA may engage in closer oversight and review of permit applications.

Based on EPA burden estimates to review a single permit and the total number of permits received in States with approved programs, the total burden for the Agency to review 404 permits received in Florida, Michigan, and New Jersey was 3,762 hours.[37] Adjusting for inflation at an hourly wage of $41.67[38] (and overhead of 1.6), the total is $250,820. It is important to note the estimates to review a single permit did not distinguish between permit type (*e.g.,* individual, general, or emergency). The estimated baseline cost to the Agency is highly variable since it is tied to the number of permits received in each State, and the number of permits received in each State varies by year. EPA's permit reviews will vary by Tribe or State depending upon the local resources and the categories of permits which are listed in the MOA requiring EPA review. Permit review time may vary by the complexity of the project.

II.B.4.3.2 Annual Report Review

EPA reviews annual reports from each Tribal or State program as part of its oversight responsibilities to assess whether the programs meet regulatory requirements. The annual report helps Tribes and States evaluate their program, identify trends and/or problems, and propose solutions to any identified problems (*see* Section II.A.4.2 for additional information about the annual report and the minimum requirements). Under prior regulations, the Agency estimated it takes approximately 40 hours to review a submitted annual report. Based on an hourly wage of $41.67 and accounting for a 1.6 overhead, the estimated baseline costs for the Agency to review a single program's annual report is $2,667. Costs to the Agency may vary depending on the quality of the submitted report and if additional requests to the approved program are needed to help clarify any issues raised in the report. If EPA determines that a Tribal or State assumed program is not administered in accordance with regulatory requirements, EPA works with the

[37] At the time of EPA ICR Number 0220.16 (OMB Control Number 2040-0168), burden hour estimates for the Agency to review permits included the State of Florida because the program was approved at the time.

[38] 2024 Federal hourly wage for a GS-12 Step 1 was sourced from the Office of Personnel Management at https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/24Tables/html/RUS_h.aspx.

Tribe or State to address deficiencies identified or, if necessary/warranted, initiates withdrawal of the assumed program.

II.B.4.3.3 Withdrawal

Under the prior regulations, there are no existing data available to inform the baseline costs associated with a withdrawal request initiated by EPA for 404(g) specifically. The Agency estimates that under the prior regulations, the adjudicatory process would take several months, at minimum, and require full time efforts of at least 4-5 Tribal or State employees and a similar number of EPA employees during that time.

II.B.4.3.4 Costs States Incur from Federal Oversight Activities

Tribes and States with assumed programs may incur additional costs from certain federal oversight activities. For example, Tribes and States need to coordinate with EPA on any permits subject to EPA review, respond to questions from EPA about the program annual report or revise a submitted annual report to comply with the requirements specified in 40 CFR 233.52 (2023) or respond to questions from EPA, and respond to any EPA correspondence related to program revision or compliance concerns. If EPA exercised its program withdrawal authority, the Tribe or State with the withdrawn program would likely incur additional costs to provide relevant materials to the Corps. These additional costs are not captured in the baseline costs because they are infrequent and/or difficult to quantify.

II.B.4.4 Treatment in a Similar Manner as a State Costs

Baseline costs for eligible Tribes to assume the section 404 program under the prior regulations are expected to be similar to the baseline costs for States assuming the section 404 program, which are discussed in the sections above. However, as discussed in Section II.A.5, Tribes must have TAS for section 404 to assume the section 404 program. The ICR associated with this rulemaking currently estimates the associated burden and labor costs at 0 hours and $0 because the Agency does not believe that any Tribes will submit a program submission request during the collection period. However, if a Tribe were interested, the Agency estimates that the burden for a Tribe to obtain TAS for section 404 would be approximately 161 hours and $12,028 in labor costs. This baseline cost is based on an GS-11, Step 1 hourly salary of $34.76[39] and an overhead factor of 1.6, as well as the $3,074 contractor's fee. As discussed in the supporting statement of the ICR, these baseline estimates are based on best available data and may be revised as more data become available (EPA ICR Number 0220.18, OMB Control Number 2040-0168).

[39] The Agency relies on federal salary wages to extrapolate labor costs from burden because we do not have comparable information for Tribal staff. 2024 GS-11 Step 1 Salaries were accessed at https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/24Tables/html/RUS_h.aspx.

III Changes Resulting from the Final Rule

EPA is finalizing the first comprehensive revisions since 1988 to the regulations governing CWA section 404 Tribal and State program (40 CFR part 233). The primary purpose of the revisions is to respond to longstanding requests from Tribes and States to clarify the requirements and processes to assume and administer a CWA section 404 program. 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.

This section of the economic analysis assesses incremental costs and benefits resulting from the final rule relative to the baseline (Section II). Due to the paucity of data, small sample size, and uncertainties, the potential costs and benefits impact assessment between the final rule and the baseline conditions is qualitative (*see* Section VI for more details). As previously described in Section II.B.3, the Supreme Court's decision in *Sackett*, as reflected in the Conforming Rule, reduced the overall scope of jurisdictional waters of the United States. As related to this rule, fewer waters of the United States are available to be assumed under the section 404 program. Consequently, EPA anticipates that Tribes and States that have assumed the section 404 program may have fewer section 404 permits to process than previously. It is unclear whether the reduction in section 404 permits would lead to a reduction in staff needs, however, as Tribes and States may still issue permits for these discharges under Tribal or State law. EPA also anticipates that fewer Tribes and States will assume the dredged and fill program under CWA section 404(g).

EPA uses several terms to describe potential impacts. EPA uses "positive" when referring to incremental benefits, "cost savings" when referring to cost reductions, and "incremental costs" when referring to cost increases. The terms "no associated change" and "*de minimis*" indicate the magnitude of anticipated impacts under the final rule. The term "no anticipated change" indicates that any regulatory changes under the final rule align with prior practice and, thus, have no impacts on costs or benefits relative to practices associated with the prior requirements (reported as "none" in the final summary table). The term "*de minimis"* is used when anticipated impacts are negligible.

This section is organized to focus the discussion on changes in the final rule that EPA expects to have economic impacts, with provisions categorized as (1) general requirements; (2) program approval and revisions; (3) permit requirements, program operations, and compliance evaluation and enforcement; and (4) federal oversight; and (5) tribal eligibility. Technical revisions (*e.g.,* 40 CFR part 232 and 40 CFR part 124) were not considered in the assessment because the Agency determined these minor or technical changes to the regulations do not have any change in the requirements and thus have no associated economic impact (*see* Final Rule Preamble Section "Technical Revisions" for further discussion of these changes).

III.A General Requirements

III.A.1 Prior Regulations on General Requirements

The prior regulations prohibited partial or phased assumption. The prior regulations required programs to be administered in accordance with the requirements of the Act (including complying with the 404(b)(1) Guidelines) and required that the programs be no less stringent than federal requirements. Numerous mechanisms existed for EPA to oversee Tribal or State programs. Conflict of interest and permit self-issuance provisions already exist for Tribal and State employees.

III.A.2 Changes to General Requirements

While technical edits were made to the partial assumption provision, the regulations still prohibit partial or phased assumption (section 233.1(b)). The regulations already required that CWA section 404 permits issued by an assuming Tribe or State must comply with the CWA, including the 404(b)(1) Guidelines, and that the programs may not impose less stringent conditions. The Agency revised the general requirements to clarify that the Tribe or State's program may not make one requirement more lenient than required as a tradeoff for making another more stringent than required (section 233.1I). The Agency is not adding further regulatory text addressing how Tribes and States may ensure compliance with the CWA 404(b)(1) Guidelines since it was already required under prior regulations as well as CWA section 404(h)(1)(A)(i). Instead, EPA discussed various approaches that Tribes and States can undertake to demonstrate they have sufficient authority to issue permits that apply and assure compliance with the CWA 404(b)(1) Guidelines. Furthermore, the revision to section 233.1(e) codifies the Agency's long-held position that the Tribe or State is responsible for administering all portions of a CWA section 404(g) Program. This additional regulatory text clarifies that the Director of the approved Tribe or State program shall administer all actions or responsibilities where there are references to the District Engineer or Corps of Engineers in the 404(b)(1) Guidelines or other regulations affecting State 404 assumption.

Regarding dispute resolution, 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. The final rule adds a new provision (section 233.1(f)) that clarifies EPA may facilitate the resolution of disputes between the federal agencies and the Tribe or State seeking to assume and/or administer a section 404 program. Additionally, it allows Tribal or State MOAs to outline procedures for resolution or elevation procedures or address disputes on a case-by-case basis (40 CFR 233.4). Under the final rule, the conflict of interest provision was revised to specify that individuals who exercise responsibilities over the section 404 permitting program may not be involved in any matters in which they have a direct personal or pecuniary interest. The final revisions also clarify that this provision applies to decisions by the Tribal or State permitting agency as well as any entity that reviews decisions of the agency.

III.A.3 Potential Impacts Associated with Revisions to General Requirements

The Agency has concluded that there is no associated change of regulatory practices from the final rule provisions on partial or phased assumption, ensuring program consistency with the CWA (*i.e.,* no less stringent than), and 404(b)(1) Guidelines. These revisions clarify the Agency's longstanding principles and help ensure consistency implementing the section 404 program. Because the conflict of interest

provision only affects who may be involved and does not affect the level of effort, the Agency has determined there is no associated change to costs.

Regarding dispute resolution, the final rule clarifies that EPA may facilitate the resolution of disputes between Tribes or States and federal agencies. Additionally, it allows the Tribal or State MOA to outline procedures for resolution or elevation procedures or address disputes on a case-by-case basis. At least one commenter noted that the disputes would pose "potentially significant costs on States." However, disputes can occur under the prior regulations. The final rule provides clarifications regarding EPA's role in dispute resolution and encourages Tribes and States to establish a dispute resolution procedure before disputes occur. Prior CWA section 404(g) regulations already provide a number of mechanisms for resolving disputes. For example, Tribes or States must provide for administrative and judicial procedures, and EPA already provides comments on Tribal or State permits. Furthermore, EPA views the clarification provided in the new general provision at section 233.1(f) as consistent with its program approval and oversight authority in CWA sections 404(h)-(j). Therefore, the Agency concludes that this provision may result in cost savings to Tribes and States by providing additional clarity for dispute resolution relative to practice under the prior regulations. Clearer dispute resolution procedures will also provide cost savings for permittees by reducing delays when permit disputes do occur. To the extent that the provision leads Tribes and States to more frequently reach out to EPA to facilitate dispute resolution is uncertain; however, there may be a potential shift in associated costs from Tribes or States to EPA.

