Clean Water Act Section 404 Tribal and State Assumption Program
Response to Comments

This Response to Comments Document, together with the preamble to the final *Clean Water Act Section 404 Tribal and State Assumption Program* rule, presents responses of the U.S. Environmental Protection Agency (EPA) to the comments received on the proposed rule, 88 FR 55276.

In finalizing the proposed rule, the Agency reviewed and considered input from a broad spectrum of interested parties. The Agency reviewed and responded to input from stakeholder meetings as well as the 46 comment letters received on the proposed rulemaking. Commenters provided a wide range of feedback on the proposal, including the substantive and procedural aspects of the proposed rule, how the proposed rule would impact stakeholders, and the legal basis for the proposed rule. EPA fully considered these comments and addressed all significant issues raised therein, including revising the rule to help streamline and clarify the requirements and processes for the assumption and administration of a CWA section 404 program, EPA's oversight, and how Tribes and States can demonstrate and ensure their program meets the minimum requirements of the CWA.

To prepare this document, the Agency read and responded to all comments received from interested parties, including input provided by Tribes, States, and other stakeholders attending outreach meetings and providing comment letters. Comments are categorized into 11 categories, and categories are presented in a manner similar to the general organization of the preamble and regulatory text. In this document, the Agency's responses appear in bold text. The responses presented in this document respond to comments that are not otherwise addressed in the preamble and, in some instances, supplement the preamble's responses to key issues raised in comments.

Although portions of the preamble to the final rule are paraphrased in this document where useful to add clarity to responses, the preamble itself is the definitive statement of the Agency's rationale for the final rule. To the extent a response in this document could be construed as in conflict with the preamble of the final rule, the language in the final rule preamble and regulatory text controls and should be used for purposes of understanding the requirements and basis of the final rule.

In many instances, responses presented in this Response to Comments Document include cross-references to responses on similar or related issues located in the preamble to the final rule, the Economic Analysis for the Final Rule, and/or other sections of the Response to Comments Document. Accordingly, this Response to Comments Document, together with the preamble to the final rule, the Economic Analysis for the Final Rule, and the rest of the administrative record should be considered collectively as EPA's response to all of the significant comments submitted on the proposed rule.

Table of Contents

Abbreviations

APA	Administrative Procedure Act
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
ESA	Endangered Species Act
FR	*Federal Register*
FTE	Full-time Equivalent
FWS	U.S. Fish and Wildlife Service
ICR	Information Collection Request
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NMFS	National Marine Fisheries Service
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

A. Subpart A - General

1. Conflict of interest

1.1 Revised regulatory prohibition against conflicts of interest

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0026)

NAWM agrees that there should be no conflict, or appearance of conflict, when States and Tribes are issuing permits under an authorized Section 404 Program. This includes permits which a State or Tribe issues to itself for work in federally regulated waters. In EPA's oversight role, it is suggested that the agency put in place safeguards to assure that permitting decisions are made within the parameters, and guided by, the Section 404(b)(1) Guidelines so as to avoid any appearance of conflict. Such safeguards should be incorporated into the MOA between EPA and the authorized State or Tribe and should include size and quality criteria for agency review.

Agency Response: The Agency appreciates commenter input regarding potential conflicts of interest or the appearance of conflict. *See* Section IV.A.1 of the final rule preamble for further discussion of the Agency's rationale for providing this revised regulatory prohibition against conflicts of interest and response to these comments. As the preamble states, the proposal does not preclude development and inclusion of additional conflict of interest safeguards in the State-EPA Memorandum of Agreement (MOA). Additionally, EPA may request review of any permit to address potential conflicts. *See also* Section IV.A.1 of the final rule preamble discussing transparency with respect to potential conflict of interest.

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0021)

EPA proposes to broaden the current conflict-of-interest prohibition to apply to "individuals" and not just "public officer[s] or employee[s]." [Footnote 51: 88 Fed. Reg. 55312.]. The proposed revisions would require "any public officer, employee, or individual with responsibilities related to the section 404 permitting program who has a direct personal or pecuniary interest in any matter that is subject to decision by the agency" to "make known such interest in the official records of the agency" and to "refrain from participating in any manner in such decision by the agency or any entity that reviews agency decisions." [Footnote 52: 88 Fed. Reg. 55312.].

Alaska opposes this new provision. Its vague and broad articulation makes it unclear to whom, exactly, this provision applies. The additional uncertainty injected to the 404 assumption process by this provision will not facilitate State assumption, as desired.

Agency Response: *See* Section IV.A.1 of the final rule preamble for further discussion of the Agency's rationale for revising this provision. The preamble addresses this concern and makes clear that anyone who has direct personal or pecuniary interests in a section 404 permitting decision shall make such interests known and recuse themselves from such decisions. EPA disagrees with the

commenter that this provision will not facilitate State assumption; the commenter has not provided any basis for the proposition that this provision will disincentivize assumption.

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0014)

The EPA's proposed rule would further erode public trust in the permitting process by unnecessarily weakening conflict of interest provisions to suit the 404 program. While at one point the EPA considered application of a stronger conflict of interest provisions found in delegated NPDES programs, the EPA has instead decided to promulgate a weaker conflict of interest provision specific to the 404.

The EPA's justification for this change is nonsensical. EPA argues that while NPDES permits are typically long-term and industrial, 404 permits are shorter and purportedly used by both industry and private citizens alike, all of whom would presumably derive a "significant portion of income" from 404 permitting programs. First, in this rule EPA is proposing long-term permitting for the 404 programs. The proposed rule itself envisions permit applications accounting for "15-year, multi-phase housing" projects that would both run longer than many NPDES actions and create substantial industrial activity en route to producing hundreds of housing units.[Footnote 48: RIN 2040-AF83 at 88] Factoring in EPA's "long-standing position that activities related to the same project should not be split into multiple permits," and a permit for a multi-stage housing project could be stretched decades into the future and long past even longer NPDES projects. The justification for the proposed rule change cannot stand on a contention that it better differentiates 402 and 404 permits when the proposed rule can create longer projects.

Agency Response: ***See*** **Section IV.A.1 of the final rule preamble for further discussion of this conflict of interest provision. The preamble makes clear that anyone who has direct personal or pecuniary interests in a section 404 permitting decision shall make such interests known and recuse themselves from such decisions. EPA disagrees that a monetary threshold, similar to the 402 regulations, is an appropriate measure to avoid conflict of interest in Tribal or State section 404 permitting decisions. Section 402 permits are typically sought to authorize continuous discharges while section 404 permits are generally one-time discharges. Thus, the Agency has determined that recusing individuals on a case-by-case basis will be sufficient to ensure avoidance of conflicts of interest.**

Finally, nowhere in the rulemaking is EPA proposing permits be issued for longer than 5 years – the statute limits Tribal and State permits to 5 years in duration. The purpose of the long-term permitting/project is to ensure all impacts associated with large projects that extend beyond an individual 5-year permit limit are considered with each 5-year permit associated with that project in mind. ***See*** **Section IV.C.1 of the final rule preamble.**

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0015)

Second, the EPA cannot realistically argue that extended and often private application for 404 programs means that "so many people would be . . . eliminated from the pool of

potential board members. "Significant portion of income" is defined as "10 percent or more of gross personal income for a calendar year" and it would be improper to argue a person performing small-scale, individual projects would fall into this category. Taking another EPA example, it is illogical to conclude that building a single boat ramp or erosion control project would constitute 10 percent of an applicant's income for a calendar year. Unless the individual constructed ramps or carried out erosion management projects as a consistent business venture, only the rarest occasion would eliminate a potential board member or conflict out an applicant.

If EPA were serious about implementing conflict of interest changes, the proper course of action would be codifying the section 402 provision as it considered doing in 1988.[Footnote 49: Id. at 124] The "significant portion of income" standard would not dilute the pool of potential board members and applicants, as EPA wrongly asserts because of the unlikely scenario of an applicant hitting that "10% of gross income" threshold in a project. Instead, EPA's proposed threshold of "significant pecuniary interest" provides no meaningful figure to guide applicants and runs contrary to EPA's desire to "ensure public confidence that permittees are treated consistently." [Footnote 50: Id. at 125.] Instead, the proposed rule offers an unwieldly tool that does little to govern other than adding both confusing language and regulatory uncertainty. We therefore oppose EPA's weakened conflict of interest provisions.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0083-0014. EPA agrees that many section 404 individual permitting projects may not implicate 10% of a person's income, and indeed, this is an additional reason that the Agency is not applying the section 402 conflict of interest provision to section 404 State program regulations. The section 402 provision would be both under- and over-inclusive. EPA has determined that when Tribes or States assume the section 404 program, a person should not be involved in any permitting decision in which the person has a direct personal or pecuniary interest, even if the decision does not implicate 10% of the person's income – a threshold which, as the commenter notes, many projects would not meet. Involvement in a permitting decision in which a person has a direct personal or pecuniary interest (no matter the percentage of the person's income implicated) risks undermining the integrity and neutrality, and certainly the** ***appearance*** **of integrity and neutrality, of the permitting process.**

1.2 Self-issuance of permits

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0038)

VI. EPA should address conflicts of interest resulting from funding by private developers and state agencies.

Conflicts of interest are also presented when private developers or state agencies are allowed to provide funding to the permitting agency that in turn allows the permitting agency to employ permit processers that will handle the permit applications submitted by the same private developers or state agencies. In effect, the private developer or non-

permitting state agency becomes the employer of their permit processor(s) even if the exact funding provided is not directly traceable to paying those specific staff. These arrangements are inherently problematic and divest the public's trust in the permitting agency's decision-making. See Article(s) [Footnote 74: J. Tobias, Defanged, Money and Politics Could Doom the Florida Panther –and the Endangered Species Act, THE INTERCEPT (Jan. 24, 2021).] EPA should clarify how this proposed rule addresses these concerns and make necessary changes to prevent these conflicts of interest, or appearance of such, from arising.

Agency Response: ***See*** **Section IV.A.1 of the final rule preamble. This rulemaking does not address sources of funding for Tribal or State agencies. Moreover, the commenter has not presented data indicating that fees paid by permit applicants, including developers or State agencies, to permitting agencies affects the agencies' objectivity in the permitting process.**

2. Compliance with the 404(b)(1) Guidelines

2.1 General comments

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0033)

EPA should also require that the MOA between the assuming state and the Corps include a provision that federal law will control in judicial review when a challenger alleges non-compliance with the Section 404(b)(1) Guidelines. Federal courts have already interpreted how the 404(b)(1) Guidelines apply, whereas applicant states do not have that experience interpreting the requirements of the Section 404(b)(1) Guidelines. In the preamble, EPA recognizes that compliance with the Section 404(b)(1) Guidelines may be challenging and offers up suggestions for how states can demonstrate compliance, id. at 55297, but EPA can and should simply require an assuming state to incorporate the 404(b)(1) Guidelines to ensure compliance. Adoption and incorporation of the Guidelines is especially important as EPA acknowledges that the only avenue where states may be able to apply the equivalent of federal laws, such as the ESA and the NHPA, after state assumption is through the application of the Guidelines. Id. at 55297, 55298. This is especially important in a state like Alaska which has no federal equivalent to NEPA.

Agency Response: **To the extent the commenter requests that the final rule require that federal law will control in a challenge alleging in state court that a state-issued permit is not consistent with the 404(b)(1) Guidelines, Tribal and State permits are Tribal and State actions subject to Tribal and State law. H.R. Rep. No. 95-830 at 104 (1977) ("The conferees wish to emphasize that such a State program is one which is established under State law and which functions in lieu of the Federal program").** ***See Chesapeake Bay Foundation v. Va. State Water Control Bd.*****, 453 F. Supp. 122 (E.D. Va 1978) (no NEPA review required for NPDES permit issued by State because the State permit is not a federal action).**

To the extent the commenter recommends that the final rule require that Tribes and States incorporate or adopt verbatim the 404(b)(1) Guidelines, the Agency disagrees. If Congress had so intended, it could have expressed that intent more clearly than by

directing that EPA "determine… whether such State has the following authority with respect to the issuance of permits pursuant to such programs … (i) to apply, and assure compliance with [the 404(b)(1) Guidelines]." By using the terms "apply" and "assure compliance with" throughout 404(h)(1), Congress left the manner of such application and assurance to the Tribes and States. *See* S. Rep. No. 95-370 at 77 (1977) ("[The amendment] provides for assumption of the permit authority by States with approved programs for control of discharges for dredged and fill material in accord with the criteria and with the guidelines *comparable to* those contained in 402(b) and 404(b)(1).") (emphasis added). Thus, Congress allowed leeway for Tribes and States to craft a Tribal or State program consistent with circumstances specific to that Tribe or State that would still result in permits that will comply with the 404(b)(1) Guidelines and other federal requirements to the same extent as a permit for the same discharge if issued by the Corps. *See* Section IV.A.2 of the final rule preamble for a discussion of the Agency's rationale.

For further discussion on judicial review, see Section IV.C.2 of the final rule preamble.

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0034)

At the very least, applicant states must show with specificity how their proposals and state laws and regulations match up with each provision of the Section 404(b)(1) Guidelines and concede that federal court decisions and federal interpretations of the Guidelines will receive deference in judicial review.

Agency Response: The Agency agrees with the commenter that Tribal and State section 404 programs must demonstrate sufficient authority to issue permits that apply and assure compliance with the 404(b)(1) Guidelines. *See* Section IV.A.2 of the final rule preamble for a further discussion.

To the extent the commenter proposes that the final rule require that federal law will control in a challenge alleging in state court that a state-issued permit is not consistent with the 404(b)(1) Guidelines, the Agency disagrees as Tribal and State permits are Tribal and State actions subject to Tribal and State law. *See* Response to Comment EPA-HQ-OW-2020-0276-0063-0033.

The Agency disagrees to the extent the commenter asserts that federal interpretive guidance is binding on Tribal and State programs. See Section IV.A.3 for a discussion of the rule of federal interpretive guidance in Tribal and State section 404 programs.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0012)

A. EPA must clearly articulate the requirements for how a state program demonstrates that permits will "apply and ensure compliance with" Section 404, including the 404(b)(1) Guidelines.

EPA's proposed rule fails to clearly require that state permits apply the 404(b)(1) Guidelines. Section 404 requires that for a state to assume the 404 program, the state must have authority to issue permits that "apply, and assure compliance with," any applicable

requirements in Section 404, including but not limited to the 404(b)(1) Guidelines. 33 U.S.C.§ 1344(h)(1)(A)(i). Congress used the word "and" to create two independent requirements for state programs: that state permits must (1) apply the 404(b)(1) Guidelines; and (2) assure compliance with those Guidelines. See Bruesewitz v. Wyeth LLC, 562 U.S. 223, 236 (2011).

The proposed rule does not meet this statutory requirement as it repeatedly states that a state need only show that its state permits will be somehow be consistent with the 404(b)(1) Guidelines. 88 Fed. Reg. at 55,277–78, 55,281, 55,284, 55,292, 55,296–98, 55,301–02, 55,310, 55,316; id. at 55,326 (to be codified at 40 C.F.R. § 233.21(b)); id. (to be codified at 40 C.F.R. § 233.30(b)(5)). The proposed rule also fails to fix this error where it appears in the existing regulations. See 40 C.F.R. §§ 233.20(a), 233.21(b), (e), 233.23(a). Rather, EPA can readily address this problem and ensure stringency in keeping with the statutory mandate by simply requiring the assuming state to fully adopt the 404 Guidelines as written. In doing so, EPA is assured that a state's program is as protective as the federal program, it eases administrative burdens considerably (no need to sift and weigh the many different permutations a state program may take), and it helps ensure consistency among programs and among EPA decisionmakers.

To comply with the Clean Water Act's mandates, EPA must explicitly require that a state program (1) adopt or incorporate by reference the 404(b)(1) Guidelines; or (2) adopt and apply more stringent state statutes and regulations [Footnote 61: EPA may alternatively require that states adopt and apply different but as stringent state statutes and regulations but must clearly articulate what an equivalent state program must look like. The proposed rule does not provide this clarity.]

Agency Response: To the extent the commenter asserts that adoption verbatim or incorporation of the 404(b)(1) Guidelines into a Tribal or State program is one way to satisfy CWA Section 404(h)(1)(A)(i), the Agency agrees. To the extent, however, the commenter asserts that CWA Section 404(h)(1)(A)(i) mandates that Tribes and States adopt verbatim or incorporate the 404(b)(1) Guidelines, EPA disagrees. *See* Response to Comment EPA-HQ-OW-2020-0276-0063-0033. *See also* Section IV.A.2 of the final rule preamble for more discussion of the Agency's rationale.

To the extent the commenter suggests that use of the term "consistent with" the 404(b)(1) Guidelines in the proposed rule preamble has a meaning other than that Tribal and State CWA section 404 programs must have authority to issue permits that "apply, and assure compliance with" the 404(b)(1) Guidelines, the Agency disagrees. The proposed rule preamble uses the phrase "consistent with" interchangeably with its description of the relevant authority. Regardless, the Agency has revised the language in a number of places to make clear that it is the Agency's interpretation that permits issued by Tribal and State CWA section 404 programs must comply with the 404(b)(1) Guidelines.

To the extent the commenter suggests that the existing regulations do not implement Section 404(h)(1)(A)(i), EPA disagrees. The regulations cited by the commenter all require that permits issued by a Tribes or State comply with the 404(b)(1) Guidelines.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0013)

B. EPA must rigorously examine state program applications to ensure that state permits will both apply and comply with Section 404 and the 404(b)(1) Guidelines in particular.

EPA is proposing to continue its practice of allowing case-by-case analysis of state programs, which only amplifies the existing uncertainty about what states must do to assume the 404 program and will contribute to a lack of consistency across states and EPA regions. 88 Fed. Reg. at 55,296–97.

EPA must clearly articulate specific criteria states must meet and by which EPA will review state program applications and their compliance with the 404(b)(1) Guidelines to avoid creating loopholes that can be exploited by states and future administrations to the detriment of our Nation's waters and wetlands. These criteria must ensure that state applications (1) clearly and fully define the particular regulatory and statutory provisions that the state will apply; and (2) clearly state that those provisions either incorporate/adopt the 404(b)(1) Guidelines or adopt more stringent requirements [Footnote 62: EPA's proposal to evaluate a permit checklist or existing state wetlands permits is inadequate because it does not examine the legal requirements of a state program, which may include too much flexibility and allow for inadequate state permits even if the examples provided are adequate. See 88 Fed. Reg. at 55,297. EPA must look to the state statutes and regulations, and how they are applied, to ensure that they meet the necessary requirements.].

Agency Response: Consistent with CWA Section 404(h)(1)(A)(i), the final rule ensures that Tribal and State programs will result in permits that apply and assure compliance with the 404(b)(1) Guidelines while providing Tribes and States the leeway allowed by Congress to craft a program consistent with the circumstances specific to that Tribe or State. See Section IV.A.2 of the final rule preamble. The 404(b)(1) Guidelines themselves provide sufficiently specific criteria against which to compare proposed Tribal and State programs.

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0014)

2. The proposed rule is requesting comment on how States and Tribes can document that there is program equivalency between the 404(b)(1) Guidelines and the applying authority's regulations. While, as indicated within the rule, the simplest method would be to incorporate the Guidelines by reference, it may be that applying States or Tribes already have regulatory language which is equivalent and so would not need to amend existing regulations. It also affords flexibility to a State or Tribe to allow for the justification of program stringency equal to the federal one without simply incorporating the Guidelines verbatim. Since the Regional Administrator is the determiner of equivalency for EPA, it would seem prudent for the agency to develop a list of elements contained within the 404(b)(1) Guidelines which it will use to make this judgement and require applying

authorities to make a step-by-step comparison between their regulations and the Guidelines. This sets a clear expectation for applicants, informs the public as to how the equivalency determination was made, and establishes a "bar" for States and Tribes to plan for and make regulatory adjustments accordingly.

Agency Response: **To the extent the commenter suggests that Tribes and States that already have regulatory language that provides sufficient authority to issue permits that apply and assure compliance with the 404(b)(1) Guidelines need not adopt verbatim or incorporate the 404(b)(1) Guidelines, the Agency agrees. To the extent the commenter suggests that EPA should develop a checklist of elements contained within the 404(b)(1) Guidelines either in the final rule or in guidance, the Agency disagrees. The 404(b)(1) Guidelines themselves provide sufficiently specific criteria against which to compare proposed Tribal and State programs without EPA setting out an additional checklist.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0020)

If a state assumes Section 404 permitting authority, EPA may object to a proposed permit that is inconsistent with the CWA Section 404(b)(1) Guidelines. 33 U.S.C. § 1344(j). However, EPA currently only reviews approximately 2-5% of the total permit applications received by the states that are administering Section 404 programs.

Agency Response: **Under the final rule, the Agency retains its oversight authority over permits issued by Tribal and State section 404 programs. *See* 40 CFR 233.50-53. For a discussion of how the final rule proposes to clarify certain aspects of EPA's oversight, see Section IV.E of the final rule preamble. The manner in which the Agency implements its oversight authority on a permit-by-permit basis is beyond the scope of this rulemaking.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0029)

EPA should include in the regulations a requirement that assuming states must adopt or incorporate by reference the CWA Section 404(b)(1) Guidelines. Although states may have alternative avenues that may be parallel to the 404(b)(1) Guidelines, the only way to ensure that the standards of the Guidelines will be met is if they are fully adopted or incorporated. Adopting or incorporating the 404(b)(1) Guidelines does not unnecessarily constrain states' ability to conduct state-specific analyses or require additional information, it merely ensures that the state's requirements are at least as stringent as the Guidelines.

Agency Response: ***See*** **Response to Comment EPA-HQ-OW-2020-0276-0063-0033.** ***See also*** **Section IV.A.2 of the final rule preamble for further discussion on the Agency's rationale.**

Great Lakes Indian Fish and Wildlife Commission (EPA-HQ-OW-2020-0276-0080-0008)

II. Permit Requirements. EPA should include in the regulations a requirement that assuming states must adopt or incorporate by reference the CWA Section 404(b)(1) Guidelines. Although states may have alternative avenues that may be parallel to the

404(b)(1) Guidelines, the only way to ensure that the standards within the Guidelines will be met is if they are fully adopted or incorporated. Adopting or incorporating the 404(b)(1) Guidelines does not unnecessarily constrain states' ability to conduct state- specific analyses or require additional information, it merely ensures that the state's requirements are at least as stringent as the Guidelines.

Agency Response: To the extent the commenter asserts that CWA Section 404(h)(1)(A)(i) mandates that Tribes and States adopt verbatim or incorporate the 404(b)(1) Guidelines, the Agency disagrees. *See* Response to Comment EPA-HQ-OW-2020-0276-0063-0033. *See also* Section IV.A.2 of the final rule preamble for further discussion of the Agency's rationale.

Tulalip Tribes of Washington (EPA-HQ-OW-2020-0276-0082-0005)

Tulalip insists that any final rulemaking requires that states fully adopt Section 404(b)(1) Guidelines to guarantee that the Section 404(b)(1) Guidelines will be met. Relatedly, the EPA should mandate that the Section 404(b)(1) analysis to be automatically updated for every five-year permit cycle.

Agency Response: To the extent the commenter asserts that CWA Section 404(h)(1)(A)(i) mandates that Tribes and States adopt verbatim or incorporate the 404(b)(1) Guidelines, the Agency disagrees. *See* Response to Comment EPA-HQ-OW-2020-0276-0063-0033. *See* Section IV.A.2 of the final rule preamble for more discussion of the Agency's rationale. To the extent the commenter recommends that EPA should mandate that a Tribe or State must automatically update its analysis of how a permit applies and assures compliance with the 404(b)(1) Guidelines every five years, see Section IV.C.1 of the final rule preamble.

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0029)

EPA should include in the regulations a requirement that assuming states must adopt or incorporate by reference the CWA Section 404(b)(1) Guidelines. Although states may have alternative avenues that may be parallel to the 404(b)(1) Guidelines, the only way to ensure that the standards of the Guidelines will be met is if they are fully adopted or incorporated. Adopting or incorporating the 404(b)(1) Guidelines does not unnecessarily constrain states' ability to conduct state specific analyses or require additional information, it merely ensures that the state's requirements are at least as stringent as the Guidelines.

Agency Response: To the extent the commenter asserts that CWA Section 404(h)(1)(A)(i) mandates that Tribes and States adopt verbatim or incorporate the 404(b)(1) Guidelines, the Agency disagrees. *See* Response to Comment EPA-HQ-OW-2020-0276-0063-0033. *See* Section IV.A.2 of the final rule preamble for further discussion of the Agency's rationale.

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0030)

EPA should also require that the MOA between the assuming state and the Corps include a provision that federal law will control in judicial review when a challenger alleges non-compliance with the Section 404(b)(1) Guidelines. Federal courts have already interpreted

how the 404(b)(1) Guidelines apply, whereas applicant states do not have that experience interpreting the requirements of the Section 404(b)(1) Guidelines.

Agency Response: To the extent the commenter proposes that the final rule require that federal law will control in a challenge alleging in state court that a state-issued permit is not consistent with the 404(b)(1) Guidelines, the Agency disagrees as Tribal and State actions subject to Tribal and State law. *See* Response to Comment EPA-HQ-OW-2020-0276-0063-0033. *See also* Section IV.A.2 of the final rule preamble for a discussion of the Agency's rationale.

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0006)

If a state assumes Section 404 permitting authority, EPA may object to a proposed permit that is inconsistent with the CWA Section 404(b)(1) Guidelines. 33 U.S.C. § 1344(j). However, EPA currently only reviews approximately 2-5% of the total permit applications received by the states that are administering Section 404 programs.

Agency Response: Under the final rule, the Agency retains its oversight authority over permits issued by Tribal and State section 404 programs. *See* 40 CFR 233.50-53. For a discussion of how the final rule proposes to clarify certain aspects of EPA's oversight, see Section IV.E of the final rule preamble. The manner in which the Agency implements its oversight authority on a permit-by-permit basis is beyond the scope of this rulemaking.

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0018)

EPA's proposed rule must clearly require that state permits apply the 404(b)(1) Guidelines and not simply be "consistent with" as the proposed rule is currently drafted. While true, if a state assumes Section 404 permitting authority EPA may object to a proposed permit that is inconsistent with or does not "apply, and assure compliance with" any applicable requirements in Section 404, including but not limited to the Clean Water Act Section 404(b)(1) Guidelines, that potential for an objection provides little assurance. [Footnote 27: 33 U.S.C. § 1344(j).] EPA currently only reviews approximately 2-5% of the total permit applications received by the states that are administering Section 404 programs.

Agency Response: To the extent the commenter suggests that use of the term "consistent with" the 404(b)(1) Guidelines in the proposed rule preamble has a meaning other than that Tribal and State CWA section 404 programs must have authority to issue permits that "apply, and assure compliance with" the 404(b)(1) Guidelines, the Agency disagrees. The proposed rule preamble uses the phrase "consistent with" interchangeably with its description of the relevant authority. Regardless, the Agency has revised the language in a number of places to make clear that it is the Agency's interpretation that permits issued by Tribal and State CWA section 404 programs must comply with the 404(b)(1) Guidelines.

Under the final rule, the Agency retains its oversight authority over permits issued by Tribal and State section 404 programs. *See* 40 CFR 233.50-53. For a discussion of how the final rule proposes to clarify certain aspects of EPA's oversight, see Section IV.E of the final rule preamble. The manner in which the Agency implements its

oversight authority on a permit-by-permit basis is beyond the scope of this rulemaking.

2.2 Demonstrating Tribes and States have sufficient authority to apply and assure compliance with the CWA 404(b)(1) Guidelines

Individual commenter (EPA-HQ-OW-2020-0276-0050-0008)

For their applications, I would recommend Tribes and States focus on identifying vulnerable areas, how they would avoid significant degradation, and impacts of human use characteristics. These are aspects of the program that, although related to the permitting aspect, are not explicitly lined out in the program. Including them would show initiative and what the Tribe or State will prioritize post-assumption. I also think that States should consider the impacts on Tribes and Tribal interests if they were to assume the section 404 program and finalize this in a Memorandum of Agreement with the Tribe(s).

Agency Response: The Agency appreciates the comment. Pursuant to CWA section 404(h)(1)(A)(i), EPA may approve a Tribal or State request for assumption only if EPA determines, among other things, that the Tribe or State has authority "[t]o issue permits which – (i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection [404](b)(1)…." Consistent with CWA section 404(h)(1)(A)(i), the existing section 404 Tribal and State program regulations require that permits issued by Tribes and States apply and assure compliance with the 404(b)(1) Guidelines. *See* 40 CFR 233.1(d); 233.20(a)); 233.23(a)); and 233.34(a). Among other things, the CWA 404(b)(1) Guidelines direct that "no discharge of dredged or fill material shall be permitted" if there is a less environmentally damaging practicable alternative, so long as the alternative does not have other significant adverse environmental consequences (40 CFR 230.10(a)); if it would cause or contribute to violations of applicable water quality standards taking into account disposal site dilution and dispersion (40 CFR 230.10(b)(1)); if it would cause or contribute to significant degradation of waters of the United States (40 CFR 230.10(c)); or if it would jeopardize the continued existence of listed endangered or threatened species under the Endangered Species Act of 1973 or result in the likelihood of the destruction or adverse modification of designated critical habitat (40 CFR 230.10(b)(3)). *See* Section IV.A.2 of the preamble to the final rule.

The final rule provides a number of ways in which Tribes can meaningfully engage with Tribal and State section 404 programs. The final rule directs that assuming Tribes and States provide for judicial review of Tribe or state-issued permits. In addition, under the final rule, Tribes may request that EPA review permits that may affect Tribal rights or interests within or beyond reservation boundaries. Tribes also may receive notice and an opportunity to provide recommendations as an "affected State" for purposes of 40 CFR 233.31 either by already having status of treatment similar to a state (TAS) for any provision of the CWA or by specifically seeking TAS for the purpose of commenting on proposed permits to be issued by a state. *See* Section IV.F of the preamble to the final rule.

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0032)

EPA should include in the regulations a requirement that assuming states must adopt or incorporate by reference the CWA Section 404(b)(1) Guidelines. Although states may have alternative avenues that may be parallel to the 404(b)(1) Guidelines, the only way to ensure that the standards of the Guidelines will be met is if they are fully adopted or incorporated. Adopting or incorporating the 404(b)(1) Guidelines does not unnecessarily constrain states' ability to conduct state specific analyses or require additional information, it merely ensures that the state's requirements are at least as stringent as the Guidelines.

Agency Response: To the extent the commenter asserts that CWA Section 404(h)(1)(A)(i) mandates that Tribes and States adopt verbatim or incorporate the 404(b)(1) Guidelines, the Agency disagrees. If Congress had so intended, it could have expressed that intent far more clearly than by directing that EPA "determine… whether such State has the following authority with respect to the issuance of permits pursuant to such programs … (i) to apply, and assure compliance with [the 404(b)(1) Guidelines]." *See* Response to Comments EPA-HQ-OW-2020-0276-0063-0033 for further discussion. *See also* Section IV.A.2 of the final rule preamble for more discussion of the Agency's rationale.

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0030

EPA should also require that the MOA between the assuming state and the Corps includes a provision that federal law will control in judicial review when a challenger alleges non-compliance with the Section 404(b)(1) Guidelines. Federal courts have already interpreted how the 404(b)(1) Guidelines apply, whereas applicant states do not have that experience interpreting the requirements of the Section 404(b)(1) Guidelines. In the preamble, EPA recognizes that compliance with the Section 404(b)(1) Guidelines may be challenging and offers up suggestions for how states can demonstrate compliance, id. at 55297, but the challenge itself indicates that states should simply incorporate the 404(b)(1) Guidelines to ensure compliance.

Agency Response: To the extent the commenter proposes that the final rule require that federal law will control in a challenge alleging in State court that a State-issued permit is not consistent with the 404(b)(1) Guidelines, the Agency disagrees. Tribal and State section 404 permits are Tribal and State actions subject to Tribal and State law. To the extent the commenter recommends that the final rule require that Tribes and States incorporate or adopt verbatim the 404(b)(1) Guidelines, the Agency disagrees. *See* Response to Comment EPA-HQ-OW-2020-0276-0063-0033. *See also* Section IV.A.2 of the final rule preamble for a discussion of the Agency's rationale.

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0031)

At the very least, applicant states must show with specificity how their proposals and state laws and regulations match up with each provision of the Section 404(b)(1) Guidelines and concede that federal court decisions and federal interpretations of the Guidelines will receive deference in judicial review.

Agency Response: **The Agency agrees with the commenter that Tribal and State section 404 programs must demonstrate sufficient authority to issue permits that apply and assure compliance with the 404(b)(1) Guidelines. *See* Section IV.A.2 of the final rule preamble for a further discussion.**

To the extent the commenter proposes that the final rule require that federal law will control in a challenge alleging in State court that a State-issued permit is not consistent with the 404(b)(1) Guidelines, Tribal and State permits are Tribal and State actions subject to Tribal and State law. *See* Response to Comment EPA-HQ-OW-2020-0276-0063-0033.

The Agency disagrees to the extent the commenter asserts that federal interpretive guidance is binding on Tribal and State programs. *See* Section IV.A.3 for a discussion of the rule of federal interpretive guidance in Tribal and State section 404 programs.

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0007)

EPA uses the proposed rule as a vehicle to offer suggestions regarding how States may "demonstrate they have sufficient authority to issue permits that apply and assure compliance with the CWA 404(b)(1) Guidelines." [Footnote 21: 88 Fed. Reg. 55296.]. EPA uses this section to advance interpretations of its existing regulations, such as: "EPA considers the human use effects under subpart F . . . to encompass impacts of proposed discharges on Tribal interests, including impacts on fisheries and other aquatic resources, aesthetics, and historic and cultural uses." [Footnote 22: 88 Fed. Reg. 55298].

Alaska's Attorney General Office is more than capable of demonstrating that the State has sufficient authority to issue permits that assure compliance with the 404(b)(1) Guidelines. We suggest EPA defer to a State Attorney General Office's evaluation of its own State's authority.

Agency Response: **The Agency appreciates the comment. CWA section 404(h)(1) directs EPA to determine whether a Tribe or State seeking to assume implementation of the CWA section 404 program has the authority as described in that subsection, including whether the Tribe or State has "sufficient authority to issue permits that apply, and assure compliance with [the 404(b)(1) Guidelines]." 33 U.S.C. 1344(h)(1)(A). The Agency will continue to carry out its statutory responsibility.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0031)

In the preamble, EPA recognizes that compliance with the Section 404(b)(1) Guidelines may be challenging and offers up suggestions for how states can demonstrate compliance, id. at 55297, but EPA can and should simply require an assuming state to incorporate the 404(b)(1) Guidelines to ensure compliance. Adoption and incorporation of the Guidelines is especially important as EPA acknowledges that the only avenue where states may be able to apply the equivalent of federal laws, such as the ESA and the NHPA, after state assumption is through the application of the Guidelines. Id. at 55297, 55298. This is especially important in a state like Alaska which has no federal equivalent to NEPA.

At the very least, applicant states must show with specificity how their proposals and state laws and regulations match up with each provision of the Section 404(b)(1) Guidelines and concede that federal court decisions and federal interpretations of the Guidelines will receive deference in judicial review.

Agency Response: The Agency agrees with the commenter that Tribal and State section 404 programs must demonstrate sufficient authority to issue permits that apply and assure compliance with the 404(b)(1) Guidelines. *See* Section IV.A.2 of the final rule preamble for a further discussion.

To the extent the commenter asserts that CWA Section 404(h)(1)(A)(i) mandates that Tribes and States adopt verbatim or incorporate the 404(b)(1) Guidelines, the Agency disagrees. *See* Response to Comment EPA-HQ-OW-2020-0276-0063-0033. See Section IV.A.2 of the final rule preamble for more discussion of the Agency's rationale. The 404(b)(1) Guidelines themselves provide sufficiently specific criteria against which to compare proposed Tribal and State programs.

To the extent the commenter proposes that the final rule require that federal law will control in a challenge alleging in State court that a State-issued permit is not consistent with the 404(b)(1) Guidelines, EPA disagrees as Tribal and State permits are Tribal and State actions subject to Tribal and State law. *See* Response to Comment EPA-HQ-OW-2020-0276-0063-0033.

The Agency disagrees to the extent the commenter asserts that federal interpretive guidance is binding on Tribal and State programs. *See* Section IV.A.3 for a discussion of the rule of federal interpretive guidance in Tribal and State section 404 programs.

2.3 Endangered Species Act

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0030)

III. EPA must ensure that ESA-listed threatened and endangered species are adequately protected during EPA's review of state assumption applications as well as a state's operation of an assumed 404 program.

The proposed rule fails to ensure that ESA-listed threatened and endangered species and their habitats continue to receive the same level of protection under state-assumed programs as they currently receive with federal 404 permitting. EPA must amend the rule to address the intersecting requirements of the Endangered Species Act and Section 404. And EPA must provide clear, binding guidelines to ensure that assuming states comply with the Clean Water Act's independent requirement that no permit jeopardize protected species or adversely modify or destroy critical habitat.

Agency Response: *See* Section IV.A.2 of the final rule preamble.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0031)

A. EPA must address its ESA consultation obligations in the proposed rule.

EPA itself has acknowledged that the agency must engage in consultation when deciding whether to approve a Section 404 assumption application [Footnote 66: D. Ross, EPA, Memorandum on Endangered Species Act Section 7(a)(2) Consultation for State and Tribal Clean Water Act Section 404 Program Approvals, Aug. 27, 2020.]. The proposed rule must be revised to ensure that in this programmatic consultation, EPA complies with the ESA-mandates for formal consultation, including using the "best scientific and commercial data available" considering the "effects of the action as a whole" to 50 C.F.R. § 402.14(c)–(d) [Footnote 67: We adopt and incorporate Earthjustice's prior comment regarding EPA's obligation to consult on its decisions regarding 404 assumption applications. Letter from Kristen Boyles et al., Earthjustice et al., to Kathy Hurld, EPA, June 6, 2020].

EPA should commit to using the wealth of information available from federal 404 permitting in assumed states to analyze the effects of 404 permitting on protected species and habitat. 50 C.F.R. §§ 402.12(f)(2)–(4), 402.14(c)(1)(i)(F), (c)(1)(iii), (vi). And EPA must ensure that the wildlife agencies have access to that information when conducting their consultation. Id. The agency must commit to fully and rigorously examining the effects of its decision, including the cumulative effects. Id. §§ 402.14(f)(4), 402.14(c)(iv). It must also ensure that the framework in place for permit review provides adequate protections to ensure a thorough evaluation of the potential effects of a permitting decision at the individual permit application level.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble. EPA agrees that it must ensure that the framework in place for permit review provides adequate protections to ensure a thorough evaluation of the potential effects of a permitting decision at the individual permit level.** ***See*** **40 CFR 233.51.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0032)

The program approval stage provides an important point to consider potential adverse impacts to species resulting from state 404 permitting decisions. Ultimately, the ESA mandates that "[e]ach Federal agency," including EPA, "shall, in consultation with and with the assistance of" the Services, ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536 (a)(2) (further explaining that in fulfilling this obligation, agencies must "use the best scientific and commercial data available") (emphasis added). Approval of an inadequate program has that potential, particularly given the importance of wetlands to biodiversity, as described above. Further, this is not a situation in which EPA's hands are tied by any sort of affirmative obligation to proceed even in the face of jeopardy to listed species or adverse modification of critical habitat. Quite the opposite, the 404(b)(1) Guidelines require that state permits ensure the absence of such results, and Section 404 requires EPA to ensure that a state program is adequate to do so. Further, the Clean Water Act obligates EPA to transmit copies of a state's submission to wildlife agencies for comment and to take any responsive comments received into account. 33 U.S.C. § 1344(g)–(h).

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.** ***See also*** **40 CFR 233.50 and 233.51.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0033)

B. EPA must engage in permit-specific ESA consultation pursuant to its oversight authority over state permits.

The ESA imposes continuous duties on both EPA and the wildlife agencies to ensure that the ongoing implementation and effects of 404 assumption will not jeopardize species or adversely modify or destroy critical habitat. In addition to conducting programmatic consultation at the time EPA decides to allow state assumption, EPA has a continuing obligation to ensure that species are protected at the permit level.

Under Section 404(j), EPA retains authority and discretion over individual permits issued by states under an assumed program. 33 U.S.C. § 1344(j). Section 404(j) requires that copies of applications and proposed permits must be submitted to EPA for review and comment and that EPA shall provide copies of the proposed permit to the Secretary of Interior through the USFWS. Id. Further, Section 404(j) provides that if EPA uses its discretion and authority to comment on a permit, EPA's comments must be resolved to EPA's satisfaction before the permit may be issued by the state. Id. This discretionary involvement allows EPA to object to the issuance of any permit that is outside of the requirements of the 404(b)(1) Guidelines, including the guideline that prohibits any permit from jeopardizing protected species or adversely modifying or destroying critical habitat. Id.; 40 C.F.R. §§ 233.50, 233.51(b)(2).

EPA should amend 40 C.F.R. § 233.50 to make clear that its review pursuant to Section 404(j) triggers EPA's ESA consultation obligations for any state-permitted project that has the reasonable potential to impact protected species and that EPA will review and comment on the subject permit. EPA's rules must also require that state permit applications and proposed permits disclose and highlight the following information: (1) a list of all ESA-listed species likely to be present all or part of any given year within the affected area of the permitted project; (2) the location of the permitted project relative to proposed or designated critical habitat for listed species; (3) impacts, including direct, indirect, and cumulative, to protected species or their critical habitat as a result of the permitted activity; and (4) all proposed, enforceable permit requirements that would ensure the protection of the identified protected species from jeopardy and incidental take and avoidance of destruction or adverse modification to critical habitat.

EPA's rule must also explicitly require that if a permitted project will occur within proposed or designated critical habitat for a protected species, or if disclosed impacts, direct, indirect, or cumulative, have the reasonable potential to harm or jeopardize a protected species, then (1) EPA retains full authority over the permit for the project; and (2) EPA shall comment on and ensure protection of the protected species and habitat by requiring adequate permit terms to address species protections specifically designed to ensure no incidental take occurs.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble. This rulemaking addresses compliance with the CWA, not the ESA. EPA declines to codify obligations under the ESA in its regulations implementing CWA section 404. EPA notes that EPA has the opportunity to review all Tribal and State permit applications with reasonable potential to affect endangered or threatened species as determined by the Fish and Wildlife Service.** ***See*** **40 CFR 233.51(b)(2). EPA also shares these permits with the USFWS, NMFS and the Corps for their review and has the opportunity to provide comment, recommendations, conditions on these permit applications or object to the issuance of the permit.** ***See*** **40 CFR 233.51(b)(2).**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0034)

As to EPA's review of state permits, EPA should also revise 40 C.F.R. § 233.51(b)(2) to read, "Discharges with reasonable potential for affecting endangered and threatened species and proposed or designated critical habitat as determined by FWS and NMFS" in order to conform to ESA obligations for the protection of listed species. See 40 C.F.R. § 233.51(b)(2) (proposed addition emphasized). Although it is implicit that discharges that damage critical habitat also harm listed species, this language change would eliminate any potential for misunderstanding as to the obligations at issue. EPA should also interpret this provision as giving USFWS and NMFS the role and responsibility to determine whether a permit has the reasonable potential to affect threatened and endangered species. If EPA decides to continue to allow state agencies to make an initial determination of impacts to protected species, the agency must require record-based concurrence from the wildlife agencies prior to permit approval to ensure that state agencies may not unilaterally exclude permits from EPA's review when those permits may, in fact, impact protected species.

The proposed rule, in allowing a state to demonstrate no jeopardy to EPA, 88 Fed. Reg. at 55,297, improperly places EPA in the position of determining jeopardy and adverse modification/destruction, a role reserved for the wildlife agencies pursuant to the ESA. 16 U.S.C. § 1536. The preamble to the proposed rule vaguely identifies ways by which a state may demonstrate its permits will not jeopardize protected species or adversely modify or destroy critical habitat, stating that they could provide certain information in the submission and "include in the program submission provisions and procedures to protect listed species and habitat." 88 Fed. Reg. at 55,297. It provides no guidance, however, on what protections and processes are necessary. At the federal level, a body of law concerning the obligations to avoid jeopardy and adverse modification exists under and in the judicial decisions construing the ESA. States must, at a minimum, provide the same level of protection in their own permit processes. EPA cannot step into the shoes of the wildlife agencies, particularly where Congress has spoken. Moreover, EPA does not have the experience and expertise necessary to make a jeopardy determination.

In addition, EPA should not allow the use of a non-statutory technical assistance process that lacks the same level of guardrails and requirements as the ESA (e.g., the use of the best available science) and allows a state to issue permits without input from the wildlife agencies, without having to use the best available science, without evaluating the baseline status of species, without evaluating the permit-specific and cumulative impacts on species, without a jeopardy determination, and without incidental take limits.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble. This rulemaking addresses compliance with the CWA, not the ESA. EPA decided not to modify 40 CFR 233.51(b)(2) to state that it will not waive review of "[d]ischarges with reasonable potential for affecting endangered and threatened species and proposed or designated critical habitat as determined by USFWS *and NMFS*" (proposed addition emphasized) because CWA 404(j) and 404(m) specifically identify the USFWS, not NMFS, for review of section 404 permit applications. This is likely because the Corps generally retains administrative authority over those waters where NMFS addresses endangered and threatened species and critical habitat, such as coastal waters, tidal waters, and wetlands adjacent to these waters. In addition, many Tribes and States do not have coastal waters and therefore would not have species under the protection of NMFS. However, in the event a Tribe or State seeking to assume section 404 permitting authority would assume waters where NMFS addresses the relevant threatened or endangered species and critical habitat, EPA encourages that Tribe or State to incorporate into its MOA with EPA that it would not waive EPA's review of "[d]ischarges with reasonable potential for affecting endangered and threatened species and proposed or designated critical habitat as determined by USFWS and NMFS." EPA could work with the assuming Tribe or State at that time to codify this change in its MOA.**

National Association of Home Builders (NAHB) (EPA-HQ-OW-2020-0276-0077-0017)

However, two other specific barriers, including the lack of available mitigation credits and delays during the Endangered Species Act (ESA) Section 7 consultation process that will occur within states that assume the program, must also be addressed.

Agency Response: **The lack of available credits and delays during the ESA section 7 consultation process are outside of the scope of this rulemaking. EPA would be glad to work with stakeholders separately to try to assist in addressing these separate concerns.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0027)

Notably, the Proposed Rule does not address what has been a large hurdle for some States considering assumption: clarity on the issue of liability under the Endangered Species Act. Alaska urges EPA to state that Florida's approach – completing a programmatic evaluation – should be used as a model. If EPA disagrees with this, EPA should indicate its reasons for disagreeing – and offer a better solution.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0010)

Similarly, the EPA has completed several biological opinions on aspects of its water program, including a consultation for its 316(b) regulations,[Footnote 33: Cooling Water Intake Structure Coalition v. US EPA, 905 F. 3d 49 (2nd Cir. 2018)] a consultation on the NPDES general permit for stormwater,[Footnote 34: EPA, Stormwater Discharges https://www.epa.gov/npdes/stormwater-discharges-industrial-activities-threatened- and-

endangered-species (last accessed May 13, 2022).] and consultations on the use of organophosphate pesticides.[Footnote 35: NOAA, Pesticide Consultations https://www.fisheries.noaa.gov/national/consultations/pesticide-consultations (last accessed May 13, 2022).] For each of these programmatic types of action, the EPA could not predict exactly when or where a third party will choose to apply a pesticide, or the choice by a third party of technology at any specific facility to address thermal impacts or the amount of pollution from a third party will seek in a general permit for stormwater (not to mention predicting when or how much it will rain). Nonetheless, the EPA's authorizations provided the necessary legal approval for such activities to eventually occur, influenced and shaped the actions of numerous (perhaps countless) third parties, and ultimately impacted the conservation status of numerous endangered species. The EPA itself has already stated that "going forward, EPA has determined that it should consult with the Services under Section 7 of the ESA if a decision to approve a state or tribal CWA Section 404 program may affect ESA-listed species or designated critical habitat" and notes that his view is supported by both the text and legislative history of the CWA support requiring consultation.[Footnote 36: U.S. EPA, Memorandum on Endangered Species Act Section 7(a)(2) Consultation for State and Tribal Clean Water Act Section 404 Program Approvals at 1] However, the EPA must endeavor to consult on the front-end on the entirety of the assumption rule and ensure that the regulatory text is strong enough to ensure actual compliance with the ESA at assumption.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0011)

EPA's prior actions approving state-administration of wetlands program have been disastrous for the overall health of wetlands and wetland-dependent species. Instead of effectuating the purposes of the Clean Water Act, EPA has approved delegation with no guardrails to prevent underfunded and understaffed state-agencies from expediting wetlands approvals with zero regard for wetland-dependent listed species. As written, the proposed rule provides no concrete metrics that will ensure delegation benefits wetland conservation moving forward resulting in subsequent action that will clearly lead to a "may effect" determination for hundreds of listed species, including the Everglades snail kite, Florida panther, and Topeka shiner.

Agency Response: ***See*** **Sections II.A and IV.A.2 of the final rule preamble. EPA's actions approving specific Section 404 programs are outside of the scope of this rulemaking.**

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0012)

Florida's improper and illegal administration of its wetlands program is emblematic of the harm associated with an improper delegation of authority. Until recently, the State of Florida consistently applied a court-invalidated definition of "Waters of the United States" when identifying jurisdictional waters in Florida, with no meaningful recourse. Furthermore, the state- driven, non-statutory "technical assistance" process established to review endangered species impacts falls far short of the Endangered Species Act's requirements, which are intended to ensure against jeopardy for all listed species. Under this framework, it appears that if the Services were to neglect to participate, they would

effectively abdicate their duty to make project-specific jeopardy determinations while state permitting proceeded forward. Furthermore, there is no clear mechanism for citizens to enforce the requirements of the Endangered Species Act in connection with this insufficient framework.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble. This rulemaking addresses compliance with the CWA, not the ESA. Implementation of an individual State or Tribal section 404 program or compliance of any particular State program with the requirements of the CWA or any other statute are outside of the scope of this rulemaking. EPA notes that on February 15, 2024, the U.S. District Court for the District of Columbia issued an order vacating the EPA's approval of the Florida's CWA section 404 assumption request. The U.S. Army Corps of Engineers is the section 404 permitting authority within Florida at this time.**

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0013)

Alaska's ambition to assume 404 authority presents similar problems. Notwithstanding glaring issues of capacity and funding the Alaska – which include recent legislative decisions to axe funding for 404 delegation – the state has repeatedly signaled support permits that EPA would eventually deny or pushed forward projects that ultimately required federal involvement.[Footnote 37: James Brooks Committee Axes Funding for Alaska's Effort to Take Over a Federal Wetlands Permitting Program ALASKA BEACON (March 28, 2023) https://alaskabeacon.com/2023/03/28/committee-removes-funding-for-alaskas- effort-to-take-over-a-federal-wetlands-permitting-program/]

EPA ultimately vetoed the massive, open-air Pebble Mine project in Bristol Bay, a decision that Alaska vehemently opposed despite unacceptable harms to a one-of-a-kind ecosystem, local fisheries, and risk to imperiled species like the northern sea otter, Steller's eider, and short-tailed albatross.[Footnote 38: Office of Governor Mike Dunleavy, EPA's Preemptive Veto Sets Dangerous Precedent (Jan. 31, 2023) https://gov.alaska.gov/epas-preemptive-veto-sets-dangerous-precedent/; U.S. FWS Proposed Pebble Mine Project Section 7 Consultation (June 18, 2020) https://www.fws.gov/sites/default/files/documents/2020-F-0279_USACE%2C%20USCG%2C%20BSEE_Pebble%20Mine_s7%20ack%20ltr_20200618.pdf] The Izembek Refuge road – which would require a 404 permit and potentially harm endangered eider species by building a road directly through a wildlife refuge – was also supported by Alaska, even as the Department of the Interior withdrew the land exchange at the heart of the controversy.[Footnote 39: Alaska Department of Law, Alaska and King Cove Corp. Seek to Halt Secretary Haaland's Withdrawal From Izembek Land Exchange (April 27, 2023) https://law.alaska.gov/press/releases/2023/042723-KingCove.html; Harvard Environmental & Energy Law Program, The Izembek Refuge Road (last accessed Oct. 12, 2023) https://eelp.law.harvard.edu/2021/02/the-izembek-refuge-road/] The risk of harm is especially stark for the wetland-dependent, critically endangered, Everglade snail kite. The main threat to the Everglade snail kite is the loss and degradation of wetlands, as excessive drainage and development have reduced its essential habitat over time.[Footnote 40: Fla. FWC, Everglade Snail Kite (accessed Oct. 4, 2023) https://myfwc.com/wildlifehabitats/profiles/birds/raptors- and-vultures/everglade-snail-kite/] The snail kite is unique in that it is almost entirely

dependent on the Florida apple snail as its food source.[Footnote 41: U.S. FWS, Everglade Snail Kite 5-Year Review at 6 (July 1, 2023) https://ecosphere-documents-production-public.s3.amazonaws.com/sams/public_docs/species_nonpublish/4500.pdf] This endemic snail is wetland-dependent, and the snail kite's hooked beak is specially adapted for removing the snail from its shell. Loss of wetlands drastically reduces the bird's prey and subsequent survival. Given that the Everglade snail kite is one of the rarest birds in the country and heavily impacted by wetland loss, any action that expedites or authorizes additional wetlands loss clearly crosses the "may effect" and "likely to adversely affect" thresholds requiring consultation with expert wildlife agencies.

Conversion of habitat potential authorized by the EPA's assumption rule would push the Florida snail kite and hundreds of other species towards extinction. Highly specialized plants such as the mountain sweet pitcher plant also rely on the unique hydrology of mountain wetland bogs – one of the rarest and most imperiled habitat types in the Southeastern United States – and are threatened by continued conversion of wetlands.[Footnote 42: U.S. FWS, Mountain Sweet Pitcher Plant 5- Year Review at 19 (June 10, 2021) https://ecosphere-documents- production-public.s3.amazonaws.com/sams/public_docs/species_nonpublish/996.pdf] The highly imperiled Salt Creek tiger beetle has also historically faced risk from loss of saline wetlands in Nebraska.[Footnote 43: U.S. FWS, 5-Year Review for the Salt Creek Tiger Beetle (Aug. 31, 2022)] Wetland loss also further reduces stream habitat for imperiled fish including the Topeka shiner, as it alters stream hydrology creating potentially unsuitable environments.[Footnote 44: S.D. Dep't of Game, Fish & Parks, Topeka Shiner Management Plan for the State of South Dakota, Rpt. No 2003- 10 (2003) https://gfp.sd.gov/UserDocs/nav/TopekaShinerManagementPlan-Revised.pdf]
Copperbelly watersnakes were once abundant in Indiana, but continued conversion of essential wetland habitat has imperiled the species, with the latest extensive survey in the state revealing no snake occurrences.[Footnote 45: U.S. FWS, Copperbelly Watersnake Northern Population Segment (Sept. 27, 2023) https://ecosphere-documents- production-public.s3.amazonaws.com/sams/public_docs/species_nonpublish/10539.pdf] The Florida panther relies upon wetlands as part of its last remaining habitat relative to its historic range, and conversion throughout the state threatens the very existence of this iconic cat.[Footnote 46: U.S. FWS, Florida Panther, 5-Year Review at 14-15 (Apr. 28, 2009) https://ecosphere-documents-production-public.s3.amazonaws.com/sams/public_docs/species_nonpublish/1347.pdf] Land conversions that result in loss of wetlands are continuing throughout the range of the Oregon spotted frog, and historic conversion effectively eliminated the amphibians from the Willamette Valley.[Footnote 47: Endangered and Threatened Wildlife and Plants; Threatened Status for Oregon Spotted Frog 79 Fed. Reg. 51658, 51699 (Aug. 29, 2014)]

Hundreds of species are imperiled by wetland loss, and a process that expedites wetland conversion would clearly affect the Everglade snail kite, Salt Creek tiger beetle, mountain sweet pitcher plant, Topeka shiner, Florida panther, copperbelly watersnake, Oregon spotted frog, and hundreds of other listed species nationwide. EPA must comply with the Endangered Species Act at the outset before finalizing this rule, in any subsequent

approvals, and provide clear, binding guidelines to ensure that individual permits do not jeopardize the existence of listed species or adversely modify or destroy critical habitat.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble. This rulemaking addresses compliance with the CWA, not the ESA. Compliance of any particular State program, or potential Tribal or State program, with the requirements of the CWA or any other statute, are outside of the scope of this rulemaking.**

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0006)

EPA discusses endangered wildlife primarily in the context of Section 404 Guidelines, which are the substantive criteria used to evaluate dredge and fill permits promulgated under Section 404(b)(1) of the Clean Water Act. States must subsequently demonstrate that their assumed programs comply with all aspects of the Clean Water Act, including the Section 404 Guidelines that in part require that permit conditions shall not "jeopardize the continued existence of listed endangered or threatened species under the Endangered Species Act of 1973 or result in the likelihood of the destruction or adverse modification of designated critical habitat."[Footnote 12: 40 CFR 230.10(b)(3)]. EPA contends that complying with these guidelines could be challenging, but it highlights compliance with endangered species protections as example. Instead of initiating Endangered Species Act consultation as required by law to protect species at the front-end with assistance from expert wildlife agencies, EPA recommends that a state could meet this requirement simply by identifying a list of species, the types of discharges, any unique conditions, and any state procedures aimed at protecting listed species and habitat.

Agency Response: To the extent the commenter asserts that the final rule would allow Tribes or States to issue permits that do not assure compliance with the 404(b)(1) Guidelines, the Agency disagrees. A Tribal- or State- issued permit cannot authorize discharges of dredged or fill material if the discharge would jeopardize the continued existence of listed endangered or threatened species under the Endangered Species Act of 1973 (listed species) or result in the likelihood of the destruction or adverse modification of designated critical habitat (40 CFR 230.10(b)(3)). ***See*** **Section IV.A.2 of the final rule preamble for a discussion of the Agency's rationale.**

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0007)

While EPA continues the disturbing trend of evading its legal obligations to consult and ensure that its assumption rule does not jeopardize the existence of any listed species, in passing the Endangered Species Act, Congress made a deliberate choice "to give endangered species priority over the 'primary missions' of federal agencies" in order to "halt and reverse the trend toward species extinction, whatever the cost."[Footnote 13: Tenn. Valley Authority v. Hill ("TVA"), 437 U.S. 153, 175, 184, 185 (1978).] Accordingly, Section 2(c) of the ESA establishes that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act."[Footnote 14: 16 U.S.C. § 1531(c)(1).] The ESA defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or

threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."[Footnote 15: Id. § 1532(3).]

While many of the ESA's provisions work to effectuate the conservation goals of the statute, the "heart of the ESA" is the interagency consultation requirements of Section 7.[Footnote 16: Western Watersheds Project v. Kraayenbrink, 632 F.3d 472, 495 (9th Cir. 2011); 16 U.S.C. § 1536.] To reach these goals, Section 7(a)(2) of the ESA requires federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the critical] habitat of such species."[Footnote 17: Id. § 1536(a)(2).] "Action" is broadly defined to include "all activities or programs of any kind authorized, funded, or carried out, in whole or in part" by federal agencies and includes conservation measures, granting permits and licenses, as well as actions that may directly or indirectly "cause modifications to the land, water, or air."[Footnote 18: 50 C.F.R. § 402.02.] Section 7 consultations are required on an agency action "so long as the agency has 'some discretion' to take action for the benefit of a protected species."[Footnote 19: NRDC v. Jewell, 749 F.3d 776, 779-80 (9th Cir. 2014).] If "an agency has any statutory discretion over the action in question, that agency has the authority, and thus the responsibility, to comply with the ESA."[Footnote 20: Am. Rivers v. United States Army Corps of Eng'rs, 271 F.Supp.2d 230, 251 (D.D.C. 2003) (emph. added)).]

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0008)

At the first step of the consultation process, an action agency must complete a biological assessment or biological evaluation to identify species that may be affected.[Footnote 21: 16 U.S.C. § 1536(c).] If the agency determines that an action may affect a species — whether such effects are beneficial or unknown in character and even if the effect is small, indirect, or the result of cumulative actions —it must consult with the Services.[Footnote 22: 50 C.F.R. §§ 402.02, 402.14(a), (g).] The only exception to the consultation requirement for a discretionary federal action is if the agency concludes its action will have "no effect" on listed species or critical habitat.[Footnote 23: 50 C.F.R § 402.14(b); Am. Fuel, 937 F.3d at 597.] As the D.C. Circuit held, the "inability to 'attribute' environmental harms 'with reasonable certainty' … is not the same as a finding that [it] 'will not affect' or 'is not likely to adversely affect' listed species or critical habitat," and does not absolve the agency's consultation duty.[Footnote 24: Am. Fuel Mfrs., 937 F.3d at 597-598 (D.C. Cir. 2019)] If the action agency determines, after a biological evaluation or through informal consultation with the Services, that the proposed action "may affect," but is "not likely to adversely affect," any listed species or habitat,[Footnote 25: A finding that the action "may affect" but is "not likely to adversely affect" means all effects are expected to be "discountable, insignificant, or completely beneficial." Id. at xv, 3-12, 3-13.] then it must obtain the written concurrence of the Services, and no further consultation is required.[Footnote: 16 U.S.C. § 1536(c); 50 C.F.R. §§ 402.13(a), 402.14(b)(1).] If an action agency determines that its action will "likely adversely affect" any listed species, then a formal consultation must occur. In making these effects determinations, agencies must use the "best scientific and commercial data available."[Footnote 27: 16 U.S.C. §§

1536(a)(2), (c)(1).] Under the formal consultation process, the Services must complete a biological opinion that evaluates the agency action. If the Services find that the action will jeopardize a species or result in the destruction or adverse modification of critical habitat, they must identify "reasonable and prudent alternatives" for the action that comply with Section 7.[Footnote 28: 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3).] If the action will not result in jeopardy, then they must provide "reasonable and prudent measures" to minimize take of any listed species, as well as an "incidental take statement," which provides the action agency legal coverage for any remaining take that is unavoidable.[Footnote 29: 16 U.S.C. § 1536(b); 50 C.F.R. §§ 402.14(h), (i).] Critically, strict adherence to the procedural requirements of Section 7 and the consultation regulations is absolutely necessary to ensure against the extinction of the nation's biodiversity. As the Ninth Circuit aptly explained, "because the procedural requirements are designed to ensure compliance with the substantive provisions … the strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements."[Footnote 30: Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985).]

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0009)

Congress always understood that the ESA's consultation process should apply broadly to federal agency actions. The law requires that each agency "insure that any action authorized, funded, or carried out by such agency" not jeopardize listed species or their critical habitats. Almost by definition, an agency authorization covers those situations where a federal agency has a role whereby the consequences of the agency action are casually remote from the actual harms to listed species. Indeed, this is why the Services' joint regulations specifically contemplate consultations applying to the promulgation of regulations, and why the Services also developed additional procedures for both a "framework programmatic action" and a "mixed programmatic action."[Footnote 31: 50 C.F.R. § 402.02]

Consultation on the Assumption Rule and subsequent program approvals are no more or less complicated than other programmatic consultations that potentially apply over large portions of the country on programmatic agency actions. For example, in 2011, the Services completed consultations on the nationwide wildland firefighting program's potential impact on listed species, especially aquatic species that are harmed by the chemicals in fire-retardants dropped from aircraft.[Footnote 32: US Forest Service, 2011. Nationwide Aerial Application of Fire Retardant on National Forest System Land; see also, Forest Serv. Employees. for Envtl. Ethics v. U.S. Forest Serv., 726 F. Supp.2d 1195 (D. Mont. 2010).] No one would ever claim that the Forest Service can predict the place that any specific wildfire would occur in the future, or if during the course of any particular wildfire that the use of fire-retardant would be needed, or that the retardant chemical would be applied over or near a specific body of water. Nonetheless, because there existed a potential for harm — even indirect and causally distant harm — a consultation was completed.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0037)

EPA must ensure that ESA-listed threatened and endangered species are adequately protected during EPA's review of state assumption applications as well as a state's operation of an assumed 404 program. The proposed rule misses the opportunity to provide additional clarity, and the preamble includes potentially confusing language, with respect to obligations to ensure that ESA-listed threatened and endangered species and their habitats continue to receive the same level of protection under state-assumed programs as they currently receive with federal 404 permitting. EPA should amend the rule to address the intersecting requirements of the ESA and Section 404. And EPA should provide clear, binding guidelines to ensure that assuming states comply with the Clean Water Act's independent requirement that no permit jeopardize protected species or adversely modify or destroy critical habitat.

The Preamble to the Proposed Rule ignores, and the Proposed Rule fails to clarify, EPA's consultation obligations. EPA has taken inconsistent positions in the past with respect to whether it has an obligation to engage in formal consultation under ESA Section 7 when reviewing a state's application to assume permitting presently conducted by the Corps under Section 404. The proposed rule misses the opportunity to solidify a position on this issue, providing clarity and uniformity for future applications. Further, the preamble, by mentioning other coordination with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (USFWS, NMFS, or "the Services") without mentioning EPA's own obligations under Section 7 might otherwise be misread to introduce confusion in this regard.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0038)

The preamble to the proposed rules states that EPA "encourages Tribes and States to consider proactively coordinating with the relevant [Services] regional or field offices when developing their program submissions" and suggests that this "would facilitate EPA's compliance with its obligations" under the Clean Water Act to provide the Services "an opportunity to comment on" the submission.[Footnote 77: 88 Fed. Reg. at 55,297.] Neither the preamble nor the proposed rule, however, say anything about EPA's obligation to engage in ESA Section 7 consultation. But as EPA itself has acknowledged, the agency must engage in consultation when deciding whether to approve a Section 404 assumption application.[Footnote 78: D. Ross, EPA, Memorandum on Endangered Species Act Section 7(a)(2) Consultation for State and Tribal Clean Water Act Section 404 Program Approvals, Aug. 27, 2020 (discussing programmatic consultation, including in circumstances where a State will assume authority over subsequent activity); see also 80 Fed. Reg. 26,832 (May 11, 2015)] EPA should revise this language and amend the proposed rule to clarify that it will engage in Section 7 consultation concerning assumption applications.

In that regard, the proposed rule must also be revised to ensure that in this programmatic consultation, EPA engages in formal Section 7 consultation, which, among other obligations, uses the "best scientific and commercial data available" to consider the

"effects of the action as a whole."[Footnote 79: 50 C.F.R. § 402.14(c)–(d).] EPA should commit to using the wealth of information available from federal 404 permitting in assumed states to analyze the effects of 404 permitting on protected species and habitat.[Footnote 80: 50 C.F.R. §§ 402.12(f)(2)–(4), 402.14(c)(i)(F), (c)(iii), (vi).] And EPA must ensure that the Services have access to that information when conducting their consultation.[Footnote 81: Id.] The agency must commit to fully and rigorously examine the effects of its decision, including the cumulative effects.[Footnote 82: Id. §§ 402.14(f)(4), 402.14(c)(iv).] It must also ensure that the framework in place for permit review provides adequate protections to ensure a thorough evaluation of the potential effects of a permitting decision at the individual permit application level.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0039)

The program approval stage provides an important point to consider potential adverse impacts to species resulting from state 404 permitting decisions. It also lends efficiency in addressing any concerns of the Services and avoiding inadequacy or insufficient protections at the program level. And the ESA requires that USFWS and EPA consider those impacts at the programmatic level. Therefore, EPA must use its ESA role and responsibilities to ensure that programmatic consultation on state 404 assumption is done right.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0040)

We note that state assumption of 404 permitting does not fit neatly into the definitions of "framework programmatic action" and "mixed programmatic action" as described in 50 C.F.R. § 402.02. A "framework programmatic action" addresses a framework for the development of future actions that would themselves be subject to Section 7 consultation.[Footnote 83: See 50 C.F.R. § 402.02.] The nature of future state permitting decisions is such that EPA's rules, as the agency currently construes them, do not contemplate direct application of Section 7 to future state permitting decisions. Meanwhile, a "mixed programmatic action" is one that approves a framework for future actions that are not themselves subject to future Section 7 consultation as to each individual action. See id. The definition, however, extends to circumstances in which the federal action agency is approving both the framework and the actions themselves.[Footnote 84: See id.] Here, EPA is not approving any permit, or future permit decision through the proposed rules. As such, the regulations concerning incidental take statements for "framework programmatic" or "mixed programmatic" actions would not be directly on point. If EPA does revise the proposed rules to clarify that its own post- assumption review right for permit applications under Section 404(j)[Footnote 85: 33 U.S.C. § 1344(j).] triggers Section 7 consultation obligations, this would resolve the challenge of reconciling EPA's present proposal with the USFWS regulations. This subsequent Section 7 consultation would be consistent with treatment of the review and approval of an assumption request as a "framework programmatic action."

Relatedly, USFWS has explained that if an incidental take statement at an early stage would be based on information lacking detail, it would be difficult to write "sufficiently specific and meaningful terms and conditions" to minimize the impact of take on the listed species and "provide an accurate and reliable trigger for reinitiation of consultation."[Footnote 86: 80 Fed. Reg. at 26,835.] Accordingly, USFWS has referenced a "policy goal[]" of the Services to "focus the provision of incidental take statements at the action level where such take will result."[Footnote 87: Id.] If in USFWS's view, it is unworkable to prepare an incidental take statement at a programmatic stage ahead of the action level at which it anticipates take, then its conclusion that it is unworkable to do so would be equally true regardless of whether subsequent actions are, or are not, the subject of future Section 7 consultation. The Services should not use Section 7 consultation as a vehicle to issue any incidental take statement that does not meet the statutory requirements and which is not based on a level information sufficient for the Services to provide specific, meaningful terms.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0041)

Ultimately, the ESA mandates that "[e]ach Federal agency," including EPA, "shall, in consultation with and with the assistance of" the Services, insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat.[Footnote 88: 16 U.S.C. § 1536 (a)(2) (further explaining that in fulfilling this obligation, agencies must "use the best scientific and commercial data available").] Approval of an inadequate program has that potential, particularly given the importance of wetlands to biodiversity, as described above. Further, this is not a situation in which EPA's hands are tied by any sort of affirmative obligation to proceed even in the face of jeopardy to listed species or adverse modification of critical habitat. Quite the opposite, the 404(b)(1) Guidelines require that state permits ensure the absence of such results, and Section 404 requires EPA to ensure that a state program is adequate to do so. Further, the Clean Water Act obligates EPA to transmit copies of a state's submission to USFWS for comment and to take any responsive comments received into account.[Footnote 89: 33 U.S.C. § 1344(g)-(h).]

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0042)

EPA must engage in permit-specific ESA consultation pursuant to its oversight authority over state permits with a reasonable potential for affecting ESA-listed species and critical habitat. Under Section 404(j), EPA retains a measure of authority and discretion over individual permits issued by states under an assumed program.[Footnote 90: Id. § 1344(j).] Section 404(j) requires that copies of applications and proposed permits must be submitted to EPA for review and comment and that EPA shall provide copies of the proposed permit to the Secretary of Interior through the USFWS.[Footnote 91: Id.] Further, Section 404(j) provides that if EPA uses its discretion and authority to comment on a permit, EPA's comments must be resolved to EPA's satisfaction before the permit may be issued by the state.[Footnote 92: Id.] This discretionary involvement allows EPA to object to the

issuance of any permit that is outside of the requirements of the 404(b)(1) Guidelines, including the Guideline that prohibits any permit from jeopardizing protected species or adversely modifying or destroying critical habitat.[Footnote 93: Id.; 40 C.F.R. §§ 233.50, 233.51(b)(2).]

EPA should amend 40 C.F.R. § 233.50 to make clear that its review pursuant to Section 404(j) triggers EPA's ESA consultation obligations for any state-permitted project that has the reasonable potential to impact protected species and that EPA will review and comment on the subject permit. EPA's rules must also require that state permit applications and proposed permits disclose and highlight the following information: (1) a list of all ESA-listed species likely to be present all or part of any given year within the affected area of the permitted project; (2) the location of the permitted project relative to proposed or designated critical habitat for listed species; (3) impacts, both direct, indirect, and cumulative, to protected species or their critical habitat as a result of the permitted activity; and (4) all proposed, enforceable permit requirements that would ensure the protection of the identified protected species from jeopardy and incidental take and avoidance of destruction or adverse modification to critical habitat.

EPA's rule must also explicitly require that if a permitted project will occur within proposed or designated critical habitat for a protected species, or if disclosed impacts, direct or indirect, has the reasonable potential to harm a protected species, then (1) EPA retains full authority over the permit for the project; and (2) EPA shall comment on and ensure protection of the protected species and habitat by requiring adequate permit terms to address species protections specifically designed to ensure no incidental take occurs.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble. The CWA does not provide a mechanism for EPA to assert authority over certain categories of section 404 permits.** ***But see*** **33 U.S.C. 1344(j)-(m) and 40 CFR 233.50-51, providing an opportunity for EPA to review draft Tribal or State permits, including permit applications that would result in discharges with reasonable potential to affect endangered or threatened species as determined by the US Fish and Wildlife Service (USFWS); requiring EPA to circulate permit applications it receives to the USFWS as well as other agencies; and authorizing EPA to object to permits based on failure to comply with CWA section 404 and its implementing regulations. If an assuming Tribe or State does not address EPA's objections within the statutory time frame, the permit application is transferred to the Corps for processing.** ***See*** **33 U.S.C. 1344(j).**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0043)

EPA must ensure that state permit-level review includes protections at least as stringent as federal requirements, including ESA Section 7 consultation, to ensure state programs satisfy the 404(b)(1) Guideline that prohibits jeopardy of protected species and adverse modification or destruction of critical habitat. The preamble to the proposed rule vaguely identifies ways by which a state may demonstrate its permits will not jeopardize protected species or adversely modify or destroy critical habitat, stating that they could provide certain information in the submission and "include in the program submission provisions

and procedures to protect listed species and habitat."[Footnote 94: 88 Fed. Reg. at 55,297.] It provides no guidance, apart from reference to the 404(b)(1) Guidelines themselves, however, on what protections and processes are necessary. At the federal level, a body of law concerning the obligations to avoid jeopardy and adverse modification exists under and in the judicial decisions construing the ESA. States must, at a minimum, provide the same level of protections in their own permit processes.

Agency Response: This rule addresses compliance with the CWA, not the ESA. To the extent the commenter asserts that the final rule would allow Tribes or States to issue permits that do not assure compliance with the 404(b)(1) Guidelines, the Agency disagrees. A Tribal- or State- issued permit cannot authorize discharges of dredged or fill material if the discharge would jeopardize the continued existence of listed endangered or threatened species under the Endangered Species Act of 1973 (listed species) or result in the likelihood of the destruction or adverse modification of designated critical habitat (40 CFR 230.10(b)(3)). *See* Section IV.A.2 of the final rule preamble for a discussion of the Agency's rationale.

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0044)

Additionally, any state permit that is issued without federal Section 7 consultation would require compliance with Section 10 of the ESA, concerning "take" of a listed species. The final rule would benefit from an acknowledgement that state agencies may wish to coordinate with federal agencies on whether Section 7 review will occur. This could help to address whether the Section 10 process is needed.

Agency Response: *See* Section IV.A.2 of the final rule preamble.

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0014)

- EPA Rules Must Provide for Protection of ESA-Listed Species.
Fifth, EPA rules must ensure that ESA-listed species continue to receive the same level of protection under state-assumed programs as they currently receive with Corps permitting, including protections from take related to individual projects. Earthjustice has several recommendations for EPA to consider as it moves forward with this rulemaking. Under 404(h), EPA must consider any comments by the Secretary of Interior submitted on a state application to assume 404 permitting. Section 404(h) also requires EPA to consider whether a state seeking to assume 404 permitting has the authority to issue permits which apply and assure compliance with the CWA Section 404(b)(1) Guidelines. Those Guidelines include a provision that prohibits the permitting of a discharge if it jeopardizes the continued existence of endangered or threatened species or results in the likelihood of the destruction or adverse modification of designated critical habitat. 40 C.F.R. 230.10(b)(3). As a result of these directives, EPA must engage in Section 7 consultation under the ESA regarding assumption of 404 permitting by a state. That consultation must be meaningful and detailed, and EPA's rules should include criteria to ensure that the consultation is robust.
Further, assuming this initial consultation is undertaken as a programmatic consultation, EPA must first review its Section 404(b)(1) Guidelines to ensure they include requirements adequate to protect listed species on a project basis. Then, EPA must include in its rules,

in the consultation document, and in the MOA with the state, requirements for project-level consultation requirements and procedures that are species- and project-specific and that protect against jeopardy and take, through the requirements of 404(h)'s application of the federal 404 guidelines, 404(j), and Section 10 of the ESA. Under 404(j), EPA retains a measure of authority and discretion over individual permits issued by states under an assumed program. Section 404(j) requires that copies of applications and proposed permits must be submitted to EPA for review and comment and that EPA shall provide copies of the proposed permit to the Secretary of Interior through the U.S. Fish and Wildlife Service. Further, Section 404(j) provides that if EPA uses its discretion and authority to comment on a permit, EPA's comments must be resolved to EPA's satisfaction before the permit may be issued by the state.
EPA's rules should make clear that this provision triggers EPA's ESA consultation obligations for any state-permitted project that may affect a listed species and that EPA will review and comment on the subject permit. EPA's rules must also, in order to ensure protections for ESA-listed species are not degraded or lost as a result of assumption of the permitting program by a state, require that permit applications and proposed permits provided to EPA disclose and highlight the following information: (1) a list of all ESA-listed species likely to be present all or part of any given year within the permitted project location; (2) location of the permitted project relative to proposed or designated critical habitat for a listed species; (3) impacts, both direct and indirect, to proposed or designated critical habitat for a listed species as a result of the permitted activity; and (4) all proposed, enforceable permit requirements for ensuring the protection of identified species from jeopardy and take. If a permitted project will occur within proposed or designated critical habitat for an ESA-listed species, or if disclosed impacts, direct or indirect, may likely harm an ESA-listed species, then EPA's rules must be clear that EPA retains full authority over the permits for the project and EPA shall comment on and ensure protection of the ESA-listed species by requiring terms in the permit adequate to address species protections specifically designed to ensure no take occurs.

Finally, EPA's rules must make clear that any MOA for an assumed program must include an acknowledgement by the state that it is subject to the requirements of Section 9 of the ESA and that the state is required to ensure that any permit issued under the assumed program includes enforceable requirements of the permittee to ensure against any take of any listed species, caused in any way, directly or indirectly, by the permitted project

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0004)

Similar results will occur with the Endangered Species Act (ESA) and the National Environmental Protection Act (NEPA); those harms will extend beyond tribes to all citizens who have an interest in full public process and protections under all applicable environmental laws. For the ESA, EPA must pay close attention to the disastrous consequences, still playing out, of allowing Florida to assume 404 permitting in 2020. EPA allowed Florida to assume the program on the basis of a programmatic Biological Opinion that resulted in no real assessment or consultation of the impact to critically endangered and threatened species dependent on Florida wetlands. EPA's approval also rested on a

"technical assistance" process that has no basis in law. It punts ESA determinations to state agencies while granting them, and state permittees, protection against take liability without having to follow the processes laid out by Congress.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble. Implementation of specific section 404 Tribal or State programs is outside of the scope of this rulemaking.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-5-0001)

II. Delegation Of Cwa § 404 Duties To A State Is A Discretionary Action That Requires Esa Consultation.

As EPA recognized in the Federal Register notice seeking public comment, EPA's position has been that consultation under ESA § 7 is not required when EPA approves a state or tribal request to assume CWA § 404 duties because EPA considered this to be a non-discretionary action. 85 Fed. Reg. 30,953 (May 21, 2020). Reconsideration of this position is appropriate: EPA's delegation of CWA § 404 programs to states or tribes is, in fact, a discretionary action, one that requires consultation with FWS and NMFS.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-5-0010)

B. Consultation on State Assumption of a CWA § 404 Program

By its very nature, assumption of the CWA § 404 program is a major undertaking. It requires exhaustive review by EPA and the Services and, once implemented, immense resources and training at the state level. CWA § 404 permits are required for all projects that necessitate discharging dredge or fill material into Waters of the United States. This implicates a massive amount of widely diverse projects, especially in states with numerous listed species and vast surface waters.

Florida, a state currently pursing assumption of the CWA § 404 program, perhaps illustrates this best. With over 130 listed species, more than 7,700 lakes (greater than 10 acres), 33 first-magnitude springs, 11 million acres of wetlands, almost 1,200 miles of coastline, and approximately 27,561 linear miles of rivers and streams, water and biodiversity are two of Florida's most prominent features [Footnote 2: See Florida Fish and Wildlife Conservation Commission, Florida's Official Endangered And Threatened Species List, 4 (2018), https://myfwc.com/media/1945/threatend-endangered- species.pdf; Elizabeth Purdum, Florida Waters: A Water Resources Manual 49 (2002), https://www.swfwmd.state.fl.us/sites/default/files/store_products/floridawaters.pdf; Florida Department of State, Quick Facts, http://dos.myflorida.com/florida-facts/quick-facts/; U.S. Geologic Survey, National Water Summary on Wetland Resources Water Supply Paper 2425, https://water.usgs.gov/nwsum/ WSP2425/state_highlights_summary.html; Florida Department of Environmental Protection, 2016 Integrated Water Quality Assessment for Florida 34 (2016) https://floridadep.gov/sites/default/files/2016-Integrated-Report.pdf.]. Section 7

consultation in Florida will involve analyzing limitless projects blanketing most of the state to determine their potential impacts on numerous listed species.

Florida, however, has proposed that the Services engage in a one-time consultation that would only identify procedural requirements for state permitting under Section 404 needed to support the Services determination that assumption would not result in jeopardy to any listed species. DEP White Paper, EPA Approval of State Assumption of Clean Water Act Section 404 Program at 1-2. While programmatic consultation allows consultation on an agency's multiple actions on a program, including a proposed program or regulation that provides a framework for future proposed actions, 50 C.F.R. § 402.02, under Florida's proposal, the truncated consultation would essentially give EPA wholesale approval from the Services for specified and foreseeable actions without any analysis of the effects of the whole action, jeopardy determinations, or take limits in direct contravention to the ESA's mandate, implementing regulations, and numerous court holdings. See, e.g., Conner v. Burford, 848 F.2d 1441, 1453-54 (9th Cir. 1988); N. Slope Borough v. Andrus, 642 F.2d 589, 608 (D.C. Cir. 1980); Wild Fish Conservancy v. Salazar, 628 F.3d 513, 521 (9th Cir. 2010); Forest Service Employees for Environmental Ethics v. U.S. Forest Service, 726 F. Supp. 2d 1195, 1225-26 (D. Mont. 2010). Under such an approach, the Services will have failed to fully consult on the action and EPA will not satisfy its burden to ensure that the proposed action is not likely to jeopardize listed species or destroy or adversely modify critical habitat.

The sheer number of listed species in Florida alone results in various circumstances for permit review that a truncated consultation's blanket authority cannot adequately cover. With Florida's vast waterways creating further complexities, Florida must explain to EPA the scope and structure of its program, including the extent of state jurisdiction, the scope of regulated activities, anticipated coordination (i.e. with biological agencies), and its permit review criteria which must ensure no jeopardy to listed species. 40 C.F.R. §§ 233.11, 233.20(a). EPA then has the daunting task to determine the adequacy of Florida's authority to administer the CWA § 404 program. 40 C.F.R. § 233.1(a). This also includes reviewing Florida's funding and manpower available for program administration and estimated workload to determine its ability to administer the program. 40 C.F.R. § 233.11.

EPA then must determine whether Florida can fulfill the requirements of the CWA and its implementing regulations, including section 404(b)(1) guidelines and the guidelines' no jeopardy mandate. 40 C.F.R. §§ 233.1(a), 233.15(g). Indeed, section 404(b)(1)'s no jeopardy requirement reiterates the requirements and considerations in ESA § 7(a)(2) consultation. Accordingly, under a programmatic consultation, EPA must review Florida's proposed criteria and process for ensuring state issued permits will not cause jeopardy to listed species. More importantly, EPA may only approve Florida's program if it determines the program fulfills this requirement while taking into account comments from the Services and the Corps. 40 C.F.R. § 233.15(g).

Indeed, even under a programmatic consultation, if assumption is approved, the jeopardy analysis cannot end. States like Florida must still ensure there will be no jeopardy to listed species prior to the issuance of permits for the discharge of dredged or fill material

pursuant to the CWA's 404(b)(1) guidelines. A state's program must be at least as stringent as the federal program, which expressly requires that both individual and general permits comply with the ESA.

The requirements regarding the robustness of a state program can be found in both the text of the CWA and EPA's implementing regulations. CWA § 404(g), which provides for state assumption of the § 404 permitting program, requires that a state certify in its application that state law provides adequate authority to carry out the federal program. EPA's implementing regulations prohibit states from "impos[ing] any less stringent requirements for any purpose." 40 CFR § 233.1 (emphasis added).

The heart of the federal 404 permitting program can be found in the CWA § 404(b)(1) guidelines. The purpose of the guidelines "is to restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material." 40 C.F.R. § 230.1(a). The guidelines achieve this purpose in part by prohibiting permits that will "[j]eopardize[] the continued existence of species listed as endangered or threatened under the [ESA], or result[] in likelihood of the destruction or adverse modification … [of] critical habitat" unless an exemption is granted by the Endangered Species Committee. 40 CFR § 230.10(b)(3). In order to restore and maintain biological diversity, the Guidelines require ESA compliance for each and every permit.

Given this framework, to assume the federal § 404 program, states must have a mechanism to ensure that all permits comply with the ESA because a state program must be at least as stringent as the federal requirements. To further cement the importance of the guidelines, not only do EPA's assumption regulations require that state programs be as stringent as the federal program, they expressly require that states comply with the guidelines in at least two sections. 40 CFR § 233.23 requires that "[f]or each permit the [state] Director shall establish conditions which assure compliance with all applicable statutory and regulatory requirements, including the 404(b)(1) Guidelines" (emphasis added). In addition, 40 CFR § 233.34 states that the state Director "will review all applications for compliance with the 404(b)(1) Guidelines."

Furthermore, EPA's implementing regulations provide a process for the Services to inform both EPA and states that have assumed the program when consultation is required. All public notices for complete permit applications must be provided to EPA for review, which must transmit them to the Services. 40 C.F.R. § 233.50(a)-(b). EPA cannot waive review of permit applications for proposed discharges with "reasonable potential for affecting endangered or threatened species" or discharges within "critical areas established under State or Federal law." 40 C.F.R. § 233.51(b).

While EPA must consult on its discretionary decision to allow a state to take over a § 404 program, states cannot evade later, specific ESA consultation requirements through an up-front abridged consultation. CWA § 404(b)(1) guidelines require compliance with the ESA on a permit-by-permit basis, reinforcing the importance Congress gave to protection of threatened and endangered species and habitat in the CWA § 404 permitting process.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-5-0002)

A. The U.S. Supreme Court Decision in National Association of Home Builders Held that Assumption of CWA § 402 Programs by States Were Non-Discretionary Decisions that Did Not Require ESA § 7(a)(2) Consultation.

ESA § 7(a)(2) requires any federal agency to consult with federal biological agencies to ensure that any proposed action is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. §1536(a)(2). An agency "action" includes all activities or programs of any kind authorized in part by federal agencies, including the granting of permits. 50 C.F.R. § 402.02. The ESA's implementing regulations provide that § 7(a)(2) applies to "all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03; see also Florida Key Deer v. Paulison, 522 F.3d 1133, 1141 (11th Cir. 2008) (FEMA had discretion in administering statute that required the agency to make flood insurance available in areas the agency determined had adequate land use and control measures pursuant to criteria the agency developed after considering information it deemed necessary to encourage adoption of local measures to reduce development in flood-prone land and "otherwise improve long-range land management and use of flood-prone areas" and therefore ESA applied); cf. Nat. Res. Def. Council v. Houston, 146 F.3d 1118, 1125-26 (9th Cir. 1998) ("Where there is no agency discretion to act, the ESA does not apply.").

The U.S. Supreme Court most recently addressed the question of discretionary involvement or control in the context of the CWA in National Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007). Reviewing delegation to the state of Arizona of the CWA § 402 program, a section of the Act that controls the issuance of point source pollution permits, the Supreme Court held EPA's delegation of that permitting program was non- discretionary and did not trigger ESA § 7(a)(2) consultation. The Supreme Court looked to the statutory language of § 402(b) that states that the EPA "shall approve each submitted program unless [it] determines that adequate authority does not exist" pursuant to nine listed criteria. 33 U.S.C. § 1342(b) (emphasis added). In reaching its decision, the Supreme Court evaluated the plain language of the statute, the overall statutory scheme, and the EPA's implementing regulations for ESA § 7(a)(2). Nat'l Home Builders Ass'n, 551 U.S. at 661–66.

The Supreme Court first determined that the meaning of "shall approve" was must approve "unless" the nine criteria listed were not met. Id. at 662. This statutory command left no room for agency discretion to consider the impact of delegation on protected species or their habitat. Id. Second, reviewing the overall structure of § 402(b), the Supreme Court held that, because § 402(b) states that the Administrator "shall approve" a state's NPDES assumption application once it met nine enumerated criteria, it operates as both a "ceiling as well as a floor." Id. at 663. Additionally, "nothing in the text of § 402(b) authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application." Id. at 671. Requiring consultation under ESA § 7(a)(2)

would add an additional criterion and "raise[] that floor," creating an impermissible clash with the mandate in § 402(b). Id. at 664. Finally, the Supreme Court deferred to the EPA's interpretation that ESA § 7(a)(2) applied only to those situations in which there was room for agency discretion in making a decision. Id. at 665. Because CWA § 402(b) set out a clear mandate for the agency to only consider the enumerated criteria, there was no agency discretion. Id. at 673.

Following Home Builders, courts determine whether an agency action is discretionary by examining whether, given the plain language, purpose, and legislative history of a statute, the "agency had some discretion to influence or change the activity for the benefit of a protected species" when making its decision. Karuk Tribe of California v. U.S. Forest Serv., 681 F.3d 1006, 1021 (9th Cir. 2012). Courts will also look to the implementing regulations that the agency has promulgated under the statute and how the agency has interpreted the statutory language over time to determine whether an agency action is discretionary. Id. at 1025-26 (evaluating regulations that the Forest Service issued under mining law to determine whether the agency had discretion to evaluate endangered species before allowing mining activities to proceed).

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-5-0003)

B. Under Home Builders, Delegation of the CWA § 404 Program Is a Discretionary Action.

Since 2010, EPA's position has been that the reasoning in Home Builders about CWA § 402 delegation being non-discretionary applied equally to CWA § 404 delegation, resting its position primarily on the similar "shall approve" language in both sections. 85 Fed. Reg. at 30,954. Through this request for comment, EPA acknowledges that it is reconsidering its position. Given the plain language of the statute, EPA's regulations, and the legislative history of the CWA, EPA should reverse its position and find that CWA § 404 delegation is a discretionary action that requires ESA § 7(a)(2) consultation.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble. Implementation of specific section 404 Tribal or State programs is outside of the scope of this rulemaking.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-5-0004)

1. The plain language of CWA § 404 requiring EPA to consider comments from FWS makes EPA's delegation decision discretionary.

ESA consultation is required for an agency action if the statute leaves "some discretion" for the agency to act for the benefit of a protected species. Nat'l Res. Def. Council v. Jewell, 749 F.3d 776, 784 (9th Cir. 2014) (citing Karuk Tribe, 681 F.3d at 1024). The test is whether, given the plain text and structure of a statute, the "agency could influence [an activity] to benefit a listed species, not whether it must do so." Karuk Tribe, 681 F.3d at 1025 (citing Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 240 F.3d

969, 977 (9th Cir. 2003)). Here, § 404(g) – (h) do not embody a simple checklist. Instead, these statutory sections include an additional step which requires EPA to "tak[e] into account any comments" from FWS -- leaving room for a consideration of threatened and endangered species. CWA § 402(b), the section at issue in Home Builders, does not mention threatened or endangered species nor require EPA to consider any agency comments.

Courts have referred to statutes that leave agencies with no discretion as "checklist" statutes. See, e.g., Alaska Wilderness League v. Jewell, 788 F.3d 1212, 1220-26 (9th Cir. 2015) (holding that CWA § 311 reads like a "checklist statute" not leaving any room for agency discretion, despite the presence of some ambiguous language).

Unlike the CWA § 402(b) state assumption provision, § 404(g) and (h) explicitly state that FWS must submit comments and EPA must consider them. 33 U.S.C. § 1344(g)(3) (" . . . the Secretary [of the Army] and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to [a proposed State assumption] program and statement to the Administrator in writing."); 33 U.S.C. § 1344(h)(1) (" . . . the Administrator shall determine, taking into account any comments submitted by the Secretary [of the Army] and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service . . . "). This additional step takes the CWA § 404 statutory language out of the checklist, non-discretionary category. In CWA § 402, "[n]othing in the text . . . authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application." Nat'l Home Builders Ass'n, 551 U.S. at 671. By contrast, CWA § 404(h) provides that additional step, requiring EPA to take into consideration the federal biological agency's comments regarding the effects of state assumption on protected species and habitat. EPA's consideration of listed species is "an end in itself" that can alter the EPA's final decision, making a § 404(h) action discretionary.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-5-0005)

2. EPA's regulations support an interpretation that CWA § 404 delegation is discretionary.

EPA's regulations also direct the agency to take into consideration comments from FWS, NMFS, and the Corps. 40 C.F.R. § 233.15(g) ("the Regional Administrator shall approve or disapprove the program based on whether the State's program fulfills the requirements of this part and the Act, taking into consideration all comments received The Regional Administrator shall respond individually to comments received from the Corps, FWS, and NMFS."). EPA cannot merely go down a check list; it must consider and use these agency comments, which is clearly a discretionary action.