III.B Program Approval and Revisions

Several revisions were made to the program approval and revisions requirements, including the program description, process for identifying retained waters, compensatory mitigation, and the effective transfer date of the program. Some of the revisions to the program approval requirements warrant further explanation and thus are described separately.

III.B.1 Program Approval Requirements

III.B.1.1 Prior Regulations on Program Description

The prior regulations require that a Tribe's or State's program submission contains information about available funding, workforce, and compliance evaluation and enforcement programs. However, the prior regulations do not specify that the available funding and workforce must be sufficient to meet the requirements of subparts C through E or that the Tribe's or State's compliance evaluation and enforcement programs must be sufficient to meet the requirements of subpart E.

III.B.1.2 Changes to Program Description Requirements

The Agency is revising 40 CFR 233.11(d) and (h) to clarify that as part of the program submission for program assumption, Tribes and States 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 (sufficient to meet the requirements of both 40 CFR part 233, subpart C and subpart E). If more than one Tribe or 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. The final 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.

The final rule requires Tribe or State agencies to describe how the agency's permit review criteria will satisfy 40 CFR part 233, subpart C. These revisions do not substantively change the requirements for permit review, program operation, and compliance and enforcement programs; rather, these revisions ensure that Tribes or States provide EPA with sufficient information. Tribal or State programs would estimate the agency's anticipated number of permit reviews, authorizations, field visits, and decisions in applications for program assumption. EPA is revising the program description requirement such 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.

III.B.1.3 Potential Impacts Associated with Program Approval Requirements

Since Tribes and States are already required to include descriptions of available funding, staffing, and compliance evaluation and enforcement programs in their program submissions, the final rule provision is not a substantial change from the prior regulations as it only clarifies the types of descriptions of staffing and funding to include with program submissions; thus, the Agency concluded that the economic impacts of the changes to the program assumption requirements are *de minimis*. Under the prior regulations, Tribes and States are already spending time to include information supporting their ability to assume the program in their program submission packages, and EPA is already considering this information and the Tribe's or State's ability to implement the program when reviewing the submission. The revisions do have the following benefits: (1) provide additional clarity to Tribes and States regarding the level of detail about available funding, staffing, and compliance evaluation and enforcement programs that should be included in the program submission; (2) address concerns expressed during EPA's engagement with Tribes and States and other organizations that there are no thresholds to ensure a State is capable of adequately administering the section 404 program; and (3) expedite EPA's review of Tribes' and States' program submissions by ensuring applicants have met or intend to meet specific budget and staffing demands prior to submission.

Since EPA already considers a Tribe's or State's ability to implement the section 404(g) program when reviewing the program submission under the prior regulations, the additional clarity in the final rule provision may actually reduce costs by reducing the potential need to provide additional information or resubmit a program submission, as Tribes and States are more likely to meet the information requirements in their initial submission. However, the additional clarity may cause Tribes and States to spend more time developing descriptions to include in the program submission, and may also minimally increase EPA's and other federal cooperating agencies review burden. The Agency expects that the effects of reducing multiple submissions outweighs the additional time required for initial applications and reviews, but this is not certain; regardless, the Agency concluded that the costs of program assumption requirements to Tribes and States and federal agencies are *de minimis*. The program submission requirement changes under the final rule should have no impact on the review process for permittee.

III.B.2 Identifying Retained Waters

III.B.2.1 Prior Regulations on Identifying Retained Waters

Section 404(g)(1) of the CWA specifies that Tribes or States desiring to administer their own section 404 program may do so for the navigable waters within their jurisdiction, with the exception 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 all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto" (33 U.S.C. 1344(g)(1)). Under the prior regulations at 40 CFR 233.11 (2023), Tribes and States submitting a section 404 program submission for program approval must 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." In addition, the prior regulations state that the MOA 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)). The prior regulations do not include a process for identifying retained waters.

III.B.2.2 Changes to Identifying Retained Waters

The Agency is finalizing a procedure at section 233.11(i) for determining the extent of waters retained by the Corps following Tribal or State assumption of the section 404 program. First, before the Tribe or State submits its assumption request to EPA, the Tribe or State must submit a request to EPA that the Corps identify the subset of waters of the United States that would remain subject to Corps section 404 administrative authority following assumption. 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, which the Corps may consider in developing its description.

If the Corps notifies the Tribe or State 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 will have 180 days from the receipt of the request transmitted by EPA to provide a retained waters description to the Tribe or State. If the Corps does not notify the Tribe or State within 30 days 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, the Tribe or State may develop the retained waters description.

Under the final rule, the Corps or the Tribe or State shall prepare the retained waters description as follows:

> (1) using the prior Rivers and Harbors Act (RHA) section 10 list(s) as a starting point;
>
> (2) place "waters of the United States," or reaches of those waters, from the RHA section 10 list(s) into the retained waters description if they are known to be presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce;
>
> (3) to the extent feasible and to the extent that information is available, add other waters or reaches of water 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, including all waters which are subject to the ebb and flow of the tide; and
>
> (4) add a description of wetlands that are adjacent to the foregoing waters.

In addition, when developing the retained waters description for State assumption, the description should include waters in Indian country as appropriate. 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 a State has authority to regulate discharges into waters in Indian country.

The final rule specifies that as a default following Tribal and State assumption, the Corps retains administrative authority over all jurisdictional wetlands "adjacent" to retained waters, as that term is defined in 40 CFR 120.2(c). However, 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.

EPA is also requiring the program description to specify 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(h)(i)(1)). Finally, EPA is 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 MOA procedures for joint processing of Federal and State permits, including joint public notice and public hearings" (40 CFR 233.14(b)(2)).

Lastly, EPA is revising which modifications to the retained waters description are considered substantial revisions. *See* Section III.B.5 for additional details and an assessment of potential impacts associated with this revision.

III.B.2.3 Potential Impacts Associated with Identifying Retained Waters

As discussed in Section II.B.1.1.3, multiple States that conducted feasibility studies on assuming the section 404 program cited lack of clarity in section 404(g)(1), which describes which waters Tribes or States can assume and which waters are retained by the Corps, as a reason for ultimately not pursuing

assumption. The lack of additional guidance on section 404(g)(1) in the prior program regulations (40 CFR part 233 (2023)) and uncertainty regarding the scope of "waters of the United States" generally has contributed to Tribes and States expressing difficulties identifying which waters are assumable versus retained.

The final rule procedure for determining the extent of waters over which the Corps would retain administrative authority following Tribal or State assumption will likely generate net benefits for those Tribes and States assuming the section 404 program. The use of RHA section 10 lists as a starting point for determining waters retained by the Corps will improve the predictability of retained waters. The improved predictability will help Tribes and States develop more accurate program assumption plans, potentially reduce assumption investigation costs, and increase permitting efficiency during the program's administration. Determining which waters are presently used or susceptible to use as a means to transport interstate or foreign commerce is, to some extent, inherently a case-specific process. EPA anticipates that the revised process will improve predictability of which waters are retained and reduce the need for the Corps to identify retained waters on a case-by-case basis when it receives a permit. Since States have said that the use of case-by-case determinations diminishes potential gains in permitting efficiency from State assumption (*see* Section II.B.1.1.3.3), the revised procedure will help Tribes and States retain gains in permitting efficiency from State assumption.

A Tribe or State may incur costs to develop documents showing that it has taken concrete and substantial steps toward program assumption, which is required to begin the retained waters description process. However, since such documentation would also be included in the program submission, EPA anticipates no incremental burden from this revision and thus no associated change. The documentation requirement to initiate the retained waters description process requires Tribes and States to provide such documentation to EPA sooner than it would otherwise (*i.e.,* while still investigating assumption or compiling the program submission).

The Agency anticipates that, overall, the retained waters provision will have net benefits accruing to and cost savings realized by Tribes and States assuming the section 404 program resulting from increased predictability and greater ease in identifying retained waters. These net benefits and cost savings will likely be higher if the Corps develops the retained waters description versus the Tribe or State developing the retained waters description using the same approach; time that Tribes or States spend developing the retained waters description would counteract at least some of their cost savings from the retained waters-related changes.

Permittees subject to assumed section 404 programs may experience cost savings and permitting efficiency from increased clarity regarding which agency has permitting authority over a given waterbody. Without a clear retained waters description, permittees could be uncertain about which agency has jurisdiction for a given project, which could delay the permitting process. A clear retained waters description will also help permittees determine if their project spans more than one jurisdiction (*i.e.,* if both retained and assumed waters are affected).

EPA and the Corps may face additional upfront costs associated with the revised process for Tribes and States to identify retained waters. EPA may spend additional time related to reviewing program submissions, including (1) reviewing the Tribe's or State's request to the Corps for the required information and (2) transmitting the request, if complete, to the Corps. EPA will also incur minimal costs

to notify the public when it transmits a State's or Tribe's request to the Corps to develop the retained waters description. The Corps may spend time (1) developing the retained waters description per the process described in the final rule and summarized above and (2) reviewing public input provided about the retained waters description during the 60-day interval following EPA's public notification. However, the description of retained waters and how to coordinate permitting for projects that may have discharges into both assumed and retained waters have always been required as part of the MOAs and program description, so EPA anticipates *de minimis* incremental costs for these two requirements. Additionally, efficiencies resulting from clarifications about the procedure may override any incremental costs to EPA and the Corps.

III.B.3 Mitigation

III.B.3.1 Prior Regulations on Mitigation

The prior regulations[40] required programs to be no less stringent and pointed to other existing mitigation structures. For example, under the prior regulations, subpart C of 404(g) required all permits to comply with the Act or regulations thereunder, including section 404(b)(1) Guidelines. Furthermore, the regulations stipulated that the discharge shall be conducted in a manner which minimizes adverse impacts and set forth requirements for restoration and mitigation (40 CFR 233.23(c)(9) (2023)).

III.B.3.2 Changes to Mitigation Requirements

Under the final rule, the new provision at 233.11(k) 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 of the CWA 404(b)(1) Guidelines (40 CFR part 230). This new provision clarifies that the Tribe's or State's approach to compensatory mitigation may deviate from the specific requirements of subpart J to the extent necessary to reflect Tribe or State administration of the program as opposed to Corps administration. The new provision 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.