Additionally, CWA § 404(h) references EPA guidelines which explicitly require consideration of endangered and threatened species. 33 U.S.C. § 1344(h)(1)(A)(i). Under § 404(h)(1)(A)(i), a state plan to assume dredge and fill permitting must comply with the

guidelines issued under § 404(b)(1). Id. Those implementing guidelines, in 40 C.F.R. § 230.30, require consideration of the potential effects on biological characteristics of an aquatic system before issuing permits. These guidelines define threatened and endangered species, § 230.30(a), and list the possible adverse effects from dredge and fill materials, §230.30(b). Id.

This guideline reference stands in contrast to CWA § 402(b), which does not contain a reference to any other EPA regulations or guidelines that require evaluating the impact to endangered and threatened species before a final agency action. It is significant that, when drafting § 404(h), Congress chose to mandate that one criterion for a state to assume § 404 permitting power is compliance with "guidelines under subsection (b)(1) of this section." 33 U.S.C. § 1344(h)(1)(A)(i). This incorporation of references to listed species parallels the references to endangered sea turtles encompassed in the High Seas Fishing Compliance Act at issue in Turtle Island Restoration Network, where the appellate court held that congressional inclusion of references to international conservation and management measures indicated that the action at issue was discretionary and required ESA § 7(a)(2) consultation. Turtle Island, 340 F.3d 969 (holding that the permitting provision of the High Seas Fishing Compliance Act is discretionary, in part, because the statute itself refers to a convention on protecting and conserving certain marine species); Northwest Envt'l. Adv. v. U.S. Dep't of Commerce, 283 F. Supp. 3d 982 (W.D. Wash. 2017) (holding that CWA § 319 decisions are discretionary, in part, because EPA promulgated related regulations to flesh out the statutory language).

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-5-0006)

3. Contrary to EPA's current interpretation, the legislative history of CWA § 404 shows specific congressional intent to protect fish and wildlife.

EPA's 2010 Opinion Letter stated that "the legislative history clarifies Congress's intent to make program transfer under § 402 and § 404 essentially the same." U.S. Env'l Protection Agency, Opinion Letter on Applicability of ESA Consultation to CWA § 404(h) Determinations at 2 (Dec. 27, 2010) [hereinafter Opinion Letter]. However, this position overlooks the clear distinction between the Congressional intent in designing § 404 and § 402 — the legislative history of § 404 reflects a desire to ensure that fish and wildlife that depend on wetlands are protected, while the legislative history of § 402 reflects a desire to create a program to allow the states to assume permitting power as quickly as possible without considering criteria outside of what is listed in the statute.

The legislative history of § 404(h) reflects a desire to ensure wetlands are protected and to prevent "serious, permanent ecological damage." S. REP. NO. 95-370, 10 (1977) [hereinafter S. Rep.]. The "implementation of section 404 . . . attempted to achieve" a correction of the unregulated destruction of wetlands. Id. Throughout the Congressional Record, Congress members made statements emphasizing that protection of wildlife is a nation-wide concern that EPA should use its authority to address.

Senator Chaffee offered that "I think it is important to bear in mind that marshes and wetlands are . . . a national asset. They are not just confined within boundaries which happen to exist in any one of our States. The wetlands perform a vital part of the food chain for our wildlife." 123 Cong. Rec. (Bound) 26682, 26716 (Aug. 4 1977) [hereinafter 1977 Cong. Rec.]. Senator Baker added that "the [CWA] places the responsibility upon EPA to administer a permit program for industrial and municipal discharges The statutory language authorizing the 404 program requires cooperation of [the Army] [C]orps [of Engineers] and EPA to insure that discharges of dredged material and fill material will not have unacceptable adverse effects on municipal water supplies, shellfish beds, fisheries, wildlife, and recreation." 1977 Cong. Rec. at 26718. The Senate Report states that "although discretion is granted to establish separate administration for a State permit program, the authority of the Administrator to assure compliance with guidelines in the issuance and enforcement of permits and in the specification of disposal sites . . . is in no way diminished." S. Rep., at 78. This reflects a desire to not only protect fish and wildlife, but to give EPA enough "discretion" and "authority" to ensure that § 404 permitting is predominantly a power exercised by the federal agency. Id.

The provisions requiring EPA to consider FWS comments further support the view that Congress intended EPA's § 404 delegation to be discretionary, not simply a box checking exercise. The U.S. House of Representatives Report declares that "this procedure is intended to recognize that the [FWS], because of its responsibilities to protect a very vital natural resource, should provide advice and consultation [FWS] should be involved at the beginning of the permit process and not after the fact." H. R. REP. NO. 95-830, at 105 (1977) (Conf. Rep.). The Senate Report further explains that "committee amendments relating to the [FWS commenting step in 404(g)–(h)] are designed to (1) recognize the particular expertise of that agency and the relationship between its goals for fish and wildlife protection and the goals of the [CWA]. . . . this consultation preserves the Administrator's discretion in addressing the concerns of these agencies, yet affords them reasonable and early participation . . ." S. Rep., at 78-79 (emphasis added).

In contrast, the legislative history of CWA § 402 does not contain any discussion of protecting wildlife or maintaining discretion and authority in the EPA's permitting power. Rather, it reflects the Congress's desire for "prompt action by the [EPA]" to approve state programs. 118 Cong. Rec. 10198, 10219 (Mar. 27, 1972) (statement of Rep. Terry). In fact, Representatives Absug and Rangel opposed § 402(b) in part because Fish and Wildlife Agencies "will no longer have statutory authority to review and comment on permit applications." 118 Cong. Rec. 8655, 8810 (Mar. 16, 1972). Congressional members highlighted the non- discretionary nature of § 402(b), complaining that "once EPA receives the permit applications, it can do no more than merely file them. No provision is made for EPA to comment on the applications. EPA cannot object to the issuance of a permit." 118 Cong. Rec. at 10240.

It is also important to consider the timing of Congressional action with respect to § 402 and § 404. Congress was fully aware of the ESA's requirements and mandates when drafting and passing § 404(g) and (h), unlike when passing § 402. Pub. L. 95–217, § 67(b), Dec. 27, 1977, 91 Stat. 1600. Indeed, a controlling factor in Home Builders was that

Congress enacted § 402(b) prior to the ESA and incorporating the ESA's consultation requirement into the state's § 402 assumption checklist would add an additional and unrelated criterion. Nat'l Home Builders Ass'n, 551 U.S. at 662-63. The Court explained that although a later enacted statute can amend or repeal an earlier statute, "repeals by implication are not favored." Id. The Court therefore found incorporating ESA § 7 consultation would effectively repeal CWA § 402's exclusive checklist for state assumption. Id. Given that Congress enacted § 404's operative language after the ESA, along with the congressional intent to specifically consider the Services' comments and protect fish and wildlife, with respect to § 404 assumption, there is nothing to repeal.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-5-0007)

III. ESA § 7 CONSULTATION IS A COMPLEX, FACT INTENSIVE ANALYSIS

ESA § 7 consultation on whether EPA's approval of a state's assumption of the CWA § 404 dredge and fill permitting program will jeopardize listed species is a complex, fact intensive analysis. ESA § 7(a)(2) first places a procedural obligation on EPA to initiate consultation with FWS and NMFS "at the earliest possible time" to determine what effects a state's assumption of the § 404 program may have on endangered and threatened species and their critical habitats. ESA § 7(a)(2) next places a substantive obligation on EPA to ensure its actions will not jeopardize the continued existence of endangered and threatened species or destroy or adversely modify their critical habitats. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-5-0008)

A. ESA Requirements For Programmatic Consultation

The ESA's implementing regulations dictate the precise requirements for satisfying this substantive obligation. Pursuant to these regulations, the Services must determine whether a state's assumption of the § 404 program poses an unacceptable risk to the survival, recovery, or critical habitat of any listed species based on the "best scientific and commercial data available" while "considering the effects of the action as a whole." Id. § 402.14(c), (d) (emphasis added). The "best scientific and commercial data" standard exists "to ensure that the ESA [is not] implemented haphazardly, on the basis of speculation or surmise." Bennett v. Spear, 520 U.S. 154, 176 (1997).

Using the "best scientific and commercial data available," the Services must produce a biological opinion. In preparing a biological opinion for a state's assumption of a CWA § 404 program, the Services must review all relevant information provided by EPA "or otherwise available" to evaluate the "effects of the action," including its direct and indirect effects, the "environmental baseline," and "cumulative effects." 50 C.F.R. § 402.14(g)(1)-(4); §402.14(h) (specifying contents of a biological opinion); see also 16 U.S.C. § 1536(c). Notably, the regulations reiterate that even when undertaking a programmatic consultation,

the action agency is not relieved "of the requirements for considering the effects of the action or actions as a whole." 50 C.F.R. § 402.14(c)(4). Moreover, the "action area" to be examined encompasses "all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02 (emphasis added).

After "add[ing] the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat," the Services must determine whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. 50 C.F.R. § 402.14(g)(4). The Services joint regulations define "jeopardize the continued existence" to mean "[engaging] in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." "Destruction or adverse modification" means "a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species." 50 C.F.R. § 402.02. The Services must also consider both recovery and survival impacts to listed species and critical habitat. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 931 (9th Cir. 2008); Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1070-71 (9th Cir.), amended, 387 F.3d 968 (9th Cir. 2004). The biological opinion does not merely provide an opinion of whether jeopardy will result, but explains "how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(a); 50 C.F.R. § 402.14.

When the Services determine that a federal action is likely to jeopardize a species or adversely modify critical habitat, they must also suggest reasonable and prudent alternatives ("RPAs") to the proposed action to avoid such impacts. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). If the Services conclude that a proposed action will result in the incidental taking of a listed species but will not cause jeopardy or destruction/adverse modification of critical habitat, they must issue an incidental take statement specifying the allowable impact on listed species; reasonable and prudent measures to minimize the impact; measures to comply with the Marine Mammal Protection Act; and other terms and conditions to be followed by the action agency. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i); Bennett, 520 U.S. at 170. Note that even mixed programmatic actions require incidental take statements at the programmatic level if the actions are "reasonably certain to cause take and are not subject to further section 7 consultation." 50 C.F.R. § 402.14(i)(6).

To fulfill the ESA § 7 consultation requirement, the Services must also use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2), (b)(4). The agency can not merely list a state's threatened and endangered species, dismiss further analysis as requiring too much speculation, or punt all meaningful analysis to the state at some future time.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-5-0009)

EPA's current position on the interplay between CWA § 404 state assumption and ESA § 7 consultation is incorrect. In reviewing the CWA's plain language, implementing regulations, and legislative history, it is clear that CWA § 404(h) provides EPA discretion in deciding whether to grant a state permitting power, unlike the checklist requirements of CWA § 402(b). Because EPA's action under CWA § 404 is discretionary, EPA must initiate and complete formal consultation under ESA § 7(a)(2) prior to granting any state § 404 permitting power.

Additionally, programmatic consultation over state delegation of a CWA § 404 program alone is not enough. EPA must first consult with the Services and to determine whether a state can fulfill the requirements of the CWA and its implementing regulations, including § 404(b)(1) guidelines and their no jeopardy mandate. 40 C.F.R. §§ 233.1(a), 233.15(g). Overarching programmatic consultation does not relieve the state of its responsibility to determine at the site-specific permit level whether there will be no jeopardy to listed species prior to the issuance of permits for the discharge of dredged or fill material pursuant to the CWA's 404(b)(1) guidelines.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Responsible Growth Management Coalition (EPA-HQ-OW-2020-0276-TRANS-092923-007-0001)

So, I'm really concerned, as echoing a lot of the concerns of prior speakers, including the lady from the National Wildlife Federation, about how state assumption of the Clean Water Act interfaces with the mandates of the Endangered Species Act, and the regulatory responsibilities of the U.S. Fish and Wildlife Service. When I read through a certain document, for instance, when I read through, living here in the State of Florida, you know, so we're at the epicenter of this issue of state assumption, right?

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Responsible Growth Management Coalition (EPA-HQ-OW-2020-0276-TRANS-092923-007-0002)

When I read through this document, ESA Biological Evaluation for Clean Water Act section 404 Assumption by the State of Florida, I would assume this lays out the mechanisms by which the state assumption and the state agencies implement the Clean Water Act to protect endangered species. But I read this one passage, so it says the state 404 program rules, and it recites the rule number and so forth, "prohibit issuance of a permit that will likely jeopardize a continued existence of endangered or threatened species, or result in the likely destruction or adverse modification of habitat designated as critical for any species as determined by the U.S. Fish and Wildlife Service and confirms that U.S. Fish and Wildlife Service conclusions about the effects of state 404 permits on listed species are determinative. FDA will monitor adverse effect determinations on listed species and critical habitat by incorporating information into their permit tracking database, similar to the information collected by the USACE. This data collection will assist in facilitating compliance with permit conditions, and can also be shared," that seems almost optional, "to be shared with U.S. Fish and Wildlife Service." I mean, why isn't U.S.

Fish and Wildlife Service at the very center, you know, driving the bus on this issue of implementation of the Endangered Species Act? That's not what that passage stated at all.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble. Implementation of specific section 404 Tribal or State programs is outside of the scope of this rulemaking.**

Responsible Growth Management Coalition (EPA-HQ-OW-2020-0276-TRANS-092923-007-0003)

This is reinforced by a monograph, a very illuminating monograph, that I found published in Environmental Law and let me give you who the author is. The author is Elizabeth Rosan, the title is "EPA's Approach to Endangered Species Protection and State Clean Water Act Programs." It was published in 2000, I believe, and it says, "The Intersection of the CWA and the ESA: To adequately address the protection of threatened and endangered species, The CWA and the ESA must work together more effectively." The current statutory framework of these environmental statutes, however, provides only limited overlap given the prominent role of states under the Clean Water Act. In 1973, Congress never addressed whether ESA procedures apply to state authorized CWA programs. With this congressional silence as a backdrop, EPA has declared that its oversight authority of state-issued CWA permits is not a federal action as contemplated by the ESA and therefore does not trigger the ESA's requirements. Well, this is really scary stuff here in Florida for us, all right.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Responsible Growth Management Coalition (EPA-HQ-OW-2020-0276-TRANS-092923-007-0004)

We are on the verge of losing the Florida panther. It is headed towards extinction. There have only been six, I mean, I shouldn't say this because it sounds like it should be a positive thing, six vehicular fatalities of Florida panthers within this year. When in prior years it was in the teens, and even sometimes twenties number.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

2.4 National Historic Preservation Act (NHPA)

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0010)

EPA's proposed rule must strengthen safeguards for protecting tribal cultural and historic resources, particularly in Alaska. As discussed above, federally recognized tribes are entitled to consultation under Section 106 of the NHPA when a federal undertaking would potentially impact tribal cultural or historic resources. Once a state assumes Section 404 permitting authority, there is no longer a federal undertaking and the procedural requirements of the NHPA do not apply. Menominee, 947 F.3d at 1073-74.

In its proposed rule, EPA suggests that an applicant state or tribe seeking to assume Section 404 permitting authority "should consider" including a process for evaluating and addressing impacts to historic properties. The proposed rule does not require applicants to

consult with tribes that may have historic or cultural resources in or near assumed waters, and does not require that the proposed program have a cultural or historic resource evaluation component. While an applicant is required to demonstrate that it will comply with the 404(b)(1) Guidelines, the lack of clarity on this point is especially troubling for tribes that rely on NHPA Section 106 consultation as a major component of cultural and historic preservation efforts. The federal guidelines, notifications and processes under the NHPA are at least familiar to tribal historic preservation personnel, while a patchwork of varying state-level protections – almost certain to be sporadically applied – does not provide the same assurances that tribal cultural and historic interests will be identified or protected. Critically, Alaska's state historic preservation act does not even mention tribes.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Choctaw Nation of Oklahoma (EPA-HQ-OW-2020-0276-0069-0001)

The Choctaw Nation of Oklahoma submits this comment letter to EPA in order to shed light on how state assumption of Section 404 permitting can impact tribes within the applicant state as well as tribes that have ancestral territory in the applicant state.

The Choctaw Nation of Oklahoma has an area of historic interest encompassing portions of 9 states. Within this area, Choctaw Nation's Historic Preservation Department annually consults on over 4,000 federal undertakings under the National Historic Preservation. Section 800.2(c)(2)(ii)(C) of the National Historic Preservation Act's regulations states: "consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government." Section 800.2(c)(4) of the same regulations states that "Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes." Finally, as noted by the ACHP in its statement on Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act; "federal agencies cannot unilaterally delegate their tribal consultation responsibilities to an applicant nor presume that such discussions substitute for federal agency tribal consultation responsibilities."

Executive Order 13175 as well as President Biden's 2022 "Memo on Uniform Standards for Tribal Consultation" further require federal agencies to consult with Tribes on federal actions that affect them on a government-to-government level.

Army Corps issuance of a permit to discharge dredged or fill material into waters of the United States under CWA Section 404 is a federal undertaking that affords federally recognized Tribes the right to government-to-government consultation under the National Historic Preservation Act. When a state assumes the responsibility to approve or deny dredge and fill permits, then there is no federal action to trigger these federal regulatory processes. States assuming the Section 404 permitting program will be under no equivalent obligation under this proposed rule. Accordingly, upon state assumption of the Section 404 permitting program, an Indian tribe with rights or resources in the assuming state stands

to lose significant and longstanding procedural and substantive legal rights that were put in place to protect tribal interests in cultural, historic and treaty-protected resources.

The Choctaw Nation of Oklahoma was involved when the State of Florida assumed Section 404 permitting authority. 85 Fed. Reg. 83553-83554 (Dec. 22, 2020). While Florida did enter into a Programmatic Agreement regarding impacts to cultural and historic properties with EPA and the Advisory Council on Historic Preservation (ACHP), no tribes were party it. In the brief consultation meetings that lead up to that agreement, Tribes including the Choctaw Nation of Oklahoma, voiced numerous concerns over this responsibility being delegated to a state including: the abdication of the federal trust and consultation responsibilities; lack of notification from the state on individual permits that may impact tribal resources; lack of clarity and notice with regard to procedures for protecting cultural or historic properties impacted by the issuance of general permits; lack of time for tribes to coordinate with and respond to state agencies throughout the permitting process; impacts to lands and waters over which there may be unresolved legal disputes; lack of state resources to adequately manage a Section 404 program; impacts to and implications for tribal traditional, cultural and statutory use rights; and concerns about all tribes being lumped together under the state's program, when tribes as individual sovereign governments have different legal rights and interests.

Over the past nearly three years, the concerns we raised seem to have been realized. The Choctaw Nation Historic Preservation Department has no record of receiving a single notification from the State of Florida on its issuance of 404 permits. Our historic and sacred sites may very well be getting destroyed through the issuance of these permits. We have no way of knowing, as the consultation and Tribal review process has apparently broken down entirely. In delegating its responsibilities, the EPA seems to have effectively repealed that part of the National Historic Preservation that formerly applied to the issuance of 404 permits within the State of Florida.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble addressing National Historic Preservation Act (NHPA) compliance.** ***See*** **Section IV.F of the final preamble addressing opportunities to increase Tribal engagement in Tribal and State section 404 permitting. Implementation of specific section 404 Tribal or State programs is outside of the scope of this rulemaking.**

Choctaw Nation of Oklahoma (EPA-HQ-OW-2020-0276-0069-0002)

Interacting with states under what was formerly a federal agency's jurisdiction is problematic for Tribes for a number of reasons. One of these is that states do not have a trust responsibility to Tribes. In practice, this means that Tribal governments are often lumped in with the general public when it comes to sharing information about projects and tribal cultural sites. Often this means that consultation is not very meaningful, with little or no follow up on the part of the states. The relationship between tribes and states not being a trust relationship further means that information that a Tribe may share with a state government does not have the same protections that it would if shared with a federal agency. Often, when Tribes express concern about an undertaking's potential to impact a sacred or historic site, we are put in a position of having to prove the existence, importance,

and locations of such sites. If we share this sensitive information with a state, a state is not under the same trust responsibility to safeguard this information that a federal agency would be under. This can force tribes to make difficult decisions about whether to allow a site to be endangered by an undertaking or to allow the site to be endangered by disclosing sensitive information about it to entities that may not be able to protect that information.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble addressing National Historic Preservation Act (NHPA) compliance. The Agency recognizes that relationships between individual Tribes and States vary. In Section IV.E.1 of the preamble EPA discusses the codification of EPA's ability to facilitate resolution of disputes. With respect to providing information of a sensitive nature, or proving the Tribes interest or right, EPA will work with the Tribe, State, and other federal agencies to address these concerns on a permit-by-permit basis.** ***See*** **Section IV.F of the final preamble addressing opportunities to increase Tribal engagement in Tribal and State section 404 permitting.**

Choctaw Nation of Oklahoma (EPA-HQ-OW-2020-0276-0069-0003)

Beyond the illegality of federal agencies delegating Tribal consultation to states, companies, and other third parties, the practice places an undue hardship on tribal historic preservation offices. Our office has found that by and large individuals, corporations, and state agencies other than SHPOs, do not possess the expertise to conduct meaningful cultural resources review or even follow the cultural resources review procedures that federal agencies have laid out for them. This results in a situation where our office has to expend its own time and resources to educate a continual stream of project applicants about the law, about their responsibilities under the law, and about cultural resources in general. In many cases, our office ends up essentially doing the cultural resources reviews for these applicants, and by extension for the federal agency that has delegated its responsibilities to them. This places an unfunded burden on Tribal Historic Preservation Offices that takes resources away from other areas where they are needed.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble addressing National Historic Preservation Act (NHPA) compliance. EPA acknowledges the commenter's concerns about the burdens it must bear to educate project applicants about cultural resources review obligations.** ***See*** **Section IV.F of the final preamble addressing opportunities to increase Tribal engagement in Tribal and State section 404 permitting.** ***See*** **Section IV.B.3 of the final rule preamble, which explains that the final rule now requires program budget and additional funding being allocated for all agencies that are responsible for program administration, potentially including the historic preservation offices of assuming Tribes and States.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0034)

As discussed above, federally recognized tribes are entitled to consultation under Section 106 of the NHPA when a federal undertaking would potentially impact tribal cultural or historic resources. According to one Circuit Court of Appeals, once a state assumes Section 404 permitting authority, there is no longer a federal undertaking and the procedural requirements of the NHPA do not apply. Menominee, 947 F.3d at 1073-74.

In its proposed rule, EPA suggests that an applicant state or tribe seeking to assume Section 404 permitting authority "should consider" including a process for evaluating and addressing impacts to historic properties. The proposed rule does not require applicants to consult with tribes that may have historic or cultural resources in or near assumed waters and does not require that the proposed program have a cultural or historic resource evaluation component. While an applicant is required to demonstrate that it will comply with the 404(b)(1) Guidelines, the lack of clarity on this point is especially troubling for tribes that rely on NHPA Section 106 consultation as a major component of off-reservation cultural and historic preservation. The Port Gamble S'Klallam Tribe uses Section 106 consultation frequently and ensures that all Army Corps, county, state, and federal permit applications the Tribe receives will have no impact on culturally important resources and have proper inadvertent discovery plans. The federal guidelines, notifications, and processes under the NHPA are at least familiar to tribal historic preservation personnel, while a patchwork of varying state-level protections – almost certain to be sporadically applied – does not provide the same assurances that tribal cultural and historic interests will be identified or protected.

Recently, Florida assumed Section 404 permitting authority. 85 Fed. Reg. 83553- 83554 (Dec. 22, 2020). While Florida did enter into a programmatic agreement regarding impacts to cultural and historic properties with EPA and the Advisory Council on Historic Preservation (ACHP), no tribes were party to the programmatic agreement [Footnote 2: See https://floridadep.gov/sites/default/files/Programmatic_Agreement_-_12-16-20.pdf.]. Potentially impacted tribes with cultural resources in Florida voiced numerous concerns about state assumption, including: abdication of the federal trust and consultation responsibilities; lack of notification from the state on individual permits that may impact tribal resources; lack of clarity and notice with regard to procedures for protecting cultural or historic properties impacted by the issuance of general permits; lack of time for tribes to coordinate with and respond to state agencies throughout the permitting process; impacts to lands and waters over which there may be unresolved legal disputes; lack of state resources to adequately manage a Section 404 program; impacts to and implications for tribal traditional, cultural and statutory use rights; and concerns about all tribes being lumped together under the state's program, when tribes as individual sovereign governments have different legal rights and interests [Footnote 3: See, generally https://www.regulations.gov/document/EPA-HQ-OW-2018-0640-0606.].

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble. Implementation of specific section 404 Tribal or State programs is outside of the scope of this rulemaking.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0007)

EPA's proposed rule must strengthen safeguards for protecting Tribal cultural and historic resources, particularly in Alaska. As discussed above, federally recognized Tribes are entitled to consultation under Section 106 of the NHPA when a federal undertaking would potentially impact Tribal cultural or historic resources. Once a state assumes Section 404 permitting authority, there is no longer a federal undertaking and the procedural requirements of the NHPA do not apply. Menominee, 947 F.3d at 1073-74.

In its proposed rule, EPA suggests that an applicant state or Tribe seeking to assume Section 404 permitting authority "should consider" including a process for evaluating and addressing impacts to historic properties. The proposed rule does not require applicants to consult with Tribes that may have historic or cultural resources in or near assumed waters, and does not require that the proposed program have a cultural or historic resource evaluation component. While an applicant is required to demonstrate that it will comply with the 404(b)(1) Guidelines, the lack of clarity on this point is especially troubling for Tribes that rely on NHPA Section 106 consultation as a major component of cultural and historic preservation efforts. The federal guidelines, notifications and processes under the NHPA are at least familiar to Tribal historic preservation personnel, while a patchwork of varying state-level protections – almost certain to be sporadically applied – does not provide the same assurances that Tribal cultural and historic interests will be identified or protected. Critically, the Alaska Historic Preservation Act does not even mention Tribes.

Recently, Florida assumed Section 404 permitting authority. 85 Fed. Reg. 83553- 83554 (Dec. 22, 2020). While Florida did enter into a programmatic agreement regarding impacts to cultural and historic properties with EPA and the Advisory Council on Historic Preservation (ACHP), no Tribes were party to the programmatic agreement [Footnote 1: See https://floridadep.gov/sites/default/files/Programmatic_Agreement_-_12-16-20.pdf.]. Potentially impacted Tribes with cultural resources in Florida voiced numerous concerns about state assumption, including: abdication of the federal trust and consultation responsibilities; lack of notification from the state on individual permits that may impact Tribal resources; lack of clarity and notice with regard to procedures for protecting cultural or historic properties impacted by the issuance of general permits; lack of time for Tribes to coordinate with and respond to state agencies throughout the permitting process; impacts to lands and waters over which there may be unresolved legal disputes; lack of state resources to adequately manage a Section 404 program; impacts to and implications for Tribal traditional, cultural and statutory use rights; and concerns about all Tribes being lumped together under the state's program, when Tribes as individual sovereign governments have different legal rights and interests [Footnote 2: See, generally https://www.regulations.gov/document/EPA-HQ-OW-2018-0640-0606.].

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble. Implementation of specific section 404 Tribal or State programs is outside of the scope of this rulemaking.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0012)

- EPA's Rules Must Protect Rights Under the National Historic Preservation Act. Third, EPA rules must provide for consultation under NHPA at the time of the assumption decision, but cannot end there. There must also be provisions for NHPA protections at the time that a particular project and permit is proposed. Again, the Menominee Indian Tribe of Wisconsin case presents the precise example of why. Often, sites of historic importance, particularly to a tribe, may not be known at the time a state applies to assume 404 permitting. In the case of Michigan, the state applied to assume permitting in the early 1980s. At that point in time, while members of the Menominee Tribe had spiritual, cultural, and ancestral connections to both sides of the Menominee River, including in Michigan,

without a particular threat articulated to historic sites and without full knowledge of the extent of historic sites, programmatic NHPA consultation would have provided little (or incomplete) protection to the Tribe and would have made meaningful participation by the Tribe difficult. Without NHPA protections at the time that a specific project is proposed that represents a specific threat to a historic site (often decades after a state assumes permitting), tribes will be left unprotected [Footnote 6: EPA cannot rely on state law to protect historic places. State historic preservation acts often lack equivalent protections of historic properties of cultural and religious importance to tribes and in some cases, like Alaska, do not even mention tribes.].

To address potential impacts to important historic places for tribes that may occur years, even decades, after assumption, EPA rules must provide that if the National Historic Preservation Act is implicated in any state permit action under an assumed program, the state permit cannot proceed and the Corps will retain or reclaim permitting authority over the subject project. Therefore, EPA must retain affirmative review and control over NHPA-implicated projects through its rules from the outset.

EPA rules must make clear that a state must examine and disclose whether a project requiring a 404 permit may affect a site defined under NHPA, that the presence of such a site entitles a tribe to consultation, and where that is the case, EPA and the Corps retain permitting authority and the permitting authority is not assumed by the state. Further, the rules should require that any Memorandum of Agreement (MOA) between an assuming state and any federal agency must fully set forth this limitation in state authority and retention of authority by EPA and the Corps.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0003)

First, absent the protections outlined below, upon assumption of a 404 program by a state, a number of federal statutes may no longer apply to protect tribal interests. As was determined with respect to Michigan's program, the National Historic Preservation Act (NHPA) no longer applies to protect wetlands and areas adjacent to them that are of historic and cultural import to tribes. Menominee Indian Tribe of Wisconsin v. EPA, 947 F.3d 1065, 1074 (7th Cir. 2020) [Footnote 2: Earthjustice continues to question the correctness of this decision given the plain language in the NHPA that provides a federal "undertaking" subject to consultation includes a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including… those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 54 U.S.C. § 300320 (formerly 16 U.S.C. § 470w) (emphasis added). Unfortunately, at this point two Circuit Courts have denied NHPA protections under assumed programs, one at the urging of your agency against tribal interests and protections.]. Tribes will lose procedural protections available under the NHPA as a result of a state assuming a program, even if there are identified archeological, historic, and cultural sites within the proposed project area. Our client, the Menominee Indian Tribe of Wisconsin, faced this exact scenario when participating in Michigan's wetland permit process for the Back Forty Mine. Because Michigan had assumed 404 permitting, Michigan (and EPA) disregarded all protections afforded the Menominee people under the NHPA.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble addressing the NHPA.** ***See*** **Section IV.F of the final rule preamble addressing increased opportunities for Tribal engagement in the permitting process where Tribes or States have assumed Section 404 permitting.**

3. No less stringent than

Environmental Protection Network (EPN) (EPA-HQ-OW-2020-0276-0057-0006)

No Less Stringent Requirements

EPN supports the clarification of how the No Less Stringent Requirement will be implemented under the proposed regulation. The prior regulations were not clear that all aspects of the program submitted to EPA for review had to be No Less Stringent than the federal program. This led to situations where the program submission included some provisions that were less stringent while others were more stringent. This change clarifies this issue. To implement this requirement, where programs are not adopted by reference to the federal program, the State Attorney General or Tribal official should be required to certify that the approach taken by the state or Tribe is no less stringent.

Agency Response: The Agency appreciates the commenter's support for the Agency's proposal to codify its longstanding principle that Tribes and States may not compensate for making one requirement more lenient than required under these regulations by making another requirement more stringent than required. ***See*** **Section IV.A.3 of the final rule preamble for a further discussion of the Agency's rationale for codifying this longstanding principle. To the extent the commenter recommends that the regulatory text be revised to expressly require that, where programs are not adopted by reference to the federal program, the State Attorney General or Tribal official certify that the State or Tribal program will result in permits that apply the CWA no less stringently than a permit for the same discharge if issued by the Corps, the Agency disagrees. The CWA and the final rule are sufficient to ensure that the State or Tribal program will result in permits that will be consistent with the CWA to the same extent as a permit for the same discharge if issued by the Corps without adding the commenter's suggested statement to the Attorney General's statement required by 40 CFR 233.12.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0028)

EPA proposes to provide increased rigidity to the regulations related to the Clean Water Act provision requiring state 404 permit programs to be no less stringent than federal requirements. EPA is proposing to codify the principle that States may not compensate for making one requirement in their 404 program more lenient by making another more stringent.

Agency Response: To the extent the commenter summarizes the Agency's proposal to codify the principle that Tribes and States may not compensate for making one requirement more lenient than required under these regulations by making another requirement more stringent than required, the Agency agrees. ***See*** **Section IV.A.3 of the final rule preamble for a further discussion of the Agency's rationale for**

codifying this principle. To the extent the commenter characterizes the Agency's proposal as providing "increased rigidity," the Agency disagrees. The principle is a longstanding one dating back at least to the 1988 preamble to the CWA section 404 Tribal and State program regulations. 53 FR 20764, 20766 (June 6, 1988). By codifying the principle in the regulations, the Agency is providing increased clarity regarding a longstanding principle.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0011)

I. The proposed rule fails to comply with the Clean Water Act's mandate that state 404 programs be at least as stringent as the federal program.

EPA is correct that the Clean Water Act mandates that a state may not impose requirements that are less stringent than federal requirements. 88 Fed. Reg. at 55,308. EPA is also correct that a state may not trade a stringent requirement for relaxation of other requirements under the law. Id. However, the proposed rule's discussion regarding state program stringency, and the 404(b)(1) Guidelines in particular, runs counter to these plain legal requirements and appears to excuse relaxation of the legal requirements by claiming "flexibility" from Congress.
See 88 Fed. Reg. at 55,277, 55,296. Flexibility cannot extend beyond the bounds of the law.

EPA may provide some flexibility to a state wishing to create a more stringent program, which goes above and beyond the 404(b)(1) Guidelines and enforcement requirements. But EPA may not, in the name of flexibility, allow a state to skirt those requirements to create a less stringent program.

Agency Response: To the extent the commenter asserts that flexibility provided by the final rule "runs counter" to the requirement that a state may not impose requirements that are less stringent than federal requirements or "excuses" relaxation of legal requirements, the Agency disagrees. Nothing in CWA section 404(h) requires that Tribes and States adopt verbatim or incorporate into their programs by reference the CWA 404(b)(1) Guidelines or other federal requirements. By not requiring verbatim adoption or incorporation by reference, Congress allowed leeway for Tribes and States to craft a Tribal or State program consistent with circumstances specific to that Tribe or State that would still result in permits that will apply the CWA at least as stringently as a permit for the same discharge if issued by the Corps. The CWA and the final rule are sufficient to ensure that the State or Tribal program will result in permits that will apply the CWA at least as stringently as a permit for the same discharge without requiring verbatim adoption or incorporation by reference of portions of the federal program. *See* Sections IV.A.2 and IV.A.3 of the final rule preamble for a further discussion of the Agency's rationale.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0002)

EPA has also overlooked key federal protections that are lost during state assumption, including the Endangered Species Act (ESA), National Environmental Policy Act

(NEPA), and National Historic Preservation Act (NHPA). The federal program works in harmony and in conjunction with these federal statutes, and a state program must ensure the same level of protections are afforded by state law in order to be equivalent to, or as stringent as, the federal program.

Agency Response: **As set forth in Sections IV.A.2 and IV.A.3 of the final rule preamble, Section 7 of the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), and Section 106 of the National Historic Preservation Act (NHPA) apply to federal actions. Issuance of a permit by a Tribe or State is not a federal action subject to those statutory provisions and processes. *See* Sections IV.A.2 and IV.A.3 of the final rule preamble for a discussion regarding how, pursuant to 33 U.S.C. 1344(h)(1)(A)(i), Tribal and State programs can demonstrate they have authority to issue permits that apply and assure compliance with those aspects of the CWA 404(b)(1) Guidelines that authorize only the least environmentally damaging practicable alternative, prohibit permitting of a discharge that would jeopardize the continued existence of listed endangered or threatened species under the ESA, and require consideration of potential effects on human use characteristics, including "areas designated under Federal and State laws or local ordinances to be managed for their aesthetic, educational, historical, recreational, or scientific value."**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0003)

It is even more important not to weaken protections for waters under Clean Water Act jurisdiction following the U.S. Supreme Court's misguided decision in Sackett v. EPA, 598 U.S. 651 (2023), which leaves many wetlands newly vulnerable. EPA must substantially revise the proposed rule to ensure that the federal floor for state 404 programs is as stringent as the Clean Water Act requires. Congress passed the Clean Water Act to set the minimum standards for protecting our Nation's waters and wetlands. EPA must ensure those minimum standards are met and maintained by any state assuming the 404 program [Footnote 2: These comments address state assumption of the 404 program only, not assumption of the 404 program by Tribes, which does not raise the same suite of concerns. Moreover, EPA has acknowledged that it is not aware of any Tribes currently considering assumption.].

Agency Response: ***See*** **Section IV.A.3 of the final rule preamble for discussion of requirements for Tribal and State programs to be consistent with and no less stringent than the requirements of the Act and its implementing regulations.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0005)

EPA must ensure that the Section 404 state assumption regulations abide by the Clean Water Act's establishment of a strong federal floor to ensure that the chemical, physical, and biological integrity of the Nation's waters and wetlands are restored and protected because states have failed to protect our waters and wetlands. In their many years of administering Section 402 Clean Water Act programs, states have struggled to implement (and many actively resist) their Clean Water Act responsibilities to set standards, assess water quality, and issue and enforce permits to limit pollutants, with the

result that our waters still do not attain basic standards of cleanliness and protection. EPA's most recent National Aquatic Resource Survey data shows that 70% of rivers and streams are not healthy based on their biological communities and 58% have excess nutrients, while 52% of wetland area is not healthy based on biological communities [Footnote 49: EPA, Explore National Water Quality. EPA reports that, using the "fish indicator" as an example, only 26% of assessed perennial rivers and streams were of "good" quality (down approximately 8% from the 2008-2009 data), 22% were of "fair" quality, and 37% were of "poor" quality (up approximately 10% from the 2008-2009 data). See also EPA, National Rivers and Streams Assessment 2013–2014 at 19 (Dec. 2020). The results were even more alarming for some other indicators. For example, 44% of assessed rivers and streams were of "poor" quality using the macroinvertebrate indicator, and 43% were "poor" using the nitrogen indicator. Id. at 20, 23. For many of the indicators, water quality worsened between the 2008/2009 survey and the 2013/2014 survey.]

Agency Response: The Agency agrees that Tribal and State permit must apply the requirements of the CWA at least as stringently as would a permit for the same discharge if issued by the Corps. See Sections IV.A.2 and IV.A.3 of the final rule preamble for a further discussion of the Agency's rationale. The Agency acknowledges the National Aquatic Resource Survey and the National Rivers and Streams Assessment 2013-2014 mentioned by the commenter. To the extent the commenter seeks to attribute the results of those surveys to alleged improper implementation of the National Pollutant Discharge Elimination System permit program by authorized States, those reports refer only broadly and generally to potential sources of certain pollutants, including some nonpoint sources. Those reports do not evaluate the quality of State NPDES programs or whether State NPDES programs are consistent with federal requirements.

Individual commenter (EPA-HQ-OW-2020-0276-0050-0013)

I believe that EPA should reconsider partial assumption for Tribes that to not meet TAS status. This would serve the interests of Tribal Sovereignty.

Agency Response: *See* Section IV.B.1 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments.

State of Michigan, Michigan Department of Environment, Great Lakes, and Energy (EGLE), Water Resources Division (EPA-HQ-OW-2020-0276-0071-0001)

The WRD supports the "no less stringent" standard for assumed programs and the U.S. EPA's position on partial assumption as reflected in the proposed rule.

Agency Response: The Agency appreciates the commenter's support for the Agency's proposals regarding how Tribes and States can issue permits that apply the requirements of the CWA at least as stringently as would a permit for the same discharge if issued by the Corps and for the Agency's position on partial assumption. For a further discussion of the Agency's rationale, see Sections IV.A.2, IV.A.3 and IV.B.1 of the final rule preamble.

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0022)

1. No Less Stringent Than

NAWM supports the proposed rule language and agrees that trading of impacts and standards is not protective of aquatic resources nor meets the federal stringency test.

Agency Response: The Agency appreciates the comment. For a further discussion of the Agency's rationale, see Section IV.A.3 of the final rule preamble.

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0002)

While the Clean Water Act is the principal legislation outlining protection of our nation's waters, it does not exist in a vacuum. The Act operates in conjunction with other laws including but not limited to the Endangered Species Act (ESA), National Environmental Policy Act (NEPA), and National Historic Preservation Act (NHPA). When a state assumes the federal program, the direct protections afforded by these federal statutes are largely lost. For a state, such as Alaska, which does not have parallel state laws (let alone equal access to courts or tribal consultation), assumption of the 404 program without adequate safeguards means that Alaskans may one day have their own Cuyahoga River incident. That is not a reality we are willing to face and one that the EPA, charged with protecting our nation's waters, should demand does not occur. Thus, EPA must require in any final rule, that a state program ensures the same level of protections are afforded by state law to be equivalent to, or as stringent as, the federal program.

Agency Response: See the Agency's Response to Comment EPA-HQ-OW-2020-0276-0068-0002.

Environmental Confederation of Southwest Florida (EPA-HQ-OW-2020-0276-TRANS-092923-002-0001)

It's very important that each and every state is consistent with federal regulations and not be allowed to be less stringent in any way. If they want to be more stringent, that'd be great. Quite frankly, if that worked out, the EPA might consider becoming more stringent themselves.

Agency Response: The Agency appreciates the comment. For a further discussion of the Agency's rationale, see Section IV.A.3 of the final rule preamble.

Natural Resources Defense Council (EPA-HQ-OW-2020-0276-TRANS-092923-008-0002)

Second, EPA must ensure that states seeking to assume permitting authority have dredge and fill permit programs that are at least as stringent as the Federal Government's.

Agency Response: The Agency agrees. For a further discussion of the Agency's rationale, see Section IV.A.3 of the final rule preamble.

Natural Resources Defense Council (EPA-HQ-OW-2020-0276-TRANS-092923-008-0006)

EPA must also ensure that state programs are equally protective of water bodies as the federal requirements, and a state seeking assumed authority must demonstrate equal stringency in all respects.

Agency Response: The Agency agrees. For a further discussion of the Agency's rationale, see Section IV.A.3 of the final rule preamble.

Chickaloon Native Village (EPA-HQ-OW-2020-0276-TRANS-092923-009-0003)

We appreciate that EPA requires the state programs to not be less stringent than the federal programs, however, to ensure this the EPA will need to put significant and continual effort into oversight, particularly in resource extraction states, including boots on the ground compliance reviews.

Agency Response: The Agency agrees that permits issued by Tribes and States must apply the requirements of the CWA at least as stringently as a permit for the same discharge if issued by the Corps. The CWA provides EPA with oversight authority over permits issued by Tribal and State section 404 programs. *See* 40 CFR 233.50-53. For a discussion of how the final rule proposes to clarify certain aspects of EPA's oversight, see Section IV.E of the final rule preamble.

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-2-0002)

While Congress did preserve important roles for states, giving them the first obligation and authority to develop water quality standards and the ability to be delegated permit authority, Congress made plain that state obligation and authority is always subject to the review and authority backstop of the EPA and that federal law and the EPA set the Clean Water Act minimum for water quality standards, permitting, effluent limits, and enforcement in the effort to address previous shortcomings in clean water efforts. See 33 U.S.C. §§1309, 1313, 1314, 1316, 1342, and 1344.

Based upon this history and Congress' direction, a fundamental tenet of the Clean Water Act is that the Clean Water Act is a floor, a minimum baseline in all respects for protection of the Nation's waters. States retain only the flexibility to be more, but never less, protective than the Clean Water Act's foundational protections. See, 33 U.S.C. § § 1311(b)(1)(C) and PUD No. 1, of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700, 705-707 (1994). This proposed rule runs directly contrary to this foundational and well-established principle.

Agency Response: To the extent the commenter asserts that permits issued by Tribes and States must be at least as stringent as a permit for the same discharge if issued by the Corps, the Agency agrees. The Agency disagrees that the final rule "runs directly counter" to the requirement that a State may not impose requirements that are less stringent than federal requirements. The CWA and the final rule are sufficient to ensure that Tribal and State permits will apply the CWA at least as stringently as would a permit issued by the Corps for the same discharge. See Sections IV.A.2 and IV.A.3 of the final rule preamble for the Agency's rationale.

B. Subpart B - Program Approval

1. Partial or phased assumption

Association of Clean Water Administrators (ACWA) (EPA-HQ-OW-2020-0276-0060-0003)

Partial Assumption: The Proposed Rule does not address the issue of partial assumption. Several states have expressed interest in partial assumption of the section 404 program and ACWA encourages the agencies to further explore options to allow for this approach. We request that EPA work with states to reconsider this position and to explore providing states with additional flexibility in the assumption of section 404 permitting authority.

Agency Response: ***See*** **Section IV.B.1 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0020)

EPA acknowledges that there has been a high level of interest in partial assumption and that this is one of the common barriers discouraging States from seeking assumption [Footnote 18: 88 Fed. Reg. 55,314; Economic Analysis at 12 (noting that "a desire to assume part of the section 404 program but not the entire program" was a "reason[] States cited for not pursuing assumption.").]. The Proposed Rule examines partial assumption but declines to revise the regulations in 40 CFR 233.1(b), which establishes that partial programs are not approvable under section 404 [Footnote 19: 88 Fed. Reg. 55,314.]. EPA briefly assesses options for implementing partial assumption, but ultimately interprets the CWA as not authorizing partial assumption under 404.

Florida encourages EPA to revisit its interpretation of Section 404 as prohibiting partial assumption. Particularly in light of Sackett, where a State's partial program may go further to protect non-WOTUS waters than the 404 program, integration into the federal program would be beneficial and ultimately have a greater reach than the federal program. Nothing in the Act prohibits partial assumption by States, and partial assumption would clearly help advance the CWA's cooperative federalism objectives. Accordingly, Florida suggests that EPA further consider ways to allow States to implement partial assumption of a 404 program, or work with Congress to increase state flexibility in these respects.

Agency Response: ***See*** **Section IV.B.1 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments.**

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0027)

3. Partial Assumption

NAWM understands the Agency's position on partial assumption and agrees that States and Tribes could avail themselves of the State Programmatic General Permit (SPGP) application process for specific activities or impact thresholds. Members of our community have successfully utilized this tool in-leu of applying for authorization to assume the entire program. The use of SPGPs has been effective in allowing the States to provide resource protection while giving project proponents the benefit of minimizing

application costs and time frames since both State and Tribal impacts would be included in the same application for federal jurisdiction. However, the application and implementation of SPGP's is not without resources costs to States and Tribes and assistance should be provided for SPGP implementation. There are differences of opinions among NAWM members on this issue and the utility of partial assumption and benefits. We will defer to individual State and Tribes for specific concerns or support of EPA's proposed rule.

Agency Response: ***See*** **Section IV.B.1 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments.**

National Tribal Water Council (NTWC) **(**EPA-HQ-OW-2020-0276-0074-SD-0009)

1. Partial assumption of program.

The concept of allowing an assumption of authority for administering the program for certain waters may seem at first glance a reasonable means to reduce the burden on already stretched staff and financial resources in Indian country. The fact of the matter, however, is a tribe would still need to implement the entirety of the program. Therefore, this proposal probably would not significantly change the workload required to fulfill the requirements of assumption, but would reduce the number of waters for which tribes could issue permits. This outcome does not seem of any benefit to tribes.

In contrast, the NTWC is intrigued by the concept that Kathy Hurld (EPA, Office of Wetlands, Oceans and Watersheds) presented to the NTWC on October 24, 2018, which suggested that tribes might assume "certain activities" of the program, but for all tribal waters. This proposal might actually streamline the requirements of full assumption while allowing for more tribal oversight and input into the permitting process, and therefore we think that this concept merits consideration.

Agency Response: ***See*** **Section IV.B.1 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments.**

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while allowing for more tribal oversight and input into the permitting process, and therefore we think that this concept merits consideration.

Agency Response: ***See*** **Section IV.B.1 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0022)

EPA has declined to revise the regulations on this point because EPA continues to believe that partial assumption is not allowed by statute [Footnote 53: 88 Fed. Reg. 55314.]. EPA additionally indicates its belief that partial assumption would be difficult for States to implement.

The inability for States to take a partial or phased approach to assumption has, historically, been a major hurdle for States seeking to assume [Footnote 54: E.g., State of Oregon HB 2436 Partial 404 Assumption Legislative Update (Nov. 2019) (identifying workgroup recommendation of "partial assumption" of 404 program covering "specific geographic areas for specific activities" in Oregon); Oregon Department of State Lands Dec. 2020 Legislative Update, at 5 (viability of partial assumption dependent on "revised 404(g) rules on assumption"), available at https://www.oregon.gov/dsl/WW/Documents/LegislativeUpdate-December2020.pdf.]. It is almost certainly a hurdle for TAS Tribes as well.

EPA should not be making policy calls about how easy or difficult EPA estimates it will be for States to partially assume the program – and certainly not without recent conversation with States, including Alaska. The conversations that Alaska has had with other States indicate that, contrary to EPA's statement, partial assumption would not be difficult for States to implement. States could, and sometimes would prefer to, take a partial or phased approach to assumption. Alaska urges EPA to reconsider pragmatic options allowing for a partial or phased assumption.

Agency Response: ***See*** **Section IV.B.1 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments. EPA determined not to authorize partial assumption following extensive discussion and outreach with Tribes and States and comments received during the public comment period.** ***See*** **Section III.B of the final rule preamble for a discussion of outreach conducted on this rule and public input opportunities. EPA looks forward to continuing to engage with Tribes and States to assist in facilitating Tribal and State assumption following the issuance of this rulemaking.**

2. Retained waters

2.1 Procedures for determining which waters are retained

Anonymous (EPA-HQ-OW-2020-0276-0044-0001)

The proposed rule also states that EPA and the Corps would jointly determine which waters are excluded from assumption by Tribes or States, based on the best available information and data, and would publish a list of such waters for each assumed program. However, the proposed rule does not specify how EPA and the Corps would make such determinations, what information and data they would use, how they would resolve any disputes or disagreements, and how they would update or revise the list of excluded waters over time.

This is an important issue that needs more clarification, as it may affect the scope and effectiveness of the assumed programs, as well as the rights and responsibilities of the Tribes, States, project applicants, and the public. Lack of treatment of this issue could lead to clarifying litigation.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble for a discussion of the rationale for EPA's approach to determining the scope of the Corps-retained waters. As discussed in the preamble, EPA convened an Assumable Waters Subcommittee under the National Advisory Council for Environmental Policy and Technology (NACEPT) specifically for the purpose of recommending a clearer process for determining the scope of retained waters. The Subcommittee met for over a year and developed a thorough report and recommendation. The Subcommittee submitted its recommendations to NACEPT, which passed it, in turn, to EPA. This rule implements the Subcommittee's majority recommendation, with even greater clarity in the form of more specific time frames and procedures. EPA also carefully reviewed the public comments on this rule, and while commenters asked for greater clarity, none provided specific and actionable suggestions as to the form such additional clarity could take. EPA therefore pursued all avenues to provide clarity with respect to the process for determining the scope of retained waters. Ultimately, applying the statutory language to different water bodies within the jurisdiction of different Tribes or States with varying types of data will require some case-by-case analysis and determinations. Yet the process EPA is establishing in this rule will provide predictability and certainty by establishing clear time frames and information sources for the development of the description. In addition, this rule establishes specific opportunities for public input, ensuring that members of the public can provide suggestions regarding the scope of retained waters to the Corps and the Tribe or State.**

The rule is clear that the retained waters list would include the following:

- **Waters of the United States, or reaches of those waters, from the RHA section 10 list(s) that are known to be presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce;**

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

- **Retained wetlands that are adjacent to the foregoing waters.**

The data and information that may be used to compile the list will vary depending on the sources of information the Corps district, State, or Tribe have available. The preamble discusses potential sources of such information, but EPA determined that it is not necessary or helpful to limit or prescribe the universe of such sources in regulatory text.

As recognized in EPA's regulations, in many cases, States lack authority under the CWA to regulate activities covered by the section 404 program in Indian country and Lands of Exclusive Federal Jurisdiction. *See* 40 CFR 233.1(b). Thus, the Corps will continue to administer the program in Indian country unless EPA determines that a State has authority to regulate discharges into waters in Indian country and approves the State to assume the section 404 program over such discharges. The rule also addresses ways of updating the list over time. *See* Section IV.B.2 of the final rule preamble.

Anonymous (EPA-HQ-OW-2020-0276-0044-0002)

Some questions this suggests are:

How would EPA and the Corps define and identify excluded navigable waters of the United States, especially in light of the ongoing review of the definition of waters of the United States by EPA and the Corps in a separate rulemaking process?

How would EPA and the Corps determine which waters are adjacent to or tributaries of excluded navigable waters of the United States, especially in cases where such waters are intermittent, ephemeral, or isolated?

How would EPA and the Corps account for changes in hydrology, ecology, land use, climate, or other factors that may affect the status or condition of assumed or excluded waters over time?

How would EPA and the Corps communicate and coordinate with Tribes, States, project applicants, and the public about which waters are assumed or excluded, and how they can access relevant information and data?

How would EPA and the Corps handle any challenges or appeals from Tribes, States, project applicants, or the public regarding the determination of assumed or excluded waters?

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0044-0001.**

EPA is not currently engaged in rulemaking addressing the definition of "waters of the United States." This rulemaking does not affect, modify or otherwise address the definition of "waters of the United States." To the extent the Corps uses its expertise to assess the scope of "waters of the United States" in compiling the retained waters description, this rulemaking does not address that part of the Corps' analysis.

Following program assumption, the Tribe or State maintains the descriptions of retained waters. Section IV.B.2 of the final rule preamble discusses procedures for modifications of that list. The Tribe or State will have the lead role in modifying and communicating to members of the public about the list and its modifications, though as discussed in the preamble, the Memorandum of Agreement between the Corps and the Tribe or State must outline procedures whereby the Corps will notify the Tribe or the State of changes to the RHA section 10 list as well as the extent to which these changes implicate the statutory scope of retained waters as described in CWA section 404(g)(1) and therefore necessitate revisions to the retained waters description. The Tribe or State would incorporate the revisions that the Corps has identified, pursuant to the modification provisions agreed upon in the Memorandum of Agreement. EPA must approve all program revisions, including changes to the retained waters descriptions. Substantial revisions, such as the removal of waters from the retained waters description and substantial additions to the description, include a public notice process. Changes in hydrology, ecology, land use, climate, or other factors that may affect the status or condition of assumed or retained waters over time may be addressed through the program modification process. *See* Section IV.B.2 for opportunities for public input on the retained waters description. EPA's approval of Tribal or State programs, including its approval of the retained waters description, may be challenged in federal district court.

Individual commenter (EPA-HQ-OW-2020-0276-0050-0004)

The term "retained waters description" is preferrable because it implies a more detailed response than a simple list of names. I think there should be some avenue for Tribes and States to argue for the waters they think should be under their authority.

Agency Response: The Agency is retaining the term "retained waters description." *See* Section IV.B.2 of the final rule preamble for a discussion of the collaborative approach the Agency anticipates between Tribes or States and the Corps in developing the retained waters description.

Kletsel Environmental Regulatory Authority (KERA) (EPA-HQ-OW-2020-0276-0051-0001)

While I understand the need for modernizing the CWA section 404, I am concerned with the lack of clarity on what waters fall under the jurisdiction of a Tribe versus the Corps. I would also like there to be clearer definitions on how waters are determined to be excluded, for instance in the case of ephemeral or intermittent bodies of water. Due to the importance of these definitions, it is necessary that all parties involved fully understand how these determinations are made.

Moreover, I am curious whether these definitions are set in stone, or can be revisited over time as usage may change.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble and the Agency's Response to Comments EPA-HQ-OW-2020-0276-0044-0001 and -0002.**

Buena Vista Rancheria of Me-Wuk Indians (EPA-HQ-OW-2020-0276-0053-0006)

BVR asks that when a Tribe applies for 404 authority that there be no waters retained by the Corps. All waters on Tribal land should be under the jurisdiction of the Tribe.

Agency Response: CWA section 404(g) provides that when a State assumes the section 404 program, the Corps retains waters that are currently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce, and adjacent wetlands. ***See*** **33 U.S.C. 1344(g)(1). EPA's regulations define "State" to include eligible Indian Tribes.** ***See*** **40 CFR 233.2,** ***citing*** **233.60. Nothing in the CWA authorizes an entity other than the Corps to retain waters that are known to be presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce.**

Buena Vista Rancheria of Me-Wuk Indians (EPA-HQ-OW-2020-0276-0053-0007)

In addition, BVR asks for clarification on how permitting authority for wetlands/waters that extend beyond the jurisdiction of a Tribe (beyond Tribal trust land) will be determined. In the case where a wetland or waterbody under permit review spans tribal, state, or federal jurisdiction, BVR suggests the Corps establish a mechanism for a Tribe to be the permitting agency for an entire wetland or water body in the permit so the permittee does not have to apply for several permits on a project that crosses jurisdictional boundaries. If the tribe cannot be the primary permitting authority, EPA must identify a means for dealing with permits that cross jurisdictional bounds.

Agency Response: EPA did not finalize its proposed approach to administrative boundaries. EPA therefore expects a significant reduction in the number of projects that straddle the boundary between assumed and retained waters. EPA recognizes that dealing with permits that cross jurisdictional bounds can be challenging, and that dealing with such issues is an inevitable result of State or Tribal assumption, as there may be permitting projects that cross State or Tribal boundaries. EPA cannot authorize a Tribe to administer a permitting program outside of the Tribe's boundaries, however, just as, for example, it could not authorize Michigan to administer the entirety of a permitting project if part of the project crossed into Indiana. Tribes and States may still choose to address projects requiring joint permitting in their MOA with the Corps. EPA would be glad to work with Tribes, States, and the Corps to help facilitate efficient and mutually satisfactory approaches to addressing permits that cross jurisdictional boundaries.

Buena Vista Rancheria of Me-Wuk Indians (EPA-HQ-OW-2020-0276-0053-0008)

BVR also supports the statement on page 55286 of the federal register that "waters that are assumable by a tribe (as defined in the report) may also be retained by the USACE when a state assumes the program" as this would allow Tribes who are not yet ready to assume 404 responsibilities the ability to have jurisdiction over waters on their lands in the future when they are ready to assume 404 responsibilities. In the case where a state does assume the permitting authority over waters that could later be assumed by the Tribe. There needs to be a mechanism in place for the Tribe to assume the permitting authority from the state.

Agency Response: States cannot assume permitting authority over waters eligible for assumption by a Tribe. *See* Section IV.B.2 of the final rule preamble and 40 CFR 233.11(i)(6). As recognized in EPA's regulations, in many cases, States lack authority under the CWA to regulate activities covered by the section 404 program in Indian country. *See* 40 CFR 233.1(b). Thus, the Corps will continue to administer the program in Indian country unless EPA determines that a State has authority to regulate discharges into waters in Indian country and approves the State to assume the section 404 program over such discharges. *See id*. The Memorandum of Agreement between the Corps and State must address any waters which are to be retained by the Corps upon program assumption by a State, which includes waters in Indian country. *Id.* at 233.14(b)(1).

Anonymous (EPA-HQ-OW-2020-0276-0054-0001)

According to the proposed rule, Tribes or States that assume the Section 404 program would have jurisdiction over all waters of the United States within their boundaries, except for those waters that are excluded from assumption by statute or regulation. It also states that the EPA and the Corps would jointly determine which waters are excluded from assumption by Tribes or States, based on the best available information and data. Then they would publish a list of such waters for each assumed program. However, the proposed rule does not specify how the EPA and the Corps would determine this, what information and data they would use, how they would resolve any disputes or disagreements, how they would update or revise the list of excluded waters over time, and where they would post the list to be seen. I feel like this is essential information that is necessary to be public and clarified so that more than three states can assume jurisdiction. Additionally, how would the EPA and the Corps account for changes in hydrology, ecology, and land use due to climate changes that may affect the condition of assumed or excluded waters over time?

Agency Response: *See* Section IV.B.2 of the final rule preamble and the Agency's Response to Comments EPA-HQ-OW-2020-0276-0044-0001 and -0002.

Environmental Protection Network (EPN) (EPA-HQ-OW-2020-0276-0057-0004)

Retained Waters

The proposed regulation clarifies how the state/Tribe will work with COE to determine which waters COE will retain under the assumption of the program. However, additional clarification that COE retains the 404 permitting authority on Tribal lands within states

that receive 404 authority may still be needed. Historically, this determination was not always completed as the state/Tribal programs were being developed. EPN supports this clarification requiring that before the program is submitted to EPA for review, states and Tribes need to submit a request to EPA to ask the COE to identify the retained waters. This change will allow the states and Tribes to show they are taking concrete and substantial steps towards assumption and streamline the process. In previous years, there has been no guidance, and this led to confusion over how COE and the states and Tribes worked through this process.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble and the Agency's Response to Comments EPA-HQ-OW-2020-0276-0053-0008.**

Association of Clean Water Administrators (ACWA) (EPA-HQ-OW-2020-0276-0060-0005)

Retained Waters: The process for assumption is ambiguous on what waters, exactly, are to be retained by the U.S. Army Corps of Engineers (USACE) when a state assumes section 404 authority. In the Proposed Rule, EPA has revised procedures by which USACE may determine which waters will remain under their jurisdiction after state assumption. EPA expresses that these revisions are intended to address state and tribal concerns over a lack of clarity and national consistency in determinations of which waters will remain under USACE jurisdiction. However, the process laid out in the Proposed Rule imposes new requirements on states and will likely add unnecessary delays to the process of determining which waters will be retained. The question of which waters will be retained by the USACE is a fundamental issue for states considering assumption. While we appreciate the agency's effort to clearly outline a process for states to assume the section 404 program, without identifying the universe of waters to be retained by the USACE, the assumption process will continue to be long, drawn-out and uncertain impacting states' interest in the program. The Proposed Rule should address this fundamental issue. We request that EPA work with states to identify ways in which the Rule may be refined to more effectively address the shortcomings of USACE's prior approach.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0044-0001.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0018)

EPA's proposal for how to identify retained waters is problematic and contrary to the language in Section 404(g). The approach in the proposed rule is to start with the Army Corps of Engineers' retained waters list developed under Section 10 of the Rivers and Harbors Act. These lists are often severely out of date and often lack supporting and current information. If a state is applying for assumption and it intends on using a Section 10 list from the Army Corps, it should only be allowed to use lists that have been comprehensively updated within the previous five years. Indeed, it is the Corps' duty to determine the scope of its jurisdiction that will be assumed by a state agency in compliance with the Clean Water Act. If, after EPA passes along a states' request to the Corps for a retained waters list, the Corps cannot provide a list that has been updated within the previous five years, the Corps must be allowed time to research and update its Section 10 list to ensure it is consistent with Section 404(g). To allow time for the Corps

to update the Section 10 lists, a state should make its request for a retained waters list at least 1 year prior to submission of the state application.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0019)

In the event that assuming states are the parties developing the retained waters list instead of the Corps, the state process must include full public information and disclosure followed by public comment from the outset. This requirement must be included as a requirement for assumption in EPA's regulations. The minimum amount of time that the state must use to develop its retained waters list should reflect the amount of information the public needs to evaluate to make informed comments on the proposed retained waters list. That is, the more waters there are within a state that must be evaluated, the longer the state must give for the public to evaluate and comment on the state's proposed list. In no event should this process take less than 6 months. EPA must recognize that this approach, whereby states start developing the retained waters list without input from the Corps, places an undue burden on the public to identify retained waters and review the state's proposed list and evidentiary support. Although EPA may perceive a need for states to start the process of assumption, it is still EPA's duty to ensure that it is only delegating waters that are allowed to be delegated under the CWA.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA agrees that it bears responsibility for ensuring that Tribes and States only assume waters able to be assumed under section 404(g), and it views the rule's approach as the most feasible means of helping the Agency to carry out that obligation.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0020)

In the event that a state begins to prepare a retained waters list in preparation for submission of the application, and the Corps begins to update its Section 10 list after the state has begun the preparation but prior to the full assumption of Section 404 permitting, the applicant must be required to incorporate and use the most recent Section 10 list to create its proposed retained waters list.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. The Corps has the first opportunity to create a retained waters description, and presumably it would use any simultaneous updates to the RHA section 10 list to inform the creation of that description. If the responsibility to develop the retained waters description were to pass to the Tribe or State, the Corps as well as members of the public could still communicate their input to the Tribe or State, including information about updates to the relevant RHA section 10 list(s). The preamble emphasizes the importance of such communications.** ***See also*** **Section IV.B.2 of the final rule preamble addressing modifications to the retained waters description following program approval.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0021)

Regardless of whether it is the state applicant or the Corps that develops the retained waters list, the retained waters list must also include waters that have been historically navigable. Historical navigability is often an indicator of whether the waterway can be navigable in its natural condition or with reasonable improvement, which is the statutory requirement for retained waters in Section 404(g). Indeed, it is often human construction or action that makes a waterway non-navigable and the CWA specifically ensures that waters that would otherwise be navigable are retained.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0022)

Finally, the retained waters list must also be revisited on a periodic basis, at least every five years. The failure to revisit the retained waters list must be considered by EPA as a reason to revoke state assumption. Other provisions of the CWA require periodic review (e.g., triennial review of state water quality standards required under 33 U.S.C. § 1313(d) and 40 C.F.R. §131.20) to account for changing circumstances. Periodic review of the Corps' retained waters list ensures the list is up to date and accounts for changes in navigability or the extent of adjacent waters and wetlands.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not establish a new requirement for a periodic mandatory review of the retained waters description because a comprehensive review may be extremely time- and resource-intensive and unnecessary. The goal of keeping the descriptions current can be achieved through periodic modifications of the retained waters description to address new information, such as changes to the RHA section 10 list. Stakeholders wishing to draw attention to the need for certain updates may petition the Tribe or State, the Corps, or EPA, to revise the retained waters description.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0012)

EPA proposes new requirements for States developing a description of retained waters. Under the proposed procedure, a State would be required to submit a request to EPA that the Corps identify the list of retained waters, along with some evidence that the State is actively pursuing assumption (i.e., legislation authorizing assumption or assumption funding, a letter from the head of a state agency, or a copy of a grant or other funding allocated to pursue assumption). After this
is submitted, the Proposed Rule identifies a timeline for EPA to send to the Corps (7 days) and for the Corps to notify the State that it will complete the request (30 days). The Proposed Rule provides that, if the Corps does not provide notification within 30 days, or if it does but does not provide a retained waters list within 180 days, a State may develop a retained waters description using the same framework as the Corps.

Again, EPA should be careful to not impose new requirements that go beyond the plain text of the CWA. Section 404(g)(1) provides the limits of state 404 purview, authorizing States to assume Section 404 permitting authority within the State's jurisdiction, except for "those waters which are presently used, or are susceptible to use in their natural

condition or by reasonable improvements 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, including wetlands adjacent thereto." 33 U.S.C. 1344(g)(1). So long as a State abides by that requirement and adopts a workable arrangement with the Corps of Engineers for identifying those waters (as was done in Florida's process), EPA should mandate no more. For example, requiring States to wait 30 days for the Corps to agree to develop the retained waters list and then another 180 days for it to actually develop the list and then allowing the Corps to not provide it, at which time the State may then develop a list, may allow undue delay not intended by Congress.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0013)

EPA also proposes changes to how a State or the Corps should approach the development of a retained waters list. The Proposed Rule outlines the steps that the Corps, or States if the Corps declines or fails to delineate the retained waters, should take to create a retained waters list. As proposed, the list would be prepared by (i) starting with the relevant Rivers and Harbors Act ("RHA") section 10 lists, then (ii) adding waters from the RHA section 10 list that are presently used or susceptible to use as a means to transport commerce, (iii) adding other waters that are presently used or susceptible to use in commerce "[t]o the extent feasible and to the extent that information is available," and finally (iv) adding a description of adjacent wetlands, noting that the "description does not require a specific listing of each wetland that is retained." [Footnote 5: 88 Fed. Reg. 55,325.] As EPA notes, previously "individual States and Corps districts have had to interpret the extent of retained waters and the meaning of "adjacent wetlands" in the context of case-by-case development of State program descriptions and the Memoranda of Agreement that are negotiated between the Corps and the State as part of a complete program submission." [Footnote 6: Id. at 55,286.]

As part of Florida's years-long 404 assumption process, in 2017 Florida began coordinating with the Corps' Jacksonville District to identify the scope of assumable and retained waters in Florida. Over the following three years the Corps refined the list based on similar standards that are articulated in the Proposed Rule (e.g., removing waters deemed navigable based solely on historic use), and the list was contained in the MOA between the Corps and Florida. The approach used in the Florida process provides an appropriate and flexible process that is consistent with the text of the CWA, while also allowing for case-specific determinations made during program implementation.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0015)

EPA is also making clear in its proposal that modifications to the "retained waters" list do not always constitute "substantial" revisions requiring additional notice and comment procedures. EPA proposes to amend 40 C.F.R. Section 233.15(d)(3) to eliminate from the definition of "substantial revision" those revisions that effect the "area of jurisdiction." Instead, these types of modifications could be approved by a letter from the

Regional Administrator, which will be published on EPA's website. Florida supports this change, which would allow additional flexibility for federal and state agencies to maintain an up-to-date public list of areas considered to be retained waters. The key point is that there needs to be a workable process for updating the retained waters list based on current information. EPA's proposed approach should help to facilitate appropriate oversight while reducing unnecessary red tape, which will support state assumption of 404 programs and increase state-federal cooperation.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0015)

The Conservation Organizations support developing a process and definition for retained waters under Section 404(g)(1). This is an essential component of assumption because it affects which waterways will receive the greatest protection under federal law, with specific actions in retained waters subject not only to the requirements of the Clean Water Act, but also subject to review under NEPA and consultation pursuant to Section 7 of the Endangered Species Act and the NHPA.

But EPA's proposal is contrary to the Clean Water Act and fails to ensure public participation that will increase accuracy of the identification of retained waters.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0019)

EPA's proposed process for developing a retained waters list also contains several flaws that must be addressed before the rule is finalized.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0020)

1. Time Limits.

EPA's proposed rule provides that a state may develop the description of retained waters if: (1) the Corps does not indicate it will prepare the retained waters list within 30 days of a request, or (2) the Corps does not prepare a retained waters list within 180 days of indicating that it would. 88 Fed. Reg. at 55,285.

These arbitrary deadlines are unnecessary and may needlessly rush a process that may require more time. It would be reasonable, for example, if the Corps required more time to complete a retained waters list because of navigability assessments that are anticipated, needed, or underway but not yet completed. It would make little sense to require the completion of a process within an arbitrary timeframe that would render the product of that process obviously inaccurate or out of date soon after [Footnote 64: As a case in point, in 2021, the Menominee Indian Tribe of Wisconsin petitioned to correct Michigan's Section 10 list for a mistake that the Corps itself had identified years earlier. As of these comments, however, that issue has yet to be resolved. Plainly, then, the time limits EPA is proposing are unreasonable.]

A time limit of 180 days is particularly unreasonable given that a state will ordinarily take 3–5 years to develop a program for submission to EPA. The Corps should be afforded a minimum of one year to develop a retained waters list, through a process that gives the agency enough time for its assessment and ensures robust opportunities for public engagement and comment.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0021)

In addition to avoiding strict time limits, EPA should not propose that states undertake the description of retained waters in the event that the Corps requires additional time. States do not have the authority or expertise to make retained waters determinations, which turn on questions of federal law and fall squarely within the longstanding regulatory and legal expertise of the Corps. While states may coordinate with the Corps on these determinations, it must be clear that the federal question of what waters are to be retained is a determination to be made exclusively by federal agencies.

It is not sufficient for EPA to rely on the "two formal opportunities" the Corps will have to "review" a retained waters list drafted by a state. 88 Fed. Reg. at 55,288. EPA and the Corps have a non-delegable duty to ensure that only assumable waters are transferred to a state following program approval. They have no authority to allow the transfer of authority over waters and wetlands that must be retained by the Corps as a matter of law. The responsibility must therefore remain with the Corps to develop a retained waters list, and with EPA to ensure that any transfer of authority complies with 404(g)(1).

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0022)

3. Using Existing RHA Section 10 Lists as Basis.

Rivers and Harbors Act (RHA) Section 10 lists will only be useful to developing a retained waters list after they have been carefully scrutinized. Retained waters lists will also have to identify other waters that meet the definition of Section 1344(g)(1).

EPA's proposal that the Corps use only "the most recently published list" of Section 10 waters as its starting point, 88 Fed. Reg. 55,285, is inadequate. To begin, not every state has an adequate Section 10 list. Some are grossly out of date and rely on determinations that are no longer consistent with federal law. Other Corps districts have multiple Section 10 lists, all of which must be considered when developing a retained waters list. The Corps must also review all judicial determinations involving the subject state to identify additional retained waters.

For example, Florida's retained waters list omitted Silver River, which is the Silver Springs Run, a water deemed covered under the RHA by a federal court. Silver Springs Paradise Co. v. Ray, 50 F.2d 356, 357 (5th Cir. 1931). Michigan's retained waters list

excluded the Menominee River, an interstate river forming the boundary between two states, in error.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA recognizes that not all RHA section 10 lists are fully comprehensive and up to date, but they are the best and most comprehensive lists available of waters that would be candidates to be retained by the Corps. As discussed in Section IV.B.2 in the final rule preamble, the RHA section 10 lists are simply starting points. Waters of the United States or reaches of those waters from the RHA section 10 list would be placed into the retained waters description if they are known to be presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce; and to the extent feasible and to the extent that information is available, other waters or reaches of waters would be added to the retained waters description that are presently used or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce. The Tribe or State may provide information to the Corps to aid in the Corps' development of the retained waters description, as may members of the public. If the responsibility to create the retained waters description has passed to the Tribe or State, the Corps and members of the public may provide information to them.** ***See*** **40 CFR 233.11(i)(2).**

Moreover, to ensure the retained waters descriptions remain as current and accurate as is feasible, EPA has modified the final rule to provide that whenever RHA section 10 lists are updated, an orderly process exists for incorporating those changes, as appropriate, into a Tribe's or State's retained waters description. Specifically, EPA now requires that the Memorandum of Agreement between the Corps and the Tribe or State outline procedures whereby the Corps will notify the Tribe or the State of changes to the RHA section 10 list that implicate the statutory scope of retained waters and the Tribe or State will incorporate those changes into its retained waters description.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0026)

We agree that some additions to a retained waters list could be deemed non-substantial for purposes of program modification. All other modifications to a retained waters list, however, should be open for public notice and comment. This includes the removal of any waters from a retained waters list, as that change not only affects the Corps' jurisdiction under the Clean Water Act, but also the applicability of other federal protections, including review under NEPA, Section 7 consultation under the ESA, and consultation under the NHPA.

In addition, EPA should require re-evaluation of any retained waters list whenever, as pertains to an approved (or applying) state: (1) the Corps makes a modification to its Rivers and Harbors Act Section 10 list, (2) EPA or the Corps makes a stand-alone Clean Water Act (a)(1) traditionally navigable waters determination, (3) a federal court makes a navigability determination, and (4) a member of the public requests a navigability determination.

Program revisions to the retained waters list that are approved by the EPA, whether EPA deems them substantial or insubstantial, should not only be communicated to the Corps, 88 Fed. Reg. at 55,291, but also to the public.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. To ensure the retained waters descriptions remain as current and accurate as is feasible, EPA has modified the final rule to provide that whenever RHA section 10 lists are updated, an orderly process exists for incorporating those changes, as appropriate, into a Tribe's or State's retained waters description. Specifically, EPA now requires that the Memorandum of Agreement between the Corps and the Tribe or State outline procedures whereby the Corps will notify the Tribe or the State of changes to the RHA section 10 list that implicate the statutory scope of retained waters and the Tribe or State will incorporate those changes into its retained waters description. Not all of the events listed above will always necessitate changes to the retained waters description, however, because, for example, the scope of RHA section 10 lists and traditional navigable waters is not coextensive with the scope of waters subject to the 404(g) parenthetical referring to Corps-retained waters. EPA has preserved some discretion as to the most appropriate time to initiate revisions to the retained waters description.**

State of Michigan, Michigan Department of Environment, Great Lakes, and Energy (EGLE), Water Resources Division (EPA-HQ-OW-2020-0276-0071-0002)

The WRD also supports the 2017 recommendations of the Assumable Waters Committee which the proposed rule reflects.

Agency Response: EPA acknowledges this expression of support.

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0011)

Comments on the timeframe for the Corps to provide retained waters analysis, dispute resolution process methods, and retained waters adjustments have been requested. NAWM agrees that when a State or Tribe has begun the application process for authorization, once criteria has been established to indicate a good faith commitment, the Corps should be able to provide an analysis of retained waters in a reasonable amount of time to the applicant. While the Corps would best be able to determine the effort needed to produce this information it does not seem unreasonable that the process of notification to EPA and subsequent Corps notice (30 days) allowing 180 days for production is unreasonable; however, some states have indicated that this is too long of a period for the Corps to provide this information.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0007)

Establishing a consistent process for identifying those waters which are retained under federal jurisdiction is an important element for States and Tribes in determining whether to apply for authorization to assume Section 404 as well as estimating the extent of their resource needs to implement the program. It is also important that this process complies

with Congressional intent to protect waters used to transport commerce. This intent goes beyond the maintenance of navigational channels and includes protecting the significant and public use and reliance on the functions of these waters. This is evident by the inclusion of adjacent wetlands by Congress and not just retaining control to the ordinary high-water mark of Section 10 waters.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Nebraska Department of Environment and Energy (EPA-HQ-OW-2020-0276-0073-0004)

The proposed rule has added another step that must be completed through EPA instead of States working directly with the Corps to get the retained waters list and start working on the administrative line. The proposal is outlining 180 days for the Corps to provide the list.

- This will delay assumption and coordination with the Corps on developing the MOA and administrative line as no communication between the State and Corps would begin until after this official request is satisfied through EPA.
    - The Department suggest EPA continue to support States and facilitate productive working relationships between State 404 programs and regional and State Corps programs by allowing States and the Corps to work together on MOAs and the premise behind the administrative line while the Corps is reviewing their section 10 and tribal waters for the development of the retain waters list.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA encourages Tribes and States to work with the Corps and EPA on other parts of the assumption package during the development of the retained waters description.**

National Association of Home Builders (NAHB) (EPA-HQ-OW-2020-0276-0077-0010)

EPA's description of "retained waters," which identifies the subset of waters the Corps would retain administrative authority (i.e., federal permitting) over after a state or Tribe takes assumption of the CWA Section 404 program is reasonable and consistent with the recommendations of the Assumable Waters Subcommittee and Corps policy [Footnote 23: NACEPT. Final Report of the Assumable Waters Subcommittee. May 2017. Available at: https://www.epa.gov/sites/default/files/2017-06/documents/awsubcommitteefinalreprort_05- 2017_tag508_05312017_508.pdf.] [Footnote 24: James, R.D. Office of the Assistant Secretary Civil Works, Army Corps. July 30, 2018. Memorandum CWA 404(g) Non- Assumable Waters.]. The proposed rule acknowledges the Corps only retains jurisdiction over those CWA Section 10 waters that are presently used or currently susceptible to use for interstate or foreign commerce, any other waters known by state or Tribe that are used or susceptible for use to transport interstate or foreign commerce, plus any wetlands that are adjacent to these retain waters [Footnote 25: 88 Fed. Reg. §55287 (August 14, 2023)].

Agency Response: EPA acknowledges this expression of support.

National Association of Home Builders (NAHB) (EPA-HQ-OW-2020-0276-0077-0012)

NAHB supports EPA's description of "retained waters" since it appropriately limits federal authority under Section 10 of the Rivers and Harbors Act (RHA) to only those waterbodies and their adjacent wetlands that are presently used in interstate commerce (or capable of being used in their present condition). NAHB applauds the EPA by clarifying what waterbodies are Section 10 RHA and are therefore retained by the Corps following the assumption by a state or Tribe. This ongoing issue has been adequately addressed as one of the barriers previously identified by states [Footnote 27: 88 Fed. Reg. §55282 (August 14, 2023)].

Agency Response: EPA acknowledges this expression of support.

National Association of Home Builders (NAHB) (EPA-HQ-OW-2020-0276-0077-0007)

NAHB opposes affording Corps districts up to 180 days to identify retained waters within a given state or Tribal boundary because 180 days exceeds EPA's statutory deadline of 120 days to determine a pending CWA 404 assumption request [Footnote 17: 33 U.S.C. 1344(h)(1).]. The EPA proposal directs states and Tribes to submit a request to EPA that the Corps identify the subset of waters that would remain under Corps authority. Once EPA receives the request, it will review and respond to the state or Tribes within seven days and notify the Corps [Footnote 18: Ibid.]. The proposal then gives the Corps 30 days to notify the state, Tribe, and EPA that it will provide the description of its retained waters and an additional 180 days to do so [Footnote 19: 88 Fed. Reg. 55285 (August 14, 2023).] . This could result in a total of 210 days. The timeline could be even further extended if the Corps for does not provide the list and the state or Tribe are forced to prepare their own.

EPA's proposal to allow Corps districts up to 180 days to comment on a state's or Tribe's description of "retained waters" is illogical since Congress has already established in the statute that EPA's failure to make a determination finding within 120 days means the CWA assumption request is deemed approved [Footnote 20: 33 U.S.C. 1344(h(3).]. These timelines should not be extended; if modified, they must be shortened to comply with the statutory deadlines established by which EPA must address completed assumption requests. EPA must not propose procedural changes for the Corps' identification of "retained waters" on pending assumption requests that conflict with statutory deadlines for EPA to provide required determinations on pending assumption requests.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. Allowing the Corps 180 days to assess the scope of potentially retained waters for inclusion in a Tribe's or State's program submission is not inconsistent with the statutory 120-day review period for program submissions. The Corps' assessments occur before program submission and may necessitate time-consuming analyses of waters.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0010)

EPA's proposal for how to identify retained waters is problematic and contrary to the language in Section 404(g). The approach in the proposed rule is to start with the Army

Corps of Engineers' retained waters list developed under Section 10 of the Rivers and Harbors Act. These lists are often severely out of date and often lack supporting and current information. If a state is applying for assumption and it intends on using a Section 10 list from the Army Corps, it should only be allowed to use lists that have been comprehensively updated within the previous five years. Indeed, it is the Corps' duty to determine the scope of its jurisdiction that will be assumed by a state agency in compliance with the Clean Water Act. If, after EPA passes along a states' request to the Corps for a retained waters list, the Corps cannot provide a list that has been updated within the previous five years, the Corps must be allowed time to research and update its Section 10 list to ensure it is consistent with Section 404(g). To allow time for the Corps to update the Section 10 lists, a state should make its request for a retained waters list at least 1 year prior to submission of the state application.

In the event that assuming states are the parties developing the retained waters list instead of the Corps, the state process must include full public information and disclosure followed by public comment from the outset. This requirement must be included in EPA's regulations as a requirement for assumption. The minimum amount of time that the state must use to develop its retained waters list must reflect the amount of information the public needs to evaluate to make informed comments on the proposed retained waters list. That is, the more waters there are within a state that must be evaluated, the longer the state must give for the public to evaluate and comment on the state's proposed list. In no event should this process take less than 6 months. EPA must recognize that this approach, whereby states start developing the retained waters list without input from the Corps, places an undue burden on the public to identify retained waters and review the state's proposed list and evidentiary support. Although EPA may perceive a need for states to start the process of assumption, it is still EPA's duty to ensure that it is only delegating waters that are allowed to be delegated under the CWA.

In the event that a state begins to prepare a retained waters list in preparation for submission of the application, and the Corps begins to update its Section 10 list after the state has begun the preparation but prior to the full assumption of Section 404 permitting, then the applicant must be required to incorporate and use the most recent Section 10 list to create its proposed retained waters list.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0020.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0011)

Regardless of whether it is the state applicant or the Corps that develops the retained waters list, the retained waters list must also include waters that have been historically navigable. Historical navigability is often an indicator of whether the waterway can be navigable in its natural condition or with reasonable improvement, which is the statutory requirement for retained waters in Section 404(g). Indeed, it is often human construction or action that makes a waterway non-navigable and the CWA specifically ensures that waters that would otherwise be navigable are retained.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0012)

Finally, the retained waters list must also be revisited on a periodic basis, at least every five years. The failure to revisit the retained waters list must be considered by EPA as a reason to revoke state assumption. Other provisions of the CWA require periodic review (e.g., triennial review of state water quality standards required under 33 U.S.C. § 1313(d) and 40 C.F.R. § 131.20) to account for changing circumstances. Periodic review of the Corps' retained waters list ensures the list is up to date and accounts for changes in navigability or the extent of adjacent waters and wetlands. Again, if any changes to the retained waters list result from this process, these should be considered substantial modifications and notice should be provided to those persons known to be interested in the matter, including any tribes in whose U&A the water body may exist.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble and EPA Response to Comments EPA-HQ-OW-2020-0276-0063-0022.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0006)

The Retained Waters List is a key aspect of the proposed rule from the Tribe's perspective. In order to protect the Treaty Tribes' reserved rights, EPA must include on the Retained Waters List—and therefore retain the Corps' administrative authority over these waters even after state assumption of 404 program authority—all waters of the United States (WOTUS) subject to Rivers and Harbors Act (RHA) Section 10 jurisdiction and all WOTUS that were historically used, are presently used, or are susceptible to use in their natural conditions or by reasonable improvement as a means to transport interstate or foreign commerce throughout western Washington; all WOTUS anywhere within Indian lands; and all WOTUS anywhere within a Tribe's Usual & Accustomed fishing area or open and unclaimed lands.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0004)

Alaska does not oppose requiring the Corps to identify which waters it believes are retained, and which are assumable. We suggest that, for added clarity and certainty, the Corps affirmatively indicate that each of the waters on its prepared list are "navigable" and include information appended to the list demonstrating the waters' navigability. Making navigability findings will provide clear direction to the Corps and will provide additional assurance to the State, the State's Legislature, and members of the public that the list is unlikely to change and can, therefore, be relied on. Imposing such a procedure is also consistent with the purpose underlying the administrative boundary in the first place: demarcating the point at which regulation is needed to protect the navigable capacity of certain waterways.

We further suggest requiring that the Corps work with the State in assembling this list, which will facilitate program transition. The Corps does not need six months to prepare the list of retained waters: this should not be an onerous task, given the availability of Section 10 waters lists. If, however, the Corps needs to determine the navigability of

certain waterbodies, and thoroughly document each waterbodies' navigability, as we recommend, six months is a reasonable amount of time.

We strongly urge EPA to eliminate the requirement that the State prove that it has taken "concrete and substantial steps toward program assumption" before the Corps begins preparation of the retained waters list. EPA would require States to submit proof of legislation authorizing funding, legislation authorizing assumption, a Governor directive, or a letter awarding a grant or other funding to pursue assumption [Footnote 16: 88 Fed. Reg. 55284–55285.]. But the very first step of the assumption process is evaluating what stands to be gained – i.e., what waters can be assumed. This is a foundational, and preliminary, piece of information that States absolutely need. Without it, States will have a very difficult time gaining the momentum necessary to obtain the items listed to prove "concrete steps." The retained waters list must be made available to the State at the beginning – not the middle or the end – of a State's push for assumption. Requiring otherwise risks severely hamstringing States' efforts.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. As discussed in the preamble, waters will only be placed in the description of retained waters if they are presently used or susceptible to use in then-natural condition or by reasonable improvement as a means to transport interstate or foreign commerce. Placement in the description constitutes an affirmative indication that waters meet these criteria. Consistent with the Agency's experience, the final rule preamble anticipates collaboration between the Corps and the Tribe or State in developing this description.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0016)

EPA's proposal for how to identify retained waters is problematic and contrary to the language in Section 404(g). The approach in the proposed rule is to start with the Army Corps of Engineers' retained waters list developed under Section 10 of the Rivers and Harbors Act. These lists are often severely out of date and often lack supporting and current information. If a state is applying for assumption and it intends on using a Section 10 list from the Army Corps, it should only be allowed to use lists that have been comprehensively updated within the previous five years. Indeed, it is the Corps' duty to determine the scope of its jurisdiction that will be assumed by a state agency in compliance with the Clean Water Act. If, after EPA passes along a states' request to the Corps for a retained waters list, the Corps cannot provide a list that has been updated within the previous five years, the Corps must be allowed time to research and update its Section 10 list to ensure it is consistent with Section 404(g). To allow time for the Corps to update the Section 10 lists, a state should make its request for a retained waters list at least 1 year prior to submission of the state application.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0017)

In the event that assuming states are the parties developing the retained waters list instead of the Corps, the state process must include full public information and disclosure

followed by public comment from the outset. This requirement must be included as a requirement for assumption in EPA's regulations. The minimum amount of time that the state must use to develop its retained waters list should reflect the amount of information the public needs to evaluate to make informed comments on the proposed retained waters list. That is, the more waters there are within a state that must be evaluated, the longer the state must give for the public to evaluate and comment on the state's proposed list. In no event should this process take less than 6 months. EPA must recognize that this approach, whereby states start developing the retained waters list without input from the Corps, places an undue burden on the public to identify retained waters and review the state's proposed list and evidentiary support. Although EPA may perceive a need for states to start the process of assumption, it is still EPA's duty to ensure that it is only delegating waters that are allowed to be delegated under the CWA.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0018)

In the event that a state begins to prepare a retained waters list in preparation for submission of the application, and the Corps begins to update its Section 10 list after the state has begun the preparation but prior to the full assumption of Section 404 permitting, the applicant must be required to incorporate and use the most recent Section 10 list to create its proposed retained waters list.

Regardless of whether it is the state applicant or the Corps that develops the retained waters list, the retained waters list must also include waters that have been historically navigable. Historical navigability is often an indicator of whether the waterway can be navigable in its natural condition or with reasonable improvement, which is the statutory requirement for retained waters in Section 404(g). Indeed, it is often human construction or action that makes a waterway non-navigable and the CWA specifically ensures that waters that would otherwise be navigable are retained.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0045)

EPA's approach to retained/assumable waters must be revised. EPA's proposed process for identifying retained waters is inadequate. EPA's proposal for how to identify retained waters is problematic and contrary to the language in Section 404(g). The approach in the proposed rule is to start with the Corps' retained waters list developed under Section 10 of the Rivers and Harbors Act (RHA). These lists are often severely out of date and often lack supporting and current information. If a state is applying for assumption and it intends on using a Section 10 list from the Corps, it should only be allowed to use lists that have been comprehensively updated within the previous five years. Indeed, it is the Corps' duty to determine the scope of its jurisdiction that will be assumed by a state agency in compliance with the Clean Water Act. If, after EPA passes along a states' request to the Corps for a retained waters list, the Corps cannot provide a list that has been updated within the previous five years, the Corps must be allowed time to research and update its Section 10 list to ensure it is consistent with Section 404(g). To allow time for the Corps to update the Section 10 lists, a state should make its request for a retained

waters list at least 1 year prior to submission of the state application.[Footnote 95: As of January 26, 2023, the exact extent of waters potentially assumed by Alaska under a CWA 404 program and retained waters that would remain under the jurisdiction of the Corps was unclear. See 2023 Feasibility Report at 31-34. From the Feasibility Report, it appears that DEC would depend on the Corps expertise to identify retained waters and then plans to negotiate the delineation between retained and assumable waters. Id.]

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0046)

Regardless of whether a state applicant or the Corps develops the retained waters list, the retained waters list must also include waters that have been historically navigable. Historical navigability is often an indicator of whether the waterway can be navigable in its natural condition or with reasonable improvement, which is the statutory requirement for retained waters in Section 404(g). Indeed, it is often human construction or action that makes a waterway non-navigable and the Clean Water Act specifically ensures that waters that would otherwise be navigable are retained.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0047)

Regarding the proposed rule change providing discretion on whether a modification to a retained waters list is substantial, we request the EPA revise the draft rule. We agree that some additions to a retained waters list could be deemed non-substantial for purposes of program modification. All other modifications to a retained waters list, however, should be open for public notice and comment, just as the development of an initial retained waters list should be. This includes the removal of any waters from a retained waters list, as that change not only affects the Corps' jurisdiction under the Clean Water Act, but also the applicability of other federal protections, including review under NEPA, Section 7 consultation under the ESA, and consultation under the NHPA.[Footnote 96: See 88 Fed. Reg. at 55,292 (specifically requesting comment on whether removals from retained waters list should always be considered substantial program revisions).]

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0048)

In addition, EPA should require re-evaluation of any retained waters list whenever, as pertains to an approved (or applying) State: (1) the Corps makes a modification to its RHA Section 10 list, (2) EPA or the Corps makes a stand-alone traditionally navigable waters determination, (3) a federal court makes a navigability determination, and (4) a member of the public requests a navigability determination.

Program revisions to the retained waters list that are approved by EPA, whether EPA deems them substantial or insubstantial, should not only be communicated to the Corps,[Footnote 97: 88 Fed. Reg. 55,291.] but also to the public.

Finally, the retained waters list must also be revisited on a periodic basis, at least every five years. The failure to revisit the retained waters list must be considered by EPA as a reason to revoke state assumption. Other provisions of the Clean Water Act require periodic review (e.g., triennial review of state water quality standards required under 33 U.S.C. § 1313(d) and 40 C.F.R. § 131.20) to account for changing circumstances. Periodic review of the Corps' retained waters list ensures the list is up to date and accounts for changes in navigability or the extent of adjacent waters and wetlands.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0022.**

Natural Resources Defense Council (EPA-HQ-OW-2020-0276-TRANS-092923-008-0005)

Similarly, in determining which waters are reserved for federal permitting, the Corps can't rely on section ten lists or other shortcuts; but instead, the Corps must affirmatively determine which waters the state may assume authority over.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0010)

- EPA Must Ensure a Process For Determining Assumable Waters That Fully Complies with 33 U.S.C. §1344(g) Limitations and That Does Not Rely On Current Section 10 Waters Lists.

Second, EPA must establish a process to ensure that states cannot and do not assume permitting in waters which are presently used, or are susceptible to use, in their natural condition or by reasonable improvement, in interstate or foreign commerce shoreward, including all waters which are subject to the ebb and flow of the tide, and including wetlands adjacent to waters that meet this definition. 33 U.S.C. § 1344(g). There are two routes for EPA to do so.

If EPA insists on relying on Corps Section 10 lists for each Corps regional office, the current lists cannot be used as a proxy for determining which waters may be assumed by a state under 404's statutory limitations. As noted above, the current Section 10 lists are inaccurate, outdated, and were not developed in accordance with the specific language and limitation of Section 404(g). Therefore, EPA and the Corps must spend the necessary time, with public notice and comment and tribal consultation, to assess the accuracy of the Section 10 lists and the lists' compliance with the specifics of Section 404(g) as set forth above. Alternatively, EPA must work with the Corps at the time EPA considers a petition to assume 404 permitting from a state to specifically determine which waters meet the definition of non-assumable waters under Section 404(g) and provide the proposed list to the public with adequate time and information for comments prior to any final decision on a state's petition.

EPA must also, in its rulemaking, make clear that any water that is an interstate water (that is, it forms a boundary or crosses a state border) or a water that forms a boundary or crosses a boundary between a state and tribal lands cannot be part of a state's assumed program.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. Interstate waters (that is, waters that form a boundary or cross a state border) or waters that form or cross a boundary between a Tribal and State lands are retained by the Corps if they are presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce, or if they are wetlands adjacent to such waters.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0007)

Earthjustice strongly objects to the proposed shorthand approach of using the Corps' "Section 10 Waters lists" to determine for which waters a state may assume 404 permitting, as fraught with error and not in compliance with the Clean Water Act statutory requirements.

Section 404(g) expressly limits the waters for which permitting may be delegated to a state. A state may not assume Section 404 permitting in:

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 high water mark or 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) (emphasis added). Any rule that EPA develops regarding assumption of 404 permitting must conform to this limitation and Earthjustice is concerned that the proposal regarding the use of Section 10 Waters lists does not conform to this statutory requirement.

Of most significant concern is the fact that the Corps' Section 10 waters lists are grossly out of date and inaccurate, as we have learned in the Menominee Indian Tribe litigation (cited above). In that case, evidence from the Corps' own files demonstrates that the Menominee River, upstream of the first mile or so, was mistakenly omitted from the regional Corps office's Section 10 waters list contrary to the Corps' own consultant's and attorney's recommendations. The Menominee River is a large river that forms the boundary between two states, Michigan and Wisconsin, and is used, and could be used in its natural condition, in interstate commerce. The Corps and EPA, while acknowledging that the Corps' documents demonstrated the Menominee River was recommended to be on the Section 10 water list, refused to take jurisdiction of permitting for a mine that was on the Michigan side of the Menominee River and that would destroy adjacent and/or connected wetlands. Earthjustice, on behalf of the Menominee Tribe, has been forced to petition to amend the Section 10 list to include the Menominee River. It should not be this difficult to get the Corps to change the Section 10 lists, when even the Corps' own files show the list is in error. For this reason alone, Section 10 lists cannot be used as the determinative "assumable waters" list for any state.

Moreover, the Corps appears too ready to manipulate its Section 10 lists depending on the administration. During the Trump Administration, the Corps substantially altered its longstanding Section 10 waters list to aid Florida's plan to assume 404 jurisdiction, cutting significant numbers of waters off the Section 10 list, contrary to longstanding definitions and contrary to Section 404(g) requirements and creating the current

untenable situation with the State of Florida assuming control of and then refusing to protect many waters through permitting.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. As described in that Section, RHA section 10 lists are a starting point and are not determinative of the scope of retained waters. The process that EPA lays out for determining the scope of waters is based on recommendations from the Assumable Waters Subcommittee, stakeholder input, and comments on the proposal, and is the most feasible way EPA determined to maximize consistency with the text of CWA section 404(g).**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0008)

In other instances, it is likely that the Section 10 waters lists are incomplete. For example, adjacent wetlands are not listed at all. It also appears from our experience that some Corps regional offices omit waters from the Section 10 lists if they are not used for large commercial navigation, a definition much narrower than that set forth in Section 404(g) [Footnote 4: In fact, the Section 10 waters lists are created by the Corps for regulatory reasons and uses distinct from 404(g) and as a result cannot be counted on to conform to the express limitations set forth in 404(g).]. Rather, the 404(g) limitation on assumption expressly provides that waters presently used or that could be used, in their natural condition or by reasonable improvement, in interstate commerce cannot be part of a state's assumed permitting. For this additional reason, Section 10 lists cannot be used to determine assumable waters for any state.

In order to ensure that a state only assumes 404 permitting in waters allowed under Section 404(g), EPA must either spend the time working with the Corps to examine and amend each and every Section 10 waters list to ensure it is accurate and meets the statutory requirements under 404(g), allow the public notice and opportunity to comment on the proposed updated lists, and provide for and implement procedures to examine and update the lists on a regular schedule, or EPA must reject the recommendation to use Section 10 lists and instead determine, with notice and comment at the time a state applies to assume 404 permitting, which waters in the state would be covered by state permitting under the specific limitations of 404(g).

We object strongly to any proposal or rule or practice that allows the use of existing Section 10 waters lists to determine the scope of a state's assumed permitting authority as not factually supported and not compliant with the Clean Water Act.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0068-SD-3-0007.**

2.2 Technical issues regarding determining the scope of retained waters

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0009)

The Tribe agrees with the statement at page 55,291 of the preamble that "at no time can there be a gap in permitting authority for any water of the United States," and therefore agrees with EPA's proposed clarification that "in the program description of an assumption request, the description of waters of the United States assumed by the Tribe or State must encompass all waters of the United States not retained by the Corps."

Agency Response: **EPA acknowledges the commenter's expression of support.**

2.3 Legal issues regarding retained waters

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0016)

A. EPA's Proposed Retained Waters' Definition is Contrary to the Plain Language of Section 1344(g).

The Clean Water Act defines retained waters as:

[T]hose 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).

EPA's proposed interpretation of retained waters as excluding waters used for interstate commerce in the past, other traditional navigable waters, and adjacent wetlands beyond an arbitrary cutoff is unlawful. EPA's regulations should instead clarify that retained waters are those that the Corps exercises exclusive jurisdiction over pursuant to the Rivers and Harbors Act (including "historic use" waters), traditionally navigable waters under the Clean Water Act, as defined in 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 120.2(a)(1), and the entire area of all wetlands adjacent thereto.

Congress' description of retained waters mirrors the Supreme Court's longstanding interpretation of traditionally navigable waters. In The Daniel Ball, the Supreme Court held that waterways are navigable in fact when they are "used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." 77 U.S. 557, 563 (1870), superseded in part by statute as recognized by Rapanos v. U.S., 547 U.S. 715, 723-24 (2006). They are navigable waters of the United States "when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." Id.

In Economy Light & Power Co. v. United States, 256 U.S. 113 (1921), the Supreme Court applied the Daniel Ball test of whether a water in its natural state is used, or capable of being used, as a highway for interstate commerce, and concluded that this test was met based on the river having had actual navigable capacity in the past (i.e., its historic use). Id. at 118, 121–124. The Supreme Court thus held that a waterway is a navigable water of the United States based on past use "even though it be not at present used for such commerce, and be incapable of such use according to present methods." Id. at 123.

That "historic use" satisfies the "used [or] susceptible of being used" for interstate commerce in "its natural state" test was thus firmly established and in use long before Congress passed the 1977 amendments to the Clean Water Act using the same terms to describe retained waters. Retained waters therefore plainly encompass historic use waters. See United States v. Wells, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents" as relates to substantially similar language); Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 813 (1989) ("When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts."); Midlantic Nat. Bank v. New Jersey Dep't of Env't Prot., 474 U.S. 494, 501 (1986) ("[I]f Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

The Corps codified the Supreme Court's interpretation of traditionally navigable waters, including historic use waters, in regulations under both the Rivers and Harbors Act and the Clean Water Act. 33 C.F.R. §§ 328.3(a)(1) (Clean Water Act), 329.4 (Rivers and Harbors Act).

The Corps articulated the position that retained waters include Clean Water Act (a)(1) traditionally navigable waters when it served on the Assumable Waters Subcommittee, something EPA attempts to gloss over by referring to the Corps' position at the time as "separate" rather than diametrically opposed to EPA's. And notably, the Corps was the only entity on the Assumable Waters Subcommittee with legal authority to interpret the Rivers and Harbors Act and, with EPA, the Clean Water Act.

Agency Response: ***See*** **Sections III.A and IV.B.2 of the final rule preamble and Appendix F of the Assumable Waters Subcommittee Report,** ***available at*** **https://www.epa.gov/sites/default/files/2017-06/documents/awsubcommitteefinalreprort_05-2017_tag508_05312017_508.pdf. The legislative history of section 404(g) and the statutory text clearly indicate that the scope of the Corps-retained waters was intended to be based on RHA section 10 waters, minus waters no longer susceptible to use in their natural condition or by reasonable improvement for transporting interstate or foreign commerce. To the extent "historic use" waters (i.e., waters historically used as a means to transport interstate or foreign commerce) are susceptible to use in their natural condition or by reasonable improvement for transporting interstate or foreign commerce, they generally satisfy the statutory criteria for the Corps-retained waters. If they are not susceptible to use in their natural condition or by reasonable improvement, they do not meet the statutory criteria.**

EPA agrees that the Corps interpreted the scope of retained waters as encompassing all traditional navigable waters, in the minority position on the Assumable Waters Subcommittee Report. EPA also recognizes that the Department of the Army subsequently sent a letter to the Corps supporting the majority recommendation as to the extent of retained waters. R.D. James, Memorandum for

Commanding General, U.S. Army Corps of Engineers: Clean Water Act Section 404(g) – Non-Assumable Waters (July 30, 2018).

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0017)

EPA's own regulations confirm that retained waters include traditionally navigable waters. In 40 C.F.R. § 233.14(b)(2), EPA stated: "Where a State permit program includes coverage of those traditionally navigable waters in which only the Secretary may issue 404 permits, the State is encouraged to establish in this MOA procedures for joint processing of Federal and State permits, including joint public notices and public hearings." But rather than effectuate Congress' intent, EPA now proposes to remove the word "traditionally" from this regulation to align with its unduly, and unlawfully, restrictive view of retained waters. EPA should abandon that proposal.

EPA's description of the "legislative history" as supporting its proposed definition of the retained waters provision is incomplete and speculative. (It is also based entirely on the accounting of the provision's legislative history by the majority opinion in the Assumable Waters Subcommittee Report, even though that subcommittee has no legal authority.)

Agency Response: ***See*** **Sections III.A and IV.B.2 of the final rule preamble, the Agency's Response to Comment EPA-HQ-OW-2020-0276-0068-0016, and Appendix F of the Assumable Waters Subcommittee Report,** ***available at*** **https://www.epa.gov/sites/default/files/2017-06/documents/awsubcommitteefinalreprort_05-2017_tag508_05312017_508.pdf. EPA has not previously interpreted the scope of the section 404(g) parenthetical referring to the Corps-retained waters to encompass all traditional navigable waters as EPA and the Corps have defined that term in the regulatory definitions of "waters of the United States." For example, EPA's approval of the scope of retained waters in the Michigan, New Jersey, and Florida section 404 programs did not rely on that interpretation. The term "navigable" is found in the section 404(g) parenthetical, so it is unsurprising that EPA once used that term as shorthand to refer to the waters in that parenthetical. It is also unsurprising that EPA sought a shorthand term to refer to the scope of the parenthetical, given its length. However, EPA is revising 40 CFR 233.14(b)(2) to avoid confusion and to clarify the distinction between "traditional navigable waters" as currently defined in 40 CFR 120.2(a) and waters in the 404(g) parenthetical, i.e., waters that are susceptible to use in their natural condition or by reasonable improvement for transporting interstate or foreign commerce.**

EPA disagrees that the legislative history in support of its interpretation of the scope of the 404(g) parenthetical is incomplete and speculative. EPA has conducted its own research on the legislative history, reflected in the final rule preamble, and has concluded that the legislative history is unusually clear as to Congress' intent: that the scope of the Corps-retained waters is similar to the scope of RHA section 10 waters, minus waters no longer used or susceptible to use in their natural condition or by reasonable improvement for transporting interstate or foreign

commerce. EPA finds Appendix F of the Assumable Waters Subcommittee Report to be a helpful summary of the legislative history, and consistent with EPA's own research.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0018)

EPA claims that the House proposed restricting the Corps' 404 authority and that the Congress ultimately reached a compromise that authorized state assumption while allowing the Corps to retain authority over the waters described by the House. But EPA points to no actual evidence of this supposed "compromise." Instead, the conference report EPA cites states:

The Conference substitute provides for the administration by a State of its own permit program for the regulation of the discharge of dredged or fill material into the navigable waters other than traditionally navigable waters and adjacent wetlands [if EPA approves program].

H.R. Rep. No. 95-830 at 104 (emphasis added) [Footnote 63: Notably, EPA's adopted accounting of the provision's history appears to have originated from private lawyers whose purpose in drafting the document is not clear. See V.S. Albrecht & B.R. Levey, The legislative history of Section 404(g)(1) of the Clean Water Act (Nov. 30, 2015). The content was later included, virtually verbatim, in Appendix F of the 2017 Assumable Waters Subcommittee Report. EPA should not rely on it (or its unsupported assumptions).].

EPA states that the legislative history described retained waters as relating to "phase 1" of the Corps' Clean Water Act regulations. 88 Fed. Reg. at 55,279. See S. Rep. 93-370 at 75; see also H.R. Rep. 95-830 at 98, 101 (amendments would allow states to administer Section 404 in phase 2 and phase 3 waters after program approved by EPA). But EPA's proposed interpretation of retained waters is far more restrictive than what constituted the Corps' phase 1 waters. 40 Fed. Reg. 31,320 (July 25, 1975); 42 Fed. Reg. 37,122, 37,124 (July 19, 1977) (phase 1 consists of waters "already regulated" by the Corps plus adjacent wetlands).

Agency Response: ***See*** **Sections III.A and IV.B.2 of the final rule preamble, the Agency's Response To Comment EPA-HQ-OW-2020-0276-0068-0017, and Appendix F of the Assumable Waters Subcommittee Report,** ***available at*** **https://www.epa.gov/sites/default/files/2017-06/documents/awsubcommitteefinalreprort_05-2017_tag508_05312017_508.pdf. EPA disagrees with the comments rejecting EPA's interpretation that the legislative history of section 404(g) indicates Congress' intent that the Corps retain waters subject to RHA section 10. The legislative history excerpts in the final rule preamble and Appendix F of the Subcommittee Report clearly reflect this intent. In addition, the Conference Report states that Senate's version of section 404 provides that "[t]he authority for control of discharges of dredge or fill material granted to a State through the approval of a program pertains solely to the environmental concerns reflected in the specific guidelines set forth in the amendment. The**

responsibility of the Corps of Engineers under the [RHA], as specified under section 511 of the Act, is not affected or altered by this provision." H.R. Rep. No. 95-830, at 99 (1977). As noted in the preamble, the 1977 amendments allowed States to assume permitting authority in "phase 2 and 3 waters after the approval of a program by [EPA]." H.R. Rep. No. 95-830, at 101 (1977). The conference report was referring to the Corps' three-phased regulatory exercise of jurisdiction over "waters of the United States." The Corps explained that phase 1 waters, in contrast, were "waters already being regulated by the Corps [] plus all adjacent wetlands to those waters…" 42 FR 37122, 37124 (July 19, 1977). The "waters already being regulated by the Corps" referred to "the same waters that were being regulated under the Rivers and Harbors Act of 1899." *Id.* at 37,123. The only difference between the waters being regulated by the Corps under the RHA and the scope of retained waters under section 404(g) is that the final text of 404(g) removes the reference to waters "used in the past" to transport interstate or foreign commerce. 33 U.S.C. 1344(g).

There are significant similarities in terminology and legal history between the scope of RHA section 10 and the regulatory definition of "traditional navigable waters in 40 CFR 120.2(a), and it is understandable that the two concepts may be confused or conflated. However, EPA's decision to use RHA section 10 lists as a starting point for retained waters descriptions is based on the practical advantages of this approach in addition to the legislative history of this section of the Act. *See* Section IV.B.2 of the final rule preamble.

Finally, the Assumable Waters Subcommittee consisted of a diverse group of experts representing a wide array of stakeholders, convened to provide advice and recommendations as to how the EPA could best clarify the scope of waters over which a Tribe or State may assume permitting responsibility under a CWA section 404 Program. The recommendations carried out this goal. EPA disagrees with comments suggesting that any part of the Subcommittee Report should be rejected based on the identity of individual Subcommittee members who may have penned a first draft of that part.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0024)

EPA's proposal that simply following the prescribed process to develop a retained waters list authorizes the Regional Administrator to presume that the list satisfies legal requirements is wholly unacceptable because it fails to conform to EPA's statutory duty to ensure that only permitting authority over assumable waters is ultimately transferred.

Agency Response: EPA disagrees with this comment. The procedure EPA outlines for the development of the retained waters description is the procedure EPA has determined will be most likely to result in a description that complies with the statutory language. EPA would review any description and any public or federal agency comments received during its review of a program request, prior to approving a Tribal or State program to ensure its compliance with EPA's

regulations and the text of section 404(g)-(*l*). *See* Section IV.B.2 of the final rule preamble.

Natural Resources Defense Council (EPA-HQ-OW-2020-0276-TRANS-092923-008-0001)

The Clean Water Act prohibits states from assuming permitting authority over traditionally navigable waters and their adjacent wetlands. To state the obvious, EPA cannot abide by this command if it allows states to permit discharges into waters that meet that description. Accordingly, EPA can't, as it proposes to, create administrative boundaries on federal waters.

Agency Response: *See* Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries.

2.4 Procedure for determining which adjacent wetlands are retained and the "administrative boundary"

Buena Vista Rancheria of Me-Wuk Indians (EPA-HQ-OW-2020-0276-0053-0005)

Buena Vista Rancheria is in full support of the Corps working with Tribal governments "to establish a clear and reliable administrative boundary that demarks the permitting authority for adjacent wetlands" and encourages the Corps to have good faith discussions with the Tribe while discussing administrative boundaries.

Agency Response: *See* Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries.

The Petroleum Alliance of Oklahoma (EPA-HQ-OW-2020-0276-0055-0010)

Third, EPA is proposing that the "administrative boundary between retained and assumed wetlands be set jointly by the tribe or state and the Corps," with a default value of 300 feet. The practical effect of this proposal in Oklahoma could be the state and 38 federally recognized tribes all would have to negotiate the administrative boundary with the Corps on an individual basis for different reaches of a water way. That potentially could leave Oklahoma with numerous different administrative boundaries along its waters, creating a permitting maze that surely would confound many permittees and increase regulatory costs, a fact EPA's Economic Analysis does not acknowledge.

Agency Response: *See* Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries.

Environmental Protection Network (EPN) (EPA-HQ-OW-2020-0276-0057-0003)

Default Boundary between Corps of Engineers and State/Tribal Waters and Wetlands
EPN supports the proposed rule's approach to setting a 300-foot default boundary between COE-retained waters and the assumed program covering state/Tribal waters and wetlands but would recommend more detail be provided on how this number was selected. This boundary will be used to clarify how the program will be administered and allows for a clear demarcation for permits issued for retained and assumed waters. EPN also suggests that the proposed rule identifies a simple methodology for how this default boundary will be applied on the ground. For example, will it be measured along the

entire length of the retained and assumed program waters? Or will it be applied at points along the boundary where the proximities are the closest?

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries.**

Idaho Department of Environmental Quality (IDEQ) (EPA-HQ-OW-2020-0276-0059-0001)

I. Retained Waters and Adjacent Wetlands

Due to the complexity of defining retained waters and adjacent wetlands as well as jurisdictional determinations, IDEQ suggests that EPA provide further clarification regarding which waters may be assumed under CWA section 404(g) and which waters will be retained by the Army Corps of Engineers (USACE). EPA should require the USACE to make navigability determinations for all retained waters.

Information on Section 10 navigable waters designations already exists, so it should not take the USACE 180 days from the receipt of request to provide a retained waters description if they have identified that they will do so. In addition, resources should be made available that help Tribes and States document and further evaluate retained waters and to clarify the extent of adjacent wetlands for decision making. Under the proposed Rule, decision making will be complicated and slowed by administrative boundary authority, inconsistent application of regulations, ecosystem fragmentation, lack of coordination, enforcement challenges, and monitoring and data sharing. To expound, conflicts may arise if multiple Tribal or State authorities claim jurisdiction over the same wetlands which can lead to legal disputes and confusion over regulatory conflicts. Different Tribal or State authorities may have varying regulations and management priorities. Inconsistencies can result in confusion for landowners. Environmental impact determination may vary by jurisdiction. Dividing management responsibilities along administrative boundaries can lead to fragmented ecosystem management, which may not adequately protect the resources.

Under the proposed Rule, the administrative boundary between retained and assumed wetlands would be set jointly by the Tribe or State and the USACE, but a 300-foot administrative boundary from the ordinary high water mark would be established as a default if no other boundary is established. Some project proposals involving jurisdictional adjacent wetlands that straddle the administrative boundary may involve a discharge into the wetland on both sides of the administrative boundary. The 300-foot administrative boundary is arbitrary and may be difficult to delineate.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0044-0001. EPA did not finalize its proposed approach to administrative boundaries. EPA is willing to provide technical assistance and to aid in resolving disputes regarding the scope of retained waters.** ***See*** **Section IV.E.1 of the final rule preamble.**

Maryland Department of the Environment (MDE) (EPA-HQ-OW-2020-0276-0061-0001)

1) Retained wetlands

a) Sections 233.11(i)(5)(i); 233.14(b)(1) discuss a default boundary for retained adjacent wetlands which are within 300 feet of mean high water or ordinary high water. In large, contiguous systems this may fragment the wetland with split between federal and State/Tribal jurisdiction. There will be additional work involved in delineating jurisdictional limits. We suggest that EPA consider assigning contiguous adjacent wetlands to the category of retained waters or develop a method and opportunity for a state to take jurisdiction over the WOTUS resources with the 300 feet with concurrence from the Corps or EPA.

b) There should be more guidance on how retained adjacent wetlands are identified. The development of regional field protocols is recommended and will be necessary.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries. The default understanding is that the Corps would retain administrative authority over all jurisdictional wetlands "adjacent" to retained waters, as that term is defined in 40 CFR 120.2. The definitions in 40 CFR 120.2 are outside of the scope of this rulemaking.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0023)

EPA's proposal to establish an "administrative boundary" to limit the Corps' administrative authority adjacent to retained waters must be eliminated as contrary to Section 404(g). We recognize the appeal of creating an administrative boundary "to clarify the extent of adjacent wetlands over which the Corps retains administrative authority," but it simply lacks support in the law and is arbitrary. 88 Fed. Reg. at 55285. This is especially true as the proposed rule allows for the "administrative boundary between retained and assumed wetlands [to] be set jointly by the Tribe or State and the Corps" or for "a 300-foot administrative boundary [to] be established as a default if no other boundary between retained and assumed adjacent wetlands is established." [Italics:Id.] The language of the proposed rule practically allows for the Corps' jurisdiction to vary from the exact boundary of the retained water to 300 feet from the boundary of the retained water with no analysis whatsoever of whether or how the retained waters are connected to adjacent wetlands. In a worst-case scenario, the state and the Corps could negotiate an administrative boundary that ends at the retained water, even though there are clearly identified adjacent wetlands that are connected to the retained water that should be retained by the Corps under the express language of the statute. The administrative boundary proposal and the default 300-foot boundary should be eliminated. The state and the Corps must define with evidentiary support where jurisdictional waters end, in compliance with the requirements of Section 404(g), for each state application.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0024)

The introduction of the administrative boundary also leads to jurisdictional confusion between the Corps and a state because now there is an increased likelihood that a project will cross the jurisdictional boundary. EPA's proposed rule states that "[t]he MOA between the Tribe or State and the Corps must articulate an approach for permitting projects involving such discharges that may occur in the adjacent wetland on both sides of the administrative boundary." Id. at 55285. The proposed rule then goes on to say that if the state and the Corps do not have a provision in the MOA outlining how projects straddling the administrative boundary will be permitted, then EPA's default provision is that the Corps would permit the part of the project waterward of the administrative boundary and the state will permit the part of the project landward of the administrative boundary. Id. This split permitting structure creates a myriad of problems for the Corps, the permittee, interested parties, and the public. Initially, this can create confusion as to which agency is the proper permitting entity, which has the domino effect of bifurcating and needlessly replicating the scope of work for each permitting entity. And because, under the proposed rule, EPA is not requiring all assuming states to adopt the language and standards in the CWA and implementing regulations, the information required for a permit application and how those permit applications are reviewed can vary between state standards and Corps standards. This also has the effect of potentially circumventing federal law that requires that projects be reviewed holistically for environmental impacts. The split permitting structure can continue to create hurdles down the line. For example, judicial review of two separate permits can create an undue burden on the ability to challenge those permits and will complicate enforcement. Parties could be stuck litigating two separate permits in two forums simultaneously, or worse yet, on drastically different timelines depending on the state's judicial review procedures. The difficulties of split jurisdiction provide a practical reason, as well as the legal reasons outlined above, for EPA to discard the "administrative boundary" proposal in the rule.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0014)

The Proposed Rule also provides additional guidance as to retained wetlands and establishes a 300-foot default boundary for what should be considered "adjacent wetlands" under the CWA. Although 300 feet would be a default boundary, the Proposed Rule offers flexibility for the State seeking assumption to jointly agree upon a different boundary with the Corps during the assumption process.

Florida supports a default 300-foot administrative boundary while also providing flexibility to set alternative boundaries on a state-by-state basis taking into consideration the geographical, geological, and hydrological differences. During Florida's assumption process, Florida and the Corps mutually agreed to a 300-foot administrative boundary for what is considered "adjacent wetlands" under the retained waters list. This delineation allows Florida to provide a mapping tool to the public, which provides a helpful starting point for determining whether particular projects would be considered within the purview of the state 404 program.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0025)

The Clean Water Act does not authorize setting arbitrary boundaries within a wetland. Section 404(g)(1) expressly states that adjacent wetlands may not be assumed by a state, full stop. Whether a wetland is adjacent (and to what extent) is a mixed question of fact and federal law. Sackett v. EPA, 598 U.S. 651 (2023). It cannot be reduced to an arbitrary number of feet from a retained water, and certainly not to a default of a mere 300 feet as EPA proposes. 88 Fed. Reg. at 55,285.

EPA recognizes as much in Footnote 25, where it states that by agreement in an MOA the Corps "may" exercise jurisdiction over adjacent wetlands on both sides of the administrative boundary where a permittee's activities will fall on both sides. But Section 404(g)(1) does not make the extent of the Corps' jurisdiction optional. It expressly states that adjacent wetlands may not be assumed by a state, whatever their extent. There is no authority to invent an "administrative boundary" that would allow a state to assume authority over part of wetlands that are adjacent to a retained water. EPA's proposal "that the Corps retain administrative authority over all jurisdictional wetlands adjacent to retained waters, except that, for purposes of administrative convenience, the geographic scope of the Corps' administrative authority would be limited by an agreed-upon administrative boundary," 88 Fed. Reg. at 55,289, is plainly contrary to law by allowing a state to exercise 404 authority over non-assumable wetlands.

Paradoxically, EPA holds the line when it comes to ensuring that the Corps will not exercise authority over a water that is assumable by law. 88 Fed. Reg. at 55,285 n.25. The same must hold true to ensure that a state will not exercise authority over waterways and wetlands that are not assumable by law.

EPA's reliance on the Assumable Waters Subcommittee Report to propose limiting the Corps' authority over retained waters fails. Congress did not give EPA or the Subcommittee the authority to re-write its description of retained wetlands, or to carve out some of those wetlands.

There is in fact no statutory authority to "establish[] a national administrative boundary to assign regulatory responsibility" either to the Corps or a state on retained waters. Congress already established the boundary: the Corps retains sole authority over wetlands that are adjacent to a retained water. This is not, as EPA suggests, an "administrative" authority. It is a legal duty statutorily-imposed by Congress.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries.**

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0007)

The current interpretation of Waters of the United States includes all wetlands, which are adjacent to, and "indistinguishable from" a "relatively permanent body of water connected to traditional interstate navigable waters."[Footnote 5: Sackett v. EPA, 598 U.S. (2023).] The 300-foot default rule sidesteps this definition and creates another layer of classification, based on administrative compromises.

This further complicates the regulatory geography. One parcel may be part of the Waters of the U.S. for the purposes of a 402 permit, but functionally not part of Waters of the U.S. for a 404 permit. Although the default border may create simplicity within one-step of State 404 program assumption, its divergence from the legal definition of waters covered under CWA will create confusion later.

More significantly for Tribes, this bartering between an assuming State and USACE results in areas whose protections do not correlate to their legal classification. States may instead regulate Waters of the U.S., the regulation of which should implicate the Federal trust obligation toward Tribes, with no obligation towards Tribal interests. The Federal Government should not be able to avoid their trust obligations through an agreement of convenience with a State, which is based on a thin distinction between permitting authority and administrative authority.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries.**

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0008)

It is therefore critical that any establishment of an administrative demarcation boundary be based on science and technical data supporting the limits of federally retained control, not just as an "administrative boundary" selected out of convenience. It is difficult to determine how EPA selected the 300-foot administrative default since it does not seem to be supported by any data indicating that this limit is protective of Section 10 waters. States and Tribes have indicated that the identification of the administrative default needs clarification. As currently proposed, there is confusion on whether the 300-foot measurement begins at the ordinary high-water mark (OHM) or at the ordinary high tide line; if one exists. NAWM recommends that a repeatable method be used to determine the appropriate limits of retained waters to comply with Congressional intent and to provide clarity to those interested in assuming the program.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries.**

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0009)

It is worth noting that regardless of what method or boundary is selected there may be differences in State and Tribal jurisdictional waters and WOTUS limits. A hydrologic benchmark would seem to be appropriate and could be replicated by modeling based on inputs and flow regimes. This method should be coordinated with EPA's Office of

Research and Development and the U.S. Army Corps of Engineers (Corps). It may be that a benchmark such as the active floodplain could be appropriate to provide both replicability and would be protective of the functions of retained waters. The draft rule advocates for the administrative approach to demarcation of the boundary between federal and state jurisdiction in order to provide clarity to permit applicants. However, this justification may be unwarranted since many states currently have different boundaries and activities which are regulated outside of the federal Section 404 scope and these differences have been navigated by project proponents since the inception of the federal regulations.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries.**

National Association of Home Builders (NAHB) (EPA-HQ-OW-2020-0276-0077-0011)

Notably, EPA acknowledges the meaning of the term "adjacent wetlands" must be consistent with the U.S. Supreme Court's interpretation of the term "adjacent" under the Sackett ruling [Footnote 26: Ibid.].

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries. The default understanding is that the Corps would retain administrative authority over all jurisdictional wetlands "adjacent" to retained waters, as that term is defined in 40 CFR 120.2. The definitions in 40 CFR 120.2 are outside of the scope of this rulemaking.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0013)

EPA's proposal to establish an "administrative boundary" to limit the Corps' administrative authority adjacent to retained waters must be eliminated as contrary to Section 404(g). EPA proposed to draw these administrative boundaries "to clarify the extent of adjacent wetlands over which the Corps retains administrative authority," 88 Fed. Reg. at 55285, but the concept simply lacks support in the law, is arbitrary, and must be abandoned in the final rule. The state and the Corps must define with evidentiary support where jurisdictional waters end, in compliance with the requirements of Section 404(g), for each state application and may not arbitrarily set a default distance for such boundaries (of 300 feet or any other distance), which has no grounding in a wetland delineation or any scientific understanding of complex wetland processes and their connection with adjacent waters. The administrative boundary proposal and the default 300-foot boundary should be eliminated entirely [Footnote 1 If a default boundary is retained, which it should not be, it should be much higher. For instance, the default boundary approved for New Jersey is 1,000 feet. While still unacceptable, this would at least not exclude as many adjacent wetlands that should properly remain subject to federal 404 authority under Section 404(g) as the proposed 300-foot default.]

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0014)

This is especially true as the proposed rule allows for the "administrative boundary between retained and assumed wetlands [to] be set jointly by the Tribe or State and the Corps" or for "a 300-foot administrative boundary [to] be established as a default if no other boundary between retained and assumed adjacent wetlands is established." Id. In a worst- case scenario, the state and the Corps could negotiate an administrative boundary that ends at the retained water, even though there are clearly identified adjacent wetlands that are connected to the retained water that should be retained by the Corps under the express language of the statute. Or it may arbitrarily set a 300-foot line when the adjacent wetland, in reality, may actually extend miles beyond the retained water boundary. This is unacceptable and has no basis in the statutory language of Section 404(g) or in scientific literature or wetland delineation practice.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0015)

The introduction of the administrative boundary also leads to jurisdictional confusion between the Corps and a state because there is an increased likelihood that a project will cross the jurisdictional boundary. EPA's proposed rule states that "[t]he MOA between the Tribe or State and the Corps must articulate an approach for permitting projects involving such discharges that may occur in the adjacent wetland on both sides of the administrative boundary." Id. at 55285. The proposed rule then goes on to say that if the state and the Corps do not have a provision in the MOA outlining how projects straddling the administrative boundary will be permitted, then EPA's default provision is that the Corps would permit the part of the project waterward of the administrative boundary and the state will permit the part of the project landward of the administrative boundary. Id. This split permitting structure creates myriad problems for the Corps, the permittee, interested parties, and the public. Initially, this can create confusion as to which agency is the proper permitting entity, which has the domino effect of bifurcating and needlessly replicating the scope of work for each permitting entity. And because, under the proposed rule, EPA is not requiring all assuming states to adopt the language or standards in the CWA and implementing regulations, the information required for a permit application and how those permit applications are reviewed can vary between state standards and Corps standards. This also has the effect of potentially circumventing federal law that requires that projects be reviewed holistically for environmental impacts. The split permitting structure can continue to create hurdles down the line. For example, judicial review of two separate permits can create an undue burden on the ability to challenge those permits and will complicate enforcement. Parties could be stuck litigating two separate permits in two forums simultaneously, or worse yet, on drastically different timelines depending on the state's judicial review procedures. The difficulties of split jurisdiction provide a practical reason, as well as the legal reasons outlined above, for EPA to discard the "administrative boundary" proposal in the rule.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0016)

Further, for projects that may include both Corps-retained wetlands and state- assumed wetlands, EPA regulations should require that the Corps is the lead permitting entity with cooperative participation by the state. As stated above, this requirement must be outlined in the MOAs between the federal agencies and the assuming state. This requirement would ensure that environmental review is not unlawfully segmented and will protect the rights of interested parties in judicial review, particularly tribes. And because state requirements may not be less stringent than Federal requirements, judicial review of the Corps' permitting decisions in federal court will not infringe on any rights of the state permitting agency or the permittee. This requirement would also ensure consistency between different Corps Districts and applicant states in how they will analyze proposed projects that straddle the jurisdictional boundary.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries. EPA therefore expects a significant reduction in the number of projects that straddle the boundary between assumed and retained waters. Tribes and States may still choose to address projects requiring joint permitting in their MOA with the Corps.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0007)

Moreover, all jurisdictional wetlands adjacent to such retained waters must be included on the Retained Waters List and described in the Memorandum of Agreement with the assuming State. As described below, administrative boundaries for adjacent wetlands must extend to the full extent of the wetland boundary delineated and not to an arbitrary distance (of 300 feet or otherwise) from the boundary of the retained water. Further, there should be no shared authority with a state for permitting projects that "may cross the administrative boundary"—or a need to "articulate an approach" for dealing with such circumstances—because there should be no "administrative boundaries" but only scientifically defensible adjacent wetland boundaries, such that it is clear that the entire adjacent wetland remains on the Retained Waters List and subject to Corps rather than state authority.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries. EPA therefore expects a significant reduction in the number of projects that straddle the boundary between assumed and retained waters. Tribes and State may still choose to address projects requiring joint permitting in their MOA with the Corps.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0003)

Thank you for proposing to codify a default administrative boundary line. Alaska agrees with the rationale underlying the 2017 Subcommittee's evaluation and recommendation of the default boundary-line approach, which is that the line should be drawn only so far as "necessary to protect these waters from activities that may adversely impact navigability." [Footnote 12: 2017 Subcommittee Report at 26.]. As recognized by the 2017 Subcommittee, the Corps is tasked under the Rivers and Harbors Act with

protecting the "navigable capacity" of waterways subject to that Act [Footnote 13: Id at 26]. And as the 2017 Subcommittee further recognized, the only "[r]egulated activities that may impact navigable capacity . . . would likely occur in areas that are in close proximity to the waterways retained by the [Corps]." [Footnote 14: Id. at 26.]. Therefore, tracking back to the navigable capacity of a waterway, and establishing a boundary on that basis, makes sense. To do this, of course, the Corps must document the navigable capacity of the waterways it seeks to retain.

The second, more obvious, caveat that must be reflected in the final rule is that this line cannot be used to demarcate waters outside of the scope of "waters of the United States" (of which "retained waters" are a subset). This means that if a wetland is distinguishable [Footnote 15: See Sackett v. EPA, 598 U.S. 651, 678 (2023) (holding that, to be subject to the Clean Water Act, a wetland must be "indistinguishable" from a water body that is a waters of the United States in its own right).]. from a traditionally navigable water at a point closer than 300 feet away from the water body, it is the point closer to the water body which demarcates the extent of the retained water for that water body. Frequently, in Alaska, wetlands are distinguishable before that point. To prevent unnecessary delay and confusion, the final rule should indicate that the administrative boundary line is in no event to exceed the point at which a wetland is distinguishable from the adjacent waterway, consistent with Sackett v. EPA.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries. The default understanding is that the Corps would retain administrative authority over all jurisdictional wetlands "adjacent" to retained waters, as that term is defined in 40 CFR 120.2. The definitions in 40 CFR 120.2 are outside of the scope of this rulemaking.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0020)

EPA's proposal to establish an "administrative boundary" to limit the Corps' administrative authority adjacent to retained waters must be eliminated as contrary to Section 404(g). We recognize the appeal of creating an administrative boundary "to clarify the extent of adjacent wetlands over which the Corps retains administrative authority," but it simply lacks support in the law and is arbitrary. 88 Fed. Reg. at 55285. This is especially true as the proposed rule allows for the "administrative boundary between retained and assumed wetlands [to] be set jointly by the Tribe or State and the Corps" or for "a 300-foot administrative boundary [to] be established as a default if no other boundary between retained and assumed adjacent wetlands is established." Id. The language of the proposed rule practically allows for the Corps' jurisdiction to vary from the exact boundary of the retained water to 300 feet from the boundary of the retained water with no analysis whatsoever of whether or how the retained waters are connected to adjacent wetlands. In a worst-case scenario, the state and the Corps could negotiate an administrative boundary that ends at the retained water, even though there are clearly identified adjacent wetlands that are connected to the retained water that should be retained by the Corps under the express language of the statute. The administrative boundary proposal and the default 300-foot boundary should be eliminated. The state and

the Corps must define with evidentiary support where jurisdictional waters end, in compliance with the requirements of Section 404(g), for each state application.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0021)

The introduction of the administrative boundary also leads to jurisdictional confusion between the Corps and a state because now there is an increased likelihood that a project will cross the jurisdictional boundary. EPA's proposed rule states that "[t]he MOA between the Tribe or State and the Corps must articulate an approach for permitting projects involving such discharges that may occur in the adjacent wetland on both sides of the administrative boundary." Id. at 55285. The proposed rule then goes on to say that if the state and the Corps do not have a provision in the MOA outlining how projects straddling the administrative boundary will be permitted, then EPA's default provision is that the Corps would permit the part of the project waterward of the administrative boundary and the state will permit the part of the project landward of the administrative boundary. Id. This split permitting structure creates a myriad of problems for the Corps, the permittee, interested parties, and the public. Initially, this can create confusion as to which agency is the proper permitting entity, which has the domino effect of bifurcating and needlessly replicating the scope of work for each permitting entity. And because, under the proposed rule, EPA is not requiring all assuming states to adopt the language and standards in the CWA and implementing regulations, the information required for a permit application and how those permit applications are reviewed can vary between state standards and Corps standards. This also has the effect of potentially circumventing federal law that requires that projects be reviewed holistically for environmental impacts. The split permitting structure can continue to create hurdles down the line. For example, judicial review of two separate permits can create an undue burden on the ability to challenge those permits and will complicate enforcement. Parties could be stuck litigating two separate permits in two forums simultaneously, or worse yet, on drastically different timelines depending on the state's judicial review procedures. The difficulties of split jurisdiction provide a practical reason, as well as the legal reasons outlined above, for EPA to discard the "administrative boundary" proposal in the rule.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0022)

Further, for projects that may include both Corps retained wetlands and state- assumed wetlands, EPA regulations should require that the Corps is the lead permitting entity with cooperative participation by the state. As stated above, this requirement must be outlined in the MOAs between the federal agencies and the assuming state. This requirement would ensure that environmental review is not unlawfully segmented and will protect the rights of interested parties in judicial review, particularly Tribes. And because state requirements may not be less stringent than Federal requirements, judicial review of the Corps' permitting decisions in federal court will not infringe on any rights of the state permitting agency or the permittee.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries. EPA therefore expects a significant reduction in the number of projects that straddle the boundary between assumed and retained waters. Tribes and State may still choose to address projects requiring joint permitting in their MOA with the Corps.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0049)

EPA's proposal to establish an administrative boundary to limit the Corps' administrative authority must be eliminated. EPA's proposal to establish an "administrative boundary" to limit the Corps' administrative authority adjacent to retained waters must be eliminated as contrary to Section 404(g). The Clean Water Act does not authorize setting arbitrary boundaries within a wetland. Section 404(g)(1) expressly states that adjacent wetlands may not be assumed by a State, full stop. Whether a wetland is adjacent (and to what extent) is a mixed question of fact and federal law.[Footnote 98: Sackett v. EPA, No. 21-454 (U.S. May 25, 2023).] It cannot be reduced to an arbitrary number of feet from a retained water, and certainly not to a default of a mere 300 feet as EPA proposes.[Footnote 99: 88 Fed. Reg. at 55,285.]

The introduction of the administrative boundary also leads to jurisdictional confusion between the Corps and a state because now there is an increased likelihood that a project will cross the jurisdictional boundary. EPA's proposed rule states that "[t]he Memorandum of Agreement between the Tribe or State and the Corps must articulate an approach for permitting projects involving such discharges that may occur in the adjacent wetland on both sides of the administrative boundary."[Footnote 100: 88 Fed. Reg. 55,291.] The proposed rule then goes on to say that if a state and the Corps do not have a provision in the memorandum of agreement outlining how projects straddling the administrative boundary will be permitted, then EPA's default provision is that the Corps would permit the part of the project waterward of the administrative boundary and the state will permit the part of the project landward of the administrative boundary.[Footnote 101: Id.] This split permitting structure creates a myriad of problems for the Corps, the permittee, interested parties, and the public. Initially, this can create confusion as to which agency is the proper permitting entity, which has the domino effect of bifurcating and needlessly replicating the scope of work for each permitting entity. And because, under the proposed rule, EPA is not requiring all assuming states to adopt the language and standards in the Clean Water Act and implementing regulations, the information required for a permit application and how those permit applications are reviewed can vary between state standards and Corps standards. This also has the effect of potentially circumventing federal law that requires that projects be reviewed holistically for environmental impacts. The split permitting structure can continue to create hurdles down the line. For example, judicial review of two separate permits can create an undue burden on the ability to challenge those permits and will complicate enforcement. Parties could be stuck litigating two separate permits in two forums simultaneously, or worse yet, on drastically different timelines depending on the state's judicial review procedures. The difficulties of split jurisdiction provide a practical reason, as well as the legal reasons outlined above, for EPA to discard the "administrative boundary" proposal in the rule.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0050)

Further, for projects that may include both Corps retained wetlands and state- assumed wetlands, EPA regulations should require that the Corps is the lead permitting entity with cooperative participation by the state. As stated above, this requirement must be outlined in the memorandum of agreement between the federal agencies and the assuming state. This requirement would ensure that environmental review is not unlawfully segmented and will protect the rights of interested parties in judicial review, particularly tribes. And because state requirements may not be less stringent than Federal requirements, judicial review of the Corps' permitting decisions in federal court will not infringe on any rights of the state permitting agency or the permittee.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries. EPA therefore expects a significant reduction in the number of projects that straddle the boundary between assumed and retained waters. Tribes and State may still choose to address projects requiring joint permitting in their MOA with the Corps.**

Natural Resources Defense Council (EPA-HQ-OW-2020-0276-TRANS-092923-008-0004)

Wetlands that are adjacent to traditionally navigable waters are not assumable, even if they extend landward for a significant distance. Especially in light of the Supreme Court's improper redefinition of adjacency in the Sackett case, maintaining federal authority over such adjacent wetlands is hardly a major imposition on the states.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries. EPA therefore expects a significant reduction in the number of projects that straddle the boundary between assumed and retained waters. Tribes and State may still choose to address projects requiring joint permitting in their MOA with the Corps.**

2.5 Procedures for modifying the extent of retained waters and other proposed clarifications

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0008)

The Tribe disagrees with the proposal at page 55,291 of the preamble that would change the current regulatory requirement that all modifications that affect the area of jurisdiction always constitute substantial revisions to a Tribal or State program, such that they require notice to "those persons known to be interested in such matters." Given the breadth of the Tribe's U&A and the need for the Federal trustee to retain Section 404 authority throughout it, all changes to the Retained Water List or description and all reductions in the scope of Federal jurisdiction (including the removal of any waters from the Retained Waters List or description) are "substantial" modifications from the Tribe's perspective, and the Tribe should receive notice and an opportunity to comment on all such changes. This is especially true when EPA makes this proposal in the same breath as saying that all changes in geographic scope of an approved tribal CWA section 404 program that would add reservation areas to the scope of its approved program are

substantial program revisions, requiring notice to known interested parties and additional process on the part of the tribe. This difference in how modifications to state jurisdictional authority versus tribal jurisdictional authority would be handled is simply unacceptable. All such changes should be considered substantial modifications, and all known interested parties, including Tribes with U&A that covers the waters proposed to be modified, must receive notice of such modification and an opportunity to comment on the change.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. In response to comments such as this, EPA is clarifying that all non-*de minimis* removals from the retained waters description are considered substantial modifications that require public notice. EPA expects this clarification will address the commenter's concern about remaining apprised of reductions in areas subject to federal trusteeship. Changes in geographic scope of an approved Tribal CWA section 404 program that would add reservation areas to the scope of its approved program are substantial program revisions because EPA must ensure that the Tribe's exercise of jurisdiction over that area meets the statutory criteria for treatment in a manner similar to that in which it treats a State, for purposes of the section 404 program.** ***See*** **33 U.S.C. 1378(e); 40 CFR 233.60, 233.61.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0019)

Finally, the retained waters list must also be revisited on a periodic basis, at least every five years. The failure to revisit the retained waters list must be considered by EPA as a reason to revoke state assumption. Other provisions of the CWA require periodic review (e.g., triennial review of state water quality standards required under 33 U.S.C. § 1313(d) and 40 C.F.R. § 131.20) to account for changing circumstances. Periodic review of the Corps' retained waters list ensures the list is up to date and accounts for changes in navigability or the extent of adjacent waters and wetlands.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble and EPA Response to Comment EPA-HQ-OW-2020-0276-0063-0022.**

2.6 Public participation in the development of the retained waters description

Individual commenter (EPA-HQ-OW-2020-0276-0050-0011)

Once this agreed upon description of retained waters is created, it should be made available to the public and a 30-day comment period should commence. After all the comments have been considered the description can be finalized. Adding this would increase the public's transparency and allow for additional input on the issue of Tribal or State sovereignty from citizens.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0023)

Public Participation.

In response to EPA's express request for comment on "how to increase transparency for the public regarding the development of the retained waters description," 88 Fed. Reg. 55,292, Conservation Organizations maintain that the Corps should publish notice when it receives a request to develop a retained waters list and provide a reasonable opportunity for public submission of data and comment. The public must be afforded an opportunity to weigh in on retained waters lists before they are finalized by the Corps to be included in a Memorandum of Agreement with a state or to be submitted by the state in its application.

EPA's proposal to include all retained waters "known" to the Corps, the state, or Tribes, 88 Fed. Reg. at 55,287, should not merely be a passive exercise based on old information. Even if EPA will not require comprehensive navigability assessments in every case, EPA should at a minimum require a process by which the public has an opportunity to identify and make "known" to the Corps additional waterways that meet the retained waters definition and must be retained by law [Footnote 65: In the case of Florida, longtime residents, environmental advocacy groups, and Tribes identified additional waterways that the Corps should have considered in developing its retained waters list. This included evidence of navigability pertaining to the critically consequential Everglades. But the Corps arbitrarily terminated a public comment period it had initiated to assess the navigability of Florida's waters before state assumption, and the public's comments were ignored. This resulted in the unlawful transfer of non-assumable waters to the State.] Note that this is particularly important given the multiple examples of error in the Section 10 lists; the public can provide valuable and necessary information to ensure that the retained waters meet the requirements of the statutes.

It is not sufficient that the public will have an opportunity to comment on a state's completed submission to EPA, nor that the public "may" have an opportunity to weigh in during the state's development of its application. 88 Fed. Reg. 55,289. The public must have the opportunity to weigh in before the Corps has prepared the retained waters list, and that is when the Corps is in the process of developing it.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0029)

EPA should make clear that the requirement for a "description" of the waters to be assumed by the state, and those to be retained by the Corps must be identified in some manner that makes apparent to the public which entity has 404 jurisdiction over which waterways. 88 Fed. Reg. at 55,324–25 (proposed § 233.11(i)). This was EPA's intention when it promulgated earlier 404 assumption regulations, and it is essential to transparency and clarity for the public.

It should not be sufficient for a state only to "describe" assumed waters categorically (as those waters not retained by the Corps). 88 Fed. Reg. at 55,325 (proposed § 233.11(i)(6)). It should similarly not be sufficient for the Corps to rely on a categorical description of retained waters by adopting the definition in 404(g)(1) to claim it has properly retained authority over all non-assumable waters. Retained waters lists should

explicitly identify the retained waterways, including those that are subject to the ebb and flow of the tide. And descriptions of assumed waters should be provided in a comparable way that is clear and accessible to the public.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble.**

2.7 Other comments on retained waters and adjacent wetlands

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0011)

- It is imperative that before any further approvals of state CWA § 404 programs are made, EPA and US ACE must clearly define the extent of the state's permit authority, including by specifying which wetlands are subject to a state permit when there is a coast, a navigable waterway used for interstate commerce, or similar waters subject to ACE jurisdiction.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble**

Wetlands Coordinator for Confederated Salish and Kootenai Tribes (CSKT) (EPA-HQ-OW-2020-0276-TRANS-083023-001-0002)

Comment 2

The third attendee that had commented through the chat asked through the chat which waters are retained by the Corps and requested examples.

Comment 3

The attendee followed up asking which waters of the U.S. tribes would need to request permits for.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. Tribes would need to seek permits from an assuming Tribe or State for discharges into all waters other than those retained by the Corps. Section IV.B.2 of the final rule preamble addresses the scope of waters retained by the Corps.**

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0011)

- It is imperative that before any further approvals of state CWA § 404 programs are made, EPA and US ACE must clearly define the extent of the state's permit authority, including by specifying which wetlands are subject to a state permit when there is a coast, a navigable waterway used for interstate commerce, or similar waters subject to ACE jurisdiction.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. The default understanding of the scope of retained adjacent wetlands is that the Corps would retain administrative authority over all jurisdictional wetlands "adjacent" to retained waters, as that term is defined in 40 CFR 120.2. The definitions in 40 CFR 120.2 are outside of the scope of this rulemaking.**

3. Program assumption requirements

3.1 Staffing and funding requirements for administration, enforcement, and compliance

Maryland Department of the Environment (MDE) (EPA-HQ-OW-2020-0276-0061-0004)

4) Implementation Support

MDE encourages and recommends that financial support be made available to jurisdictions implementing an assumed Section 404 program. In addition, some states or jurisdictions have Programmatic General Permits (PGPs) issued from the Corps, under which authorizations result in a comparable federal authorization. While this is not a form of assumption, the jurisdictions with PGPs are doing uncompensated work on behalf of federal agencies. The jurisdiction with the PGPs may also assume responsibility for receiving and distributing joint permit applications to the Corps and other federal agencies for review as needed and agreed upon. Jurisdictions with PGPs also assume oversight over permittee responsible mitigation projects for a no net loss of wetlands.

Agency Response: This rulemaking addresses the requirements and procedures for Tribal and State section 404 program approval, operation, and program withdrawal. Federal funding for Tribal and State programs is outside of the scope of this rulemaking.

Individual commenter (EPA-HQ-OW-2020-0276-0050-0003)

Tribes and States being able to prove that they can carry out permitting operations at the same capacity as the USACE is essential to the assumption process. Proving this ability should be based on the current permit load that the USACE deals with and comparing it to the Tribe or State's proposed program funding and staff. There is still confusion for Tribes and States that have more than one USACE district operating in their boundaries, and there should be guidelines in place to help entities in this situation. I worry about the Tribes and States that do not have adequate funding or manpower to administer the program at the same level as the USACE. I believe there should be a section in the application to request additional funds or training from EPA. A Tribe or States may have the perfect design for their program, but just not the resources to realize it and this should not necessarily be a barrier to assumption.

Agency Response: *See* Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to implement it, and about the utility and feasibility of comparisons with the Corps' funding and staff. *See also* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0061-0004.

Environmental Protection Network (EPN) (EPA-HQ-OW-2020-0276-0057-0008)

Clarify Requirements for Demonstration of Sufficient Resources by States and Tribes. Under the Section 404(g) assumption program, the states and Tribes need to show they have sufficient resources both in terms of staffing and funding to support all aspects of the ongoing program. The existing regulations did not clearly identify which parts of the

program required this demonstration. Assumption of the Section 404 program is an expensive proposition, and it is critical that states and Tribes demonstrate they have the resources to fully implement the program. The proposed regulation makes it clear that the state/Tribe must show they have sufficient resources to implement the program properly.

Agency Response: EPA acknowledges the commenter's expression of support. *See* Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to administer the program in its entirety.

Association of Clean Water Administrators (ACWA) (EPA-HQ-OW-2020-0276-0060-0004)

Funding: Several state officials have expressed that lack of funding precludes states from assuming the section 404 program, which requires significant resources including financial, staff and administrative costs on the part of the state. State resources are already strained and while many states would like to assume the section 404 program, lack of federal funding support will impact states' interest in the program. Recognizing the challenges faced by states in section 404 assumption, we ask that EPA provide federal funding to support state or tribal assumption of the section 404 program.

Agency Response: EPA recognizes that lack of dedicated funding for 404 implementation may affect the interest of Tribes and States in assuming the section 404 program. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0061-0004.

Alaska Miners Association (AMA) (EPA-HQ-OW-2020-0276-0067-0004)

Lastly, AMA advocates that when the assumption process is evaluated, a federal funding structure should be considered. Primacy programs, such as the 404 Program, are administered through cooperative federalism, meaning the federal law is established by national standards while states implement them within their borders. One of the key principles of cooperative federalism is that "states that choose to implement federal programs should be both adequately funded by the federal government to do so as Congress directed in authorizing statutes and should also invest state resources (either directly or through fees or other methods) sufficient to implement a successful program." EPA should not propose changes and new requirements to the assumption process, including a discussion of incentives, without consideration of supplying states with additional resources.

Agency Response: *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0061-0004.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0036)

V. EPA must provide more requirements for states regarding sufficient funding and staffing.

The proposed rule improves upon existing regulations by specifying that states must not only describe available funding and staffing, but also demonstrate that funding and

staffing will be sufficient to meet program requirements. However, the rule does not go far enough in providing transparency and requirements for states that seek to assume the program. EPA must provide additional minimum requirements to avoid creating underfunded, understaffed, inadequate state 404 programs, recognizing that those who advocate for a state to assume the 404 program are always incentivized to minimize its costs to make assumption more politically palatable.

Florida is a prime example. In its application to assume the 404 program, the Florida Department of Environmental Protection prepared a detailed description of its anticipated workload under the assumed program, concluding that it would be able to administer the state 404 program using only existing resources, including reallocating existing positions and staff time from elsewhere in the Department [Footnote 68: FDEP, Program Description, Section (e) – Workload Analysis at 8 (undated) (FDEP, Program Description, Section (e)).] In total, the department expected to reallocate 18 staff to the 404 permitting program [Footnote 69: FDEP, Program Description, Section (d) – Funding and Person Power at 3 (undated).]. These conclusions were based in part on Florida's existing wetlands permitting program, the requirements for which the department believed overlapped with 404 permitting requirements by "85%." [Footnote 70: FDEP, Program Description, Section (e) at 9.] These predictions proved wildly inaccurate, and the state found itself completely unprepared to administer the program. In the first annual report on the program, for example, the department reported that it had 212 people working within the 404 program, including 69 full-time members of the permitting team, 34 full-time members of the compliance and enforcement team, and additional clerical, training, guidance and leadership personnel [Footnote 71: FDEP, State 404 Program Annual Report, July 1, 2021 – June 30, 2022 at 38 (May 10, 2023) (Florida 2022 Annual Report).]. And, even that number was inadequate; the department was still "obtain[ing] new positions and hir[ing] new staff as quickly as possible." [Footnote 72: Id.]. In part, the enormous shortfall was due to a permitting workload that was almost double what the state's application predicted [Footnote 73: Compare FDEP, Program Description, Section (e) at 9-15 (adding the estimated number of permits annually for all types and districts equals 791 anticipated permits) with Florida 2022 Annual Report at 35 (six months after assuming the program, Florida had 1,322 open 404 permit applications).] But undoubtedly, the incentive to minimize costs in the pursuit of program approval also played a role.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to administer the program in its entirety.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0037)

EPA must learn from this example. EPA's final rule should make clear that in evaluating whether funding and staffing is sufficient to meet program requirements, EPA will, at minimum, apply the following standards:

- Reallocation of existing resources is presumptively inadequate to meet any part of the program requirements. States seeking to rely on the reallocation of resources must

provide detailed supporting documentation, including, if applicable, (1) a description of duties existing staff perform that they will no longer perform, and the person-hours gained by eliminating those duties; and (2) a description of the skills and expertise staff have that are applicable to reallocated tasks, and any skills or expertise staff would need to develop to perform the reallocated tasks.

- Claims of efficiency related to overlapping state and federal requirements should presumptively be excluded from calculations of the funding and staffing necessary to meet program requirements. States seeking to rely on such efficiencies must provide detailed supporting documentation describing the tasks performed under existing state programs that are redundant with tasks under the 404 program, and the person-hours that may be gained by eliminating those duties.
- The state program will be presumed to be no more efficient than the Corps 404 program and will likely be less so as states will have less experience and will need at least several years to reach maximum efficiency. States seeking to rely on claims of equivalent or greater efficiency compared to the Corps 404 program must provide detailed supporting documentation describing the tasks that the state anticipates completing more efficiently, the rationale for expecting the efficiency, and a comparison of qualifications of relevant staff between the state and Corps and permitting budgets from the Corps for the immediately preceding years for purposes of comparison.
- EPA will presume that the state must establish salaries commensurate with Corps salaries for comparable positions. Any state seeking to rely on a program description with lower compensation than the analogous Corps positions must provide detailed supporting documentation explaining how a lower salary will enable the state to fill comparable positions.
- States must account for staffing and funding for all aspects of the 404 program, including administrative, human resources, training, guidance, leadership, enforcement, compliance, scientific personnel and legal personnel.
- Descriptions of necessary staffing and funding resources should include all state agencies involved in the 404 program, not just the state agency primarily responsible for administering the program (such as wildlife agencies, state historic preservation offices, Tribal historic preservation offices, and attorneys general).
- States must provide information about their ability to hire qualified staff for open positions in agencies that would be involved in the 404 program, including the average length of vacancies and any hiring challenges that the state currently faces or anticipates.
- In calculating the staff and funding required for the program, states must provide at least a 20 percent margin of error to account for any economic changes or difficulties in precise predictions for a wholly new state program. In addition, staff will require training in new duties, and typically new staff will need to be hired. State permit loads may increase following assumption, compared to the federal permitting loads. All of these factors, and EPA's experience with states that have assumed the program, justify requiring a 20 percent margin of error in state resource calculations.
- In addition to a margin of error, states should describe the steps they will take to address unexpected shortfalls. These steps must include how EPA will be notified of shortfalls, how additional funding will be obtained, how positions will be filled, and timelines for doing so.
- EPA should specify the actions it will take if the state fails to provide sufficient

staffing and funding for the program following assumption, including but not limited to revoking the assumed program.
- EPA should specify what benchmarks a state will need to meet in order to show that staffing and funding are sufficient, and at what intervals (not less than every five years, and not less than every two years for the first 4-6 years).
- Publication with sources for detailed information should be provided allowing EPA and the public to verify all data (which includes more than simply state budgets—the information should be individual and line-item specific).
- States must also demonstrate to EPA any existing Clean Water Act delegated or assumed programs are adequately funded and staffed. EPA will presume that any current failure to adequately fund or staff such existing programs precludes the state from adequately funding or staffing a state 404 program.
- It is strongly recommended that states pursuing assumption commission an unbiased feasibility study the goal of which is to provide information about both the costs and benefits of assuming the program, not merely to demonstrate that assumption is beneficial to the state.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a response to the commenters' recommendation that EPA require information similar to what is listed above. EPA will not always need each of the pieces of information listed above to determine whether a program submission meets the requirements of the CWA, and therefore EPA has decided that the Agency should not commit to rejecting a program submission if it lacks any piece of the data listed above. Moreover, codifying information requirements with this degree of specificity could limit flexibility on the part of Tribes or States and EPA to design and approve program descriptions reflecting their particular circumstances. However, EPA views this suggested information as helpful guidance to Tribes or States as they assess how best to demonstrate that they have the capacity to administer the section 404 program.**

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0014)

IX. Lack of dedicated funding for 404 administration precludes participation by smaller Tribes and States

Without sufficient supplementary funding offered through EPA or USACE, it will remain financially difficult for Tribes to assume the administration of section 404 programs. Although the proposed rule clarifies many aspects of the application process, the expense and challenge of administering the program remains largely unchanged.

Agency Response: EPA recognizes that lack of funding may affect the interest of Tribes and States in assuming the section 404 program. ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0061-0004.**

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0015)

A. The opportunity costs of existing grants lessen the appeal of using the funds to develop and administer a section 404 program.

Although EPA offers several channels of funding which may be used "to build capacity to assume the section 404 program,"[Footnote 10: Id. at 55,281.] the limited resources of Tribes hamper the ability to use such funds for creating a replacement for an existing federally operated program. For example, the supplementary information for the proposed rule suggests that Wetland Program Development Grants could be used to enable the assumption of a section 404 program. While those funds are intended to be used to "conduct projects that promote the coordination and acceleration of research, investigations, experiments, training, demonstrations, surveys and studies relating to the causes, effects, extent, prevention, reduction and elimination of water pollution."[Footnote 11: "About Wetland Program Development Grants (WPDGs)," Environmental Protection Agency, https://www.epa.gov/wetlands/wetland-program-development-grants-and-epa-wetlands-grant-coordinators] Using these grants to create a permitting agency would necessarily take that money away from the research and discovery that the grants are intended for. Similarly, CWA section 106 grants are general in their application; therefore, any section 106 funds going to creating a 404 program are going to deprive a different program. Without committed grants for the development of Tribal 404 programs, many Tribes may continue to lack the capacity for program assumption.

Agency Response: EPA recognizes that lack of funding may affect the interest of Tribes and States in assuming the section 404 program. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0061-0004.

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0016)

Furthermore, grants are only temporary, and therefore the stable administration of a 404 program would require more permanent funding sources. While the proposed rule allows for the charging of permit fees,[Footnote 12: Clean Water Act Section 404 Tribal and State Program Regulation, 88 Fed. Reg. 55,280.] the requirement to show "sufficient" program budgets and funding mechanisms for program administration, as well as compliance evaluation and enforcement programs,[Footnote 13: Id. at 55,324-25 (to be codified at 40 C.F.R. 233.11(d), (h)).] implies that funding is expected beyond the revenues from permit fees.[Footnote 14: For example, Arizona's Department of Environmental Quality estimated that it would have to charge at least 24 times more than USACE for permits in order to have a self-funded program. The cost was substantially higher for individual permits. See Arizona Department of Environmental Quality. (2018). Clean Water Act §404 Program

Technical Working Group - Fees White Paper. Meanwhile, Alaska Department of Environmental Conservation estimates that adopting the 404 program will require continual fiscal support from the General Fund. See Alaska Department of

Environmental Conservation. (2023). Clean Water Act Section 404 Dredge and Fill Program Assumption Feasibility Report.] If EPA envisages permit programs, which fund themselves, then the assumption of 404 programs would appear much more accessible.

Given the opportunity cost of using limited grant money on the assumption of 404 program responsibilities when a functioning 404 program already exists at the Federal level, the prospect of assuming a 404 program will likely remain impractical for many Tribes.

Agency Response: EPA recognizes that lack of funding may affect the interest of Tribes and States in assuming the section 404 program. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0061-0004.

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0017)

B. Efficiency gains from section 404 program assumption could be granted to the assuming agency to offset the cost-shifting.

Some concerns over sufficient funding for the assumption of 404 programs may be alleviated by a reallocation of the funds that will be saved through the Tribes' adoption of 404 responsibilities. One of the main benefits of assuming the 404 program is the "elimination of a high percentage of duplication in state/tribal and federal permitting programs."[Footnote 15: "Section 404 Program Assumption: A Handbook for States and Tribes" Prepared by the Association of State Wetland Managers and the Environmental Council of the States (Aug. 2011). Hearing Before the Subcommittee on Water Resources and Environment, 112th Cong. 125 (Sept. 20, 2012).] The permitee will experience this elimination of duplication, but also by the USACE, who will be able to transition from administering into oversight. Some amount of the funds saved by the consolidation of permit administration into a Tribe's aegis could be granted to the Tribe to incentivize assumption of the program and facilitate its smooth operation. The use of some of these efficiency gains as an incentive for program adoption can still result in costs savings overall.

Agency Response: EPA recognizes that lack of funding may affect the interest of Tribes and States in assuming the section 404 program. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0061-0004.

State of Michigan, Michigan Department of Environment, Great Lakes, and Energy (EGLE), Water Resources Division (EPA-HQ-OW-2020-0276-0071-0005)

Although not part of the proposed rule, the WRD would like to comment on the need for the U.S. EPA to provide financial resources to support program implementation that is specifically for assumed Section 404 programs. The State of Michigan has been a proponent of this type of funding from the time our program was assumed. Furthermore, not having this type of funding is a barrier for other states who are interested in assuming the program.

Agency Response: **EPA recognizes that lack of funding may affect the interest of Tribes and States in assuming the section 404 program. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0061-0004.**

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0002)

NAWM appreciates EPA's efforts to clarify the minimum requirements needed for Tribal and State authorization and the attempts to make them more transparent, straightforward, and flexible. However, it is also important to recognize the significant resources required by a Tribe or State to implement the federal program. If EPA wishes to encourage Tribes and States to assume the CWA 404 program, resource support is necessary to achieve this goal and incorporate it into a larger program strategy; clarifying regulations may not be sufficient to entice Tribes and States to seek program authorization without added implementation resources.

Agency Response: **EPA recognizes that lack of funding may affect the interest of Tribes and States in assuming the section 404 program. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0061-0004.**

Nebraska Department of Environment and Energy (EPA-HQ-OW-2020-0276-0073-0005)

Within the preamble of the proposed rule EPA States, "EPA funding programs can also be used by Tribes and States to build capacity to assume the section 404 program or to implement assumed programs (e.g., CWA Section 106 funds).". EPA goes on to State that a lack of funding is outside of the scope of this rulemaking.

- Clarification is needed from EPA if they are taking into account assumed programs in their calculations for l 06 fund allocations or if States and tribes are supposed to prioritize 106 funds for assumed program over other eligible activities.
    - The Department would like EPA to clarify if they are accounting for assumed programs in the calculation for 106 fund allocations.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0061-0004.**

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-0004)

Further, if EPA genuinely seeks to encourage tribes to seek TAS for CWA §404 authority, there needs to be a concerted effort to identify and secure adequate financial and technical support for tribal programs.

Agency Response: **EPA recognizes that lack of funding may affect the interest of Tribes and States in assuming the section 404 program. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0061-0004.**

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0003)

However, resources are a major consideration: CWA § 404 programs require substantial resources to develop and implement, in terms of both the staff required and the dollars needed to develop and administer an extensive and complex permit program. Indeed, this may be the primary reason why only two states have assumed responsibility for the

program to date. The resource burden is even greater on tribes than on states, since tribes in general lack a tax base and have significantly fewer industries within their jurisdictions that would be available to share some of the costs, for example, through the assessment of permit fees.

Presumably EPA is aware of the cost and effort that its staff expends in an oversight role of an assumed program. It is unfortunate that EPA does not seem to recognize the need to fund tribes to take over this permitting program. It is summarily inadequate to suggest that the competitive wetlands program development grants or CWA § 106 funding are a viable means to fund such a program. Wetland program development grants could certainly be used to start a permitting program, but not to sustain it, and CWA § 106 grants are intended to fund tribal water quality monitoring programs. For tribes to begin down this arduous process requires a significant commitment on their part, one which they cannot responsibly take on without having at least some certainty in long-term funding streams.

If EPA truly wants to increase tribes' interest in assuming a CWA § 404 program, it must provide specific funding for tribes to build the capacity needed to receive assumed authority. Further, it must continue to fund tribes to administer the program once it is delegated. Perhaps the DITCA (Direct Implementation Tribal Cooperative Agreement) framework could serve as a model for how EPA could support a sustainable tribal wetland permitting program. Alternatively, there could be an EPA-funded group or groups formed to assist tribes in developing CWA § 404 programs. The group could be based on EPA Regions, and would also support tribes in each region by providing the essential skills and expertise needed both to assess whether to assume authority for the program and to develop and manage it.

Moreover, the effort involved in seeking and obtaining CWA § 404(g) authority is itself very labor intensive, from a technical, legal and policy standpoint. The NTWC suggests that EPA consider streamlining the process, in terms of time commitment as well as paperwork. Training and support from EPA will be needed to educate the tribes on how to fill out the packet. In addition, such an effort not only costs tribes money but also requires tribes to take time away from other important efforts. Tribes are concerned that states are in a much better position than tribes staff-wise, as well as financially, to assume authority to manage the CWA § 404(g) program, which could lead to the additional problems discussed below.

Agency Response: EPA recognizes that lack of funding may affect the interest of Tribes and States in assuming the section 404 program. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0061-0004.

National Association of Home Builders (NAHB) (EPA-HQ-OW-2020-0276-0077-0016)

EPA identifies within the preamble several challenges states and Tribes face when considering assuming the CWA Section 404 program. The lack of federal funding or assistance to states and Tribes to develop wetlands permitting programs remains one of the primary barriers. However, while acknowledging the lack of funding is a significant

barrier, the Agency also points out that addressing funding concerns is outside the scope of this EPA rulemaking [Footnote 32: 88 Fed. Reg. 55282 (August 14, 2023)].

Agency Response: EPA recognizes that lack of funding may affect the interest of Tribes and States in assuming the section 404 program. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0061-0004.

National Association of Home Builders (NAHB) (EPA-HQ-OW-2020-0276-0077-0004)

In addition to removing the obstacles and clarifying the various provisions of CWA Section 404, NAHB strongly encourages EPA to consider establishing funding mechanisms for states and Tribes seeking to assume the program.

Agency Response: EPA recognizes that lack of funding may affect the interest of Tribes and States in assuming the section 404 program. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0061-0004.

National Association of Home Builders (NAHB) (EPA-HQ-OW-2020-0276-0077-0006)

Congress established a firm statutory timeline for EPA to make required CWA 404 assumption determinations. In concert with those deadlines, EPA's proposed revisions must be clear, transparent, and capable of being efficiently implemented. In other words, EPA must avoid proposing new administrative procedures or requirements that would result in unnecessary delays or confuse states or Tribes preparing CWA assumption requests. Consistent with this view, NAHB objects to two of EPA's proposed revisions. The first is a proposed procedure for having Corps districts identify all "retained waters" under Section 10 Rivers and Harbors Act within the boundaries of a state or Tribe seeking program assumption [Footnote 15: 88 Fed. Reg. 55285 (August 14, 2023).] . The second is a proposed requirement for states or Tribes, when complying with the "program description" requirement, to include for EPA's review and comment copies of all job position descriptions and qualifications for staff responsible for administrative, inspections, or enforcement activities [Footnote 16: 88 Fed. Reg. 55283 (August 14, 2023).].

Agency Response: *See* Section IV.B.2 of the final rule preamble for a discussion about the development of a retained waters description. *See* Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all components of a program.

National Association of Home Builders (NAHB) (EPA-HQ-OW-2020-0276-0077-0008)

NAHB also opposes EPA's proposal to require states or tribes when submitting the required "program description" to include job qualifications and position descriptions for staff handling administrative, inspection, and enforcement responsibilities [Footnote 21: 88 Fed. Reg. 55324 (August 14, 2023)]. As EPA acknowledges, current regulations concerning program description require states and Tribes to include information on projected staffing levels, organization structure, and administrative responsibilities [Footnote 22: 40 C.F.R. §233.10]. NAHB believes EPA's existing requirements are sufficient for the EPA to make its determination on the adequacy of a state's or Tribe's

assumption request. Furthermore, NAHB questions the usefulness of EPA receiving copies of position descriptions or qualifications from a state or Tribe. Does EPA envision seeking changes to a state or Tribal government's required qualifications for staffing positions within the 120 days EPA must complete its determination? How would this affect states with existing state wetland programs - including those state wetland programs that already protect wetlands beyond the level of federal protection afforded under the CWA? Would these existing state wetland programs need to change their position descriptions and qualifications if they sought the CWA Section 404 assumption? NAHB questions the utility of EPA's proposal and urges the Agency not to finalize this requirement.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to implement it. This rule does not necessarily require States with existing wetland programs that seek assumption to change their position descriptions and qualifications. It does not prescribe specific position descriptions and qualifications and recognizes the importance of providing flexibility to Tribes and States to describe positions and list required qualifications. The rule simply requires that Tribes and States provide information about position descriptions and qualifications so that EPA can determine whether the Tribe or State has the capacity to carry out the section 404 program consistent with the CWA and implementing regulations.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0027)

We have concerns about the ability of states and tribes to assume permitting authority due to possible funding constraints, and we therefore request that EPA advocate for federal funds to be made available for tribes who are interested in taking over the 404 program. We understand that the implementation of Section 404 permitting programs can be an expensive endeavor if done correctly. A permitting program that is compliant with the CWA requires staff to review permit applications holistically, as well as staff to review technical details, and to understand topics like wetland delineation and impacts. Staff must also comply with the Section 404(b)(1) Guidelines and other federal requirements. Consequently, EPA should work with interested tribes to develop a realistic budget for tribal assumption of the 404 program and sufficient federal funds should be made available for tribes to successfully take over the 404 program.

Further, EPA should include clarifying revisions to its proposed rules to assess a state's financial ability to carry out all of the requirements of Section 404, the Section 404(b)(1) Guidelines, and any other federal requirements. Prior to submitting an application, the state must inquire to the Corps for an approximate accounting of the cost of administering Section 404 permits within the state. The applicant state should approximate how many permits it may process over the course of five years, estimate the number of professional staff required to process that number of permits, and estimate how much the state requires in its annual budget to run such a program for a period of five years using the Corps' data. The applicant state should also include data from the Corps in its application to provide a baseline for its financial accounting. Without a

baseline to compare state applications, there is no way to actually evaluate whether an applicant state has the fiscal capacity to carry out a program that complies with federal law.

Agency Response: EPA recognizes that lack of funding may affect the interest of Tribes and States in assuming the section 404 program. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0061-0004.

***See* Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to implement it, and of the utility and feasibility of comparisons with the Corps' funding and staff.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0002)

1. Program Assumption Requirements

EPA proposes to impose more requirements on what a State application must contain. For example, EPA would require States to identify "position descriptions as well as budget and funding mechanisms in the program description" [Footnote 4: 88 Fed. Reg. 55324.]; introduce new terminology mandating that all elements currently listed in 40 CFR 233.11(a) are addressed in an assumption application, on penalty of disapproval [Footnote 5: 88 Fed. Reg. 55283.]; and require a description of inter-agency coordination if applicable.

While these requirements are more onerous than the current program description requirements, these are details that my Division identified last session and marked for inclusion in our application. Alaska therefore does not object to these additional requirements.

Agency Response: *See* Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to administer all portions of a section 404 program.

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0028)

The Proposed Rule also does not account for another major hurdle to State assumption, which is the lack of funding. Alaska thanks EPA for the express notation that "EPA funding programs can also be used by Tribes and States to build capacity to assume the section 404 program (e.g., Wetland Program Development Grants) or to implement assumed programs (e.g., CWA section 106 funds)." [Footnote 61: 88 Fed. Reg. 55281.]. Whether the Wetland Program Development Grants could be used for 404 assumption efforts was a point of unclarity for us last legislative session. We urge EPA to increase the section 106 funds so that some may be made available to pursue assumption, and otherwise push to make funds available for implementation of a 404 assumed program.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0061-0004.**

Tulalip Tribes of Washington (EPA-HQ-OW-2020-0276-0082-0004)

Further, it is disappointing that the EPA acknowledged tribal concerns over the lack of program funding being a major impediment to tribal assumption of Section 404 authority but chose not to address this issue in the Proposed Rule. It is commonplace for the federal government to provide funding for tribal programs that had been historically administered by the federal government. See e.g., 25 U.S.C. § Chapter 46. A similar approach should be considered for tribal assumption of Section 404 authority.

Agency Response: EPA recognizes that lack of funding may affect the interest of Tribes and States in assuming the section 404 program. ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0061-0004.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0026)

Chickaloon Native Village concerns about Alaska's ability to assume permitting authority due to possible funding constraints. We understand that the implementation of Section 404 permitting programs can be an expensive endeavor if done correctly. A permitting program that complies with the CWA requires staff to review permit applications holistically, as well as staff to review technical details, and to understand topics like wetland delineation and impacts. Staff must also comply with the Section 404(b)(1) Guidelines and other federal requirements. Earlier this year, Alaska Department of Environmental Conservation (DEC) sought five million dollars for annual funding for assumption of the Section 404 permitting program. This is significantly less than the approximately eight million dollars the Corps currently spends to administer its wetlands permitting program in Alaska, and less than half of what Michigan, Florida and New Jersey each spend to administer their Section 404 programs [Footnote 5: See Jade North, LLC, Clean Water Act Section 404 Dredge and Fill Program Assumption: Feasibility report at 5 (Jan. 25, 2023) ("Michigan's budget for its 404 Program is $12.3 million and includes 82 staff in 10 offices."); id. ("New Jersey's budget for its 404 Program is $14.5 million and includes 176 staff."); id. ("Florida's budget for its 404 Program is $11.3 million and includes 170 staff.").].

EPA should include clarifying revisions to its proposed rules regarding a state's financial commitment to ensure that states will be able to carry out all of the requirements of Section 404, the Section 404(b)(1) Guidelines, and any other federal requirements. Prior to submitting an application, the state must inquire to the Corps for an approximate accounting of the cost of administering Section 404 permits within the state. The applicant state should approximate how many permits it may process over the course of five years, estimate the number of professional staff required to process that number of permits, and estimate how much the state requires in its annual budget to run such a program for a period of five years using the Corps' data. The applicant state should also include data from the Corps in its application to provide a baseline for its financial accounting. Without a baseline to compare state applications, there is no way to actually evaluate whether an applicant state has the fiscal capacity to carry out a program that complies with federal law.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all portions of the program, and of the utility and feasibility of comparisons with the Corps' funding and staff.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0011)

The rule must outline these requirements so that states fully understand EPA's expectations for assuming the program. For example, EPA must make clear in the final rule that reallocation of existing resources is presumptively inadequate to meet any part of the program requirements. If a state's program description includes such a reallocation, a state must provide detailed supporting documentation, including, if applicable, 1) a description of duties existing staff perform that they will no longer perform, and the person-hours gained by eliminating those duties; 2) a description of the skills and expertise staff have that are applicable to reallocated tasks, and any skills or expertise staff would need to develop to perform the reallocated tasks; and (3) a description of any tasks performed under existing state programs that are redundant with tasks under the 404 program, and the person-hours that may be gained by eliminating those duties.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all portions of the program. This rulemaking preserves certain flexibility for Tribes and States by not setting bright line budgetary or funding requirements, such as presuming that reallocations of resources are presumptively inadequate. EPA decided not to require submission of each piece of information that this commenter requests as a Tribe or State's failure to submit each of these pieces of information should not necessarily warrant rejecting a program submission. Rather, the final rule requires certain information that will enable the Agency to judge whether a Tribal or State agency has the capacity to implement its program based on the specific conditions within its jurisdiction, such as expected numbers of permit applications and federally listed threatened and endangered species affected.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0012)

A state such as Alaska, for example, must not take a myopic view of assumption of the program. Thus, it is inherent that the final rule clarifies that states must account for staffing and funding for all aspects of the 404 program, including administrative, human resources, training, guidance, leadership, enforcement, compliance, and legal personnel. This means that a state only accounts for staffing in ADEC, for example. Descriptions of necessary staffing and funding resources must include all state agencies involved in the 404 program, not just the state agency primarily responsible for administering the program.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all provisions of the program. EPA**

has clarified in the final rule that descriptions of necessary staffing and funding resources must include all Tribal or State agencies involved in the 404 program, not just the Tribal or State agency primarily responsible for administering the program.

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0008)

Additionally, while the proposed rule improves upon existing regulations by specifying that states must not only describe available funding and staffing but also demonstrate that funding and staffing will be sufficient to meet program requirements, it does not go far enough in providing transparency and guidance to states that seek to assume the program. EPA must draw from its experience in the few states that have assumed the program and provide additional minimum requirements to avoid creating underfunded, understaffed, inadequate state 404 programs.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to full administer all provisions of the program. EPA has balanced the importance of that goal with the need to allow certain flexibility for Tribes and States to adapt staffing and funding requirements to the particular circumstances of their prospective programs.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0009)

In Alaska, this is of particular concern. Alaska does not have the financial or staffing resources to successfully carry out the 404 program. Currently, the federal program requires an annual budget of roughly $7.9 million; in 2023, ADEC requested roughly $5 million from the Alaska Legislature.[Footnote 15: Alaska Legislature, Differences Between Operating Budget HB39 (SCS1 and SCS2) / Mental Health Bill (SCS1 and SCS2) (Apr. 26, 2023).] Since 2013, the Alaska Legislature has routinely faced budgetary challenges. Specifically, in 2023, the Governor presented a state budget

- with a $400 million dollar deficit. Such fiscal irresponsibility does not bode well for a state being able to assume the requirements of such a large program.
- As it is, Alaska is already requesting federal financing to implement the 404 program:
- AK DEC, with support from the Environmental Council of the States (ECOS) and NAWM, is seeking a change that will allow federal grant funds to help support state implemented 404 Programs. The DEC commissioner has sought and received support for the action from U.S. Senator Lisa Murkowski and Congresswoman Mary Peltola directly and U.S. Senator Dan Sullivan's staff. The entire Alaska Congressional Delegation expressed support to help the state obtain federal funding to develop and implement this program.[Footnote 16: ADEC, Section 404 Dredge and Fill Program, Frequently Asked Questions at 6 (updated Apr, 18, 2023).]
- Alaska's potential assumption of the program seemingly relies on a double-edged sword. The federal government (i.e., U.S. taxpayers) would potentially still be paying for implementation of the Section 404 program in Alaska and yet the

protections (i.e., notice and comment, Tribal consultation, NEPA, ESA, NHPA, equal access to courts, etc.) offered by the federal program would be lost.

- With Alaska's wetlands covering approximately 174 million acres, or about 43% of Alaska's surface area and comprising 63% of the Nation's wetlands, a large investment of resources will be required for the State to successfully run the program. For comparison, three states have assumed the 404 program thus far:
- Florida assumed the 404 Program in 2020. Florida has approximately 10 million acres of wetlands (approximately 24% of its surface area). Florida's budget for its 404 Program is $11.3 million and includes 170 staff.[Footnote 17: Jade North, LLC, Clean Water Act Section 404 Dredge and Fill Program Assumption Feasibility Report at 5 (Jan. 25, 2023) (2023 Feasibility Report)] Note: Florida originally projected that assumption would require no additional funding from the legislature and just a shift of 18 positions because, unlike Alaska, Florida already had a state wetland permit program.[Footnote 18: See Florida Department of Environmental Protection (FDEP), Program Description, Section (e) – Workload Analysis at 8-9; FDEP, Program Description, Section (d) – Funding and Person Power at 3; Florida Department of Environmental Protection, Program Description, Section (e) – Workload Analysis at 9.] Florida learned quickly that it had grievously underestimated the resources required to run the program.[Footnote 19: See FDEP, State 404 Program Annual Report, July 1, 2021 – June 30, 2022 (May 10, 2023) (reporting that it had 212 people working within the 404 program, including 69 full-time members of the permitting team, 34 full-time members of the compliance and enforcement team, and additional clerical, training, guidance and leadership personnel and still needed more).] While staffing and funding levels have increased, Florida has continued to understaff and underfund the program, relying on entry-level staff who lack the training and expertise necessary to adequately administer the program.[Footnote 20: Letter from Jeanneanne Gettle, EPA, to Emile Hamilton, FDEP, Apr. 6, 2023.]

New Jersey assumed the 404 Program in 1994. New Jersey has 915,000 acres of wetlands (approximately 16% of its surface area). New Jersey's budget for its 404 Program is $14.5 million and includes 176 staff.[Footnote 21: 2023 Feasibility Report at 5.]

Michigan assumed the 404 Program in 1984. Michigan has 6.5 million acres of wetlands (approximately 10% of its surface area). Michigan's budget for its 404 Program is $12.3 million and includes 82 staff in 10 offices.[Footnote 22: Id.]

Currently, the Federal program requires 49 staff. With that level of staffing the U.S. Army Corps of Engineers (Corps) completed 775 actions per year over a five-year period (2017-2022) or 48 FTE = 16 actions/FTE/year. In contrast, Alaska plans to assume the program with 28 positions, expanding with an additional 4 positions in year two to a total of 32.[Footnote 23: Id. at x.] Alaska proposed that it could assume approximately 75% of the Corps permitting responsibilities: 581 actions per year = 32 FTE = 18 actions/FTE/year.[Footnote 24: Id. at 52, Tbl. 2.]

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to implement it.** ***See also*** **Section II.B.4 of the Economic Analysis for the Clean Water Act Section 404 Tribal and State Program Regulation (EA) for further discussion. If Alaska were to submit a request to assume the program, EPA would evaluate that request based on the criteria laid out in the statute and regulations.**

Sierra Club (EPA-HQ-OW-2020-0276-TRANS-092923-004-0004)

EPA's rules must be at least as stringent as federal law requires, including ensuring that the states have the resources, that means staff with expertise and funding, to operate the state 404 program, to protect the rights of people and wildlife, not the pockets of politicians and their donors.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all provisions of the program.**

Florida Wildlife Federation (EPA-HQ-OW-2020-0276-TRANS-092923-006-0002)

I also wanted to talk about funding and staffing. I heard a previous speaker mentioned, but I would like to dive deeper on behalf of Florida's experience to date. We are seeing firsthand here in Florida what happens when EPA fails to require an adequate showing that a state has the funding and staffing to operate all aspects of the state 404 program. In its application, Florida told EPA that it needed no additional funding or resources to take over the 404 program. That has not been true. Moreover, EPA failed to analyze the capacity of other state agencies that have a role in the Florida 404 program, including the Florida Fish and Wildlife Conservation Commission, Florida State Historic Preservation Officer, and Tribal Historic Preservation Officers. EPA must require Florida to fix its resource problems and must ensure that no other state can assume the 404 program without demonstrating the capacity, funding, and expertise to run it.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all provisions of the program. EPA has clarified in the final rule that descriptions of necessary staffing and funding resources must include all state agencies involved in the 404 program, not just the state agency primarily responsible for administering the program.**

Natural Resources Defense Council (EPA-HQ-OW-2020-0276-TRANS-092923-008-0011)

Five, the state has the technical and resource capacity necessary to implement and enforce the program.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all provisions of the program.**

Chickaloon Native Village (EPA-HQ-OW-2020-0276-TRANS-092923-009-0007)

The state of Alaska has never disclosed the true cost of primacy over the fall for wetlands permitting that they are trying to take over, or how the state would pay for it. We appreciate the EPA is considering specificity in state primacy proposals about what primacy would cost, that the states have resources and funding to operate a program, and what personnel and technical skills would be needed to implement the program. We feel EPA should regularly review the capacity of states to fund a primacy program, including adequate staffing, engaging the public, and compliance and enforcing violations.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all provisions of the program.** ***See also*** **Section IV.E.3 of the final rule preamble for a discussion of the agency's revised program reporting requirements, designed to ensure that the EPA can regularly review the capacity of Tribes and States to staff and operate a section 404 program that meets statutory and regulatory requirements. EPA has also clarified the requirements for the annual report.** ***See also*** **Section IV.E.3 of the final rule preamble for a discussion of the Agency's revised program reporting requirements, designed to ensure that the EPA can regularly review the capacity of Tribes and States to staff and operate a section 404 program meeting statutory and regulatory requirements.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0010)

EPA must learn from prior states who assumed the program. Approving a state program as inadequate as Florida's, for example, does not serve the protective purposes of the Clean Water Act and is a disservice to Alaskans who are proud of our environment and way of life, reliant on clean and healthy waters. Considering the experience of other states and ADEC's poor track record with the 402 program, we strongly support EPA requiring 404 assumption applicants to comply with 40 C.F.R. § 233.11 Program description (g), "including a description of how the State will coordinate its enforcement strategy with that of the Corps and EPA." Additionally, EPA's final rule should make clear that it will rigorously evaluate whether funding and staffing is sufficient to meet program requirements and will apply trigger mechanisms and enforcement measures if a state is unable to fulfill its assumed obligations. As Alaskans have learned from the State's poor track record in regard to the 402 program, EPA writing a report outlining Alaska's deficiencies is not enough.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all provisions of the program.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0013)

As the EPA has discovered with Alaska's assumption of the 402 and Clean Air Act compliance and enforcement programs, Alaska is often understaffed and underfunded leading to failure to be able to perform the most basic compliance and enforcement tasks. EPA's final rule must account for such failures by states moving forward. It must require

that states describe steps they will take to address unexpected shortfalls and the notice requirements states must follow to alert EPA when shortfalls occur. EPA must also include the actions it will take if a state fails to provide sufficient staffing and funding for the program following assumption, including but not limited to revoking the assumed program.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all provisions of the program.** ***See also*** **Section IV.E.3 of the final rule preamble for a discussion of the Agency's revised program reporting requirements, designed to ensure that the EPA can regularly review the capacity of Tribes and States to staff and operate a section 404 program meeting statutory and regulatory requirements.**

Environmental Confederation of Southwest Florida (EPA-HQ-OW-2020-0276-TRANS-092923-002-0002)

The next thing that I think is important that I never really see conversation about is enforcement. When you talk about if they have the ability to fund, if they have the ability to staff the assumption of the 404 you need to also know if they have the dollars and staff to enforce 404. I've seen throughout my life where there are many rules and regulations that are adopted, but they're never enforced, and that's what the plan is. There are never any dollars for it, so that's as critical as having any other staff person available. As far as the enforcement goes, you need to do a cost-benefit analysis. You need to make it more costly to not follow the 404 rule than the benefit you get by not following the 404 rule. And again, in my life, I see it's generally just a slap on the hand. It's called the cost of doing business. We need to change that. We need to make sure that historic waters, historic used waters, continue to remain protected. We don't want to have any protections taken away from them. They are historic waters. I'm a history buff, and that's important to the whole being of Florida. Many times, we pave over our history, but we certainly shouldn't pollute over our history.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all provisions of the program, including compliance and enforcement. Penalty amounts are beyond the scope of this rulemaking.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0019)

IV. Epa Must Rigorously Review A State's Staffing, Resources And Funding Proposals And Require Full Adequate Funding Prior To Assumption Of 404 Permitting Programs.