III.B.3.3 Potential Impacts Associated with Mitigation

This new requirement may impose a *de minimis* addition of time and resource burden to Tribes and States when developing their program submission; however, since prior regulations (40 CFR 233.23(c)(9) (2023)) required mitigation associated with discharges, EPA was already considering Tribal and State mitigation approaches during program approvals. Thus, this provision is likely to have *de minimis* impacts on Tribes or States. Since the regulatory changes primarily impact the program submission requirements, EPA anticipates no impacts to permittees.

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[40] Changes to mitigation requirements in the regulations are described in this section (Section III.B.3) and Section III.D.3. Section III.B.3 clarifies mitigation authority, and Section III.D.3 discusses a new provision allowing for federal oversight of third-party mitigation instruments.

III.B.4 Effective Date

III.B.4.1 Prior Effective Date Regulations

The prior regulations state that the transfer of permitting authority to a Tribe or State shall not be considered effective until notice of EPA's program approval appears in the *FR*.

III.B.4.2 Changes to the Effective Date

EPA is revising 40 CFR 233.13(b)(5) to provide that the transfer of an approved section 404 program to a Tribe or State takes effect 30 days after publication of the notice of EPA's decision in the *FR*, except where EPA and the Tribe or State have established a later effective date, not to exceed 180 days from the date of publication of the decision in the *FR*. EPA will allow more than 30 days only when a Tribe or State's specific circumstances support the need for additional time before assuming administration of the program. The effective date will be specified in the MOA with EPA and the published *FR* notice, and the program description will specify the steps the Tribe or State will take, if any, after EPA approval to administer its program (*e.g.,* timeline for hiring and training staff).

III.B.4.3 Potential Impacts Associated with a Delayed Effective Date

Allowing Tribes and States some flexibility to set the effective date for transferring the section 404 program from the Corps will provide them with the additional time needed to implement changes required to administer the program. As discussed in Section II.B.4.1.1.2, initial implementation costs to administer the program may include hiring and training costs for staff as well as IT infrastructure costs for data storage and processing. EPA expects that Tribes and States will begin these processes prior to EPA's approval, and indeed, they will need to detail many of their staffing and similar plans in the program submission. However, Tribes and States may need to wait to take certain steps until EPA has approved their program. Allowing Tribes and States 30 days (by default, and up to 180 days) between program approval and the effective date provides added flexibility for Tribes and States to ramp up the capabilities required to administer the program and provides time for funds to be released for program administration, particularly for Tribes and States with no prior dredged or fill program. Efforts to more clearly define when program administration responsibilities transfer from the Corps to the Tribe or State provide additional clarity for permittees regarding the appropriate contact for any permit-related communications and potentially reduce costs for these permittees during the transition. Providing advanced notice of the date of program transfer also benefits the federal cooperating agencies and the public, including permittees, by supporting the smooth transition of program functions while limiting uncertainty that could arise with a longer or uncertain transition period.

III.B.5 Program Revisions

III.B.5.1 Prior Regulations Program Revisions

Prior regulations required that any proposed or actual changes to the assumed program be revised within one year of the promulgation of such regulations, or two years if the revisions require statutory changes. Program modifications require submission of a modified program description to EPA and approval of the revisions by the Regional Administrator. Revisions may be minor, requiring a letter of approval from the Regional Administrator, or substantial, which require public notice, a public hearing and publication of

the decision by the Regional Administrator in the *FR*. Substantial revisions include but are not limited to certain revisions that affect the area of jurisdiction, scope of activities regulated, criteria for the review of permits, public participation, or enforcement capabilities. Tribes and States may also need to provide a supplemental Attorney General's statement, program description, or other documents as necessary if EPA suspects that circumstances have changed for the program and requests such materials to evaluate the program's compliance with the requirements of the CWA.

III.B.5.2 Changes to the Program Revisions

The Agency is finalizing revisions to section 233.16(d)(2) and (3) to clarify procedures for notifying EPA and Tribal leaders regarding non-substantial and substantial revisions. The revised procedures clarify how the EPA Regional Administrator will notify other interested parties (*e.g.,* other federal agencies, the public) about non-substantial revisions (40 CFR 233.16(d)(2)). The revised regulations also remove "area of jurisdiction" from the list of program revisions that will always be considered substantial and replace it with language specifying that modifications to the extent of the retained waters description, other than *de minimis* removals, always constitute substantial revisions to a Tribal or State program (40 CFR 233.16(d)(3)). The new provision is more limited in scope since it exempts *de minimis* removals from the retained waters description from being considered a substantial revision. Lastly, additions to 40 CFR 233.16(d)(3) specify that revisions to an approved Tribal CWA section 404 program are substantial where they would add reservation areas to the scope of its approved program.

III.B.5.3 Potential Impacts Associated with Program Revisions

This provision of the final rule provides clarity to Tribes and States, EPA, and other stakeholders regarding the notification procedures for non-substantial and substantial revisions. By exempting *de minimis* removals from the retained waters description from being considered a substantial revision, this provision could reduce costs to the Corps, EPA, and other federal cooperating agencies associated with revisions to the retained waters description since the substantial revision notification procedure is much more extensive than the notification procedure for non-substantial revisions. EPA retains the flexibility to deem changes to the retained waters description as substantial revisions. The final rule provision also adds additional examples to the regulatory text of modifications that would always be considered substantial (40 CFR 233.16(d)(4)), including if an approved Tribal program seeks to add reservation area to its program scope, which provides *de minimis* clarity benefits to Tribes and States regarding the type of program modification that would be subject to the substantial revision notification procedure.

III.C Permit Requirements, Program Operations, and Compliance Evaluation and Enforcement

The Agency is finalizing revisions to prior provisions, as well as finalizing new provisions to clarify procedures and requirements for judicial review, long-term permitting, coordination requirements, and compliance and enforcement. The affected States process is described in Section II.A.5.

III.C.1 Judicial Review and Rights of Appeal

III.C.1.1 Prior Judicial Review Regulations

The prior regulations require the program description to describe the Tribe's or State's judicial review procedure but did not contain a corresponding substantive requirement for Tribal or State programs. Additionally, the prior regulations did not include discussion on the application of the judicial review requirement to Tribes who assumed the program.

III.C.1.2 Changes to Judicial Review

EPA is finalizing a provision that requires 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. This approach is intended to (1) implement the CWA's requirement for public participation in the permitting process and the requirement that State programs comply with all requirements of section 404, (2) implement the regulatory requirement that Tribal and State programs be no less stringent than the federal section 404 program, and (3) give meaning to the regulatory requirement that State program descriptions describe their judicial review procedures.

EPA is also codifying a requirement that Tribes must provide a commensurate form of citizen recourse for applicants and others affected by Tribe-issued permits. Consistent with the requirement applicable to States, that recourse 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.

III.C.1.3 Potential Impacts Associated with Judicial Review

The judicial review provision will not impose any additional burden on States; it simply codifies the substantive corollary to the program description requirement under the prior regulations, which requires States to describe their judicial review procedures. In addition, 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 requirements outlined in the CWA section 402 National Pollutant Discharge Elimination System that States authorize judicial review.

EPA anticipates minimal burden increases to Tribes with assumed section 404 programs from the codification of a requirement for Tribes to have a comparable judicial review process. EPA anticipates that this additional burden will result in incremental costs because Tribes will also have flexibility regarding how they meet this requirement. Although many Tribes have distinct judicial systems analogous to State judicial systems, others do not. EPA is not requiring Tribes to create new court systems or prescribing a single judicial option that may not be feasible with prior Tribal governmental structures. Rather, Tribes must ensure an appropriate means of citizen recourse as part of an approved Tribal section 404 program to comply with the judicial review provision of the final rule. This provision

will provide *de minimis* benefits to Tribes by requiring them to prepare clear procedures for potential legal challenges prior to program assumption, although EPA would have consulted with Tribes regarding judicial review under the prior regulations. Codification of the requirement for Tribes to have a comparable judicial review process also provides clarity to permit applicants and the public regarding their options to challenge permitting actions of a Tribe with an assumed section 404 program.

III.C.2 5-Year Limit on Permits and Long-Term Permits

III.C.2.1 Prior Long-Term Permit Requirements

Consistent with CWA section 404(h), the prior regulations limited to five years the duration of CWA section 404 permits issued by Tribes or States that assume the section 404 program (40 CFR 233.23(b) (2023)). However, EPA recognized certain projects by their nature may be long-term (*e.g.,* residential or commercial developments, energy or mining projects, transportation corridor development) and require section 404 permit coverage for long periods. The Agency was 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.

III.C.2.2 Changes to Long-Term Permit Requirements

EPA is finalizing revisions to sections 233.30(a) and 233.30(a)(5), which outline a process for permitting long-term projects that is consistent with the requirement that Tribal or State section 404 permits not exceed five years and that provides sufficient information for the Tribe or State to consider the full scope of impacts to the aquatic environment. To minimize unnecessary effort and paperwork, and to provide the Tribe or State and the public with information that can assist with the successful permitting of a project, the Agency is finalizing that applicants for projects with a planned schedule which may extend beyond the initial five-year permit application period submit a 404(b)(1) analysis for the full project with the application for the first five-year permit. For example, an applicant seeking permit coverage for a 15-year, multi-phase housing development project will provide information about all phases of the project, covering its full 15-year term, in its permit application. If this project were anticipated to involve the construction of two hundred homes in years 0-5, two hundred homes in years 5-10, and two hundred homes in years 10-15, the permit application will provide information about the construction of all six hundred homes.

This process will lead to more consistency and transparency in subsequent five-year permitting decisions since permitting Tribes and States will be provided with more complete information on project activities, but providing information about all phases of the project does not authorize dredged and fill activity beyond the five-year permit term. Unless there has been a "change in circumstances" related to an authorized activity, the same information should be provided in subsequent applications for later stages of the long-term project, such as applications authorizing activity in years 6-10 of the project, years 11-15 of the project, and so forth. The applicant will only need to modify the 404(b)(1) analysis for subsequent five-year permits if there has been a "change in circumstances" related to an authorized activity, based on the eight "change in circumstance" factors discussed in the preamble to the final rule (*see* Final Rule Preamble Section IV.C.1). However, 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 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).