Funding is a key indicator of a state's seriousness and readiness to assume a permitting program under Section 404 that will fully comply with the Clean Water Act and will fully protect tribes, individual citizens, and the environment. The proper time for EPA to review and ensure that funding is adequate to protection of the environment through robust permitting programs is well before a state has assumed the program. To that end,

there are several key pieces of data that EPA's rules should require of any application (and, of course, that EPA must scrutinize carefully in deciding whether a state should assume the program).

First, EPA should review the state's NPDES permitting program. How many staff do they have and what are the areas and levels of expertise? What is the annual budget? How many permits are issued by those staff? Has that number changed over the period the state has had the program? Is there a backlog, how much, and what is the claimed reason? How might the budget be affected during periods of economic downturn? EPA should carefully review NPDES permits issued by the state for stringency and compliance with the Clean Water Act. EPA should elicit public comment on the precise issue of state performance under an existing program.

This will provide EPA with information on two important data points. If a state NPDES program is robust and meeting the requirements of the law, then that information will give EPA a gauge for funding the additional 404 permitting; funding of a new program should be roughly equivalent and additive to the existing adequate permitting program. If the NDPES program is not functioning well—delays or failure to be adequately protective or not adequately responsive to the public—it may be an indicator that the state is underfunding its permitting obligations and will be a red flag against allowing the state to take on 404 permitting.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all provisions of the program.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0020)

Second, EPA should review the Corps' 404 permitting for that state. EPA should assess regional Corps staffing over the previous 5 years for 404 permitting (and disregarding the years the Navigable Waters Protection Rule was in place because the Corps' ability to regulate and permit during that time was improperly constrained) and the kind and levels of expertise the Corps staff have. What is the cost of the Corps program for the applicant state? EPA should set the expected funding level for any state seeking to assume the program at a level significantly greater than the Corps' budget for at least the first 3 to 5 years of a state's assumed program as the state gets the program started and gains experience. Any state will be starting a wholly new program with staff requiring skills different than or additive to a state's existing staff. It should be expected that a state must spend more in the initial phases than the Corps spends on a long- existing program.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all provisions of the program, and about the utility and feasibility of comparisons with the Corps' funding and staff.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0021)

Third, EPA must set requirements for staffing the state program and require the state to have certified wetland specialists for wetland identification and delineation. It is

unacceptable for a state to wholly rely on a permit applicant for this function. The state must have certified wetlands specialists capable of independently assessing extent, type, and impact to waters and wetlands as part of an assumed program and make sure that there are enough personnel to have the time to do so for each permit.
Fourth, EPA must make clear in its regulations that a state cannot expect to assume 404 permitting with existing (or one or two more) staff. It is inconceivable that a state could take on an entire program without adding staff and EPA should set that expectation immediately. If a state is not adding those staff, then the state has not invested the requisite financial resources into ensuring a comparable program to one administered by the Corps and EPA and adequate under the Clean Water Act.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all provisions of the program. This rulemaking preserves certain flexibility for Tribes and States, including by not establishing particular position descriptions or qualifications, or minimum staffing numbers. Rather, the rule requires certain information that will enable the Agency to judge whether a Tribal or State agency has the capacity to implement its program based on the specific conditions within its jurisdiction, such as expected numbers of permit applications, types of wetlands and surface waters likely to be affected, and number of threatened or endangered species potentially affected.**

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0003)

However, resources are a major consideration: CWA § 404 programs require substantial resources to develop and implement, in terms of both the staff required and the dollars needed to develop and administer an extensive and complex permit program. Indeed, this may be the primary reason why only two states have assumed responsibility for the program to date. The resource burden is even greater on tribes than on states, since tribes in general lack a tax base and have significantly fewer industries within their jurisdictions that would be available to share some of the costs, for example, through the assessment of permit fees.

Presumably EPA is aware of the cost and effort that its staff expends in an oversight role of an assumed program. It is unfortunate that EPA does not seem to recognize the need to fund tribes to take over this permitting program. It is summarily inadequate to suggest that the competitive wetlands program development grants or CWA § 106 funding are a viable means to fund such a program. Wetland program development grants could certainly be used to start a permitting program, but not to sustain it, and CWA § 106 grants are intended to fund tribal water quality monitoring programs. For tribes to begin down this arduous process requires a significant commitment on their part, one which they cannot responsibly take on without having at least some certainty in long-term funding streams.

If EPA truly wants to increase tribes' interest in assuming a CWA § 404 program, it must provide specific funding for tribes to build the capacity needed to receive assumed authority. Further, it must continue to fund tribes to administer the program once it is

delegated. Perhaps the DITCA (Direct Implementation Tribal Cooperative Agreement) framework could serve as a model for how EPA could support a sustainable tribal wetland permitting program. Alternatively, there could be an EPA-funded group or groups formed to assist tribes in developing CWA § 404 programs. The group could be based on EPA Regions, and would also support tribes in each region by providing the essential skills and expertise needed both to assess whether to assume authority for the program and to develop and manage it.

Moreover, the effort involved in seeking and obtaining CWA § 404(g) authority is itself very labor intensive, from a technical, legal and policy standpoint. The NTWC suggests that EPA consider streamlining the process, in terms of time commitment as well as paperwork. Training and support from EPA will be needed to educate the tribes on how to fill out the packet. In addition, such an effort not only costs tribes money but also requires tribes to take time away from other important efforts. Tribes are concerned that states are in a much better position than tribes staff-wise, as well as financially, to assume authority to manage the CWA § 404(g) program, which could lead to the additional problems discussed below.

Agency Response: EPA recognizes that lack of funding may affect the interest of Tribes and States in assuming the section 404 program. However, this rulemaking addresses the requirements and procedures for Tribal and State section 404 program approval, operation, and program withdrawal. Federal funding for Tribal and State programs is outside of the scope of this rulemaking. By streamlining and clarifying assumption requirements, EPA expects this rulemaking will reduce costs and confusion on the part of Tribes and States as they prepare to seek assumption. EPA would also be glad to work with Tribes to discuss concerns about the costs and effort of assumption.

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0030)

EPA should include clarifying revisions to its proposed rules regarding a state's financial commitment to ensure that states will be able to carry out all of the requirements of Section 404, the Section 404(b)(1) Guidelines, and any other federal requirements. Prior to submitting an application, the state must inquire to the Corps for an approximate accounting of the cost of administering Section 404 permits within the state. The applicant state should approximate how many permits it may process over the course of five years, estimate the number of professional staff required to process that number of permits, and estimate how much the state requires in its annual budget to run such a program for a period of five years using the Corps' data. The applicant state should also include data from the Corps in its application to provide a baseline for its financial accounting. Without a baseline to compare state applications, there is no way to actually evaluate whether an applicant state has the fiscal capacity to carry out a program that complies with federal law.

Agency Response: *See* Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404

program have the capacity to fully administer all provisions of the program, and about the utility and feasibility of comparisons with the Corps' funding and staff.

Nebraska Department of Environment and Energy (EPA-HQ-OW-2020-0276-0073-0003)

EPA is seeking comments on making revisions for requiring the submittal of additional evidence of commitment, job descriptions and position qualifications for assumed program implementation and is requesting comments for additional types of information that should be provided to EPA for assumption such as metrics to determine funding and staffing needs based on Corps 404 programs.

- The current required program elements for an application to EPA already require a complete program description including sustainable funding, staffing descriptions, estimated workloads, approved State regulations and letters from both the Governor and Attorney General. This appears to be adding unnecessary and duplicative burdens on States. The Corps data has shown to be incomplete and inconsistent between Corps Districts and among staff within the same District making using their data to estimate assumed program needs difficult.
    - The Department suggests leaving the required program elements from the previous rule as is. Information as to how each of these elements may be developed should be provided in guidance and EPA should work with the Corps to streamline their data entry to provide consistently among Corps Districts.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0030.**

3.2 Other comments on the program assumption requirements

Individual commenter (EPA-HQ-OW-2020-0276-0058-0001)

As it stands the states that have assumed 404 have been wholly unprepared for the financial burden they placed on themselves. They've also used their assumption of the program to weaken protections and fail in their duties to enforce the law. Please ensure that any assumption of 404 regulations by states or tribes only occurs after they've shown that they have the financial ability to run the program and actually intend on enforcing the law.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all provisions of the program.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0010)

As noted in EPA's Economic Analysis for the Proposed Clean Water Act Section 404 Tribal and State Program Rule ("Economic Analysis"), the existing regulations already require that the program description contain information on available funding, manpower, and compliance evaluation and enforcement programs, and therefore the proposed changes to this provision are not a substantial change from the baseline because it does not impose any specific metrics for States to meet. Florida agrees with EPA's

decision not to include specific threshold metric requirements. Based on the Economic Analysis and other EPA statements, the revisions in this section are not intended to be more stringent or shift the benchmarks to create new rigorous requirements. EPA should ensure that the proposed revisions are not used as a way to impose more onerous standards on States.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to administer all provisions of the program. This rulemaking preserves certain flexibility for Tribes and States by not setting bright line budgetary or funding requirements, such as presuming that reallocations of resources are presumptively inadequate. Rather, the rule requires certain information that will enable the Agency to judge whether a Tribal or State agency has the capacity to implement its program based on the specific conditions within its jurisdiction, such as expected numbers of permit applications and numbers of threatened or endangered species potentially affected.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0008)

EPA proposes to revise the current program assumption requirements to clarify and add to the information required as part of the application package for program assumption [Footnote 2: 88 Fed. Reg. 55,283.]. The Proposed Rule provides more detail on what EPA is looking for when asking for descriptions of available resources and existing programs and makes mandatory certain descriptions by replacing the word "should" with "must" in CFR 233.11(a) [Footnote 3: The proposed changes to the program assumption requirements also include additional guidance on the development of the "retained waters" description and a compensatory mitigation description requirement, which are discussed in more detail in sections IV. and V. below.].

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all provisions of the program.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0009)

Although Florida generally supports EPA's efforts to provide clarity on the requirements for a complete application, EPA should be cautious not to allow additional terms to hinder state assumption. And EPA should ensure that it does not depart from the plain text of Section 404(g)(1), which provides that a state application needs to be a "full and complete description of the program" along with a legal "statement" explaining that the State has "adequate authority to carry out the described program…" 33 U.S.C. § 1344(g)(1) (emphasis added). Respecting and trusting the States to manage their water resources effectively and in compliance with law, Congress did not mandate an overly complicated or comprehensive application process. In fact, Congress directed that, within 120 days of the filing of a complete application, EPA "shall" approve or disapprove the program. If EPA does not act within that timeframe, the state program is automatically "deemed approved." Id. § 1344(h)(3).

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all provisions of the program. Consistent with the commenter's recommendation, this rulemaking preserves certain flexibility for Tribes and States, and EPA expects that the rule's new requirements will still enable EPA to carry out its obligation to evaluate program submissions and either approve or disapprove them within 120 days of receipt of a complete program submission.**

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0006)

NAWM supports the Agency's efforts to clarify the requirements it views as essential for States and Tribes to be authorized to assume the CWA Section 404 Program. These requirements need to be consistent and transparent so that all parties, including States, Tribes, and the regulated community, understand the metrics which EPA will use to judge the adequacy of the applicant and the applicant's baseline resources which are needed to implement the Section 404 program. As is indicated in the proposed rule, these requirements must include the regulatory framework, personnel, and the resources sufficient to implement the program and to comply with the 404(b)(1) Guidelines. It is incumbent on the Regional Administrator to assure that the submitted intent and application is supported by a budget, personnel plan and commitment which indicates a good faith effort to meet the program requirement outlined in subparts C through E. These elements are also important to support the resource investment of EPA and other resource partners in the assumption application process. They are equally important to assure affected communities that their aquatic resources will be protected and project proponents that the State or Tribe have sufficient resources to review their proposals in a timely manner.

Many States and Tribes, while having interest in applying for authorization, would not have the capacity, necessary resources, nor the ability to hire and fund a program until such time as the application is approved. The final rule needs to be clear on the expectations of EPA for an approved applicant to obtain personnel and budgetary resources so that interested States and Tribes can include this into their cost estimates for program implementation and secure leadership authorization and support. States and Tribes are best suited to determine the appropriate times frames for implementation however, NAWM fully supports the identification of clear and transparent expectations for those interested in applying for authorization.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all provisions of the program. EPA agrees that program submission requirements must be consistent and transparent, and the final rule is intended to achieve those goals.** ***See*** **Section IV.B.5 for a discussion about the time frame for program implementation.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0014)

The EPA must take advantage of this rare opportunity and ensure that state governments who wish to assume the 404 program are crystal clear on what resources will be required to assume the program and understanding of the requisite coordination and oversight with the Corps and EPA. The rule must require a clear plan of action, with detailed benchmarks a state must meet when assuming the program, and outline the actions that the EPA will take if a state is not meeting its Clean Water Act obligations, including revoking the program.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to fully administer all provisions of the program. EPA agrees that program submission requirements must be consistent and transparent, and the final rule is intended to achieve those goals.** ***See*** **Section IV.E.2 of the final rule preamble for a discussion about EPA's revisions to program withdrawal procedures.**

4. Compliance with compensatory mitigation requirements and federal oversight of third-party instruments

Individual commenter (EPA-HQ-OW-2020-0276-0050-0006)

Regarding mitigation, EPA should provide specificity on whether or how particular provisions of subpart J should or should not apply to Tribal or State programs. This would clear up additional confusion and would encourage more Tribes and States to assume. If a Tribe or State establishes third party mechanisms, then EPA and the other listed agencies should be informed and able to review them. Relevant Tribal or State agencies, such as Fish and Wildlife Services, should be added to the list.

Agency Response: The Agency appreciates commenter input regarding the application of subpart J of the 404(b)(1) Guidelines to Tribal or State programs. ***See*** **Section IV.B.4 of the final rule preamble for further discussion as to how subpart J applies to Tribal and State programs and the response to these comments.**

Regarding the comment on third party mechanisms, the Agency is finalizing a new provision that outlines a process which requires Tribes or States administering section 404 programs to transmit a copy of each draft instrument to EPA, the Corps, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service (if appropriate) for review prior to approving the final instrument, as well as to any Tribal or State resource agencies to which the Tribe or State committed to send draft instruments in the program description. ***See*** **Section IV.B.4 of the final rule preamble for further discussion of third party compensatory mitigation instrument oversight and approval.**

Environmental Protection Network (EPN) (EPA-HQ-OW-2020-0276-0057-0009)

Wetlands Mitigation and Coordination under the Endangered Species Act and National Historic Preservation Act

EPN has two other areas of concern. The final rule should include references to the current regulations requiring compensatory mitigation and the procedures for implementing those requirements. It should be clear that the assumed programs will have to follow the same tiered approach to compensatory mitigation set out in the current regulations.

Agency Response: ***See*** **the Section IV.B.4 of the final rule preamble for the Agency's response to this comment.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0031)

State applications to assume Section 404 permitting authority must include, in detail, how the state will comply with the mitigation requirements set forth in subpart J of the Section 404(b)(1) Guidelines. 40 C.F.R. §230 subpart J. The best approach to this, and the one most likely to promote consistency and ease for EPA, permittees, and citizens, is for EPA to simply require that states adopt outright or incorporate by reference the Section 404(b)(1) Guidelines, including and especially when it comes to mitigation.

The purpose of the CWA is to avoid or minimize impacts to jurisdictional waters and wetlands, and in the event that those impacts cannot be avoided, to then require mitigation of those impacts. 40 C.F.R. part 230. Mitigation requirements are hierarchical to ensure that waters and wetlands are protected from impacts to protect aquatic values. 40 C.F.R. § 230.91(c). The most consistent avenue to ensure that states are actually meeting the substantive criteria outlined in the Section 404(b)(1) Guidelines is to require states to adopt those guidelines or incorporate them by reference.

Further, any mitigation agreements or "instruments" that the applicant state proposes to use must be reviewed by EPA and the Corps before they are effective. It is the duty of the Corps to ensure that actions are not infringing on its jurisdiction, and it is the duty of EPA to ensure that state-assumed programs do not violate the CWA. Any instruments addressing mitigation cannot be approved until they address all concerns that EPA identifies in its review. Further, any instruments addressing mitigation must also be sent to tribes within the state and tribes with ancestral territory within the state's permitting area.

EPA should also amend the 404(b)(1) Guidelines to supersede the 1994 Alaska Wetlands Initiative and other EPA and Army Corps' memoranda regarding compensatory mitigation in Alaska, which have been applied—frequently at the expense of Alaska Tribes—to provide lesser protection and compensation for Alaska wetlands than for wetlands in other regions of the country.

Agency Response: ***See*** **Section IV.B.4 of the final rule preamble for discussion on ensuring consistency and compliance with subpart J of the 404(b)(1) Guidelines and the Agency's response to this aspect of the comment.**

Regarding the comment on third party mechanisms, ***see*** **Section IV.B.4 of the final rule preamble for further discussion and the Agency's response to this aspect of the comment. The final rule process for third party mechanisms does not require the Tribe or State to provide the draft instrument to Tribes within the State's permitting area or with interests within the Tribe's or State's jurisdiction, because review of the third party mechanisms is part of EPA's oversight of Tribal and State programs, and Tribes do not exercise oversight over assumed programs. However, a Tribe or State can commit to sending draft instruments to Tribes and State resource agencies in their program description or elect to send draft instruments on a case-by-case basis.**

The comment on amending the 404(b)(1) Guidelines is outside the scope of this rulemakings. This rulemaking does not revise the 404(b)(1) Guidelines.

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0016)

EPA proposes requiring States to include a description of its compensatory mitigation approach "consistent with the requirements of part 230, subpart J." [Footnote 7: 88 Fed. Reg. 55,292.] Although it still must be as stringent as the requirements of subpart J, EPA makes clear that a "State's approach may deviate from the specific requirements of subpart J to the extent necessary to reflect State administration of the program using State processes as opposed to Corps administration." [Footnote 8: Id.]

Florida supports allowing States to develop and implement the compensatory mitigation approach that is the best fit for the particular State so long as it is consistent with the minimum requirements of the Clean Water Act. Among the three States that have assumed the 404 program, each State has codified a different approach to determining appropriate amounts of required compensatory mitigation. For example, while New Jersey and Michigan primarily calculate required compensation based on acre ratios, Florida relies on the Uniform Mitigation Assessment Method, which considers numerous factors, including current condition of the wetlands, hydraulic connection, uniqueness, fish and wildlife utilization, and mitigation risk [Footnote 9: See Fla. Admin. Code R. 62-345.300.]. For purposes of issuing Section 404 permits outside these three programs, the Corps is responsible for determining whether compensatory mitigation is required for a specific Section 404 permit [Footnote 10: 40 C.F.R. §§ 230.5, .91(c)(2).]. The Corps makes such determinations based on what is "practicable" and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity [Footnote 11: Id. §§ 230.93(a), (c).]. The Guidelines define "practicable" as "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."[Footnote 12: See id. § 230.3(l).]

Agency Response: ***See*** **Section IV.B.4 of the final rule preamble for discussion on ensuring consistency and compliance with subpart J of the 404(b)(1) Guidelines and the Agency's response to this aspect of the comment.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0018)

EPA is also proposing to include additional federal oversight over third-party compensatory mitigation instruments used in state 404 programs. Specifically, EPA is proposing that States that use these mechanisms must submit instruments associated with these mechanisms, if any, to EPA, the Corps, the U.S. Fish and Wildlife Service ("USFWS"), the National Marine Fisheries Service ("NMFS"), and any state resource agencies to which the State committed to send draft instruments in the program description for comment.

Florida cautions EPA not to create rigid new standards that will frustrate States' ability to develop and implement a compensatory mitigation approach that best fits each particular State. As discussed above, Florida's compensatory mitigation approach has been successful in meeting the requirements of 40 C.F.R. 230 prior to this type of proposal.

Agency Response: ***See*** **Section IV.B.4 of the final rule preamble for discussion on ensuring consistency and compliance with subpart J of the 404(b)(1) Guidelines and the Agency's response to this aspect of the comment.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0014)

C. EPA must ensure that state 404 programs have equivalent mitigation requirements.

EPA must ensure that mitigation requirements for state programs will comply with the mitigation requirements set forth in subpart J of the Section 404(b)(1) Guidelines. To foster that and ensure that the requirements are transparent, EPA must detail in the rule the minimum substantive requirements for state programs that are fully equivalent to federal requirements, including the federal program's policy for no net loss of wetlands. EPA must ensure that state programs detail how they will comply with these mitigation requirements.

The purpose of the Clean Water Act is to avoid or minimize impacts to jurisdictional waters and wetlands, and in the event that those impacts cannot be avoided, to then require mitigation of those impacts. 40 C.F.R. part 230. Mitigation requirements are hierarchical to ensure that waters and wetlands are protected from impacts to protect aquatic values. 40 C.F.R. § 230.91(c). The most consistent avenue to ensure that states are actually meeting the substantive criteria outlined in the Section 404(b)(1) Guidelines is to require states to adopt those guidelines or incorporate them by reference.

Further, EPA cannot allow state programs to pick and choose between the forms of mitigation allowed (permittee responsible, mitigation banks, and in-lieu fees). This would allow state programs to circumvent the established hierarchy of using these forms of mitigation and would not be equivalent to the federal program. 40 CFR § 230.93(b). All three have a function and some, like permittee-responsible mitigation, is often less successful and therefore generally less favored. 40 CFR § 230.93(a)(1), (b). State

programs that do not provide for all and follow the established hierarchy for their use would have less stringent compensatory mitigation requirements as compared to the federal program.

Further, any mitigation agreements or "instruments" that the applicant state proposes to use must be reviewed by EPA and the Corps before they are effective. It is the duty of the Corps to ensure that actions are not infringing on its jurisdiction, and it is the duty of EPA to ensure that state-assumed programs do not violate the Clean Water Act. Any instruments addressing mitigation cannot be approved until they address all concerns that EPA identifies in review.

EPA should move forward with their proposed approach to require state programs to: (1) send third party mechanisms' instruments to EPA, Corps, USFWS, NMFS and Tribal or state resource agencies for review prior to issuance, (2) satisfy all concerns raised by federal agencies prior to issuance, and (3) receive approval of third-party mechanisms' instruments from EPA, Corps, USFWS, NMFS and Tribal or state resource agencies prior to issuance.

Agency Response: ***See*** **Section IV.A.2 and IV.A.3 of the final rule preamble regarding compliance with the 404(b)(1) Guidelines and requirements for Tribal and State programs to be consistent with and no less stringent than the requirements of the Act and its implementing regulations. Regarding the comment on ensuring consistency and compliance with subpart J of the 404(b)(1) Guidelines, including the application of the hierarchy approach,** ***see*** **Section IV.B.4 of the final rule preamble for further discussion and the Agency's response to this aspect of the comment.**

Regarding the comment on third party mechanisms, ***see*** **Section IV.B.4 of the final rule preamble and the Agency's response to comment EPA-HQ-OW-2020-0276-0063-0031.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0067)

- Any instruments addressing mitigation must also be sent to Tribes within the state and Tribes with ancestral territory within the state's permitting area.

Agency Response: **S*ee*** **Section IV.B.4 of the final rule preamble for further discussion and the Agency's response to comment EPA-HQ-OW-2020-0276-0063-0031.**

State of Michigan, Michigan Department of Environment, Great Lakes, and Energy (EGLE), Water Resources Division (EPA-HQ-OW-2020-0276-0071-0004)

The proposed rule appears to allow the states some flexibility in meeting the compensatory mitigation requirements of Part 230, Subpart J. The WRD supports allowing states to deviate from the specific requirements of Subpart J as long as they are no less stringent.

Agency Response: ***See*** **Section IV.B.4 of the final rule preamble for discussion on ensuring consistency and compliance with subpart J of the 404(b)(1) Guidelines and the Agency's response to this comment.**

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0012)

The goal of mitigation is to replace functions lost and degraded through permitted activities which allow for impacts to aquatic resources. It is a key component of any wetlands permit program and essential to comply with the intent of the CWA and the 404(b)(1) Guidelines. Many tools can be used to achieve this functional replacement, and these may include in- lieu-fee and banking projects. In order for EPA to assure that an assumed State or Tribal program is compliant with the 404(b)(1) Guidelines, subpart J, EPA should provide clear direction on what the expectation is for resource mitigation including banking and in-lieu- fee proposals. This includes what standards EPA will be using for the review of an applicant's proposed mitigation program. As part of the application process NAWM suggests that standards for mitigation prospectus review be included and reviewed during the assumption application process and memorialized in the MOA between the State or Tribe and the federal resource agencies; these standards should also be consistent with the mitigation requirements for retained waters mitigation (i.e., the 2008 Corps and EPA Mitigation Rule). EPA, in its oversight role, should screen the banking or in-lieu-fee proposal prospectuses and, should the prospectus not comply with the agreed upon elements outlined in the MOA, coordinate with the other federal resource agencies for concurrence prior to approval. The mitigation proposals should include an analysis of functions lost and diminished as a result of permit issuance, expected functional gain of replacement or uplift proposals, monitoring protocol (including measurable success criteria), and financial assurance mechanisms.

Agency Response: ***See*** **Section IV.B.4 of the final rule preamble for further discussion of third party mechanisms and the Agency's response to this comment. As discussed in that Section, the standards EPA will use to evaluate proposed mitigation programs are that while it may deviate from the specific requirements of subpart J to the extent necessary to reflect Tribal or State administration of the program, the mitigation mechanisms may be no less stringent than the substantive criteria for compensatory mitigation described in 40 CFR part 230, subpart J.** ***See*** **Section IV.A.2 and IV.A.3 for a description of requirements for Tribal and State programs to be consistent with and no less stringent than the requirements of the Act and its implementing regulations including issuance of permits which comply with the 404(b)(1) Guidelines.**

National Association of Home Builders (NAHB) (EPA-HQ-OW-2020-0276-0077-0013)

Concerning compensatory mitigation requirements for state or tribal programs seeking CWA 404 assumption, EPA's proposal reaffirms the CWA 404(b)(1) guidelines and EPA's implementing regulations provide that every permit issued must apply and ensure compliance under the CWA, including compensatory mitigation requirements [Footnote 28: 88 Fed. Reg. 55293 (August 14, 2023).] [Footnote 29: 40 C.F.R. 230, Subpart J] NAHB recognizes that any state or tribal program receiving CWA 404 assumption must ensure compensatory mitigation performed as a permit condition of a CWA 404 permit must be consistent with the Corps' compensatory mitigation requirements [Footnote 30:

See Corps (2008) Compensatory Mitigation of Losses of Aquatic Resources (73 Fed. Reg. §§19594-19650)]. While NAHB recognizes this, EPA and Corps must address the lack of options available to abide by the 2008 Mitigation Rule [Footnote 31: 70 Fed. Reg. 19594 (April 10, 2008).] .NAHB urges the Agencies to work together to ensure enough mitigation banks are online and available to meet the market's demand. The Interagency Review Team (IRT) process to approve mitigation banks is slow, convoluted, and faulty. Home builders must compete with private companies and state and federal agencies for credits that are oftentimes scares and overly expensive. To address the nation's housing shortage, our members desperately need access to all mitigation options, including having credits readily available for purchase. NAHB urges the agencies to adopt reasonable compensatory mitigation banking programs that will be applied consistently and provide other options such as in lieu fee programs as a viable compensatory mitigation option. EPA should work with the states and Tribes seeking to assume the CWA 404 permitting program to expedite the IRT process to create additional mitigation options in their boundaries.

Agency Response: While the Agency appreciates commenter input on available options to meet compensatory mitigation requirements, the development of mitigation banks or other mitigation mechanisms is outside the scope of this rulemaking. This rulemaking solely addresses the implementing regulations for CWA section 404 Tribal and State programs.

Regarding the comment on the instrument review process, see Section IV.B.4 of the final rule preamble for further discussion.

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0028)

State applications to assume Section 404 permitting authority must include, in detail, how the state will comply with the mitigation requirements set forth in subpart J of the Section 404(b)(1) Guidelines. 40 C.F.R. §230 subpart J. The best approach to this, and the one most likely to promote consistency and ease for EPA, permittees, and citizens, is for EPA to simply require that states adopt outright or incorporate by reference the Section 404(b)(1) Guidelines, including and especially when it comes to mitigation.

The purpose of the CWA is to avoid or minimize impacts to jurisdictional waters and wetlands, and in the event that those impacts cannot be avoided, to then require mitigation of those impacts. 40 C.F.R. part 230. Mitigation requirements are hierarchical to ensure that waters and wetlands are protected from impacts to protect aquatic values. 40 C.F.R. § 230.91(c). The most consistent avenue to ensure that states are actually meeting the substantive criteria outlined in the Section 404(b)(1) Guidelines is to require states to adopt those guidelines or incorporate them by reference.

Further, any mitigation agreements or "instruments" that the applicant state proposes to use must be reviewed by EPA and the Corps before they are effective. It is the duty of the Corps to ensure that actions are not infringing on its jurisdiction, and it is the duty of EPA to ensure that state-assumed programs do not violate the CWA. Any instruments addressing mitigation cannot be approved until they address all concerns that EPA

identifies in its review. Further, any instruments addressing mitigation must also be sent to tribes within the state, tribes with ancestral territory within the state's permitting area, and tribes with off-reservation reserved rights within the state.

Agency Response: ***See*** **Section IV.B.4 of the final rule preamble for discussion on ensuring consistency and compliance with subpart J of the 404(b)(1) Guidelines and the Agency's response to this aspect of the comment.**

In response to the comment on third party mechanisms, ***see*** **Section IV.B.4 of the final rule preamble and the Agency's responses to comments EPA-HQ-OW-2020-0276-0063-0031 and EPA-HQ-OW-2020-0276-0072-0012.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0005)

The Proposed Rule would add a requirement that a State's assumption application include "[a] description of the State's approach to ensure that all permits issued satisfy the substantive standards and criteria for the use of compensatory mitigation consistent with the requirements of part 230, subpart J." [Footnote 17: 88 Fed. Reg. 55292–55294, 55325.] Subpart J is the compensatory mitigation portion of the 404(b) Guidelines [Footnote 18: See 40 Code of Fed. Reg. ("C.F.R.") parts 230.91–.98 (entitled "Compensatory Mitigation for Loss of Aquatic Resources").]. EPA indicates that a State "may deviate from the specific requirements of subpart J to the extent necessary to reflect State administration of the program using State processes as opposed to Corps administration . . . [but] may not be less stringent than the requirements of subpart J." [Footnote 19: 88 Fed. Reg. 55325.].

The State appreciates EPA's explicit recognition of the flexibility the States enjoy when crafting a compensatory mitigation program tailored to their State. Last legislative session, in Alaska, we obtained broad consensus on how to expand and improve upon the Corps' compensatory mitigation program in Alaska. We discussed allowing permittees to clean up contaminated sites affecting water quality, completing projects to improve fish passage, and improving wastewater management, among other projects that would improve the health of Alaska's environment. We spoke with EPA Region 10, who expressed their support. States are incentivized to find the projects that would most improve water quality in their State and to design a compensatory mitigation system accordingly. The Corps has no such incentive. We appreciate EPA's continued support on this point.

Agency Response: The Agency appreciates the commenter's support for flexibility in compensatory mitigation programs, which may differ from the substantive criteria of subpart J of the 404(b)(1) Guidelines, but Tribal or State section 404 programs must be consistent with and no less stringent than federal requirements.

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0027)

State applications to assume Section 404 permitting authority must include, in detail, how the state will comply with the mitigation requirements set forth in subpart J of the Section 404(b)(1) Guidelines. 40 C.F.R. §230 subpart J. The best approach to this, and

the one most likely to promote consistency and ease for EPA, permittees, and citizens, is for EPA to simply require that states adopt outright or incorporate by reference the Section 404(b)(1) Guidelines, including and especially when it comes to mitigation.

The purpose of the CWA is to avoid or minimize impacts to jurisdictional waters and wetlands, and in the event that those impacts cannot be avoided, to then require mitigation of those impacts. 40 C.F.R. part 230. Mitigation requirements are hierarchical to ensure that waters and wetlands are protected from impacts to protect aquatic values. 40 C.F.R. § 230.91(c). The most consistent avenue to ensure that states are actually meeting the substantive criteria outlined in the Section 404(b)(1) Guidelines is to require states to adopt those guidelines or incorporate them by reference.

Agency Response: ***See*** **Section IV.B.4 of the final rule preamble for discussion on ensuring consistency and compliance with subpart J of the 404(b)(1) Guidelines and the Agency's response to this comment.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0028)

Further, any mitigation agreements or "instruments" that the applicant state proposes to use must be reviewed by EPA and the Corps before they are effective. It is the duty of the Corps to ensure that actions are not infringing on its jurisdiction, and it is the duty of EPA to ensure that state-assumed programs do not violate the CWA. Any instruments addressing mitigation cannot be approved until they address all concerns that EPA identifies in its review. Further, any instruments addressing mitigation must also be sent to Tribes within the state and Tribes with ancestral territory within the state's permitting area.

EPA should also amend the 404(b)(1) Guidelines to supersede the 1994 Alaska Wetlands Initiative and other EPA and Army Corps' memoranda regarding compensatory mitigation in Alaska, which have been applied—frequently at the expense of Alaska Tribes—to provide lesser protection and compensation for Alaska wetlands than for wetlands in other regions of the country.

Agency Response: **S*ee* Section IV.B.4 of the final rule preamble and response to comment EPA-HQ-OW-2020-0276-0063-0031.**

California State Water Resources Control Board (EPA-HQ-OW-2020-0276-TRANS-082423-003-0002)

Comment 2

I just want to verify that the requirement for EPA review of compensatory mitigation would only apply to states that have assumed 404 program administration and will not affect mitigation required under state authorities.

Agency Response: This rulemaking solely addresses the implementing regulations for CWA section 404 Tribal and State programs.

Chickaloon Native Village (EPA-HQ-OW-2020-0276-TRANS-092923-009-0008)

We in Alaska have massive acres of wetlands, thousands, and thousands of acres and correspondingly massive, planned projects across the street that would dredge and fill wetlands. We agree with Patty Whitehead's comment that intermittent wetlands that don't fall under the Sackett rule are still vital for habitat. Currently, compensatory mitigation in Alaska operates under an Alaska exception that allows the Corps to permit projects without compensatory mitigation. We would like to see the EPA require the state of Alaska to have compensatory mitigation for all wetland permitting as a condition for the state to take over primacy. EPA wants comments on whether there is a need for specificity on requirements for compensatory mitigation, and whether third-party compensatory mitigation mechanisms should be provided to EPA, and we emphatically agree yes, that is needed.

Agency Response: See Section IV.B.4 of the final rule preamble for further discussion on ensuring consistency and compliance with subpart J of the 404(b)(1) Guidelines and third-party mechanisms. Nothing in this rulemaking prevents the State from requiring mitigation for impacts to other waters and EPA encourages Tribes to work with the State to protect these resources.

5. Effective date for approved programs

Individual commenter (EPA-HQ-OW-2020-0276-0050-0007)

I agree that the section 404 Tribal and State program regulations should have an effective date for transfer, the maximum time limit should be longer than 120 days, as Congress may be overestimating the ease at which these transfers will happen. The public should be informed of the selected timeframe and what that transition entails. A comment period needs to be established so that the public's opinion on the assumption can be heard and considered. I also agree that, should a Tribe or State request a longer timeframe, they should include in their program description their reasoning and a plan.

Agency Response: The Agency appreciates commenter input regarding the establishment of an effective date for transfer of approved programs. The Agency proposed to establish, as a default, a minimum effective date of 30 days from publication of the notice of EPA's program approval in the Federal Register, but also to allow for an effective date of up to 120 days from publication of notice in the Federal Register. The final rule provides for a presumptive 30-day effective date, but also provides that Tribes and States can request an effective date that is up to 180 days from publication of the notice of EPA's program approval in the Federal Register. *See* Section IV.B.5 of the final rule preamble for further discussion of the Agency's rationale for this provision.

Idaho Department of Environmental Quality (IDEQ) (EPA-HQ-OW-2020-0276-0059-0002)

II. Program Assumption Requirement

The proposed Rule would revise current requirements and specify that the transfer of an approved program to a Tribe or State would take effect 30 days after publication of the

notice of EPA's program approval in the Federal Register, except where EPA and the Tribe or State have established a later effective date (not to exceed 120 days from the Federal Register publication). Idaho is one of the many states fully authorized to assume the National Pollutant Discharge Elimination System (NPDES) program which was successfully transferred using a phased-in approach. IDEQ recommends that the final Rule not default to a 30-day, with a maximum 120-day, effective date to allow Tribes or States to negotiate the flexibility to begin program administration and allow for best program implementation. A regulatory phased-in approach may be necessary for Tribes and States to provide added time to hire additional qualified staff and increase resources to implement and expand budgetary constraints required for program development and implementation. Though legislative support or proof of allocated funds may be submitted as part of the assumption process, budget cycles and/or hiring processes may not align with the timing of fund allocation or staffing availability. Therefore, an allowance for effective date flexibility is warranted and should be provided in the Memorandum of Agreement (MOA) with the Regional Administrator. Furthermore, the proposed Rule does not specify the conditions or circumstances under which a Tribe or State may request a later effective date from the date of the program assumption notice publication in the Federal Register.

Agency Response: ***See*** **Sections IV.B.1 and IV.B.5 of the final rule preamble for the Agency's rationale for this provision. The Final Rule provides for a 30-day default effective date of program transfer and allows for later effective dates up to a maximum period of 180 days from publication of the notice of EPA's program approval in the Federal Register. In Section IV.B.5 of the final rule preamble, EPA discusses some of the circumstances that could lead a Tribe or State to request a longer effective date, but EPA does not intend for this discussion to specify the only conditions or circumstances that might support a request for a later effective date.**

Association of Clean Water Administrators (ACWA) (EPA-HQ-OW-2020-0276-0060-0006)

Delayed Effective Date: We appreciate EPA's inclusion of new language in the Proposed Rule that would provide a default delay period between EPA approval of a state's assumption section 404 authority and the effective date upon which the state begins administration of the program. However, 30 days (as provided in the Proposed Rule) is an insufficient amount of time for states to take necessary steps to ensure that section 404 authority can be transferred to states without any disruption. We recommend that EPA modify the Proposed Rule to provide a default period of at least 120 days between EPA approval of state assumption and the effective date on which states begin administration of the section 404 program.

Agency Response: Based on prior experience and consistent with some of the comments received, EPA believes that 30 days is a sufficient amount of time for program transfer when a Tribe or State has its staff and other resources in place. The final rule also allows flexibility for Tribes and States to request the effective date be up to 180 days from publication of the notice. ***See*** **Section IV.B.5 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0050-0007.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0011)

EPA proposes that the effective date for a state program would commence, and a State would begin administering its program, 30 days after EPA's approval is published in the Federal Register, except where EPA and the State have agreed to a later date not to exceed 120 days from publication [Footnote 4: 88 Fed. Reg. 55,294.]. The existing regulations provide that the transfer of permitting authority shall not be considered effective until EPA's approval is published in the Federal Register, but otherwise do not dictate the timing requirements for an effective date.

States seeking assumption make significant investments to apply for and obtain approval of a state Section 404 program and may often be prepared to assume the program as soon as it is approved. Arrangements for timely and effective transfer of the program can be addressed between the State, the Corps, and EPA, and should be left to a state-specific decision with maximum flexibility to select an effective date that is appropriate under the circumstances.

Although Florida supports EPA's efforts to allow flexibility for a State to request a later effective date, the 30-day minimum effective date is not necessary. Rather than setting a strictly prescribed minimum effective date, EPA should work with each State seeking assumption on developing a timeframe that is tailored to the State, which would be identified in the MOA.

Agency Response: ***See*** **Section IV.B.5 of the final rule preamble for a discussion of the thirty-day minimum effective date.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0059)

XIV. EPA's decision on whether to approve an application to assume the 404 program is a rulemaking that requires at least a thirty-day delay in effect.

We agree that EPA must provide at least a thirty-day delay in effect of a decision to approve a 404 state assumption application. 88 Fed. Reg. 55,294-95. Although EPA may expand this delay beyond thirty days, EPA must comply with the Administrative Procedure Act's default effective date of thirty days. When EPA decides to approve a state 404 assumption application, it is engaging in rulemaking, not adjudication. Ctr. for Biological Diversity v. Regan, 597 F.Supp.3d 173, 211-12, & n.9 (D.D.C. 2022). As a result, the procedural requirements of the Administrative Procedure Act apply, and EPA must provide at least a thirty- day delay in the effective date of its decision. 5 U.S.C. § 553(d).

This thirty-day delay is necessary to ensure that members of the public have an opportunity to request that EPA stay the effect of its decision pending any potential legal challenge on EPA's action. 5 U.S.C. § 705. Without this delay, affected members of the public will be deprived of their legal right to seek a stay from the agency. See Ctr. for Biological Diversity v. Regan, No. CV 21-119 (RDM), 2023 WL 5437496 (D.D.C. Aug. 23, 2023).

A minimum thirty-day delay would also provide structure for a more seamless transition to state permitting, rather than a haphazard scramble on the part of the Corps and states. By clearly establishing this delayed effective date, an assuming state and the Corps would be able to plan for the transfer, allow time for permit files to be transmitted, and create more certainty for all parties involved.

Agency Response: EPA has finalized the thirty-day minimum delay between publication in the Federal Register and effective date of a Tribal or State program. *See* Section IV.B.5 of the final rule preamble for a discussion of the minimum and maximum time between approval and program administration.

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0018)

C. Limited transfer period introduces substantial risk into application for smaller Tribes and States.

The narrow window for the date of transferring program administration disproportionately impacts smaller Tribes and States. In order to be ready for the transfer within the 30 days (stated as a default) or 120 days (the proposed maximum time), EPA recommends that "a Tribe or State should not wait until EPA approves the program before initiating hiring and training processes for staff that were committed in the program description."[Footnote 16: Clean Water Act Section 404 Tribal and State Program Regulation, 88 Fed. Reg. 55,295.] Most States that have conducted feasibility studies estimate a training period of 1-2 years.[Footnote 17: "Economic Analysis for the Proposed Clean Water Act Section 404 Tribal and State Program Rule," (June 2023) 14-18.] However, one would assume that EPA approval is not necessarily a given for all programs. Initiating hiring and training processes while the authorization is pending is a gamble. By making the transfer period shorter than the time reasonably expected for creating a new administrative program, the proposed Rule creates a barrier of risk for Tribes unwilling to dedicate scarce resources before the EPA ruling is known. This could be alleviated by allowing a broader range of possible dates when drafting the Memorandum of Agreement with EPA.

Agency Response: EPA recognizes that while Tribes or States with similar programs may not need to add significant resources prior to program approval, those without existing programs probably need to commit new resources, and possibly hire or train staff, before EPA has determined whether their programs are approved. To limit the scope of these resource commitments early in the process, EPA is allowing Tribes and States to demonstrate the need for an effective date that is up to 180 days from the date of formal program approval. The Agency is also available to work closely with a Tribe or State as it prepares its program submission and to help address concerns about timing, resources, and other issues. Since the Tribe or State controls the timing of its program submission, this coordination should help the Tribe or State develop a clearer understanding of the sufficiency of its proposed program and better time its commitment of administrative resources before the Tribe or State submits a program assumption request. With these measures, the Agency believes that by the

time a Tribe or State has submitted an approvable program, it should be in a position to take all remaining steps to fully implement the program by the agreed-upon effective date.

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2 020-0276-0072-0013)

In order to assure a smooth transition of the 404 program from the Corps to a State or Tribe we believe that a specific time frame for application, permit review and compliance transfer be established. This time frame could have multiple variables depending on the regulatory and resource status of the approved authority. If an approved program needs to develop a program structure, secure implementation funding, hire qualified staff, and implement a permitting program there could be a need for flexibility in the effective date of the approved program. Therefore, it would seem reasonable that a range of time be established in the proposed rule to accommodate the potential variability in the existing regulatory structure of the approved State or Tribe. The effective date should be included in the Federal Register notice of approval, and it would seem unlikely to be less than 30 days from notice and should not be greater than 120 days as indicated in the proposal. Any time frame greater than 120 days would seem to indicate that the applying authority is not yet prepared to assume the program and so notice should be withheld until such time as the applying State or Tribe can meet the time frames proposed. States and Tribes have indicated that flexibility needs to be maintained in the determination of the effective date and should be dependent upon the needs and resources of the individual applying authority.

Agency Response: EPA agrees that specifying a program transfer period of at least 30 days will provide the benefits that the commenter identifies, whereas the need for a very long time frame could indicate the Tribe or State is not sufficiently prepared to assume the program. However, the Agency has determined that there may be instances in which a Tribe or State can meet the requirements for program assumption, but still demonstrate the need for up to 180 days to ensure it is able to fully implement the program. *See* Section IV.B.5 of the final rule preamble.

Nebraska Department of Environment and Energy (EPA-HQ-OW-2020-0276-0073-0006)

Approved program effective date delay of up to 120 with an automatic delay of 30 days once EPA approves the program application.

- Delaying the effective date allows for additional training of new program staff and potential applicants and gives the Corps and those with permits already in the review process time to either complete them or prepare to begin a new application for a State 404 permit. This will help alleviate the Corps transferring a larger workload than necessary as many permits being reviewed can be completed and new permittees can be notified of the program effective date and can plan accordingly.

Agency Response: EPA agrees that specifying a program transfer period of 30 to 180 days will provide these benefits. *See* Section IV.B.5 of the final rule preamble for a discussion of the delayed effective date.

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0006)

EPA proposes an effective date of 30 days after program approval unless a later effective date, not to exceed 120 days, is established for special circumstances [Footnote 20: 88 Fed. Reg. 55294.].

Alaska has no objection to a short transition time to transfer an assumed program from the Corps to a State.

Agency Response: The final rule provides for a minimum transfer period of 30 days but allows for a period of up to 180 days. *See* Section IV.B.5 of the final rule preamble.

6. General comments on Memorandum of Agreements (MOAs)

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0015)

Program approval relies on the execution of a Memorandum of Agreement (MOA) between the assuming state, the Corps, and EPA. 40 C.F.R. § 233.14. EPA proposes several amendments and requests comment on topics that must be included in an MOA for Section 404 assumption. The proposed rule is silent as to how MOAs must involve or include tribes within the assuming state. We propose several additions to the MOA requirements that would ensure tribal rights are protected and to provide an avenue for tribes within the state to be involved.

As an initial matter, tribes within the state should be consulted on draft versions of the MOA prior to finalization. As stated above, consultation with tribal governments should occur as early as possible. Affected tribes should also be afforded the opportunity to be signatories to the MOA if appropriate. There also must be a process whereby affected tribes who were not afforded an opportunity to review the MOA prior to execution, or who were unable to participate in the MOA to review and make recommendations later, or to later become a participating party to the MOA. This will ensure that affected tribes are able to participate as sovereign nations in state programs and decision making processes that impact their rights and resources. Tribes must have the ability to stay involved when states assume Section 404 permitting.

MOAs must be revisited at a regular interval to ensure they are consistent with updated information on tribal rights and resources and with developments in the law. We suggest that MOAs be revisited by the assuming state, federal agencies, and tribes every 5 years.

Agency Response: Pursuant to EPA's Policy on Consultation and Coordination with Indian Tribes ("Consultation Policy"), approving Tribal or State section 404 programs is an activity that is generally appropriate for consultation. *See* EPA's Policy, *available at* https://www.epa.gov/system/files/documents/2023-12/epa-policy-on-consultation-with-indian-tribes-2023_0.pdf **at 5-6. The Consultation Policy notes that, "Tribal officials may request consultation on EPA actions or decisions [and] EPA strives to honor Tribal governments' requests with consideration of the nature**

of the activity, past consultation efforts, available resources, timing, and all other relevant factors." *Id.* at 6. These consultations may address the MOA between the assuming Tribe or State and the Corps, or the MOA between the assuming Tribe or State and EPA, as those MOAs are critical components of a Tribal or State section 404 program submission.

Consistent with EPA's policy, for example, when EPA was reviewing Florida's submission seeking to assume the section 404 program, EPA initiated and completed consultation with the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, and the Poarch Band of Creek Indians. Tribes may also seek consultation opportunities prior to a submission of a Tribal or State program request, and EPA will consider that request consistent with the Policy. This rule does not modify EPA's Consultation Policy in any way.

MOAs between the State and EPA or the Corps and EPA involve matters specific to the two agencies entering these agreements, such as procedures for transmitting permit applications or draft permits to each other and for communicating on those applications. Moreover, the presence of federally recognized Tribes, and those Tribes' degree of interest in and engagement with the section 404 permitting program varies significantly between States. One national requirement for Tribal inclusion in all the Corps-State or EPA-State MOAs would therefore not be appropriate. Tribes interested in entering into an MOA with an assuming Tribe or State, the Corps, or EPA may raise that concern during consultations on program approvals or separately, and the assuming Tribe or State may enter into an MOA or other agreement with Tribes or entities addressing issues of importance to Tribes. In addition, EPA is providing other opportunities in this rule to facilitate Tribal engagement in the section 404 permitting process where Tribes or States have assumed that program. *See* Section IV.F of the final rule preamble.

EPA declines to set a 5-year requirement for revisiting MOAs. In EPA's experience, the existing procedures for revision of Tribal and State programs at 40 CFR 233.16, in coordination with the annual report requirements in 233.52, function effectively to ensure that State programs remain up-to-date. EPA has decided to retain its existing approach of event-based or need-based revisions rather than imposing the burden of additional 5-year review requirements on Tribes, States, EPA regional offices, and the Corps.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0062)

- Tribes within the state or Tribes with treaty rights, resources, or ancestral territory within the state should be consulted on draft versions of the MOA with EPA prior to finalization. There also must be a process whereby affected Tribes who were not afforded an opportunity to review the MOA prior to execution, or who were unable to participate in the MOA to review and make recommendations later, or to later become a participating party to the MOA.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0015.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0064)

- MOAs must be revisited at a regular interval to ensure they are consistent with updated information on Tribal rights and resources and with developments in the law.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0015.**

Choctaw Nation of Oklahoma (EPA-HQ-OW-2020-0276-0069-0005)

From our experience in Florida, our office can see that if the EPA transfers 404 permitting authority to states via MOAs, a mechanism has to be created for revisiting the MOA regular interval to ensure they are consistent with updated information on tribal rights and resources and with developments in the law. We suggest that MOAs be revisited by the assuming state, federal agencies, and affected tribes every 5 years.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0015.**

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0010)

The tribes within Michigan's borders have had 34 years of experience with a state dredge and fill permitting authority, and this experience should be used to inform all assumptions of that permitting authority going forward. In light of lessons learned, as summarized above, whenever EPA develops MoAs with states in connection with assumption of the CWA § 404 program, each MoA should include specific terms that protect tribal interests, tribal jurisdiction and treaty and subsistence rights.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0015.**

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0014)

- Future EPA/State MoAs should explicitly require consultation and coordination with Tribes in treaty-affected lands, not just adjacent to trust lands but throughout ceded territory where there are retained treaty and subsistence rights. Permit processes must explicitly consider impacts to treaty-protected resources. A treaty with the federal government is constitutionally the highest law of the land, and therefore treaty protections supersede state permit guidelines.

Agency Response: EPA anticipates that the opportunities EPA is providing in this rule to facilitate Tribal engagement in assumed section 404 permitting programs will address Tribal concerns and facilitate protection of Tribal interests within Indian country and in treaty-affected lands. ***See*** **Section IV.F of the final rule preamble addressing Tribal engagement opportunities, and Section IV.A.2 of the final rule preamble addressing the considerations that must be addressed during the permitting process.**

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0015)

- All EPA/state MoAs must explicitly require that permit processes within ceded territory not present an onerous burden on tribes' exercise of treaty-protected rights, including activities designed to conserve and protect those rights.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0074-SD-0014.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0023)

Program approval relies on the execution of a Memorandum of Agreement (MOA) between the assuming state, the Corps, and EPA. 40 C.F.R. § 233.14. EPA proposes several amendments and requests comment on topics that must be included in an MOA for Section 404 assumption. The proposed rule is silent as to how MOAs must involve or include tribes within the assuming state, or tribes with treaty rights, resources, or ancestral territory within the assuming state. We propose several additions to the MOA requirements that would ensure tribal rights are protected and to provide an avenue for tribes within the state or tribes with treaty rights, resources, or ancestral territory within the state (collectively "affected tribes") to be involved.

As an initial matter, tribes within the state or tribes with treaty rights, resources, or ancestral territory within the state should be consulted on draft versions of the MOA prior to finalization. Consultation with tribal governments should occur as early as possible. Affected tribes should also be afforded the opportunity to be signatories to the MOA if appropriate. There also must be a process whereby affected tribes who were not afforded an opportunity to review the MOA prior to execution, or who were unable to participate in the MOA development, can review, make recommendations, and even become a participating party to the MOA later. This will ensure that affected tribes are able to participate as sovereign nations in state programs and decision-making processes that impact their rights and resources. Tribes must have the ability to stay involved when states assume Section 404 permitting.

MOAs must be revisited at a regular interval to ensure they are consistent with updated information on tribal rights and resources and with developments in the law. We suggest that MOAs be revisited by the assuming state, federal agencies, and affected tribes every 5 years.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0015 and EPA-HQ-OW-2020-0276-0074-SD-0014.**

Great Lakes Indian Fish and Wildlife Commission (EPA-HQ-OW-2020-0276-0080-0007)

I. Memorandum of Agreement for Program Assumption. In GLIFWC staff's experience interacting with the State of Michigan (which has delegated 404 authority), the Memorandum of Agreement was ineffective at providing any mechanism for tribal involvement or opportunities for recourse to the EPA to ensure that treaty resources were protected. Unfortunately, the proposed rule is also silent as to how MOA's will help ensure that treaty rights are appropriately considered. Because the entry into an MOA is

an EPA action that may impact treaty rights, the consideration and approval of an MOA with a state should be the subject of tribal consultation.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0015 and EPA-HQ-OW-2020-0276-0074-SD-0014.**

Tulalip Tribes of Washington (EPA-HQ-OW-2020-0276-0082-0002)

The Proposed Rule should require that federally recognized Indian tribes be consulted during the early stages of any proposed Memorandum of Agreement ("MOA") pursuant to 40 C.F.R. § 233.14. The EPA and the Corps should utilize tribal liaisons to ensure that affected federally recognized Indian tribes are provided meaningful opportunities to review and critique MOAs. Further, any final rulemaking should require that MOAs include federal consultation regarding any state permitting action that may impact tribal rights and resources. MOAs should also make clear that the Corps is the lead agency when there are permitting projects spanning retained and assumed jurisdiction. Additionally, MOAs should be reviewed by the signatories and affected tribes at least every five years and must include a dispute resolution process that provides affected tribes a potential path to address concerns without litigation.

Agency Response: ***See*** **Section IV.F of the final rule preamble. EPA may consult with Tribes on the development of its MOA with a Tribe or State pursuing assumption of the program. EPA's current policy on Consultation with Indian Tribes is available at https://www.epa.gov/system/files/documents/2023-12/epa-policy-on-consultation-with-indian-tribes-2023_0.pdf.** ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0046 for an explanation as to why EPA is not requiring the designation of an EPA-Tribal liaison as a condition of State assumption of a CWA section 404 program.**

Just as EPA is not mandating one specific approach to resolving all disputes, EPA declines to require Tribal or State MOAs with EPA to include one specific dispute resolution approach. Tribal and State program structures may differ, as may the circumstances of particular disagreements. EPA does not think it would be helpful to prescribe one method of resolution, nor to mandate that Tribes or States do the same. However, to the extent Tribes or States choose to lay out a dispute resolution or elevation provision in their MOAs, that provision must be followed. ***See*** **40 CFR 233.1(f).**

See **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0015 and EPA-HQ-OW-2020-0276-0074-SD-0014. EPA is available to assist in resolving disputes;** ***see*** **Section IV.E.1 of the final rule preamble.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0013)

Program approval relies on the execution of a Memorandum of Agreement (MOA) between the assuming state, the Corps, and EPA. 40 C.F.R. § 233.14. EPA proposes several amendments and requests comments on topics that must be included in an MOA for Section 404 assumption. The proposed rule is silent as to how MOAs must involve or

include Tribes within the assuming state. We propose several additions to the MOA requirements that would ensure Tribal rights are protected and to provide an avenue for Tribes within the state to be involved.

As an initial matter, Tribes within the state should be consulted on draft versions of the MOA prior to finalization. As stated above, consultation with Tribal governments should be initiated as early as possible and consultation should be invited repeatedly throughout the development of the MOA. Affected Tribes should also be afforded the opportunity to be signatories to the MOA if appropriate. There also must be a process whereby affected Tribes 1) who were not afforded an opportunity to review the MOA prior to execution can review and make recommendations later, or 2) who were unable to participate in the MOA, can later become a participating party to the MOA. This will ensure that affected Tribes are able to participate as sovereign nations in state programs and decision-making processes that impact their rights and resources. Tribes must have the ability to stay involved when states assume Section 404 permitting.

MOAs must be revisited at a regular interval to ensure they are consistent with updated information on Tribal rights and resources and with developments in the law. We suggest that MOAs be revisited by the assuming state, federal agencies, and Tribes every 5 years.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0015.**

Individual commenter (EPA-HQ-OW-2020-0276-0050-0012)

A Memorandum of Agreement between the Tribe or State and the USACE about this transition is necessary. Tribes and States need to know what support they can expect from the USACE.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0015.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0016)

The MOA must also be explicit in how it addresses permitting for projects that span both state and Corps jurisdiction. Specifically, the Corps should be the lead permitting entity for the entire project with state input or with a state acting as co-lead. This will ensure that federal protections are not lost and that projects are reviewed holistically for impacts to the entire project area. Splitting permitting review and decisions will lead to inconsistencies for project review and can have further impacts when it comes to judicial review. Split permitting also requires more resources from the public to be involved in the permitting process, including having to submit comments to and participate in public hearings for two different entities on the same project. The MOA should explicitly list the Corps as the lead permitting agency and outline how the state will assist or provide input into that process.

Agency Response: EPA recommends that MOAs between the assuming Tribe or State and EPA should address permitting for projects that span both the State's and the Corps' jurisdiction. EPA is willing to assist assuming Tribes or States and

the Corps in reaching agreement on such an approach. EPA is not establishing one national requirement for coordination as Tribal and State agencies may already have procedures for communicating with the Corps, and EPA does not want to preclude them from developing case-specific approaches that would be most efficient and environmentally protective.

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0025)

Further, for projects that may include both Corps retained wetlands and state-assumed wetlands, EPA regulations should require that the Corps is the lead permitting entity with cooperative participation by the state. As stated above, this requirement must be outlined in the MOAs between the federal agencies and the assuming state. This requirement would ensure that environmental review is not unlawfully segmented and will protect the rights of interested parties in judicial review, particularly tribes. And because state requirements may not be less stringent than Federal requirements, judicial review of the Corps' permitting decisions in federal court will not infringe on any rights of the state permitting agency or the permittee.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0016.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0063)

- The MOA must also be explicit in how it addresses permitting for projects that span both state and Corps jurisdiction. Specifically, the Corps should be the lead permitting entity for the entire project with state input or with a state (or tribe) acting as co-lead.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0016.**

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0003)

I. Determination of retained waters in State-USACE memoranda of agreement should involve Tribes when Tribal waters are being discussed.

As structured, the proposed rule divides waters and wetlands between States assuming 404 programs and the U.S. Army Corps of Engineers ("USACE") as the result of bilateral discussions, with no explicit role for the Tribes, whose water resources will likely be affected.

Naturally, developing a Memorandum of Agreement ("MOA") between the State and USACE regarding administrative boundaries is a valuable step towards the efficient operation of concurrent 404 programs. However, in light of the recently ambiguous interpretation of the Federal Government's trust relationship with Tribes,[Footnote 1: See Arizona v. Navajo Nation, 599 U.S. (2023).] allowing for direct Tribal involvement in the MOA will help to ensure that Tribal resources are properly respected. Given that the proposed rule allows Tribes to request EPA review of permits affecting water resources beyond reservation boundaries,[Footnote 2: Clean Water Act Section 404 Tribal and State Program Regulation, 88 Fed. Reg. 55,328 (Aug. 14, 2023) (to be

codified at 40 C.F.R. § 233.51(d)).] some uncertainty could be resolved early by allowing those off-reservation interests to be noted in the MOA. This involvement could be through consultation with Tribes throughout the drafting process or by allowing Tribes full participation in the process, and to become signatories.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0015.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0024)

The MOA must also be explicit in how it addresses permitting for projects that span both state and Corps jurisdiction. Specifically, the Corps should be the lead permitting entity for the entire project with state input or with a state (or tribe) acting as co-lead. This will ensure that federal protections are not lost and that projects are reviewed holistically for impacts to the entire project area. Splitting permitting review and decisions will lead to inconsistencies for project review and can have further impacts when it comes to judicial review. Split permitting also requires more resources from the public to be involved in the permitting process, including having to submit comments to and participate in public hearings for two different entities on the same project. The MOA should explicitly list the Corps as the lead permitting agency and outline how the state will assist or provide input into that process.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0016.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0014)

The MOA must also be explicit in how it addresses permitting for projects that span both state and Corps jurisdiction. Specifically, the Corps should be the lead permitting entity for the entire project with state input or with a state acting as co-lead. This will ensure that federal protections are not lost and that projects are reviewed holistically for impacts to the entire project area. Splitting permitting review and decisions will lead to inconsistencies for project review and can have further impacts when it comes to judicial review. Split permitting also requires more resources from the public to be involved in the permitting process, including having to submit comments to and participate in public hearings for two different entities on the same project. The MOA should explicitly list the Corps as the lead permitting agency and outline how the state will assist or provide input into that process.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0016.**

7. Other comments on program approval

Association of Clean Water Administrators (ACWA) (EPA-HQ-OW-2020-0276-0060-0007)

Effects to other States/Tribes: EPA should provide a process for states pursuing assumption to account for potential impacts to interstate wetlands and waters.

Agency Response: **EPA encourages the permitting Agency to engage with potentially affected Tribes and States early in the permitting process to ensure permits do not adversely affect the waters of another Tribe or State. *See* Section IV.F of the final rule preamble for discussion of coordination requirements at 40 CFR 233.31.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0012)

As discussed above, lack of federal consultation is a major concern for tribes with lands, waters and cultural or historic ties within states that seek to assume Section 404 permitting authority. At a minimum, as a condition of approval of a state application to assume Section 404 permitting authority, a state should be required to enter into programmatic agreements with EPA, the ACHP, and each federally recognized tribe with lands or resources that may be affected by state assumption of Section 404 authority so that tribal cultural resources maintain the equivalent procedural and substantive protection that is afforded to them under the permitting regime as implemented by the Corps. See Advisory Council on Historic Preservation Handbook on Consultation with Indian Tribes in the Section 106 Review Process, § V.A.6. (June 2021)(federal consultation under NHPA Section 106 may only be delegated to a non-federal party if a tribe agrees in advance and the federal agency remains responsible for ensuring that the process is carried out properly).

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble. Nothing in the CWA authorizes EPA to require States and Tribes to enter into agreements with the Advisory Council on Historic Reservation or with Tribes that "may be affected" by State assumption. *See* Section IV.F of the final rule preamble for a discussion of ways that EPA intends to further facilitate Tribal engagement in permitting decisions that may affect Tribal resources. Where such MOAs may be required pursuant to another law, or would be helpful in addressing various interests and facilitating coordination, EPA encourages Tribes and States to develop them.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0035)

The Proposed Rule does not address consultation with USFWS regarding the Endangered Species Act ("ESA") consultation process and the incidental take issues that often arise in the 404 context. Florida supports programmatic approaches to ESA consultation. During Florida's assumption, EPA designated FDEP as the non-Federal representative for purposes of engaging in consultation with USFWS under Section 7 of the ESA. FDEP submitted a biological evaluation to USFWS concerning the impact of Florida's Section 404 Program on federally listed species and critical habitat, and USFWS issued a biological opinion to accompany EPA's determination concerning Florida's 404 assumption request. The USFWS programmatic biological opinion ("State 404 BiOp") that covers the EPA's approval of Florida's assumption is the mechanism by which technical assistance between USFWS and Florida has been established. The State 404 BiOp's establishment of a technical assistance process between Florida and USFWS ensures that no state 404 permit will be likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. This technical assistance process results in a project-level analysis that allows Florida to request comments and receive input from the USFWS and

to incorporate protection measures into permits. The USFWS State 404 BiOp includes a programmatic incidental take statement ("ITS") that exempts any incidental take that results from the issuance of a state 404 permit from being considered as prohibited take under section 9 of the ESA. The exemption from Section 9 prohibitions provided by the ITS covers the permittee as long as the permittee abides by the state 404 permit conditions.

Florida encourages EPA to recognize the right to engage in programmatic consultation under Section 7 during the Section 404 assumption process and issue regulations or guidance that outline the process that Florida took and recognize the benefits that a programmatic approach can have for assumption.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0056)

XII. EPA should further clarify requirements for a complete application.

We urge EPA to clarify that a state's assumption application may only be deemed complete when all documents that the state's application references, or on which the state otherwise relies to demonstrate that its program meets the requirements for assumption, have been submitted to EPA and made available to the public for comment. In the case of Florida, EPA deemed the State's submission complete even though Florida: (1) had not adequately described the waters over which the State would assume authority (using instead the tautology that the State would assume all waters of the United States not retained); (2) had not adopted or otherwise demonstrated that it would at all times abide by the governing definition of waters of the United States under federal law; (3) relied on components of a "forthcoming" programmatic biological opinion to claim that its program, and permits issued pursuant to that program, would not jeopardize ESA species or adversely modify critical habitat.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble. Whether Florida's submission to EPA was complete is outside of the scope of this rulemaking.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0069)

- At a minimum, as a condition of approval of a state application to assume Section 404 permitting authority, a state should be required to enter into programmatic agreements with EPA, the ACHP, and each federally recognized tribe with lands or resources that may be affected by state assumption of Section 404 authority, so that Tribal cultural resources maintain the equivalent procedural and substantive protection that is afforded to them under the permitting regime as implemented by the Corps.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble and the Agency's Response to Comments EPA-HQ-OW-2020-0276-0063-0012.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0070)

XVI. EPA should not approve any 404 state assumption application until the conclusion of this rulemaking, and must ensure existing programs are modified to conform to the final rules.

Our research indicates that several states, including Minnesota, Oregon, North Carolina, Virginia, and Alaska are exploring assumption or actively moving to petition to assume the 404 program. EPA should make clear to states that it will not consider any request to assume the Clean Water Act 404 program until after this rulemaking is complete and that any request to assume must conform to the final rules. EPA must also require that existing approved programs are revised to conform to the new rules.

In addition, since some of the components of the proposed rule have already been implemented as to Florida and their legality is currently being challenged in federal court, EPA should not approve 404 programs until the conclusion of that litigation.

Agency Response: Whether EPA may approve specific Tribal or State 404 program submissions is outside of the scope of this rulemaking. EPA notes, however, that it has not approved any programs between the time this comment was submitted and finalizing this rule.

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0005)

State and Tribal representatives have also raised concerns about endangered species and historic resource impact coordination procedures and the need for EPA to assure that the federal agencies entrusted with these resources are adequately consulted with to assure their protections and compliance with federal regulations. It is also important that any selected options for final rule language are supported by data and sound science so that the physical, chemical, and biological integrity of the nation's waters are protected.

Agency Response: *See* Section IV.A.2 of the final rule preamble for a discussion of consultation obligations. The final rule is reasonable and informed by the agency's experience and available data, and it is intended to further the protection of the physical, chemical, and biological integrity of the nation's waters. EPA notes that this rule does not, however, raise scientific or technical issues, e.g., it does not reopen the CWA section 404(b)(1) Guidelines. Rather, the rule is focused on making the procedures and substantive requirements for assumption transparent and straightforward.

National Association of Home Builders (NAHB) (EPA-HQ-OW-2020-0276-0077-0014)

NAHB members within the State of Florida report difficulties and significant delays getting the U.S. Fish and Wildlife Service (FWS) to complete its required review of potential impacts of Section 404-related activities on endangered species (i.e., threatened or endangered species) and/or designated critical habitat under the ESA. The Florida Department of Environmental Protection's (FDEP's) establishment of permitting timeframes under its state's wetlands environmental resource permitting (ERP) program significantly benefits NAHB members as they plan, design, or undertake construction activities and could be used as a model for other states. Following the CWA Section 404 assumption, FDEP advised all applicants seeking state-issued CWA 404 permits that may impact endangered species and or designated critical habitat, must sign a waiver acknowledging ERP permitting deadlines do not apply [Footnote 33: Florida Department of Environmental Protection State 404 Program Frequently Asked Questions. Available at

ttps://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/state-404-program- frequently.]. FDEP's request for applicants to sign waivers acknowledging permit deadlines cannot be achieved due to delays incurred during FWS's review of CWA 404 permit applications. FDEP's experiences with the CWA 404 assumption process, including required FWS review of pending CWA 404 permits could be informative for other states considering CWA 404 assumption.

Agency Response: EPA acknowledges this comment.

National Association of Home Builders (NAHB) (EPA-HQ-OW-2020-0276-0077-0015)

Many states with existing state wetlands programs also have statutory deadlines on when they shall issue a permit. For example, in the State of Ohio for projects under .5-acre impact, the Ohio Environmental Protection Agency requires the permit to be issued in under 30 days; if the project impacts more than 3 acres, they'll issue the permit in 180 days [Footnote 34: Ohio Environmental Protection Agency. Available at https://epa.ohio.gov/divisions-and-offices/surface- water/permitting/water-quality-certification-and-isolated-wetland-permits.]. For states like Ohio with a wetland permitting program with permitting deadlines, EPA should consider how assumption would impact these programs and timelines. If EPA's goal is to enable more states to seek CWA 404 assumption, it must ensure all aspects of the CWA 404 permitting process, including the ESA's Section 7 consultation process, operate efficiently.

Agency Response: EPA acknowledges the importance of efficient operation of Tribal and State permitting efforts. EPA would be glad to work with Tribes and States seeking assumption to help them determine whether and how their existing program structures and time frames can align with the permitting procedures laid out in the CWA and implementing regulations. General permits are one useful tool that many States find helpful to more efficiently issue permits with minimal individual and cumulative impacts. EPA cannot approve Tribal or State programs that do not comply with the requirements of the Act and implementing regulations, including the procedural and substantive requirements of the permitting process.

National Association of Home Builders (NAHB) (EPA-HQ-OW-2020-0276-0077-0005)

Importantly, the statute and regulations require that if the EPA Administrator determines a CWA 404(g) assumption request submitted by a state or Tribe has demonstrated the authority required to administer the CWA 404 permitting program then the EPA Administrator "shall approve" the state's (or Tribe's) request to transfer CWA 404 permitting program authority [Footnote 13: 33 U.S.C. 1344(h)(3).]. Furthermore, CWA 404(h)(3) states that if the EPA Administrator fails to determine with respect to any complete CWA 404 program assumption request submitted by a state or Tribe within the 120-day deadline, that state's or Tribe's CWA 404(g) program request shall be deemed approved [Footnote 14: Ibid.]. Therefore, in addition to clarifying the specific information and data that must be included in a submittal, it is critically important that the proposed revisions to the CWA 404 assumption regulations do not create unnecessary new procedures or requirements that could prevent EPA, states, or Tribes from achieving these statutorily-established deadlines.

Agency Response: **EPA agrees with the commenter that it lacks authority to approve Tribal or State programs that do not comply with the requirements of the Act and implementing regulations, including the procedural and substantive requirements of the permitting process. Nothing in this rule impedes the implementation of the statute's requirements.**

National Association of Home Builders (NAHB) (EPA-HQ-OW-2020-0276-0077-0009)

Lastly, any extension or delays will be interpreted as purposefully creating regulatory confusion and unnecessary delay, thereby discouraging States from taking advantage of statutory opportunities under Sections 101(b) and 404(g) of the CWA. EPA touts this proposal as facilitating the process of obtaining program approval. Increasing the approval timeline will undermine the achievement of this goal.

Agency Response: **EPA acknowledges the importance of efficient operation of Tribal and State permitting efforts, consistent with CWA requirements. Nothing in this rule impedes the implementation of the statute's requirements for program approval or operation.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0035)

As discussed above, lack of federal consultation is a major concern for tribes with lands, waters, and cultural or historic ties within states that seek to assume Section 404 permitting authority. At a minimum, as a condition of approval of a state application to assume Section 404 permitting authority, a state should be required to enter into programmatic agreements with EPA, the ACHP, and each federally recognized tribe with lands or resources that may be affected by state assumption of Section 404 authority, so that tribal cultural resources maintain the equivalent procedural and substantive protection that is afforded to them under the permitting regime as implemented by the Corps. See Advisory Council on Historic Preservation Handbook on Consultation with Indian Tribes in the Section 106 Review Process, § V.A.6. (June 2021) (federal consultation under NHPA Section 106 may only be delegated to a non-federal party if an Indian tribe agrees in advance and the federal agency remains responsible for ensuring that the process is carried out properly).

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble and the Agency's Response to Comments EPA-HQ-OW-2020-0276-0063-0012.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0045)

As discussed above, lack of federal consultation is a major concern for Tribes with lands, waters and cultural or historic ties within states that seek to assume Section 404 permitting authority. At a minimum, as a condition of approval of a state application to assume Section 404 permitting authority, a state should be required to enter into programmatic agreements with EPA, the ACHP, and each federally recognized Tribe with lands or resources that may be affected by state assumption of Section 404 authority so that Tribal cultural resources maintain the equivalent procedural and substantive protection that is afforded to them under the permitting regime as implemented by the Corps. See Advisory Council on Historic Preservation Handbook on Consultation with Indian Tribes in the Section 106 Review Process, § V.A.6. (June 2021) (federal consultation under NHPA

Section 106 may only be delegated to a non-federal party if a Tribe agrees in advance and the federal agency remains responsible for ensuring that the process is carried out properly).

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble and the Agency's Response to Comments EPA-HQ-OW-2020-0276-0063-0012.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0006)

EPA must make clear to all states that it will not consider any request to assume the Clean Water Act 404 program until after this rulemaking is complete and that any request to assume must conform to the final rule. In addition, since some of the components of the proposed rule have already been implemented as to Florida and their legality is currently being challenged in federal court, EPA should not approve 404 programs until the conclusion of that litigation. While Alaska has actively moved to petition to assume the 404 program, consistent with the requirements of the Clean Water Act and in particular 40 CFR § 233.15, EPA must immediately inform it (and all states) that any assumption must be on hold until completion of these rule, ensuring that applications meet the requirements of the Act. This is important for consistency and a level playing field as well as transparency for all members of the public and affected groups.

Agency Response: Whether EPA may approve a specific Tribal or State 404 program request is outside of the scope of this rulemaking. However, EPA notes that it has not approved any programs between the time this comment was submitted and finalizing this rule.

California State Water Resources Control Board (EPA-HQ-OW-2020-0276-TRANS-082423-003-0003)

Comment 3

Will EPA's approval cover only the assumed jurisdiction[?], or will it address the states whole mitigation process [?] (i.e. does EPA approval require that the state have a single mitigation process for both federal and non-federal waters[?)]

Agency Response: EPA's approval of the compensatory mitigation component of a Tribe or State's program submission only addresses the mitigation procedures that the Tribe or State will implement for discharges into assumed waters. It does not address procedures for discharges into the Corps-retained waters. That said, EPA encourages assuming Tribes or States to coordinate with the Corps, to the extent helpful and appropriate, to maximize efficiencies and meet compensatory mitigation requirements for impacts to assumed and retained waters.

Florida Wildlife Federation (EPA-HQ-OW-2020-0276-TRANS-092923-006-0001)

Regarding threatened and endangered species, EPA must ensure it is adequately consulting with U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, pursuant to the Endangered Species Act (ESA) when considering whether to approve a state for a 404-assumption application. In considering a state application, EPA must ensure the

wildlife agencies rigorously adhere to the ESA by considering the baseline status of protected species, as well as impacts of assumption on species in their habitats. This is the only way to ensure that assumption will not jeopardize their survival in recovery of species in assumed states. If wildlife agencies determine that as a result of assumption species will likely be injured or killed or habitat will be destroyed or adversely modified, EPA must ensure that this harm is limited and controlled through incidental take limits in meaningful terms and conditions at the program level.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble.**

Natural Resources Defense Council (EPA-HQ-OW-2020-0276-TRANS-092923-008-0007)

This includes but is not limited to first, the state has an environmental review process equivalent to the National Environmental Policy Act assessment that the Corps undertakes when it issues a section 404 permit.

Agency Response: Whether Tribes or States implement a process equivalent to the National Environmental Policy Act (NEPA) is outside of the scope of CWA section 404. That said, many of the considerations normally addressed in a NEPA analysis must be considered in the statutorily-required analysis as to whether a draft section 404 permit ensures compliance with the CWA section 404(b)(1) Guidelines. Some Tribes and States may have their own programs with requirements similar to those of NEPA.

South Florida Wildlands Association (EPA-HQ-OW-2020-0276-TRANS-092923-010-0005)

I talked in general about the acts, but let's look at the Endangered Species Act. Let's look about the role of the U.S. Fish and Wildlife Service under the federal permitting. So, when the Army Corps would field an application, they would have to look at the application, look at the project, and if they saw the potential for injury to a federally listed species they would be required to consult with the U.S. Fish and Wildlife Service and the Fish and Wildlife Service would produce a formal, full-blown biological opinion, subject to NEPA, subject to all kind of federal laws. We've substituted something called technical consultation from the U.S. Fish and Wildlife Service, who adds that to the state office, Fish and Wildlife Commission, and submits that to the Florida DEP. None of these agencies have any experience or expertise in reviewing projects in any way near the expertise of the scientists of the U.S. Fish and Wildlife Service.

I'm absolutely convinced that had this 404 process not been turned over to the state, eventually the Fish and Wildlife Service would have been looking at these projects, they would have produced a biological opinion that found jeopardy, meaning a likelihood of extinction or likelihood that the panther, or the Florida panther, or another one of our endangered species, could never recover and claim jeopardy and that would have stopped the project. And that would have stopped, actually, that would have created a domino effect, we would have stopped many projects.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble. Implementation of a particular State's section 404 program is outside of the scope of this rulemaking.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0013)

- EPA Rules Should Ensure Protection of Designated Uses of Waters Under Treaty Reserved Rights

Fourth, in recent proposed rules, https://www.govinfo.gov/content/pkg/FR-2022-12-05/pdf/2022-26240.pdf, EPA has clarified and standardized the longstanding obligation of EPA (and states) to consider the impact on tribal interests and treaty-reserved uses of waters when reviewing a state's water quality standards. EPA's rules here should similarly ensure that those reserved rights and interests are properly considered when determining whether a state's program is adequate for the protection of those rights. In determining whether a state meets the requirements for assumption, EPA has an obligation to determine whether the state program meets the requirements of the Clean Water Act and that includes protecting designated uses of water. Designated uses must include treaty-reserved uses and tribal interests. Further, under that requirement it is appropriate for EPA to require review of every permit that may affect those rights.

Agency Response: ***See*** **Section IV.F of the final rule preamble. In approving Tribal or State programs, EPA must ensure that the programs have the authority to issue permits that comply with the 404(b)(1) Guidelines. The 404(b)(1) Guidelines, in turn, must ensure protection of designated uses.** ***See*** **40 CFR 230.10.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0018)

- EPA Must Ensure Complete Applications

Finally, while it shouldn't need to be said, EPA's rules must make abundantly clear that each one of these and all the rules' requirements must be included, in full, in a state's application before EPA deems that application complete. There can be no room for "conditional" completion or pro forma complete application that triggers the timeline for EPA decisions on applications. Applications must be fully complete, with all information necessary to EPA's decision under the law, in compliance with all the rules—not just some completed "form"— before EPA can deem the application complete and ready for EPA consideration.

Agency Response: EPA agrees that it must only review complete program submissions, consistent with 40 CFR 233.15(a).

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0009)

- Stay of 404 Program Assumptions By States Until Conclusion of Rulemaking

First and foremost, EPA must make clear to states that it will not consider any request to assume 404 permitting until after this rulemaking is complete and that any request to assume must conform to the rules. Our latest research indicated that some states, for example Minnesota, Oregon, North Carolina, and Alaska, are "exploring" assumption or actively moving to petition to assume 404 permitting. EPA must immediately inform them (and all states) that any assumption must be on hold until completion of rules. This is important for consistency and a level playing field as well as transparency for all citizens and interested groups.

Agency Response: Whether EPA may approve specific Tribal or State 404 programs is outside of the scope of this rulemaking. However, EPA notes that it has not

approved any programs between the time this comment was submitted and finalizing this rule.

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-4-0001)

We are writing to express increasing concern from environmental advocates and tribes across the country about state efforts to take over Section 404 Clean Water Act permitting. Our concerns fall into two significant categories:

(1) that EPA has not developed robust guidance and/or rules regarding requirements for and measures of comparability as required by the Clean Water Act in order to approve a state's assumption of 404 permitting; and

(2) that state assumption has an extremely adverse impact on tribes due to the resulting abdication of the federal government's trust responsibility to tribes. When states issue permits for projects impacting tribal lands, waters or resources, there is no requirement for government-to-government consultation, making it highly likely that the lands, waters, and ways of life of tribes and tribal communities, will suffer irreparable harms. This is contrary to the current administration's commitment to environmental justice and support of tribal communities.

Based upon these important considerations, we ask that EPA take a step back to ensure that it is not harming the environment or tribes in an ill-conceived rush to have states assume 404 permitting. Below we briefly detail some of the concerns we have, and would be happy to further discuss them.

Agency Response: EPA acknowledges these concerns. This rulemaking is intended to clarify requirements for Tribal and State assumption of the section 404 program, both to facilitate the assumption process and to ensure that Tribal and State program approval and operation is administered consistent with the requirements of the CWA and these regulations. EPA has included and clarified various measures in this rulemaking to ensure Tribal participation in the permitting process. *See* Section IV.F of the final rule preamble.

C. Subpart D - Program Operation

1. Five-year permits and long-term projects

Maryland Department of the Environment (MDE) (EPA-HQ-OW-2020-0276-0061-0002)

2) Entire and Complete Projects

Section 233.30 (a) discusses review of projects which may take more than 5 years to complete. A new permit would be required for any part of the project that will not be completed within any 5-year period, including all subsequent phases. MDE recommends that additional language be included in Section 330.30 (b) clarifying that sufficient information related to planned impacts for future phases included in the initial application. It is important to reinforce the need to review an entire and complete project

to not limit avoidance and minimization opportunities of later phases of the project due to the authorized impacts in the initial phase conducted during the first 5-year permit cycle. All cumulative impacts to regulated resources should be considered as early as possible.

Agency Response: ***See*** **Section IV.C.1 of the final rule preamble.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0041)

YRITWC agrees that the initial review of proposed projects should encompass the entirety of the project. EPA's proposed approach to require an applicant submit a 404(b)(1) analysis for the entirety of the project as part of the first five-year permit review period is appropriate to see and analyze the impacts of the project over its lifespan. EPA's proposal also allows for the 404(b)(1) analysis to be updated at the request of an assuming state agency, but EPA should instead require the 404(b)(1) analysis to be automatically updated for every five-year permit cycle. Id. at 55303. Projects may change as they move forward and even small changes may have an impact on tribal rights and resources. EPA should also require states to provide written explanation in the event the state does not require an updated 404(b)(1) analysis.

Agency Response: ***See*** **Section IV.C.1 of the final rule preamble.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0021)

EPA is proposing to add some guidance for what is required in permit applications that are expected to take more than five years. The CWA does provide that state-issued permits may not exceed five years [Footnote 20: 33 U.S.C. § 1344(h) ("state has the following authority with respect to the issuance of permits pursuant to such program: to issue permits which…are for fixed terms not exceeding five years")]. However, the Proposed Rule offers some revisions that would make "the permit application process for permits after the initial five-year permit application [] easier and simpler." [Footnote 21: 88 Fed. Reg. 55,302]. Although projects that expect to exceed five years will still need to obtain a new permit every five years, EPA is proposing that the application for the first five-year permit should include an analysis covering the full term of the project—this in turn would allow each subsequent permit application to use the same analysis, unless there has been a significant change in circumstances. Although EPA is clear that this "does not constitute pre-approval of subsequent five-year permits for the project," it will streamline the process for approval. Florida appreciates EPA's efforts to allow the first five-year permit to streamline longer term coverage.

Agency Response: ***See*** **Section IV.C.1 of the final rule preamble. The requirement to update the 404(b)(1) analysis for subsequent five-year permits applies if there has been any change in circumstance related to an authorized activity. The rule also requires a written explanation if the Tribe or State does not require an update to the 404(b)(1) analysis.**

Alaska Miners Association (AMA) (EPA-HQ-OW-2020-0276-0067-0003)

The provision introduced regarding a five-year permit threshold should be removed. Project proposals like mines generally have a permit timeline of five years so that the

mine can continuously be evaluated and practices changed for best management and performance. The requirement to do analysis for longer than five years is actually to the detriment of the environment, and should be discouraged. In addition, it brings risk of litigation to permit decisions.

Agency Response: ***See*** **Section IV.C.1 of the final rule preamble. EPA disagrees with the comment. Nothing in the rule approach affects the statutory limit of five years for Tribal or State 404 permits. As a result, long-term projects like mines will continue to receive a thorough review every five years. Requiring an applicant to submit a 404(b)(1) analysis for the entirety of the project as part of the first five-year permit review period and update that analysis for subsequent five-year permits if there has been a change in circumstances related to an authorized activity is consistent with the Act and benefits the environment by ensuring that the scope of impacts associated with a complete project is factored into the permitting decision for each five-year permit. The requirement that a Tribe or State provide a detailed written explanation in the record of decision for the permit if they do not require an update to the 404(b)(1) analysis promotes transparency and reasoned decision-making which should reduce the risk of litigation involving permitting decisions.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0045)

VIII. EPA must improve its proposal for permitting projects that would require more than five years to complete.

Conservation Groups agree that the first five-year permit of proposed projects should encompass the entirety of the project, not just the activities taking place in the initial five-year period. EPA's proposed approach to require an applicant to submit a Section 404(b)(1) analysis for the entirety of the project as part of the first five-year permit review period is appropriate to see and analyze the impacts of the project over its lifespan.

EPA's proposal also allows for the Section 404(b)(1) analysis to be updated at the request of an assuming state agency, but EPA should instead require the Section 404(b)(1) analysis to be automatically updated at least every five-year permit cycle. Id. at 55,303. Projects may change as they move forward, and even small changes may have an impact on Tribal rights and resources. Immediate permit modification should be required where those changes would affect the overall impacts of the long-term project.

EPA should also emphasize the need for adequate public outreach for long-term permitting decisions because it will likely be difficult to raise concerns about the entire project at later permitting stages.

Agency Response: ***See*** **Section IV.C.1 of the final rule preamble. EPA believes the proposed "immediate permit modification" requirement is unnecessary since a Tribal or State 404 permit may be challenged at any time if the applicant exceeds the impacts authorized under the permit. The commenter also emphasized the need**

for adequate public outreach for long-term permitting decisions because it will likely be difficult to raise concerns about the entire project at later permitting stages. EPA believes the final rule approach, which requires an applicant to submit a 404(b)(1) analysis for the entirety of the project as part of the first five-year permit application and requires that permit applications and public notices for subsequent five-year permits indicate whether the 404(b)(1) analysis has been updated, ensures the public has adequate information to evaluate long-term projects at all permitting stages.

State of Michigan, Michigan Department of Environment, Great Lakes, and Energy (EGLE), Water Resources Division (EPA-HQ-OW-2020-0276-0071-0003)

The proposed rule language on demonstrating how a state program's permit review criteria will be sufficient to carry out federal requirements, as well as the proposed language on what is required for long-term projects, is supported by the WRD.

Agency Response: ***See*** **Section IV.C.1 of the final rule preamble.**

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0016)

1. Five-Year Permits and Long-term Projects

Establishing procedures for the permitting of long-term projects is helpful for the analysis of total project impacts, development of alternatives to avoid aquatic resources, and to inform the public and neighboring jurisdictions on total project plan proposals. It is important though to review and update these analyses during each 5-year permit cycle to ensure that conditions and project needs have not changed. While this proposal is informative, it should not be considered "once and done" nor should the authorized program minimize its review standards. Each subsequent permit application and analysis needs to be reviewed to assure that all opportunities for avoidance and minimization are employed and not limited by the initial project review. It is important that in EPA's oversight role they review and respond accordingly to long-term projects and permit review to assure compliance with the 404(b)(1) Guidelines.

Agency Response: ***See*** **Section IV.C.1 of the final rule preamble. EPA agrees with the commenter and will carefully review long-term projects for compliance with the 404(b)(1) Guidelines as part of the initial five-year permit application and for all subsequent five-year permit applications.**

Nebraska Department of Environment and Energy (EPA-HQ-OW-2020-0276-0073-0007)

The proposed rules allows for long term projects to submit an analysis showing how the entire project will comply with the 404(b)(1) guidelines during the first 5-year permit. This is intended to streamline the permitting process for the second 5-year permit. EPA is proposing applicants apply for the second 5-year permit at least 180 days prior to the expiration of the current permit.

- This will streamline the permitting process to allow for continued construction and timely completion of the project while also planning for all necessary controls and mitigation of unavoidable impacts.

Agency Response: ***See*** **Section IV.C.1 of the final rule preamble.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0032)

The Port Gamble S'Klallam Tribe agrees that the initial review of proposed projects should encompass the entirety of the project. EPA's proposed approach to require an applicant submit a Section 404(b)(1) analysis for the entirety of the project as part of the first five-year permit review period is appropriate to see and analyze the impacts of the project over its lifespan. EPA's proposal also allows for the Section 404(b)(1) analysis to be updated at the request of an assuming state agency, but EPA should instead require the Section 404(b)(1) analysis to be automatically updated for every five-year permit cycle. Id. at 55303. Projects may change as they move forward and even small changes may have an impact on tribal rights and resources. EPA should also require states to provide written explanation in the event the state does not require an updated Section 404(b)(1) analysis.

Agency Response: ***See*** **Section IV.C.1 of the final rule preamble.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0011)

The Proposed Rule acknowledges that Congress limited 404 permit terms to five years. EPA, however, is concerned that "if applicants with long-term projects only submit information about activities that will occur during one five-year period of their project in their permit application, the permitting agency and members of the public will not have sufficient information to assess the scope of the entire project." To address its concern, EPA is proposing that permit applicants for projects whose lifespan is expected to exceed 5 years must "include an analysis demonstrating that each element of the 404(b)(1) Guidelines is met . . . for the full term of the project." [Footnote 29: 88 Fed. Reg. 55326.] This requirement would apply to assumed programs only, creating another disparity between Corps-issued 404 permits and State-issued 404 permits. EPA indicates that this new requirement will improve environmental protection and will "provid[e] the applicant with more regulatory certainty" because it will "ensure consistency in permitting decision associated with the project." [Footnote 30: 88 Fed. Reg. 55303.].

This proposed requirement would hinder, if not halt entirely, assumption efforts. As a practical and political matter, placing more requirements on permit applications under a state- assumed program, as compared to a Corps-run program, is likely to generate strong public opposition from industry. Without industry support – crucial for many States – a State is unlikely to generate the momentum necessary to make the requisite legislative changes and obtain funding.

Agency Response: ***See*** **Section IV.C.1 of the final rule preamble.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0012)

This new requirement suffers from legal infirmities as well. First, EPA is not free to substitute its judgement for Congress, who imposed permit terms of 5 years. Requiring permittees to demonstrate compliance with the 404(b)(1) Guidelines for the lifespan of

the project is inconsistent with Congress's requirement that permits be limited to 5 years. Second, this requirement would make State programs more stringent than the federal program. While States may choose to make State programs more stringent than the federal program, EPA may not force that choice. EPA's suggestion that this proposed requirement improves regulatory certainty, and therefore is a helpful addition, disregards reality. Alaska recommends deleting this new provision.

Agency Response: ***See*** **Section IV.C.1 of the final rule preamble.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0038)

Chickaloon Native Village agrees that the initial review of proposed projects should encompass the entirety of the project. EPA's proposed approach to require an applicant submit a 404(b)(1) analysis for the entirety of the project as part of the first five- year permit review period is appropriate to see and analyze the impacts of the project over its lifespan. EPA's proposal also allows for the 404(b)(1) analysis to be updated at the request of an assuming state agency, but EPA should instead require the 404(b)(1) analysis to be automatically updated for every five-year permit cycle. Id. at 55303. Projects may change as they move forward and even small changes may have an impact on Tribal rights and resources. EPA should also require states to provide written explanation in the event the state does not require an updated 404(b)(1) analysis.

Agency Response: ***See*** **Section IV.C.1 of the final rule preamble.**

2. Judicial review and rights of appeal

Alaska Mining Impacts Network (EPA-HQ-OW-2020-0276-0045-0004)

EPA must ensure that the public has equal access to courts. The EPA acknowledges in its proposed rule that the public can be discouraged from bringing environmental lawsuits in state courts due to the potential for high litigation fees. Even though the EPA plans to reject state programs with mandatory fee shifting, it should do more to guarantee that fee shifting in assumed states only occurs within the narrow boundaries permitted by federal law. In Alaska, the lack of a public interest litigant exception to the state's fee- shifting provision chills concerned citizens from bringing their concerns before the courts. We see this in the assumed 402 program currently, and if the state were to assume the 404 program, the same chilling effect would happen.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble. EPA appreciates the commenters' concern about potential chilling effects of fee shifting requirements. EPA will evaluate State judicial review provisions and commensurate Tribal provisions as part of program submissions on a case-by-case basis to determine whether they provide for judicial review of Tribal- or State-issued permits or permit denials that is sufficient to provide for, encourage, and assist public participation in the permitting process. States and Tribes with expansive judicial review opportunities, such as those that allow standing to challenge permits on the part of interested citizens and citizen groups, and that do not require parties who lose lawsuits brought in good faith to pay other parties' legal fees, should meet the regulatory judicial review requirement.**

Individual commenter (EPA-HQ-OW-2020-0276-0050-0009)

The judicial review and appeal rule should apply to Tribes that have judicial systems analogous to State judicial systems. This would be difficult to enforce because it would be on a case-by-case basis, but I believe it important for Tribes to be treated as the sovereign groups that they are.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

The Petroleum Alliance of Oklahoma (EPA-HQ-OW-2020-0276-0055-0014)

IV. EPA IS PROPOSING NO REQUIREMENT FOR JUDICIAL REVIEW OF A TRIBAL PERMIT DECISION

On the one hand, "EPA proposes to clarify that States seeking to assume the section 404 program must provide for judicial review of decisions to approve or deny permits. 88 Fed. Reg. at 55298. The agency's focus on judicial review of state decisions is so detailed that the agency even seeks comment on state standards for associational standing.

Yet on the other hand, "EPA is not proposing that this [judicial review] requirement apply to Tribes." 88 Fed. Reg. at 55300. EPA went farther and stated that it does not intend to restrict "qualified Tribes to a single judicial option that may not fit existing Tribal governmental structures." Id. at 55301 [Footnote 14: It is not enough for EPA to assert it has taken the same approach in other regulatory contexts. Those regulatory programs may well suffer from the same defects as the instant regulation.]. Therefore, EPA resorted to requiring "some appropriate form of citizen recourse for applicants … affected by Tribe-issued permits would be needed to ensure meaningful public participation in the permitting process." Id. EPA closed by stating that it encourages tribes and states to "establish an administrative process for the review and appeal of permit decisions…." Id.

The Alliance understands EPA's conundrum here. We assume EPA is reluctant to ask, much less require that Tribes waive their sovereign immunity in exchange for assumption of the section 404 program. Yet the agency is unable to identify an equally effective alternative, or any alternative for that matter. EPA does not specify any form of recourse available to a disappointed permittee, or any other affected person. The agency is left to "encourage" establishment of administrative remedies yet is silent on judicial review. It is more than conceivable that a non- Indian permittee would be left with no recourse if a Tribe asserts sovereign immunity in tribal, state, and federal Court. That leaves citizens with no recourse but to seek to elide sovereign immunity [Footnote 15: See Lustre Oil. Co. LLC v. Anadarko Minerals, Inc., 2023 MT 62 (223).] or raise Constitutional objections to the preclusion of judicial review. (Providing some form of administrative review, even if available, does not suffice if the tribe does not permit judicial review.)

The absence of real and meaningful judicial review of a state or tribe's final decision raises serious Constitutional due process and equal protection concerns that could be fatal to the entire program. It may be that these issues will not be raised and adjudicated

until a permittee challenges a specific permit denial, but it is unlikely this issue will avoid litigation forever. EPA should resolve this issue before finalizing its rules for assumption of section 404 authority.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

The Petroleum Alliance of Oklahoma (EPA-HQ-OW-2020-0276-0055-0002)

It also is important to note that in excluding tribes from the requirement that entities seeking to assume administration of the section 404 program must provide access to judicial review, the proposed rule could leave regulated entities with no recourse at any level for judicial review. This raises fundamental Constitutional issues.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0035)

The EPA correctly acknowledges that particular state processes or other state requirements may be impediments to judicial review of state-issued Section 404 permits. Accordingly, EPA must keep the requirement for judicial review, equivalent to federal judicial review, in the regulatory text. In addition, EPA should further elaborate on the restriction against the imposition of attorneys' fees. The preamble identifies "State requirements that provide for the losing party in a challenge to pay all attorneys' fees, regardless of the merit of their position, is an unacceptable impingement on the accessibility of judicial review." Id. at 55298. The language of the proposed regulation states that a state will not meet EPA's standard "if it requires the imposition of attorneys' fees against the losing party, notwithstanding the merit of the litigant's position." Although the language appears to be clear on the imposition of attorneys' fees, EPA must go further and clarify that this prohibition includes the imposition of any attorneys' fees, including partial fees. Any state program that imposes even partial fees must be barred from assuming a 404 program by EPA. This issue is of particular concern in Alaska,which has a loser-pays rule, whereby litigants who lose in civil cases may be required to pay a percentage of the attorney's fees for the prevailing party. Alaska Civil Rule 82. This loser-pays requirement has the affect of significantly limiting judicial review, especially for clients with limited financial resources, which includes many small tribes.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0036)

EPA should ensure that states cannot make it more difficult to obtain judicial review of Section 404 permits. For example, EPA should explicitly limit any state requirements for administrative exhaustion to the same reasonable efforts that are required under federal law prior to or as part of judicial review of state-issued section 404 permits. Without this explicit regulation, states may include administrative exhaustion requirements that are unduly burdensome and cost-prohibitive such that the public and tribes may not be able to successfully challenge the permit. Federally issued Section 404 permits are challenged under the Administrative Procedure Act. 88 Fed. Reg. at 55300. This process, based on

an administrative record, allows for broad public and tribal participation. And although any litigation is costly, review under the APA is not as costly as producing a full evidentiary hearing before an administrative agency. EPA should explicitly limit burdensome administrative exhaustion requirements in the final rule. This will ensure that members of the public and tribes do not have to pay exorbitant costs before they are afforded the opportunity for judicial review. Extensive administrative review processes that are substantially different from federal judicial review and are more costly can stifle public participation ("When citizens lack the opportunity to challenge executive agency decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as public comments and public hearings on proposed permits, may be compromised. Citizens may perceive that a State administrative agency is not addressing their concerns about section 404 permits because the citizens have no recourse to an impartial judiciary, which would have a chilling effect on all the remaining form of public participation in the permitting process.") Id. at 55299.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0037)

Quite simply, state judicial review provisions must not be more burdensome on challengers to state-issued permits than what would be required under federal law. This provision does not require EPA to impose a specific administrative review procedure, but instead allows states to continue with state review, as long as they defer to federal requirements on standing and administrative exhaustion. Limiting state administrative appeals processes for permitting decisions is consistent with ensuring the public has access to judicial review. EPA should make clear in the final rule that administrative exhaustion requirements under state laws may be no more burdensome than challenges to federally issued section 404 permits. EPA should also make clear that exhaustion requirements or other burdens to judicial access will result in an automatic denial of a state application to assume Section 404 permitting.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0038)

EPA should also consider adding a requirement that the same standard of review for federal permits should apply to state judicial review of state-issued 404 permits. This ensures that the public and tribes can participate in permit challenges without having to put on affirmative evidence, which can be costly. EPA should also explicitly include that standing for judicial review should mirror that of federal review and should not be unduly limited. All of the above proposals will ensure that the public can participate in the judicial review process for state-issued permits without substantial burdens that would not exist in federal judicial review.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0039)

EPA should also include in the final rule the actions that EPA can and will take in the event states violate the judicial review provision. At minimum, if a state is violating judicial review requirements, EPA must immediately suspend the state permitting program and pending permits. This ensures that applicants or agencies are not circumventing the requirements of the CWA by processing permits that cannot be reviewed by an impartial judiciary. If a state comes into compliance with judicial review requirements, then it can resume processing permits.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble. In the event Tribes or States do not comply with the requirements of the CWA or this rule, EPA may exercise oversight, and ultimately may initiate program withdrawal.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0040)

EPA must also provide an avenue for judicial review in Federal District Court in certain circumstances. At a minimum, Federal District Court review should be available for tribes with rights and resources that may be impacted by a state-issued permit. EPA's proposed rule assumes that states will comply with the Section 404(b)(1) Guidelines and "EPA notes that complying with the CWA 404(b)(1) Guidelines currently provides an opportunity for States to consider potential impacts of proposed section 404 permits on aquatic resources and uses important to Tribes." Id at 55298-97. However, state courts, and state administrative agencies in particular, are not appropriate entities to determine the scope of tribal rights or resources. If YRITWC disagrees with a state analysis of how the proposed permit will impact tribal rights and resources, we should be able to challenge that finding in federal court. These are federal questions and EPA should include a provision explicitly recognizing that judicial review in Federal District Court is available where federally protected tribal rights and resources are at stake.

Agency Response: The question as to which court may exercise jurisdiction over challenges to Tribal or State permitting actions is outside the scope of this rulemaking. Generally speaking, Tribal or State permits are issued under Tribal or State law and thus subject to the jurisdiction of the Tribe or State as appropriate. ***See*** **H.R. Rep. No. 95-830 at 104 (1977) ("The conferees wish to emphasize that such a State program is one which is established under State law and which functions in lieu of the Federal program").** ***See Chesapeake Bay Foundation v. Va. State Water Control Bd.*****, 453 F. Supp. 122 (E.D. Va 1978) (no NEPA review required for NPDES permit issued by State because the State permit is not a federal action)."**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0024)

In the name of public participation, EPA is proposing to require all States to meet specific standards for judicial review, standing, and granting of attorney's fees. EPA's proposal to mandate that States have procedural measures that are identical to federal civil procedure is unnecessary and oversteps what is required under the CWA. EPA should evaluate each State on a case-by-case basis, taking the existing state-specific processes into consideration.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0025)

EPA proposes to require all States to meet specific standards for judicial review and standing for state 404 assumption. The current regulations simply require a State to provide a description of its judicial review procedure, but do not set a defined threshold or require a State's judicial review process to mirror the federal process. The Proposed Rule would require a State to have a judicial review process "that is the same as that available to obtain judicial review in Federal court of a Federally-issued NPDES permit."[Footnote 25: 88 Fed. Reg. 55,315]. Florida urges EPA to defer to state approaches so long as they are consistent with the requirements of the CWA. In other words, as long as a State's program is as protective as the federal program, additional requirements pertaining to state judicial review procedures should not be mandated. Florida is concerned that EPA's proposal attempts to apply a one-size-fits-all approach for judicial review processes that is not necessary under CWA Section 404.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0026)

To be clear, the Florida 404 program incorporates extensive public participation in the permitting and judicial review process, with mechanisms for public comment, administrative hearings, and judicial appeals. Florida law gives many opportunities for public engagement throughout the permitting process as well as ample opportunities to bring permit challenges under the Florida APA (Fla. Stat. Ch. 120) and the Florida Environmental Protection Act (Fla. Stat.§ 403.412). In fact, just as the public has a right to broader information under Florida's Sunshine laws, Florida administrative law also gives them greater opportunities to use that information to advance their interests in permit challenges. Consistent with the federal process, interested persons may submit any information that they would like during the public notice and comment process. See Fla. Admin. Code § 62-331.060 (describing public notice and comment procedures). However, Florida administrative law also provides for a de novo permit hearing before a Florida 404 permit becomes effective, which provides affected parties with an additional opportunity to obtain and submit even more information (including via depositions and interrogatories) and to ensure consideration of that additional information in the hearing record. See Fla. Stat. § 120.57(1)(b).

During the pendency of the administrative hearing process, FDEP's issuance of a permit is not final agency action (meaning that the permit is automatically stayed pending resolution of the administrative challenge). The "administrative hearing process is designed to formulate agency action" so FDEP's "final action may be different from the proposed agency action and may result in the issuance of a permit as requested by the applicant or as modified in the course of the [administrative] proceeding or by settlement." Fla. Admin. Code § 62-110.106(7)(e)(2). Moreover, FDEP's initial determination receives no deference and all of the parties to the administrative proceeding have the "opportunity to respond, to present evidence and argument on all issues involved, [and] to conduct cross-examination and submit rebuttal evidence. . . ."

Id.§ 120.57(1)(b); see, e.g., Hamilton Cnty. Bd. of Cnty. Comm'rs v. Fla. Dep't of Envt'l Regulation, 587 So.2d 1378, 1387-88 (Fla. 1st DCA 1991). In other words, these de novo administrative proceedings are designed to give aggrieved "parties an opportunity to change the agency's mind." Capeletti Bros. v. Dep't of Gen. Servs., 432 So.2d 1359, 1363 (Fla. 1st DCA 1983).

If the administrative process described above results in a final order issuing the permit, Florida law provides for a right to seek judicial review. See Fla. Stat. § 120.68.[Footnote 26: Under Florida law, any person "substantially affected" by an FDEP rule or proposed rule may seek an administrative determination that the rule is invalid. See Fla. Stat. § 120.56(1)(a); § 120.569(1). Florida courts have interpreted Chapter 120 liberally to achieve the statutory purpose of increasing public participation in agency decisions. NAACP, Inc. v. Fla. Bd. of Regents, 863 So. 2d 294, 298 (Fla. 2003); Palm Beach Cnty. Envt'l Coal. v. Fla. Dep't of Envt'l Prot., 14 So.3d 1076 (Fla. 4th DCA 2009). This includes the opportunity to challenge the validity of an existing rule "at any time during which the rule is in effect." Fla. Stat. § 120.56(3).] The "reviewing court's decision may be mandatory, prohibitory, or declaratory in form, and it shall provide whatever relief is appropriate irrespective of the original form of the petition." Fla. Stat. § 120.68(6)(a). Florida courts may, among other things, "[o]rder agency action required by law; order agency exercise of discretion when required by law; set aside agency action; remand the case for further agency proceedings; or decide the rights, privileges, obligations, requirements, or procedures at issue between the parties; and [o]rder such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld." Id. Under Florida law, unlike federal law, agencies do not receive any deference to their interpretations. FLA. CONST. Art. V, § 21 ("In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule and must instead interpret such statute or rule de novo.").

Florida's robust process serves as an example why EPA should not dictate how States must handle judicial review as a regulatory threshold requirement. States with various judicial review mechanisms may be unable or discouraged from pursuing 404 assumption, even where they could "provide for, encourage, and assist public participation in the permitting process" in other, more efficient, and effective ways. Moreover, in light of the cooperative federalism framework of the CWA and other overriding constitutional federalism concerns, EPA should avoid intruding into areas of state control including state judicial review processes.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0027)

EPA also proposes to amend Section 233.24 that "state requirements that provide for the losing party in a challenge to all attorneys' fees, regardless of the merit of their position, are an unacceptable impingement on the accessibility of judicial review."[Footnote 27: 88 Fed Reg. 55,326.]. EPA argues that awarding attorney's fees following litigation "does not 'provide for, encourage, and assist' public participation in the permitting

process" and therefore a State may not apply this type of provision during its implementation of the 404 program.

Florida strongly disagrees with this proposed change. There is simply no basis in law for imposing such a requirement on States, nor should EPA intrude into an issue that is so obviously within the sovereign purview of States to manage their state judicial procedures. This is especially true given the total lack of any record evidence showing that these provisions are currently being used in inappropriate ways. Likewise, the addition of this language adds additional barriers to state assumption, which are unnecessary under the CWA. EPA has not provided a sufficient rationale to justify imposing this requirement. Before EPA imposes a blanket requirement based on a hypothetical concern about a broad statute, it should determine that there is a track record of States using this kind of authority against permit challengers in ways that are inconsistent with the CWA. As discussed in section L above, EPA should defer to state approaches so long as they are consistent with the specific requirements of the CWA.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0007)

Florida also disagrees with EPA's proposed provisions requiring States to adopt federal standards of civil judicial review and attorney's fees provisions that are clearly areas of state sovereign control and beyond the scope of EPA's proper purview.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0039)

VII. EPA's proposed rule must do more to ensure adequate access to courts.

As EPA's proposal recognizes and explains, ensuring access to state courts and tribunals is necessary to "provide for, encourage, and assist public participation in the permitting process." 88 Fed. Reg. at 55,326, 55,300. Specifically, "ensuring that States provide an opportunity for judicial review that is the same as that available to obtain judicial review in Federal court" is critical. Id. at 55,299 (emphasis added). State judicial review provisions must not be more burdensome on challengers to state-issued permits than what is required under federal law.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0040)

A. EPA must strengthen the rule's prohibition against fee shifting.

All plaintiffs should have sufficient access to court to enforce the Clean Water Act—from indigent individuals to Tribes, nonprofit organizations, and government bodies of all sizes and means. EPA's proposal improves the judicial review language used in the 1996 Clean Water Act Section 402 National Pollutant Discharge Elimination System state program regulations by acknowledging that states' fee shifting requirements can unacceptably impinge on access to judicial review. See 88 Fed. Reg. at 55,326, 55,300.

However, the proposed rule does not go far enough to ensure that any assuming states appropriately provide for, encourage, and assist public participation in the permitting process. EPA should not permit assumption by any states that provide for mandatory or discretionary fee shifting in any amount against losing plaintiffs except in extraordinary circumstances.

In federal court lawsuits brought under the Clean Water Act and similar federal statutes, fee shifting against a losing plaintiff is both discretionary and limited to a narrow set of circumstances related to abuse of the judicial process. In these kinds of cases, courts may award attorney's fees to the prevailing defendant only if "a court finds that [the losing plaintiff's] claim was frivolous, unreasonable, [] groundless," or was made in bad faith. Christiansburg Garment Co. v. Equal Emp. Opportunity Comm'n, 434 U.S. 412, 422 (1978); see also Akiak Native Cmty. v. U.S. E.P.A., 625 F.3d 1162, 1166-67 (9th Cir. 2010) (noting the Christiansburg standard applies to the fee shifting provision in the Clean Water Act) (citing Saint John's Organic Farm v. Gem County Mosquito Abatement Dist., 574 F.3d 1054, 1063-64, n. 1 (9th Cir. 2009)). This is appropriate because in such cases, 1) the plaintiff is the instrument Congress chose to vindicate an important right conferred by federal statute, and 2) when a prevailing plaintiff is awarded attorney's fees, the award is against a party that violated federal law, (while the same is not true, for example, for a prevailing defendant.) Christiansburg Garment Co., 434 U.S. at 422. "To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of [these laws]." Id. In practice, the Christiansburg standard ensures that unsuccessful challenges to 404 permits "brought in federal court will ordinarily not result in a fee award against the plaintiff who brought the challenge." Akiak Native Cmty., 625 F.3d at 1167.

The Christiansburg standard is a critical pillar of access to federal courts for public interest environmental litigation, which is especially vulnerable to the risks posed by fee shifting. This type of litigation most often seeks equitable relief to prevent or reverse environmental damage, generating important but nonmonetary benefits for society at large, only some part of which the plaintiff will enjoy. It often involves no prospect of financial remuneration for plaintiffs beyond, at most, the possibility of partially recovering attorney's fees. On the other hand, even partial fee shifting against a losing plaintiff can pose unknown and essentially unlimited financial risks. And, every lawsuit, no matter how meritorious, carries some risk of losing. "This leaves the plaintiffs' risk-reward analysis severely skewed" such that any fee shifting against losing plaintiffs is a significant deterrent to filing. G. Sommers, The End of the Public Interest Exception: Preventing the Deterrence of Future Litigants with Rule 82(b)(3)(i), 31 Alaska L. Rev. 131, 155 (2014) (Sommers 2014). Finally, the risks posed by fee shifting have been amply demonstrated by academicians as a significant barrier to a citizen protecting their rights and obtaining access to the courts. That access is fostered and guaranteed by the Clean Water Act without the risk of fee shifting. In order to ensure equivalency, EPA must examine this aspect of state programs and reject any that erect even partial barriers.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0041)

Under the proposed rule, a state would be ineligible to assume the program "if it requires the imposition of attorneys' fees against the losing party, notwithstanding the merit of the litigant's position." 88 Fed. Reg. at 55,326. This does not ensure adequate access to courts, because it does not limit the scope of discretionary fee shifting against losing plaintiffs in a manner commensurate with the Christiansburg standard.

To adequately provide for public participation in the 404 permitting process, states that assume the program should be required to demonstrate that their fee shifting scheme is not designed in such a way as to have a greater chilling effect on potential plaintiffs than the rule that applies in federal court—i.e., that any fee shifting against plaintiffs who unsuccessfully sue to enforce the program or vindicate their rights under the program is discretionary and limited to claims that are frivolous, unreasonable, groundless, or filed in bad faith. Any broader risk of fee shifting against losing plaintiffs in these cases substantially adds to the inherent risks of litigation and undercuts Congress' efforts to promote the Clean Water Act's vigorous enforcement. See Christiansburg Garment Co., 434 U.S. at 422.

EPA should revise the rule in pertinent part to read:

A State will not meet this standard if, for example, it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review), or if it permits any imposition of attorneys' fees, fully or partially, against losing plaintiffs whose claims are not frivolous, unreasonable, groundless, or made in bad faith.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0042)

B. EPA must ensure that states enact no stricter standing requirements than are applicable under federal law.

EPA requests comment on whether to require, consistent with federal law, "that States provide 'any interested person an opportunity for judicial review in State court of the final approval or denial of permits by the State,'" and that they recognize associational standing to the same extent that it is recognized under federal law. 88 Fed. Reg. at 55,301. While these requirements may already be implicit in the proposed rule, EPA should make explicit that no state may assume the permitting program if it enacts stricter standing requirements than those that apply in challenges to federal permits. Flexibility on this point is neither necessary nor appropriate. Like the risk of fee shifting, it goes to

the heart of whether a state "provide[s] for, encourage[s], and assist[s] public participation in the permitting process." Id. at 55,326, 55,300.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0043)

C. EPA must ensure that access to court cannot be narrowed via mandatory additive administrative processes.

EPA recognizes that "[w]hen citizens lack the opportunity to challenge executive agency decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as public comments and public hearings on proposed permits, may be compromised." Id. at 55,299. In many states, however, potential plaintiffs must exhaust some administrative remedies before they can gain access to court. See id. at 55,300. Depending on a state's laws, seeking these remedies can cost thousands of dollars more and take far longer than the reasonable exhaustion efforts required under federal law, deterring their use. Therefore, EPA cannot ensure adequate access to court without also ensuring that any required administrative review procedures are not prohibitively burdensome, expensive, or inaccessible. EPA should revise the rule to explicitly prohibit assuming states from requiring more burdensome exhaustion procedures than the reasonable efforts that are required under federal law.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0044)

D. EPA should specify consequences for violating the judicial review provision.

In addition to providing more clarity in general about what actions EPA will take in the event state programs fall out of compliance with these rules, EPA should specifically identify the actions that EPA will take in the event states violate the judicial review provision. At minimum, if a state is violating judicial review requirements, EPA must immediately suspend the state permitting program and pending permits. This would ensure that applicants or agencies are not circumventing the requirements of the Clean Water Act by processing permits that cannot be reviewed by an impartial judiciary. And, making these consequences explicit would establish clear expectations for states that seek to assume or retain the permitting program.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0039.**

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0012)

Although the proposed rule ensures that States adopt Federal judicial standing rules, there are no requirements ensuring that judicial review will be as readily available as it is under Federal authority. The proposed rule allows for States to impose substantial

administrative exhaustion hurdles that could make the road to meaningful judicial review so tortuous that it is functionally blocked. There is no clear reason why EPA should allow States to make judicial review any more difficult to obtain after program assumption than the currently functioning Federal system. Therefore, the rule should have language prohibiting States from making meaningful judicial review more difficult than Federal procedures.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0019)

X. There should be more explicit requirements for the judicial review that is implicitly required for Tribes seeking to assume program administration.

While the proposed Rule's text notes that Tribes are exempted from the requirement for judicial review of permit decisions, the supplementary information alludes to the need for some form of quasi-judicial recourse. In the supplementary information, EPA seems to require "some appropriate form of citizen recourse for applicants and others affected by Tribe-issued permits," but without actually requiring that in the rule itself.[Footnote 18: Clean Water Act Section 404 Tribal and State Program Regulation, 88 Fed. Reg. 55,301.] EPA notes that certain "non-judicial mechanisms for citizen recourse" may be appropriate, but does not provide criteria for when it is and is not appropriate or why a mechanism might be.[Footnote 19: Id.]

We request clarification on what the actual requirements are for ensuring sufficient "meaningful public participation" via judicial review, as hinted at in the rule's supplementary information.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0015)

3. Judicial Review and Rights of Appeal

NAWM supports the inclusion of public participation in the 404 regulatory process and that any impediments to encourage this should be removed prior to application approval. Since the NPDES assumption process has developed and used language since 1996, it would be an established model for States and Tribes to transfer and we recommend inclusion of similar language into the 404(g) regulations to encourage and assure public participation. This would also set an established expectation for program equivalency determinations during the application review process.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

Nebraska Department of Environment and Energy (EPA-HQ-OW-2020-0276-0073-0001)

The Proposed Rule would clarify that States seeking approval to administer a State 404 program must provide for judicial review of decisions to approve or deny State 404 permits equivalent to the judicial review provided for federal 402 permits.

- Requiring a heightened level of judicial review for State issued permits does not facilitate State implementation of a 404 permit program and is not consistent with the Clean Water Act (CWA). Section 101(b) of the CWA States "It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act." The proposed rule would run contrary to section 101(b) of the CWA by creating an additional hurdle to States seeking program approval. Additionally, section 509(b)(1) of the CWA provides for judicial review by any interested person for the Administrator's action in issuing or denying 402 permits and is silent on 404 permits. Long-established principles of statutory interpretation say that because the Act is silent on 404 permits while addressing 402 permits, Congress was intentional in not requiring a heightened level of judicial review for 404 permits. Requiring States to provide a level of judicial review which does not exist for federal 404 permits, and is not required under the CWA, is inconsistent with CWA section 101(b) and would require States to implement State 404 programs which are not consistent with the structure of 404 permitting programs Congress intended under CWA section 509(b)(1).
- EPA' s assertions that heightened judicial review is necessary to facilitate public participation or that a State agency will give less weight to commenters without judicial review[Footnote 1: 88 Fed. Reg. 55298-55299 (Aug. 14, 2023) is purely speculative, challenges the integrity of the State agencies, and does not recognize the efforts made by States to secure meaningful public engagement. EPA relies on a Fourth Circuit Court of Appeals decision[Footnote 2: Com. of Va. v. Browner, 80 F.3d 869 (4th Cir. 1996), amended (Apr. 17, 1996), amended (May 9, 1996)] as confirmation that judicial review is necessary to ensure that the public comment period serves its proper purpose.[Footnote 3: 88 Fed. Reg. 55299 (Aug. 14, 2023)] However, the decision, on which EPA relies on, is addressing section 502(b)(6) of the Clean Air Act, which specifically directs EPA to promulgate regulations which require State Title V programs to provide for judicial review of permit decisions by any person with Article III standing[Footnote 4: Com. of Va. v. Browner, at 877] who participates in the State public comment process. Section 10l (e) of the CWA differs from the Clean Air Act because it does not specifically require judicial review. Section 101(e) only requires that public participation be provided for in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program. EPA's determination that States need to implement a heightened level of judicial review in order to provide for meaningful public participation is flawed and discredits the hard work of its partner States.
- The public has the opportunity to comment on State issued 404 permits within a public comment period and at a hearing if so requested.[Footnote 5: 40 C.F.R. §§ 233.32 and 233.33] The State must consider all comments received and make

those comments part of the official record.[Footnote 6: 40 C.F.R. § 233.34] EPA ignores the fact that EPA retains oversight of all permits issued by a State under Section 404.[Footnote 7: 40 C.F.R. § 233.50] States must forward permits to EPA for review prior to issuance, and if EPA determines that a State did not adequately consider the comments of a citizen, then EPA can require the State to correct the deficiency before the permit can be issued. Requiring that a State implement a heightened level of judicial review for permit decisions is an unnecessary impediment to States seeking approval of a State 404 program because EPA retains oversight.

- Section 101(e) of the CWA directs the Administrator to develop the regulations which specify the minimum guidelines for public participation in cooperation with the States.
    - The Department suggests EPA remove the proposed section 233.24 from the 404(g) rule.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0010)

Fourth, EPA's proposal would not allow States to limit standing to challenge permits in State court [Footnote 28: 88 Fed. Reg. 55300.] If EPA is going to require States to rewrite standing rules in their courts – some of which are developed by common law, and therefore very difficult to rewrite – in order to assume the 404 program, EPA all but guarantees that States whose courts do not already utilize EPA's preferred standing rules will be unable to assume the program.

This section, as proposed, poses strong disincentives and potentially insurmountable hurdles to assumption. Alaska recommends deleting it in its entirety.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0008)

Presently, the standards governing a court challenge to a NPDES permit are different from the standards governing a court challenge to a Corps-issued 404 permit. EPA proposes to make the judicial standard of review for a State-issued 404 permit similar to that required for State NPDES programs, with one modification: the finalized rule will "specify that State requirements that provide for the losing party in a challenge to pay all attorneys' fees, regardless of the merit of their position, are an unacceptable impingement on the accessibility of judicial review." [Footnote 23: 88 Fed. Reg. 55298.]. EPA's basis for this is to "give effect to the CWA's requirements for public participation in the permitting process" as reflected in § 101(e) [Footnote 24: 88 Fed. Reg. 55298.]. Curiously, EPA would not make this section applicable to Tribe-administered 404 programs—only State-administered programs.

As a preliminary matter, EPA lacks a basis for imposing different requirements on States and Tribes with Treatment as States ("TAS") status administering an assumed program. When Tribes attain TAS status, they are "treated as states" – not subject to special requirements (or exempt from certain requirements). EPA's rationale for not applying this section to Tribes – that "requiring Tribes to waive sovereign immunity to judicial review of permitting decision would be a significant disincentive to Tribes" to assume the program – applies equally to States. This is an arbitrary distinction.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0009)

Second, provisions about attorneys' fees in court are outside the scope of permissible bases on which to approve or reject a State's application [Footnote 25: See CWA §§ 404(g), (h).] EPA's cited authority, CWA§ 101(e), does not leave it up to EPA alone, but rather EPA and the States, to "provide[] for, encourage[], and assist[]" public participation by "develop[ing] and publish[ing] regulations specifying minimum guidelines for public participation." [Footnote 26: 88 Fed. Reg. 55298 (quoting 33 U.S.C. § 1251(e)).]. This is not an appropriate application requirement and may not be repackaged as one without a statutory re-write.

Third, by requiring parity with NPDES standards of review, as opposed to the current 404 standards of review, EPA essentially subjects State 404 permits to a higher degree of court scrutiny than Corps 404 permits. And, of course, CWA § 509(b)(1), does not authorize the judicial review of federally issued 404 permits – that is authorized by the federal Administrative Procedure Act ("APA"), and subject to APA standards [Footnote 27: See 88 Fed. Reg. 55300.] Legally, EPA may not require State 404 permits to meet a higher level of scrutiny than federal 404 permits. Practically, this will disincentivize State assumption by jeopardizing industry support.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

Tulalip Tribes of Washington (EPA-HQ-OW-2020-0276-0082-0006)

By way of the Treaty of Point Elliott, which is the supreme law of the land, Tulalip reserved property rights—both within and outside of the exterior boundaries of the Tulalip Indian Reservation—that could be affected by Section 404 permitting decisions. If such permitting decisions are made by Washington, Tulalip should not be forced to put these valuable, federally reserved property rights before a state judicial process. Any final rulemaking should explicitly require that judicial review in Federal District Court shall be available to tribes when challenging state Section 404 permitting decisions.

Agency Response: The question as to which court may exercise jurisdiction over challenges to Tribal or State permitting actions is outside the scope of this rulemaking. ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0040.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0032)

The EPA correctly acknowledges that particular state processes or other state requirements may be impediments to judicial review of state-issued Section 404 permits. Accordingly, EPA must keep the requirement for judicial review, equivalent to federal judicial review, in the regulatory text. In addition, EPA should further elaborate on the restriction against the imposition of attorneys' fees. The preamble identifies "State requirements that provide for the losing party in a challenge to pay all attorneys' fees, regardless of the merit of their position, is an unacceptable impingement on the accessibility of judicial review." Id. at 55298. The language of the proposed regulation states that a state will not meet EPA's standard "if it requires the imposition of attorneys' fees against the losing party, notwithstanding the merit of the litigant's position." Although the language appears to be clear on the imposition of attorneys' fees, EPA must go further and clarify that this prohibition includes the imposition of any attorneys' fees, including partial fees. Any state program that imposes even partial fees must be barred from assuming a 404 program by EPA. This issue is of particular concern in Alaska, which has a loser-pays rule, whereby litigants who lose in civil cases may be required to pay a percentage of the attorney's fees for the prevailing party. Alaska Civil Rule 82. This loser-pays requirement has the effect of significantly limiting judicial review, especially for clients with limited financial resources, which includes many small Tribes.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0033)

EPA should ensure that states cannot make it more difficult to obtain judicial review of Section 404 permits. For example, EPA should explicitly limit any state requirements for administrative exhaustion to the same reasonable efforts that are required under federal law prior to or as part of judicial review of state-issued section 404 permits. Without this explicit regulation, states may include administrative exhaustion requirements that are unduly burdensome and cost-prohibitive such that the public and Tribes may not be able to successfully challenge the permit. Federally issued Section 404 permits are challenged under the Administrative Procedure Act. 88 Fed. Reg. at 55300. This process, based on an administrative record, allows for broad public and Tribal participation. And although any litigation is costly, review under the APA is not as costly as producing a full evidentiary hearing before an administrative agency. EPA should explicitly limit burdensome administrative exhaustion requirements in the final rule. This will ensure that members of the public and Tribes do not have to pay exorbitant costs before they are afforded the opportunity for judicial review. Extensive administrative review processes that are substantially different from federal judicial review and are more costly can stifle public participation ("When citizens lack the opportunity to challenge executive agency decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as public comments and public hearings on proposed permits, may be compromised. Citizens may perceive that a State administrative agency is not addressing their concerns about section 404 permits because the citizens have no recourse to an impartial judiciary, which would have a chilling effect

on all the remaining forms of public participation in the permitting process.") Id. at 55299.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0034)

Quite simply, state judicial review provisions must not be more burdensome on challengers to state-issued permits than what would be required under federal law. This provision does not require EPA to impose a specific administrative review procedure, but instead allows states to continue with state review, as long as they defer to federal requirements on standing and administrative exhaustion. Limiting state administrative appeals processes for permitting decisions is consistent with ensuring the public has access to judicial review. EPA should make clear in the final rule that administrative exhaustion requirements under state laws may be no more burdensome than challenges to federally issued section 404 permits. EPA should also make clear that exhaustion requirements or other burdens to judicial access will result in an automatic denial of a state application to assume Section 404 permitting.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0035)

EPA should also consider adding a requirement that the same standard of review for federal permits should apply to state judicial review of state-issued 404 permits. This ensures that the public and Tribes can participate in permit challenges without having to put on affirmative evidence, which can be costly. EPA should also explicitly include that standing for judicial review should mirror that of federal review and should not be unduly limited. All of the above proposals will ensure that the public can participate in the judicial review process for state-issued permits without substantial burdens that would not exist in federal judicial review.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0036)

EPA should also include in the final rule the actions that EPA can and will take in the event states violate the judicial review provision. At minimum, if a state is violating judicial review requirements, EPA must immediately suspend the state permitting program and pending permits. This ensures that applicants or agencies are not circumventing the requirements of the CWA by processing permits that cannot be reviewed by an impartial judiciary. If a state comes into compliance with judicial review requirements, then it can resume processing permits.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0039.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0037)

EPA must also provide an avenue for judicial review in Federal District Court in certain circumstances. At a minimum, Federal District Court review should be available for Tribes with rights and resources that may be impacted by a state-issued permit. EPA's proposed rule assumes that states will comply with the Section 404(b)(1) Guidelines and "EPA notes that complying with the CWA 404(b)(1) Guidelines currently provides an opportunity for States to consider potential impacts of proposed section 404 permits on aquatic resources and uses important to Tribes." Id at 55298-97. However, state courts, and state administrative agencies in particular, are not appropriate entities to determine the scope of Tribal rights or resources. If Chickaloon Native Village disagrees with a state analysis of how the proposed permit will impact Tribal rights and resources, we should be able to challenge that finding in federal court. These are federal questions and EPA should include a provision explicitly recognizing that judicial review in Federal District Court is available where federally protected Tribal rights and resources are at stake.

Agency Response: The question as to which court may exercise jurisdiction over challenges to Tribal or State permitting actions is outside the scope of this rulemaking. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0040.

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0032)

EPA must ensure the final rule requires equal access to courts for any state seeking to assume the 404 program by strengthening the rule's prohibition against fee shifting. All plaintiffs should have sufficient access to court to enforce the Clean Water Act. Under the Clean Water Act, citizens have the authority to bring lawsuits to address violations and force compliance with the Act.[Footnote 55: 33 U.S. Code § 1365.] These citizens' suits have been an essential tool in furthering the purposes of the Act and protecting the quality of our nation's waters.[Footnote 56: K. D. Florio, Attorney's Fees in Environmental Citizen's Suits: Should Prevailing Defendants Recover?, 27 BOSTON COLLEGE ENV. AFFAIRS L. REV. 707, 709 (2000).] In such suits, courts may award any prevailing or substantially prevailing party fees as it deems appropriate.[Footnote 57: 33 U.S. Code § 1365(d).] However, federal courts only award attorney's fees to defendants in rare circumstances.[Footnote 58: C. Kinley, The Water is on Fire: Current Circuit Approaches to Fee?Shifting in Citizen?Suits Under the Clean Water Act and the Need for Clearer and More Uniform Standards, 46 WM. & MARY ENVTL. L. & POL'Y REV. 521 (2022) (Kinley 2022).] Conversely, courts will typically award fees to prevailing plaintiffs.[Footnote 59: Id.] This practice has made it financially feasible for citizens to act in the public interest, bringing actions to protect water quality.[Footnote 60: K. S. Coplan, Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law, 25 COLO. NAT. RES. ENERGY &ENV'T. L. REV. 61, 72 (2011).] EPA's draft regulations seem to acknowledge this reality by acknowledging that states' fee shifting requirements can unacceptably impinge on access to judicial review. The rule, however, does not go far enough. The final rule must clearly state that EPA will disqualify any state that provides for mandatory or discretionary fee shifting in any amount against losing plaintiffs except in extraordinary circumstances.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0033)

In the Ninth Circuit, a court may only award a prevailing defendant fees in a Clean Water Act suit where a plaintiff's claim was frivolous, unreasonable, or groundless.[Footnote 61: Razore v. Tulalip Tribes, 66 F.3d 236, 240 (9th Cir. 1995) (adopting Title VII fee-shifting standard set out in Christiansburg Garment Co. v. Equal Emp. Opportunity Comm'n, 434 U.S. 412, 422 (1978)).] In addition, a court may only deny a prevailing plaintiff fees under very narrow, rare, special circumstances—for example, where plaintiff's suit did not provide a social benefit.[Footnote 62: St. John's Organic Farm v. Gem County Mosquito Abatement Dist., 574 F.3d 1054, 1062 (9th Cir. 2009) (citing Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968)).] Under these standards, citizens in Alaska are currently protected from high degrees of risk or uncertainty that they will need to pay a defendant's fees if they are unsuccessful in bringing a Clean Water Act Section 404 suit. They are also relatively assured of recovering their fees if they are successful. This balance of financial risks is essential in enabling citizens to participate in protecting water quality within Alaska for purposes of Section 404 of the Clean Water Act.[Footnote 63: See Kinley 2022 at 576 ("Considering the environmental crises we continue to face today and the often limited resources available to government agencies, more citizens need to participate in enforcing the CWA. However, greater participation requires a predictable, inclusive, and incentivizing fee shifting provision.").]

In contrast, under Alaska law, unsuccessful plaintiffs may be required to pay not only their own fees but also the prevailing party's fees.[Footnote 64: AS 09.60.010; Alaska Rule of Civil Procedure 82(a) (requiring partial fee shifting against the losing party in civil cases); Alaska Rule of Appellate Procedure 508(e)(4) (requiring partial fee shifting against the losing party in appeals from agency action); see also G. Sommers, The End of the Public Interest Exception: Preventing the Deterrence of Future Litigants with Rule 82(b)(3)(i), 31 Alaska L. Rev. 131, 155 (2014) (Sommers 2014).] For ordinary civil cases, the court may consider the reasonableness of a plaintiff's position in determining the appropriate amount of a fee award.[Footnote 65: Alaska Rule of Civil Procedure 82(b)(3)(F).] And for administrative appeals, the court may not award fees if it determines the fee award would deter similarly situated litigants if not reduced.[Footnote 66: Alaska Rule of Appellate Procedure 508(e)(4)(B).]

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0034)

Alaska is the only state in the country with a "loser pays" rule that does not fully insulate public interest litigants from having to pay the opposing party's fees if they lose in litigation. The only exception to that rule is where a plaintiff brings a claim in the public interest under the Alaska or U.S. Constitution[Footnote 67: AS 09.60.010(c); Alaska Rule of Civil Procedure 82(a).]—an exception that would not protect Clean Water Act

citizen's suits should the State achieve primacy over Section 404 permitting. While Alaskan courts have the discretion to ameliorate the fees public interest plaintiffs may be subject to, those results are unpredictable and unreliable for plaintiffs and provide no up-front assurance that plaintiffs will be insulated from having to pay defendants' fees.[Footnote 68: See Sommers 2014.] This creates a significant chilling effect on plaintiffs seeking to protect the public interest. There are examples in Alaska where individual citizens bringing suits in the public interest have been threatened with overwhelming fees—even where their lawsuit was constitutional in nature and they should have been protected from fees.[Footnote 69: J. Edge, Protesters show support for Hammond, Fisher in Pebble Mine case, ALASKA PUBLIC MEDIA (Oct. 23, 2013); Nunamta Aulukestai v. State of Alaska Dept. of Nat. Res, Case No. 3AN- 09-09173, Declaration of Victor Fischer (Feb. 5, 2012); Nunamta Aulukestai v. State of Alaska Dept. of Nat. Res, Case No. 3AN-09-09173, Declaration of Bella Gardiner Hammond (Jan. 27, 2012) (Hammond Decl.); Nunamta Aulukestai v. State of Alaska Dept. of Nat. Res, Case No. 3AN-09-09173, Declaration of Ricky Delkittie, Sr. (Jan. 24, 2012); Nunamta Aulukestai v. State of Alaska Dept. of Nat. Res, Case No. 3AN-09-09173, Declaration of Violet Willson (Jan. 30, 2012).] Non-profit organizations that financially supported plaintiffs in bringing public interest lawsuits but were not parties to such suits have been subjected to invasive discovery requests related to defendants attempting to seek fees.[Footnote 70: See Nunamta Aulukestai, et at. v. State of Alaska Dept. of Nat. Res, Case No. 3AN-09-09173 CI, Alaska Conservation Foundation, Memorandum in Support of Motion for Protective Order (Oct. 8, 2012).] These actions, even where unsuccessful, lead citizens to conclude that they "will not consider ever becoming involved" in public interest suits in the future.[Footnote 71: Hammond Decl. ¶ 14.] The courts' discretion to ameliorate these risks is insufficient to counterbalance the chilling effect they have on public interest litigation in the state.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0035)

When the State sought and achieved permitting authority under Section 402, EPA relied on Alaska courts' discretion in managing fee awards, as well as the State's stated commitment that it would not seek fees unless a suit was deemed frivolous or brought only for purposes of delay.[Footnote 72: ADEC, Alaska Pollutant Discharge Elimination System Program Description at 57 (Oct. 29, 2008).]

That has been insufficient and has led to a chilling effect for citizen enforcement related to Section 402 permitting decisions. Even to the extent the State holds to its commitment, there is no bar on intervenors seeking fees in such cases. And the courts' power to ameliorate fee awards is "simply too open-ended, and the uncertainty this creates for litigants may be chilling in its own right."[Footnote 73: Summers 2014 at 156.] In the years since Alaska was granted primacy over the NPDES program, public interest litigants that previously participated in litigation to protect Alaska's waters have been deterred. For example, the Sierra Club "has not brought a single action in Alaska state court since [Alaska abolished its public interest exemption to fee-shifting] because there has been no reliable way to predict its potential liability for fee and cost

awards."[Footnote 74: Id.] Similarly, the Northern Alaska Environmental Center "has filed only one non-constitutional case . . . which had eight plaintiff organizations to share the burden of any potential adverse fee award."[Footnote 75: Id.]

Under the proposed rule, a state would be ineligible to assume the program "if it requires the imposition of attorneys' fees against the losing party, notwithstanding the merit of the litigant's position."[Footnote 76: 88 Fed. Reg. at 55,326.] This does not ensure adequate access to courts, because it does not limit the scope of discretionary fee shifting against losing plaintiffs.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0036)

Under this standard, if Alaska were awarded 404 primacy without being required to eliminate the discretionary fee shifting, citizens would experience much higher financial risks and burdens when seeking to enforce Section 404 of the Clean Water Act. EPA must protect against this narrowing of citizens' ability to participate in Clean Water Act enforcement. EPA must ensure that fee-shifting for defendants only occurs in the limited scenarios envisioned by federal law.

EPA should revise the rule in pertinent part to read:

A State will not meet this standard if, for example, it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review), or if it permits any imposition of attorneys' fees, fully or partially, against losing plaintiffs whose claims are not frivolous, unreasonable, groundless, or made in bad faith.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0004.**

Gila river Indian Community, Department of Environmental Quality (EPA-HQ-OW-2020-0276-TRANS-081523-002-0001)

Comment 1

A second attendee asked through the chat for further clarification about the judicial review and not including Tribes/tribal courts in that portion of the rule.

Comment 2

The attendee asked through the chat if EPA was trying to impose something on judicial reviews that is not available in tribal court systems, and if so, where would judicial review occur.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

Sierra Club (EPA-HQ-OW-2020-0276-TRANS-092923-004-0005)

It must require the state to give all affected people the ability to challenge permits, to enforce permit conditions, and to do what all people have the right to do, to enforce our environmental laws.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

Natural Resources Defense Council (EPA-HQ-OW-2020-0276-TRANS-092923-008-0010)

Four, the state's judicial and administrative processes provide citizens with an equivalent ability to challenge permit decisions and do not create grave financial risks to citizens that engage in such challenges.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble.**

Chickaloon Native Village (EPA-HQ-OW-2020-0276-TRANS-092923-009-0005)

We appreciate the EPA is clarifying the methods for dispute resolution and judicial review, and we'd like to ensure that Tribes are able to engage in these, when there are state permits that they would like to challenge, especially where state permits would damage Tribal historical, cultural, and natural resources.

Agency Response: ***See*** **Sections IV.C.2 and IV.F of the final rule preamble.**

Chickaloon Native Village (EPA-HQ-OW-2020-0276-TRANS-092923-009-0006)

EPA needs to mandate that Tribes and the public are able to challenge permits and enforce environmental laws when the states have primacy.

Agency Response: ***See*** **Sections IV.C.2 and IV.F of the final rule preamble.**

D. Subpart E - Compliance Evaluation and Enforcement

1. Criminal intent standard (*mens rea*)

California State Water Resources Control Board (EPA-HQ-OW-2020-0276-TRANS-082423-002-0001)

On the compliance and enforcement request, are you interested in just criminal prosecutions or do you want feedback on simple negligence in civil and administrative context as well?

Agency Response: This rule only addresses the *mens rea* for criminal violations of the CWA.

Environmental Protection Network (EPN) (EPA-HQ-OW-2020-0276-0057-0007)

Revision of Criminal Enforcement Standards
EPN supports this clarification of the Criminal Enforcement mens rea requirements. This change clarifies the evidentiary standard that is necessary to prove a criminal violation. The existing regulations were not consistent with the underlying statutory requirements

and resulted in some state/Tribe enforcement programs having to modify their statutory requirements to meet the CWA requirements. There was a question as to how stringent they needed to be given the conflict between the statute and the regulations. Under the proposed regulations, the state/Tribal enforcement programs allow for any mens rea to prosecute a criminal violation.

Agency Response: EPA acknowledges the commenter's expression of support.

Idaho Department of Environmental Quality (IDEQ) (EPA-HQ-OW-2020-0276-0059-0004)

IV. Compliance and Enforcement

IDEQ supports the proposed Rule clarification that Tribes and States that are authorized to administer the CWA section 402 and 404 permitting programs, or that seek authorization to do so, are required to authorize prosecution based on a criminal intent of any form of negligence, which may include gross negligence.

Agency Response: EPA acknowledges the commenter's expression of support.

Charles River Watershed Association (CRWA) (EPA-HQ-OW-2020-0276-0062-0001)

CRWA has reviewed this rule. Our initial analysis is that while the purpose of this rulemaking may have some benefit - streamlining the procedures for state assumption of Clean Water Act ("CWA") Section 404 permitting authority - in practice, due to its treatment of criminal intent standards, this rule may impair the protectiveness of the program and may effectively authorize a race to the bottom with respect to state CWA enforcement programs.

CRWA draws attention to the below out of an abundance of caution and to demonstrate the necessity of extending the comment period for this rulemaking so that its full effects may be properly analyzed. Portions of this rule - in particular the changes to mens rea requirements - were first proposed during the Trump Administration. As is often the result of many such regulatory streamlining initiatives, through this rulemaking, EPA may be significantly weakening protections for national water resources, a decision with significant climate change implications. As a watershed organization, CRWA recognizes that the effects of climate change cross state boundaries. Despite Massachusetts' relatively robust protections for wetlands, the same may not be true of our neighbors. Restoration and flooding are cross-boundary issues that could easily alter Massachusetts' natural environment if § 404 permitting was handled differently by surrounding states.[Footnote 1: In particular, Vermont has looked into the assumption of § 404 permitting authority. See Vermont State Wetland Program Summary, National Association of Wetland Managers (NAWM), https://www.nawm.org/pdf_lib/state_summaries/vermont_state_wetland_program_summary_083115.pdf] In particular, interstate rivers like the Connecticut or Merrimack cross state boundaries, meaning that less stringent state-administered § 404 programs could have deleterious effects on our state's water resources. Other instate waters could likewise be harmed by regulatory changes by upstream neighbors. Even if the Army Corps of Engineers ("the Corps") retained permitting authority over the mainstem

branches of these interstate rivers, harm to tributaries or waters within larger watershed areas could still negatively affect water resources in our state.

However, as other commenters have noted, it is difficult to properly ascertain the full effects of this rule due to the 60-day comment period, which is wholly insufficient to fully analyze a rulemaking whose effects may be so far-reaching. For the following reasons, CRWA expresses concern about this rulemaking and joins the other commenters in requesting that EPA extend the comment period for this rule by 30 days.

Agency Response: ***See*** **Section IV.D of the final rule preamble. EPA disagrees with the commenter that this rule will impair the protectiveness of the section 404 program and effectively authorize a race to the bottom with respect to state CWA enforcement programs. Many States administering or seeking to administer the programs do not currently have authority to prosecute based on a simple negligence** ***mens rea*****. EPA is unaware of any concrete evidence indicating that the absence of a simple negligence** ***mens rea*** **for criminal violations has served as a bar to effective State criminal enforcement programs. EPA also is unaware of any evidence indicating that the absence of such a standard in a State issuing a section 402 or 404 permit would affect the behavior of dischargers to the extent that it would notably increase the deleterious effects of pollution on downstream states that have a simple negligence** ***mens rea*****.**

EPA did not extend the original 60-day comment period, as 60 days provides sufficient opportunity to consider and respond to the proposed rule. ***See*** **Section III.B of the final rule preamble for further discussion on the rulemaking development process, including opportunities for public engagement and input. EPA notes that the proposal to clarify the criminal negligence** ***mens rea*** **was originally issued separately in December 2020, so stakeholders have had ample opportunity to consider this particular aspect of the rule.**

Charles River Watershed Association (CRWA) (EPA-HQ-OW-2020-0276-0062-0003)

This rulemaking affords the EPA Administrator too much discretion to approve state enforcement programs with less protective criminal intent standards than the Federal Clean Water Act program would otherwise employ

In this proposed rulemaking EPA relies on § 402(b)(7) and § 404(h) to assert that the Administrator of EPA has broad discretion to approve state enforcement programs less stringent than those in the statute. EPA further takes the position that in authorizing state programs, the Administrator is not bound to apply the objective criminal liability standards and sanctions in § 309 of the statute, and may substitute their own. EPA notes that "beginning in 1999, three circuit courts of appeal determined that criminal negligence under CWA § 309(c)(1) is 'ordinary negligence' rather than gross negligence or any other form of negligence." However, EPA correctly notes that "[t]hese courts did not address whether this provision implicates Tribal or State programs administering CWA § 402 or 404 programs." Given that, EPA now asserts that the provision simply does not apply to Tribal or State Programs: "[w]hile EPA's own enforcement authority in

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

However, a requirement to demonstrate the "authority to abate violations of the permit or permit program" is far from an objective standard. Whatever preference Congress may have expressed for state autonomy, minimum national standards are a central tenant of the CWA. If EPA's position were to prevail, the Administrator could approve state enforcement programs with de-minimis criminal negligence standards, undermining this fundamental premise. If states are not required to implement the statutory enforcement standards of § 309 there would be no objective criminal enforcement standards. Rather, all that would be left would be a reliance on the current EPA Administrator's discretion. Of even greater concern, in this rulemaking, EPA identifies no limit on the Administrator's authority in this respect, and, "while the current EPA might be rigorous in its evaluation of any state's application to assume responsibility for Section 404 permits, one can easily imagine an Administration in which that rigor might be relaxed."[Footnote 6: Id.]

Agency Response: ***See*** **Section IV.D of the final rule preamble.**

Charles River Watershed Association (CRWA) (EPA-HQ-OW-2020-0276-0062-0004)

EPA's interpretation that Clean Water Act §§ 402 and 404 allow for "approved Tribal and State programs to have a 'somewhat different' approach to criminal enforcement than the Federal Government's approach" ignores statutory directives such as 402(a)(3) which require permit programs with the "same terms, conditions, and requirements…" for states and the federal government

CWA § 402(a)(3) provides in full: "The permit program of the Administrator under paragraph (1) of this section, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section."

This language reasonably gives rise to the interpretation that Congress intended the EPA Administrator to establish a permit program for the states through 402(b) that is substantially similar to the Federal program. While EPA takes care to provide substantial precedent to support the position that state enforcement programs do not have to "mirror" federal standards,[Footnote 7: 88 Fed. Reg. 55276, 55307 (Aug. 14, 2023).] arguably the more likely reason for a similarity between Federal and state programs is to prevent a two-tiered permitting regime where state-administered CWA programs are less protective. Therefore, more logically - and much more true to the spirit of the CWA - the purpose of 402(a)(3) is to set a floor from which state-administered programs may be more stringent.

EPA's proposed rule appears to entirely disregard § 402(a)(3), and largely relies on § 402(b)(7) for the proposition that the controlling factor in determining whether a state program's enforcement standards are appropriate is the Administrator's discretion as to whether or not they are "adequate." This ignores the fact that nowhere in the CWA does Congress explicitly state that § 309 does not apply to the states. Regardless of whether case law authorizes EPA's approach, CRWA has a great deal of trepidation around a national CWA enforcement scheme that has no floor and leaves determinations of adequacy largely in the hands of a single unelected individual.

However, some of the cited cases also do not appear to support state program deviation from the federal floor of simple negligence found in § 309. In Akiak Native Community v. EPA, the decision appeared premised more on enforcement mechanisms and less on criminal intent standards.[Footnote 8: 625 F.3d 1162 (9th Cir., 2010).] In NRDC v. EPA, the court ruled that EPA may allow states to apply less than the maximum statutory criminal penalties in the Act but neither litigant mentioned § 402(a)(3), and the court, in its ruling, did not take judicial notice of this statutory provision.[Footnote 9: 859 F.2d 156 (D.C. Cir., 1988).] The court's ruling also appears to contradict the statutory text which applies solely to civil penalties under § 309(d).[Footnote 10: Id.] EPA also ignores that this ruling concerns criminal penalties, not criminal intent standards, which are appropriately analyzed very differently. Perhaps most importantly, in NRDC the court noted the foundation of the permit program and the congressional intent of these provisions was that the CWA "be administered in such a manner that the abilities of the States to control their own permit programs will be developed and strengthened. [Members of Congress] look for and expect State and local interest, initiative, and personnel to provide a much more effective program than that which would result from control in the regional offices of the Environmental Protection Agency."[Footnote 11: Id. at 175 (emphasis added).] As interpreted by the court, Congress' goal was always to create more protective state programs.

Thus, while CRWA recognizes the support for state autonomy and the administrative balancing required by the Administrator in the permitting process, allowing states to have lower criminal enforcement standards is largely incompatible with the intent for states to have the "much more effective" programs referenced in NRDC. This supports the interpretation that if Congress intended state programs to deviate from the criminal enforcement standards articulated in the CWA, the goal would be to have more stringent enforcement in light of the Sackett decision. Should states be allowed to implement less stringent enforcement measures, the now heavily reduced number of protected waters under the CWA would be at even more risk and therefore defy the very purpose for which the CWA was enacted.

Agency Response: ***See*** **Section IV.D of the final rule preamble.**

Charles River Watershed Association (CRWA) (EPA-HQ-OW-2020-0276-0062-0005)

The modification of legislatively approved criminal liability standards by executive branch agencies without express Congressional authorization implicates significant constitutional questions

Absent explicit legislative authorization, executive branch agencies may not modify the type of criminal standards and sanctions Congress authorized and to whom they apply. Section 309 deals with criminal liability standards and sanctions. Where other explicitly required elements of state § 404 programs are technical standards of the kind where deference is often afforded to expert agencies[Footnote 12: EPA notes the specific inclusion of §§ 1317, 1318, and 1343 (and other sections) as required elements of a state § 404 program and contrasts them with the absence of section § 1319 as a required element. EPA appears to argue this is proof that only explicitly stated provisions are required in CWA § 402 and § 404 state programs.], deciding which criminal liability standards and sanctions to apply is not a power implicitly left to the discretion of unelected executive branch officials. Only Congress has the authority to decide who is subject to such standards and sanctions and the nature of the sanctions. Therefore, the Congressionally set criminal intent standard should apply, even if not explicitly included as a required element of a state 404 program. EPA's position that the Administrator may - through the context of state program authorizations - effectively modify congressionally authorized criminal intent standards and thereby to whom criminal sanctions apply raises significant constitutional questions, particularly with respect to the non-delegation doctrine. The interaction between the non-delegation doctrine and agency interpretation of criminal rulemaking authority has been recognized, and it has also been recognized that "criminal law delegations are different from other delegations … [t]hey are inconsistent with foundational criminal law doctrine, they present greater threats to the principles underlying the non-delegation doctrine, and they are not supported by the ordinary arguments in favor of delegation."[Footnote 13: F. Andrew Hessick & Carissa Byrne Hessick, Nondelegation and Criminal Law, 107 Va. L. Rev. 281, 282 (2021).]

EPA's position also conflicts with the Historical and Statutory Notes found at the end of § 309 of the CWA[Footnote 14: 33 USC §1319(d); Water Quality Act of 1987, Title III, §313(b)(2), Pub. L. No. 100-4, 101 Stat. 45 (INCREASED PENALTIES NOT REQUIRED UNDER STATE PROGRAMS).]. In those notes, Congress explicitly authorizes departures from state program civil enforcement penalties in the context of state program approval. Arguably, the discretion to depart from the criminal liability standards - a far greater authority since it involves who is or is not subject to criminal sanctions - is a power that Congress would have to explicitly authorize, which it does not appear to have done. The absence of explicit Congressional authorization to depart from criminal liability standards applicable to state programs may be fatal to EPA's proposal.

EPA is likely unable to rely on Chevron deference to apply criminal liability standards not found in the statute being interpreted.

EPA asserts that to the extent its interpretation "is viewed as different from any earlier interpretations of CWA sections 402 and 404 and implementing regulations, [it] has ample authority to change its interpretation of ambiguous statutory language," citing Chevron in support of this assertion.[Footnote 15: Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984)] However, as discussed above, delegation does - or should - function differently in the context of criminal law, and the same applies to deference standards. The principle that

Chevron deference does not apply to interpretations of criminal statutes has been conclusively established.[Footnote 16: United States v. Apel, 571 U.S. 359, 369 (2014); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155 (10th Cir. 2016); and Abramski v. United States, 573 U.S. 169, 191 (2014).] EPA appears to be asserting Chevron deference through this rulemaking to determine who is and is not subject to criminal liability. This position is contrary to well-settled law.

Moreover, if this rule is finalized, EPA will be applying criminal liability standards (gross negligence and willfulness) through state programs that are not found in the CWA. As EPA notes, the case law is clear that the criminal negligence standard in the CWA is simple negligence and that there is no willful standard in the statute. EPA's position is therefore not likely to be entitled to Chevron deference, appears contrary to the statute as explained above, and ignores the clear implications of Congress' explicit grant of authority to the Administrator to vary statutory civil penalties despite making no such grant with respect to criminal liability standards.

Agency Response: ***See*** **Section IV.D of the final rule preamble.**

Florida Department of Environmental Protection (FDEP) **(**EPA-HQ-OW-2020-0276-0066-0019)

According to EPA, the proposed "new language confirms EPA's interpretation of the effect of its current regulation" that the CWA authorizes approval of state programs that allow for
prosecution based on a mens rea of any form of negligence, including gross negligence. Criminal enforcement for water resources violations is clearly an area of traditional state control, and federal mandates related to state criminal laws would implicate important constitutional principles. Additionally, as the Proposed Rule notes, "[i]n addressing the enforcement requirements for State programs, Congress did not require Tribes and States to have identical enforcement authority to EPA's. Congress did not use the words 'all applicable,' 'same,' or any phrase specific to any mens rea standard, let alone the Federal standard, as it did in other parts of CWA sections 404(h) or 402(b)." [Footnote 16: 88 Fed. Reg. 55,307.]
Florida agrees with EPA's approach here. Under CWA Section 404(h)(1), a State need **[in bold]**only demonstrate authority necessary to "abate violations of" its permitting program, "including civil and criminal penalties and other ways and means of enforcement." [Footnote 17: 33 U.S.C. § 1344(h)(1)(G).] That broad language makes it clear that States have flexibility in devising criminal enforcement regimes. The Proposed Rule affirms this and affirms that EPA has discretion to approve state programs that deviate from the federal enforcement model within the framework of the Proposed Rule. Accordingly, the Proposed Rule would further the intent of the CWA Section 402(g) and 404(g) of balancing "the need for uniformity with Tribal and State autonomy" by making clear that variable state enforcement authority is allowed as part of Section 404 assumption.

Agency Response: ***See*** **Section IV.D of the final rule preamble.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0046)

IX. EPA's proposal to allow weaker state enforcement programs conflicts with the Clean Water Act.

EPA's proposed rule would also allow weaker state enforcement programs than what federal law requires by allowing states to adopt "any" negligence standard for criminal enforcement rather than the federal standard. Id. at 55,321, 55,306-08.

At the outset, we remind EPA that there has been strong, widespread opposition to such a change precisely because it would conflict with the Clean Water Act, undermine the Act's objectives, and further imperil our waterways.

In the preamble, EPA downplays the extent of that opposition by claiming that there were only two comments in opposition to its earlier effort to allow weaker state enforcement programs, while five comments supported the change. Id. at 55,306. But the fact is that at least nine environmental organizations, including three national organizations, opposed the change by comment letter dated January 13, 2021.75 An additional twenty-seven organizations later asked EPA to withdraw the proposed change on April 20, 2021.76 EPA acknowledged receipt on June 22, 2021. It is therefore clear that EPA's proposal to undermine criminal enforcement is widely opposed.

Agency Response: ***See*** **Section IV.D of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0062-0001. EPA agrees with the commenter's characterization of the number of organizations that signed comment letters in January and April of 2021 and does not intend to downplay opposition to its December 2020 proposal addressing the simple negligence** ***mens rea.***

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0047)

A. The Clean Water Act plainly requires that state programs have authority to prosecute simple negligence violations.

Section 309 of the Clean Water Act plainly enumerates violations under Section 402 and 404 for permits issued by the Corps or by a state. Section 309(c)(1) specifically provides that "[a]ny person who . . . negligently violates . . . any permit condition or limitation implementing" provisions of the Clean Water Act in a permit issued under Sections 402 or 404 by a state "shall be punished by a fine . . ., imprisonment . . . or by both." 33 U.S.C. § 1319(c)(1). The plain language of the statute thus provides the floor for state or federal criminal enforcement of Sections 402 and 404.

75 The January 2021 letter was submitted by Center for Biological Diversity, Columbia Waterkeeper, Conservancy of Southwest Florida, Earthjustice, Environmental Confederation of Southwest Florida, Miami Waterkeeper, Minnesota Center for Environmental Advocacy, Sierra Club, and St. Johns Riverkeeper. See Earthjustice et al. 2021 Letter.

76 The April 2021 letter was submitted by the nine organizations listed above as well as twenty- seven more organizations from around the country: Advocates for Clean and Clear Waterways, Alabama Rivers Alliance, Anthropocene Alliance, The Alliance for

the Great Lakes, Clean Water Action, Colorado Latino Forum, Defenders of Wildlife, Endangered Habitats League, Environment America, Florida Wildlife Federation, For the Love of Water, GreenLatinos, Harpeth Conservancy, Idaho Conservation League, Illinois Council of Trout Unlimited, League of Conservation Voters, Mississippi River Collaborative, Missouri Confluence Waterkeeper, National Latino Farmers and Ranchers Trade Association, National Parks Conservation Association, Natural Resources Defense Council, Nebraska Wildlife Federation, Our Santa Fe River, PolicyLink, Puget Soundkeeper Alliance, Rural Coalition, Surfrider Foundation, Tennessee Clean Water Network, and Waterkeeper Alliance. Letter from Tania Galloni et al., Earthjustice et al., to Michael Regan et al., EPA, Apr. 20, 2021

Federal courts interpreting Section 309 have uniformly held that the standard set by Congress for criminal liability is one of simple negligence. See United States v. Maury, 259-60 (3d Cir. 2012) (plain language of "negligence" means ordinary negligence); United States v. Pruett, 681 F.3d 232, 242-43 (5th Cir. 2012) (same); United States v. Ortiz, 427 F.3d 1278, 1283 (10th Cir. 2005) (same); United States v. Hanousek, 176 F.3d 1116, 1120 (9th Cir.

1999) (same). States administering Section 402 or 404 must therefore also provide criminal liability for negligent violations of the Clean Water Act.

EPA's preamble claims that Section 309(c) "specifically provides EPA with enforcement authority to establish misdemeanor criminal liability in subsection (c)(1) and a range of penalties for '[n]egligent violations' of specified provisions." 88 Fed. Reg. at 55,306. But Section 309(c) says nothing about granting EPA enforcement authority, nothing about authorizing EPA to establish misdemeanor criminal liability, and, in fact, nothing about EPA at all other than as the issuer of Clean Water Act permits and orders that could be violated. See 33 U.S.C. § 1319(c).

To the contrary, in Section 309(c) Congress itself established misdemeanor criminal liability for negligent violations of the Clean Water Act. Congress spoke quite plainly on the matter, stating that anyone who negligently violates a 402 or 404 permit issued by a State "shall be punished." Id.

Agency Response: ***See*** **Section IV.D of the final rule preamble.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0048)

There is nothing in Section 309(c) that limits criminal liability for negligent violations to prosecution by the EPA. Where Congress intended to specify authority pertaining to EPA, it said so. See, e.g., 33 U.S.C. §§ 1319(a)(1) (addressing compliance orders that may be issued by EPA); 1319(g) (addressing administrative penalties that may be imposed by EPA or the Corps). Section 309(c), by contrast, is not limited to actions by EPA (or the Corps).

Congress further expressly required that any state seeking to administer Section 402 or 404 programs demonstrate it has the authority to abate violations of state-issued permits through civil and criminal penalties before EPA may approve the delegation or assumption of authority under the Clean Water Act. 33 U.S.C. §§ 1342(b)(7),

1344(h)(1)(G). The Clean Water Act sets forth those violations in Section 309(c), including 309(c)(1). States must therefore demonstrate that they have authority to abate simple negligence violations through criminal penalties.

EPA's preamble acknowledges that states must be able to demonstrate authority to abate violations through civil and criminal penalties but claims that Section 309 does not apply as a requirement for state 402 or 404 programs. 88 Fed. Reg. 55,306. But EPA fails to identify any other place in the Clean Water Act that sets forth the "violations" to which Sections 402(b)(7) and 404(h)(1)(G) refer. The reference is plainly to Section 309.

The fatal flaw in EPA's approach is evident from the agency's own preamble. At a loss for any other standard, EPA defends its proposed "any negligence will do" approach as requiring that "States be able to implement the text of section 309, requiring authority to prosecute based on a negligence mens rea." 88 Fed. Reg. at 55,307. But the text of Section 309 criminalizes simple negligence. In other words, the negligence in Section 309 is not "any" negligence. It is, as federal courts have universally recognized, simple negligence.

EPA claims that its approach is supported by Congress' not requiring identical enforcement authority in Sections 402 and 404 and seeks to contrast this with other provisions where Congress required equivalence with federal law. 88 Fed. Reg. at 55,307 (citing Sebelius v. Cloer, 569 U.S. 369, 378 (2013)). But Congress plainly required that states have authority to abate violations by civil and criminal penalties and plainly set forth those violations (including as to permits issued by a state) in Section 309. Congress was required to do no more to make this intent clear.

Agency Response: ***See*** **Section IV.D of the final rule preamble.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0049)

As prior comment letters have explained, neither Nat. Res. Def. Council, Inc. v. E.P.A., 859 F.2d 156 (D.C. Cir. 1988) (NRDC), nor Akiak Native Community v. EPA, 625 F.3d 1162 (9th Cir. 2010), on which EPA continues to rely, support EPA's proposed approach here. In NRDC, the Court held that state programs need not establish the same maximum penalties for civil or criminal violations as available under federal law. The issue here is allowing a state not to have the same minimum negligence standard that is required under federal law.

In NRDC, the Court recognized the importance of enforcement to meet Clean Water Act goals. The Court ruled that states were not required to have the same maximum penalties in light of an express Congressional amendment that stated that increased penalties were not required for state programs. 859 F.2d at 179. There is no comparable pronouncement by Congress here. To the contrary, Congress spoke directly to violations of state permits in Section 309.

In Akiak Native Community, the issue was Alaska's failure to provide for administrative penalties in its 402 program. The Ninth Circuit ruled that Congress did not require states

to be able to impose administrative penalties, because the delegation provision addressed only civil and criminal penalties. 625 F.3d at 1171-72. The issue here, by contrast, is a state's ability to impose criminal penalties, which the Clean Water Act clearly requires. See 33 U.S.C. §§ 1342(b)(7); 1344(h)(1)(G).

Allowing states to exclude an entire class of criminal violations from criminal liability under state law would incentivize states like Idaho and Florida to further avoid enforcement of the Act and remove an important deterrent to violations of the Act, regardless of what actions a state may take.77

Agency Response: ***See*** **Section IV.D of the final rule preamble.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0050)

B. EPA's own regulations have long recognized that states may not require a higher burden of proof for criminal intent than is required of EPA.

EPA's regulations have rightly recognized that the criminal intent standard for states with assumed programs must be no greater than that required of EPA under the Clean Water Act. 40

77 In states with political climates where Clean Water Act enforcement is limited to begin with, such as Florida and Idaho, a more demanding mens rea requirement would only tip the scales further, providing cover for state regulators to avoid enforcement responsibilities. The Idaho Department of Environmental Quality has recently proven reluctant to take action even against serial violators causing serious environmental harm. In one notable example, only a citizen suit against the Gallena Complex Mine filed by the Idaho Conservation League prodded the agency even to file a formal complaint. EPA should not further erode enforcement by allowing states to ignore an important tool for deterrence required by Congress.

C.F.R. § 123.27(b)(2) ("The burden of proof and degree of knowledge or intent required under State law for establishing violations under [§ 123.27(a)(3)] shall be no greater than" that required of EPA when it prosecutes the offense); id. § 233.41(b)(2) ("The burden of proof and degree of knowledge or intent required under State law for establishing violations under [§ 233.41(a)(3)] 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."); see also Idaho Conservation League v. U.S. Env't Prot. Agency, 820 F. App'x 627 (9th Cir. 2020).

EPA suggests that its proposed approach is "consistent with" the Ninth Circuit's statement in Idaho Conservation League that a state program's burden of proof on criminal intent need not "mirror" the federal programs' burden. 88 Fed. Reg. at 55,307. But the Ninth Circuit expressly rejected that argument as authorizing EPA to approve a state 402 program with a heightened mens rea requirement, because under the very regulations EPA now seeks to "clarify," EPA clearly required that a state's criminal intent standard be no greater than that required of EPA [Footnote 78: The Ninth Circuit also expressly rejected EPA's argument that its own regulation was ambiguous or

internally inconsistent and that the Court should therefore defer to the agency's interpretation. 820 F. App'x at 628.] 820 F. App'x at 628. As the Ninth Circuit recognized, the issue is not one of mirroring, but of meeting the minimum Clean Water Act standard. Id.

Although EPA claims it has long asserted this position, the preamble points to nothing other than EPA's litigation position in Idaho Conservation League, which the Ninth Circuit panel unanimously rejected. EPA neglects to mention that the agency originally notified Idaho that its proposed 402 program was not adequate under federal law because of its heightened mens rea standard. The Trump Administration reversed course and approved Idaho's program anyway. It then went on to approve Florida's 404 program notwithstanding the same enforcement deficiency. It is disappointing that this administration has chosen to continue down the road of undermining Clean Water Act enforcement.

Whether old or new, EPA's proposed approach is unlawful. As shown above, the Clean Water Act plainly requires states to have the authority to abate simple negligence violations by criminal penalties. There is therefore no ambiguity in the statute for the agency to resolve. Cf. 88 Fed. Reg. at 55,307-08. And because EPA's proposed approach is contrary to the statute, it is not reasonable, and therefore not lawful.

Lastly, EPA's claim that there is no "concrete evidence" to demonstrate that the absence of simple negligence mens rea in some state programs has adversely affected state enforcement is neither here nor there. Id. at 55,308. Congress has spoken clearly on what is required. And a primary purpose of the Clean Water Act's robust enforcement scheme is to deter, as well as punish, violations. It may not be practical to quantify the impact a strict enforcement regime has. But that is no reason to ignore what Congress has mandated.

Congress has struck the balance between state autonomy, minimum federal requirements, and the interest in uniformity. That balance is reflected in the statute itself. EPA cannot reweigh those interests where Congress has plainly spoken. And EPA cannot, and should not, authorize state programs that undermine enforcement of the Clean Water Act.

Agency Response: ***See*** **Section IV.D of the final rule preamble. EPA disagrees with the commenter's assertion that in States with political climates where CWA enforcement is limited to begin with, its change to the *mens rea* requirement would only "tip the scales" further away from enforcement. EPA is unaware of evidence indicating that any lack of willingness to prosecute "serial violators causing serious environmental harm" would be affected by the authority to prosecute simple negligence violations of the CWA.**

Nebraska Department of Environment and Energy (EPA-HQ-OW-2020-0276-0073-0008)

The proposed rule amends the criminal enforcement requirement to provide that assumed States must authorize prosecution based on any form of negligence.

- This lessens the burden on States that would have had to pass legislation for simple negligence standards.

Agency Response: ***See*** **Section IV.D of the final rule preamble.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0017)

The Proposed Rule provides that States and Tribes "do not need authority to prosecute based on a simple negligence mens rea in their criminal enforcement programs." [Footnote 42: 88 Fed. Reg. 55308.] It "does not change the standard applicable to EPA's criminal enforcement of the CWA." [Footnote 43: 88 Fed. Reg. 55308.].

Alaska has no objection to this provision, which does not change current law.

Agency Response: EPA acknowledges this comment.

Idaho Conservation League (EPA-HQ-OW-2020-0276-TRANS-092923-013-0001)

This rulemaking concerns some of our interests as the state of Idaho in the last several years has been granted primacy for NPDES program and is in the relative infancy of developing their program and administrating that program successfully. As the general political will in the state of Idaho does not generally afford the Idaho Department of Environmental Quality the ability to be particularly aggressive on compliance and enforcement issues for NPDES, organization has played a role in watchdogging violations of the IPDES and NPDES program, including initiating citizen suits against specific violators.

So, specifically to this rule to my understanding as it would allow, or potentially, I guess, to put in writing the regulatory ability for states to develop their own standard for criminal intent, we see this as potentially a negative impact for our interests and the interest of environmental conservation in Idaho. Citizen suit procedures were written into the Clean Water Act for a reason and although we may not be able to bring a criminal case as an organization, it would help, or so, I guess, strengthen the intent for the responsibility for the State of Idaho to hold criminal violators responsible to the same standard that the Federal Government would. So, I think for the cases, EPA and those listening as it pertains to them in their interest, if there is an interest in making sure that conservation is, and protections of, you know, the Clean Water Act regulations and resources is consistent throughout the states and held to the highest standard as the Federal Government sees it, then I would recommend that these regulations or rulemaking does not allow for criminal intent to be interpreted by an individual state, that it should be, as with many other regulators that it needs to be, or many other regulations, that it needs to be consistent, at least as stringent as federal standards, if not more, but no less. So, thank you for the time. If there's any questions, I'd be happy to elaborate and thank you again.

Agency Response: ***See*** **Section IV.D of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0068-0050.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-2-0001)

We write on behalf of several local, state and national conservation organizations devoted to protecting the Nation's lands, water and wildlife to urge the U.S. Environmental Protection Agency ("EPA") to withdraw its proposed rule regarding the Criminal Negligence Standard for State Clean Water Act 402 and 404 Programs. The proposed amendment to 40 C.F.R. §§ 123.27 and 233.41(b)(2) is arbitrary, unreasonable, and an unlawful interpretation of the negligence standard required under Clean Water Act section 309(c)(1), 33 U.S.C. § 1319(c)(1), in that it would allow for state-assumed enforcement to be less stringent than federal enforcement, in violation of federal law. We urge the EPA to abandon this unlawful, unreasonable proposal that would ultimately result in weakened and inconsistent protections for wetlands, water, and wildlife.

Agency Response: ***See*** **Section IV.D of the final rule preamble.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-2-0003)

A. Criminal Enforcement Of The Clean Water Act Is Critical To Ensure Fulfillment Of The Promises And Requirements Of The Act.

The backstop of criminal enforcement is a critical safeguard and deterrent to ensure that permittees comply with permit conditions to minimize environmental degradation and maximize environmental protections as required by the Clean Water Act. To that end, Clean Water Act Section 309(c)(1)(A), codified in 33 U.S.C. § 1319(c)(1)(A), makes it a crime to negligently violate "any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this title by the Administrator or by a State or…404 of this title by the Secretary of the Army or by a State." (emphasis added). Every federal circuit court to have considered this language has held that the plain meaning of section 309(c)(1) establishes liability for simple or ordinary negligence for violations of Clean Water Act permits.

In section 309(c)(1), Congress spoke directly and unambiguously to the mens rea requirement for Clean Water Act violations. Section 309(c)(1) states: "[a]ny person who. . . negligently violates. . . any requirement imposed. . . in a permit issued under sections 402 or 404 of this title by the Secretary of the Army or by a State. . . shall be punished[.]" 33 U.S.C. § 1319(c)(1).

B. The Proposed Rule Itself Is Internally Inconsistent.

EPA's proposed regulation at 40 C.F.R. §§ 123.27(b)(2) and 233.41(b)(2) is internally inconsistent, and therefore arbitrary and unreasonable. The proposed regulation purports to continue to require that state mens rea requirements be as stringent as federal law, but then creates an express exception that eviscerates that very requirement, making the first statement false. The proposed regulation is directly contrary to the requirement that EPA authorize state programs only if they are at least as stringent as the federal program. 33 U.S.C. §§ 1342(b) and 1344(g)(1), (h)(1); 40 C.F.R. §§ 123.27, 233.1(d), and 233.41(b)(2).

Agency Response: ***See*** **Section IV.D of the final rule preamble. EPA affirms in this rule the importance of the principle that Tribal and State programs must no less stringent than federal programs, but also recognizes the need to allow for some degree of variation in Tribal and State regulatory, administrative and judicial structures.** ***See also*** **Sections IV.A.2 and IV.C.2 of the final rule preamble.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-2-0004)

C. EPA Cannot Propose A Rule Contrary To The Express Direction Of Congress And The Overwhelming Weight Of Case Law.

Although Congress spoke directly to the standard of negligence required to violate a federal or state-issued 402 or 404 permit, EPA claims that it seeks "to clarify that states… are not required to establish the same negligence standard that the CWA establishes." 85 Fed. Reg.

80713 (December 13, 2020). EPA's proposal does not "clarify," but rather, changes and amends 40 C.F.R. §§ 123.27(b)(2) and 233.41(b)(2) to add the language underlined below:

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

EPA's Proposed Rule would allow for distinctly different mens rea standards to be applied by states that assume 402 or 404 permitting, and therefore would allow for less stringent enforcement and less protection under state programs. Ordinary negligence is the lowest form of criminal mens rea aside from strict liability. It is the failure to use care that a reasonably prudent and careful person would under similar circumstances. United States v. Hanousek, 176 F.3d 1116, 1120 (9th Cir. 1999). A lower mens rea standard provides for more robust criminal enforcement of permit violations – and therefore greater environmental protections – because it sets a lower bar the government must meet to bring and prevail in an enforcement action and promotes compliance through deterrence.

Gross or culpable (criminal) negligence, is a different mens rea as compared to ordinary negligence. For example, in Florida, culpable negligence is defined as "reckless indifference or grossly careless disregard of the safety of others." State v. Greene, 348 So. 2d 3, 4 (Fla. 1977). It has also been defined as "a gross and flagrant character, evincing reckless disregard for human life or of the safety of persons exposed to its dangerous effects;" or "the entire want of care which would raise the presumption of indifference to consequences;" or "reckless indifference to the rights of others, which is equivalent to an intentional violation of them." Id. Unlike simple negligence, culpable negligence encompasses threatened or actual harm to others and can be the basis for violent crimes such as manslaughter. In the context of environmental offenses, such a

high bar would exclude an entire class of permit violations that are subject to criminal penalty under federal law.

Every Circuit Court of Appeal to have interpreted this provision of the Clean Water Act has held it requires ordinary or simple negligence, rather than a higher criminal negligence standard, such as gross negligence. Hanousek, 176 F.3d at 1120; United States v. Ortiz, 427 F.3d 1278, 1283 (10th Cir. 2005); United States v. Pruett, 681 F.3d 232, 243 (5th Cir. 2012); United States v. Maury, 695 F.3d 227, 259 (3d Cir. 2012). No other court has interpreted this statutory provision to state otherwise.

Agency Response: ***See*** **Section IV.D of the final rule preamble.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-2-0005)

Agencies cannot override Congress's plain direction, either explicitly or in the manner the agency interprets and applies its rule. See, United States v. Maes, 546 F.3d 1066, 1068 (9th Cir. 2008) ("a regulation does not trump an otherwise applicable statute"); and United States v. Doe, 701 F.2d 819, 823 (9th Cir. 1983) ("[w]here an administrative regulation conflicts with a statute, the statute controls"). Because Congress has spoken directly to the standard of negligence required for a violation of section 402 and 404 permits, EPA is not authorized to promulgate a regulation contrary to the statute. See, 5 U.S.C. § 706(2)(A); Chevron v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

For section 402 and 404 programs, Congress clearly states at section 309(c)(1)(A) that the negligence mens rea standard applies to violations of permits issued by the Administrator, the Corps, or by a state. Because sections 402 and 404 of the Clean Water Act pertains to both federal and state-assumed programs, it is incorrect for EPA to maintain that section 309(c)(1) applies only to criminal enforcement actions brought by EPA. See, 85 Fed. Reg. 80715. When a state government enforces a state-assumed 402 or 404 program, it is required to uphold the purposes and minimum standards of the Clean Water Act, even if the programs are not identical. This premise is evident in the current regulations, which state that "the degree of knowledge or intent required under State law for establishing violations. . . shall be no greater than the degree of knowledge or intent EPA must provide when it brings an action under the Act." See, e.g., 40

C.F.R. § 233.41(b)(2). See also, 40 C.F.R. § 233.1(d). It is further evident in the congressional intent that state-assumed Clean Water Act programs be more effective than the federal program, discussed further below, and the requirement that states demonstrate adequate authority to carry out a 402 or 404 program. 33 U.S.C. §§ 1342(b) and 1344(g)(1).

That the ordinary negligence standard applies to Clean Water Act program violations, regardless whether the permit is issued by the federal government or the state, is affirmed in United States v. Maury, 695 F. 3d 227 (3d Cir. 2012). In Maury, the Department of Justice brought an enforcement action under Clean Water Act section 309(c) for violations of a New Jersey-issued National Pollutant Discharge Elimination System ("NPDES") permit (a section 402 permit). Id. at 234, 244. DOJ charged defendants with willful violations of the Act, but defendants requested a jury instruction for lesser

included offenses, which were misdemeanor negligent violations. Id. at 255. The court instructed the jury as to simple negligence, rather than gross negligence, for the lesser included offenses, and defendants were convicted for willful and negligent violations of the Act. Id. at 246, 256.

The Third Circuit Court of Appeals affirmed application of the simple negligence standard, citing Hanousek, Ortiz, and Pruett. Id. at 257-58. The court adopted the reasoning in those cases, citing the plain language of the text and noting that when Congress intended a higher mens rea requirement in other provisions of the Act, it explicitly stated so. Id. at 257 (citing 33

U.S.C. § 1321(b)(7)(D), where Congress used the phrase "gross negligence"). The court also cited the Ninth Circuit's reasoning in Hanousek that the Clean Water Act is public welfare legislation that can criminalize ordinary negligent conduct that "a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." Id.

Agency Response: ***See*** **Section IV.D of the final rule preamble. EPA agrees that it lacks authority to issue a rule contrary to the CWA, but as described in the preamble, the Agency views this rule as consistent with the statute.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-2-0006)

EPA attempts to minimize the significance of its proposal by characterizing it as "[a]llowing states or tribes flexibility in the degree of negligence for which they are authorized to bring criminal cases," 85 Fed. Reg. 80716. This "flexibility," however, would allow states to exclude an entire class of permit violations from criminal liability. Further, as set forth above, the "flexibility" afforded by the Clean Water Act is a one-way ratchet, only allowing states to be more, not less, protective.

EPA also cites Natural Resources Defense Council, Inc. (NRDC) v. EPA in an attempt to support its radical change to allow state assumed permit programs to offer less protections to water resources than when those programs are administered by federal agencies. EPA claims in this regard that state and federal programs need not "mirror" each other. 85 Fed. Reg. 80715-16 (citing Nat. Res. Def. Council, Inc. v. United States Envtl. Prot. Agency, 859 F. 2d 156 (D.C. Cir. 1988)). While a state program need not "mirror" the federal program, it absolutely must provide at least the same level of protections to the nation's water resources – including the disincentives and enforcement safeguards – as those afforded under federally administered programs. See, 40

C.F.R. § 233.1(d) ("[a]ny approved State program shall, at all times, be conducted in accordance with the requirements of the Act. . . [w]hile States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose").

NRDC provides no support for EPA's proposed rule, as NRDC is factually distinguishable, and it in fact makes clear that the present proposal is contrary to legislative intent. NRDC is distinguishable to the proposed rule at hand, first because it

addresses penalties, not liability. It therefore presumes successful prosecution of a violation in the first place. The case involved a challenge to EPA regulations that allowed different maximum penalties in a state-administered NPDES program to those required under the Clean Water Act. Nat. Res. Def. Council, Inc., 859 F. 2d at 173. EPA was tasked with fashioning minimum enforcement provisions deemed adequate for state-delegated 402 programs, and the minimum penalties in the regulation at issue were set higher than the minimum penalties in the Clean Water Act. Id. at 178-179 (emphasis added). This is, of course, consistent with the overall policy and goal of Congress to make the Clean Water Act the minimum baseline protections for our water resources. The EPA's reasoning in promulgating the minimum penalty baseline regulation was "to ensure effective State enforcement programs" so that EPA would not "be forced to take its own enforcement action in approved States" because of an inadequate state program. Id. at 181. The court recognized that while EPA regulations establish "a floor for. . . state enforcement authority," Congress made its intent clear that state-assumed Clean Water Act programs must be administered to "provide a much more effective program than that which would result from control in the regional offices of the Environmental Protection Agency." Id. at 174.

Here, EPA is attempting to set the floor for enforcement actions below what is required by CWA; that is, to allow a state program that is harder to enforce because of a higher mens rea standard is below the floor of minimum enforcement requirements and therefore contrary to legislative intent for state-assumed programs. EPA would allow states to pull the floor out from Clean Water Act enforcement by allowing states to exclude an entire class of criminal violations from criminal enforcement, and in doing so, undermining deterrence, compliance with, and enforcement of the Act. Plainly implicit in NRDC is that a state program that is less effective than a federally administered program runs counter to the Act and is, in a word, pointless.

Finally, EPA's proposed rule here would create the very scenario EPA sought to avoid in the rulemaking at issue in NRDC: state-assumed programs with higher negligence mens rea standards would be inadequate and require EPA to step in to ensure compliance with the Act.

Agency Response: ***See*** **Section IV.D of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0062-0001.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-2-0007)

The other case EPA cites, Akiak Native Community. v. EPA, is also factually distinguishable and further demonstrates that EPA's proposed rule here is unlawful. See 85 Fed. Reg. 80716 (citing Akiak Native Cmty. v. United States Envtl. Prot. Agency 625 F. 3d 1162, 1171-72 (9th Cir. 2010)). That case involved a challenge to the delegation of section 402 permitting authority to the state of Alaska. First, Akiak involved a challenge to Alaska's ability to assess civil penalties administratively compared to the federal government's, which is entirely different to the issue in the proposed rulemaking, which involves criminal liability for Clean Water Act program violations. See, Akiak, 625 F. 3d at 1171 (emphasis added). The court upheld the program transfer, finding that Alaska had other effective enforcement means as to civil penalties, such as the ability to sue

permit violators for environmental remediation costs or damages. Id. at 1172. Akiak reinforces the principle that a state program must be at least as stringent as its federal counterpart. The Ninth Circuit allowed the state to assume the program, but only because the state's alternative method was sufficient to ensure that Alaska had equally adequate civil enforcement of permit requirements. Here, if the proposed rule were adopted, it would allow states to exclude an entire class of permit violations from criminal liability. This would undermine deterrence and compliance with the Clean Water Act and is plainly not equal or adequate.

Finally, the Ninth Circuit recently again affirmed, in Idaho Conservation League v. United States Envtl. Prot. Agency, No. 18-72684 (September 10, 2020), that state-assumed programs must provide water resources protection equal to federal programs, finding that the EPA abused its discretion in approving a state 402 program with a gross negligence standard. The court re-affirmed that ordinary negligence is the standard for violations of Clean Water Act section 309(c)(1), and while acknowledging that a state program need not "mirror" the federal program as to mens rea, a state plan must include criminal liability for a mens rea standard no greater than ordinary negligence. Slip op. at 3 (citing 40 CFR § 123.27(b)(2), which is identical to § 233.41(b)(2)).

EPA's proposed rule finds no support in either the statute or case law.

Agency Response: ***See*** **Section IV.D of the final rule preamble.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-2-0008)

EPA's proposed rule would allow states to implement inconsistent and contrary levels of water resource protections through differing levels of enforcement. This is a very real and immediate problem that directly contradicts the basic policy and purpose of Congress to provide a minimum baseline of water protections across the nation and also Supreme Court case law directing that one state's permitting cannot interfere with another state's implementation and achievement of its water Clean Water Act standards and protections. See, Arkansas v. Oklahoma, 503 U.S. 91 (1992).

In practice, why for example, should a polluter be able to remain free of criminal penalties in North Dakota, but be subject to those penalties in Minnesota for discharges of pollutants that may affect both states? When a violation occurs, what happens to a discharger into a large river like the Columbia/Snake system or the Missouri or the Menominee River that traverse and/or border multiple states? Perhaps the upstream state (e.g. Idaho in the Columbia/Snake system) has a different mens rea than downstream, but the downstream states' (Oregon and Washington's) hands are tied to take action against what may be a serious violation causing serious damage. Plainly this system is directly contrary to the concept that the federal Clean Water Act sets the minimum guarantees and protections for all waters. It further is directly contrary to the principles espoused regarding permitting in Arkansas v. Oklahoma that an upstream state cannot issue permits or take actions that will negatively affect a downstream state's ability to meet that state's water quality standards. A different mens rea in an upstream or bordering state would cause similar problems, removing the ability of the downstream state to obtain equal and adequate enforcement of standards and permit requirements.

EPA's proposed rule is therefore both impractical, likely to lead to confusing and contradictory results, and contrary to long-established and basic Clean Water Act principles and requirements for consistent baseline protection of water resources.

Agency Response: ***See*** **Section IV.D of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0062-0001. Per the commenter's example, in the event a downstream Tribe or State were unable to take action against a criminal violation that occurred in an upstream Tribe or State, and that is affecting the downstream Tribe or State's waters because of the absence of a simple negligence standard in the upstream Tribe or State, the downstream Tribe or State could ask EPA to exercise its enforcement authority. EPA anticipates that such situations will be extremely rare, as in most cases downstream Tribes or States would be able to prosecute discharges affecting their waters from upstream Tribes or States as grossly negligent or knowing violations.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0017)

- EPA Must Not Approve Programs That Lack the Proper Mens Rea Standard

As EPA is aware from litigation over Idaho's application to assume Section 402 permitting, EPA cannot approve a state permitting program that fails to criminalize simple negligence for violations of the law. The Ninth Circuit found EPA's approval of Idaho's submission contrary to the law on that basis. Yet, EPA did the same thing in approving Florida's assumption of Section 404 permitting. This is incorrect under the law. EPA's new rules must be clear on this point and EPA must ensure that its staff understands and uniformly applies and enforces that requirement in all states.