Federal agency reviewers or members of the public may request that the applicant update the 404(b)(1) analysis but must submit information supporting the request. The Tribe or State would address why the request from the federal agency reviewer or member of the public was not granted as part of the record of decision for the permit.

To avoid a stoppage in work in the event a project anticipated to be completed within five years is not completed during that time, the Agency is requiring that an applicant must seek a new five-year permit at least 180 days prior to the expiration of the current permit to allow sufficient time for the application to be processed. However, 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.

EPA is also clarifying that all aspects of the permit application, public notice, and Tribal or State review requirements set forth in 40 CFR part 233.30, 233.32, and 233.34, respectively, apply to each permit application for projects that exceed a five-year construction schedule.

III.C.2.3 Potential Impacts Associated with Long-Term Permit Requirements

Although there is a higher upfront cost to permit applicants in providing a 404(b)(1) analysis for the full long-term project in the first five-year permit application, applicants will benefit from greater regulatory certainty in subsequent five-year permit decisions. EPA expects a streamlined permit application process for permits after the initial five-year permit application because the applicant and the Tribe or State will have already analyzed the full project, particularly if there is no "change in circumstances." The benefits in time savings for subsequent five-year permit applications and in regulatory certainty will likely override the incremental burden for the initial five-year permit application. However, the Tribe or State will incur some additional burden when reviewing subsequent five-year permit applications to assess whether a "change in circumstances" has occurred, providing written documentation if there has not been a "change in circumstances," and reviewing revised analysis for compliance with the 404(b)(1) Guidelines if a "change in circumstance" has occurred. Additionally, applicants will incur additional burden in cases when a "change in circumstances" requires modifications to the 404(b)(1) analysis for subsequent five-year permits. When considering all potential burden impacts of the long-term permitting process under the final rule, the Agency anticipates overall *de minimis* cost impacts for both applicants and Tribes and States since the impacts are primarily a cost shift from subsequent five-year permit applications to the initial application. The Agency also anticipates *de minimis* benefits for both permit applicants and Tribes and States from greater regulatory certainty resulting from more complete, upfront information in initial permit applications.

The long-term permitting process under the final rule ensures that permit applications consider impacts over the duration of the project (and not just the first five-year period of the project), increasing transparency and ensuring an accurate accounting of their cumulative impacts. As such, the process in the final rule will provide *de minimis* environmental benefits by ensuring that the scope of impacts associated with a complete project are factored into permitting decisions for each five-year permit.

III.C.3 Compliance Evaluation and Enforcement

III.C.3.1 Prior Regulations Compliance Evaluation and Enforcement

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 233.41(a)(3)(ii) (2023) did not clearly articulate EPA's the best interpretation of the statute.

III.C.3.2 Changes to Compliance Evaluation and Enforcement

EPA is finalizing revisions to the criminal enforcement requirements in 40 CFR 123.27 and 40 CFR 233.41 to state that Tribes and States that administer the CWA section 402 National Pollutant Discharge Elimination System permitting program or the section 404 program are required to authorize prosecution based on a *mens rea*, or criminal intent, of any form of negligence, which may include gross negligence.

III.C.3.3 Potential Impacts Associated with Compliance Evaluation and Enforcement

In order to provide more autonomy and flexibility, the final rule clarifies that Tribes and States do not need to have authority to prosecute based on a simple negligence *mens rea* in their criminal enforcement programs. EPA does not think that the absence of a simple negligence *mens rea* for criminal violations is a bar to effective State criminal enforcement programs. The final rule documents that State may establish criminal violations based on any form or type of negligence. EPA has concluded that the best reading of the CWA authorizes it to approve 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. Since the regulatory changes will be clarifying the extent of flexibility in a regulatory requirement, and that Tribes and States are free to continue to authorize prosecutions committed with a simple negligence *mens rea*, this final rule provision will not impose an additional regulatory burden.

III.D Federal Oversight

III.D.1 Annual Reporting

III.D.1.1 Prior Annual Reporting Requirements

Under the prior regulations, Tribes or States with assumed section 404 programs must submit an annual report at the end of each annual period evaluating the Tribe's or State's program, identifying any problems, and recommending resolutions for any problems. 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.

III.D.1.2 Changes to Annual Reporting Requirements

The final rule requires that assumed programs provide, in addition to the prior reporting requirements, reporting on compensatory mitigation, resources, staffing, and resolution of identified issues (40 CFR 233.52(b)). Additionally, section 233.52(e) now requires the Tribe or State Director to make a copy of the final annual report public. 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.

III.D.1.3 Potential Impacts Associated with Annual Reporting Requirements

Since the regulatory revisions largely describe EPA's current interpretation of the annual reporting requirements, the Agency expects that this change will have *de minimis* economic impacts. 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 regarding 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 assumed programs may make minor revisions to address the regulatory changes under this provision (*see* Section III.F for details).

III.D.2 Withdrawal Procedures

III.D.2.1 Prior Withdrawal Procedures

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.

III.D.2.2 Changes to Withdrawal Procedures

EPA is revising the withdrawal procedure by replacing the adjudicatory hearing process with a formal hearing process.[41] The final rule streamlines the withdrawal process, making it less time- and resource-intensive. Under the final provision, 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, the Regional Administrator will notify the Tribe or State of the alleged noncompliance. The Tribe or State will have 30 days to demonstrate compliance following notification from the Regional Administrator. If

[41] The process in the final rule is modeled on the withdrawal procedures for Tribal and State Underground Injection Control programs at 40 CFR 145.34 but has been revised to accommodate the requirements of section 404.

the Tribe or State demonstrates compliance, the Regional Administrator will notify them that no other action is necessary. However, if the Tribe or State fails to adequately demonstrate compliance within 30 days, EPA will schedule a public hearing to discuss withdrawal of the Tribal or State program. 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 may make oral or written presentations. Within 90 days of the hearing, if the Administrator finds that the Tribe or State is not in compliance, the Administrator will notify the Tribe or State of the specific deficiencies of the program and provide an additional 90 days for the Tribe or State to carry out remedial actions specified by the Administrator to bring the program into compliance. If the Tribe or State completes the remedial actions within the 90 days or is found to be in compliance after the hearing, the withdrawal proceeding will conclude. If the Administrator determines that the Tribe's or State's remedial actions within 90 days of the hearing are insufficient and that the assumed program should be withdrawn, EPA must immediately proceed with the withdrawal process (*i.e.,* within 90 days after the conclusion of the hearing process). The withdrawal decision will be published in the *FR*, the Corps will resume permit decision-making under section 404 in the affected Tribe or State, and any provision in the CFR addressing the Tribe's or State's assumption will be rescinded.

III.D.2.3 Potential Impacts Associated with Withdrawal Procedures

A more streamlined section 404 program withdrawal process (*i.e.,* removal of the adjudicatory procedure, addition of an EPA deadline to proceed with withdrawal within 90 days of the hearing) will reduce costs for EPA, Tribes and States, and interested parties by reducing time and resource burden during any withdrawal considerations. Since the CWA does not require the adjudication process, the prior regulatory approach created an unnecessary resource burden for EPA, Tribes and States, and interested parties.

Additionally, since the final rule establishes withdrawal procedures that are more similar to procedures used for program approval than the prior approach (*e.g.,* by requiring a public hearing to discuss a Tribe's or State's program withdrawal), it may enhance the administrability and public understanding of the withdrawal process. Lastly, the streamlined withdrawal process may lead to environmental benefits to the extent that (1) Tribes and States are able to more efficiently remedy any deficiencies in their assumed section 404 program during the withdrawal procedure, or (2) the section 404 program is returned to the Corps with reduced delay when Tribes or States do not remedy deficiencies within the specified timeframe.

III.D.3 Federal Oversight of Third-Party Mitigation Instruments

III.D.3.1 Prior Requirements Associated with Federal Oversight of Mitigation Third-Part Instruments

With regard to mitigation, the prior regulations do not address the extent of EPA oversight regarding the review and approval of mitigation instruments or opportunities for other Agencies to comment on the mitigation instruments.

III.D.3.2 Changes Associated with Federal Oversight of Mitigation Third-Part Instruments

EPA is adding a new provision to section 233.50(k). This new provision requires Tribes and States that choose to use third-party compensation mechanisms, such as mitigation banks or in-lieu fee programs, to submit instruments associated with these mechanisms to EPA, the Corps, USFWS, NMFS, and any Tribal

or State resource agencies to which the Tribe or State committed to send draft instruments in the program description for comment prior to approving the instrument.[42] If EPA comments that the instrument fails to comply with the description of the Tribe's or State's proposed approach to ensure compliance with the substantive criteria for compensatory mitigation (40 CFR part 230, subpart J), the Tribe or State cannot approve or put into effect the final compensatory mitigation instrument until EPA notifies them that the final instrument ensures compliance with this approach.

III.D.3.3 Potential Impacts Associated with Federal Oversight of Mitigation Third-Party Instruments

Third party instruments, such as mitigation banking and/or in-lieu-fee programs, as mechanisms for compensatory mitigation are not required. If Tribes and States choose to use mitigation banks and/or in-lieu-fee programs as mechanisms for compensatory mitigation, they may face some additional resource costs for the time needed to submit bank and in-lieu-fee instruments to EPA and other federal agencies and address any comments received to ensure compliance with the criteria for compensatory mitigation. Because a Tribe or State has the option of implementing this program, the costs are uncertain. If Tribes or States choose to implement a third party mitigation program, EPA expects there may be incremental costs associated with this new provision. The Agency expects these incremental costs to be minimal because the instrument review process is modeled on, and similar to, current EPA review procedures. If Tribes or States do not establish a third party instrument program, then there are no incremental costs associated with this new provision.

Federal agency staff may also experience some costs if Tribal and State programs choose to implement a third party mitigation program. Under the final rule, Tribes or States must send draft third party mitigation instruments to EPA, USFWS, NMFS, and any Tribal or State resource agencies to which the Tribe or State committed to send draft instruments in the program description for comment prior to approving the instrument. This new proposed process addresses EPA's oversight responsibilities where Tribe or State programs are establishing third party compensatory mitigation. The proposed process is also intended to incorporate input from other relevant agencies, which is analogous to the way the Interagency Review Team (IRT) oversees mitigation for Corps-issued permits to incorporate input from other relevant agencies. The Agency expects this instrument review process would be familiar to Tribes, States, and other federal cooperating agencies because it is modeled on but does not replicate the compensatory mitigation review outlined in the subpart J of the 404(b)(1) Guidelines. Although the review time associated with this new provision is likely similar to the review burden associated with IRT panels, the number and occurrence of reviewing the draft mitigation instruments is uncertain. EPA believes this additional input may better facilitate the development of successful compensatory mitigation instruments, minimize environmental impacts, and ensure the success of assumed programs over the long term. Thus, the Agency concluded that this new requirement will have positive benefits for Tribes, States, and permit applicants.

[42] This requirement does not include permittee-responsible mitigation instruments.

III.E Tribal Eligibility

III.E.1 Prior Regulations to Tribal Input

A section 404 Tribal or State program must (1) provide notice for each section 404 permit application to the public and any other Tribe or State whose waters may be affected, and (2) provide an opportunity for a public hearing before ruling on each application. Additionally, affected States are provided an opportunity to submit written comments and suggest permit conditions within the public comment period. The regulations define the term "State" to include Tribes that meet the eligibility requirements to assume a section 404 program. If the permitting State chooses not to implement the suggested permit conditions, the affected State and the EPA Regional Administrator must be notified of this decision and the rationale for the decision by the permitting State.

III.E.2 Changes to How Tribes Can Provide Input

EPA is finalizing three changes to further facilitate Tribal engagement in permitting decisions that may affect Tribal resources. First, EPA is requiring Tribes and States that have assumed the section 404 program to consider applicable Tribal comments and suggested permit conditions regarding permits that may affect the biological, chemical, or physical integrity of their reservation waters. The provision enables Tribes that have been approved for TAS for *any* CWA provision to comment as an affected state alongside Tribes with TAS for section 404. Second, EPA is establishing a provision providing opportunities for Tribes that have not yet been approved for TAS for any CWA provision to apply for TAS solely for the purpose of commenting as an affected State on section 404 permits. Third, EPA is providing an opportunity for Tribes to request EPA review of Tribal- or State-issued section 404 permits that may affect Tribal rights or interests, even if federal review has been waived (40 CFR 233.51(d)).

III.E.3 Potential Impacts Associated with Expanding Input from Tribes

All three of the changes will enable more Tribes whose waters may be affected by a dredge or fill project to comment on permit decisions and participate in the section 404 program. Benefits of the changes are discussed in more detail in Section V.

Tribes with TAS for a CWA provision whose waters may be affected by a State section 404 permit may face additional time costs when providing written comments and recommendations. Tribes without TAS will also face additional costs if they choose to apply for TAS for the purpose of commenting on section 404 permits. Tribes interested in this TAS opportunity will need to demonstrate their capability solely for the purpose of submitting comments as an affected State.

Tribes or States that have assumed the section 404 program may incur additional time and resource burden associated with the new opportunity for comments to be received from Tribes with TAS for any CWA provision whose waters may be affected by a section 404 permit. States will have to provide an opportunity for potentially affected Tribes to submit written comments within the public comment period and recommend permit conditions. Additionally, if States do not accept Tribal recommendations, they will need to notify the affected Tribe and the EPA Regional Administrator. EPA notes, however, that this burden is already accounted for in the current ICR as Tribes with TAS for CWA section 404 are currently defined as affected States. The final rule does not change the burden associated with such coordination; it does lessen the burden on Tribes. A Tribe that has already demonstrated TAS approval for other CWA

programs can leverage that effort for the purposes of commenting as an affected State in the section 404 process. There is limited information to evaluate the potential costs to permittees.

EPA may also experience *de minimis* costs due to the Tribal provisions in the final rule. The EPA Regional Administrator may have an increased time burden to review notices if Tribes or States do not address Tribal comments and recommendations, but EPA notes that Tribes could request EPA review of such permits under the prior regulations. EPA and other federal cooperating agencies will also experience a time burden when reviewing Tribal applications for TAS solely for the purpose of commenting on section 404 permits. However, EPA anticipates that the process for review of Tribal applications will be straightforward in this limited TAS context. Lastly, EPA may experience *de minimis* costs when Tribes request EPA review of permit applications. During EPA review, EPA must request public notice and provide a copy of the notice and other information needed for review of the application to the Corps, the USFWS, and the NMFS. Given the revisions in the final rule for providing Tribal input on Tribe- and State-issued section 404 permits, EPA anticipates that Tribes will use this opportunity in limited circumstances. Providing a mechanism to obtain TAS for this limited commenting opportunity eliminates unnecessary barriers to such Tribal involvement and expands Tribal opportunities to actively engage in managing their waters and resources.

III.F Impacts to States with Existing Programs

This section identifies parts of this rule that may affect States with existing 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 final rule in accordance with 40 CFR 233.16.

Final rule provisions that could affect existing State-assumed programs include a provision ensuring opportunity for judicial review of agency decisions (Section III.C.1), a revised approach to addressing the five-year limit on permits (Section III.C.2), and updates to federal oversight of third party mitigation instruments (Section III.D.3). In addition, general requirement clarifications (*i.e.,* no less stringent than, conflict of interest; Section III.A) and updated annual reporting requirements (Section III.D.1) may affect existing State-assumed programs.

EPA does not view any of its regulatory changes in this rule 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 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.

IV Summary of Potential Impacts

This economic analysis qualitatively assessed the potential benefits and costs of the final rule, relative to the prior regulations, accruing to and imposed on Tribes, States, permittees, and the federal agencies. Section III provides a qualitative assessment of potential final rule impacts for each rule provision. As discussed in Sections II.B.3 and VI, EPA performed a qualitative assessment because of numerous data limitations and uncertainties regarding the potential impacts resulting from the final rule. Benefits and costs of Tribal and State assumption with changes under the final rule are primarily related to permitting efficiency and familiarity with local resources rather than environmental improvements. Tribal and State regulators often have more familiarity with local aquatic resources, issues, and needs. When assuming the section 404 program, Tribes and States can integrate dredged and fill permitting with traditional water quality programs and streamline the permitting process by combining federal dredged or fill permitting requirements with any prior Tribal- or State-level requirements. Thus, Tribal or State section 404 programs can help reduce delays and save money for permit applicants.

This section summarizes the incremental and cumulative costs and benefits of the final rule for different interested parties, including Tribes, States, and permittees. 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. Costs of the final rule are mainly negative (*i.e.,* cost savings), with some positive (*i.e.,* incremental costs) impacts borne by Tribes, States, permittee, and federal agencies.

Table IV-1 summarizes the incremental potential impacts of the final rule provisions, relative to the prior regulations (Section II.A). The table is intended to provide a concise summary of potential impacts on Tribes, States, and permittees. The table omits impacts to EPA, the Corps, and other cooperating agencies for clarity of presentation because several provisions do not affect these entities (*see* Section III for discussion of impacts to these agencies).

IV.A Incremental Summary

Table IV-1 shows that *benefits* of the final rule, are primarily attributable to the following categories: establishing a process to develop a retained waters description, providing a program effective date, and providing opportunities for Tribal input. The benefits of establishing a process to develop a retained waters description include (1) an increased likelihood that Tribes and States can determine whether assuming the section 404 program is advantageous and (2) a reduced likelihood of case-by-case determinations as to whether a water is retained. Since case-by-case determinations both slow down and make more uncertain the outcomes of the section 404 permitting process, limiting the use of such determinations is a significant benefit to permittees subject to section 404 programs. The benefit of the effective date change is to ensure that Tribes and States have necessary time to prepare for assumption. The benefit of providing opportunities for Tribal input is ensuring that the voices of affected Tribes are heard. Table IV-1 also shows that "expanding input from Tribes" has the most significant cost implications (*i.e.,* incremental costs).

Incremental costs of the final rule are primarily attributable to two final rule provisions: (1) a potential burden increase for Tribes to meet revised judicial review requirements and (2) a potential burden increase to Tribes, States, and permittees from revisions that expand input from Tribes. The Agency

expects these costs to be smaller than the benefits just described. Additionally, *cost savings* from other provisions (*e.g.,* identifying retained waters, effective date, withdrawal procedures) may result in overall cost savings from the final rule.

IV.B Cumulative Potential Impacts

The combined effect of the final rule provisions has additional implications. For example, the final rule provisions improve clarity for Tribes and States interested in assuming the section 404 program and provide flexibility for how certain requirements are met. Additional benefits of Tribal- and State-administered section 404 programs may include increased consistency in permit decisions, application of local knowledge, and a single point of contact for dredged and fill permitting. This analysis assumes that the total number of permits and other associated permitting actions will not change as a result of the final rule, as there are no data which suggest otherwise.

Permittees subject to section 404 programs may also benefit from an increasing number of Tribal- and State-administered section 404 programs. Although section 404 permit fees may increase relative to the Corps' fees, Tribal or State assumption could lead to reduced duplication of application materials, increased consistency in permit decisions, and application of local knowledge (this can vary and depends on the way the Tribe or State administers the program).

When Tribes and States assume the section 404 program, the Corps processes and issues fewer permits. Therefore, transferring section 404 permitting authority to a Tribe or State allows Corps staff to focus on other tasks. Some of the assumption costs for Tribes and States (*e.g.,* annual operation costs) are not new costs but are passed from the Corps to assuming Tribes or States (*i.e.,* a cost transfer).

Since Tribal and State programs may not impose conditions less stringent than those required under federal law, EPA does not anticipate any negative environmental impacts under the final rule. Clarifications provided by the final rule, particularly regarding information requirements for program submissions and long-term permits, will also benefit the public by ensuring that sufficient information is available during evaluations and public comment periods to protect public interests (*e.g.,* environmental quality). The final rule is a procedural federal rule that clarifies the requirements for assumption and administration of the section 404 program. Benefits of the final rule represent elements such as transparency, efficiency, and clarity provided by the final rule, while costs include either cost savings or incremental costs resulting from the final rule. Based on the assessment of incremental and cumulative impacts of the final rule, as summarized above and in Table IV-1, EPA has concluded that the benefits of the final rule justify the costs.