Agency Response: ***See*** **Section IV.D of the final rule preamble.**

2. Other comments

The Petroleum Alliance of Oklahoma (EPA-HQ-OW-2020-0276-0055-0015)

V. EPA SHOULD NOT REQUIRE STATES TO HAVE THE SAME CRIMINAL ENFORCEMENT AUTHORITY AS EPA

In a separate proposed rulemaking, EPA proposed that states and tribes should not be required to have the same criminal enforcement authority as the courts have interpreted EPA to have. 85 Fed. Reg. 80713 (Dec. 14, 2020). As EPA noted in the preamble to that proposed rulemaking, while EPA's enforcement authority under the Clean Water Act requires only proof of ordinary negligence, that provision does not necessarily apply to state or tribal programs. Id. at 80715.

Instead, EPA maintains that it is enough that the state has authority to "abate violations of the permit or permit program." Id., citing 33 U.S.C §§ 1342(b)(7), 1344(h)(1)(G). The Act, EPA concluded, does not require identical enforcement authority between states and EPA. Id.

The practical effect of EPA's interpretation in the 2020 rulemaking and the instant rulemaking, see 88 Fed. Reg. at 55307, is that states may account for different degrees of negligence for which they are authorized to bring criminal cases. The Alliance agrees with and supports EPA's analysis of the underlying statutory provisions and the applicable case law. The Clean Water Act does not require that states' enforcement authority merely duplicate the Act's enforcement authority; the Act and EPA's interpretation thereof appropriately acknowledge state autonomy in this instance.

Agency Response: EPA acknowledges the commenter's expression of support.

The Petroleum Alliance of Oklahoma (EPA-HQ-OW-2020-0276-0055-0003)

Conversely, The Alliance agrees with and supports EPA's conclusion that sections 402 and 404 of the Clean Water Act allow for state programs to have approaches to criminal enforcement different than EPA's statutorily mandated approach [Footnote 1: EPA raised the issue of criminal negligence in this rulemaking apparently without adverting to the complexity of tribal criminal jurisdiction, particularly tribal criminal jurisdiction over non-Indians. The leading treatise on Indian law notes that Indian tribes do not have criminal jurisdiction over non-Indians. Instead, the treatise notes, EPA typically will grant primary regulatory status to tribes without requiring them to demonstrate full criminal enforcement authority. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 10.06[2] at 816 (Nell Jessup Newton (ed. 2012). Recent Supreme Court decisions have addressed tribal criminal authority over non-Indians but leave the subject confused. See Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022); United States v. Cooley, 141 S. Ct. 1638 (2021). The Alliance strongly urges the agency to reconsider whether it is prudent to enmesh the section 404 issue with tribal criminal enforcement authority.].

Agency Response: *See* Section IV.D of the final rule preamble. This rule does not impose any new enforcement authority requirements on Tribes.

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0021)

In order for States and Tribes applying for authorization to meet the "no less stringent then" standard there should be comparable standards of compliance evaluation and enforcement to the current federal authorities. In order to ensure that this standard is achieved, and to provide clear expectations of EPA to the applying authority, it would seem best to incorporate these expectations into the regulations. NAWM supports a consistent approach between authorized authorities, the federal 404 program, and consistency among CWA programs.

Agency Response: *See* Section IV.D of the final rule preamble.

Natural Resources Defense Council (EPA-HQ-OW-2020-0276-TRANS-092923-008-0009)

Three, the state has the capacity to enforce against the full range of violations of the law, including negligent ones.

Agency Response: *See* Section IV.D of the final rule preamble.

Chickaloon Native Village (EPA-HQ-OW-2020-0276-TRANS-092923-009-0009)

I also agree with Becky Ayech's comment regarding the funding that is required for enforcement, and that you need to make it more costly to not follow the 404. Regulations mean nothing without enforcement, and too often we see regulations go forward and they'll follow up work on the ground to actually enforce them. I also agree with her comments that EPA needs to regularly review how well states that have primacy are protecting their resources, and not only should the EPA take enforcement actions if they are not but begin proceedings to remove their authority of primacy. That ends my comments.

Agency Response: EPA agrees with the commenter's assertion of the importance of Tribal and State 404 program enforcement, and of EPA oversight of Tribal and State enforcement efforts. This rule clarifies and strengthens requirements related to both Tribal and State program enforcement, and EPA oversight of their efforts. EPA also agrees that it is important that EPA maintains the authority to conduct enforcement actions even where Tribes and States have assumed permitting authority.

E. Subpart F - Federal Oversight

1. Dispute resolution

The Petroleum Alliance of Oklahoma (EPA-HQ-OW-2020-0276-0055-0008)

One example rests on the fact that the preamble and proposed rule do little to explain how EPA would respond if both the state and one or more tribes located within Oklahoma concurrently sought to assume administration of section 404 within their jurisdictions. Disputes among similarly situated parties would be almost certain to arise, yet EPA sees its role only as a facilitator of conflict resolution.

EPA's response to concerns that such disputes may arise provides little solace. The preamble to the proposed rule states that EPA will assist in facilitating resolution of such disputes but provides little in the way of detail. In fact, EPA declined to "articulate in the regulations all potential areas where a dispute may arise." 88 Fed. Reg. at 53312. Instead, EPA is proposing to add a "general provision" to the Purpose and Scope section stating EPA may facilitate resolution of such disputes. Perhaps that is the best EPA can do but permit applicants may find themselves in extended purgatory while EPA attempts – if it chooses to become involved – to facilitate a resolution between a state and potentially numerous tribes as well as upstream entities. This approach will impose potentially significant costs on states that EPA's Economic Analysis does not address.

Presumably, permittees would be left on the sidelines while the parties waited on EPA's assistance. The preamble says nothing about how EPA would respond if the dispute remained unresolved. Does permitting in those jurisdictions simply come to a halt? Such a situation would create confusion for the regulated community, as well as significant permitting delay. The Alliance sees such a circumstance as unacceptable. Presumably, the State of Oklahoma would be forced to somehow navigate the issues at the root of the

dispute, yet the agency's Economic Analysis does not even qualitatively identify this as a cost. Neither does the Economic Analysis try to estimate how such delays would affect the regulated community.

Agency Response: **The Agency appreciates the concerns raised by the commenter; however, EPA disagrees that the provision is not sufficient to resolve disputes. The Agency has provided this clarification to address situations, such as the one presented by the commenter. The provision's intentional flexibility and lack of a prescriptive list of scenarios where conflict may arise, allows EPA to facilitate, as appropriate (i.e., EPA will not likely engage in disputes between a State water quality agency and its sister wildlife agency). Disagreements are highly dependent on particular factual circumstances and relevant case law and thus the Agency has provided flexibility on how these are to be resolved. EPA disagrees that permittees will be waiting indefinitely for disputes to be resolved. Permitting processes, including timelines, are clearly outlined in sections 40 CFR 233.30, 233.32, and 233.34 of the regulations.** ***See*** **Section IV.E.1 of the final rule preamble for further discussion of the Agency's rationale for providing this clarification regarding resolution of disputes as well as response to the comments below.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0017)

EPA must require that MOAs include a provision on dispute resolution. This dispute resolution process must include an avenue for tribes within the state or with rights, resources or ancestral territory within the state to initiate a dispute resolution process in the event their concerns are not heard or addressed by either the assuming state, the Corps, or EPA. Dispute resolution is a valuable tool that may reduce the need for litigation.

Agency Response: ***See*** **Section IV.E.1 of the final rule preamble and the Agency's Response to Comments in Section B.6. Just as EPA is not mandating one specific approach to resolving all disputes, EPA declines to require Tribal or State MOAs with EPA to include one specific dispute resolution approach. Tribal and State program structures may differ, as may the circumstances of particular disagreements. EPA does not think it would be helpful to prescribe one method of resolution, nor to mandate that Tribes or States do the same. However, to the extent Tribes or States choose to lay out a dispute resolution or elevation provision in their MOAs, the rule does require that provision to be followed.** ***See*** **40 CFR 233.1(f).**

Regarding a Tribe's ability to seek resolution about concerns associated with permits issued by other Tribes or States that may adversely affect their waters or interests, see Section IV.F of the final rule preamble, Section F of the Agency's response to comments regarding Tribal considerations, and 40 CFR 233.30, 233.32, 233.34, and 233.51(b)(3). Additionally, EPA generally consults with affected Tribes on the approval of Tribal and State program requests. ***See*** **EPA Policy on Consultation with Indian Tribes at 5,** ***available at*** **https://www.epa.gov/system/files/documents/2023-12/epa-policy-on-consultation-with-indian-tribes-2023_0.pdf.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0027)

EPA fails to outline how it will facilitate dispute resolution within the proposed regulations, and declines to include in the proposed regulations a requirement that applicant states and the Corps include a dispute resolution process in their MOAs. As stated above, dispute resolution must be a required component of MOAs between assuming states and the federal agencies. Those dispute resolution provisions must address how the assuming state and federal agencies will address concerns raised by affected tribes. Dispute resolution can be a helpful tool and may help reduce potential litigation.

Agency Response: ***See*** **Section IV.E.1 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0017.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0028)

EPA must also have a separate dispute resolution process outlined in the regulations for affected tribes and the public to raise concerns throughout the state application process for assumption of 404 permitting authority. EPA's proposed regulations outline several steps states must take even before submitting a full application to EPA for Section 404 assumption. Every step along the way poses potential for dispute, including the process for establishing a retained waters list, state demonstrations of funding to adequately administer the permitting program, state demonstrations of legal parity with federal requirements, to name a few. EPA must find a way to resolve disputes between state agencies, affected tribes, and the public. State assumption can have broad, and potentially severe impacts, particularly to affected tribes. A dispute resolution process provides interested parties an assured mechanism for disputes to be resolved in a transparent manner.

Agency Response: ***See*** **Section IV.E.1 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0017. There is no bright line national standard that EPA could establish to address each of the particular situations the commenter has identified, which would be highly dependent on particular factual circumstances and relevant case law.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0058)

XIII. EPA should require that dispute resolution procedures be outlined in memoranda of agreement.

Regarding EPA's proposed rule changes to clarify its role in facilitating dispute resolution, EPA should require that state programs provide the procedures for dispute resolution in the memorandum of agreement between the state and EPA. This will ensure transparency for all interested and affected parties.

Agency Response: ***See*** **Section IV.E.1 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0017.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0065)

- EPA must require that MOAs include a provision on dispute resolution. This dispute resolution process must include an avenue for Tribes within the state or with treaty rights

or resources or ancestral territory within the state to initiate a dispute resolution process in the event their concerns are not heard or addressed by either the assuming state, the Corps, or EPA. EPA must also have a separate dispute resolution process outlined in the regulations for affected Tribes and the public to raise concerns throughout the state application process for assumption of 404 permitting authority.

Agency Response: ***See*** **Section IV.E.1 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0017.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0066)

- It is not up to EPA to determine whether a state has jurisdiction in Indian Country. Questions or uncertainties about state jurisdiction in Indian Country must be first addressed with the affected tribe, and EPA must maintain a presumption that there is no state jurisdiction in Indian Country. If there is still a dispute, then the proper avenue is for a federal judiciary or Congress, not EPA, to determine.

Agency Response: EPA appreciates the commenter's concern. 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.** ***See id.*** **If a question arises with respect to potential State jurisdiction in Indian County, EPA will work with the appropriate decision authorities to resolve the uncertainty. However, EPA does have the authority to approve the scope of a Tribal or State section 404 program.** ***See*** **33 U.S.C. 1344(h)-(l).**

Choctaw Nation of Oklahoma (EPA-HQ-OW-2020-0276-0069-0006)

Additionally, dispute resolution must be a required component of MOAs between assuming states and the federal agencies. Those dispute resolution provisions must address how the assuming state and federal agencies will address concerns raised by affected tribes. Dispute resolution can be a helpful tool and may help reduce potential litigation.

Agency Response: ***See*** **Section IV.E.1 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0017.**

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0011)

VII. The lack of a clear dispute resolution process or guidelines lacks transparency and impedes the ability of parties to seek judicial review.

A clearly articulated procedure for dispute resolution will be necessary for Tribes to preserve the option for judicial recourse. The more discretion granted to EPA in mediating disputes, the less basis for independent assessment and therefore the less ability for the judiciary to address perceived errors.[Footnote 6: See, e.g., Menominee Indian Tribe of Wisc. v. Environmental Protection Agency, 947 F.3d 1065, 1073 (7th Cir. 2020).] In effect, agency flexibility is able to trump judicial oversight. Given the rule's

acknowledgement of judicial review as being essential for ensuring "meaningful public participation" in other parts of the program,[Footnote 7: Clean Water Act Section 404 Tribal and State Program Regulation, 88 Fed. Reg. 55,299.] the same needs and requirements should be present in dispute resolution. Dispute resolution should be transparent and reviewable, and the proposed rule does not appear to provide such safeguards.

Agency Response: The Agency appreciates the commenter's concern regarding transparency and reviewability of resolution of disputes. The provision is written to maintain necessary flexibility in how disputes are resolved, however. *See* Sections IV.E.1 and IV.C.2 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0017. EPA separately addresses Tribal engagement in the permitting process in Section IV.F of the final rule preamble.

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0013)

VIII. The language of the rule only allows EPA to facilitate dispute resolution for States seeking to administer a section 404 program, and not disputes arising once the State has begun administering the program.

To create broad dispute resolution powers, the "Purpose and Scope" section was amended to include language enabling EPA to mediate in disputes "between Federal agencies, Tribes, and States seeking to assume and/or administer a CWA section 404 program,"[Footnote 8: Id. at 55,323 (to be codified at 40 C.F.R. 233.1(f)).] but this language would exempt all disputes that arise once the State or Tribe has begun administering the program. The supplementary information suggests that this power of mediating would be useful for "disputes with permitees or other affected parties regarding permitting decisions,"[Footnote 9: Id. at 55,312.] among other disputes. However, permitees and permitting decisions only exist after the agency has begun issuing permits. At that point, the agency would no longer be seeking to assume or administer a program; they already would be administering it.

Agency Response: EPA disagrees that this language is limited to EPA resolving disputes during the assumption process. The language "to assume and/or administer" makes clear that it applies during program administration as well as when Tribes or States seek assumption. *See* 40 CFR 233.1(f).

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0004)

Furthermore, the MOA should contain provisions for addressing Tribal waters and the role of the Tribe in the operation of the 404 program. Procedures for dispute resolution between Tribes and the assuming State could be established in the MOA, provided that Tribes are involved in such drafting. When dividing up the waters and establishing rules of operation, an ounce of prevention may be worth a pound of cure.

Program assumption will have effects on Tribes, even when Tribal waters are retained by USACE. EPA should acknowledge Tribal sovereignty and interests when dividing up the inherently interconnected waters of a region, and should do so by promoting Tribal participation in the drafting of the MOA and its later operation.

Agency Response: **The Agency appreciates the concerns raised by the commenter regarding Tribal interest in agreements associated with assumption of the section 404 program by other Tribes and States. However, EPA is not incorporating this recommendation into the final rule. While States and Tribes are welcome to enter into joint MOAs clearly articulating coordination processes, and the MOA between EPA and the assuming Tribe or State may reference such agreements and processes, an MOA between two parties may not obligate another party, not part of the agreement, to abide by provisions in said agreement. The regulations indicate that the two required MOAs are between the EPA and the assuming Tribe or State, and the second is between the Corps and the assuming Tribe or State. *See also* Section IV.F of the final rule preamble for a discussion of ways that this rule facilitates Tribal engagement in the permitting process.**

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0010)

Any dispute resolution process should be chaired by the EPA Regional Administrator, and specific steps for this process should be identified in the rule and formalized in the accompanying Memorandum of Agreement (MOA). While modification to the retained waters scope may be necessary, it seems that this process should inherently be a federal responsibility. NAWM suggests that procedures be identified for a State or Tribe to petition the Corps for modification to the identified waters. Should a disagreement occur between the Corps and a State or Tribe, then the dispute resolution process, chaired by EPA, should be initiated similar to the original method during the application process; this process should be memorialized in the MOA between the applying authority, Corps District(s), and EPA Region.

Agency Response: **The Agency thanks the commenter for the suggestions that the Regional Administrator chair and specific steps to laying out dispute resolution processes be memorialized in the EPA – Tribal or State MOA. However, EPA maintains that by not incorporating specific processes in the rule, flexibility is maintained on how and when disputes are resolved – as appropriate to the situation. The final rule does require that Tribes or States must comply with any dispute resolutions that they choose to establish in their MOAs, however. *See* 40 CFR 233.1(f). Additionally, EPA is not incorporating the recommendation that the Regional Administrator chair dispute resolution processes. While the Regional Administrator is the final decision maker for approval or denial of program requests and maintaining EPA objections to permits, to require the Regional Administrator to be the chair of dispute resolution processes would likely and unnecessarily result in long delays. The final rule does not preclude the Regional Administrator from engaging in the resolution of disputes, but as many disputes may be resolved at other levels or through mechanisms other than a formal hearing or process requiring the presence of the Regional Administrator, the Agency is finalizing the provision as**

proposed as it provides the most flexibility in how disputes may be resolved. See Section IV.E.1 of the preamble of the final rule.

EPA is not adopting the commenter's recommendation that procedures must be identified for a Tribe or State to petition the Corps for modification of retained waters, as this is unnecessary. The Tribe or State may modify the list of retained waters whenever it deems it appropriate, consistent with CWA section 404(g); the Corps exercises authority over the Rivers and Harbors Act (RHA) section 10 list, but the retained waters description is managed by the Tribe or State as approved by EPA. The Memorandum of Agreement between the Corps and the Tribe or State must outline procedures whereby the Corps will notify the Tribe or the State of changes to the RHA section 10 list as well as the extent to which these changes implicate the statutory scope of retained waters as described in CWA section 404(g)(1) and therefore necessitate revisions to the retained waters description. The Tribe or State would incorporate the revisions that the Corps has identified, pursuant to the modification provisions agreed upon in the Memorandum of Agreement.

EPA agrees with the commenter to the extent the commenter views the scope of retained waters as subject to federal approval, however; any changes the Tribe or State makes to the scope of retained waters must be approved by EPA. 40 CFR 233.16(d). *See* Section IV.B.2 of the final rule preamble.

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0025)

1. Dispute Resolution

Concur without comment.

Agency Response: The Agency thanks the commenter for support of this provision as proposed.

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0025)

EPA must require that MOAs include a provision on dispute resolution. This dispute resolution process must include an avenue for tribes within the state or with treaty rights or resources or ancestral territory within the state to initiate a dispute resolution process in the event their concerns are not heard or addressed by either the assuming state, the Corps, or EPA. Dispute resolution is a valuable tool that may reduce the need for litigation.

Agency Response: The Agency thanks the commenter for their recommendation regarding how disputes between Tribes and States should be formalized in the MOA. EPA is not incorporating this recommendation into the final rule; however, the Agency has clarified and expanded opportunities for Tribes to raise concerns with discharges that may affect their aquatic resources or interests. *See* Sections IV.E.1 and IV.F of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0017.

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0020)

EPA proposes to add a "general provision to . . . clearly articulate that EPA may facilitate resolution of potential disputes between the Tribe or State and Federal agencies and provide for resolution or elevation procedures . . . ." This section specifically suggests that EPA may resolve disputes regarding retained waters [Footnote 50: 88 Fed. Reg. 55312.].

EPA has not demonstrated a need for it to serve in a dispute-resolution role. Please consider removing.

Agency Response: ***See*** **Section IV.E.1 of the final rule preamble. A number of Tribes, States, and organizations have asked EPA to clarify its role in resolving disputes.**

Great Lakes Indian Fish and Wildlife Commission (EPA-HQ-OW-2020-0276-0080-0012)

MOA's must also contain an avenue for tribes to initiate dispute resolution should the assuming state or the Corps fail to address their concerns.

Agency Response: ***See*** **Sections IV.E.1 and IV.F of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0017.**

Tulalip Tribes of Washington (EPA-HQ-OW-2020-0276-0082-0002)

The Proposed Rule should require that federally recognized Indian tribes be consulted during the early stages of any proposed Memorandum of Agreement ("MOA") pursuant to 40 C.F.R. § 233.14. The EPA and the Corps should utilize tribal liaisons to ensure that affected federally recognized Indian tribes are provided meaningful opportunities to review and critique MOAs. Further, any final rulemaking should require that MOAs include federal consultation regarding any state permitting action that may impact tribal rights and resources. MOAs should also make clear that the Corps is the lead agency when there are permitting projects spanning retained and assumed jurisdiction. Additionally, MOAs should be reviewed by the signatories and affected tribes at least every five years and must include a dispute resolution process that provides affected tribes a potential path to address concerns without litigation.

Agency Response: ***See*** **Sections IV.E.1 and IV.F of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0017 and EPA-HQ-OW-2020-0276-0063-0015.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0015)

EPA must require that MOAs include a provision on dispute resolution. This dispute resolution process must include an avenue for Tribes within the state or with rights, resources or ancestral territory within the state to initiate a dispute resolution process in the event their concerns are not heard or addressed by either the assuming state, the Corps, or EPA. Dispute resolution is a valuable tool that may reduce the need for litigation.

Agency Response: The Agency thanks the commenter for their recommendation regarding how disputes between Tribes and States should be formalized in the MOA. EPA is not incorporating this recommendation into the final rule; however, the

Agency has clarified and expanded opportunities for Tribes to raise concerns with discharges that may affect their aquatic resources or interests. *See* Sections IV.E.1 and IV.F of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0017.

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0024)

EPA fails to outline how it will facilitate dispute resolution within the proposed regulations, and declines to include in the proposed regulations a requirement that applicant states and the Corps include a dispute resolution process in their MOAs. As stated above, dispute resolution must be a required component of MOAs between assuming states and the federal agencies. Those dispute resolution provisions must address how the assuming state and federal agencies will address concerns raised by affected Tribes. Dispute resolution can be a helpful tool and may help reduce potential litigation.

Agency Response: The Agency thanks the commenter for their recommendation regarding how disputes between Tribes and States should be formalized in the MOA. EPA is not incorporating this recommendation into the final rule; however, the Agency has clarified and expanded opportunities for Tribes to raise concerns with discharges that may affect their aquatic resources or interests. *See* Section IV.E.1 of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0017.

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0025)

EPA must also have a separate dispute resolution process outlined in the regulations for affected Tribes and the public to raise concerns throughout the state application process for assumption of 404 permitting authority. EPA's proposed regulations outline several steps states must take even before submitting a full application to EPA for Section 404 assumption. Every step along the way poses potential for dispute, including the process for establishing a retained waters list, state demonstrations of funding to adequately administer the permitting program, state demonstrations of legal parity with federal requirements, to name a few. EPA must find a way to resolve disputes between state agencies, affected Tribes, and the public. State assumption can have broad, and potentially severe impacts, particularly to affected Tribes. A dispute resolution process provides interested parties an assured mechanism for disputes to be resolved in a transparent manner.

Agency Response: The Agency thanks the commenter for their recommendation regarding how disputes between Tribes and States should be formalized in the MOA. EPA is not incorporating this recommendation into the final rule; however, the Agency has clarified and expanded opportunities for Tribes to raise concerns with discharges that may affect their aquatic resources or interests. *See* Sections IV.E.1 and IV.F of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0017.

2. Withdrawal provisions

Environmental Protection Network (EPN) (EPA-HQ-OW-2020-0276-0057-0005)

Withdrawal of Program and Partial Assumption
Under the existing regulations, the withdrawal of the assumed program required formal adjudication, which was difficult and time consuming for all parties. EPN supports the proposed regulation that streamlines the process while protecting the rights of the states and Tribes to be part of the process.

EPN also supports the clarification in the proposed regulation that specifies that partial program assumptions are not authorized under the Section 404(g) assumption program. Other federal programs such as the National Pollutant Discharge Elimination System allow for this, and historically, this question has come up during Section 404(g) assumption discussions for the state/Tribes to seek only part of the program. This addresses the issue directly.

Agency Response: ***See*** **Sections IV.B.1 and IV.E.2 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0048)

EPA's proposed revisions to streamline the process to withdraw approval of a state permitting program are clear. However, EPA needs to impose a timeline on when it will make a determination of whether the state is in compliance with the requirements of Section 404. As proposed, the timeline includes deadlines for the state's first opportunity to come into compliance (30 days), a timed window for a public hearing if they don't correct (between 30 and 60 days), and a deadline for the state's second opportunity to come into compliance (90 days). Id. at 55310. The regulations do not state, however, when EPA must make a decision after the public hearing of whether the state is in compliance with the law. This means that a program can be out of compliance for anywhere from 150 days to several months or years while EPA makes that determination. We suggest that EPA include a timeline for when it will make a decision and we suggest an outer time limit of 60 days. This time limit is reasonable, especially given that as the rule is proposed, EPA has already made an initial determination that the state is not in compliance before a public hearing is even scheduled.

EPA must also include a provision in this section that all permitting will be suspended during this review period. This pause on permitting process must be automatic once EPA makes its first determination that the state is not in compliance and issues its first notice to the state. Permits processed by a program that is not in compliance with the law cannot meet the standards of the CWA. State permitting can resume once EPA makes a final determination that the state program has come into compliance with Section 404 requirements. EPA must also review any permits that are partially processed during the time the state program is determined to be non- compliant. These regulatory additions ensure that the goals and protections of the CWA are being met and not circumvented by applicants or state agencies.

Agency Response: ***See*** **Section IV.E.2 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments. EPA is not requiring that permitting be suspended during the program compliance review period because turning permitting authority off for an interim period, before EPA has determined whether or not the Tribe or State will ultimately retain that authority, would be unnecessarily disruptive to Tribal or State program staff, Corps staff, and permit applicants. If ultimately EPA concludes that the Tribe or State is not administering the program consistent with CWA requirements, it will withdraw permitting authority pursuant to the statute and regulations.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0031)

EPA is proposing significant changes to the withdrawal process for state programs. The Proposed Rule notes that these changes would "harmonize procedures for program withdrawal with the program approval process." The Proposed Rule would eliminate the current formal adjudicatory process with a simplified process that would not afford the State the protections of an adjudicatory hearing and would limit the State's ability to defend its program. Under the proposal, if "the Regional Administrator finds that a [] State is not administering the assumed program consistent with the requirements of the CWA and 40 CFR part 233" then the State will be informed and has 30 days to "adequately demonstrate compliance." [Footnote 28: 88 Fed. Reg. 55,310.] The proposed rule does not set any parameters for how the Regional Administrator would assess a program, nor does it provide any threshold standards for a "finding." If compliance is not "adequately demonstrate[d]," a public hearing would be held, and EPA will make a compliance determination. Based on a determination of non-compliance, a State would have 90 days to carry out remedial actions as prescribed by EPA. If a State cannot carry out the remedial actions, EPA will withdraw program approval with no further proceedings. The withdrawal decision will be published in the Federal Register and the Corps would resume permit decision making under section 404 immediately.

Florida strongly opposes this proposal and disagrees with EPA's reasoning and support for this proposal. The idea of "harmonizing" program approval and program withdrawal contradicts the text of the statute, Congress's legislative intent, and EPA's historical position. Additionally, this kind of "easy in, easy out" system is wrong-headed, contrary to law, and simply bad policy. It encourages economic waste, erodes stability and predictability, and disincentivizes state investment in assumption. "Streamlining" the withdrawal process raises due process issues that EPA has not addressed and is plainly contrary to the principle of cooperative federalism so fundamental to the CWA.

Agency Response: ***See*** **Section IV.E.2 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments. Due process requirements and the CWA's emphasis on cooperative federalism do not require the lengthy adjudicatory procedures surrounding the prior withdrawal procedures. EPA's revised procedures provide ample opportunity for input from the assuming Tribe or State as well as stakeholders, as well as ample opportunity for corrective action by the Tribe or State. In fact, the revised process is more transparent to members of the public than the internal agency adjudicatory trial required by the**

prior withdrawal requirements. Moreover, this rule does not alter the potential grounds for withdrawal in EPA's prior regulations, only the procedures attending withdrawal. Therefore, this rule should not give rise to concerns that programs will be withdrawn more hastily than they would have been under the prior regulations.

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0032)

First, the text of the statute makes it clear that the program approval process is intended to promote cooperative federalism, which streamlines the approval of a state program but provides additional hurdles for withdrawing a program once approved. Specifically, the statute has clear language that, when EPA fails to make a determination on a state program submission within 120 days, the state program "shall be deemed approved" and a State will begin administering the 404 program without further review. 33 U.S.C. § 1344(h)(3). This language clearly indicates that Congress intended to encourage state assumption. Conversely, the statute requires a public hearing to be conducted before the Administrator may even determine that a State is not administering the program in accordance with the statute. See 33 U.S.C. 1344(i). Only after a hearing may EPA then provide notice to the State and direct corrective actions be taken. Id. The plain text of the statute makes it clear that Congress intended CWA 404 assumption to be "easy in" but program withdrawal as an extended case-specific adjudicatory process designed to give maximum due process to the State. The current regulations are in line with the clear language of the statute and require withdrawal proceedings to be conducted as a formal adjudicatory hearing. The current regulations also indicate how EPA's historical interpretation of the statute and the intent behind the withdrawal provisions required an adjudicatory process.

Agency Response: ***See*** **Section IV.E.2 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments.** ***See also*** **EPA's Response to Comment EPA-HQ-OW-2020-0276-0066-0031. EPA agrees with the commenter that Congress encourages State assumption but disagrees that anything in the CWA requires the lengthy adjudicatory process that the prior withdrawal procedures laid out.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0033)

Second, it is bad policy to remove adjudicatory protections and erode the barriers to non-voluntary withdrawal of an involved and large-scale state program like this. This proposed "easy in, easy out" system creates the potential for a flip-flopping effect that will negatively affect States, federal agencies, and the regulated public. As discussed above, Florida spent a considerable amount of time and resources in its assumption process. By undermining the stability of the program approval, the proposed revisions to the withdrawal provisions leave the door open for these significant investments to be rendered obsolete without a fair and transparent adjudication. Not only is there a potential for economic waste due to withdrawal of programs that have already invested in state programs, but also the threat of withdrawal will disincentivize state investment in assumption generally [Footnote 29: EPA notes that the proposed process is modeled on the withdrawal procedures for state Underground Injection Control ("UIC") programs. 88 Fed. Reg. 55,311. There are significant differences between a CWA 404 program and

a UIC program, notably a state-run CWA 404 program covers a larger geographical scope, supplies more permits, and is just generally broader and more involved than a UIC program. The resource intensity and the investments a State must make to assume a 404 program is not comparable to a UIC program and should not be as easily withdrawn]. In addition to economic effects of an easy withdrawal, this proposal also erodes stability and predictability for stakeholders and States.

Agency Response: ***See*** **Section IV.E.2 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments.** ***See also*** **EPA's Response to Comment EPA-HQ-OW-2020-0276-0066-0031. EPA disagrees that removing unnecessary encumbrances to the withdrawal procedures will disincentivize investment in State programs.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0034)

Third, the proposed withdrawal process raises significant due process concerns. A formal adjudicatory hearing is not a mere procedural hurdle; it is a foundational element of ensuring that States have a meaningful opportunity to be heard, to present evidence, and to address and respond to EPA concerns before their program is withdrawn. The action of withdrawing is properly considered an adjudication because the withdrawal of a state program involves a determination about specific facts related to an individual State's compliance or performance, which has tangible consequences for the State, for which the State should receive all the benefits of an adjudicatory hearing. Eliminating the long-standing process of providing an adjudicatory hearing during withdrawal procedures disregards the constitutional principles of due process which guarantee fair procedures by government agencies before depriving an entity of its interests.

The act of aligning the approval and withdrawal processes does not, in and of itself, ensure fairness or justice. By ignoring the text and intent of the statute and sidelining a historically rooted adjudicatory process, the EPA risks undermining the trust and confidence of States, undermining the legitimacy of its own actions, and potentially setting a precedent for future regulatory changes that could further sideline due process considerations. The withdrawal procedures must be fair, transparent, and allow States an adequate opportunity to respond and address EPA concerns—the proposed withdrawal procedures do not, but the existing procedures do. Accordingly, Florida respectfully requests that EPA omit the updated withdrawal provisions from the final rule.

Agency Response: ***See*** **Section IV.E.2 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments.** ***See also*** **EPA's Response to Comment EPA-HQ-OW-2020-0276-0066-0031. EPA disagrees with the commenter that only an adjudicatory process allows for a determination about specific facts related to an individual State's compliance or performance; the revised withdrawal procedures allow for public input and Tribal or State feedback specifically regarding whether the Tribe or State meets CWA and regulatory requirements, or can take remedial action to meet these requirements.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0006)

Specifically, Florida opposes, among other things, EPA's proposal to eliminate the adjudicatory hearing for an EPA determination to withdraw approval of a state program.

Agency Response: ***See*** **Section IV.E.2 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0053)

If and when annual reporting shows that a state is no longer in compliance with federal requirements, EPA must remedy this issue using the process prescribed in the Clean Water Act by initiating withdrawal proceedings. These proceedings were created to give EPA the tools to ensure that states remain in compliance with the Clean Water Act. EPA must comply with the statutory requirements and institute withdrawal proceedings when states are no longer in compliance.

Agency Response: ***See*** **Section IV.E.2 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0055)

XI. EPA must go further to streamline withdrawal procedures and should initiate withdrawal procedures when necessary to ensure that state programs comply with federal requirements.

EPA's proposal to simplify and streamline withdrawal procedures is a step forward to ensure that EPA withdraws Section 404 authority from any state that fails to comply with the law. Although EPA has stated it will not "take program withdrawal lightly," 88 Fed. Reg. at 55,311, the agency should not shy away from using this process to bring states into compliance with the law. When a state program fails to comply with federal requirements, EPA must initiate withdrawal to ensure that our waters and wetlands are protected.

We agree with EPA's plans to create firm deadlines for the steps in the withdrawal process. Id. at 55,310. However, EPA must also create deadlines to (1) make its findings after the public hearing; (2) notify a state of the specific deficiencies in the state program and of necessary remedial actions or notify a state that the state is complying with the law; and
(3) publish its decision to withdraw a state 404 program that would initiate the transfer back to the Corps. See id.

We also agree with EPA's statement that the agency must "widely disseminate[]" notice of the hearing regarding potential withdrawal of a state program, including in the Federal Register and on EPA's website. Id. at 55,310, 55,329. EPA must ensure that the public has adequate time to prepare and participate in this hearing.

Agency Response: ***See*** **Section IV.E.2 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments.**

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0023)

2. Withdrawal Procedures

We concur with the proposed regulatory changes and would suggest the inclusion of a probationary review period for those authorities which receive formal notification of non- compliance from the Regional Administrator and satisfactorily correct identified deficiencies.

Agency Response: ***See*** **Section IV.E.2 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments. The withdrawal procedures allow for both a 30-day and a subsequent 90-day period in which a Tribe or State may address issues of non-compliance that EPA has identified.**

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0016)

- For each state that assumes authority under CWA § 404(g), EPA must conduct a periodic review of that state's implementation of its authority. To facilitate this review, EPA should lay out the criteria that will be used to judge a state's efforts and should provide standards and procedures for revoking a state's authority when it has not exercised its CWA § 404 authority properly.

Agency Response: ***See*** **Section IV.E.2 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments. The annual report that any assuming Tribe or State must submit provides an opportunity for a regular review of the Tribe or State's implementation of its authority. In this rule, EPA is clarifying the information that Tribes or States must provide in their reports.** ***See*** **Section IV.E.3 of the final rule preamble.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0033)

EPA's proposed revisions to streamline the process to withdraw approval of a state permitting program is clear. However, EPA needs to impose a timeline on when it will make a determination of whether the state is in compliance with the requirements of Section 404. As proposed, the timeline includes deadlines for the state's first opportunity to come into compliance (30 days), a timed window for a public hearing if they don't correct (between 30 and 60 days), and a deadline for the state's second opportunity to come into compliance (90 days). Id. at 55310. The regulations do not state, however, when EPA must make a decision after the public hearing of whether the state is in compliance with the law. This means that a program can be out of compliance for anywhere from 150 days to several months or years while EPA makes that determination. EPA must include a timeline for when it will make a decision, and we suggest an outer time limit of 60 days. This time limit is reasonable, especially given that as the rule is proposed, EPA has already made an initial determination that the state is not in compliance before a public hearing is even scheduled.

EPA must also include a provision in this section that all permitting will be suspended during this review period. This pause on permitting process must be automatic once EPA makes its first determination that the state is not in compliance and issues its first notice

to the state. Permits processed by a program that is not in compliance with the law cannot meet the standards of the CWA. State permitting can resume once EPA makes a final determination that the state program has come into compliance with Section 404 requirements. EPA must also review any permits that are partially processed during the time the state program is determined to be non-compliant. These regulatory additions ensure that the goals and protections of the CWA are being met and not circumvented by applicants or state agencies.

Agency Response: ***See*** **Section IV.E.2 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments.** ***See also*** **EPA's Response to Comment EPA-HQ-OW-2020-0276-0063-0048.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0018)

In general, Alaska is appreciative of EPA's transparency with this rulemaking. But EPA's proposal under this section to "simplify" and "streamline" its own withdrawal procedures is at odds with facilitating State assumption. This proposal would eviscerate the processes that are currently in place to ensure that withdrawal is done fairly and after the State or Tribe has had a full and fair opportunity to be heard [Footnote 44: 88 Fed. Reg. 55310.].

Currently, EPA may only withdraw program approval following a formal adjudication process, which allows for motion practice, presentation of evidence, and other due process-like safeguards [Footnote 45: 88 Fed. Reg. 55311.]. Under EPA's new process, or lack thereof, a Regional Administrator may withdraw program approval if he finds that a State is "not administering the program consistent with the requirements of the CWA and 40 CFR part 233" and gives the State or Tribe "30 days to demonstrate compliance." [Footnote 46: 88 Fed. Reg. 55310.]. If the 30 days pass and the State has, in EPA's estimation, failed to demonstrate compliance, EPA will hold a public hearing (non-adjudicatory hearing). Thereafter, EPA must notify the State of specific deficiencies and give the State 90 days to return to compliance or return the program [Footnote 47: 88 Fed. Reg. 55310.].

Missing from the new proposed process is a meaningful opportunity for the State to be heard, or meaningful standards to constrain the Regional Administrator's discretion. Alaska urges EPA to retain the existing withdrawal procedures, which ensure a fair process. The new procedures do not. The new procedures, and specifically the discretion – i.e., instability and unpredictability – they inject into the withdrawal process, will discourage, rather than facilitate, State assumption. Please remove this section and retain the existing procedures.

Agency Response: ***See*** **Section IV.E.2 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments.** ***See also*** **EPA's Response to Comment EPA-HQ-OW-2020-0276-0066-0031.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0043)

EPA's proposed revisions to streamline the process to withdraw approval of a state permitting program are clear. However, EPA needs to impose a timeline on when it will make a determination of whether the state is in compliance with the requirements of Section 404. As proposed, the timeline includes deadlines for the state's first opportunity to come into compliance (30 days), a timed window for a public hearing if they don't correct (between 30 and 60 days), and a deadline for the state's second opportunity to come into compliance (90 days). Id. at 55310. The regulations do not state, however, when EPA must make a decision after the public hearing of whether the state is in compliance with the law. This means that a program can be out of compliance for anywhere from 150 days to several months or years while EPA makes that determination. We suggest that EPA include a timeline for when it will make a decision and we suggest an outer time limit of 60 days. This time limit is reasonable, especially given that as the rule is proposed, EPA has already made an initial determination that the state is not in compliance before a public hearing is even scheduled.

EPA must also include a provision in this section that all permitting will be suspended during this review period. This pause on permitting process must be automatic once EPA makes its first determination that the state is not in compliance and issues its first notice to the state. Permits processed by a program that is not in compliance with the law cannot meet the standards of the CWA. State permitting can resume once EPA makes a final determination that the state program has come into compliance with Section 404 requirements. EPA must also review any permits that are partially processed during the time the state program is determined to be non-compliant. These regulatory additions ensure that the goals and protections of the CWA are being met and not circumvented by applicants or state agencies.

Agency Response: ***See*** **Section IV.E.2 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments.** ***See also*** **EPA's Response to Comment EPA-HQ-OW-2020-0276-0063-0048.**

Environmental Confederation of Southwest Florida (EPA-HQ-OW-2020-0276-TRANS-092923-002-0003)

I want to remind you that you talked about this is about preventing pollution and managing their aquatic waters. Florida is dismal, in being able to do either of those things. If you don't know we have this thing called blue-green algae because they took over the numeric standards. You need to be able to go back to those states and to those states that have taken over the program, and if they are not meeting those requirements of the program, not only should you take enforcement action, but you should take proceedings to remove that program from them.

Agency Response: ***See*** **Section IV.E.2 of the final rule preamble for discussion of the Agency's rationale for this provision and response to these comments. EPA's oversight of any particular State program is outside of the scope of this rulemaking.**

3. Program reporting

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0049)

EPA's program reporting requirements should also include budgetary information. Specifically, the state's annual report should include the budgetary costs of administering the program for the preceding year. The annual report should also include the project costs to administer the program for the next year. The annual report should also include an update on any litigation within the state regarding state-issued section 404 permits that may have commenced or concluded in the reporting year.

Agency Response: The Agency appreciates commenter input suggesting additional reporting requirements including the program's budget and any litigation regarding Tribal or State issued section 404 permits. *See* Section IV.F of the final rule preamble for further discussion of the Agency's rationale for not specifying additional requirements for the Tribe's or State's annual report to include budget or litigation.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0051)

X. EPA must strengthen its oversight to ensure that state assumed programs stay in compliance with the Clean Water Act.

Because EPA relies heavily on annual reporting, it must ensure that it codifies specific, detailed requirements for this reporting and should include budgetary information. Specifically, the state's annual report should include the budgetary costs of administering the program for the preceding year. The annual report should also include the project costs to administer the program for the next year. The annual report should also include an update on any litigation within the state regarding state-issued section 404 permits that may have commenced or concluded in the reporting year.

Agency Response: *See* Section IV.F of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0049.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0054)

Conservation Groups support EPA's decision to ensure that annual reporting is publicly available. EPA should also ensure that draft state reports and EPA requests for additional information are included in the publicly disclosed information.

Agency Response: The Agency appreciates the commenter input requesting transparency regarding the annual review. The final report will contain any information that EPA has requested, and the rule requires that the final report be made publicly available. *See* Section IV.E.3 of the final rule preamble.

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0024)

3. Program Reporting NAWM supports clear and transparent program metrics and reporting for all authorized Section 404 permit programs including the public availability and notice of annual reports.

Agency Response: **The Agency appreciates commenter support for transparent metrics and reporting. *See* Section IV.E of the final rule preamble for a summary of the final rule's requirements for annual reporting and how the Agency determined the annual report will provide increased transparency in program reporting and oversight.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0019)

EPA proposes to increase the requirements of what must be in a State's annual report to EPA [Footnote 48: 88 Fed. Reg. 55311.]. EPA would require a "robust" overview that includes identifying implementation challenges and solutions, quantitative reporting, and specific metrics related to compensatory mitigation, resources, and staffing [Footnote 49: 88 Fed. Reg. 55311.]

The more onerous EPA's regulations are, the more State resources are taxed in ensuring compliance. And the more difficult it is to secure the necessary legislative authority and funding. There is no demonstrated benefit in this provision, which appears rooted in a mistrust of State management. Alaska suggests this provision be removed.

Agency Response: **The Agency appreciates commenter input opposing additional reporting and suggesting that the proposed rule would make it more difficult for Tribes and States to assume section 404. *See* Section IV.E of the final rule preamble for further discussion of the Agency's rationale for clarifying annual reporting requirements and its finding that the new requirements will not make Tribal or State assumption more difficult.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0044)

EPA's program reporting requirements should also include budgetary information. Specifically, the state's annual report should include the budgetary costs of administering the program for the preceding year. The annual report should also include the project costs to administer the program for the next year. The annual report should also include an update on any litigation within the state regarding state-issued section 404 permits that may have commenced or concluded in the reporting year.

Agency Response: ***See* Section IV.F of the final rule preamble and the Agency's response to comment EPA-HQ-OW-2020-0276-0063-0049.**

Natural Resources Defense Council (EPA-HQ-OW-2020-0276-TRANS-092923-008-0012)

An essential component of this stringency demonstration is that it must be maintained over time. EPA needs to build into these regulations a robust oversight rule by which states must report annually to EPA on their implementation of the program and EPA must carefully review states permitting for consistency with the Clean Water Act and be prepared to withdraw the program when deficiencies are evident.

Agency Response: **The Agency acknowledges the commenter's support for Tribal and State annual reporting and careful and robust EPA review. *See* Section IV.F of**

the final rule preamble for a summary of how the final rule clarifies requirements for annual reporting, thereby improving EPA's ability to ensure a program remains consistent with section 404 program requirements. *See* Section IV.E.2 for a discussion of program withdrawal.

4. Other comments on federal oversight

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0030)

EPA's oversight role should not be transformed into a tool to impose requirements or practices that go beyond what the law requires. Wherever possible, EPA should take a flexible approach and provide adequate transition periods for States to update their programs to reflect changes in federal law. EPA must ensure that States have sufficient time to adjust to changes in federal law, particularly where States are required to modify laws and regulations and/or where changes occur via judicial decisions. For example, as seen in numerous Supreme Court cases, the definition of WOTUS can quickly change, which may create new requirements under the CWA. Accordingly, EPA should ensure that there is sufficient flexibility and lead time for state programs to the greatest extent consistent with the CWA.

Agency Response: The Agency appreciates commenter input regarding EPA oversight and providing sufficient time for approved programs to address any potential program changes resulting from changes to federal statutes or regulations. *See* 40 CFR 233.16 for the time frames provided for making conforming changes to approved programs.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0052)

EPA must also ensure that it maintains consistent and thorough review of assumed programs to ensure that states remain in compliance, even ten or twenty years after assumption. For example, changes in state administrations can have a profound impact on the resources allocated to state environmental agencies.

Agency Response: The Agency appreciates commenter concerns regarding EPA oversight of approved programs. The final rule preamble describes clarifications and revisions to provisions of the preamble and regulations associated with EPA oversight. *See* Section IV.A.3 of the final rule preamble clarifying minimum standards; Section IV.B.4 of the final rule preamble regarding compensatory mitigation instruments; and Section IV.E of the final rule preamble addressing federal oversight.

5. Categories of permits for which EPA review cannot be waived

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0001)

Overall, Earthjustice's experience dictates that state assumption of 404 permitting must be subjected to very strict scrutiny and oversight by EPA, both at the time a state applies to assume the program as well as after assumption. This is in keeping with the overall Clean Water Act concept of cooperative federalism which requires EPA to function as the backstop and oversight to state administration and implementation of Clean Water Act

requirements. That oversight obligation does not have an expiration date. The possibility of tribes, individual citizens, and the environment generally losing significant protections as a result of state assumption of 404 programs is very real and must be rigorously protected against.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0068-0052.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0016)

- EPA Must Ensure the 404 Guidelines Fully Apply and Have a Review Mechanism to Ensure That Remains the Case Over Time

Seventh, recent experience with the State of Michigan and their Office of Administrative Hearings demonstrated that states that have approved permit programs may not see the need to strictly adhere to Section 404 Guidelines and/or may not understand that this is an assumed program under the Clean Water Act with Clean Water Act requirements. In litigation over Michigan's issuance of a permit under its assumed 404 permitting program, an Administrative Law Judge found that he had no jurisdiction or obligation to review and apply federal regulatory or statutory requirements under either the Section 404 Guidelines or the Clean Water Act and that those Guidelines and the Clean Water Act simply did not apply to Michigan permitting once Michigan assumed the program. See, Orders Denying Stay and Denying Summary Judgment, In the Matter of Tom Boerner, Menominee Indian Tribe of Wisconsin, and Coalition to Save the Menominee River on the Permit issued to Aquila Resources, Inc., Docket No. 18-013058 (Michigan Office of Administrative Hearings), issued February 6, 2019 and May 19, 2019, respectively. This is, of course, wholly incorrect, but it highlights the obligation of EPA both at the time a state assumes a program and then from time to time as the state applies the program, to oversee and make clear that a state must adopt and apply (in their regulatory, judicial, and administrative review capacities) the Section 404 Guidelines and all Clean Water Act requirements. EPA must make clear that the 404 guidelines must either be fully adopted into the state's regulations and/or make clear through rulemaking that the 404 guidelines fully apply to a state permitting program in the same way that EPA's NPDES permitting regulations in 40 C.F.R. ch. 122 apply to all state NPDES permitting programs. EPA should further make clear that the only deviation is if a state chooses to impose requirements that are more protective of the environment than the Section 404 guidelines. EPA must also implement internal controls sufficient to fully review a state's program for this and other compliance with guidelines on a not less than five-year schedule. This should include reviews of state budgets to ensure a permit program is not underfunded and thereby underprotective.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble for a description of how Tribal and State programs may meet the requirements of the CWA section 404(b)(1) Guidelines and Section IV.E.3 of the final rule preamble for a description of annual reporting requirements.**

EPA agrees with the commenter that States must adhere to CWA requirements and the section 404(b)(1) Guidelines following assumption. EPA declines to adopt a comprehensive 5-year review requirement for Tribal or State programs, which may be extremely resource-intensive and not necessarily warranted. The many oversight tools at EPA's disposal, including annual report reviews, permit review and objection authorities, and the authority to request information and approve program revisions in 40 CFR 233.16 provide sufficient tools for EPA to monitor Tribal and State compliance with CWA requirements.

F. Subpart G - Eligible Indian Tribes

1. Legal issues regarding tribal opportunities

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0016)

The revisions proposed in this section are legally indefensible. Potentially creating new, substantive rights for Tribes is inconsistent with the scope of this rulemaking, which is billed as one of clarifying and facilitating State assumption. Additionally, the uncertainty injected into the assumption process by these proposed changes are likely sufficient to defeat many States' bids for assumption. Alaska suggests removing them from this rulemaking, and retraining focus on the intended goals of clarifying and facilitating State assumption.

Agency Response: ***See*** **Section IV.F of the final rule preamble for EPA's rationale regarding these changes. This rulemaking is intended, among other things, to clarify minimum requirements for Tribal and State assumption, and that includes clarifying requirements for stakeholder participation in the permitting process, consistent with CWA sections 101(e) and 404(h)(1)(C), (E).**

2. Comments on tribal opportunities for engagement

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0044)

EPA has proposed that tribes that have been approved for treatment as a state (TAS) under any section of CWA, not just Section 404, would have the opportunity to suggest permit conditions for Section 404 permits that would impact on-reservation waters. Id. at 55303. EPA also has proposed that tribes would be able to apply for a limited TAS solely for the purpose of commenting on a state- issued Section 404 permit if it would impact on-reservation waters. Finally, EPA proposes that tribes may request that EPA review permits, presumably if a tribe has not been approved for TAS under the CWA or if a Section 404 permit would impact tribal rights and resources but not reservation waters.

We are concerned with how these provisions will apply to Alaska Native tribes. Most tribes in Alaska do not have reservation lands. Tribes without jurisdiction over their waters have not been offered the opportunity to apply for TAS. 40 C.F.R. § 131.8. Many tribes, particularly small tribes, do not have significant resources to commit to funding water resources staff. Accordingly, it seems unlikely that tribes in Alaska will be made

aware of permits potentially impacting our rights, or that we will have the time or resources to comment and propose conditions on those permits for which we do receive notification.

Agency Response: EPA recognizes the unique status of Alaska Native Tribes and Villages. Comments addressing assumption of any particular Tribal or State program are outside of the scope of this rulemaking. EPA recognizes the critical importance of ensuring that all stakeholders, including Alaska Tribes and Native Villages, receive notice as well as the opportunity to meaningfully comment on proposed permits following Tribal or State assumption, and views facilitating such notice and opportunity for comment as part of EPA's role. The Agency recognizes that limited financial resources are a concern for many Tribes in Alaska and elsewhere. EPA is able to exercise oversight authority to ensure that permits issued by approved Tribal and State section 404 programs are consistent with the CWA 404(b)(1) Guidelines.

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0039)

EPA has proposed that Tribes that have been approved for treatment as a state (TAS) under any section of CWA, not just Section 404, would have the opportunity to suggest permit conditions for Section 404 permits that would impact on-reservation waters. Id. at 55303. EPA also has proposed that Tribes would be able to apply for a limited TAS solely for the purpose of commenting on a state-issued Section 404 permit if it would impact on-reservation waters. Finally, EPA proposes that Tribes may request that EPA review permits, presumably if a Tribe has not been approved for TAS under the CWA or if a Section 404 permit would impact Tribal rights and resources but not reservation waters.

We are concerned with how these provisions will apply to Alaska Native Tribes. Most Tribes in Alaska do not have reservation lands. Tribes without jurisdiction over their waters have not been offered the opportunity to apply for TAS. 40 C.F.R. § 131.8. Many Tribes, particularly small Tribes, do not have significant resources to commit to funding water resources staff. Accordingly, it seems unlikely that Tribes in Alaska will be made aware of permits potentially impacting our rights, or that we will have the time or resources to comment and propose conditions on those permits for which we do receive notification.

Agency Response: EPA recognizes the unique status of Alaska Native Tribes. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0044.

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0013)

The Proposed Rule includes three changes to "afford protection to Tribal resources," specifically Tribal resources and interests that are "off reservations" that "may be affected by activities permitted under assumed 404 programs." [Footnote 31: 88 Fed. Reg. at 55305.]. These changes would: (1) enable Tribes who have TAS status for any CWA provision to comment on State 404 permits as an Affected State; [Footnote 32: 88

Fed. Reg. 35303. Currently, only States, and Tribes with TAS to assume the 404 program, have this comment opportunity. 88 Fed. Reg. 35303.] (2) create a new TAS option, specifically for the ability to comment on State 404 permits as an Affected State; and (3) codify an opportunity for Tribes to request EPA review of permits that may affect Tribal rights or interests. If EPA objects to the draft permit, a State may not issue the permit until the State has taken "steps required by EPA to eliminate an objection." [Footnote 33: 88 Fed. Reg. 55305.]. EPA justifies these additional requirements as "[c]onsistent with the Federal trust responsibility and the policies underlying CWA section 518." [Footnote 34: 88 Fed. Reg. 55304.].

Under existing law, when a TAS Tribe is notified of an upstream project, and objects, additional requirements are imposed on the permitting State that are not imposed when similar objections/comments are made by a non-TAS Tribe. Namely, the State must notify the TAS and the EPA Regional Administrator of its decision not to accept the recommendations of the TAS Tribes and its reasons for doing so [Footnote 35: 88 Fed. Reg. 55304; see 33 U.S.C. 1341(1)(e).]. The Regional Administrator then has time to comment on, object to, or make recommendations regarding the Tribal concerns set forth [Footnote 36: 88 Fed. Reg. 55304.]. This, of course, applies only to those Tribes who have applied for and attained TAS status – it does not presently include all Tribes. Notably, States already must public notice permits – giving Tribal stakeholders an opportunity for comment and input on every permit. States must provide EPA with a copy of every permit application [Footnote 37: Clean Water Act § 404(j).] – giving Tribal stakeholders additional opportunity to provide comment through EPA.

Alaska values input from our Tribal stakeholders, and is not seeking in any way to diminish or preclude their participation in the 404 permitting process. EPA's proposed changes to the current process, however, are problematic for several reasons.

First, proposed changes (1) and (2) allow any Tribe to be treated as TAS irrespective of whether they have met Congress's requirements for TAS status. This is unlawful: EPA may not rewrite statutory text to short circuit the process for attaining TAS status. Broadening the scope of which Tribes are considered TAS Tribes may only be effectuated by statutory change.

Second, these provisions do not apply to permits issued under a federal 404 program, so EPA has no basis for imposing these requirements here.

Agency Response: ***See*** **Section IV.F of the preamble to the final rule. EPA disagrees that this final rule would allow any Tribe to be treated as an "affected State" whether or not they have met requirements for TAS. EPA is not broadening the scope of TAS; EPA is simply stating when and how Tribes are considered to be an "affected State" for the purposes of the coordination requirements found in 40 CFR 233.31. These provisions leverage existing TAS approvals for Tribes and articulate how Tribes may seek and receive TAS for the sole purpose of commenting as an "affected State."**

The final rule provides that an Indian Tribe may apply to the Regional Administrator for a determination that it meets the statutory criteria of section 518 of the CWA, 33 U.S.C. 1377, for the sole purposes of public participation as an "affected State" on Tribal or State issued CWA section 404 permits. *See* Section IV.F of the final rule preamble for EPA's rationale and 40 CFR 233.31(d) for the criteria to be met. Nothing in the CWA prohibits EPA from offering this opportunity. CWA sections 101(e) and 404(h) emphasize the importance of maximizing public participation in the permitting process, and the CWA does not preclude any streamlining of TAS application requirements.

EPA disagrees that opportunities for Tribes to meaningfully engage and provide recommendations on the Corps CWA section 404 permits do not exist. There are mechanisms for Tribes to meaningfully engage on permits that may affect their waters or interests when the Corps is the permitting agency. For example, the Corps does not permit activity under section 404 until it ensures compliance with Section 106 of the National Historic Preservation Act (NHPA). For projects that may result in impacts to cultural resources listed on, or eligible for listing on the National Register of Historic Places, the Corps consults with the State or Tribal Historic Preservation Officer, as appropriate. As a part of the cultural resources investigation, the Corps may also consult with Federally recognized Indian Tribes, in accordance with Executive Order 13175. For more information, *see* *https://www.spl.usace.army.mil/Missions/Regulatory/Permit-Process/Section-106/*.

EPA also disagrees with the statement that EPA lacks a basis for imposing requirements on the permitting process when a Tribe or State is the permitting authority. The CWA authorizes EPA to oversee Tribal and State programs, including ensuring adequate public participation and coordination with Tribes and States that may be affected by the issuance of a permit. *See* 33 U.S.C. 1344(h)(1)(B)-(C). The final rule's clarifications and opportunities provide more Tribes access to TAS, consistent with the Act. These provisions of this rulemaking do not create new, substantive rights for Tribes, other than notification and public comment opportunities.

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0022)

EPA has proposed that Tribes that have been approved for treatment as a state (TAS) under any section of the Clean Water Act, not just Section 404, would have the opportunity to suggest permit conditions for Section 404 permits that would effect on-reservation waters.[Footnote 29: 88 Fed. Reg. at 55,303.] EPA also has proposed that Tribes would be able to apply for a limited TAS solely for the purpose of commenting on a state-issued Section 404 permit if it would impact on-reservation waters. Finally, EPA proposes that Tribes may request that EPA review permits, presumably if a Tribe has not been approved for TAS under the Clean Water Act or if a Section 404 permit would impact Tribal rights and resources but not reservation waters.

We are concerned with how these provisions will apply to Alaska Native Tribes. Most Tribes in Alaska do not have reservation lands. Tribes without jurisdiction over their

waters have not been offered the opportunity to apply for TAS.[Footnote 30: 40 C.F.R. § 131.8.] Many Tribes, particularly small Tribes, do not have significant resources to commit to funding water resources staff. Accordingly, it seems unlikely that Tribes in Alaska will be made aware of permits potentially affecting their rights, or that they will have the time or resources to comment and propose conditions on those permits for which they do receive notification.

Agency Response: EPA recognizes the unique status of Alaska Native Tribes. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0044.

Environmental Protection Network (EPN) (EPA-HQ-OW-2020-0276-0057-0001)

Tribes as Affected Downstream States and Application of Treatment as States (TAS)
EPN supports the proposed modifications that address the role of affected Tribes in reviewing proposed permits issued by authorized states or Tribes. However, EPN does have a specific comment on the terminology used in this provision regarding "downstream" states and Tribes. The term "downstream" in this section and elsewhere appears to be a shorthand expression for the broader phrase "...any state (other than the permitting state) whose waters may be affected by the issuance of a permit…" found in CWA section 404(h)(1)(E). Since some affected waters may not be "downstream" of the permit (e.g., upstream waters for which impacts downstream affect migratory aquatic species upstream), the use of the term downstream can lead to confusion interpreting this term. We suggest referring to "affected states and Tribes."

The proposal provides three important paths for Tribes to engage on such permits. First, any Tribe that has been approved for TAS for any portion of the CWA can submit comments that must be addressed by the permitting state or Tribe. This covers approximately half of federally recognized Tribes with reservations. Second, a Tribe that does not have TAS status for any part of the CWA can request TAS specifically for the purpose of commenting on a proposed section 404 permit. This narrow TAS approval can be a very streamlined process. Again, Tribal comments would have to be addressed by the permitting state or Tribe. Third, a Tribe can request that EPA review any permit that affects Tribal rights or interests. EPA would consider interests such as treaty rights that occur outside of Tribal boundaries. Taken together, these provisions substantially improve the ability of Tribes to address the potential impacts of Section 404 permit actions taken by states or Tribes authorized to implement the permitting program.

Agency Response: EPA has replaced "downstream" with the term "affected." EPA is not adding the word "Tribes" to this provision as the regulations define "State" to include eligible Tribes.

Nebraska Department of Environment and Energy (EPA-HQ-OW-2020-0276-0073-0002)

Under the proposed rule, any downstream tribe that has been approved for TAS for any CWA provision would have an opportunity to suggest permit conditions for section 404 permits issued by upstream States, and tribes would be allowed to apply for TAS solely for the purpose of commenting on 404 permits.

- The coordination requirements of 40 C.F.R. § 233.31 should be limited to tribes which have received TAS for section 303 of the CWA and have federally approved water quality standards (WQS). Permit conditions requested by tribes under § 233.31 should be protective of the biological, chemical, or physical integrity of the waters as expressed by tribal WQS. The relationship between the federal government and tribes is that of sovereign to sovereign. There is the potential for unnecessary conflict if States are tasked with evaluating requested permit conditions which are based on rights or interest derived through treaties and trust relationships between tribes and the federal government. States have the ability to work with tribes who have not received TAS for section 303 throughout the permitting process to ensure that the tribes are well informed and given the opportunity to provide feedback.
    - The Department suggests conditions formally requested by tribes should be limited to requests made by tribes which have been approved for TAS for section 303 of the CWA and promulgated their own WQS. Any request for conditions to protect tribal rights or interests which are derived through treaty between tribes, the federal government, or because lands are being held in trust on behalf of the tribe by the federal government should go through EPA.

Agency Response: ***See*** **Section IV.F of the final rule preamble. EPA agrees that any permit issued shall comply with the 404(b)(1) Guidelines.**

EPA declines to accept the commenter's recommendation that the coordination requirements of 40 CFR 233.31 should be limited to Tribes which have received TAS for section 303 of the CWA and have federally approved water quality standards. The recommended language would place unnecessary barriers on Tribes seeking to meaningfully engage on permits that may affect their waters and interests. Adopting the commenter's recommendation would require Tribes to seek TAS for multiple CWA programs *before* having access to the statutory coordination requirements found in 40 CFR 233.31. The commenter has not provided any reason why Tribes should not be permitted to comment on permits for dredging and filling activities that could affect Tribal interests if they do not have the resources to promulgate their own water quality standards. Moreover, early coordination and the opportunity to provide recommendations will facilitate permitting by reducing the need for Tribes to request EPA review of permits. EPA's review can delay permit issuance, as the CWA provides EPA with up to 90 days to review and coordinate with other federal agencies on permits for which it requests review.

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0018)

EPA has proposed that tribes, like the Port Gamble S'Klallam Tribe, that have been approved for treatment as a state (TAS) under any section of CWA, not just Section 404, would have the opportunity to suggest permit conditions for Section 404 permits that would impact on-reservation waters. Id. at 55303. EPA also has proposed that tribes would be able to apply for a limited TAS solely for the purpose of commenting on a state-issued Section 404 permit if it would impact on-reservation waters. We generally

support these proposals but are concerned that they again increase burdens upon tribes with interests in states that may assume Section 404 permitting authority. Although we support the increased opportunity to comment and propose permit conditions, each instance will require investment of time and resources by an impacted tribe. The current Section 404 permitting program is carried out and funded by the Army Corps, but states are likely to have fewer resources to commit to implementing a Section 404 permitting program and have limited incentive to ensure tribal rights and resources are not impacted by its permitting decisions. This is particularly true if a permit is for a project that may generate revenue for the state or if there is political pressure to approve the project.

Agency Response: ***See*** **Section IV.F of the final rule preamble, addressing EPA's efforts to facilitate Tribal engagement in State or Tribal section 404 permitting programs, particularly with respect to permits that may adversely affect Tribal resources or interests. CWA section 404 permits, whether issued by the Corps, a State or a Tribe, must be consistent with the CWA section 404(b)(1) Guidelines, which ensure that all permits meet the same minimum requirements and protections for aquatic resources.** ***See*** **Section IV.B.3 of the final rule preamble for a discussion about the importance of ensuring that Tribes and States that assume the section 404 program have the capacity to implement it.**

American Exploration & Mining Association (AEWA) (EPA-HQ-OW-2020-0276-0076-0001)

As described in Section C.2 of the Preamble, EPA is proposing three changes to certain comment and review provisions as they relate to Tribal interests. First, any downstream Tribe that has been approved by EPA for treatment in a similar manner as a State (TAS) for any CWA provision would have an opportunity to suggest permit conditions for CWA Section 404 permits issued by upstream States and authorized Tribes that may affect the biological, chemical, or physical integrity of their reservation waters. Second, EPA proposes to enable Tribes that have not yet been approved for TAS for any CWA provision to apply for TAS solely for the purpose of commenting as a downstream Tribe on CWA Section 404 permits proposed by States or other authorized Tribes. Third, and most problematic in our view, EPA proposes to provide an opportunity for Tribes to request EPA review of permits that may affect [Underlined: Tribal rights or interests.]

We are not necessarily opposed to the first two changes in that we support ensuring meaningful opportunities for Tribes to participate in CWA Section 404 permitting processes. We simply point out that these provisions make virtually every Tribe in the U.S. eligible to provide comments on permitting actions and request EPA review.

Agency Response: EPA disagrees that the final rule means that "virtually every Tribe in the U.S. will be eligible" to provide comments on [all] permitting actions and request EPA review of all permits. This provision applies to affected Tribes with TAS for a CWA program. Additionally, under the current regime anyone, not just Tribes, may already request EPA review of any permit. The third provision the commenter identifies simply clarifies an existing opportunity. ***See*** **Section IV.F of the final rule preamble for EPA's rationale regarding these provisions and the Agency's response to comment EPA-HQ-OW-2020-0276-0079-0013.**

3. Comment opportunity for Tribes with TAS for any CWA provision

Buena Vista Rancheria of Me-Wuk Indians (EPA-HQ-OW-2020-0276-0053-0001)

Buena Vista Rancheria of Me-Wuk Indians (BVR) supports, with suggested modifications and clarification, the Environmental Protection Agency's (EPA) proposed changes related to Tribes as Affected Downstream States in relation to Section 404. Allowing any Tribe with Treatment in a Similar Manner as a State (TAS) under any CWA provision to comment on 404 permits will make it easier for federally recognized Tribes to provide input on 404 permits.

Agency Response: The Agency acknowledges the commenter's support.

Buena Vista Rancheria of Me-Wuk Indians (EPA-HQ-OW-2020-0276-0053-0003)

In addition, BVR requests funding be made available for Tribes pursuing TAS.

Agency Response: Funding is outside the scope of this rulemaking.

Idaho Department of Environmental Quality (IDEQ) (EPA-HQ-OW-2020-0276-0059-0003)

III. Tribes as Affected Downstream States

EPA proposes any downstream Tribe that has been approved for treatment in a similar manner as a State (TAS) for any CWA provision would have an opportunity to suggest permit conditions for section 404 permits issued by upstream States and authorized Tribes that may affect the biological, chemical, or physical integrity of their reservation waters. The proposed Rule requires the Tribe receive notice and an explanation if the permit does not address their comments and EPA must be notified. This would also cause additional regulatory delays. IDEQ supports Tribes having the ability to work collaboratively with States. Though it is important for Tribes that have not been approved for TAS to engage and participate in the public comment process, suggesting permit conditions may extend their authority beyond the CWA and the requirement to provide notification if conditions are not accepted is burdensome.

Agency Response: The Agency disagrees that these provisions will delay permitting. The timelines in this provision are the same as those articulated in the statute and prior regulations for EPA permit review and oversight.

The requirement to provide potentially affected Tribes and States the opportunity to comment on a State or Tribe-issued CWA section 404 permit is a statutory requirement. The statute requires that "[t]o assure that any state (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State …if any part of such written recommendations are not accepted…the permitting State will notify such affected State (and the Administrator) …" *See* 33 U.S.C. 1344(h)(1)(E).

The regulations at 40 CFR 233.31 provide that the opportunity for the affected State or Tribe to provide comment is within the public comment period, which is generally no less than 30 days. Additionally, permitting agencies typically work

with affected Tribes prior to permit proposal, a practice EPA encourages to reduce the likelihood of delays.

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0017)

NAWM supports a robust dialogue between permitting authorities and neighboring jurisdictions, including tribal lands and interests. Permits issued by States or Tribes who have assumed the Section 404 program do not trigger Section 401 due to the lack of a permit issued by a federal agency. As a result, Section 401(a)(2)'s opportunity for neighboring jurisdictions to comment on implications of a proposed permit do not apply. The proposed process would help fill that gap.

The proposal preamble does not explicitly explain why the proposed process is necessary for downstream Tribes to have an opportunity to raise implications of a permit from an assumed program. This omission is likely to result in many comments asserting that the proposed neighboring jurisdiction process is duplicative of Section 401 and is unnecessary. The preamble draws an analogy to the Clean Air Act. NAWM strongly recommends the final rule preamble go beyond the Clean Air Act to CWA Section 401 water quality certification, and in so doing explicitly explain why Section 401's neighboring jurisdiction provisions would not apply to permits issued by assumed programs.

Agency Response: ***See*** **Section IV.F of the final rule preamble for discussion of these provisions. EPA has not provided additional language in the preamble as Tribal- and State- issued permits are not federal actions triggering CWA section 401 certification. The CWA requires that "affected States" be notified and given the opportunity to provide recommendations if the proposed discharge may affect their resources.** ***See*** **33 U.S.C. 1344(h)(1)(E). To add additional discussion on other provisions of the Act which are not a part of this rulemaking will likely create confusion rather than provide clarity.**

4. Applying for TAS solely to comment on proposed section 404 permits

Buena Vista Rancheria of Me-Wuk Indians (EPA-HQ-OW-2020-0276-0053-0002)

BVR also supports allowing Tribes to apply for TAS for the sole purpose of commenting on 404 permits. Tribes should be able to request an area of interest or define the geographic scope of the TAS for 404 permit review to the scope that is relevant to the Tribe even if the permits under review are not on reservation land. This would increase the Tribes ability to ensure that permits affecting waters within its ancestral area can be reviewed in order to protect cultural and ecologically significant areas.

Additionally, BVR asks the EPA to conduct outreach programs to inform Tribes about this proposed change (applying for TAS for the sole purpose of commenting on 404 permits).

Agency Response: EPA encourages Tribes to work with a Tribe or State that assumes the CWA section 404 program to identify areas of interest to the affected

Tribe (within and beyond reservation lands) and to develop mechanisms to ensure these interests are considered during the permitting process. *See* Section IV.F of the final rule preamble for further discussion and rationale for these provisions. EPA plans to conduct outreach on the final rule, including the opportunity to apply for TAS for the purpose of commenting as an "affected State" on Tribal- or State-issued 404 permits.

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0009)

V. We strongly support the enabling of Tribes to suggest permit conditions with only a minimal TAS application burden.

The ability of Tribes to provide suggestions for permit conditions for upstream 404 permit programs is incredibly beneficial to the Tribes and is conducive to cooperative resource management. The goals of maximizing the economic gains from natural resources and of sustaining healthy ecosystems are both dependent on collaborative management between all interested parties. This collaborative management can only occur when the barriers to participation are removed. The development of a relatively low-cost method for Tribes to suggest permit conditions for upstream waters is a significant step towards useful collaborative management.

However, the sovereignty of Tribes and the safeguarding of their interests should not depend on their ability to meet a threshold administrative application burden, however "minimal." Any gatekeeping regulation accomplished by the limited TAS application will be accomplished through the inherent costs of developing, drafting, and submitting suggested permit conditions anyway. Therefore, simply being a federally recognized Tribe should be sufficient to enable the submission of permit conditions.

We anticipate that this empowerment will be reinforced by the pending EPA rule establishing baseline water quality standards for Tribes. It is hoped that the baseline standards, incorporating Tribal uses and desires, will be used as permit conditions for upstream 404 programs. Should downstream Tribes not be considered downstream states despite these EPA-approved standards, then a different provision should be added to secure the same protections.

Agency Response: This rulemaking enhances Tribal access to the notification and commenting procedures found at 40 CFR 233.31 which are reserved for "affected States." *See* 33 U.S.C. 1344(h)(1)(C) and (E). Section 518 of the CWA authorizes EPA to treat eligible federally recognized Tribes in a similar manner as a State for purposes of implementing and managing various environmental functions under the statute. *See* 33 U.SC. 1377(e). Tribes may seek TAS for the sole purpose of providing recommendations on Tribe- or State-issued permits that may affect their interests which is consistent with the CWA and Congressional intent. Additionally, any Tribe, or Tribal member, may comment on a proposed Tribal- or State- issued permit during the public comment period. *See* Section IV.F of the final rule preamble for further discussion on these provisions.

The Tribal water quality standards rulemaking is outside of the scope of this rulemaking.

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0018)

The proposal outlines the Agencies role in review of federal actions and the coordination with neighboring jurisdictions on potential impacts to the water quality of resources under their control. The rule also sets out a process for Tribes to receive treatment in a similar manner as a State (TAS) specifically for this purpose. EPA, in its oversight authority of an authorized 404 program, must assure that all potential impacts to neighboring jurisdictional interests are addressed and coordinated by the authorized program. We suggest that the coordination procedures with neighboring jurisdictions and Tribal lands and interests be outlined in the authorization MOA with the authorized State or Tribe and should clearly identify roles and responsibilities.

Agency Response: The regulations articulate coordination procedures with affected Tribes and States, including requirements for notification of the opportunity to comment, the time frame within which to provide comment, and next steps if permit recommendations from an affected Tribe or State are not accepted. As the regulations already identify roles and responsibilities, EPA is not imposing additional requirements for addressing them in the MOA, but EPA may provide future guidance if it is determined to be helpful.

In addition, preferred methods of communication may differ for each Tribe and State, though if a Tribe or State believes coordination procedures should be further identified through the MOA, EPA encourages such coordination.

Great Lakes Indian Fish and Wildlife Commission (EPA-HQ-OW-2020-0276-0080-0009)

III. Expanded TAS to Enable Comments as a Downstream Affected State. The EPA proposes to expand treatment as a state (TAS) for the purpose of allowing downstream tribes without TAS to comment on upstream 404 permits. The agency also proposes to "provide an opportunity" for any tribe to request review of permits that may affect tribal rights or interests. Rather than creating a separate process, EPA should consider providing the same limited TAS status (as is proposed for a downstream tribe without TAS) for tribes when states issue 404 permits anywhere within treaty ceded territories. This would provide additional weight to tribal comments and would further the EPA's separate initiative to require that water quality standards under the CWA protect tribal interests in aquatic-dependent resources. Since many of these resources are found in wetland ecosystems, the TAS option would enable a more robust comment opportunity for affected tribes.

Agency Response: The Agency appreciates commenter input with respect to opportunities regarding which Tribes are considered and may provide input as an "affected State." EPA is not amending the final rule to establish the same process for commenting as an "affected State" as when a Tribe indicates its rights or interests in ceded territories may be affected by a permit. 40 CFR 233.31 addresses potential impacts to Tribal or State waters, not ceded territories. *See* 33 U.S.C.

1344(h)(1)(E). **EPA is not adding any regulatory revisions on this point as such requests are most efficiently addressed on a case-by-case basis. Under the final rule's approach, Tribes can focus their attention and resources, and EPA's, appropriately on permits of concern and not on all permits within a potentially large geographic area of ceded territory.**

5. Opportunity to request EPA review of permits affecting Tribal rights and interests

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0047)

YRITWC supports EPA's proposal to add a provision for tribes to notify EPA of permit applications that potentially affect tribal rights or interests, "even if Federal review has been waived." Id. at 55305. This provision must stay in the final rule as a tool that tribes can use to protect tribal resources in the event of state assumption. In order for EPA to be accountable to tribes that utilize this avenue for EPA review, EPA must add a corresponding provision to §233.50, that if the Regional Administrator withdraws an objection that is based on the potential impacts to tribal rights or interests, that EPA must provide a written explanation as to why EPA is withdrawing its objections or why EPA's objections have been satisfied. Because this provision gives EPA the ability to act on behalf of tribes, even if EPA has waived that category of review, EPA must explain how or why those tribal interests have been protected as part of the permit process.

Agency Response: As discussed in Section IV.F of the final rule preamble, EPA may send a copy of the letter removing EPA's objections to a permit at a Tribe's request or pursuant to a prior agreement.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0068)

- EPA should ensure the final rules add a provision for Tribes to notify EPA of permit applications that potentially affect Tribal rights or interests, even if Federal review has been waived. If EPA withdraws an objection that is based on the potential impacts to Tribal rights or interests, EPA must provide a written explanation as to why EPA is withdrawing its objections or why EPA's objections have been satisfied.

Agency Response: *See* Section IV.F of the final rule preamble addressing EPA's efforts to facilitate Tribal engagement in State or Tribal section 404 permitting programs, particularly with respect to permits that may affect Tribal rights or interests. *See also* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0047 for further discussion of notification when EPA withdraws an objection.

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0010)

VI. We strongly support the ability of Tribes to request EPA review for permits that threaten off-reservation resources, but there should be an affirmative duty to inform Tribes of pending permits.

We hope that allowing Tribes to request EPA review of permits that may threaten on- and off- reservation water resources will ensure that no significant water resource will

receive less consideration due to State assumption of a 404 program. The ability to request this review is a valuable reaffirmation of the EPA's trust obligation.

However, there is no mechanism within the proposed rule to ensure that Tribes will be informed of pending State-issued permits affecting off-reservation waters. For Tribes to have an effective means of providing input, or instigating EPA review, they first must know of the pending permit. Therefore, we suggest that the rule include a duty to inform Tribes of pending 404 permits. Waters significant to Tribes could be articulated in the MOA detailing assumed waters, provided that Tribes are allowed participation in the drafting.

In effect, State adoption of a 404 program should not lessen a Tribe's engagement with permit decisions. State obligations as a result of adoption should be at least as stringent as the Federal program's consultation requirements.

Agency Response: ***See*** **Sections IV.F of the final rule preamble regarding notification requirements. In addition to the public notice and the affected State notification requirements, Tribes may work with Tribes and States issuing CWA section 404 permits to identify any additional mechanisms for notifying the affected Tribe of permitting actions.** ***See*** **40 CFR 233.31, 233.32;** ***see*** **33 U.S.C. 1344(h)(1)(C), (E). EPA has not required an additional notification process as each Tribe may wish to be notified through a different mechanism or rely on the existing notification requirements in the regulations. Any such coordination procedures should be part of a program description and as appropriate, articulated in MOAs.**

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0019)

It is also suggested that the coordination process occur prior to the issuance of a Public Notice allowing neighboring jurisdictions to elevate concerns prior to draft permit development so conditions could be implemented to mitigate the issues raised. Having Tribes need to request EPA to intervene on their behalf would appear to be an additional procedural process than is currently the practice with the Corps as the permitting authority.

Agency Response: EPA encourages States and Tribes to work together prior to proposal of a permit. Such efforts will improve permitting, protect interests and build relationships. To maintain flexibility and allow for the design of mechanisms that work best for the individual Tribal-State relationships, EPA has not mandated a specific process or timeline. ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0072-0019.**

American Exploration & Mining Association (AEWA) (EPA-HQ-OW-2020-0276-0076-0002)

Our concern is the burden and uncertainty that could be created by the request for EPA review provision. AEMA members have at times been frustrated by delays in permitting actions by the U.S. Army Corps of Engineers (Corps). This is why we believe encouraging State program assumption is appropriate especially in protecting water resources under State jurisdiction. However, the Corps permitting process is well

established, with EPA generally having a well-defined and typically very selective oversight role. As a result, very few Corps CWA Section 404 permit actions have been subject to EPA objection.

In the interest of maintaining an effective and timely permitting program, we assume that all States will seek to avoid potential EPA objections to permit actions. As such, they will be required to anticipate what Tribal rights and interests could be and address them both at the programmatic and individual permit action levels. The Proposed Rule implies that the EPA review would address both on- and off-reservation effects. It further indicates that the "proposed revisions to Section 233.51 would enable Tribes to request EPA's review of permits that may affect both rights reserved through treaties, statutes, executive orders, or other sources of Federal law, as well as Tribal interests in resources that may not be reflected in Federal law but are nonetheless of significance—e.g., of cultural significance—to Tribes." We believe this provision places a potentially unreasonable burden on States in interpreting Tribal reserved rights and interests.

Specifically, to ascertain whether reserved rights could be impacted by any type of CWA Section 404 permit action, agencies must identify such rights. That would require agencies to interpret legal agreements that even courts find challenging.

In the first place, agencies have not been delegated the authority to interpret treaties or other instruments. See Maine v. Johnson, 498 F.3d 37, 45 (1st Cir. 2007) (interpretation of 1979 and 1980 settlement acts resolving State/Tribal jurisdiction issues in Maine a matter of Federal law not within the purview of the U.S. Environmental Protection Agency [EPA]). To the contrary, the Federal courts have original jurisdiction over questions of treaty-guaranteed rights. See 28 U.S.C. Section 1362. In the case of some reserved Tribal rights, however, the States may have jurisdiction to resolve such claims. Confederated Salish Kootenai v. Flat., 616 F. Supp. 1292, 1295 (D. Mont. 1985); (Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Arizona v. San Carlos Apache Tribe, 463 U.S. 545, (1983).

Second, in addition to lack of legal authority, agencies fundamentally do not have the expertise to interpret agreements between Tribal Nations and the Federal government. There is a significant and extremely complex body of constitutional law that governs the interpretation of treaties and other instruments, such that even Federal courts struggle with these questions. Where courts have not already definitively established such rights, significant historical research is required to identify what instruments might establish Tribal reserved rights. Even finding out what treaties apply, much less what they mean, is a difficult and uncertain task. Many treaties apply to more than one Tribal Nation. Many have been specifically abrogated by Congress, others implicitly so. There is no single repository of such legal documents, much less any resource that could point agencies to a definitive list of reserved rights established, identified, or quantified under such documents.

Furthermore, the expansive language in the Proposed Rule goes beyond just reserved rights subject to legal interpretation, but rather suggests that any type of tribal interest

could be used to trigger EPA review and possible EPA objection to a permit action. This has the potential to extend far beyond the framework of effects on the aquatic environment typically addressed under CWA Section 404 to any type of environmental, social, or cultural concern that a Tribe may have about a project. Moreover, the reference to potential off-reservation effects puts no proximity-related boundaries on what could be considered.

As a result, we see potentially significant challenges for States to incorporate these requirements into their program development, including whether EPA would require specific provisions to interpret them in their regulations. We see this as a major disincentive to pursuing program primacy. Moreover, once a program is approved, the requirements could cause long delays as State agency staff that are not qualified to interpret Tribal rights and interests struggle to apply the requirements in individual and general permit actions. We further see this as a disincentive for industries such as ours to support State primacy applications. Finally, if primacy is granted, we see the potential for the program requirements to delay and, in some cases, prevent development of critical and essential mineral projects, as well as virtually every other type of critical infrastructure project that needs a CWA Section 404 permit.

As noted above, EPA Regional offices also do not have the internal legal and policy capabilities to interpret what constitutes appropriate rights and interests, and they will struggle to determine how they should be applied in reviewing primacy applications and for specific permit actions. The Proposed Rule makes no acknowledgement of these potential issues. Like several other actions this administration has proposed, [Footnote 1: See CEQ's National Environmental Policy Act Implementing Regulations Revisions Phase 2, Docket Number CEQ-2023-0003 and EPA's Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, Docket Number EPA-HQ-OW-2021-0791, AEMA submitted comments on these issues for both these rulemakings.] the Tribal review requirements seem at a broad level to be good ideas to address Tribal concerns over State CWA Section 404 programs. However, they have been proposed with no regard to the implementation challenges they could raise for States and EPA Regional offices.

<u>Agency Response:</u> EPA agrees that Tribes and States interested in assuming CWA section 404 programs are interested in developing programs that are effective and review permit request in a timely fashion. To develop such a program, EPA encourages the issuing Tribe or State to work with all affected Tribes and States to identify and resolve potential adverse impacts to the affected Tribe or State's resources and interests. Additionally, the program should ensure issued permits are consistent with and no less stringent than the CWA section 404(b)(1) Guidelines. Developing programs that ensure consistency with the requirements of the Act and resolve affected Tribal and State concerns will minimize EPA objections to Tribe or State-issued permits. For reference, EPA has maintained an objection to a tiny fraction of permits in the 40 years that Michigan has administered the program and has not maintained an objection to any permits in New Jersey's 30 years administering the program.

Nothing in this rule requires States or Tribes to determine whether reserved rights could be impacted by any type of CWA section 404 permit action, and certainly not to interpret Treaties or reserved rights between individual Tribal nations and the Federal Government. This rule simply clarifies opportunities for Tribes to seek EPA review of draft permits that the Tribe views as affecting its rights and interests. When Tribes seek EPA review of such draft permits, EPA will review to ensure the permits are consistent with the section 404(b)(1) Guidelines. This tool simply enhances communication opportunities within the guardrails of the CWA to help ensure that Tribal resources and rights are protected consistent with the requirements of the CWA.

EPA is not placing distance limitations on which Tribes may request EPA review of a permit that may affect their treaty rights or interests. Different Tribal Nations have been displaced at various distances from their ancestral lands and may retain rights to lands at various distances. To place a limitation based on distance could be contrary to Treaties retaining such rights. Moreover, as noted above, this rule does not create any new rights; it simply facilitates EPA review of draft permits consistent with EPA's authority under the statute.

American Exploration & Mining Association (AEWA) (EPA-HQ-OW-2020-0276-0076-0003)

We are, therefore, concerned that the broad language in the Proposed Rule could lead State agencies and/or EPA to completely defer to Tribes' assertion of reserved rights or interests and blind acceptance over their concerns about a permit, and create a de facto Tribal veto/consent process for permit actions. This is especially the case where EPA must act according to strict review and objection deadlines under Section 233.50.

The Preamble states that "EPA anticipates that Tribes will use this opportunity in limited circumstances and that this will not be used for every permit application under public notice." However, we see no documentation for this assumption. Our experience is that Tribes can sometimes assert that entire regions or States, or major watersheds, are subject to their rights and interests, and that an individual permit action might broadly degrade those resources. Moreover, the expansive and inclusive nature of Tribal participation described in the Proposed rule suggests that many Tribes could express their rights or interests over a specific project. For example, Alaska has more than 230 Federally recognized Tribes. As we have seen, almost always one or more Tribes has opposed our members' projects from the exploration stage all the way through to project construction and operations. We respect these views, but EPA also needs to acknowledge the broader local, regional, state-wide, national, and global benefits our projects can bring, including sourcing critical and essential minerals from a secure and environmentally and socially responsible jurisdiction.

We, therefore, urge that EPA re-consider the proposed change for Tribes to request EPA review. This can be better accomplished through individual State program development tailored to their specific conditions. Otherwise, at a minimum EPA should acknowledge the issues that we have raised and better define how these requirements would be implemented, either in the Final Rule and/or follow- up guidance.

Agency Response: **EPA appreciates the concern raised by the commenter. However as described in Section IV.F, this rule simply facilitates EPA's review within the existing framework of CWA section 404(j) and 40 CFR 233.50 to ensure permit compliance with the section 404(b)(1) Guidelines; it does not create any other new substantive review requirements for State permits. Facilitating public participation in the permitting process carries out the intent of CWA sections 101(e) and 404(h)(1)(C)-(E). Nothing in this rule would authorize EPA's "blind acceptance" of Tribal concerns, or the concerns of any other stakeholder. This rule simply allows certain permits to be highlighted for EPA's review; once EPA is sent these permits, it would review them for compliance with CWA requirements just as it would review any other draft permit. Furthermore, given the TAS provisions discussed in Section IV.F of the final rule preamble, EPA anticipates that Tribes will use this opportunity in limited circumstances. EPA encourages Tribes and States to work to identify areas within which Tribes may wish to receive notice of pending permits so that they may review and consider if they have any concerns to raise to the permitting agency.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0017)

To the extent that the Corps does not maintain 404 authority over all areas in which Tribes have reserved rights (including all off-reservation areas), the Port Gamble S'Klallam Tribe generally supports EPA's proposal to add a provision to section 233.51 to codify Tribes' opportunity to request EPA review of permits that Tribes view as potentially affecting Tribal rights or interests, but encourages EPA to adopt a more robust version of this provision in the final rule as a tool that tribes can use to protect tribal resources in the event of state assumption. While this provision provides for tribes to notify EPA of permit applications that potentially affect tribal rights or interests, "even if Federal review has been waived," the practicalities of tribes' ability to utilize this provision must be accounted for. Id. at 55305. And the proposed provision does not go far enough to address this concern.

The tribes who provided feedback to EPA during pre-proposal outreach that there is "no reliable instrument for coordination with States assuming the section 404 program regarding potential impacts on historical and cultural sites or Tribal natural resource rights located outside of reservation lands" were correct. Id. However, the rule, as drafted, seems to place the burden of this lack of reliable process on tribes to track every public notice in the state's jurisdiction, as though it were a member of the general public, to determine whether it should get in touch with EPA to let the Federal trustee know that its reserved rights are in need of protection. The language of the rule does not seem to require anything from the state assuming 404 jurisdiction to ensure that tribes with off-reservation rights are specifically notified of permit applications that may affect their rights. The rule should require states taking over a 404 program to ensure that tribes with reserved rights and other tribal interests within the scope of the state's jurisdiction are specifically notified of such applications (i.e., not have to follow general public notice emails and websites as though they were an ordinary member of the public), that current contact information for person(s) at the tribe responsible for review of such notices is updated regularly and used, and that enough information has been included in the public

notice and project application for tribes to be able to assess the potential impacts, if any, on their rights and resources.

Another problem with the proposed provision is that it would require tribes to notify EPA of a permit application that potentially affects Tribal rights or interests within just 20 days of public notice. Given the workloads of most tribal staff, as well as the large geographic area covered by many tribes' U&A and other areas in which they may have reserved rights, 20 days is an extremely short time for tribes to be able to assess a public notice and notify EPA that a permit may affect their reserved rights or other important tribal interests. That time for notification should be extended to at least 45 days, especially in the absence of the special notification requirements described above.

Finally, in order for EPA to be accountable to tribes that utilize this avenue for EPA review, EPA must add a corresponding provision to § 233.50, that if the Regional Administrator withdraws an objection that is based on the potential impacts to tribal rights or interests, that EPA must provide a written explanation as to why EPA is withdrawing its objections or why EPA's objections have been satisfied. Because this provision gives EPA the ability to act on behalf of tribes, even if EPA has waived that category of review, EPA must explain how or why those tribal interests have been protected as part of the permit process.

EPA anticipates its review of state-proposed Section 404 permits under this provision will be limited. Id. at 55305. EPA should revisit this assumption given the extent of off-reservation reserved rights that tribes hold throughout many regions of the country. A state assuming authority to implement a Section 404 permitting program will have little incentive to protect impacted tribes (unless EPA requires it), particularly if a project will not impact on-reservation waters but may impact off-reservation tribal or treaty resources. The Army Corps and EPA cannot sidestep their legal and trust responsibilities to protect tribal resources by shifting the burden of protecting off-reservation resources from degradation by state governments to the tribes. A clear and ready avenue for federal oversight and involvement must remain available, and PGST anticipates that it will be used often in states where tribes hold off-reservation reserved rights. Appropriate levels of Federal resources and staffing should therefore be anticipated and provided for.

Agency Response: ***See*** **Section IV.F of the final rule preamble. EPA recognizes that tracking every public notice issued by an assumed Tribe or State would be a burden on Tribal resources. EPA also recognizes, however, that Tribes may be in the best position to identify permits that address Tribal rights and interests. EPA therefore did not impose the burden of identifying such permits on the assuming Tribal or State agency. EPA encourages Tribes to work with assuming Tribes and States to identify regions for which they may wish to be notified of permits to help reduce the number of permits for which the Tribe receives notice.**

EPA understands that the timeframe within which a Tribe must request EPA review of a permit is limited. However, the statute requires EPA notify the Tribe or State agency issuing the permit within 30 days of receiving the proposed permit if EPA intends to comment on the permit. In order for EPA to reserve this right to

comment on the permit, EPA must be made aware of the Tribe's request prior to the expiration of the 30 calendar days to allow time for EPA to prepare a notice informing the permitting agency of EPA's intent to review and provide comment.

***See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0047 for further discussion of notification when EPA withdraws an objection.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0015)

Fifth, EPA includes no criteria against which to assess the validity of a Tribe's asserted off-reservation interest. So far as the Proposed Rule goes, a Tribe need only select a permit application and "have identified [it] as having a potential impact on Tribal resources." [Footnote 41: 88 Fed. Reg. 55305.] Doing so imposes additional requirements, and political pressure, on States. Without discussion or evaluation, this rulemaking appears premised on the existence of Tribal rights to resources existing off-reservation. Before purporting to impose legally binding requirements to protect these rights, EPA must first indicate what it believes these rights to be.