The assessment of impacts resulting from the final rule (*see* Section III) includes costs and benefits incurred by a subset of interested parties, including Tribes or States, permit applicants or permittees, and EPA. Within each provision of the prior regulation, not every group incurs costs. For example, permittees primarily incur costs from permit application requirements, but they may also incur follow-on costs from other provisions, such as program revisions or program withdrawals; permittees do not incur costs from provisions related to program approval (*see* Table IV-1). EPA does not assess costs incurred by the Corps or other cooperating agencies at the provision level because several provisions do not affect these entities; thus, discussing potential impacts of the rule as a whole to these entities is clearer than a provision-level analysis. For example, cooperating agencies are primarily affected by provisions related to federal

oversight or requirements for MOAs or MOUs; the Corps is primarily affected when a Tribe or State assumes the program, thereby reducing the Corps' section 404(g)-related responsibilities for the assuming Tribe or State.

IV.C Concluding Remarks on Potential Impacts

Due to the nature of the rule being a procedural rule, this economic analysis describes costs imposed on and benefits accruing to the interested parties defined. This is unlike other economic analyses which often separately describe costs imposed on regulated entities and benefits accruing to society as a whole. Although the baseline cost estimates presented in Section II are not quantitatively used to estimate the incremental impacts of the final rule, they provide useful background information on assuming the section 404(g) program.

The Agency determined the revisions associated with the final rule clarifies and streamlines the assumption, administration, and oversight process and procedures. These updates improve clarity for Tribes and States interested in assuming the section 404, as well as permittees seeking a Section 404 permit. The new and revised provisions also expand opportunities for Tribes to engage in the permitting process. Overall, EPA concluded that the qualitative benefits of the rule justify the qualitative costs.

Table IV-1. Summary of potential economic implications of revised or new provisions associated with the final rule, relative to the prior regulations by interested party.

Table entries reflect cumulative impacts of changes under each provision relative to prior regulations.

Provision	Benefits[1]	Costs[2]
Category 1: General Requirements		
Partial Assumption	None for T/S, P	None for T/S, P
Consistency with the CWA (*i.e.,* no less stringent than)	None for T/S, P	None for T/S, P
404(b)(1) Guidelines	None for T/S, P	None for T/S, P
Dispute Resolution	Positive for T/S and P	Cost savings for T/S and P
Category 2: Program Approval & Revisions		
Program Approval Requirements	*de minimis* for T/S; none for P	*de minimis* for T/S; none for P
Identifying Retained Waters	Positive for T/S, P	Cost savings for T/S and P
Mitigation	*de minimis* for T/S; none for P	*de minimis* for T/S; none for P
Effective Date	Positive for T/S and P	Cost savings for T/S; uncertain for P
Program Revisions	*de minimis* for T/S; none for P	None for T/S and P
Category 3: Permit Requirements, Program Operation, Compliance and Enforcement		
Judicial review	*de minimis* for T; Positive for P; none for S	Incremental costs for T; none for S and P
5-Year Limits on Permits and Long-Term Permits	*de minimis* for T/S and P	*de minimis* for T/S and P
Compliance Evaluation and Enforcement	None to T/S and P	None to T/S, and P
Category 4: Federal Oversight		
Annual Reporting	*de minimis* for T/S; none for P	*de minimis* for T/S; none for P
Withdrawal Procedures	Positive for T/S and P	Cost savings for T/S; uncertain for P
Third-Party Mitigation Instrument Review	Positive for T/S and P	*Uncertain* for T/S; none for P
Category 5: Tribal Eligibility		
TAS-related revisions	Positive for T; none for S and P	Cost savings for T; none for S and P
Coordination Responsibilities (Expanding Input from Tribes)	Positive for T; uncertain for S and P	Uncertain for T/S and P

Interested Party Acronyms: T = Tribes; S = States; T/S = Tribes and States; P = permittee subject to section 404 programs.

[1] **Benefits** of the final rule represent elements such as transparency, efficiency, and clarity provided by the final rule. Benefits categories include positive, *de minimis,* none, or uncertain. Benefits refer to environmental benefits; however, because this is a procedural rule, it is not expected to generate notable environmental benefits. For this reason, Tribes, States, and Permittees appear in both costs and benefits columns.

[2] **Costs** of the final rule are mainly negative (*i.e.,* **cost savings**), with some positive (*i.e.,* **incremental costs**) impacts borne by Tribes, States, and permittee. Cost categories also include *de minimis*, none, and uncertain.

V Environmental Justice Considerations

Executive Order (E.O.) 12898 (59 FR 7629, February 11, 1994) directs agencies to make environmental justice (EJ) part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations in the United States. Moreover, the E.O. provides that each federal agency must conduct its programs, policies and activities that substantially affect human health or the environment in a manner that ensures such programs, policies and activities do not have the effect of (1) excluding persons or populations from participation in, (2) denying persons or populations the benefits of, or (3) subjecting persons or populations to discrimination under, such programs, policies and activities because of their race, color or national origin.

E.O. 14008 (86 FR 7619, January 27, 2021) expands on the policy objectives established in E.O. 12898 and directs federal agencies to develop programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related, and other cumulative impacts on disadvantaged, historically marginalized and overburdened communities, as well as the accompanying economic challenges of such impacts.

E.O. 14096 (88 FR 25251, April 26, 2023) supplements the foundational efforts of E.O. 12898 to address EJ. E.O. 14096 directs the federal government to build upon and strengthen its commitment to deliver EJ to all communities across America through an approach that is informed by scientific research, high-quality data, and meaningful federal engagement with communities with EJ concerns.

Other recent executive actions that touch on EJ include E.O. 13563, E.O. 13985, E.O. 13990 and E.O. 14091. EPA also published "Technical Guidance for Assessing Environmental Justice in Regulatory Analysis" (U.S. EPA, 2016) to provide recommendations that encourage analysts to conduct the highest quality analysis feasible, recognizing that data limitations, time and resource constraints, and analytic challenges would vary by media and circumstance.

The final rule creates more transparency and clarity for Tribes and States with existing section 404 programs and for those seeking to assume. There are EJ considerations that 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.

Within the final rule and assumption process, there are multiple opportunities for public engagement through public notice and hearings. These include the public hearing opportunities during:

- program operation, where it is deemed of public interest in a permit application or draft general permit (40 CFR 233.33);
- modification, suspension, or revocation of permits (40 CFR 233.36);
- program revisions, if the Regional Administrator determines the proposed revision is substantial (40 CFR 233.16); and

- proceedings to determine whether to withdraw approval of a program, during which all interested parties shall be given opportunity to make written or oral presentations on the Tribe or State program at the public hearing (40 CFR 233.53(c)(2)).

The final rule provides that Tribes and States may not impose requirements that are less stringent than federal requirements. 40 CFR 233.1(d). This requirement provides a minimum of environmental protection for all, including communities with EJ concerns. If Tribes or States have more protective environmental requirements than federal standards, water quality impacts could improve and advance EJ.

Another positive EJ impact of the final rule is an improved ability for communities with EJ concerns to participate in the section 404 permitting process. For example, for long-term projects which require multiple five-year permits, the final rule clarifies that all aspects of the public notice requirements set forth in 40 CFR 233.30, 233.32, and 233.34 apply. The public notice requirements allow stakeholders the opportunity for public participation on all aspects of a long-term project. EPA also finalized a process for assessing and addressing if any "changes in circumstances" occurred when applying for subsequent five-year permits, which will help ensure consideration of potential cumulative impacts of the proposed project (Section III.C.2). In addition, 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.

The final rule also requires permitting Tribes and States to notify potentially affected Tribes or States regarding permit applications that may affect waters, areas, uses, or other interests of importance to them. 40 CFR 233.31. This coordination allows potentially affected Tribes or States, which could include communities with EJ concerns, to submit written comments within the public comment period and recommend permit conditions.

The final rule fills gaps and facilitates engagement of Tribes as relevant entities to provide input regarding potential effects on their waters. More specifically, the final rule provides three additional opportunities for Tribes that wish to play a more active role in section 404 permitting processes without assuming the section 404 program (Section III.E). First, the final rule clarifies that affected Tribes approved for TAS for *any* CWA provision may provide comments and recommend conditions on section 404 permits that may affect the biological, chemical, or physical integrity of the other Tribal or State waters. This interpretation expands opportunity for Tribal participation in section 404 programs, as nearly half of federally recognized Tribes have been approved for TAS for other CWA provisions.[43] Second, potentially affected Tribes will have the opportunity to obtain TAS solely for the purposes of commenting on section 404 permits as an affected State. Lastly, Tribes may request EPA review of permits that may potentially affect Tribal rights or interests. These provisions will help to ensure that Tribal rights and resources are being considered and protected by virtue of EPA's oversight of these permit applications.

[43] Of the 574 federally recognized Tribes, over 285 have been granted TAS status for one or more CWA provisions. 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.

VI Data Limitations and Uncertainties

Table VI-1 summarizes the limitations and uncertainties of the potential impacts arising from the final rule. Because of the numerous data limitations and uncertainties, EPA performed a qualitative assessment of potential cost implications of the final rule. It is uncertain whether these limitations and uncertainties understate or overstate the potential impacts.

Table VI-1. Limitations and uncertainties in estimating effects of the final rule

Uncertainty/Data Limitation	Notes
Limitations of data sources for assessing costs of Tribal and State assumption	Limitations of the data sources that EPA used to assess costs of Tribal and State assumption, under both the prior regulations and the final rule, are subject to several limitations and uncertainties. For example, the small number of States that have assumed the program or developed a feasibility study limits their generalizability. Additionally, changes related to the scope of assumable "waters of the United States" are not reflected in the feasibility studies or State program annual reports. For additional details on the limitations and uncertainties of the data sources that EPA used to assess costs of Tribal or State assumption, *see* Section II.B.3 and additional entries in this table.
Uncertainty regarding Tribal and State response to the final rule	Although only three States have assumed the section 404 program to date, other States have investigated assumption in the past (*e.g.,* Alaska, Arizona, Arkansas, Kentucky, Maryland, Minnesota, Montana, Nebraska, North Dakota, Oregon, Virginia, and Wisconsin). States identified issues that they considered barriers to assumption and possible remedies during discussions with EPA that occurred while they investigated program assumption. Although the final rule addresses many known barriers, how Tribes and States will respond (*i.e.,* whether they complete the assumption process and how quickly) is uncertain.
Uncertainty regarding the magnitude of costs and benefits of the final rule	The final rule addresses many known barriers to program assumption. The magnitude of costs and benefits resulting from the final rule, however, is uncertain due to many factors. Factors contributing to cost and benefit uncertainty include difficulty estimating nationally representative costs under the prior regulations due to the small sample size of States that have assumed the program to date (three States and no Tribes), uncertainty regarding the effects of State-identified barriers on each Tribe or State under the prior regulations, level of assumption planning prior to the final rule, and prior Tribal and State programs and infrastructure. For Tribes or States considering assumption, the final rule will likely result in cost savings and benefits. However, for Tribes and States not pursuing assumption, the final rule will have no economic impacts. Impacts of the final rule on Tribes are especially difficult to assess since no Tribes have assumed the section 404 program or completed a feasibility study, but as discussed in Sections III.E and V, the final rule increases opportunities for Tribes to participate in the section 404 process without assuming the section 404 program. The Agency relied on federal salary wages to extrapolate labor costs from burden because we do not have comparable information for Tribal staff.
Uncertainty regarding the change in permit applications after Tribal or State assumption	Due to the small sample size of States that have assumed the program to date, there is a great deal of uncertainty regarding how program assumption will affect the magnitude of permit applications, if at all. Although Florida received a larger than anticipated number of permits after assuming the section 404 program, Florida's experience may not be representative of other Tribes or States that may assume the program in the future. Therefore, EPA did not project changes in permit applications after assumption of the section 404 program.
No forecasting of Tribes and States that would assume the	EPA did not examine the incremental impacts associated with individual Tribal or State program administration, individual Tribal or State fee programs, and

Uncertainty/Data Limitation	Notes
program or estimation of impacts on each Tribe or State	other incremental budget impacts because of significant uncertainty regarding such impacts. Because of these limitations and uncertainties associated with baseline information, EPA is not forecasting which States will adopt the program as a result of the final rule, nor the incremental costs of administering the program under the final rule for those states that have assumed the section 404 program; such forecasting would be highly speculative due to both a lack of data and high variability between States.
Uncertainty in the scope of the waters of the United States	EPA recognizes cost categories vary by the extent of "waters of the United States" and average annual section 404 permit volume for each Tribe or State. The Agency used the best available information at the time of this rulemaking. The analysis described does not account for changes in the scope of assumable waters and relies on the best available data at the time of this rulemaking. Similarly, data leveraged from the ICR supporting statement represents the best available at the time of this rulemaking and does not reflect changes to the scope of assumable waters.
Lack of Tribal feasibility studies	No Tribes have assumed or submitted a feasibility study to EPA; thus, cost estimates are solely derived based on input provided by States. Our best estimates for costs to Tribes is based on TAS values from ICRs for other CWA regulatory programs (*e.g.,* TAS for sections 303(c), 303(d), and 401) (EPA ICR Number 0220.18, OMB Control Number 2040-0168).
Small sample size of the States with approved programs	Given the small sample size of States with approved programs and States that have completed feasibility studies, along with differences across these States that would affect section 404 program costs (*e.g.,* scope of assumable waters, annual average section 404 permit volume), the list of potential costs are best estimates and subject to uncertainty. However, the analyses and cost estimates for administering a program are still useful for the purposes of this economic analysis.

VII Statutory and Executive Order Reviews

The statutory requirements considered during development of the final rule include the Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act, the Paperwork Reduction Act (PRA), the Unfunded Mandate Reform Act and the National Technology Transfer and Advancement Act. The analysis is also conducted pursuant to E.O. 12866 (Regulatory Planning and Review), E.O. 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), E.O. 13132 (Federalism), E.O. 13175 (Consultation and Coordination with Indian Tribal Governments), E.O. 13045 (Protection of Children from Environmental Health Risks and Safety Risks), E.O. 13211 (Action Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use), E.O. 13563 (Improving Regulation and Regulatory Review), and E.O. 14094 (Modernizing Regulatory Review). Requirements with specific import for an economic and programmatic analysis are described below; others are addressed in the preamble to the final rule.

VII.A RFA and SBREFA

The Agency certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act. 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 entity assumes the section 404 program or not and regardless of the changes in the final rule.

VII.B Paperwork Reduction Act

In accordance with the PRA, EPA has an OMB-approved ICR for the CWA section 404 State-assumed programs regulations following the final rule (EPA ICR Number 0220.18, OMB Control Number 2040-0168). ICRs are developed based on available information about how a regulation may affect a respondent. This is a rulemaking ICR that includes both incremental burden of the final rule and total burden of the CWA section 404 State-assumed programs regulations. The new baseline total annual burden and labor costs incurred by Tribes, States, and permittees is 54,848 hours and $3,182,445. The rulemaking increased the overall annual burden and labor costs by 185 hours and $11,521. *See* the Supporting Statement for the ICR for the Final Rule in the docket for this rulemaking for further discussion on the estimates for this collection (EPA ICR Number 0220.18, OMB Control Number 2040-0168).

VII.C Unfunded Mandate Reform Act

The Unfunded Mandate Reform Act contains requirements for agencies when regulations include unfunded federal mandates imposed by the federal government on Tribal, State, and local governments. This action does not contain any unfunded mandate as described in the Unfunded Mandate Reform Act, 2 U.S.C. 1531-38, and does not significantly or uniquely affect small governments. CWA section 404(g) does not require that Tribes or States assume the section 404 program; rather, Tribes and States voluntarily request assumption. The action imposes no enforceable duty on any Tribal, State, or local governments, or the private sector.

VIII References

Alaska Department of Environmental Conservation. (2023). Clean Water Act Section 404 Dredge and Fill Program Assumption Feasibility Report.

Arizona Department of Environmental Quality. (2018). Clean Water Act §404 Program Technical Working Group - Fees White Paper.

Association of State Wetland Managers. (2010). Expanding the States' Role in Implementing CWA § 404 Assumption.

Assumable Waters Subcommittee. (2017). Final Report of the Assumable Waters Subcommittee.

Florida Department of Environmental Protection. (2020a). *Memorandum of Agreement Between the Florida Department of Environmental Protection and the United States Environmental Protection Agency*. Retrieved from https://floridadep.gov/sites/default/files/MOA_EPA_Signed.pdf

Florida Department of Environmental Protection. (2020b). *Programmatic Agreement Among the U.S. Environmental Protection Agency, the Advisory Council On Historic Preservation, the Florida Division of Historical Resources-State Historic Preservation Officer, and the Florida Department of Environmental Protection Regarding the Section 106 Process For the EPA's Approval of the State of Florida's Request to Assume A Clean Water Act (CWA) Section 404 Permitting Program*. Retrieved from https://floridadep.gov/sites/default/files/Programmatic_Agreement_-_12-16-20.pdf

Florida Department of Environmental Protection. (2020c). *State 404 Program Rule Adoption Hearing*. Retrieved from https://floridadep.gov/sites/default/files/State404ProgramHearing_04022020.pdf

Florida Department of Environmental Protection. (2022). *Draft State 404 Program Annual Report, July 1, 2021 – June 30, 2022*.

Florida Department of Environmental Protection. (2023). State 404 Program Application Information. Retrieved from https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/state-404-program-application

Florida Department of Environmental Protection, & U.S. Army Corps of Engineers. (2020). *Memorandum of Agreement Between the Florida Department of Environmental Protection and the Department of the Army*. Retrieved from https://floridadep.gov/sites/default/files/Appendix_2_FDEP_FWC_FWS_404_MOU_Final_Full_Signatures.pdf

Hurld, K., & Linn, J. (2008). *Pursuing Clean Water Act 404 Assumption: What States Say About the Benefits and Obstacles. Presentation at the ASWM Annual State/Federal Coordination Meeting.* Retrieved from https://www.nawm.org/pdf_lib/hurld.pdf

Michigan Department of Environment, Great Lakes and Energy. (2020). Michigan's 404 Program. Retrieved from https://www.nawm.org/pdf_lib/assumption_webinar/michigans_404_program_021820_garwood.pdf

Michigan Department of Environment, Great Lakes, and Energy. (2019). *Joint Permit Application Fees: State Fees, Federal Fees, Minor Project (MP) Categories, and General Permit (GP) Categories*. Retrieved from https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Programs/WRD/Wetlands/Joint-Permit-Application-Fee-Schedule.pdf?rev=889a70b4b55b46d292a3e703be7fa8cd&hash=2FE723FD33B8E1200C50D86658B78DB2

Michigan Department of Environment, Great Lakes, and Energy. (2022). *Section 404 Program Annual Report, Fiscal Year 2020*.

Minnesota Department of Natural Resources, & Minnesota Board of Water and Soil Resources. (2017). Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study.

Minnesota Department of Natural Resources, & Minnesota Board of Water and Soil Resources. (2018). Analysis of Retained and Assumable Waters in Minnesota: A Supplement to the January 17, 2017 Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study Report to the Legislature.

Montana Water Policy Interim Committee. (2016). Assuming Dredge-and-Fill Permits: A Water Policy Interim Committee Report to the 65th Legislature.

Nebraska Department of Environment and Energy. (2021). *Clean Water Act Section 404 Program Assumption Investigation Report*. Retrieved from https://westernstateswater.org/wp-content/uploads/2023/03/CWA-Section-404-Assumption-Investigation-Report.pdf

New Jersey Department of Environmental Protection. (2019). *Regulatory Fee Schedule*. Retrieved from https://www.nj.gov/dep/landuse/download/lur_022.pdf

Society for Human Resource Management (SHRM). (2022). 2021 Human Capital Benchmarking Report. Retrieved from https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/shrm-hr-benchmarking-reports-launch-as-a-member-exclusive-benefit.aspx

State of Montana. (2021). State Employee Data.

State of New Jersey. (2022). *Twenty-Ninth Annual Report to USEPA, Region II For a State-Assumed Freshwater Wetlands Regulatory Program (July 1, 2021 - June 30, 2022)*.

State of Wisconsin. (2022). *Section 404 Assumption Feasibility Final Report*. Retrieved from https://dnr.wisconsin.gov/sites/default/files/topic/Wetlands/studyCouncil/WDNR_404_Assumption_Feasibility_Final_Report_18Jan2022.pdf

U.S. Army Corps of Engineers Portland District. (n.d.). Frequently Asked Questions. Retrieved from https://www.nwp.usace.army.mil/Missions/Regulatory/FAQ/

U.S. Environmental Protection Agency. (2008). Final Report: Results of the U.S. Environmental Proection Agency Region 5 Review of Michigan Department of Environmental Quality's Section 404 Program.