Agency Response: This rule does not address what, if any rights particular Tribes may have to resources off-reservation. This rule simply facilitates Tribal notification to EPA of draft permits that may impact the Tribes' rights or interests within or beyond reservation boundaries. EPA may then, in turn, assess whether the permit complies with the requirements of the section 404(b)(1) Guidelines, as required by the CWA.

Great Lakes Indian Fish and Wildlife Commission (EPA-HQ-OW-2020-0276-0080-0010)

IV.EPA Review of Permits. GLIFWC staff support the proposal to codify tribes' opportunities to request EPA review of proposals that have the potential to affect their treaty rights. In order for EPA to be accountable to tribes that utilize this avenue for EPA review, EPA must add a corresponding provision to § 233.50, that if the Regional Administrator withdraws an objection that is based on the potential impacts to tribal rights or interests, that EPA must provide a written explanation as to why EPA is withdrawing its objections or why EPA's objections have been satisfied. Because this provision gives EPA the ability to act on behalf of tribes, even if EPA has waived that category of review, EPA must explain how or why those tribal interests have been protected as part of the permit process.

Agency Response: *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0047 for further discussion of notification when EPA withdraws an objection.

Tulalip Tribes of Washington (EPA-HQ-OW-2020-0276-0082-0007)

Tulalip supports tribes having the ability to notify the EPA when state permitting applications may affect tribal rights or interests but requests that the EPA be required to explain, in writing, the underlying reasons for any withdrawing of EPA's objections that were based on potential impacts to tribal rights or resources.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0047 for further discussion of notification when EPA withdraws an objection.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0042)

Chickaloon Native Village supports EPA's proposal to add a provision for Tribes to notify EPA of permit applications that potentially affect Tribal rights or interests, "even if Federal review has been waived." Id. at 55305. This provision must stay in the final rule as a tool that Tribes can use to protect Tribal resources in the event of state assumption. In order for EPA to be accountable to Tribes that utilize this avenue for EPA review, EPA must add a corresponding provision to § 233.50, that if the Regional Administrator withdraws an objection that is based on the potential impacts to Tribal rights or interests, that EPA must provide a written explanation as to why EPA is withdrawing its objections or why EPA's objections have been satisfied. Because this provision gives EPA the ability to act on behalf of Tribes, even if EPA has waived that category of review, EPA must explain how or why those Tribal interests have been protected as part of the permit process.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0047 for further discussion of notification when EPA withdraws an objection.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0020)

EPA must afford all potentially affected Tribes the ability to request EPA review of state-issued Section 404 permits.

Agency Response: EPA is also revising section 233.51 to codify an opportunity for Tribes to request EPA review of permits potentially affecting Tribal rights or interests. ***See*** **Section IV.F of the final rule preamble for further discussion.**

6. Comments regarding EPA's Trust responsibilities

Alaska Mining Impacts Network (EPA-HQ-OW-2020-0276-0045-0002)

AKMIN expresses profound concern regarding Alaska's current initiatives to assume the 404 permitting process. We ask that the EPA not consider any request to assume 404 permitting until after this rulemaking is complete and that any request to assume must conform to the rules. The EPA must immediately inform Alaska that any assumption process must be on hold until the completion of this rulemaking.

The federal government has an obligation to consult with tribes before acting in a way that may affect a tribe's right. States do not have the same obligation. A state that is reluctant to address specific project-related concerns with a tribe may find it easier to dismiss their significance. Alaska didn't officially acknowledge tribes as governments until July 2022. Even then, the measure itself doesn't change the current legal status of Alaska Tribes or the State's responsibility or authority. Additionally, the Alaska Department of Environmental Conservation has routinely failed to consult with Alaska

tribes. EPA cannot consider state consultation on 404 permits to be a substitute for the federal government's primary trust responsibility to tribes.

Agency Response: **A Tribal or State request to assume the section 404 program is beyond the scope of this rulemaking. To the extent the commenter is concerned about opportunities to provide recommendations on permits issued by Tribal or State section 404 programs, the final rule articulates how Tribes may meaningfully engage in the permitting process. If Alaska requests to assume the program, the program will need to comply with all provisions of CWA section 404 and these final regulations. *See* Sections IV.A, IV.B, and IV.F of the final rule preamble for more discussion of these opportunities and requirements.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0001)

As an initial matter, federal agencies such as EPA and the Army Corps of Engineers (Army Corps or Corps) cannot abdicate the federal trust responsibility they hold to tribal nations. Any iteration of these regulations must ensure that tribal rights and resources, including cultural and subsistence resources, remain protected at the same level as they are currently protected under federal law.

Agency Response: **This rulemaking does not alter or in any way affect the federal government's trust responsibilities with Tribal nations. *See* Sections IV.A.2 and IV.F of the final rule preamble for discussion of requirements and mechanisms to ensure Tribal rights and resources are considered during the permitting process.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0013)

EPA must clarify how other critical protections for tribal resources associated with federal Section 404 permitting will continue under a state-assumed Section 404 program. State assumption of Section 404 permitting will remove other federal protections that accompany a Corps-issued permit, including NEPA, the MSA and the ESA. As stated above, these federal protections are also a critical avenue for tribal involvement. Federal agencies should, as part of their trust responsibility, consult with tribes in conducting NEPA review and analyzing ESA impacts and impacts to fisheries. Environmental reviews under NEPA, MSA and the ESA must also consider impacts to tribal rights and resources, including subsistence resources. EPA's proposed rule has not clarified how those responsibilities will translate to state-assumed programs, especially when the state does not have a trust responsibility to tribes. EPA must remain involved in state permitting programs and ensure that state programs are meeting federal environmental review requirements with respect to tribal rights and resources.

Agency Response: **This rulemaking does not alter or in any way affect the federal government's trust responsibilities with Tribal nations. All permits issued by a Tribe or State must comply with the environmental review criteria found at 40 CFR 230. *See* Section IV.A.2 and IV.A.3 of the final rule preamble. The annual report requirements and EPA oversight of the program are sufficient to ensure permits comply with the requirements of the Act. *See* Section IV.E of final rule preamble.**

Tribal and State permits are Tribal and State actions subject to Tribal and State law. H.R. Rep. No. 95-830 at 104 (1977) ("The conferees wish to emphasize that such a State program is one which is established under State law and which functions in lieu of the Federal program"). *See Chesapeake Bay Foundation v. Va. State Water Control Bd*., 453 F. Supp. 122 (E.D. Va 1978) (no NEPA review required for NPDES permit issued by State because the State permit is not a federal action). As Tribal and State decisions are not federal actions, the federal consultation requirements under Section 7 of the ESA, NEPA, and MSA are not triggered.

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0002)

EPA must ensure that the duty to consult and the duty to carry out federal trust responsibilities owed to federally recognized tribes do not fall by the wayside if a state assumes authority to issue permits under CWA Section 404. When the Army Corps issues a permit to discharge dredged or fill material into waters of the United States under CWA Section 404, it constitutes a federal action that affords the right to consultation to federally recognized tribes that may be impacted by the permit in accordance with Executive Order 13175 (Nov. 6, 2000).

Agency Response: This rulemaking does not alter or in any way affect the federal government's trust responsibilities with Tribal nations. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0013.

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0005)

The trust responsibility owed to tribes by the federal government dictates that tribal rights and resources not be negatively impacted by federal actions. States assuming the Section 404 permitting program will be under no equivalent obligation under this proposed rule. Accordingly, upon state assumption of the Section 404 permitting program, an Alaska Native tribe with rights or resources in the assuming state stands to lose significant and longstanding procedural and substantive legal rights that were put in place to protect tribal interests in cultural, historic and subsistence resources.

Agency Response: *See* the Agency's Responses to Comments EPA-HQ-OW-2020-0276-0045-0002, EPA-HQ-OW-2020-0276-0063-0013, and EPA-HQ-OW-2020-0276-0085-0039 as well as Section IV.A.2 regarding federal trust responsibilities and Section IV.F for a discussion of opportunities for Tribal engagement in the permitting process.

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0006)

If a state assumes Section 404 permitting authority, EPA may object to a proposed permit that is inconsistent with the CWA Section 404(b)(1) Guidelines. 33 U.S.C. § 1344(j). However, EPA currently only reviews approximately 2-5% of the total permit applications received by the states that are administering Section 404 programs. Further, a state can overcome EPA's objections by adding permit conditions – a process in which tribes have no meaningful right to engage. And EPA has discretion to withdraw its objection to a permit at any time and without justification – a decision that is not subject to judicial review. Menominee v. EPA, 947 F.3d at 1073. These discretionary and rarely

used oversight measures are not equivalent to the legal avenues available to tribes for a federally issued Section 404 permit, and are certainly no substitute for the trust responsibility owed to tribes by the federal government. Absent additional oversight, the process as proposed is an insufficient safeguard against the potential for increased negative impacts to tribal rights and resources in states assuming Section 404 permitting authority.

Agency Response: Under the final rule, the Agency retains its oversight authority over permits issued by Tribal and State section 404 programs. *See* 40 CFR 233.50-53. For a discussion of how the final rule proposes to clarify certain aspects of EPA's oversight, see Section IV.E of the final rule preamble. Except where review has not been waived, the manner in which the Agency implements its oversight authority on a permit-by-permit basis is beyond the scope of this rulemaking.

EPA disagrees that the oversight measures in the regulations are insufficient to protect Tribal rights and resources. The final rule provides a number of ways in which Tribes can meaningfully engage with Tribal and State section 404 programs. The final rule directs that assuming Tribes and States provide for judicial review of state- or Tribe-issued permits. *See* Section IV.C.2 of the preamble to the final rule for further discussion on judicial review. In addition, under the final rule, Tribes may request that EPA review permits that may affect Tribal rights or interests within or beyond reservation boundaries. *See also* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0047 for further discussion of notification when EPA withdraws an objection. Tribes also may receive notice and an opportunity to provide recommendations as an "affected State" for purposes of 40 CFR 233.31 either by already having status of treatment similar to a state (TAS) for any provision of the CWA or by specifically seeking TAS for the purpose of commenting on proposed permits to be issued by a state. *See* Section IV.F of the preamble to the final rule.

***See also* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0013.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0060)

- EPA and the Corps cannot abdicate the federal trust responsibility they hold to Tribal nations.

Agency Response: This final rule does not affect or alter the federal government's trust responsibilities.

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0006)

III. The 300-foot default administrative boundary is arbitrary and may result in a dereliction of the Federal trust responsibility.

The Federal trust responsibility implicates "moral obligations of the highest responsibility and trust,"[Footnote 4: Seminole Nation v. United States, 316 U.S. 286,

297 (1942).] and these obligations are not met by arbitrarily limiting the geographic areas where Tribal interests must be considered.

Agency Response: EPA has not finalized a default 300-foot default administrative boundary for retained wetlands. *See* Section IV.B.2 of the final rule preamble.

***See* the Agency's Responses to Comment EPA-HQ-OW-2020-0276-0076-0002 and Section IV.F of the final rule preamble for discussion of Tribal opportunities to request EPA review of a Tribe- or State-issued permit that may affect Tribal rights or interests.**

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-0003)

The current administration's emphasis on improving tribal relations, honoring tribal sovereignty and fulfilling trust responsibility should be reflected in clear and unambiguous expectations for states who seek to implement §404 programs to consult with potentially affected tribes, fully consider tribal impacts of these regulated activities, and then to avoid, minimize or mitigate those impacts.

Agency Response: This final rule does not affect or alter the federal government's trust responsibilities. *See* Section IV.F of the final rule preamble, addressing EPA's efforts to facilitate Tribal engagement in State or Tribal section 404 permitting programs, particularly with respect to permits that may affect Tribal rights or interests.

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0004)

1. States do not have the same trust responsibility as the federal government to consider tribal interests.

If states take over the CWA § 404 program from EPA and the Army Corp of Engineers (ACE), ideally states would interact with tribes regarding impacts from state permits on downstream tribal waters, the way EPA and ACE should do. States are not subject to the same trust responsibility to tribes as the federal government, however, and may not accord the same weight to tribal concerns as the federal government would.

As EPA knows, the federal government owes a trust responsibility to tribes that requires the federal government to recognize and protect tribal interests. Tribal rights to consultation stem from this responsibility. Tribes also have a unique government-to-government relationship with the federal government. Although, more often than not, tribes would prefer managing their own affairs, including with regard to natural resources, when tribes lack the capacity to do so it is the federal government's responsibility to protect tribal interests.

In contrast, when federal authority is delegated to a state, tribes are not always consulted and tribal interests tend to be summarily dismissed in the face of conflicting state interests. This situation is of particular concern in the context of CWA § 404(g), since it is much more likely that states will assume authority for the wetlands permit program than tribes, for all the reasons discussed above. The end result puts tribes at a great

disadvantage, since it leaves tribes to deal directly with their state counterparts, without the federal safeguards for tribal interests.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0074-0003.**

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0005)

2. States are not required to comply with NHPA or ESA when issuing permits.

The consultation requirements of the National Historic Preservation Act (NHPA) and Endangered Species Act (ESA) are triggered by "federal action." If states take over the issuance of CWA § 404 permits, the federal action requirement is not triggered by the permit issuance itself. Yet the permitted discharges may nevertheless impact tribal waters, and tribal natural and cultural resources are still at risk of being degraded or destroyed. Recently EPA representatives assured the NTWC that EPA will continue to exercise its responsibilities under these statutes. The NTWC strongly supports this position. In fact, for example, on beds and banks, held in trust by the United States for the Coeur d'Alene Tribe, the United States Supreme Court held that the State of Idaho has no right title or interest in the Tribe's waters. This is illustrative of how the federal government must maintain authority of this program on tribal waters, if tribes do not assume this role.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble addressing compliance with Section 106 of the NHPA and Section 7 of the ESA.** ***See also*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0013.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0019)

Army Corps issuance of a permit to discharge dredged or fill material into waters of the United States under CWA Section 404 is a federal action that affords the right to consultation to federally recognized tribes that may be impacted by the permit in accordance with Executive Order 13175 (Nov. 6, 2000). The Corps must also assess the effects of proposed 404 permits on Treaty-protected fishing rights in tribal U&A. Treaty Rights MOU, available at https://www.doi.gov/sites/doi.gov/files/interagency-mou-protecting-tribal-treaty-and-reserved-rights-11-15-2021.pdf; see generally Section I. In addition, a Corps-issued Section 404 permit includes substantive and procedural protections under the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA) and the National Historic Preservation Act (NHPA). These are important safeguards to ensure meaningful protection of natural and cultural resources, as well as to incorporate tribal feedback and to preclude interference with tribal rights and resources. One way or another, each of these protections must be preserved as more states seek to assume authority over the 404 program.

When a state assumes the responsibility to approve or deny dredge and fill permits, at least one Circuit Court of Appeals has held that there is no federal action to trigger some of these federal regulatory processes. See Menominee Indian Tribe of Wisconsin v. EPA, 947 F.3d 1065, 1068 (7th Cir. 2020). And unless EPA requires it in these regulations, a

state agency reviewing a Section 404 permit application is not obligated to act in the best interests of an affected tribe or required to identify tribes whose interests may be affected. While many states have adopted tribal consultation policies, the actual implementation of those policies, as well as the extent of the consultation, varies by state. The trust responsibility owed to tribes by the federal government dictates that tribal rights and resources not be negatively impacted by federal actions. EPA must ensure that States assuming the Section 404 permitting program under this proposed rule satisfy the same obligations. Accordingly, upon state assumption of the Section 404 permitting program, EPA must ensure that no Indian tribe with rights or resources in the assuming state stands to lose significant and longstanding procedural and substantive legal rights that were put in place to protect tribal interests in cultural, historic and treaty-protected resources. EPA must therefore explicitly explain, and take whatever measures are necessary to ensure, that each of the aforementioned protections is preserved.

Agency Response: ***See*** **the Agency's Responses to Comments EPA-HQ-OW-2020-0276-0074-0003 and EPA-HQ-OW-2020-0276-0063-0013.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0021)

Further, a state can overcome EPA's objections by adding permit conditions – a process in which tribes have no meaningful right to engage. And, under the current version of the regulations, EPA has discretion to withdraw its objection to a permit at any time and without justification – a decision that is not subject to judicial review. Menominee, 947 F.3d at 1073. These discretionary and rarely used oversight measures are not equivalent to the legal avenues available to tribes for a federally issued Section 404 permit and are certainly no substitute for the trust responsibility owed to tribes by the federal government. Absent additional oversight, the process as proposed is an insufficient safeguard against the potential for increased negative impacts to tribal rights and resources in states assuming Section 404 permitting authority.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0006.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0029)

Third, EPA's reliance on a "Federal trust responsibility" disregards the Supreme Court's June 2023 holding in Arizona v. Navajo Nation that "[t]he Federal Government owes judicially enforceable duties to a Tribe 'only to the extent it expressly accepts those responsibilities.' " [Footnote 38: Arizona v. Navajo Nation, 599 U.S. 555, 564 (2023) (quoting United States v. Jicarilla Apache Nation, 564 U.S. 162, 177 (2011)).]"Whether the Government has expressly accepted such obligations," the Court continued, " 'must train on specific rights-creating or duty-imposing' language in a treaty, statute, or regulation." [Footnote 39: Id] This requirement "follows from separation of powers principles." [Footnote 40: Id]. Following the Court's decision in Arizona v. Navajo Nation, then, the federal government – which includes EPA – must identify with specificity the "rights-creating or duty-imposing" language in a treaty, statute, or regulation which creates, and delineates, the scope of a specific federal trust responsibility. In a nationally applicable rulemaking like this, EPA must identify and

delineate this trust responsibility for each federally recognized Tribe it seeks to act on behalf of. And to the extent EPA relies on CWA § 518, § 518 is not an independent grant of power and cannot be relied upon for these revisions.

Agency Response: This final rule does not affect or amend the federal government's existing trust responsibilities. The extent of those responsibilities, and the commenter's recommendation to "identify and delineate this trust responsibility for each federally recognized Tribe" is beyond the scope of this rulemaking. When a Tribe or State seeks to assume and administer a section 404 program, EPA will work with potentially affected Tribes to identify their trust responsibilities.

Great Lakes Indian Fish and Wildlife Commission (EPA-HQ-OW-2020-0276-0080-0002)

As an initial matter, the federal court cases that reaffirmed GLIFWC's member tribes' treaty- reserved rights have made it clear that state management actions are constrained by the existence of the tribes' rights, and that states are not free to do whatever they wish without taking those rights into account. It is also true that the federal government is not relieved of its treaty obligations and trust responsibilities when it delegates programs to the states. Any iteration of these regulations must ensure that tribal rights and resources, including treaty rights and resources, are protected and are not subject to state control.

Agency Response: *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0074-0003.

Great Lakes Indian Fish and Wildlife Commission (EPA-HQ-OW-2020-0276-0080-0004)

The trust responsibility owed to tribes by the federal government dictates that tribal rights and resources are not negatively impacted by federal actions. States assuming the Section 404 permitting program will be under no equivalent obligation under this proposed rule. Accordingly, upon state assumption of the Section 404 permitting program, tribes with rights and resources in the assuming state stand to lose significant and longstanding procedural and substantive legal rights that were put in place to protect tribal interests in cultural, historic and treaty-protected resources.

Agency Response: *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0074-0003.

Great Lakes Indian Fish and Wildlife Commission (EPA-HQ-OW-2020-0276-0080-0005)

If a state assumes Section 404 permitting authority, EPA may object to a proposed permit that is inconsistent with the CWA Section 404(b)(1) Guidelines. 33 U.S.C. § 1344(j). However, EPA currently only reviews approximately 2-5% of the total permit applications received by the states that are administering Section 404 programs. Further, a state can overcome EPA's objections by adding permit conditions – a process in which tribes often have no meaningful opportunity to engage. And, under the current version of the regulations, EPA has discretion to withdraw its objection to a permit at any time and without justification – a decision that is not subject to judicial review. Menominee, 947 F.3d at 1073. These discretionary and rarely used oversight measures are not equivalent to the legal avenues available to tribes for a federally issued Section 404 permit and are certainly no substitute for the trust responsibility owed to tribes by the federal

government. Absent additional oversight, the process as proposed is an insufficient safeguard against the potential for increased negative impacts to tribal rights and resources in states assuming Section 404 permitting authority.

Agency Response: ***See*** **the Agency's Responses to Comments EPA-HQ-OW-2020-0276-0063-0006.**

Tulalip Tribes of Washington (EPA-HQ-OW-2020-0276-0082-0001)

Unlike the Corps and EPA, states are not bound by a legally enforceable fiduciary obligation to protect tribal rights, lands, resources, and federal mandates. Indeed, Washington has taken many actions that directly contravene Tulalip's rights and resources. Without enforceable federal mandates, such as the aforementioned fiduciary obligation, the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), and the National Historic Preservation Act ("NHPA"), Washington may continue to take actions against tribal rights and resources via the Section 404 permitting program.

While the Proposed Rule allows for the EPA to object to permitting actions, this limited, discretionary, oversight is cold comfort to tribes and pales in comparison to legally enforceable fiduciary obligation under the current Section 404 permitting regime in Washington. Accordingly, Tulalip insists that federal consultation regarding any permitting action that may impact tribal rights and resources must be imposed as a condition for any state assumption of Section 404 permitting authority. Such consultation should ensure that tribes maintain the equivalent procedural and substantive protection that is afforded to them by federal law under the permitting regime currently implemented by the Corps.

Agency Response: EPA declines to incorporate the recommendation that EPA must engage in formal consultation with Tribes on all Tribally- or State-issued permits that may impact the Tribe's rights as this requirement is unnecessary and overly burdensome for the affected Tribe, the federal agencies, the Tribe or State processing the permit, and permit applicants. ***See*** **Section IV.F of the final rule preamble for opportunities to ensure Tribal interests are considered in Tribal- or State-issued permits, including the opportunity for Tribes to request EPA review of a permit.** ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0013.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0001)

As an initial matter, federal agencies such as EPA and the Army Corps of Engineers (Army Corps or Corps) cannot abdicate the federal trust responsibility they hold to Tribal nations. Any iteration of these regulations must ensure that Tribal rights and resources, including cultural and subsistence resources, remain protected at the same level as they are currently protected under federal law.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0074-0003.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0012)

And while many states have adopted Tribal consultation policies, the Alaska legislature only recognized Tribes as governments last year and typically fails to engage in government-to-government consultation with Tribes. The trust responsibility owed to Tribes by the federal government dictates that Tribal rights and resources not be negatively impacted by federal actions. States assuming the Section 404 permitting program will be under no equivalent obligation under this proposed rule. Accordingly, upon state assumption of the Section 404 permitting program, an Alaska Native Tribe with rights or resources in the assuming state stands to lose significant and longstanding procedural and substantive legal rights that were put in place to protect Tribal interests in cultural, historic and subsistence resources.

Agency Response: ***See*** **the Agency's Responses to Comments EPA-HQ-OW-2020-0276-0074-0003 and EPA-HQ-OW-2020-0276-0063-0044.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0003)

EPA must ensure that the duty to consult and the duty to carry out federal trust responsibilities owed to federally recognized Tribes do not fall by the wayside if a state assumes authority to issue permits under CWA Section 404. When the Army Corps issues a permit to discharge dredged or fill material into waters of the United States under CWA Section 404, it constitutes a federal action that affords the right to consultation to federally recognized Tribes that may be impacted by the permit in accordance with Executive Order 13175 (Nov. 6, 2000).

Agency Response: ***See*** **the Agency's Responses to Comments EPA-HQ-OW-2020-0276-0063-0044 and EPA-HQ-OW-2020-0276-0063-0013.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0004)

Further, a state can overcome EPA's objections by adding permit conditions – a process in which Tribes have no meaningful right to engage. And EPA has discretion to withdraw its objection to a permit at any time and without justification – a decision that is not subject to judicial review. Menominee v. EPA, 947 F.3d at 1073. These discretionary and rarely used oversight measures are not equivalent to the legal avenues available to Tribes for a federally issued Section 404 permit, and are certainly no substitute for the trust responsibility owed to Tribes by the federal government. Absent additional oversight, the process as proposed is an insufficient safeguard against the potential for increased negative impacts to Tribal rights and resources in states assuming Section 404 permitting authority.

Federal consultation should be required for projects or permits impacting Tribal rights and resources, and federally recognized Tribes should be afforded appropriate and timely notification so that they may request federal oversight when a state-issued 404 permit may impact Tribal rights and resources.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0006.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0008)

EPA must clarify how other critical protections for Tribal resources associated with federal Section 404 permitting will continue under a state-assumed Section 404 program. State assumption of Section 404 permitting will remove other federal protections that accompany a Corps-issued permit, including NEPA, the MSA and the ESA. As stated above, these federal protections are also a critical avenue for Tribal involvement. Federal agencies should, as part of their trust responsibility, consult with Tribes in conducting NEPA review and analyzing ESA impacts and impacts to fisheries. Environmental reviews under NEPA, MSA and the ESA must also consider impacts to Tribal rights and resources, including subsistence resources. EPA's proposed rule has not clarified how those responsibilities will translate to state-assumed programs, especially when the state does not have a trust responsibility to Tribes. EPA must remain involved in state permitting programs and ensure that state programs are meeting federal environmental review requirements with respect to Tribal rights and resources.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0013.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0015)

EPA must take into account Tribal governments and the United States' trust obligations. Alaska hosts more than 230 of the 574 federally recognized Tribal governments of the United States. Thus, in Alaska, state assumption of Clean Water Act Section 404 permitting would have even more significant consequences for Tribes and Indigenous peoples than in other parts of the country. Among other protections, Tribes would no longer be guaranteed their right to government-to-government consultation on 404 permits. Nor would they be guaranteed the opportunity to participate in processes under federal statutes such as NEPA and the NHPA. EPA's proposed revisions to protect Tribal interests are burdensome and weak, and are no substitute for government-to-government consultation.

Agency Response: ***See*** **the Agency's Responses to Comment EPA-HQ-OW-2020-0276-0063-0044 and EPA-HQ-OW-2020-0276-0063-0013.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0016)

EPA must ensure that the duty to consult and the duty to carry out federal trust responsibilities owed to federally recognized Tribes do not fall by the wayside if a state such as Alaska assumes authority to issue permits under Section 404. When the Corps issues a permit to discharge dredged or fill material into waters of the United States under Section 404, it constitutes a federal action that affords the right to consultation to federally recognized Tribes that may be affected by the permit, in accordance with Executive Order 13175.[Footnote 25: 65 Fed. Reg. 67,249 (Nov. 6, 2000).] In addition, a Corps-issued Section 404 permit includes substantive and procedural protections under NEPA, the ESA, the Magnuson-Stevens Fishery Conservation and Management Act, and the NHPA. And while we believe the same standards should apply when a state assumes the responsibility to approve or deny dredge and fill permits, because there is no federal action to trigger these federal laws and their implementing regulations, part of the direct

protections may be lost.[Footnote 26: See Menominee Indian Tribe of Wisconsin v. EPA, 947 F.3d 1065, 1068 (7th Cir. 2020).]

Agency Response: ***See*** **the Agency's Responses to Comments EPA-HQ-OW-2020-0276-0063-0044 and EPA-HQ-OW-2020-0276-0063-0013.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0017)

Beyond government-to-government consultation, federal issuance of 404 permits includes a host of other procedures for the public and Tribes to engage with decisionmakers. Currently, Tribes serve as cooperating agencies in the NEPA process and regularly participate in consultation, hearings, and other processes under the NHPA and the Alaska National Interest Lands Conservation Act (ANILCA). In these capacities, Tribes have provided critical information and insights to decisionmakers. Additionally, NEPA provides an opportunity for the public and Tribes to receive notice, provide comments, and otherwise participate in the NEPA process. Without a federal requirement to be as stringent as the federal government, State 404 assumption would eliminate these participation opportunities for the public and for Tribes. Alaska has no analogue for NEPA or the NHPA. And it is unclear how the State will coordinate with federal land managers to ensure subsistence protections under ANILCA remain.

A state agency reviewing a Section 404 permit application need not act in the best interests of an affected Tribe, or even identify Tribes whose interests may be affected. And while many states have adopted Tribal consultation policies, Alaska only just formally recognized Tribes in 2022, and typically fails to engage in government-to-government consultation with Tribes. The trust responsibility owed to Tribes by the federal government dictates that Tribal rights and resources are not negatively impacted by federal actions. States assuming the Section 404 permitting program will be under no equivalent obligation under this proposed rule. Accordingly, upon state assumption of the Section 404 permitting program, an Alaska Native Tribe with rights or resources at issue stands to lose significant and longstanding procedural and substantive legal rights that were put in place to protect Tribal interests in cultural, historic and subsistence resources.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble for discussion of section 404(b)(1) Guidelines protections, which take into account human use of the resources such as subsistence fisheries.** ***See*** **the Agency's Responses to Comments EPA-HQ-OW-2020-0276-0063-0044 and EPA-HQ-OW-2020-0276-0063-0013.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0019)

Further, a state can overcome EPA's objections by adding permit conditions—a process in which tribes have no meaningful right to engage. And EPA has discretion to withdraw its objection to a permit at any time and without justification—a decision that is not subject to judicial review.[Footnote 28: Menominee v. EPA, 947 F.3d at 1073.] These discretionary and rarely used oversight measures are not equivalent to the legal avenues available to Tribes for a federally issued Section 404 permit, and are certainly no substitute for the trust responsibility owed to Tribes by the federal government. Absent

additional oversight, the process as proposed is an insufficient safeguard against the potential for increased negative impacts to Tribal rights and resources in states assuming Section 404 permitting authority.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0006.**

Gaa-Miskwaabikaang (EPA-HQ-OW-2020-0276-TRANS-081523-001-0003)

Comment 1

The attendee said he had a question specific to experiences in territories that overlap with jurisdiction from EPA Region 5, indicating that there were well documented instances and frustrations with experiences with a state that has 404 authority. He asked EPA how have they considered such experiences when drafting the proposed rule.

Comment 2

The attendee replied suggesting that EPA staff on the call were unable to share how specific tribal concerns related to section 404 in the State of Michigan were considered in the proposed rulemaking.

Comment 3

The attendee said that there have been various activities proposed and currently operating that have gone through regulatory processes (some that are complete, some that are ongoing) and the state of Michigan at times had been resistant or unwilling to engage with tribes, as the sovereigns that they are, and when the issues were raised to EPA they often hear that it has delegated authority to the state, and EPA affirmed that trust responsibility has not been handed off with delegated authority. However, he said that EPA thus far has not necessarily engaged with the state of Michigan or done anything to uphold this trust responsibility of these instances. Therefore, this has been brought up by EPA Region 5 and respective tribes in their monthly calls related to some of these projects. The attendee said that to the best of his knowledge, they have not received a reassuring answer. Consequently, he reached out to EPA Region 5 staff who have also connected him with the 404 email about this issue, but has not heard how these tribal concerns were incorporated into the proposed rule.

Comment 4

The attendee said he believed Ms. Hurld understood him appropriately and that he understood she could not have specific details on how the concerns from the specific tribes he referred to were implemented in the rulemaking during the input meeting. He said that the discussion would likely continue in Region 5 calls and that they may submit a comment for the rulemaking.

Agency Response: **EPA considered all comments and input provided during the public comment period and during early engagement with States as well as early engagement and consultation with Tribes. Copies of public outreach and engagement summaries are available in the docket to this final rule (EPA-HQ-OW-2020-0276).** ***See also*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0074-0003.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0006)

B. EPA Cannot Delegate Its Trust Responsibility to States.

In addition to the protections afforded tribal interests through application of various federal statutes, federal agencies have a trust responsibility to tribes for the protection of tribal interests in government decisions that cannot be waived or delegated. The federal government thus has an obligation to consult with tribes before acting in a way that may affect a tribe's rights, such as by granting a Clean Water Act permit that would impair, degrade, or eliminate waters in which a tribe has reserved rights. Those trust obligations and the attendant obligations to consult with tribes regarding permitting decisions rest with the federal government, not states. While some states voluntarily consult with tribes, the meaning of consultation and the willingness of states to do so varies widely. Even states that have statutory directives to consult apply it inconsistently and that duty is a creature of legislation, not a treaty or trust obligation.

As such, it is more readily jettisoned by a state unwilling to engage with a tribe on concerns about particular projects. For example, it has taken until July 2022 for the Alaska legislature to recognize tribes as governments and the Alaska Department of Environmental Conservation routinely does not consult with Alaska tribes. EPA cannot consider state consultation on 404 permits to be a substitute for the federal government's primary trust responsibility to tribes.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0074-0003.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-4-0001)

We are writing to express increasing concern from environmental advocates and tribes across the country about state efforts to take over Section 404 Clean Water Act permitting. Our concerns fall into two significant categories:

(1) that EPA has not developed robust guidance and/or rules regarding requirements for and measures of comparability as required by the Clean Water Act in order to approve a state's assumption of 404 permitting; and

(2) that state assumption has an extremely adverse impact on tribes due to the resulting abdication of the federal government's trust responsibility to tribes. When states issue permits for projects impacting tribal lands, waters or resources, there is no requirement for government-to-government consultation, making it highly likely that the lands, waters, and ways of life of tribes and tribal communities, will suffer irreparable harms.

This is contrary to the current administration's commitment to environmental justice and support of tribal communities.

Based upon these important considerations, we ask that EPA take a step back to ensure that it is not harming the environment or tribes in an ill-conceived rush to have states assume 404 permitting. Below we briefly detail some of the concerns we have, and would be happy to further discuss them.

Agency Response: EPA has considered the concerns raised by the commenter and concludes that the final rule complies with the requirements of the CWA by providing more detail and clarification regarding the requirements Tribes and States must meet to assume administration of the section 404 program. The statute requires that Tribes or States administering a CWA 404 program must ensure permits issued by approved Tribe and State section 404 programs are consistent with the CWA 404(b)(1) Guidelines. *See* Sections IV.A.2, IV.A.3, IV.B.1-4, IV.C, IV.E, IV.F of the final rule preamble for discussion of provisions which clarify the standards and processes to ensure that permits issued by Tribal or State programs are consistent with and no less stringent than the CWA and implementing regulations.

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0004)

1. States do not have the same trust responsibility as the federal government to consider tribal interests.

If states take over the CWA § 404 program from EPA and the Army Corp of Engineers (ACE), ideally states would interact with tribes regarding impacts from state permits on downstream tribal waters, the way EPA and ACE should do. States are not subject to the same trust responsibility to tribes as the federal government, however, and may not accord the same weight to tribal concerns as the federal government would.

As EPA knows, the federal government owes a trust responsibility to tribes that requires the federal government to recognize and protect tribal interests. Tribal rights to consultation stem from this responsibility. Tribes also have a unique government-to-government relationship with the federal government. Although, more often than not, tribes would prefer managing their own affairs, including with regard to natural resources, when tribes lack the capacity to do so it is the federal government's responsibility to protect tribal interests.

In contrast, when federal authority is delegated to a state, tribes are not always consulted and tribal interests tend to be summarily dismissed in the face of conflicting state interests. This situation is of particular concern in the context of CWA § 404(g), since it is much more likely that states will assume authority for the wetlands permit program than tribes, for all the reasons discussed above. The end result puts tribes at a great disadvantage, since it leaves tribes to deal directly with their state counterparts, without the federal safeguards for tribal interests.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0074-0003.**

National Tribal Water Council (NTWC) **(**EPA-HQ-OW-2020-0276-0074-SD-0005)

2. States are not required to comply with NHPA or ESA when issuing permits.

The consultation requirements of the National Historic Preservation Act (NHPA) and Endangered Species Act (ESA) are triggered by "federal action." If states take over the issuance of CWA § 404 permits, the federal action requirement is not triggered by the permit issuance itself. Yet the permitted discharges may nevertheless impact tribal waters, and tribal natural and cultural resources are still at risk of being degraded or destroyed. Recently EPA representatives assured the NTWC that EPA will continue to exercise its responsibilities under these statutes. The NTWC strongly supports this position. In fact, for example, on beds and banks, held in trust by the United States for the Coeur d'Alene Tribe, the United States Supreme Court held that the State of Idaho has no right title or interest in the Tribe's waters. This is illustrative of how the federal government must maintain authority of this program on tribal waters, if tribes do not assume this role.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble addressing Section 106 of the NHPA and Section 7 of the ESA compliance.** ***See also*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0013.**

7. Other approaches for Tribal involvement

Individual commenter (EPA-HQ-OW-2020-0276-0050-0010)

Ways for Tribes to comment on State action that will affect their waters is always beneficial. Opening these comment avenues to Tribes that do not meet TAS status is an avenue that EPA should consider.

Agency Response: ***See*** **Section IV.F of the final rule preamble.**

Individual commenter (EPA-HQ-OW-2020-0276-0050-0005)

I must express some concern over waters on tribal lands being retained by the USACE when States assume the 404 program. This should be the default, but not the only option. I believe that a Memorandum of Agreement on this matter between the State, Tribe, and USACE should be required. Tribes should have a say in which entity they think should oversee permitting on their lands. Tribes have expressed less interest in States over assuming the section 404 program, due to confusion and lack of resources. Many Tribes do not qualify for Tribes Approved for Treatment as a State (TAS) and thus cannot assume the program, but this should not bar them from the conversation. Even if Tribes do not assume the program, they should still be allowed a say on who oversees their lands.

Agency Response: EPA welcomes input from Tribes on a case-by-case basis before and during EPA's consultation on a State program submission to discuss options for program administration on Tribal land.

Buena Vista Rancheria of Me-Wuk Indians (EPA-HQ-OW-2020-0276-0053-0004)

While BVR is in full support of these proposed changes, BVR also recognizes that the proposed changes only apply to federally recognized Tribes and encourages EPA to find ways to include non-federally recognized Tribes in the 404 permit consultation process.

Agency Response: EPA appreciates the concern raised by the commenter. Non-federally recognized Tribes may comment on Tribe- or State-issued 404 permits during the public comment period and they may request EPA review of a permit. *See* Section IV.F of the final rule and 40 CFR 233.32 and 233.51(d).

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0046)

EPA anticipates its own review of state-proposed Section 404 permits will be limited. Id. at 55305. As discussed above, it would be appropriate for EPA to assign a tribal liaison to ensure there are resources available for tribes – particularly under-resourced tribes – to seek federal oversight of a project. A state assuming authority to implement a Section 404 permitting program will have little incentive or legal responsibility to protect impacted tribes, particularly if a project will not impact tribal waters but may impact tribal rights, resources or subsistence practices. The Army Corps and EPA cannot abdicate their legal and trust responsibilities to protect tribal resources, or delegate them to the states. A clear and ready avenue for federal oversight and involvement must remain available, particularly given the unique considerations applicable to Alaska Native tribes.

Agency Response: While this rule does not explicitly require designation of a specific EPA-Tribal liaison for each State that assumes a CWA section 404 program, EPA currently has staff dedicated to collaborating and supporting our Tribal partners. Furthermore, when a Tribe or State is approved to administer a section 404 program, EPA allocates additional staff to oversee the approved program. The responsibilities of that staff include Tribal coordination. EPA may choose to designate a Tribal liaison for issues related to particular Tribal or State programs on a case-by-case basis. *See also* Section IV.F of the final rule preamble for additional ways Tribes and Native Villages may meaningfully engage in the permitting process in Tribal or State programs. *See also* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0078-0017.

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0050)

EPA must afford all potentially affected tribes the ability to request EPA review of state-issued Section 404 permits. Additionally, we again recommend EPA assign/establish a tribal liaison to ensure affected tribes in Alaska can seek government-to-government consultation and federal review of state-issued 404 permits that impact their rights and resources.

Agency Response: *See* the Agency's Response to Comments EPA-HQ-OW-2020-0276-0053-0004 and EPA-HQ-OW-2020-0276-0063-0046.

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0009)

Federal consultation should be required for projects or permits impacting tribal rights and resources, and federally recognized tribes should be afforded appropriate and timely notification so that they may request federal oversight when a state-issued 404 permit may impact tribal rights and resources. One way to ensure adequate consultation would be to designate a tribal
liaison from EPA as a condition of state assumption of the Section 404 program to ensure that there will be an appropriate avenue for impacted tribes to seek federal consultation, involvement and oversight as appropriate.

Agency Response: ***See*** **Section IV.F of the final rule preamble and the Agency's Response to Comments EPA-HQ-OW-2020-0276-0082-0001 and EPA-HQ-OW-2020-0276-0063-0046.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0061)

- Federal consultation should be required for projects or permits impacting Tribal rights and resources, and federally recognized Tribes should be afforded appropriate and timely notification so that they may request federal oversight when a state-issued 404 permit may impact Tribal rights and resources. It would be appropriate for EPA to assign a Tribal liaison to ensure there are resources available for Tribes—particularly under-resourced Tribes—to seek federal oversight of a project.

Agency Response: ***See*** **Section IV.F of the final rule preamble and the Agency's Response to Comments EPA-HQ-OW-2020-0276-0082-0001, EPA-HQ-OW-2020-0276-0053-0004, and EPA-HQ-OW-2020-0276-0063-0046.**

Choctaw Nation of Oklahoma (EPA-HQ-OW-2020-0276-0069-0004)

If EPA does choose to delegate 404 permitting to states, one way to ensure that the government-to-government relationship with tribes remains intact would be for the EPA to provide a state Tribal liaison as a condition of state assumption of the Section 404 program. This liaison would be a federal employee, and would consult with tribes on state 404 permits. Such a position would ensure that there will be an appropriate avenue for impacted tribes to seek federal consultation, involvement and oversight as appropriate. Our office works with two states where the Federal Highway Administration has such a liaison that consults with tribes on federally funded projects that are carried out by state DOTs. This setup has been quite effective at maintaining beneficial working relationships and efficient projects reviews.

Agency Response: ***See*** **Section IV.F of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0046.**

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0020)

Some States and Tribes have expressed concerns with the procedures outlined in the proposed rule for tribal coordination and will be providing specific concerns with their comments. The Corps Districts provide notice and engage directly with Tribes on potential project impacts to Tribal lands and interests; the expectation should be the same for any authorized 404 permit program.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0074-0003.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0022)

Federal consultation should be required for projects or permits impacting tribal rights and resources, and federally recognized tribes should be afforded appropriate and timely notification so that they may request federal oversight when a state-issued 404 permit may impact tribal rights and resources. One way to ensure adequate consultation would be to designate a tribal liaison from EPA as a condition of state assumption of the Section 404 program to ensure that there will be an appropriate avenue for impacted tribes to seek federal consultation, involvement, and oversight as appropriate. In short, EPA must remain involved in state permitting programs and ensure that state programs are meeting federal environmental review requirements with respect to tribal rights and resources.

Agency Response: ***See*** **Section IV.F of the final rule preamble and the Agency's Response to Comments EPA-HQ-OW-2020-0276-0082-0001 and EPA-HQ-OW-2020-0276-0063-0046.**

Great Lakes Indian Fish and Wildlife Commission (EPA-HQ-OW-2020-0276-0080-0006)

To help remedy this problems, federal consultation should be required for projects or permits impacting tribal rights and resources, and federally recognized tribes and properly delegated intertribal agencies should be afforded appropriate and timely notification so that they may request federal oversight when a state-issued 404 permit may impact tribal rights and resources. One way to ensure adequate consultation would be to require, as a condition of state assumption of the Section 404 program, the designation within the MOA (discussed below) of a tribal liaison within EPA to ensure that there will be an appropriate avenue for impacted tribes to seek federal consultation, involvement, and oversight as appropriate.

Agency Response: ***See*** **Section IV.F of the final rule preamble and the Agency's Response to Comments EPA-HQ-OW-2020-0276-0082-0001 and EPA-HQ-OW-2020-0276-0063-0046.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0041)

EPA anticipates its own review of state-proposed Section 404 permits will be limited. Id. at 55305. As discussed above, it would be appropriate for EPA to assign a Tribal liaison to ensure there are resources available for Tribes – particularly under- resourced Tribes – to seek federal oversight of a project. A state assuming authority to implement a Section 404 permitting program will have little incentive or legal responsibility to protect impacted Tribes, particularly if a project will not impact Tribal waters but may impact Tribal rights, resources or subsistence practices. The Army Corps and EPA cannot abdicate their legal and trust responsibilities to protect Tribal resources, or delegate them to the states. A clear and ready avenue for federal oversight and involvement must remain available, particularly given the unique considerations applicable to Alaska Native Tribes.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0046.** ***See also*** **Section IV.F of the final preamble for a discussion of ways Tribes and Native Villages may meaningfully engage in the permitting process in Tribal or State programs.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0046)

EPA must afford all potentially affected Tribes the ability to request EPA review of state-issued Section 404 permits. Additionally, we again recommend EPA assign/establish a Tribal liaison to ensure affected Tribes in Alaska can seek government- to-government consultation and federal review of state-issued 404 permits that impact their rights and resources.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0046.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0005)

One way to ensure adequate consultation would be to designate a Tribal liaison from EPA as a condition of state assumption of the Section 404 program to ensure that there will be an appropriate avenue for impacted Tribes to seek federal consultation, involvement and oversight as appropriate.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0046.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0021)

Additionally, we recommend EPA assign and establish a Tribal liaison to ensure affected Tribes in Alaska can seek government-to-government consultation and federal review of state-issued 404 permits that affect their rights and resources.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0046.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0023)

EPA anticipates its own review of state-proposed Section 404 permits will be limited.[Footnote 31: 88 Fed. Reg. at 55,305.] As discussed above, it would be appropriate for EPA to assign a Tribal liaison to ensure there are resources available for Tribes—particularly under-resourced Tribes—to seek federal oversight of a project. A state assuming authority to implement a Section 404 permitting program will have little incentive or legal responsibility to protect affected Tribes, particularly if a project will not affect Tribal waters but may affect Tribal rights, resources or subsistence practices. The Corps and EPA cannot abdicate their legal and trust responsibilities to protect Tribal resources, or delegate them to the states. A clear and ready avenue for federal oversight and involvement must remain available, particularly given the unique considerations applicable to Alaska Native Tribes.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0046.** ***See*** **Section IV.B.3 of the final preamble and rule for further**

discussion of the requirements to staff and fund a Tribal or State section 404 program.

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0024)

Federal consultation should be required for projects or permits affecting Tribal rights and resources, and federally recognized Tribes should be afforded appropriate and timely notification so that they may request federal oversight when a state-issued 404 permit may affect Tribal rights and resources. Again, one way to ensure adequate consultation would be to designate a Tribal liaison from EPA as a condition of state assumption of the Section 404 program to ensure that there will be an appropriate avenue for affected Tribes to seek federal consultation, involvement, and oversight as appropriate.

As currently written, EPA's draft rule does not protect Tribal interests in Alaska. Its provisions for Tribal engagement are overly burdensome and inadequate. EPA must ensure that Tribes receive equal protection and voice when a state assumes 404 permitting, including by requiring government-to-government consultation.

Agency Response: ***See*** **the Agency's Responses to Comments EPA-HQ-OW-2020-0276-0053-0004 and EPA-HQ-OW-2020-0276-0063-0046.**

8. Other comments on tribal opportunities for engagement

Maryland Department of the Environment (MDE) (EPA-HQ-OW-2020-0276-0061-0003)

3) Effects to Other States/Tribes

a) Section 233.31(a) allows a state or tribe with an assumed program to consider effects and comments on the proposed impacts from an adjacent state/tribe and make the decision whether to accept comments or recommendations to protect the water quality of the affected state/tribe. There are provisions for the affected state or tribe to raise objections with the Regional Administrator, and for the Regional Administrator to resolve the comments. The effect notification to the adjacent jurisdiction would occur later in the process, only during the public comment period. The timing of the adjacent effect notification potentially reduces opportunities for avoidance and minimization of adverse impacts to water quality of the adjacent jurisdiction. Procedures should be required to pre-identify interstate watersheds or waters, project types and/or impact extents for which the adjacent jurisdiction would receive notification that an application has been received that meets the effects criterion outside the public notice comment period. No permit may be issued when EPA or the adjacent downstream jurisdictions object until the objection is eliminated that the discharge may violate the adjacent jurisdictions water quality standards. This early identification process for a project will ensure timely coordination and eliminate unnecessary delay of project decisions.

b) MDE recommends that there be an opportunity that allows for interstate wetlands and waters, as identified by the state, be retained by federal agencies for permitting This will ensure that a federal agency may act as a mediator in making decisions on discharges which may affect water quality of a neighboring jurisdiction.

Agency Response: **EPA encourages the permitting agency to engage with potentially affected Tribes and States early in the permitting process to ensure permits do not adversely affect the waters of another Tribe or State. Except as provided in section 233.31 of the final rule, EPA has not provided further regulatory language on how or when such coordination shall occur to retain flexibility in meeting the individual needs of the permitting agency and to not overburden the affected Tribe or State.**

Pursuant to the CWA, the Corps may only retain interstate wetlands or waters to the extent they are 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, and including wetlands adjacent thereto.

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0045)

For federally issued permits, any impacted tribe has the right to federal consultation and input, not just those with TAS. The current Section 404 permitting program is carried out and funded by the Army Corps, but states are likely to have fewer resources to commit to implementing a Section 404 permitting program and have limited incentive to ensure tribal rights and resources are not impacted by its permitting decisions. This is particularly true if a permit is for a project that may generate revenue for the state.

Agency Response: ***See*** **the Agency's Response to Comments EPA-HQ-OW-2020-0276-0074-0003 and EPA-HQ-OW-2020-0276-0082-0001.**

Alaska Miners Association (AMA) (EPA-HQ-OW-2020-0276-0067-0001)

AMA wishes to address the treatment of tribes as regulatory agencies as proposed in the rule. We strongly support ADEC's efforts to extensively engage with tribes. From their website:

"Government-to-government consultation" is a term of art created by federal law and executive order that requires the federal government to engage in certain processes in relation to sovereign tribes. Since this is a legal creation of federal law, it does not exist under state law. However, nothing precludes states from forming intergovernmental agreements and state-tribal compacts to promote positive state-tribal relationships and foster collaborative policy development.

DEC has a Tribal Government Liaison position that coordinates with divisions and other State agencies and works closely on tribal concerns. Additionally, DEC maintains a tribal relations website at that includes a 2002 policy statement describing the DEC's tribal engagement process.

The Division of Water also has a Local and Tribal Government Liaison that implements the Division's communication and engagement processes established in the Program Description for implementing the CWA Section 402 Permitting Program, outlining the

Department's public participation guidance and strategies. Several paragraphs of the document discuss engagement efforts, including section 4.0 - Supplemental Communication Tools, which outlines a consultation process led by the Division of Water's Local and Tribal Government Liaison. [Bold: This consultation and process is in addition to the routine public participation process available to the general public and takes place prior to issuance of a public notice of a draft permit.] Additionally, the Division of Water maintains a helpful document on our website titled APDES Guidance for Local and Tribal Governments. As we develop the 404 Program for approval and prepare the Program Description, we anticipate a similarly structured engagement process for tribal organizations, which DEC will work to refine in communication and collaboration with Local and Tribal Governments.

The APDES process for Local and Tribal government engagement was outlined in Appendix H Public Participation in the APDES Process, in the Departments application to EPA for APDES Program primacy. Under the subsection Local and Tribal government consultation (page 8), it states:

"Consultation with local State-chartered and federally recognized Tribal governments, and RCACs is typically organized and led by a project liaison and can be organized as a single discussion with representatives of the local or Tribal government or a series of discussions prior to providing formal public notice of a draft permit. Consultation may be either face-to-face or by telephone depending on cost, staff availability, and other practical considerations. The consultation process is intended to provide for a meaningful and timely dialog with local and Tribal officials with open sharing of information, the full expression of local and state views, a commitment to consider local views in decision-making, and respect for local authority and knowledge. If necessary and requested by the Tribe, DEC will use a translator or facilitator to assist with this effort. Summaries of consultations will be entered into the permit record including DEC responses to substantive concerns."

Lastly, DEC recently established ongoing quarterly meetings with the goal of improving DEC's partnership and communication with Alaska's Indigenous People. Our goal with these meetings is to establish a line of communication between DEC and the tribes and regional and village corporations; share and receive information; identify the efforts, activities, and permits that DEC is working on; and learn if there are areas of interest or concern that we can work together to address. The meetings are announced in an email to tribal organizations, shared on DEC's website and social media, and are open to all tribes, regional and village corporations, and all others who are interested.

<u>Agency Response:</u> EPA appreciates the commenter's input regarding Alaska's efforts to actively engage Alaska's Tribes and Native Villages in permitting decisions that may affect them, their resources or interests. Implementation of any existing or future Tribal or State section 404 program is outside of the scope of this rulemaking. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0046.

Alaska Miners Association (AMA) (EPA-HQ-OW-2020-0276-0067-0002)

From an industry perspective, with close coordination between the State of Alaska, Alaska Native Corporations, and tribes, the process to regulate waters in Alaska is stringent, thorough, and robust. The additional concept in the Proposed Rule to treat tribes as a regulatory agency brings uncertainty to the process. Project applicants deserve to know who the regulators are and a predictable process by government agencies with dedicated missions and mandates. Establishing tribes as regulatory agencies should be addressed in an across-the- board process for all aspects of the regulatory process and not just in this specific Proposed Rule.

Agency Response: In the 1987 revisions to the CWA, Congress provided that eligible Tribes may assume the CWA section 404 program if EPA approves their dredged and fill permitting program as consistent with the CWA and its implementing regulations. *See* 33 U.S.C. 1377(e). The CWA further requires that Tribes and States assuming the CWA section 404 program notify and provide opportunity for affected States (including eligible Tribes) to provide permit recommendations and that if such recommendations are not accepted by the issuing Tribe or State, the affected State and EPA are to be notified along with the reasons why the recommendations were not accepted. 33 U.S.C. 1344(h)(1)(E).

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0014)

Fourth, to the extent EPA seeks to graft federal consultation requirements onto States, EPA may not do this. It is up to States and Tribes to manage their relations with each other, not EPA.

Agency Response: The CWA requires that Tribes and States assuming the CWA section 404 program notify and provide opportunity for affected States (including eligible Tribes) to provide permit recommendations and that if such recommendations are not accepted by the issuing Tribe or State, the affected State and EPA are to be notified along with the reasons why the recommendations were not accepted. 33 U.S.C. 1344(h)(1)(E). The specific procedures for such notifications may be established by the issuing State or Tribe and the "affected Tribe or State." EPA encourages arrangements for such coordination to be clearly articulated in Tribal or State regulations or MOUs between these entities.

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0040)

For federally issued permits, any impacted Tribe has the right to federal consultation and input, not just those with TAS. The current Section 404 permitting program is carried out and funded by the Army Corps, but states are likely to have fewer resources to commit to implementing a Section 404 permitting program and have limited incentive to ensure Tribal rights and resources are not impacted by its permitting decisions. This is particularly true if a permit is for a project that may generate revenue for the state.

Agency Response: *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0045.

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0051)

For federally issued permits, any affected Tribe has the right to federal consultation and input, not just those with TAS. The current Section 404 permitting program is carried out and funded by the Corps, but states are likely to have fewer resources to commit to implementing a Section 404 permitting program and have limited incentive to ensure Tribal rights and resources are not impacted by its permitting decisions. This is particularly true if a permit is for a project that may generate revenue for the state.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0045.**

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0002)

Given the proposed rule's focus on maintaining standards at least as stringent as 404(b)(1) guidelines, we believe that the ability of Tribes to provide input, suggest permit conditions, and use Federal regulations should be similarly upheld when States adopt 404 programs.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0045. See Section IV.A.3 of the preamble for discussion of a Tribe or State's obligation to issue permits that are no less stringent than the requirements of the Act and regulations at 40 CFR 233 and that assure compliance with the regulations at 40 CFR 230.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-4-0003)

And in all these examples and throughout this process, tribes' concerns have not been adequately heard, considered, or addressed, in stark contrast to this Administration's pledge to strengthen relationships with tribal nations and to prioritize environmental justice.

Agency Response: **EPA respectfully disagrees with this comment.** ***See*** **Section IV.F of the final rule preamble, addressing EPA's efforts to facilitate Tribal engagement in State or Tribal section 404 permitting programs, particularly with respect to permits that may adversely affect Tribal resources or interests.** ***See also*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-TRANS-081523-001-0003.**

Buena Vista Rancheria of Me-Wuk Indians EPA-HQ-OW-2020-0276-0053-0008

BVR also supports the statement on page 55286 of the federal register that "waters that are assumable by a tribe (as defined in the report) may also be retained by the USACE when a state assumes the program" as this would allow Tribes who are not yet ready to assume 404 responsibilities the ability to have jurisdiction over waters on their lands in the future when they are ready to assume 404 responsibilities. In the case where a state does assume the permitting authority over waters that could later be assumed by the Tribe. There needs to be a mechanism in place for the Tribe to assume the permitting authority from the state.

Agency Response: **EPA is not currently aware of situations in which it could authorize a State to assume waters that are assumable by Tribes. This rulemaking, therefore, does not address mechanisms for Tribes to assume permitting authority from States.**

G. Technical edits

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0022)

Part 233, subpart H lists approved state 404 programs. EPA is proposing to update this subpart to include updated Michigan laws (as the state codes have changed since this section was added in 1984). EPA is also requesting comment "on whether the Agency has identified all changes to state laws and regulations incorporated by reference in 40 CFR 233 subpart H."

During the process of amending and updating the regulations related to approved state programs, EPA should move ahead with including the Florida 404 program and cross-references to the relevant Florida statutes as previously approved by EPA. EPA's codification of a state's 404 program in the Code of Federal Regulations is not required for assumption to be effective under Section 404 [Footnote 22: See Center for Biological Diversity v. Regan, Case No. 1:21-cv-00119-RDM, Docket No. 73 (Memorandum and Order) (D.D.C. Mar. 20, 2022).]. EPA's failure to propose inclusion of Florida's State 404 Program in Part 233, Subpart H appears to be an administrative oversight given its previous expressed written intention to do so [Footnote 23: See https://www.epa.gov/cwa404g/pre-publication-notice-codifying-epas-adjudicatory-decision-floridas-clean- water-act (last visited 10/8/2023).].

Agency Response: **Florida obtained EPA's approval to assume the CWA section 404 program on December 17, 2020. On February 15, 2024, the U.S. District Court for the District of Columbia vacated EPA's approval of Florida's program. *Center for Biological Diversity v. Regan*, No. 21-119, 2024 WL 655368 (D.D.C.). (An appeal of the district court's decision is pending. See No. 24-5101 (D.C. Cir.).) Accordingly, EPA declines to codify Florida's program in Part 233, Subpart H as part of this rulemaking effort.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0023)

EPA is proposing to codify the definition of "Indian lands." Florida supports EPA codifying the definition. This is consistent with EPA's longstanding practice and sets a reasonably clear delineation for States seeking to define the scope of its 404 program [Footnote 24: See Wash. Dep't of Ecology v. EPA, 752 F.2d 1465, 1469–71 n. 1 (9th Cir. 1985) ("EPA has regarded [the term 'Indian lands'] as synonymous with 'Indian country,' which is defined at 18 U.S.C. § 1151 to include all lands (including fee lands) within Indian reservations, dependent Indian communities, and Indian allotments to which Indians hold title. We accept this definition as a reasonable marker of the geographic boundary between state authority and federal authority."); See also Narragansett Indian Tribe v. Narragansett Elec. Co., 89 F.3d 908, 915 (1st Cir. 1996) ("[W]e recognize that … section 1151 on its face is concerned only with criminal

jurisdiction. Nonetheless, the Supreme Court has repeatedly stated that the definition provided in section 1151 'applies to questions of both criminal and civil jurisdiction.' … Elsewhere, the Court has simply defined 'Indian country' in civil cases in terms closely paralleling those of section 1151, while citing to that statute.").]. Providing a regulatory definition for "Indian lands" will allow greater certainty and uniformity among States that assume the 404 program.

Agency Response: The Agency appreciates commenter support regarding codification of the definition for "Indian lands." As discussed in Section IV.H of the final rule preamble, the Agency is finalizing codification of "Indian lands" as proposed. *See* Section IV.H of the final rule preamble for further discussion of the Agency's rationale for finalizing this provision.

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0030)

NAWM does not have any specific comments or concerns with the proposed technical and minor updates. We will note however that those items which are specifically identified in the "Request for Comment" Section are not listed as specific changes in the "What is the Agency proposing?" Section. Therefore, it is difficult to comment on what EPA is specifically proposing to change. Regarding "notice" procedures we concur that the rule should reflect current notification practices. We also believe that any edits and/or updates to notification processes should include language on expectations for reaching out to Tribes and underserved communities which may be affected by authorization and/or potential permit decisions; this may be outside the "normal" electronic media methods identified and could include presentations at community centers or places of worship and pamphlet development and distribution.

Agency Response: The Agency appreciates commenter input regarding the notice procedures. As discussed in Section IV.H of the final rule preamble, the Agency is clarifying in the preamble that both electronic mail and mail are acceptable methods of transmitting public notices or documents.

In addition to electronic mail or mail, the Agency encourages assumed Tribes or States to consider other methods to notify potentially interested stakeholders, including communities with environmental justice concerns, of potential permit decisions (e.g., other appropriate communication and outreach means and methods, such as local newspapers or newsletters and phone calls to community leaders).

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0024)

EPA proposes to define "Indian lands" to mean "Indian country" as defined in the criminal code (15 U.S.C. § 1151) [Footnote 55: 88 Fed. Reg. 55316.].

Alaska supports the incorporation of 15 U.S.C. § 1151. For utmost clarity, EPA should incorporate 15 U.S.C. § 1151 by including an explicit reference to the provision in the text of the final rule.

Agency Response: **The Agency appreciates commenter input regarding codification of the definition for "Indian lands." As discussed in Section IV.H of the final rule preamble, the Agency is finalizing codification of "Indian lands" as proposed, which includes a reference to 18 U.S.C. 1151. *See* 40 CFR 233.2 and Section IV.H of the final rule preamble for further discussion of the Agency's rationale for finalizing this provision.**

H. Statutory and Executive Order Reviews

1. Executive Order 13132: Federalism

Association of Clean Water Administrators (ACWA) (EPA-HQ-OW-2020-0276-0060-0001)

Federalism Implications: In the preamble of the Proposed Rule, EPA recognizes that the Proposed Rule "will potentially affect Tribes and States that have assumed or will in the future request to assume administration of the CWA section 404 program." However, EPA goes on to conclude that the rulemaking "does not have federalism implications and will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." ACWA disagrees with this conclusion.

Executive Order 13132, Federalism, defines policies that have "federalism implications" to include "regulations that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Numerous provisions of the Proposed Rule - including but not limited to provisions addressing (i) the scope of assumable waters; and (ii) new requirements for states seeking approval of program assumption – unambiguously implicate the distribution of power over assumable waters and state responsibilities in assuming section 404 authority. Therefore, we respectfully request that EPA reconsider its determination that the Proposed Rule does not have federalism implications or, in the alternative, provide states with supported reasoning for this assertion.

Agency Response: **The final rule clarifies and facilitates the process of State assumption of the section 404 program. The Agency maintains that this rule does not impose new costs or other requirements on States, preempt State law, or limit State's policy discretion. No State is required to request to assume the section 404 program. Consistent with EPA's policy to promote communication between EPA and State governments, EPA conducted outreach and engagement with state government officials prior to the finalization of this rule to permit them to have meaningful and timely input into its development. *See* Section V.E. of the final rule preamble for further discussion.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0025)

1. EO 13132 Federalism analysis:

The Proposed Rule indicates that EPA "has concluded that compared to the status quo, this rule does not impose any new costs or other requirements on States, preempt State law, or limit States' policy discretion; rather, it helps to clarify and facilitate the process of State assumption of the section 404 program." [Footnote 56: 88 Fed. Reg. 55319–55320.]. EPA further indicates that "EPA engaged with State officials early in the process of developing the proposed rule . . . [citing Trump EPA's engagement from 2018]." [Footnote 57: 88 Fed. Reg. 55320.] EPA's (2023) State Engagement Summary Report, posted as a supporting document on regulations.gov, indicates that the extent of the Biden EPA's engagement with States was two presentations – both "informational webinars" in which "EPA did not seek additional input." [Footnote 58: 88 Fed. Reg. 55283.].

Had the Biden EPA reached out to Alaska during their evaluation, and revision, of the Trump EPA's draft of this rulemaking, Alaska could have provided valuable input, and given EPA a realistic sense of which provisions are likely to facilitate, and which are likely to hinder, State assumption for political or practical reasons. Further, the input requested by Trump's EPA did not cover key issues now covered in this Proposed Rulemaking. In particular, the Trump EPA's outreach was not focused, as this one is, on "mak[ing] permitting more equitable" and including provisions increasing tribal involvement in State programs [Footnote 59: 88 Fed. Reg. 55277.]. Alaska requests that EPA listen to our repeated calls for early, and meaningful, engagement in rulemakings such as this that have significant impacts on our State. EPA's continued failure to do so reflects a disregard of cooperative federalism and a disrespect for States.

Agency Response: Consistent with EPA's policy to promote communications between EPA and State and local governments, EPA engaged with State officials early in the process of developing the proposed rule to permit them to have meaningful and timely input into its development as well as opportunities during the rulemaking process. *See* Sections III.B and V.E. of the final rule preamble and the *State Engagement Summary Report and the Summary Report of the Input Meetings on the Proposed Rule Changes for the Clean Water Act Section 404(g)*, both of which can be found in the docket associated with this final rule for further discussion of this engagement.

2. Environmental Justice

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0026)

2. EO 12898 Environmental Justice

Buried at the end of this rulemaking is the statement that "[t]he proposed rule would enable Tribes to have a more significant role in the permit decision-making process than under current practice." [Footnote 60: 88 Fed. Reg. 55320.].

Alaska respectfully requests that all proposed revisions serving this end be excised from this rule and re-introduced in a separate rulemaking explicitly aimed at pursuing this goal. Bootstrapping these types of provisions into a rulemaking purportedly aimed at

"clarifying" and "facilitating" State assumption risks convoluting the effort, and increases the chances that EPA's final rule will, ultimately, backfire on EPA and deter State assumption. Deterring State assumption, of course, is not in EPA's best interests – nor is it consistent with Congress's intent that States assume.

Agency Response: EPA disagrees that clarifying opportunities for Tribal involvement in Tribal and State permitting procedures will deter State assumption. These opportunities provide clear mechanisms and timelines and are consistent with the CWA's emphasis on the importance of ensuring public involvement in permitting decisions.

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0025)

The proposed rule fails to recognize environmental justice implications of assumption of the 404 program. Environmental justice concerns are at the forefront of many Alaskans minds as it pertains to assumption of the Clean Water Act's 404 program. As EPA's process for drafting the revised rule involved primarily state engagement with little to none from affected Tribes and communities, and there is little mention of environmental justice concerns in the proposed regulations, we are concerned that EPA has little regard for the environmental justice effects of its revisions to rules that have been in effect for decades. The EPA must not finalize a rule that lowers the bar for assumption at the expense of important and required statutory protections.

Environmental justice as defined by EPA is "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[Footnote 32: EPA, Environmental Justice.] Further, EPA states that achieving environmental justice requires all people to have "the same degree of protection from environmental and health hazards, and [e]qual access to the decision-making process to have a healthy environment in which to live, learn, and work."[Footnote 33: Id.]

Agency Response: *See* Section V.J of the final rule preamble for discussion as to how this rule complies with Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All. See also Section V of the Economic Analysis for further discussion about environmental justice considerations in the rulemaking.

I. Economic Analysis

The Petroleum Alliance of Oklahoma (EPA-HQ-OW-2020-0276-0055-0011)

Fourth, it appears that EPA has not acknowledged the situation where an upstream state in considering a permit that numerous downstream entities assert would impair their water-related interests. Such a situation is likely to occur eventually, and it could implicate not only the State of Oklahoma but also potentially numerous tribes. Resolution of disputes initiated by numerous entities could be time consuming and challenging. The State of Oklahoma is likely to be the entity left to seek a resolution, potentially at significant cost,

yet the Economic Analysis does not address those potential costs, either [Footnote 10: As noted above, EPA's proposed solution would require EPA to serve as a dispute resolution facilitator, yet EPA would have no authority to impose a resolution. The state would be left to work through the permitting maze.].

Agency Response: **The Agency appreciates the commenter's concerns regarding the complexities with addressing multiple water quality standards. The scenario described, of a Tribe or States considering a permit that may affect the interests of another Tribe or State, exists whether the Corps or a Tribe or State is the permitting authority. When reviewing and potentially issuing a permit that the permitting agency must ensure such considerations are taken into account. *See* 40 CFR 233.32(a). EPA disagrees that the provision provides for no final authority for EPA to resolve disputes. The purpose of this provision is to clarify EPA does have such authority – through its oversight role and responsibilities. For example, EPA can facilitate disputes that implicate CWA requirements or whether or not a waterbody is a water of the United States; the statute and case law make clear that EPA is responsible for determining the scope of the CWA. *See* Section IV.E.1 of the final rule preamble and Section III.A.3 of the Economic Analysis for further discussion of the rule's dispute resolution provision.**

The Petroleum Alliance of Oklahoma (EPA-HQ-OW-2020-0276-0055-0012)

Fifth, if both the state and multiple tribes seek to exercise section 404 authority over a length of stream or river – an entirely plausible situation – the regulated community could simultaneously have to deal with the Corps of Engineers, the State of Oklahoma, and numerous tribes. Each would have different processes, fees, requirements, permit timing, and terms for cross-boundary consultation. The economic analysis does not address issues such as this but a project applicant's cost of permitting a project caught in this permitting maze would be significant. At the same time, the affected governments would have to absorb significant personnel and financial costs in developing a process for somehow mediating multiple different 404 jurisdictions.

Agency Response: **The Agency appreciates commenter input on the Tribal and State assumption of the section 404 permit program. The scenario the commenter lays out currently exists when the Corps of Engineers is the permitting agency, and a Tribe or State also has regulations or permitting requirements for the same waters. This scenario also exists under the prior Tribal and State section 404 regulations where Tribes or States have or anticipate assuming the program. This final rule does not add any new authorities; instead, it clarifies who the permitting authority shall be, how coordination shall occur, and how comments by affected Tribes and States shall be considered if a Tribe or State is the permitting agency. Additionally, EPA has clarified EPA's role in facilitating disputes - if they arise. For the reasons listed above, the Agency estimates there is no increased burden to project applicants, but that there may be cost savings to permit applicants. Potential cost savings occur when a Tribe or State which is currently regulating discharges of dredged and fill material into waters of the United States, assumes the program. In such a scenario, the applicant no longer submits an application to the Corps of Engineers and needs to**

submit a single permit request to the Tribal or State permit program to meet both the Tribal or State permitting requirements and the section 404 permitting requirements. EPA is unaware of situations where State administration of the CWA section 404 program has created confusion or additional burden on permit applicants.

The Petroleum Alliance of Oklahoma (EPA-HQ-OW-2020-0276-0055-0007)

Beyond the legal issues outlined above, implementation of EPA's proposed rule would create significant confusion and challenges in Oklahoma. Set out below are examples of how allowing assumption of section 404 authority by entities other than the State of Oklahoma would confuse and delay permitting and impose significant costs not captured by EPA's Economic Analysis [Footnote 9: Environmental Protection Agency, Economic Analysis for the Proposed Clean Water Act Section 404 Tribal and State Program Rule, June 2023 (hereinafter the "Economic Analysis").].

Agency Response: The Agency appreciates commenter input on State and Tribal assumption of the 404 program and the potential challenges and costs arising from possible disputes among different entities. 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. Section IV.E.1 of the preamble to this final rule discusses the procedures and rationale for finalizing the new provision at 40 CFR 233.1(f) The costs and benefits associated with this provision are qualitatively discussed in the Economic Analysis for the Final Rule. *See* Section III.A.3 of the Economic Analysis for further discussion regarding the costs associated with this rulemaking. *See also* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0055-0012 regarding the commenter's concerns that this rulemaking will create significant confusion for permittees.

J. General Comments

1. Pre-proposal Tribal and State outreach

Association of Clean Water Administrators (ACWA) (EPA-HQ-OW-2020-0276-0060-0002)

State Consultation in the Continuing Development of the Proposed Rule: ACWA recognizes EPA's indication of early state outreach in its development of the Proposed Rule. However, EPA's 2023 State Engagement Summary Report (posted as a supporting document on regulations.gov) indicates the extent of EPA's engagement with states was limited to two presentations – both pre-scripted "informational webinars" in which "EPA did not seek additional input." When EPA and the states engage in robust conversation and collaboration, smarter, more effective, and more efficient regulations are crafted that further environmental protection while simultaneously encouraging economic development. We request that EPA provides states – as co-regulators of the CWA – with opportunities for meaningful and ongoing consultation in the continued development and finalization of the Proposed Rule outside of (and in addition to) the public comment process.

Agency Response: **EPA acknowledges the comment. EPA engaged States and Tribes in robust discussions regarding this rulemaking in 2018 and provided several opportunities for input on this rulemaking. *See* Section III.B of the final rule preamble and *The Summary Report of the Input Meetings on the Proposed Rule Changes for the Clean Water Act Section 404(g)* in the docket associated with this final rule.**

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0004)

NAWM is also concerned with the rule making process undertaken by the Agency. Given the breadth of inquiries which EPA is requesting comment on, NAWM suggests that it would have been more appropriate for the EPA to have issued a Federal Register notice for proposed rulemaking and requested input from Tribes, States, and the regulated community on the suite of options prior to issuing the draft rulemaking. In its current format it is difficult to comment on EPA's reasoning for selecting one alternative over another and allows for final rule development without additional public involvement and explanation. While the EPA expresses its belief that a rigorous involvement of States and Tribes has occurred prior to the issuance of this Federal Register notice, many States and Tribes have expressed their concern with the pre-rulemaking engagement process and the lack of substantive involvement outside of the Assumable Waters Subcommittee under the auspices of the National Advisory Council for Environmental Policy and Technology (NACEPT). NAWM has heard from some of our States which expressed interest in assuming the 404 program that they would have appreciated additional coordination efforts from EPA prior to the proposed rule publication. EPA also indicated that pre-rule involvement occurred at various regional meetings. However, draft rule language and specific areas for comment were not specifically outlined at those engagements nor was any formal pre-rule notice of intent and request for comment issued.

Agency Response: **See the Agency's Response to Comment EPA-HQ-OW-2020-0276-0060-0002.**

2. General comments on the proposed rule

2.1 General support for the proposed rule

Anonymous (EPA-HQ-OW-2020-0276-0046-0002)

I fully support such measures that will enhance cooperative federalism with such states. By streamlining and clarifying the process by which states can apply for § 404 jurisdiction over WOTUS in their state, we may see an increase in the number of states who assume control of this permitting process. Because there are now far fewer federally-protected wetlands, state control has become increasingly necessary. Under an assumption program, states would then have jurisdiction over § 404 permitting in federally-recognized wetlands, as well as wetlands covered under state law. This may facilitate greater efficiency and regulatory specificity by allowing one state's agency to oversee all wetlands, regardless of whether they are protected by the federal CWA. So, in states with already-robust water protections, this scheme of cooperative federalism may result in better environmental outcomes. In states that lack laws exceeding the federal CWA, this regulation will not likely have a deleterious outcome, as their programs will still be subject

to federal law. So, I see this regulation as a net positive, encouraging more environmentally-inclined states to take charge of regulating their own wetlands to suit the environmental and economic particularities of the region.

Agency Response: EPA acknowledges this expression of support.

Individual commenter (EPA-HQ-OW-2020-0276-0050-0002)

The legislative history suggests that Congress anticipated that many Tribes and States would assume the program, so the purpose of this proposed rule should be to encourage Tribes and States to assume the section 404 program by decreasing the amount of confusion in the application process. The main reason that assumptions are permitted is to maintain Tribal and State sovereignty. Overall, I agree with the proposed rule as it addresses the specific issues that Tribes and States have expressed with the assumption process. I believe that this rule will clear up much confusion surrounding the process and will provide Tribes and States with guidelines for going about the assumption process. My main concerns are issues regarding Tribal sovereignty and how the proposed rule could further enforce that.

Agency Response: EPA acknowledges this expression of support.

State of Utah, Public Lands Policy Coordinating Office (EPA-HQ-OW-2020-0276-0056-0003)

Currently, only three states have been approved by EPA to administer CWA 404 permitting programs. No Tribes have been approved by EPA to administer a CWA 404 permitting program [Footnote 2: Id.at 55278.]. Change is necessary to encourage states and Tribes to take an active role in managing resources within their borders.

Agency Response: EPA has clarified and revised provisions of the regulations to facilitate State and Tribal assumption of the section 404 program.

Anonymous (EPA-HQ-OW-2020-0276-0064-0001)

Seeing as the EPA has not amended the Clean Water Act Tribal and State Program in over 35 years, this revision is very much overdue. This proposed revision is very timely, seeing as the Senate Committee on Environment and Public Works just held a hearing on September 20th about drinking water in tribal communities, bringing increased attention to this critical issue. Ecosystems, especially those that are underwater, are very fragile to any disruptions that may occur. Removing sediment from the bottom of a body of water (referred to as "dredged or fill material" here) will always have consequences for a given ecosystem, and therefore this proposed rule is much needed as it will clarify the state's role in monitoring any discharges of fill material into water sources. If this update is not enacted, state legislatures may claim that due to the unclear language of CWA section 404, their responsibility in this sector is limited. Additionally, the attention that is given towards equity and environmental justice is very appreciated, as tribes will now have greater access to participation in the permitting process in regards to projects from another state if the CWA is updated.

Agency Response: EPA appreciates the commenter's support for the revisions.

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0004)

Florida is generally supportive of the provisions in the Proposed Rule that eliminate or reduce barriers to assumption and that streamline and improve the Section 404 regulations to facilitate state assumption. Florida is also supportive of increased flexibility for States seeking 404 assumption and encourages EPA to address state assumption on a case-by-case basis, acknowledging that each State has unique geographical, biological, programmatic, and legal features, which the 404 assumption approved process should be tailored to address.

Agency Response: EPA appreciates the commenter's support for the revisions. EPA agrees with the commenter about the importance of approaching Tribal or State assumption on a case-by-case basis, given each the unique geographical, biological, programmatic, and legal features of each Tribe and State.

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0001)

NAWM supports the U.S. Environmental Protection Agency's (EPA) efforts to update and clarify the regulations pertaining to Tribal and State assumption and administration of the CWA Section 404 permitting program for discharges of dredged or fill material. Aquatic resource protection can only be accomplished by a unified effort of Tribal, State and Federal programs. A holistic regulatory structure managed by a single governing program will result in clarity to the regulated community and provide consistency in resource management and mitigatory goals. It is also important to continue the protections for aquatic resources which maintain the quality of traditionally navigable waters, assure that the quality of aquatic resources of neighboring Tribes and States are maintained, and that EPA provides sufficient oversight to authorized programs to provide national consistency and assure that the goals of the CWA are achieved.

Agency Response: EPA appreciates the commenter's support for the revisions.

National Association of Home Builders (NAHB) (EPA-HQ-OW-2020-0276-0077-0001)

Because our members routinely conduct activities that may impact federal and/or state-regulated waters and wetlands and are often required to obtain both federally-issued and state-issued permits and authorizations, NAHB has long supported states assumption of the CWA's permitting programs, including Section 402 National Pollutant Discharge Elimination System (NPDES) and Section 404 dredge and fill permitting processes. State-assumed programs are a proven way to streamline and bring more certainty to an often cumbersome, lengthy, and unwieldy process. As a result, NAHB strongly supports states and Tribes requesting and obtaining delegation of the CWA 404 program.

Agency Response: EPA acknowledges the comment.

National Association of Home Builders (NAHB) (EPA-HQ-OW-2020-0276-0077-0003)

Despite these advantages, only three states have assumed the 404 program – Michigan, New Jersey, and Florida. Michigan assumed the program in 1984, New Jersey in 1994, and Florida in 2020 [Footnote 6: 88 Fed. Reg. 55280 (August 14, 2023).]. This is not due to a lack of effort? many states including Alaska, Arizona, Indiana, Kentucky, Nebraska, Maryland, Minnesota, North Dakota, Oregon, and Virginia have explored or pursued

CWA Section 404 assumption over the years, but those efforts have been stymied by various stumbling blocks. To date, the assumption process has been wrought with challenges and confusion arising from uncertainty over the extent of waters subject to CWA jurisdiction, which waters remain under federal oversight, and the costs and administrative burdens of establishing, implementing, and maintaining wetland permitting programs that meet federal requirements, among others. Further, the EPA acknowledges that no Tribes currently administer the program or have expressed interest in doing so [Footnote 7: Ibid.]. Clearly, the program needs to change if it is to operate as Congress intended.

Agency Response: EPA acknowledges the comment.

2.2 General opposition to the proposed rule

Individual commenter (EPA-HQ-OW-2020-0276-0052-0001)

The implementation of these regulations could have widespread negative impacts on the protection of the nation's waters and wetlands. For instance, the process of taking over such a program is costly and intensive, as some officials have learned the hard way. States like Arizona, Indiana, and Oregon have backed away from their own attempts when confronted with financial realities and other hurdles (Crunden 2023). Additionally, states like Alaska, Nebraska, and Minnesota are seeking to influence the dredge-and-fill permitting program, which has implications for federally protected waters. Currently, for most of the country's waters, the Army Corps of Engineers retains authority, while the EPA has veto power over CWA Section 404 permits.

Agency Response: EPA acknowledges the challenges faced by Tribes and States seeking to assume the program. EPA disagrees that implementation of these regulations could have widespread negative impacts on the nation's waters and wetlands. *See* the Economic Analysis associated with this rulemaking for further discussion of the environmental costs and benefits of this action.

Individual commenter (EPA-HQ-OW-2020-0276-0052-0003)

This push from these states for new comprehensive regulations aligns with a Trump-era rule revising Clean Water Act requirements, which could empower deregulation from supporters of the new legislation. Elise Bennett, a senior attorney with the Center for Biological Diversity (CBD), has been aware of the potential plans from the EPA since the Trump Administration and the negative implications this move could have on federally protected waters. According to Bennett, "We believe it does not set the proper environmental guardrails to ensure states can actually meet the Clean Water Act's requirements, as well as other significant federal laws like the Endangered Species Act, which are in place to ensure these permits do not drive species declines and extinctions" (Crunden 2023). For example, Florida was granted authority by the EPA to oversee Section 404 permitting, causing further concern due to being home to significant and fragile wetland ecosystems. An initial analysis from Bloomberg indicates that permit approvals in Florida have faced significant criticism due to the lack of understanding and familiarity with Section 404 permitting. Moreover, the implications of Florida or any other states having authority over 404 permitting could lead to project approvals that threaten

ecosystems by causing irreversible damage to threatened and endangered species populations, drinking water, water quality, and wetlands.

Agency Response: EPA disagrees that this rulemaking aligns with an individual administration. Nothing in this rule facilitates project approvals that would threaten ecosystems or cause irreversible damage to threatened and endangered species populations, sources of drinking water, or wetlands. Tribes and States have requested EPA provide clarity and remove barriers to assumption for many years. The Agency's efforts to review and revise the existing regulations began in earnest in 2015, with the convening of the Assumable Waters Subcommittee. *See* Section III of the final rule preamble for further discussion on efforts leading up to the finalization of this rulemaking.

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0005)

Florida urges EPA not to implement any proposed changes that would serve to add additional hurdles or otherwise limit state assumption in a manner contrary to the CWA's text and cooperative federalism purposes.

Agency Response: This rulemaking is consistent with the CWA and in particular its cooperative federalism principles, and the revisions as a result of this rulemaking are intended to clarify procedures to facilitate Tribal and State assumption.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0001)

In general, the Conservation Organizations are opposed to many provisions of EPA's proposed rule as set forth in detail below. EPA's proposed rule codifies some unlawful positions the agency took when approving Florida's program, including positions regarding assumable waters and criminal enforcement. These are currently being litigated. As to other issues, EPA's proposal weakens the requirements for states to assume 404 permitting with the clear goal of facilitating assumption without regard to the potential impact on the resources.

Although some of EPA's proposed changes would be an improvement from the current rules, the agency does not go far enough to (1) require state programs to be at least as stringent as federal law requires; (2) ensure that states have the resources and funding to operate a state 404 program; (3) mandate that affected members of the public are able to challenge permits and enforce environmental laws; and (4) improve the timing and process for both approving state assumption applications and withdrawing or revising inadequate state programs.

Agency Response: EPA does not comment on ongoing litigation. Additionally, the approval of any individual section 404 program is beyond the scope of this rulemaking.

***See* Sections IV.A through IV.E of the final rule preamble for discussion on the provisions added to ensure programs are administered consistent with, and no less stringent than, the requirements of the CWA section 404 and its implementing regulations.**

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0003)

We understand that one of the goals of this notice is to receive input from the regulated community on how best to construct elements of an authorized program to assure aquatic resource protection. To this end, EPA has proposed options and/or methods for the authorized program to coordinate issues ranging from historic preservation, endangered species, water quality of neighboring jurisdictions, and traditionally navigable waters. While we understand and support EPA's goal to provide flexibility to those Tribes and States seeking to assume the 404 program, it is also important to assure that the resulting program construct is scientifically sound and comports with the intent of Congress. It is also important that these proposed rule revisions do not create any unnecessary procedures which may affect rights which Tribes and States inherently have or ones which limit federal agencies from implementing their congressionally mandated responsibilities.

Agency Response: EPA agrees with the commenter and believes the final rule is consistent with Congressional intent for Tribes and States to take primary responsibility for managing their aquatic resources.

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0001)

As detailed below, on balance, we do not believe that EPA's proposed revisions, if finalized, will achieve its stated goals. Indeed, some aspects are likely to deter State assumption. And some do not give effect to Congress's recognition in § 101(b) that "it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" as well as "to plan the development and use . . . of land and water resources." This foundational policy statement, which aminates the entire Clean Water Act, is undermined by micromanagement of State programs. Consistent with Congress's intent, EPA must leave States with maximum responsibility and flexibility in assumed programs.

Agency Response: EPA disagrees with the commenter. This rule gives effect to CWA section 101(b) while providing flexibility in the way Tribes and States design and administer their programs. The rule's program oversight and coordination provisions are necessary to ensure EPA has the information necessary to ensure Tribal and State programs comply with the CWA.

Great Lakes Indian Fish and Wildlife Commission (EPA-HQ-OW-2020-0276-0080-0011)

From an off-reservation perspective, tribes that hold reserved rights to hunt, fish and gather within ceded territories are not the regulatory authority with control over the issuance of 404 permits, nor can they assume that authority under the Clean Water Act as currently written. The tribes rely on other governments to exercise their authorities in ways that preserve and enhance the habitats that support healthy and abundant natural resources. Unfortunately, states are not always as diligent about working with tribes to ensure tribal interests are appropriately considered as are federal agencies. The EPA and Army Corps must ensure that federal obligations are not abrogated through state action.

While the goal of clarifying the procedures for assumption of Section 404 permitting is a good one, the proposed regulations must protect tribal rights and resources, and must provide mechanisms for the federal government to uphold its treaty obligations and trust responsibilities in both an on- reservation and off-reservation context.

Agency Response: The final rule provides a number of ways in which Tribes can meaningfully engage with Tribal and State section 404 programs. *See* Section IV.F of the preamble to the final rule for further discussion.

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0001)

EPA's poorly articulated proposal streamlines a program meant to fast-track dredge and fill operations even as wetland loss accelerates nationwide.[Footnote 1: U.S. Coastal Wetlands are Rapidly Disappearing. Her's What it'll Take to Save Them CLIMATE CENTRAL (Mar. 1, 2023) https://www.climatecentral.org/partnership-journalism/us-coastal-wetlands-are-rapidly-disappearing-heres-what-itll-take-to-save] This proposal is offered without any environmental safeguards or protections for imperiled wildlife and in written without important context that makes it near impossible to meaningfully comment. Allowing states to assume authority for wetlands permitting yields no environmental benefit and has historically complicated nationwide protection of wetlands. While some underleveraged States may struggle with implementation from a capacity standpoint, others have actively resisted meaningfully implementation of the Clean Water Act ("CWA"). For example, the State of Florida consistently applied a court-invalidated definition of "Waters of the United States" when identifying jurisdictional waters in Florida, with no meaningful recourse. Out of due diligence, we must note our opposition to every aspect of this pointless proposal and request that it be withdrawn immediately.

Agency Response: This rule carries out Congress' charge to enable Tribal and State assumption, pursuant to CWA section 404(g). The CWA also provides that Tribes and States that assume administration of section 404 permitting must be consistent with and no less stringent than the federal program. Implementation of particular existing State 404 programs is outside the scope of this rulemaking.

2.3 Requests for extension of the comment period

Alaska Mining Impacts Network (EPA-HQ-OW-2020-0276-0045-0005)

Finally, The current comment deadline is too short, and it should be extended. It took the EPA years of working closely with states to draft the rule. Sixty days are inadequate for organizations and concerned citizens to comment on 211 pages of dense regulatory text, legal analysis, and technical information. Rather than pushing forward with incomplete public engagement, EPA should take the time to ensure it has received input from all sectors to get these regulations right.

Agency Response: The APA requires agencies to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. 553(c). The APA does not specify a minimum number of days for accepting comments

on a proposed rule. The Agency complied with its obligation under the APA to provide a reasonable length of time for interested parties to comment on the proposed rule. EPA did not extend the original 60-day comment period, as EPA has provided ample opportunity for members of the public to consider and respond to the proposed rule. *See* Section III.B of the final rule preamble for further discussion on the rulemaking development process, including opportunities for public engagement and input. Moreover, a pre-publication version of the proposed rule was posted on the EPA's website, on July 19, 2023, which was 27 days prior to its publication in the *Federal Register* and opening of the public comment period.

Conservancy of Southwest Florida (EPA-HQ-OW-2020-0276-0047-0001)

On behalf of the Conservancy of Southwest Florida and our over 6,500 supporting families, we ask that the Environmental Protection Agency (EPA) extend the public comment period on the Proposed Clean Water Act Section 404 Program Regulations (EPA-HQ-OW-2020-0276). We support Earthjustice and the other organizations that made a request for an extension on August 18, 2023.

We agree with Earthjustice that it is in EPA's best interest to seek out as many comments as possible and ensure that the public has sufficient time to fully develop meaningful comments on all aspects of the proposed rule to ensure it adequately protects our nation's waters and wetlands. Additional time would mean that we and our partners could address any opportunities to improve how State assumed programs operate now and in the future.

These regulations would have widespread impacts on the protection of our nation's waters and wetlands. For the first time in thirty-five years, EPA is proposing new regulations that identify the procedures for State assumption of the Clean Water Act 404 program and set the minimum standards that States must meet to assume the 404 program.

In addition to this rulemaking, the public will also need to assess EPA's rule on the definition of waters of the United States ("WOTUS") during the same time period. Without an extension, the public will be tasked with analyzing two separate technical rulemakings under a limited period.

Wetlands and waters are vital habitat for threatened and endangered species, drinking water, water quality, natural floodwater attenuation, and so much more.

Please extend the comment period by thirty days. Thank you for considering our request.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0005.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0048-0001)

On behalf of the undersigned organizations, Earthjustice respectfully requests that the U.S. Environmental Protection Agency ("EPA") extend by thirty days the public comment period on the agency's Proposed Clean Water Act Section 404 Tribal and State Program Regulations (EPA-HQ-OW-2020-0276), 88 Fed. Reg. 55,276 (Aug. 13, 2023).

Earthjustice and the undersigned organizations request that EPA extend the comment period to allow the public time to provide more detailed comments on these regulations which would have widespread impacts on the protection of our nation's waters and wetlands.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0005.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0048-0002)

The regulations and preamble span fifty-five pages in the Federal Register representing 211 pages of dense regulatory text, legal analysis, and technical information, accompanied by thirty-eight separate supporting documents. It takes a substantial amount of time to review such a large amount of material and provide meaningful comments. Point in fact, it took EPA over five years to develop the proposed rule. To assume that the public will be able to read, interpret, understand, and fully respond to such an intricate and technical proposal in sixty days is unrealistic and chills public participation.

In addition to processing EPA's 404 rulemaking, the public will also need to assess the import of EPA's updated final rule on the definition of waters of the United States ("WOTUS"), which EPA intends to issue by September 1, 2023, [Footnote 1: Amendments to the 2023 Rule, EPA, https://www.epa.gov/wotus/amendments-2023-rule (last updated June 26, 2023).] well into the comment period for these regulations. The WOTUS rule has profound implications for the manner by which EPA proposes to define retained and assumable waters here. Without an extension, the public will be tasked with analyzing two separate technical rulemakings under a limited period.

It is in EPA's best interest to seek out as many comments as possible and ensure that the public has adequate time to fully develop meaningful comments. EPA has been working hand in glove with States on these proposed rules for five years. It has not provided the public with the same opportunity to engage with the agency. However, the public has the best perspective on the issues they have faced in States that have assumed the 404 program and in States with other delegated Clean Water Act programs. Earthjustice, for example, has extensive experience from extensive work over many years and cases representing tribes, environmental advocates, and environmental justice organizations, and is eager to provide thorough comments on all aspects of the proposed rule to ensure it adequately protects our nation's waters and wetlands. More time is necessary for us to ensure that we fully respond to all questions the agency poses and to address any opportunities to improve how State assumed programs operate now and in the future.