U.S. Environmental Protection Agency. (2016). *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis*. Retrieved from https://www.epa.gov/environmentaljustice/technical-guidance-assessing-environmental-justice-regulatory-analysis

U.S. Environmental Protection Agency. (2019). Meeting Summary of the Clean Water Act §404(g) Rulemaking Pre-proposal State Engagement Meeting, December 6, 2018.

U.S. Environmental Protection Agency. (2021a). *Supporting Statement for ICR 0220.16 Clean Water Act 404 State-Assumed Programs*. Retrieved from https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202308-2040-002

U.S. Environmental Protection Agency. (2021b). *Supporting Statement for ICR 022014 Clean Water Act 404 State-Asssumed Programs*. Retrieved from https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202106-2040-002

U.S. Environmental Protection Agency. (2023a, December 19). Tribes Approved for Treatment as a State (TAS). Retrieved from https://www.epa.gov/tribal/tribes-approved-treatment-state-tas

U.S. Environmental Protection Agency. (2023b). Wetland Program Development Grants and EPA Wetlands Grant Coordinators. Retrieved from https://www.epa.gov/wetlands/wetland-program-development-grants-and-epa-wetlands-grant-coordinators

U.S. Environmental Protection Agency, & U.S. Department of the Army. (2022). *Supplementary Material to the Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule*.

Virginia Department of Environmental Quality. (2012). Study of the Costs and Benefits of State Assumption of the Federal 404 Clean Water Act Permitting Program.

Wetland Advisory Council. (2012). Final Report.

Appendix A. Feasibility Study Summary Table

Table A-1 summarizes the feasibility studies discussed in Section II.B.1.1.3. This table provides more detail than Table II-1, which is included in Section II.B.1.1.3.

Table A-1. Summary of variables discussed in each State Feasibility Study

Variable Discussed in Report	Alaska	Arizona	Minnesota	Montana	Nebraska	Virginia	Wisconsin
Year State Feasibility Study Published	2023	2018	2017	2021	2021	2012	2022
Annual costs to develop and administer the program	Yes - Est $4.8-5 million	Yes - Est. $2.1 million	Yes - Est. $150,000	No - Noted training cost only (see below)	Yes - Est. $2.6 million	Yes - $3.4-4.0 million	Yes - Est. $1.0-1.4 million
Timeframe for program development and approval	Yes - Est. 2 years	No	Yes - Est 2 years	No	Yes - 4.5 years	No	No
Described activities leading up to program approval	Yes - Hiring, developing tools, trainings, and preparing the assumption package	No	Yes - Focused on revising State laws	Yes - Training needs and costs (see below)	Yes - Hiring, entering into MOAs, preparing assumption package, notifying public	No	Yes - Public and Stakeholder input; Develop State statutes and administrative codes; Prepare the assumption application; update permit applications and online information
Program Staffing Needs	Yes - 28-32 FTE	Yes - 10 FTE + $220,000 legal support services	No	No	Yes - 30.7 FTE	Yes - 40 FTE *legal staff needs or fees not included in estimates	Yes - 11.9-16.4 FTE
Staff Training Plan or Costs	Yes - General discussion	No	No	Yes - Estimated 8-10 project managers to train with Corps staff before issuing permits; Estimated training costs over 2 years to be between $1.9-2.3 million	No	No	No - Noted 0.5 FTE to develop the assumption application ($42,400)

Variable Discussed in Report	Alaska	Arizona	Minnesota	Montana	Nebraska	Virginia	Wisconsin
Equipment/Supplies	Yes - General discussion	No	No	No	No	No	No
Information Technology (IT)	No	No	Yes - $3 million	No	No	Yes - $3.5 million in total	No
Discusses Funding Sources to Sustain State Program	Yes - Alaska General Funds	Yes? - Self-funding program based on permit fees	No	No	Yes - Two options discussed: "Chargeable impact" and "Hourly rate"	Yes - Permit fees estimated to cover 10-25% of program costs	No
Permit Fee Structure	Yes - GP: Flat fee for specific action/ authorization types; IP: base fee (plus hourly fee for time spent)	Yes - GP: $32,353; Nationwide Corp permit use: $2,423; IP: $125,000	No	No	Yes - Assumptions for each fee structure discussed in report; Chargeable impact: $296.80; Hourly rate: $67.07	Yes - GP: $300; IP: Not estimated	No
Estimated Annual Number of Permits	No	No	No	No	Yes - 871 permits annually	No	No

Appendix B. Section 404 Permit Volume by State, 2013-2018

This appendix presents section 404 permit volume by State, including general and individual permits combined for each year from 2013 to 2018 (Table B-1) and annual average values, separated by general and individual permits, for years 2013 to 2018 (Table B-2). EPA used permitting data for the time period 2013 through 2018 for comparison purposes. We used this timeframe as the scope of waters was fairly consistent during this time. Permitting volume fluctuated beginning in 2020 as the definition of "Waters of the United States" changed, starting with the Navigable Waters Protection Rule (85 FR 22250, April 21, 2020) through the Revised Definition of 'Waters of the United States'; Conforming (88 FR 61964, September 8, 2023)). Thus, data during this timeframe are not readily comparable.

Table B-1. Section 404 permits issued by the U.S. Army Corps of Engineers in years 2013-2018, by State

State	2013	2014	2015	2016	2017	2018	Average, 2013-2018
AK	638	473	483	488	603	430	519
AL	743	504	485	446	558	593	555
AR	1,370	911	1,147	1,068	609	555	943
AZ	278	506	177	362	220	337	313
CA	2,091	1,989	1,666	2,663	2,294	2,238	2,157
CO	883	1,393	773	892	1,759	936	1,106
CT	257	250	241	325	440	284	300
DE	92	154	83	97	78	95	100
FL	1,644	1,649	1,759	1,826	2,149	2,238	1,878
GA	872	746	709	1,550	943	932	959
HI	31	25	21	49	28	57	35
IA	1,099	1,091	809	851	845	726	904
ID	604	608	519	516	643	743	606
IL	1,863	1,486	1,026	1,479	1,219	1,151	1,371
IN	1,020	841	1,033	1,101	1,172	1,227	1,066
KS	1,964	597	672	613	838	616	883
KY	613	550	452	874	557	445	582
LA	2,662	3,903	2,617	1,945	1,638	1,598	2,394
MA	289	300	435	460	521	435	407
MD	1,563	1,271	1,035	540	1,056	1,182	1,108
ME	425	421	429	451	565	653	491
MN	1,224	1,059	1,064	1,062	1,004	1,377	1,132
MO	1,972	1,390	1,920	3,057	1,862	1,569	1,962
MS	736	620	476	776	827	730	694
MT	585	539	425	527	536	376	498
NC	1,524	1,647	1,524	1,758	1,640	2,124	1,703
ND	683	710	668	623	375	470	588
NE	633	593	477	633	672	658	611
NH	454	363	343	486	350	482	413
NM	208	378	411	260	207	205	278

State	2013	2014	2015	2016	2017	2018	Average, 2013-2018
NV	126	73	85	46	65	56	75
NY	1,956	2,130	1,954	2,241	2,161	1,738	2,030
OH	1,487	1,850	1,859	1,496	2,703	1,550	1,824
OK	469	517	493	393	635	556	511
OR	883	608	562	694	778	552	680
PA	7,651	6,326	5,863	5,967	4,890	2,407	5,517
RI	80	47	36	50	52	44	52
SC	572	436	438	749	832	802	638
SD	332	312	268	371	371	405	343
TN	1,245	1,210	1,124	1,518	1,003	1,184	1,214
TX	3,684	3,344	5,105	3,052	2,078	4,035	3,550
UT	449	360	308	342	397	313	362
VA	1,515	1,370	1,378	1,563	1,502	1,524	1,475
VT	491	398	273	242	261	293	326
WA	1,605	856	858	718	1,803	1,418	1,210
WI	1,752	1,857	2,124	2,036	1,992	2,349	2,018
WV	2,781	2,409	1,837	1,720	2,897	3,624	2,545
WY	235	189	178	237	293	232	227

Source: U.S. Army Corps of Engineers

Table B-2. Annual average (2013-2018) individual and general section 404 permits issued by the U.S. Army Corps of Engineers, by State

State	Individual	% Total	General	% Total
AK	89	17.2%	430	82.8%
AL	44	8.0%	511	92.0%
AR	34	3.6%	909	96.4%
AZ	11	3.6%	302	96.4%
CA	178	8.2%	1,979	91.8%
CO	19	1.7%	1,087	98.3%
CT	8	2.7%	291	97.3%
DE	11	10.5%	89	89.5%
FL	440	23.4%	1,437	76.6%
GA	63	6.5%	896	93.5%
HI	7	19.4%	28	80.6%
IA	38	4.2%	866	95.8%
ID	8	1.3%	598	98.7%
IL	39	2.8%	1,332	97.2%
IN	19	1.8%	1,047	98.2%
KS	22	2.5%	861	97.5%
KY	52	9.0%	530	91.0%
LA	254	10.6%	2,140	89.4%
MA	17	4.1%	390	95.9%
MD	58	5.2%	1,050	94.8%

State	Individual	% Total	General	% Total
ME	7	1.5%	484	98.5%
MN	106	9.4%	1,025	90.6%
MO	37	1.9%	1,925	98.1%
MS	46	6.6%	649	93.4%
MT	16	3.1%	482	96.9%
NC	33	2.0%	1,670	98.0%
ND	19	3.2%	569	96.8%
NE	11	1.7%	600	98.3%
NH	2	0.4%	412	99.6%
NM	6	2.0%	273	98.0%
NV	4	5.8%	71	94.2%
NY	82	4.0%	1,948	96.0%
OH	53	2.9%	1,771	97.1%
OK	8	1.6%	502	98.4%
OR	55	8.1%	624	91.9%
PA	27	0.5%	5,491	99.5%
RI	2	2.9%	50	97.1%
SC	61	9.5%	577	90.5%
SD	15	4.4%	328	95.6%
TN	27	2.2%	1,187	97.8%
TX	117	3.3%	3,433	96.7%
UT	15	4.0%	347	96.0%
VA	46	3.1%	1,429	96.9%
VT	6	1.9%	320	98.1%
WA	60	5.0%	1,150	95.0%
WI	51	2.5%	1,968	97.5%
WV	20	0.8%	2,525	99.2%
WY	2	0.7%	226	99.3%

Source: U.S. Army Corps of Engineers