Further, extending the comment period by thirty days is unlikely to significantly affect EPA's ability to finalize these regulations in a timely manner. EPA is not under any deadline to act and has waited thirty-five years to propose the updates at hand. Rather than pushing forward with incomplete public engagement, EPA should take the time to get these regulations right.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0005.**

South Florida Wildlands Association (EPA-HQ-OW-2020-0276-0049-0001)

Unfortunately, the deadline for comments is mid-October.

I have to assume the recording will not be available until the comment period is over or nearly over. Is there a way for you folks to expedite the process so the full public can listen to the session during the comment period?

In light of this timeline, I request that the deadline be extended a month from the date the recording of the public session becomes available. Important information was shared from stakeholders during that session and the general public should be able to avail themselves of that information before submitting comments of their own. The comments provided information about the 404g process and its impacts that was not available in the documents shared by EPA.

Please let me know this this request is approved.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0005.**

Individual commenter (EPA-HQ-OW-2020-0276-0052-0002)

Finally, it is in the EPA's interest to reconsider extending the public comment period by an additional thirty days to ensure the public has adequate time to revisit the Federal Register and provide meaningful comments. Such actions are necessary due to the dense regulatory text and legal analysis that will take a substantial amount of time to comprehend. For instance, there are only six comments on such an important and comprehensive revision of the CWA Section 404 permitting program, and the comment period ends on October 13, 2023. In retrospect, I object to the EPA moving forward with the proposed rule due to incomplete public engagement and the need for more time to propose better regulations in line with environmental conservation.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0005.**

Buena Vista Rancheria of Me-Wuk Indians (EPA-HQ-OW-2020-0276-0053-0010)

BVR asks the EPA to extend the comment period and, during that extension, provide clarification via workshops and webinars to Tribes about how the new WOTUS definition is applied in this proposed rulemaking.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0005.**

Anonymous (EPA-HQ-OW-2020-0276-0075-0001)

I request that the EPA extend comment period for EPA-HQ-OW-2020-0276 by thirty days. It is in EPA's best interest to seek out as many comments as possible and ensure that the

public has sufficient time to fully develop meaningful comments on all aspects of the proposed rule to ensure it adequately protects our nation's waters and wetlands. It will also provide for additional time to assess how State assumed programs now operate or may operate in the future.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0005.**

South Carolina Environmental Law Project (SCELP) (EPA-HQ-OW-2020-0276-0081-0001)

The South Carolina Environmental Law Project (SCELP) respectfully requests that the Environmental Protection Agency (EPA) extend the public comment period for the proposed Clean Water Act Section 404 Tribal and State Program Regulation (Docket ID No. EPA–HQ– OW–2020–0276). Our reasoning for this request is largely the same as Earthjustice, the Conservancy of South Florida, and the other organizations that published comments seeking an extension of the comment period.

EPA's regulations regarding state and tribal assumption of administration of the section 404 program have not been comprehensively updated for nearly forty years. In EPA's public hearing presentation, the agency recognized that the current regulations are out of date and ill- equipped to address the requirements and procedures for assuming and administering a 404(g) program today. Accordingly, for the last five years, EPA has been working with states and tribes to determine where the 404(g) regulations (1) lack clarity, (2) create barriers for assuming and administering a program, and (3) fall short of fulfilling the statutory purposes behind the Clean Water Act. Coordinated efforts between EPA, the states, and tribes have made these updates to the section 404 program possible.

While the coordination between EPA, states, and tribes is recognized and appreciated, this process of updating the 404(g) regulations has been largely closed off to the public. This means that many stakeholders were not given an opportunity to share their perspectives, knowledge, or expertise on these new regulations until the public comment period opened on August 14, 2023. Unfortunately, a 60-day comment period is simply not long enough for the public to read, understand, and comment upon a legally and scientifically dense regulation program change. Not only do members of the public need to read the extensive proposed rule to understand the program change, but the public must also conceptualize these changes in the context of 43 supporting documents posted by EPA in the rulemaking docket. To do so effectively, more time in the comment period is needed.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0005.**

South Carolina Environmental Law Project (SCELP) (EPA-HQ-OW-2020-0276-0081-0002)

While this comprehensive update to the section 404 program is significant in its own right, this proposed regulation is all the more important given the Supreme Court's opinion in Sackett v. EPA issued earlier this year. In this decision, the Supreme Court redefined which water bodies and wetlands are entitled to protection under the Clean Water Act. In so doing, the Court "depart[ed] from the statutory text, from 45 years of consistent agency

practice, and from this Court's precedents." Sackett v. Envtl. Prot. Agency, 598 U.S., No. 21–454, slip op. at 69 (2023) (Kavanaugh, J., concurring in the judgment).

The result of this abrupt change in federal practice is that states and tribes will now have responsibility to protect the wetlands no longer covered by the Clean Water Act. This means that the section 404 program is going to be in higher demand by states than it ever has been before, so clear, comprehensive, and effective 404(g) regulations are also needed now more than ever before. EPA must receive input from the widest range of stakeholders and members of the public as possible in order to ensure that the new 404(g) regulatory scheme strikes the proper balance between assumption and oversight. The best way to ensure that most comments possible are received is to extend the comment period—which is especially appropriate in light of the stakes of this proposed rulemaking.

In sum, we hope that EPA will extend the comment period for this rule to allow more stakeholders and members of the public to have their voice heard at such a crucial time as this. Thank you for considering our request.

Agency Response: ***See*** **Section IV.A.2 and IV.A.3 of the final rule preamble regarding requirements to be consistent than and no less stringent than the requirements of the Act. The scope of a CWA section 404 program is limited to "waters of the United States" and while a Tribal or State program may have a broader scope, the Agency's oversight is limited to assumed waters consistent with CWA section 404(g)(1). Regulatory actions associated with the scope of waters of the United States is outside the scope of this rulemaking.**

See **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0005.**

Region 10 Tribal Operations Committee (RTOC) (EPA-HQ-OW-2020-0276-0084-0001)

Given the significance of wetlands and water resources generally for Tribes in Alaska, Washington, Idaho, and Oregon, we are very concerned about maintaining and improving the protections and oversight that Section 404 provides. We are particularly cognizant of the risk that State assumption of these programs may pose for Tribal sovereignty and input in permitting decisions. Given the significance of the matter relative to the length of the comment period, we request that EPA consider an extension of the comment period for 90-days, that EPA provide additional opportunities for Tribes to consult on the proposed rule, and that an additional webinar be conducted for tribal staff and consortia (such as the RTOC) specifically addressing the effect of State assumption on Tribal interests.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0005.**

Region 10 Tribal Operations Committee (RTOC) (EPA-HQ-OW-2020-0276-0084-0002)

The factsheet distributed by EPA, as well as the proposed rule's supplementary information, provides plenty of detail regarding the prospects for State or Tribal assumption of 404 programs, but these resources are much quieter about the effects that State assumption would have on Tribes. For nearly all Tribes, 404 program assumption will remain financially and administratively impractical, despite the proposed rule's

clarifications. However, additional States assuming 404 programs will have substantial effects on Tribes. Among the more significant issues that Tribes would not be made aware of through the factsheet and supplementary information alone is the loss of certain Federal environmental and cultural protections that rely on a federal nexus for their authority [Footnote 1: See Menominee Indian Tribe of Wisc. v. Environmental Protection Agency, 947 F.3d 1065, 1073 (7th Cir. 2020); 54 U.S.C. § 306108 (requiring Federal agency undertaking or issuance of any Federal license); 42 U.S.C. § 4332 (requiring "major Federal actions"); 16 U.S.C. § 1531 (limited to "all Federal departments and agencies," which can only "cooperate" with State and local agencies).]. This is particularly relevant for Alaska Natives, who cannot rely on the sovereignty protections inherent to reservation lands. The proposed rule leaves ambiguous whether Alaska Native Villages could qualify for the limited Treatment-as-a-State provision and such information would be necessary to informed Tribal input.

We believe that the extent and significance of the impacts from increased State assumption of 404 programs relative to the material discussed in EPA's materials for the proposed rule merits additional time for review and comment. It would also be useful for EPA to host a webinar specifically on the impacts of State assumption on Tribes and the Federal protections which might be threatened.

Agency Response: The final rule provides a number of ways Tribes can meaningfully engage with Tribal and State section 404 programs. The final rule directs that assuming States provide for judicial review of State-issued permits and that Tribes provide for a commensurate form of review. *See* Section IV.C.2 of the final rule preamble for further discussion. In addition, under the final rule, Tribes may request that EPA review permits that may affect Tribal rights or interests within or beyond reservation boundaries. Tribes also may receive notice and an opportunity to provide recommendations as an "affected State" for purposes of 40 CFR 233.31 either by already having status of treatment in a similar manner as a state (TAS) for any provision of the CWA or by specifically seeking TAS for the purpose of commenting on proposed permits to be issued by a state. *See* Section IV.F of the final rule preamble.

***See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0005 regarding the request for an extension to the public comment period.**

Region 10 Tribal Operations Committee (RTOC) (EPA-HQ-OW-2020-0276-0084-0003)

Another impediment to the consultation and coordination with Tribes regarding this proposed rule is the degree of maintenance of the Tribal Consultation Opportunities Tracking System ("TCOTS") page. Although the system is designed to keep Tribes informed of significant pending matters, the posted deadlines are often different from the actual deadlines. The TCOTS page for this issue stated the deadline for comment as September 17th. After that date, the page for this proposed rule was taken down. TCOTS has not informed Tribes of the current deadline for comments, nor is it informing Tribes of the issue at all since September 17th. An extension will allow more Tribes to become aware of the deadline, and to get better informed about the actual matter.

Wetlands, and water resources generally, are essential to many Tribes for cultural, economic, and spiritual reasons. Almost no activity has more potential for significantly affecting the economic and political integrity and the health and welfare of all Tribal people than water use, quality, and regulation.

Given the importance of the proposed rule and the issue of wetlands conservation to the health and welfare of Tribes, we believe the request for extension is reasonable.

Agency Response: EPA appreciates the feedback and regrets any miscommunication regarding tribal consultation opportunities on this rule and will seek to address this issue for future rulemakings. EPA posted and maintained information regarding this rule and the opportunity to provide public input on EPA's website and in the *Federal Register* throughout the public comment period. EPA communicated the opportunities and deadlines for public comment and Tribal consultation in letters to the Tribes, during the Tribal listening sessions, and the public hearing.

***See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0005 regarding the request for an extension to the public comment period.**

California State Water Resources Control Board (EPA-HQ-OW-2020-0276-TRANS-082423-003-0004)

Comment 4

One last follow up (suggestion, not question). Given any decisions about state assumption would be greatly affected about how EPA and the Corps will implement the Sackett Decision, I recommend EPA consider postponing end of the comment period until after greater clarity has been provided on Sackett.

Agency Response: *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0005 regarding the request for an extension to the public comment period.

On August 29, 2023, EPA and the U.S. Army Corps of Engineers issued a final rule that amends the "Revised Definition of 'Waters of the United States'" to conform key aspects of the regulatory text to the Supreme Court's May 25, 2023 *Sackett* decision. This rule was published in the *Federal Register* on September 8, 2023. 88FR 61964.

Earthjustice (EPA-HQ-OW-2020-0276-TRANS-092923-001-0001)

First, EPA does not engage with communities and advocates in developing this rule. Instead, they have focused primarily on how to make state assumption easier. The EPA spent years talking to states about 404 assumption and hearing what states are likely to be changed, they haven't done that with environmental groups and communities. They must hear from them now, but the current comment period is inadequate considering the hundreds of pages of dense regulatory checks, legal analysis, and supporting documentation in the record. Rather than pushing forward with incomplete public engagement, EPA must extend the comment period and make sure it gets this rule right.

Agency Response: This rulemaking is an update to, and clarification of the requirements Tribes and States must meet to assume and administer a CWA section

404 program. EPA appropriately sought Tribal and State input on the provisions which could benefit from additional clarity. *See* Section III of the final rule preamble for further discussion public engagement and outreach during this rulemaking effort.

***See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0005 regarding the request for an extension to the public comment period.**

Responsible Growth Management Coalition (EPA-HQ-OW-2020-0276-TRANS-092923-007-0008)

Number one, please extend the public comment period. There is a large amount of elaborate government policy information to wade through for the public to be able to adequately and cogently absorb and address, and the time allotted is woefully inadequate at present.

Agency Response: *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0005.

Conservancy of Southwest Florida (EPA-HQ-OW-2020-0276-TRANS-092923-012-0001)

"Hello, my name is Amber Crooks, with the Conservancy of Southwest Florida. We have a significant interest in this issue, and we'll be making our comments in writing. We would like to reiterate our recent request via letter to extend the comment period to allow for adequate time to comment. Thank you."

Agency Response: *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0045-0005.

2.4 Potential impacts on proposed changes on existing State section 404 programs

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0011)

Recently, Florida assumed Section 404 permitting authority. 85 Fed. Reg. 83553-83554 (Dec. 22, 2020). While Florida did enter into a programmatic agreement regarding impacts to cultural and historic properties with EPA and the Advisory Council on Historic Preservation (ACHP), no tribes were party to the programmatic agreement [Footnote 1: See https://floridadep.gov/sites/default/files/Programmatic_Agreement_-_12-16-20.pdf.]. Potentially impacted tribes with cultural resources in Florida voiced numerous concerns about state assumption, including: abdication of the federal trust and consultation responsibilities; lack of notification from the state on individual permits that may impact tribal resources; lack of clarity and notice with regard to procedures for protecting cultural or historic properties impacted by the issuance of general permits; lack of time for tribes to coordinate with and respond to state agencies throughout the permitting process; impacts to lands and waters over which there may be unresolved legal disputes; lack of state resources to adequately manage a Section 404 program; impacts to and implications for tribal traditional, cultural and statutory use rights; and concerns about all tribes being lumped together under the state's program, when tribes as individual sovereign governments have different legal rights and interests [Footnote 2: See, generally https://www.regulations.gov/document/EPA-HQ-OW-2018-0640-0606.].

Agency Response: **As the commenter notes, generally States lack authority to regulate activities on Indian lands and thus the Corps will continue to permit dredged and fill activities in Indian Country until such time as the Tribe assumes administration of the program. *See* Sections IV.B.1 and IV.B.2 of the final rule preamble for further discussion.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0017)

Florida's program follows the federal mitigation hierarchy, ensures that its program is "at least as stringent as the federal program, and [it] meet[s] or exceed[s] the requirements in the 404(b)1 guidelines" and took compensatory mitigation requirements under Subpart J into account throughout its assumption process [Footnote 13: See e.g., https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/state-404- program-frequently.]. Accordingly, Florida questions any suggestion that "[s]ubsequent to a review of the final rule, Michigan, New Jersey, or Florida may determine a program revision is necessary to ensure that any permits they issue will apply and ensure compliance with the substantive criteria for compensatory mitigation in subpart J." [Footnote 14: 88 Fed. Reg. 55,316.] If there are any specific issues that EPA may be considering, this should be raised with Florida as part of the 404 oversight process. Indeed, in its Economic Analysis, EPA even notes that mitigation is already considered and addressed during assumption approvals, and this codification would only have de minimis impacts on States as they develop their assumption request. [Footnote 15: EPA, Economic Assessment at 32, https://www.epa.gov/system/files/documents/2023-07/SAN%206682%20404g%20Proposal%20Economic%20Analysis_20230621_508c_QC4_1.pdf] Again, the critical point is that EPA should protect flexibility for state programs within the bounds of the CWA.

Agency Response: **When this final rule goes into effect, EPA will work with States implementing section 404 programs to ensure that those programs comply with regulatory requirements, pursuant to the existing regulatory process for program revisions. States will not need to revise their programs if they already comply with the rulemaking.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0028)

Contrary to EPA's representation, existing state programs do conflict with some of the agency's proposals here as to retained waters (including the process for modifying retained waters lists) and also conflict with federal law (the definition of retained waters). Once the agency finalizes a lawful rule on assumption, EPA must require that approved states modify their programs to come into compliance with federal law, and must evaluate those modifications through rulemaking, subject to notice and comment, under the Administrative Procedure Act and Clean Water Act.

Agency Response: **EPA agrees that where an approved section 404 program is inconsistent with the provisions of this final rule, the State must amend their program to be consistent with the final rule and seek EPA approval of the amended program.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0006)

Florida's unlawful 404 dredge and fill permitting program is a prime example of why Congress enacted the Clean Water Act as a federal backstop and the harm that can occur if EPA abdicates its responsibility to ensure that state programs comply with the Act's requirements before approving assumption. Several environmental organizations filed suit challenging EPA's approval, and the underlying actions by USFWS and the Corps, as unlawful [Footnote 50: Am. Complaint, Ctr. for Biological Diversity v. Regan, No. 21-CV-119 (RDM), ECF No. 77; Pls. M. Summary Judgment, Ctr. for Biological Diversity v. Regan, No. 21-CV-119 (RDM), ECF No. 98; Pls. Reply for M. Summary Judgment, Ctr. for Biological Diversity v. Regan, No. 21-CV-119 (RDM), ECF No. 104. See also Pls. M. Partial Summary Judgment, Ctr. for Biological Diversity v. Regan, No. 21-CV-119 (RDM), ECF No. 31; Pls. Reply for M. Partial Summary Judgment, Ctr. for Biological Diversity v. Regan, No. 21-CV-119 (RDM), ECF No. 43; Pls. Notice of Supp. Authority, Ctr. for Biological Diversity v. Regan, No. 21-CV-119 (RDM), ECF No. 59; Pls. Sur-Reply for M. Partial Summary Judgment, Ctr. for Biological Diversity v. Regan, No. 21-CV-119 (RDM), ECF No. 69; Ctr. for Biological Diversity v. Regan, 597 F. Supp. 3d 173 (D.D.C. 2022); Ctr. for Biological Diversity v. Regan, No. 21-119, 2023 WL 5437496 (D.D.C. Aug. 23, 2023). The Miccosukee Tribe of Indians of Florida also brought suit in the Southern District of Florida. See Pl. M. for Summary Judgment, Miccosukee Tribe of Indians of Fla. v. EPA, No. 1:22-CV-22459 (KMM), ECF No. 32.]

Agency Response: Litigation over EPA's approval of any specific State section 404 program is outside of the scope of this rulemaking.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0007)

While in litigation, Florida for more than a year and a half continued to apply the vacated and illegal Navigable Waters Protection Rule (NWPR) definition of waters of the United States to its 404 program, unlawfully limiting the scope of Clean Water Act permitting jurisdiction in Florida [Footnote 51: See Letter from Tania Galloni, Earthjustice, to Shawn Hamilton et al., Florida Department of Environmental Protection (FDEP) et al., Sept. 1, 2021; Letter from Tania Galloni Earthjustice, to Mark Wilson et al., Florida Chamber of Commerce et al., Feb. 16, 2022; Letter from Christina I. Reichert, Earthjustice, to Radhika Fox, EPA, Jan. 30, 2022; Letter from Daniel Blackman, EPA, to Emile D. Hamilton, FDEP, Dec. 9, 2021; see also Letter from Jeanneanne Gettle, EPA, to John Truitt, FDEP, Jan. 31, 2022; Letter from John Blevins, EPA, to Emile D. Hamilton, FDEP, Nov. 12, 2021; Letter from Jeanneanne Gettle, EPA, to Emile Hamilton, FDEP, Apr. 6, 2023; EPA Objection Letters Compilation.]. Vacatur of the illegal and under-protective NWPR restored the broader coverage of waterways under the Clean Water Act dictated by the pre-2015 jurisdictional rules, but Florida refused to follow federal law with considerable negative impacts for Florida's waterways and wetlands. This is precisely why EPA should not rush to facilitate state assumption without ensuring that state assumed programs will comply with the law.

Agency Response: Implementation of any specific State section 404 program is outside of the scope of this rulemaking. This rulemaking is intended to clarify assumption requirements to ensure that Tribal or State programs comply with the CWA.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0008)

EPA's approval of Florida's program sanctioned other deficiencies as well. For example, Florida claimed it could administer the program without any additional funding and failed to demonstrate adequate staffing or the requisite expertise to administer it [Footnote 52: See Pls. M. Summary Judgment, Ctr. for Biological Diversity v. Regan, No. 21-CV-119 (RDM), ECF No. 98.]. While the State has since recognized that administering 404 permitting is and must be resource-intensive, the State has continued to understaff and underfund the program, relying in many ways on entry-level staff who lack the training and expertise necessary to adequate administration [Footnote 53: Letter from Jeanneanne Gettle, EPA, to Emile Hamilton, FDEP, Apr. 6, 2023; Letter from Jeanneanne Gettle, EPA, to Emile Hamilton, FDEP, Apr. 6, 2023.]. The State has also failed to require the necessary supporting documentation for its decisions on whether a permit is required, hamstringing EPA's oversight, as well as documentation on compensatory mitigation and cumulative losses [Footnote 54: Id]. These concerns were brought to EPA's attention during public comment, but the agency approved Florida's program anyway.

Agency Response: Implementation of any specific State section 404 program is outside of the scope of this rulemaking. *See* Section IV.B.3 of the final rule for discussion on resource and staffing requirements for Tribal and State section 404 programs.

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-4-0002)

Congress enacted stringent 404 assumption requirements to ensure that federal protections are not undermined by states that lack the capacity, expertise, rigor, and/or stringency to administer 404 in compliance with federal standards. Congress further excluded waters used or capable of being used in interstate commerce, recognizing that a state may act adversely to the interests of communities in other states or the nation as a whole. Finally, to protect these important considerations, Congress granted EPA the authority to apply these protective measures and to decide whether to approve a state program, including after taking into account comments from other affected agencies.

Under the Trump administration, EPA actively created considerable workarounds and ignored requirements for state assumption in order to facilitate Florida's assumption of the 404 program. Those actions have undermined the Clean Water Act in that state, with tremendous negative consequences for the environment that will only compound over time. Further, Florida has proven itself unwilling to administer the program in accordance with the law.

This administration must not only rectify those errors in Florida, but also ensure that EPA's review of any state proposals to assume 404 jurisdiction reflects the high level of rigor and protection Congress intended. EPA cannot abdicate responsibilities to communities and ecosystems around the country in the name of "federalism", and should not be complicit in ill-advised state efforts to assume 404 jurisdiction.

Allowing other states to replicate the Florida model (or even the model that led to Michigan assuming the program given what is currently known about that state's administration of

it) would further undermine the Clean Water Act, to the detriment of the nation's waterways, including essential wetlands, and the tribes and tribal communities, along with protected species, that rely on them.

Agency Response: ***See*** **Sections IV.A through IV.E of the final rule preamble for discussion of the clarifications and provisions added to ensure programs are administered consistent with, and no less stringent than, the requirements of the CWA section 404 and its implementing regulations. Sections IV.A.2 and IV.A.3 of the final rule preamble, in particular, discuss the requirement that Tribal and State section 404 programs must be consistent than and no less stringent than the requirements of the Act and its implementing regulations. Implementation of any particular State section 404 program is outside of the scope of this rulemaking.**

National Association of Wetland Managers (NAWM) (EPA-HQ-OW-2020-0276-0072-0028)

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

NAWM is not aware of any significant burdens that the proposed rule changes will have on existing State 404 Programs. However, we will defer to those States to identify any impacts which the proposal may have on their programs and resources.

Agency Response: EPA acknowledges the comment.

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-0001)

Furthermore, at the time that we submitted these early-input comments, Kathie Brosemer (former NTWC at-large representative from the Sault Ste. Marie Tribe in Michigan) helped draft a section (starts on p. 4) that specifically called out the fundamental flaws in Michigan's assumption process that EPA is promoting, in one of the few (3) states that have §404 authority, and there is an actual track record of how that has impacted tribes. It does not appear that EPA's current "modification of procedures" does anything to meaningfully address or correct the very real problems experienced by the Michigan tribes we specifically flagged for EPA to consider. The Michigan tribes have seen degradation of tribally important resources and constraints around their abilities to address obvious adverse impacts from a poorly implemented state wetland regulatory program.

Agency Response: ***See*** **Section IV.F of the final rule preamble regarding opportunities for Tribes to raise concerns on permits that may adversely affect their waters or interests. Implementation of EPA's approval of any specific State section 404 program is outside of the scope of this rulemaking. EPA notes that States with assumed section 404 programs may implement additional State water quality protection programs that are not part of the approved section 404 program.**

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0006)

Michigan assumed responsibility for wetland dredge and fill permitting in 1984, the first of only two states to do so. A Memorandum of Agreement (MoA) between Michigan and EPA set out the responsibilities of the state and the federal government. The MoA was

revised in 2011, and at that time language was inserted that the state would consult affected tribes as well as neighboring states when making CWA § 404 permitting decisions.

Michigan has had issues with the No Less Stringent requirement, due to providing various exemptions from wetland permitting (for example for agricultural uses, agricultural drains, and road maintenance) that were not allowed under the federal rules. A detailed timeline of the development of Michigan's program and its struggles with compliance with federal law is found at http://www.fraserlawfirm.com/blog/2013/08/2013-public-act-98-significantly-changes- michigans-wetlands-protection-program/. The state has faced public scrutiny, internal investigation, and EPA communication about these issues since at least 1997. PA 98, passed into law in summer 2013, was an attempt to rectify these issues; however, it introduced 22 new inconsistencies with federal law (listed at the above website). To date there is no certainty in the regulated community about which wetlands fall under the provisions of the law, especially when farming activities are involved.

Most recently, State Rep. Tom Casperson introduced SB 1211 during the lame duck session of November 2018. If enacted it would gut wetlands protections by redefining what constitutes a protected wetland, excluding wetlands smaller than 10 acres and wetlands not adjacent to a navigable water. About half of the wetlands of Michigan, or about a half million acres, would suddenly not be protected if this bill becomes law. It seems certain that if this bill becomes law, that would be the "last straw" after more than 20 years of Michigan's noncompliance, and environmental organizations will petition EPA to withdraw Michigan's assumption of wetland regulation. The uncertainties created by Michigan's failure to comply with the law, its efforts to change the law outside of the regulatory process, and the likely ensuing litigation will only result in more delays for developers in the state.

Given the lengthy and protracted attempts by Michigan lawmakers (and in some cases state agency staff) to thwart the intent of CWA § 404, it is unclear why the EPA is looking to encourage other states to take on this authority. If other states follow Michigan's lead and behave in a similar manner, it would require significant staff and legal resources for EPA to monitor and manage this obstruction and live up to its duty to faithfully implement the law.

Agency Response: ***See*** **Sections IV.E.1 and IV.E.3 of the final rule preamble. Implementation of EPA's approval of any specific State section 404 program is outside of the scope of this rulemaking. EPA notes that States with assumed section 404 programs may implement additional State water quality protection programs that are not part of the approved section 404 program.**

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0007)

To provide more detail from a tribal perspective on Michigan's assumption of the CWA § 404 program, the experiences of eight Michigan tribes with state wetland permitting actions were collected through phone or in-person interviews. Tribes in both peninsulas are represented in the stories collected. All respondents were interested in providing this information and willing to share their tribe's experiences. Some referred to others within

the tribal government who knew more about the incident(s), but due to time limitations those others were not contacted.

Several recurring themes emerged. One recurring issue was surprising, and that is that Michigan routinely overstepped its authority by issuing permitting decisions on tribal trust lands and reservations. On these lands, state laws simply do not apply; rather, the Army Corps of Engineers (ACE) is the wetland dredge/fill permitting authority. Unfortunately, in some cases the tribal staff were unaware of this division in jurisdictional authority, and conceded to state permits because of the joint permitting process the Michigan Department of Environmental Quality (MDEQ) has in place with ACE.

The MDEQ/ACE joint permit process provides for a single application form for multiple purposes, including dredge/fill, installations of pilings, and similar activities. MDEQ and ACE share a single application and the attachments filed with it, and this procedure, when applied routinely and regularly for hundreds of applicants from across the state, creates a process flow routine that is difficult to modify for the few permit applications for which ACE retains authority, such as on tribal lands. Examples of the jurisdictional problem that has arisen, perhaps as a result of this process, include:

- An exploration geologist built a road through a wetland on tribal trust land, in the mid-2000s, which MDEQ approved.

- Restoration work on the Lake Superior shoreline required a "joint permit" which involved MDEQ and ACE discussions of where each has jurisdiction, around a high water mark, but this was on reservation land.

- A recent letter from ACE to MDEQ, informing them of federal jurisdiction for environmental law on tribal trust land, surprised tribal staff because of the implication that MDEQ did not already know this.

Other experiences included cases of MDEQ asserting authority over permitting in wetlands immediately adjacent to a Great Lake, which is also subject to ACE jurisdiction.

- A tribal fee land proposal to redevelop a fishing harbor faced a year's delay over MDEQ's asserted permitting of minor wetland fill (to slightly widen an access road) in coastal wetland adjacent to Lake Michigan.

- A proposal from a pipeline company to lay mats in a wetland adjacent to Lake Michigan to stage its geotechnical studies at the Straits, has been permitted by MDEQ.

<u>Agency Response:</u> EPA acknowledges this comment and refers the commenter to Sections IV.B.1, IV.B.2, and IV.F of the final rule preamble for further discussion regarding CWA section 404 permitting in Indian country, waters to be retained by the Corps for purposes of CWA section 404 permits, and coordination and commenting procedures for permits that may affect Tribal waters or interests.

Implementation of any specific State section 404 program is outside of the scope of this rulemaking.

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0008)

Several tribes related numerous instances of MDEQ permitting wetland destruction in ceded territories without consideration of impacts on treaty-retained rights to hunt, fish, and gather in those areas. Wetlands are a significant ecotype with great importance for tribal lifeways, including being one of the most important sources for medicinal plants and the only source of wild rice. Destruction of wetlands within ceded territories harms tribes' access to these plants, is in violation of treaties with the United States, and is in essence a form of genocide. Treaty-retained rights are part and parcel of the treaty terms with the federal government, and state law does not supersede them.

Finally, tribes reported several instances when MDEQ wetland permitting processes prevented a tribe from carrying out important conservation initiatives.

- A wild rice lake in ceded territory had nontribal lakeshore residents wanting to treat wild rice with herbicides to remove an impediment to motor boating. The state approved this herbicide treatment. The tribe offered to relocate the wild rice to another appropriate waterway before the herbicide was applied, but the wetland permit process that MDEQ required of them was so onerous it introduced significant delays, and the herbicide treatment was carried out in the meantime. Wild rice is a culturally significant traditional and subsistence resource that is dramatically diminished from its historic range, and its restoration is a critical conservation initiative for many tribes. To have a state environmental law impede a tribal conservation initiative that was made necessary by the approvals given under a different state environmental law is outrageous. This violates the spirit of every conservation rule ever enacted.

- A brownfield restoration within a wetland in ceded territory resulted in removal of contaminated soil and subsequent fencing to protect a portion of the wetland. Subsequent efforts to control invasive species in the area were thwarted by lack of access to the fenced-in area due to institutional controls placed on the site. That area became a continuous vector of seed and rhizomes from invasive plants to the region, as MDEQ would not allow tribal staff to enter and control those plants.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0074-SD-0007.**

State of Alaska Department of Environmental Conservation (EPA-HQ-OW-2020-0276-0079-0023)

G. Comments Related to Potential Impacts of the Proposed Regulatory Changes on Existing State Section 404 Programs (Judicial Review, Compensatory Mitigation, Five-Year Permits and Long-Term Projects, Program Scope, Conflict of Interest)

This section is likely impactful to the States that have already assumed, and may jeopardize retention of their programs. Alaska urges EPA to pay particular attention to comments on

this section from the States who have already assumed the program (New Jersey, Michigan, and Florida), and to any comments or input from Nebraska and other States actively seeking assumption. They are in a unique position to opine on this section and their comments should receive extra weight.

Agency Response: EPA has considered all comments received.

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0016)

EPA is proposing a variety of provisions related to judicial review and fee-shifting aimed at increasing court access and ensuring proper participation. EPA notes that its proposal – if finalized – may affect existing State-assumed programs and require modifications of permitting procedures. EPA specifically notes that a state requiring revisions would need to submit a program revision in accordance with 40 CFR 233.16. EPA also provides specific time periods for out-of-compliance states to make such revisions, including a two-year period if the changes require legislation.

Only three states – Florida, Michigan, and New Jersey – have assumed authority over 404 programs. EPA notes that states should anticipate a need to revise their programs, but statements indicate that the agency itself has not decided whether either of the three states are out-of-sync with its proposed guidelines. However, it is abundantly clear that Florida does not meet these guidelines. At a minimum, Florida's provisions on fee-shifting and standing differ from what EPA proposes, which presumably would require revocation.

Under EPA's proposal, a state does not "provide for, encourage, and assist" public participation in the permitting process if State law or regulation requires that attorneys' fees must be imposed in favor of any prevailing party and against the losing party, notwithstanding the good faith or merit of the litigant's position.[Footnote 51: Id. at 82] This fee-shifting provision forms a barrier to court access for litigants unable to risk an adverse fee award, no matter the strength of their case.

Florida's state program conflicts with federal law and this proposal by incorporating a mandatory fee-shifting provision that has no analog under the Clean Water Act and discourages or precludes under-resourced individuals and organizations from seeking to vindicate their rights.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble for discussion regarding judicial review requirements. Implementation of any specific State section 404 program is outside of the scope of this rulemaking.**

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0017)

EPA also notes that "narrow standing restrictions" are an additional deficiency that would presumably require program revocation. A state does not "provide for, encourage, and assist" public participation if it narrowly restricts the class of persons who may challenge a permit. EPA also requests specific comment on whether to explicitly state that limits to associational standing would run afoul of the proposed provisions.[Footnote 52: Id. at 85]

Florida's state program conflicts with federal law and this proposal by imposing barriers for prospective plaintiffs who seek to enforce water protection laws via a heightened burden to prove standing in state court. For example, under Florida's program, only a "citizen of the state" could maintain an enforcement action, and at least one Florida court has found that a foreign corporation would not quality as a citizen of the State, even when they hold a valid certificate of authority to operate in the State.[Footnote 53: Fla. Stat. § 403.412; Legal Env't Assistance Found. v. FDEP, 702 So.2d 1352, 1353 (Fla. 1st Dist. Ct. App. 1997). See Mcclash v. Manasota-88, Inc., No. 14-4735, 2015 WL 3966050, at *8 (Fla. Div. Admin. Hearings June 25, 2015) ("Sierra Club is not a citizen of the state; it is a foreign nonprofit corporation.")] Federal law, by contrast, authorizes citizen suits under the Clean Water Act by "any citizen" (i.e., "a person or persons having an interest which is or may be adversely affected").[Footnote 54: 33 U.S.C. § 1365(a), (g).]

It is clear that Florida's administration of the 404 programs violate the EPA's proposed guidance, and if finalized, the EPA must work to revoke delegation if changes are not made.

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble for discussion regarding judicial review requirements. Implementation of any specific State section 404 program is outside of the scope of this rulemaking.**

Earthjustice (EPA-HQ-OW-2020-0276-TRANS-092923-001-0002)

Under the Trump Administration, EPA green lit considerable workarounds to federal laws to facilitate Florida's assumption of the 404 program. The EPA is proposing to adopt many of these workarounds, including reversing the Corps' position on retained waters, undermining the requirements for state criminal enforcement standards, and putting threatened and endangered species at risk. Those actions have undermined the Clean Water Act in Florida, as well as public confidence in the process. This has led to tremendous environmental damage, which will only compound in the future. And Florida has proven itself unwilling to administer the program in accordance with the law, it has also highlighted the fact that EPA oversight does not remedy an inadequate state program. Rather than focusing solely on allowing more states to assume the goal for program, EPA should be taking this opportunity to fix the problems so that waters, wetlands, and protected species receive the protections required by law.

Agency Response: This final rule clarifies the requirements to assume and administer a Tribal or State CWA section 404 program. Implementation of EPA's approval of any specific State section 404 program is outside of the scope of this rulemaking.

Sierra Club (EPA-HQ-OW-2020-0276-TRANS-092923-003-0001)

You may have heard about Hurricane Ian, and recently, to the credit of our county commissioners in Lee, a project was denied which would have otherwise gone forward even under 404 regulations in the state because people realized how the coastal wetlands protected their homes and properties. We've got a lot of competing factors going on right now regarding sea level rise, storm surge, atmospheric rivers, very slow-moving hurricanes, wetlands have never been more important. I do appreciate the extent to which EPA is firming up some of the rules for the state and Tribal assumption of the 404

programs, and I hope it will accomplish the goals that speakers Christina and Becky before me mentioned were often overlooked when states assume, especially the State of Florida. We have seen some, some horrible moments of Florida not being able to manage the program. A lot of rubber stamping of projects going through without EPA and Corps guidance. So, I'm just speaking at a very high level. Hoping that EPA will maintain control to the extent that the state would otherwise refuse not to, to protect these wetlands, protect these cushions, these sponges for nutrients and other pollutants, for controlling coastal water quality. As many years as the Everglades Restoration Program has been going on, we haven't seen improved coastal water quality. Our coral reefs are dying. We've got algae instead of sea grass. Even our springs at this point are suffering from nutrient overloads. Wetlands could never be more important, and I do appreciate EPA's intent to help us to protect them in perpetuity.

Agency Response: This final rule clarifies the requirements to assume and administer a Tribal or State CWA section 404 program and to ensure that permits issued comply with the CWA and the environmental review criteria in the 404(b)(1) Guidelines.

Sierra Club (EPA-HQ-OW-2020-0276-TRANS-092923-004-0001)

EPA's proposed rules do not go nearly far enough to fix the huge, and wetland-killing problems with Florida's 404 state assumption. What is being proposed does in fact eliminate the so-called barriers, I mean protections, in order to facilitate assumptions by irresponsible states at the expense of our diminishing wetlands, our suffering waters. We are beyond disappointed the EPA has not engaged with the most impacted, marginalized communities, and their advocates. While it may appease concerns of high-level state government officials, you know, some of which are appointed by industry-friendly politicians, it utterly fails in addressing many of the concerns of marginalized and front-line communities that are hardly ever the concern of for-profit, big corporations. There is no environmental justice to those in our communities that have been promised so much by this current EPA administration. We have severe wetlands and water problems in Florida, and some of them can be seen in the tears that run down our cheeks, in the carcass of dead fish, in the orphaned manatees starving to death.

Agency Response: ***See*** **Sections III.B and IV.A.2 of the final rule preamble. Implementation of any specific State section 404 program is outside of the scope of this rulemaking.**

Sierra Club (EPA-HQ-OW-2020-0276-TRANS-092923-004-0002)

We're so disheartened that EPA will propose to weaken protections for wetlands and waters in the name of so-called facilitating processes for the states, including EPA's proposal on what's retained and assumed in on state's criminal enforcement standards. Given the latest Supreme Court decision in EPA's associated, you know waters ruling, it is even more important. Factoring that during the Trump Administration we were gaslighted. Water advocates were gaslighted with considerable workarounds that were done by EPA to facilitate the assumption. The proposed changes, honestly, feel like a spit to the efforts to restore the Everglades. Our wetlands are our first line of defense against flooding nutrient pollution.

Agency Response: **This final rule clarifies the requirements to assume and administer a Tribal or State CWA section 404 program and to ensure that permits issued comply with the CWA and the environmental review criteria in the 404(b)(1) Guidelines.**

Sierra Club (EPA-HQ-OW-2020-0276-TRANS-092923-004-0003)

And we are very tired of running out of our precious waters, of the tears running down our cheeks, for tons of dead fish, dolphins, birds, turtles, and even manatees, our gentle mermaids. In Florida, we're in a race against time to defend and restore our wetlands and water. There's absolutely no reason for an EPA that cares and made so many promises. Do not make such further changes and improve this program.

Agency Response: **This final rule clarifies the requirements to assume and administer a Tribal or State CWA section 404 program and to ensure that permits issued comply with the CWA and the environmental review criteria in the 404(b)(1) Guidelines. Implementation of any specific State section 404 program is outside of the scope of this rulemaking.**

Responsible Growth Management Coalition (EPA-HQ-OW-2020-0276-TRANS-092923-007-0005)

You know, we are just desecrating and decimating wetlands right and left because this particular state administration, both at the gubernatorial level and at the legislative level, are business and developer centric.

Agency Response: **Implementation of any specific State section 404 program is outside of the scope of this rulemaking.**

Responsible Growth Management Coalition (EPA-HQ-OW-2020-0276-TRANS-092923-007-0006)

So, we now more than ever, we need a really strong state assumption rules, especially with regard to protection of endangered species and especially with regard to protection of intermittent wetlands and wetlands that don't fall under the Sackett ruling. I mean, we are a state full of wetlands like that, because you know, our wetlands have been ditched, diked, dammed, and diverted. So, wetlands that used to be connected to navigable waters or waters that you know, that ran into larger bodies of water, that doesn't exist anymore, but these wetlands are still vital to cleaning our water and maintaining habitat.

Agency Response: **This final rule clarifies the requirements to assume and administer a Tribal or State CWA section 404 program and to ensure that permits issued comply with the CWA and the environmental review criteria in the 404(b)(1) Guidelines.**

South Florida Wildlands Association (EPA-HQ-OW-2020-0276-TRANS-092923-010-0001)

I'm going to go right into some of the problems we've seen because, as people know, the transfer happened in Florida in 2020. I would say in a nutshell it's been a horrible experience and an unmitigated disaster, even before the Sackett decision came up, and we're still kind of waiting to see how that exactly plays out, we had already lost lots of protection due to the transfer.

Agency Response: **Implementation of any specific State section 404 program is outside of the scope of this rulemaking.**

South Florida Wildlands Association (EPA-HQ-OW-2020-0276-TRANS-092923-010-0002)

In 2022, we obtained some of the records of applications that had come into two of the Florida counties, Collier and Lee counties. Just since 2020, we've got 733 wetland applications that came into Collier, 631 came into Lee County, and 333 in Collier, 174 in Lee had already been approved. Hundreds received exemptions, or what was called no permit required letters. These things were just sailing through. I kind of described this as candy canes in Christmas for the developers. The developers specifically said they wanted a streamlined procedure, and that's what they got. They got a streamlined procedure. It was cheaper for them. It was easier for them. It was faster for them, and they could go right into construction. And that was the purpose of that transfer, that the EPA gave into that was sort of unbelievable to us and I remember being at one of these meetings before the transfer took place saying the same things I'm going to say today. Aside from the publicly owned lands, the federal lands and state lands, which are a big chunk of South Florida, the big bulk of the lands that support the wildlife in South Florida predominantly, southwest Florida, the western Everglades, what we also call the Amazon of North America, are privately owned lands, they're ranches, farms, rural properties.

Agency Response: **Implementation of any specific State section 404 program is outside of the scope of this rulemaking.**

2.5 Other general comments on the proposed rule

Individual commenter (EPA-HQ-OW-2020-0276-0058-0002)

Any changes to the regulations must account for a State's or Tribe's financial ability to run the 404 program, will continue to consult the public and tribes, have similar transparency to the EPA and ACoE, and ensure all obligations and laws will be followed.

Agency Response: ***See*** **Section IV.B.3 of the final rule preamble for discussion of the requirements regarding funding and staffing for assumption and administration of a Tribal or State 404 program.** ***See*** **also Section IV.B.3 of the final rule preamble for discussion of Tribal and State section 404 program compliance with the section 404(b)(1) Guidelines.**

Tulalip Tribes at Quil Ceda Village (EPA-HQ-OW-2020-0276-TRANS-083023-002-0001)

Comment 1

A fourth attendee requested through the chat the full title of the proposed rule and a link to it. She also sent through the chat the link to the main cwa404g website.

Agency Response: **The following link to the main CWA section 404 State and Tribal Programs web page was provided.**

Tulalip Tribes at Quil Ceda Village (EPA-HQ-OW-2020-0276-TRANS-083023-002-0003)

COMMENT 3

The attendee said that a written comment may better illustrate the problem as she sees it.

Agency Response: EPA encouraged submittal of written comments to the docket for this rulemaking.

2.6 Other comments on permit requirements

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0015)

- EPA Rules Must Ensure Advance Public Information, Notice, and Comment Equivalent to NEPA.

Sixth, an important guarantee for tribes and all citizens in the 404 permitting by the Corps is that NEPA requires full public disclosure of information about environmental impacts and a full discussion of less-environmentally damaging alternatives, mitigation options, and environmental justice and tribal resources impacts, with an opportunity for the public to submit comments and information, prior to issuance of a proposed permit. This allows the permitting agency and public to fully understand a project's implications and ways to avoid environmental and tribal resource harms. Those important public, community, and environmental protections should not be lost or degraded simply because a state, as opposed the Corps, is issuing the 404 permit. Many states have a state-based version of NEPA, but other states do not (e.g. Oregon and Alaska). Even when a state has a version of NEPA protections, those protections and implementation of the statute can vary widely state by state.

EPA's rules should provide that for states without their own NEPA-equivalent environmental review protections, the state assumption application package submitted to EPA must provide for NEPA-equivalent protections (or better) within 404 permitting, for full disclosure of information regarding all environmental impacts and alternatives, mitigation analysis, and environmental justice and tribal resources impacts with full advance opportunity for public comment, before a proposed permit is issued. Without these equivalent protections, a state's permitting program will not provide the same level of environmental and public process protection as the Clean Water Act and therefore the state's assumption of the permitting program should be denied.

Agency Response: This rule is intended to implement CWA requirements for program assumption. Establishing a NEPA-like process at the Tribal or State level is outside of the scope of this rulemaking, but EPA recognizes that some Tribes and States may have similar processes. Additionally, while the processes in NEPA only apply to federal actions, the 404(b)(1) Guidelines ensure a comprehensive consideration of impacts to aquatic features, and of alternatives. By ensuring that Tribes and States are able to comply with these Guidelines, EPA can achieve many of the goals of disclosure and analysis of environmental impacts and alternatives that the commenter identifies. *See* Section IV.A.2 of the final rule preamble for a discussion of Tribal and State section 404 program compliance with the 404(b)(1) Guidelines and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0068-0002.

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0005)

For NEPA protections, as EPA is aware, not all states have their own version of NEPA (and even where a state does have a state-level NEPA statute, state application and enforcement of its requirements is inconsistent) [Footnote 3: According to the Council on Environmental Quality, only 16 states (plus District of Columbia and Puerto Rico) have their own NEPA-type statutes: https://ceq.doe.gov/laws- regulations/states.html.]. An important tool for tribes (and all citizens) to protect their interests and concerns is through the public notice, comment, and full information and analysis under NEPA. Where a state does not have equivalent NEPA public engagement and information protections (as in Florida, Oregon, Nebraska, or Alaska), delegation of section 404 permitting to that state will degrade the rights of tribes and others to obtain full notice, information, and ability to participate in the process of shaping a project such that a state's decisions protect tribes' rights and minimizes harm to the environment. The inconsistent state laws and implementation will also, absent EPA regulation as proposed below, create a patchwork of protections and inconsistencies in permitting across the U.S., depending upon which state a tribe or citizen is lucky (or unlucky) enough to be in. A consistent set of requirements from EPA regarding assumption will help alleviate those inconsistencies and increase protections.

Agency Response: This rule is intended to implement CWA requirements for program assumption. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0068-SD-3-0015.

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0013)

- "Joint" permitting processes such as the MDEQ/ACE process muddy the waters regarding proper jurisdiction. The officials involved become accustomed to their customary practices and neglect to adjust them for different circumstances. In future assumptions of authority, tribes strongly recommend against such joint permitting processes to avoid inappropriate treatment of tribal lands and waters.

Agency Response: *See* Section IV.A.2 of the final rule preamble for a discussion of ensuring Tribal engagement in the section 404 permitting process.

3. General comments on Tribal or State assumption

3.1 General support for Tribal or State assumption

State of Utah, Public Lands Policy Coordinating Office (EPA-HQ-OW-2020-0276-0056-0002)

Assuming adequate staffing and funding, state agencies are in the best position to make management decisions as it relates to waters within the state. This is due to the state agencies' proximity to and persistent work in the waters within the state's borders. Nobody understands the water situation in Utah better than our state employees tasked with managing the resource. Utah's Division of Water Quality does an excellent job of safeguarding and improving Utah's water through balanced regulation.

Agency Response: **EPA acknowledges this comment and believes the final rule provides flexibility for Tribes or States to administer a program consistent with the Act while meeting their individual resource needs.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0001)

Reflecting the Constitution's recognition of the preeminent role of state governments in most areas of law and policy,[Footnote 1: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.] Congress expressly preserved for States the "primary responsibilities and rights" to address water resources pollution, stating: "It is the policy of Congress that the States . . . implement the permit programs under section [404 of the CWA]." 33 U.S.C. § 1251(b). To that end, Section 404 invites States to seek EPA's approval to administer state-level permit programs in place of the federal permit program. Id. §§ 1342(b), 1344(g). Over 40 States have obtained approval to administer state programs under Section 402 of the CWA, while only three States—Michigan, New Jersey, and most recently, Florida—have assumed responsibility for administering their own Section 404 programs. Clearly, there is a need to better facilitate and support state 404 assumption.

While Section 404 assumption reflects the CWA's cooperative federalism framework and promotes the shared responsibility of state and federal agencies in conservation of water resources, the implementation of the 404 program has not yet achieved Congress's original vision for how this program would operate. More can and should be done to help facilitate state 404 assumption in a manner consistent with the plain text of the Act. For that reason, Florida appreciates EPA's attention to this important issue.

Agency Response: **EPA acknowledges the commenter's support for aspects of this rulemaking.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0002)

Accordingly, Florida supports efforts to streamline assumption of the 404 program and promote cooperative federalism. As demonstrated by Florida's successful implementation of the 404 program, state assumed programs can streamline the 404 permitting procedures and offer opportunities for faster permit processing time, development of state-specific general permits, reduced duplication of application materials, increased consistency in permit decisions, application of local knowledge, and a single point of contact for permitting decisions.

Agency Response: **EPA acknowledges the commenter's support for aspects of this rulemaking.**

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0001)

The NTWC embraces Congress' delegation to tribes to develop and implement CWA programs for their reservations. CWA § 518(e), 33 U.S.C. § 1377(e); 81 Fed. Reg. 30183 (2016) (EPA Revised Interpretation of Clean Water Act Tribal Provision). There is no doubt that tribes, the aboriginal managers of their waters, are the ones most familiar with their aquatic resources, issues and needs. EPA's support for tribal assumption of the CWA

§ 404 dredge and fill permit program addresses one aspect of this congressional delegation and is welcomed by NTWC.

Agency Response: EPA acknowledges the commenter's support for aspects of this rulemaking.

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0002)

A tribally run CWA § 404 program can reduce delays and save money for permit applicants. It can allow the tribe to streamline the process, reduce unnecessary paperwork and, by providing opportunities for early input and discussion, avoid potential conflicts between tribes, states and the federal government regarding permit decisions. More importantly, it puts the tribe in charge of protecting its own valued aquatic ecosystems as well as the traditional services that those systems provide. Tribes also having the most knowledge about their own water resources, are better able than the federal government to foresee potential adverse effects from a proposed dredge and fill project and to propose mitigation measures. The current permit process does not afford tribes adequate review and does not provide compensation adequate for loss or for mitigation efforts. It also often does nothing more than identify concerns with a proposed permit, without actually resolving them. For these reasons, if the need for resources were not a consideration, many tribes would be interested in developing their own CWA § 404 programs.

Agency Response: EPA acknowledges the comment and the resource limitations faced by many Tribes.

National Association of Home Builders (NAHB) (EPA-HQ-OW-2020-0276-0077-0002)

State assumption can provide many benefits, including increased program efficiency, improved integration with other state resources programs and increased regulatory program stability [Footnote 5: Association of State Wetland Managers. Nov. 2010. "Clean Water Act Section 404 State Assumption." Available at https://www.aswm.org/pdf_lib/cwa_section_404_state_assumption_factsheets.pdf (October 19, 2020).].

Agency Response: EPA acknowledges the comment.

Great Lakes Indian Fish and Wildlife Commission (EPA-HQ-OW-2020-0276-0080-0001)

GLIFWC's governing Board of Commissioners (Board) consistently supports laws and policies that provide for the protection and restoration of water resources. The Board also supports tribal assertions of regulatory authority over reservation lands and waters, including assumption of various programs under the Clean Water Act, including Section 404. A number of GLIFWC's member tribes have assumed "treatment as a state" status under the Clean Water Act, have adopted water quality standards, and issue certifications pursuant to Section 401.

Agency Response: EPA acknowledges the comment.

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0001)

The NTWC embraces Congress' delegation to tribes to develop and implement CWA programs for their reservations. CWA § 518(e), 33 U.S.C. § 1377(e); 81 Fed. Reg. 30183 (2016) (EPA Revised Interpretation of Clean Water Act Tribal Provision). There is no doubt that tribes, the aboriginal managers of their waters, are the ones most familiar with their aquatic resources, issues and needs. EPA's support for tribal assumption of the CWA § 404 dredge and fill permit program addresses one aspect of this congressional delegation and is welcomed by NTWC.

Agency Response: EPA acknowledges the commenter's support for this rulemaking.

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0002)

A tribally run CWA § 404 program can reduce delays and save money for permit applicants. It can allow the tribe to streamline the process, reduce unnecessary paperwork and, by providing opportunities for early input and discussion, avoid potential conflicts between tribes, states and the federal government regarding permit decisions. More importantly it puts the tribe in charge of protecting its own valued aquatic ecosystems as well as the traditional services that those systems provide. Tribes also having the most knowledge about their own water resources, are better able than the federal government to foresee potential adverse effects from a proposed dredge and fill project and to propose mitigation measures. The current permit process does not afford tribes adequate review and does not provide compensation adequate for loss or for mitigation efforts. It also often does nothing more than identify concerns with a proposed permit, without actually resolving them. For these reasons, if the need for resources were not a consideration, many tribes would be interested in developing their own CWA § 404 programs.

Agency Response: EPA acknowledges this comment.

3.2 General opposition for Tribal or State assumption

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0003)

In addition, a Corps-issued Section 404 permit includes substantive and procedural protections under the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the National Historic Preservation Act (NHPA). When a state assumes the responsibility to approve or deny dredge and fill permits then there is no federal action to trigger these federal laws and their implementing regulations. See Menominee Indian Tribe of Wisconsin v. EPA, 947 F.3d 1065, 1068 (7th Cir. 2020).

Agency Response: EPA acknowledges this comment.

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0004)

A state agency reviewing a Section 404 permit application need not act in the best interests of an affected tribe, or even to identify tribes whose interests may be affected. And while many states have adopted tribal consultation policies, the Alaska legislature only recognized tribes as governments last year and typically fails to engage in government-to-government consultation with tribes.

Agency Response: **EPA acknowledges this comment. *See* Section IV.F of the final rule preamble for discussion regarding opportunities for Tribes to engage in section 404 permits issued by Tribes and States.**

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0001)

The RTOC and NTWC are primarily concerned about the level of protections for Tribal water resources being compromised through State adoption of CWA section 404 programs. Because State adoption may exempt the administering agency from Federal obligations, such as consultation with Tribes, the National Historic Preservation Act, or the National Environmental Policy Act, facilitating more State 404 programs could compromise Tribal protections.

Agency Response: ***See*** **Sections IV.A.2, IV.A.3 and IV.F of the final rule preamble for discussion regarding statutory consultation requirements and opportunities for Tribes to engage in the section 404 permitting process following Tribal or State assumption.**

Great Lakes Indian Fish and Wildlife Commission (EPA-HQ-OW-2020-0276-0080-0003)

The Army Corps' issuance of a permit to discharge dredged or fill material into waters of the United States under CWA Section 404 is a federal action that affords potentially affected tribes the right to consultation. In addition, a Corps-issued Section 404 permit includes substantive and procedural protections under the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the National Historic Preservation Act (NHPA). When a state assumes the responsibility to approve or deny dredge and fill permits then there is no federal action to trigger these federal regulatory processes. *See Menominee Indian Tribe of Wisconsin v. EPA*, 947 F.3d 1065, 1068 (7th Cir. 2020).

More specifically, a state agency reviewing a Section 404 permit application is not obligated to act in the best interests of an affected tribe. While its actions may be constrained by the existence of a court-affirmed treaty right, it is not the treaty signatory and does not hold tribal trust responsibilities. While the states in which GLIFWC operates have adopted tribal consultation policies, consultation does not guarantee that the outcome of that process will protect treaty resources.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0070-0001. Nothing in this rulemaking affects EPA's obligations to protect Tribal treaty rights.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0011)

In addition, a Corps-issued Section 404 permit includes substantive and procedural protections under the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the National Historic Preservation Act (NHPA). When a state assumes the responsibility to approve or deny dredge and fill permits then there is no federal action to trigger these

federal laws and their implementing regulations. See Menominee Indian Tribe of Wisconsin v. EPA, 947 F.3d 1065, 1068 (7th Cir. 2020).

A state agency reviewing a Section 404 permit application need not act in the best interests of an affected Tribe, or even to identify Tribes whose interests may be affected.

Agency Response: ***See*** **Sections IV.A.2 and IV.A.3 of the final rule preamble for discussion regarding consistency with other Acts.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0003)

States have struggled to implement (and there are those like Alaska that actively resist) their Clean Water Act responsibilities to set standards, assess water quality, and issue and enforce permits to limit pollutants. These struggles are only compounded when programs such as Section 402 and 404 are assumed by states. With the federal government, the public has the opportunity to comment and participate in the process of promulgating regulations and rules, being able to raise concerns about what may be an oversight in the process. Those opportunities are largely lost with a state like Alaska, which, for example, lacks a parallel state environmental policy act.

Agency Response: ***See*** **Sections IV.B.2, IV.C.1, IV.C.2, IV.E.2, and IV.F of the final rule preamble and 40 CFR 233 subparts C through E of the regulations regarding opportunities for public comment regarding Tribal and State section 404 permits.**

Earthjustice (EPA-HQ-OW-2020-0276-TRANS-092923-001-0003)

EPA must ensure that it holds the line and protects our Nation's waters and wetlands. The act exists because states were not properly protecting their waterways. Congress enacted stringent workforce assumption requirements to make sure that federal protections were not undermined by states that lack the capacity, the expertise, and the rigor to administer 404 and compliance of federal standards. An inadequate 404 Assumption rule will take us backward. EPA cannot abdicate its responsibilities to communities and ecosystems around the country in the name of federalism. It should not be complicit in ill-advised state efforts to assume the 404 program.

Agency Response: EPA acknowledges the comment and agrees Tribes and States must meet and maintain the minimum requirements set out by the Act and regulations to assume and administer a section 404 program. ***See*** **Section IV.A.3 of the final rule preamble for further discussion.**

Responsible Growth Management Coalition (EPA-HQ-OW-2020-0276-TRANS-092923-007-0009)

Number two, hopefully you can find it in your budget to visit states like Florida and Alaska that have critical issues centering on wetlands protections, or lack thereof, and endangered species protections and lack thereof.

Agency Response: EPA acknowledges the comment. Approval and implementation of any particular Tribal or State program is outside of the scope of this rulemaking.

EPA acknowledges the value of understanding a State's particular circumstances when approving and overseeing Tribal and State programs, however.

Natural Resources Defense Council (EPA-HQ-OW-2020-0276-TRANS-092923-008-0003)

First, it's important that the Federal Government not forgo protection of those waters the Clean Water Act directs and the Army Corps of Engineers to retain jurisdiction over.

Agency Response: The final rule is consistent with the CWA and the Corps retains permitting over certain waters as described in the Act.

Chickaloon Native Village (EPA-HQ-OW-2020-0276-TRANS-092923-009-0002)

We are particularly concerned about the potential for state primacy to reduce the protections of the Endangered Species Act, the National Environmental Protection Policy Act, and the National Historic Preservation Act.

Agency Response: Nothing in this rulemaking affects EPA's obligations to protect Tribal treaty rights.

South Florida Wildlands Association (EPA-HQ-OW-2020-0276-TRANS-092923-010-0003)

There is no federal connection with those lands, therefore all of the federal laws that used to come into play when we needed a federal permit, meaning a permit issued by the Army Corps of Engineers, don't apply to these Florida DEP state permits. That's a state permit, it doesn't trigger the Endangered Species Act in the same way. It definitely doesn't trigger the National Environmental Policy Act, or NEPA. It doesn't trigger the National Historic Preservation Act, which also applies to Native Tribal resources which are extensive in Florida, and it doesn't apply to the Administrative Procedures Act. These acts that were created years and years ago that have gone through decades of federal litigation to clarify their meaning and application were tossed. So, as we're discussing how to make this better, how do you make it better? How do you maintain what you're referring to the same level of federal protection when you've tossed out the federal laws, essentially the federal laws that provide that protection. Do you expect Florida to come up with its own version of NEPA? This Florida Legislature is going to do that?

Agency Response: EPA acknowledges the comment. *See* Section IV.A.2 of the final rule preamble.

South Florida Wildlands Association (EPA-HQ-OW-2020-0276-TRANS-092923-010-0004)

I would suggest, I'm not sure how much time I have because I'm looking at my notes, but I would suggest that as part of your review process you come down to Florida and view what some of the people from the state who are experiencing this 404 transfer are going through. Drive along Oil Well Road, Alico Road, and Mckinley Road. See the devastation happening to one of the most biodiverse parts of our country. It's amazing how similar, I was listening to the speaker from Alaska, and you couldn't find two states further apart than Florida and Alaska, but I can't help but say, I lived in Alaska for three years, and I know what that state government is like, and I know how similar it is to Florida state government. You're transferring authority for wetlands and wildlife protection to states that have no interest in that topic. They're interested in development as fast as possible,

and we've seen a great deal of that. So, as you're going through how to improve this process, really, I don't see how you do it. I think that this process should be tossed. I think that anybody on this meeting who is not living in one of the states where the authority has already been assumed by the state, fight it tooth and nail. Fight for those federal protections that you have right now because you're never going to be able to equal that by the state. We need to strengthen the federal protections that are there.

Agency Response: ***See*** **Section IV.A.3 regarding the requirement for Tribal and State section 404 programs to be no less stringent than the CWA and implementing regulations. Approval and implementation of any particular Tribal or State program is outside of the scope of this rulemaking. EPA acknowledges the value of understanding a State's particular circumstances when approving and overseeing Tribal and State programs, however.**

South Florida Wildlands Association (EPA-HQ-OW-2020-0276-TRANS-092923-010-0006)

So, we can't afford this program. I think many states are reeling under the same kinds of problems, and I think how you fix it, I think you toss it. You toss it, and you don't expect states to take on the role of a federal process that has been in place for decades, that's been reviewed by federal courts, and I think there's no way to reproduce it on the state level. I would say just toss the program, pull the plug on it.

Agency Response: Approval and implementation of any particular Tribal or State program is outside of the scope of this rulemaking. EPA acknowledges the value of understanding a State's particular circumstances when approving and overseeing Tribal and State programs, however.

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0002)

In many instances, state assumption of 404 programs will be outright harmful to tribal and environmental interests because of a lack of equivalent state protections for various federal statutes that currently apply. As a result, Earthjustice generally opposes state assumption of 404 permitting as likely a degradation of rights and protections for many interests [Footnote 1: Please note that this letter is specific to assumption of 404 permitting by states, not tribes, although it does concern impacts to tribes from a state assuming the program. Nothing in this letter concerns a tribe assuming 404 permitting for tribal lands.].

Agency Response: EPA acknowledges this comment.

3.3 Comments regarding States and Tribes not currently administering a 404 program

The Petroleum Alliance of Oklahoma (EPA-HQ-OW-2020-0276-0055-0001)

Key among them is that provisions of federal law preclude EPA from authorizing Oklahoma tribes to assume regulatory authority over section 404 programs absent agreement by the State of Oklahoma.

Agency Response: The scope of an individual Tribal or State program is outside the scope of this rulemaking. EPA will work with any requesting Tribe or State to ensure the approved program scope is within their jurisdiction.

The Petroleum Alliance of Oklahoma (EPA-HQ-OW-2020-0276-0055-0004)

I. SAFETEA OF 2005 LIMITS EPA AUTHORITY

It appears that EPA has failed to take into account the unique and complex landscape that exists in Oklahoma. Section 10211 of SAFETEA [Footnote 2: Pub. L. 109-59, 199 Stat. 1144, 1937 (Aug. 10, 2005).] clarified and streamlined the State of Oklahoma's role in managing virtually all environmental media within the state's exterior borders. In so doing, Congress created a regulatory framework that is unique to Oklahoma that EPA is not free to disregard.

Subsection (a) of Section 10211 provides that if the EPA Administrator has approved regulatory programs submitted by the State of Oklahoma for implementation of federal environmental programs in non-Indian country, then upon request of the state, the Administrator shall approve the State to administer the State programs within certain areas of Indian country. Significantly, SAFETEA does not provide EPA Administrator discretion to consider the merits or circumstances of the State request or to impose conditions on approval; if the state's request falls within the statute's parameters, then the Administrator must grant the state's request. It is virtually a ministerial task on the Administrator's part.

On July 22, 2020, the Governor of Oklahoma duly requested approval under Section 10211(a) of SAFETEA to administer in Indian country those environmental programs that had previously been approved by EPA for application outside Indian country [Footnote 3: The state did not seek authority over certain excepted lands, including Indian allotments, lands held in trust by the United States on behalf of individual Indians or a tribe, or certain lands owned in fee by a tribe.]. In a letter to the Governor dated October 1, 2020, the Administrator acknowledged that despite its general practice with respect to Indian country, EPA must apply the statutory mandate embodied by SAFETEA [Footnote 4: The Administrator's letter to the Governor noted that "to the extent EPA's prior approvals of these State programs excluded Indian country, any such exceptions are superseded for the geographic areas of Indian country covered by this approval under SAFETEA."] and grant the Governor's request. The EPA Administrator's approval applied to all of the State of Oklahoma's existing EPA-approved regulatory programs, including, but not limited to, water quality standards and implementation plans [Footnote 5: Section 303, 33 U.S.C. § 1313.] and national pollutant discharge elimination system programs [Footnote 6: Section 402, 33 U.S.C. § 1342.] of the CWA implemented by a range of state agencies.

Agency Response: EPA acknowledges the comment. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0055-0001.

The Petroleum Alliance of Oklahoma (EPA-HQ-OW-2020-0276-0055-0005)

Subsection (b) of Section 10211 of SAFETEA is even more relevant to understanding the significant limits on EPA's ability to authorize a tribe or tribes to exercise section 404 authority within the exterior boundaries of the State of Oklahoma. Subsection (b) specifies that EPA may extend treatment as a state status for purposes of administering environmental programs to an Oklahoma tribe only if the state voluntarily enters into a

cooperative agreement with the tribe for treatment as a state and concurrently agrees to joint administration of an environmental program's requirements. Thus, a Tribe must first seek treatment as a state before seeking to implement section 404 authority over waters of the United States in Oklahoma or any other state [Footnote 7: The Tribe also must be federally recognized.].

Agency Response: EPA acknowledges the comment. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0055-0001.

The Petroleum Alliance of Oklahoma (EPA-HQ-OW-2020-0276-0055-0006)

Congress clearly articulated its intent in the SAFETEA provision regarding Oklahoma and EPA may not disregard this law. EPA may not authorize an Oklahoma Tribe to implement the provisions of section 404 of the Clean Water Act absent the state's assent to such an authorization [Footnote 8: On December 22, 2021, EPA proposed to withdraw and reconsider its earlier decision approving the Governor of Oklahoma's request to extend approval of the state's EPA-approved environmental regulatory programs to certain areas of Indian country within the State of Oklahoma. https://www.epa.gov/ok/proposed-withdrawal-and-reconsideration- and-supporting-information (last visited September 7, 2023). EPA acknowledged the State's request was made pursuant to Section 10211(a) of SAFETEA. EPA stated it sought greater consultation with affected tribes and the need to review implementation of EPA programs by the State of Oklahoma. https://www.epa.gov/system/files/documents/2021-12/notice-of-proposed-withdrawal-and-reconsideration_0.pdf (last visited July 19, 2022). In a comment letter dated January 31, 2022, the State of Oklahoma forcefully rebutted the EPA's authority to reconsider or withdraw the Administrator's earlier decision to approve the state's request to extend approval of the state's EPA-approved environmental regulatory programs into certain areas of Indian country within the state. See https://www.epa.gov/system/files/documents/2022-02/state-of-oklahoma-comment.pdf. EPA has taken no action since announcing its intent to reconsider the decision extending approval of the state's EPA-approved regulatory programs to certain areas of Indian country within the State of Oklahoma.]. EPA should revise its proposal to take into account the limits on its statutory authority to empower an Oklahoma Tribe to assume responsibility for implementing section 404 of the Clean Water Act.

Agency Response: EPA acknowledges the comment. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0055-0001.

The Petroleum Alliance of Oklahoma (EPA-HQ-OW-2020-0276-0055-0009)

Second, it is important for EPA to acknowledge there are 39 tribes, including 38 federally recognized tribes, in Oklahoma. Some tribes are situated upstream of others, while of course other tribes are situated downstream from both other states and other Tribes. It is possible, even likely, that different entities would reach different conclusions about whether a permit should be granted and under what conditions. The Alliance is very concerned that such a situation is likely to arise if EPA were to grant numerous entities 404 authority. Our concern is amplified by the number of potential applicants to assume administration of the section 404 program.

Agency Response: **EPA acknowledges the comment and seeks to work with all Tribes and States interested in assuming the program. *See* EPA Policy on Consultation with Indian Tribes and 40 CFR 233.60.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0014)

In addition, EPA's proposed rule does not address how the state of Alaska would coordinate with federal land managers on subsistence issues under the Alaska National Interest Lands Conservation Act (ANILCA). More than in any other state, tribes in Alaska rely heavily on subsistence resources, including on federal public lands [Footnote 3: U.S. Congressional Research Service. Subsistence Uses of Resources in Alaska: An Overview of Federal Management (R47511; April 20, 2023), by Mark K. DeSantis and Erin H. Ward, https://crsreports.congress.gov/product/pdf/R/R47511/3.]. The state of Alaska has consistently taken positions hostile to Alaska Native subsistence uses and resources under ANILCA. Issues related to subsistence hunting, fishing and gathering in Alaska have long been complex and contentious. Adding further jurisdictional and regulatory uncertainty with regard to wetland regulation is sure to cause additional issues, particularly at the expense of Alaska Native tribes and citizens.

Finally, Alaska's Public Records Act is not comparable to the federal Freedom of Information Act (FOIA). Alaska's Public Records act deviates from FOIA in fundamental ways that put the public at a significantly greater disadvantage than FOIA. For example, under the Alaska public Records Act, there are greater costs involved because fee waivers are limited to $500 per year per requester; agencies are allowed to demand advance payment with no limitation; there is no provision for expediting requests; there are no consequences for an agency's failure to timely provide information; there are no consequences for a public official who obstructs the disclosure of public records; and a prevailing litigant under Alaska's Public Records Act would not be able to fully recover attorneys' fees incurred. In short, obtaining information related to a proposed dredge and fill permit under Alaska's state requirements will be much more difficult and costly than it would be under FOIA, and there will be limited recourse if Alaska state officials fail to comply with public disclosure requirements.

Agency Response: **EPA acknowledges the commenter's concerns regarding consistency with the CWA impacts on compliance with other Acts. The consistency of particular Tribe or State programs with the requirements of the CWA or the final rule is outside the scope of this rule. EPA is willing to work with any prospective Tribal or State CWA section 404 program to ensure it complies with the CWA and this rule. In addition, following receipt of a proposed section 404 program, EPA will seek public comment and input from federal agencies and work with Tribes and States to ensure any approved program is consistent with the CWA.**

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0026)

EPA's proposed regulations specifically state that "the Corps will continue to administer the [Section 404] program in Indian country unless EPA determines that a state has authority to regulate discharges into waters in Indian country and approves the State to assume the section 404 program over such discharges." Id. at 55285.

This year, Alaska filed suit against the Bureau of Indian Affairs for granting a tribal land-into-trust application in Alaska. In its complaint, Alaska alleges that the Alaska Native Claims Settlement Act prevents the Department of Interior from taking land into trust on behalf of Alaska Native tribes, and that tribal trust land in Alaska, other than the lands reserved to the Metlakatla Indian Community, threatens Alaska's sovereignty [Footnote 4: Complaint at 1-2, Alaska v. Newland, Case No. 3:23-cv-00007, (D. Alaska filed Jan. 17, 2023), https://law.alaska.gov/pdf/press/230117-Complaint.pdf.].4 The litigation will take some time to resolve, and leaves open significant questions and uncertainties about federal, state and tribal jurisdiction in Alaska. If Alaska seeks to assume authority to implement a Section 404 permitting authority, the issue of whether, where and to what extent the state may seek regulatory authority over tribal trust lands and waters must be addressed and resolved in coordination and consultation with Alaska Native tribes.

Agency Response: As recognized in EPA's regulations, in many cases, States lack authority under the CWA to regulate activities covered by the section 404 program in Indian country. See 40 CFR 233.1(b). Thus, the Corps will continue to administer the program in Indian country unless it is determined that a State has authority to regulate discharges into waters in Indian country and EPA approves the State to assume the section 404 program discharges into such waters. When reviewing requests to assume the section 404 program, the EPA seeks public input and will work affected States or Tribes, including engaging in Tribal consultation on the Agency's decision to approve or deny the request. *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0014.

Yukon River Inter-Tribal Watershed Council (EPA-HQ-OW-2020-0276-0063-0029)

The YRITWC have concerns about Alaska's ability to assume permitting authority due to possible funding constraints. We understand that the implementation of Section 404 permitting programs can be an expensive endeavor if done correctly. A permitting program that complies with the CWA requires staff to review permit applications holistically, as well as staff to review technical details, and to understand topics like wetland delineation and impacts. Staff must also comply with the Section 404(b)(1) Guidelines and other federal requirements. Earlier this year, Alaska Department of Environmental Conservation (DEC) sought five million dollars for annual funding for assumption of the Section 404 permitting program. This is significantly less than the approximately eight million dollars the Corps currently spends to administer its wetlands permitting program in Alaska, and less than half of what Michigan, Florida and New Jersey each spend to administer their Section 404 programs [Footnote 5: See Jade North, LLC, Clean Water Act Section 404 Dredge and Fill Program Assumption: Feasibility report at 5 (Jan. 25, 2023) ("Michigan's budget for its 404 Program is $12.3 million and includes 82 staff in 10 offices."); id. ("New Jersey's budget for its 404 Program is $14.5 million and includes 176 staff."); id. ("Florida's budget for its 404 Program is $11.3 million and includes 170 staff.").].

Agency Response: Funding for section 404 programs is outside the scope of this final rule. *See* Section IV.B.3 of the final rule preamble for discussion regarding what must be included in a program description.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0010)

Alaska's approach to the Clean Water Act is just one of many reasons why allowing the State to assume the 404 program would be disastrous for the state's waters and the people who rely on them. Alaska still has yet to successfully implement the Clean Water Act Section 402 permitting program that EPA delegated to the state fifteen years ago [Footnote 59: EPA News Release, EPA Authorizes the State of Alaska to Assume Water Quality Permitting Authority (Oct. 31, 2008).] Even though Alaska's wetlands are largely pristine and high quality, the State still has no process for designating Tier 3 outstanding national resource waters [Footnote 60: See, e.g., ADEC, Division of Water, Outstanding National Resource Water Fact Sheet (Apr. 1, 2017) ("The State is in the process of developing implementation methods, and these methods once developed, will specify who will designate Tier 3 waters.").] Alaska has no environmental review law similar to NEPA, and no wetlands permitting program. Its public records act is more costly to utilize and more difficult to enforce than the federal Freedom of Information Act. Alaska chills public participation in state permitting processes by applying a "loser pays" rule in state court that has no exception for public interest litigants. And, Alaska does not engage in anything like government-to-government consultation with Tribal governments, treating them instead as mere members of the public during permitting processes. Combined, these facts about Alaska law and its government paint a bleak picture for wetland protection should the State ever succeed in assuming the 404 program.

EPA should carefully consider the various ways that Alaska's assumption of the 404 program would jeopardize Clean Water Act protections for the majority of the Nation's wetlands, and should specifically prohibit them in the final rule.

Agency Response: ***See*** **Sections IV.A through IV.E in the final rule preamble for discussion on the clarifications and provisions of the final rule added to ensure programs are administered consistent with, and no less stringent than, the requirements of the CWA section 404 and its implementing regulations. The scope of any particular prospective Tribal or State program is outside the scope of this rulemaking. Consistency of an individual Tribal or State program will be reviewed for consistency with the CWA at the time the request is submitted to EPA.**

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0009)

Although the initiative lacks funding at this time, Alaska has taken several steps toward attempting to assume the 404 program, [Footnote 55: See AS 46.03.020(14) (authorizing the Department of Environmental Conservation to "notwithstanding any other provision of law, take all actions necessary to receive federal authorization of a state program . . . to administer and enforce a dredge and fill permitting program allowed under [Clean Water Act Section 404] and to implement the program, if authorized"); Alaska Department of Environmental Conservation (ADEC), Section 404 Dredge and Fill Program: Frequently Asked Questions at 5 (Apr. 18, 2023) ("[AS 46.03.020(14)] has been in place since 2013 and it is beyond time to fund that effort and move the application and approval process along."); ADEC, 404 Assumption Cheat Sheet at 2 (Jan. 1, 2023) (noting that in the FY 2023 budget, the Alaska legislature appropriated $1 million for a feasibility study on 404 program assumption); Jade North, LLC, Clean Water Act Section 404 Dredge and Fill

Program Assumption: Feasibility Report (Jan. 25, 2023).] and its environmental agency continues to advocate for funding with the state's legislature [Footnote 56: ADEC, 2023 Dredge and Fill Permitting Program Legislative Engagement.]. This is concerning because Alaska is home to the majority of the nation's wetlands—more than all other states combined—and its views on the Clean Water Act are openly hostile. In its recent motion before the United States Supreme Court, for example, Alaska seeks to vacate EPA's action to prohibit the Pebble mine under Clean Water Act Section 404(c) [Footnote 57: Mot. for Leave to File Bill of Compl., State of Alaska v. US, No. 22O175, at 40 (U.S. July 28, 2023)]. It argues among other things that even if EPA's action is a valid application of the Clean Water Act, it is an unconstitutional taking of the state's property [Footnote 58: Id. at 33, ¶155.]. In other words, Alaska's position is that even if a discharge within the state's borders would violate the Clean Water Act and cause unacceptable adverse effects on waters of the United States, EPA cannot prohibit that discharge.

Agency Response: EPA acknowledges the comment. The scope of any particular prospective Tribal or State program is outside the scope of this rulemaking. Consistency of a Tribal or State program with the CWA will be reviewed at the time the request is submitted to EPA.

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0001)

I.The waters and wetlands within the Port Gamble S'Klallam Tribe's Usual and Accustomed areas and other areas in which it reserved rights by Treaty are of exceptional importance to the Tribe, Section 404 permitted- activities are prohibited from interfering with the Tribe's treaty rights in these areas, and Section 404 permitting in them should continue to be regulated by the Federal trustee rather than a state agency.

The Port Gamble S'Klallam Tribe is a fishing tribe. Since time immemorial, fishing has been the foundation on which the Port Gamble S'Klallam Tribe's culture, economy, and ceremonial life was based. In 1855, when the Port Gamble S'Klallam Tribe entered the Treaty of Point No Point, 12 Stat. 933, with the United States, sacred promises were made between sovereign nations. The Port Gamble S'Klallam Tribe and others ceded hundreds of thousands of acres of their homelands, while reserving certain rights to themselves. Chief among the rights reserved—and persistently defended by the Tribe—is the right to continue taking fish and shellfish as they always had throughout their usual and accustomed fishing grounds (U&A) and to continue to hunt and gather on open and unclaimed lands. Article 4 of the Treaty of Point No Point states:

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands.

Agency Response: Nothing in this rule affects a Tribes' treaty or reserved rights. This rule clarifies opportunities for Tribes to provide input on permits and seek EPA review of draft permits that the Tribe views as affecting their rights and interests. When Tribes seek EPA review of such draft permits, EPA will review to ensure the

permits are consistent with the section 404(b)(1) Guidelines which includes consideration of human use. *See* Section IV.B of the final rule preamble regarding compliance with the CWA section 404(b)(1) Guidelines. *See also* Section IV.F of the final rule preamble for further discussion on Tribal opportunities to meaningfully engage in the permitting process of Tribes and States that have assumed the section 404 program.

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0002)

With this treaty language, the Port Gamble S'Klallam Tribe, like other Treaty Tribes in Western Washington, reserved fundamental rights that they had exercised since time immemorial. The Treaty was intended to allow the Tribe and its citizens to continue their way of life in the face of white settlement, both at that time and in perpetuity, in large part by continuing robust tribal harvest of fish in off-reservation marine waters and freshwater rivers and lakes and hunting and gathering on open and unclaimed lands. And in addition to extinguishing tribal land claims to pave the way for orderly non-native settlement, the treaty-makers' recognition of these reserved rights secured for the United States, as instructed by their superiors in Washington, D.C., the crucial practical benefit of not having to pay for the Indians' perpetual subsistence.

To this day, fish remain of central importance to the Port Gamble S'Klallam Tribe's culture, economy, ceremonies, and diets. More than 150 Port Gamble tribal members continue to earn all or a portion of their livelihood working as commercial salmon and shellfish fishers, and a 2020 survey shows 300 subsistence tribal fishers continuing to provide food for themselves and their families. In addition, the Tribe conducts fisheries throughout the shared U&A to obtain fish for ceremonial use (including funerals, weddings, and honoring and gifting observances, as well as other ceremonies and practices), and subsistence harvests from the U&A are a key element of the diet of many tribal members. See United States v. Washington, 459 F. Supp. 1020, 1039 (W.D. Wash. 1978); United States v. Washington, 626 F. Supp. 1405, 1434,1442, 1486 (W.D. Wash. 1985) (describing the usual and accustomed fishing grounds of the Port Gamble Klallam Tribe). Likewise, hunting and gathering continues to be a critical aspect of the tribal economy and culture.

However, despite the promises made by Treaty, the Tribe's way of life is now severely threatened. Rivers, streams, bays, straits, lakes, and wetlands throughout the Tribe's off-reservation usual and accustomed fishing grounds and the open and unclaimed lands in which they reserved these fundamental rights have been modified in manners detrimental to the fish, shellfish, game, and plant species upon which the Tribe depends, including through bank armoring and other stabilization projects, the fill of wetlands, and many other dredge and fill activities. Salmon populations are in a precarious position and forage fish are consistently declining due to widespread habitat modification. Tribal members likewise face significant hurdles to access, including physical access and the ability to use traditional fishing methods, as a result of in-water structures, such as piers, docks, and mooring buoys. Each of these impediments to fishing, or at least those constructed or repaired since the Clean Water Act's Section 404 program came into being, requires a 404 permit. But in waters in which the Tribe reserved, through Treaty, the right to continue

fishing as they had since time immemorial, tribal members should not be—and never should have been—subjected to such fish shortages or access challenges.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0078-0001.**

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0005)

Integrating consideration of tribal treaty and reserved rights into agency decision-making and regulatory processes is consistent with the federal government's trust responsibility to federally recognized tribes and to fundamental principles of good government. Treaties themselves are the source of legal authority to ensure that agency processes account for reserved treaty rights.

Treaty Rights MOU, available at https://www.doi.gov/sites/doi.gov/files/interagency-mou- protecting-tribal-treaty-and-reserved-rights-11-15-2021.pdf.

The United States and its agencies must keep these bedrock principles in mind while administering statutes affecting the Treaty-protected resource, including the Clean Water Act. In recent years, it has done a better job of this in many Section 404 permitting processes in the Puget Sound area. However, this rulemaking threatens to rollback that progress if it would surrender federal Section 404 permitting to the State of Washington in any tribal U&A or other areas in which the Tribe reserved usufructuary rights by Treaty. The Treaty Tribes—along with the United States—have had to sue the State of Washington on many occasions to protect their Treaty rights from State action. That same State—while its leadership may be well-intentioned towards Tribes and their rights at times—should not be afforded Section 404 permitting authority in waters critical to Treaty rights. Consequently, EPA and the Corps should retain full Federal control over the Section 404 program throughout waters within the Treaty Tribes' Usual and Accustomed areas and open and unclaimed lands in western Washington.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0078-0001.**

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0018)

Additionally, states that have expressed interest in assumption do not comply with the EPA's proposed guidance. Alaska's fee-shifting rules similarly require payment of attorney's fees to the prevailing party, regardless of whether the case is frivolous or not, effectively chilling any meaningful access to challenging a proposed permit.[Footnote 55: Alaska R. Civ. P. 82 (2023)]

Agency Response: ***See*** **Section IV.C.2 of the final rule preamble. Consistency of a Tribal or State program with the CWA will be reviewed at the time the request is submitted to EPA.**

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0010)

Finally, Alaska's Public Records Act is not comparable to the federal Freedom of Information Act (FOIA). Alaska's Public Records act deviates from FOIA in fundamental

ways that put the public at a significantly greater disadvantage than FOIA. For example, under the Alaska Public Records Act, there are greater costs involved because fee waivers are limited to $500 per year per requester; agencies are allowed to demand advance payment with no limitation; there is no provision for expediting requests; there are no consequences for an agency's failure to timely provide information; there are no consequences for a public official who obstructs the disclosure of public records; and a prevailing litigant under Alaska's Public Records Act would not be able to fully recover attorneys' fees incurred. In short, obtaining information related to a proposed dredge and fill permit under Alaska's state requirements will be much more difficult and costly than it would be under FOIA, and there will be limited recourse if Alaska state officials fail to comply with public disclosure requirements

Agency Response: CWA section 404 requires public notice and opportunity for participation in the permitting process. Additionally, see Section IV.C.2 of the final rule preamble and response to comment regarding judicial review of permits. Consistency of a Tribal or State program with the CWA will be reviewed at the time the request is submitted to EPA.

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0002)

CNV is strongly opposed to having the State of Alaska assume the Clean Water Act Section 404 Program.

Agency Response: EPA acknowledges this comment. Approval of any particular Tribal or State section 404 program is outside of the scope of this rule.

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0023)

EPA's proposed regulations specifically state that "the Corps will continue to administer the [Section 404] program in Indian country unless EPA determines that a state has authority to regulate discharges into waters in Indian country and approves the State to assume the section 404 program over such discharges." Id. at 55285.

This year, Alaska filed suit against the Bureau of Indian Affairs for granting a Tribal land-into-trust application in Alaska. In its complaint, Alaska alleges that the Alaska Native Claims Settlement Act prevents the Department of Interior from taking land into trust on behalf of Alaska Native Tribes, and that Tribal trust land in Alaska, other than the lands reserved to the Metlakatla Indian Community, threatens Alaska's sovereignty [Footnote 4: Complaint at 1-2, Alaska v. Newland, Case No. 3:23-cv-00007, (D. Alaska filed Jan. 17, 2023), https://law.alaska.gov/pdf/press/230117-Complaint.pdf.]. The litigation will take some time to resolve, and leaves open significant questions and uncertainties about federal, state and Tribal jurisdiction in Alaska. If Alaska seeks to assume authority to implement a Section 404 permitting authority, the issue of whether, where and to what extent the state may seek regulatory authority over Tribal trust lands and waters must be addressed and resolved in coordination and consultation with Alaska Native Tribes.

Agency Response: *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0078-0001. The scope of any particular prospective Tribal or State program is outside

the scope of this rulemaking. Consistency of a Tribal or State program with the CWA will be reviewed at the time the request is submitted to EPA.

Chickaloon Native Village (CNV) (EPA-HQ-OW-2020-0276-0085-0009)

In addition, EPA's proposed rule does not address how the state of Alaska would coordinate with federal land managers on subsistence issues under the Alaska National Interest Lands Conservation Act (ANILCA). More than in any other state, Tribes in Alaska rely heavily on subsistence resources, including on federal public lands [Footnote 3: U.S. Congressional Research Service. Subsistence Uses of Resources in Alaska: An Overview of Federal Management (R47511; April 20, 2023), by Mark K. DeSantis and Erin H. Ward, https://crsreports.congress.gov/product/pdf/R/R47511/3.] The State of Alaska has consistently taken positions hostile to Alaska Native subsistence uses and resources under ANILCA. Issues related to subsistence hunting, fishing and gathering in Alaska have long been complex and contentious. Adding further jurisdictional and regulatory uncertainty with regard to wetland regulation is sure to cause additional issues, particularly at the expense of Alaska Native Tribes and citizens.

Agency Response: EPA acknowledges the comment. EPA will review the coordination processes associated with any individual program for consistency with CWA section 404 and the requirements set out in the regulations at 40 CFR 233.

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0001)

We ask that EPA make the changes proposed in these comments to ensure that the federal floor is as stringent as required by the Clean Water Act. The Act exists because states were not properly protecting their waterways, which led to rivers so polluted that not only could people not drink the water, but they could not swim, fish, or recreate.[Footnote 1: One example among many (e.g., Buffalo River, Buffalo, New York; Schuylkill, Philadelphia, Pennsylvania; and the Rouge River, Detroit, Michigan) is the 1969 fire on the Cuyahoga River in Cleveland, Ohio, which is attributed as one of the main factors leading to the creation of the Environmental Protection Agency and the passage of the Clean Water Act. See EPA, History of the Clean Water Act (CWA), Section 2: Cuyahoga River fire aftermath: June, 1969.] As a result, Congress passed the Clean Water Act to set the minimum standards for protecting our Nation's waters and wetlands. As Alaskans, we have benefited from those protections, successfully avoiding the gross mistakes committed by some of the contiguous states because of a combination of our small population and the restrictions imposed by the Act. Without EPA's assurance that those minimum standards are met and maintained by any state assuming the 404 program, we fear that will not soon be the case.[Footnote 2: These comments address state assumption of the 404 program only, not assumption of the 404 program by Tribes.]

Agency Response: *See* Sections IV.A.2 and IV.A.3 of the final rule preamble regarding the requirement that all approved Tribal and State section 404 programs remain consistent with and no less stringent than the requirements of the Act and implementing regulations and that permits issued comply with the section 404(b)(1) guidelines.

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0026)

Projects that have gone through the 404-permitting process in Alaska have presented significant environmental and health hazards that disparately impact rural and Indigenous communities. Additionally, rural and Indigenous communities have not been granted equal access to the decision-making process for various projects subject to 404 permitting. When environmental justice concerns like these arise in a federal process, the federal government has programs and procedures to address and correct the issues that the state government does not have. EPA itself has an environmental justice office with regional staff and a hotline available to the public.[Footnote 34: EPA, Contact Us About Environmental Justice.] Unlike the federal government, Alaska is unprepared to prevent and address environmental justice issues like those presented by the following projects that have gone through 404 permitting.

Agency Response: ***See*** **Section IV.A.3 of the final rule preamble regarding the requirement that all approved Tribal and State section 404 programs remain consistent with and no less stringent than the requirements of the Act and implementing regulations.** ***See*** **Section IV.A.2 of the final rule preamble discussing the environmental review criteria and other factors that must be considered prior to issuance of a permit. This section makes clear that no permit shall be issued unless it complies with the section 404(b)(1) guidelines. The scope of any particular prospective Tribal or State program is outside the scope of this rulemaking. Consistency of a Tribal or State program with the CWA will be reviewed at the time the request is submitted to EPA.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0027)

Red Dog Mine, located in northwest Alaska, has been subject to 404 permitting multiple times throughout its long-lasting operation: first in the 1980s before initial operation began[Footnote 35: U.S. Department of the Interior, Regulatory Processes Associated with Metal?Mine Development in Alaska: A Case Study of the Red Dog Mine at 11 (Sept. 1992).], and then in relation to additional deposit development.[Footnote 36: EPA, Red Dog Mine Extension Aqqaluk Project Final Supplemental Environmental Impact Statement at 9 (Oct. 2009).] In 2021, Red Dog Mine reported releasing a total of 601,844,108 pounds of toxic waste, including cadmium, copper, lead, mercury, nickel, and zinc.[Footnote 37: EPA TRI Explorer, Facility Profile Report: Red Dog Operations.] The health risks associated with these metals are significant. At low levels of exposure in adults, lead may impact various organs and cause irreversible brain damage.[Footnote 38: Alaska Community Action on Toxics, Red Dog and Subsistence: Analysis of Reports on Elevated Levels of Heavy Metals in Plants Used for Subsistence Near Red Dog Mine, Alaska at 15 (May 2004) (ACAT 2004).] As the Centers for Disease Control and Prevention has found though, there is no safe level of exposure for lead for developing children.[Footnote 39: Unequivocal evidence demonstrates that there is no safe level of lead exposure for developing children, as confirmed by authoritative bodies including the Centers for Disease Control and Prevention, the U.S. Agency for Toxic Substances and Disease Registry, and the U.S. Food and Drug Administration. See U.S. Centers for Disease Control and Prevention, Low Level Lead Exposure Harms Children: A Renewed Call for Primary Prevention, Report of the Advisory Committee on Childhood Lead

Poisoning Prevention (Jan. 4, 2004); U.S. Department of Health and Social Services, Agency for Toxic Substances and Disease Registry, Toxicological Profile for Lead (Aug.2020); U.S. Food and Drug Administration, Action Levels for Lead in Food Intended for Babies and Young Children: Draft Guidance for Industry (Jan. 2023).] Similarly, cadmium exposure may result in renal failure, lung damage, liver damage, reduced verbal and IQ development in children, and more.[Footnote 40: ACAT 2004at 15.] The nearby village of Kivalina, which is 98% Iñupiat[Footnote 41: R. Gregg, Relocating the Village of Kivalina, Alaska Due to Coastal Erosion, Climate Adaptation Knowledge Exchange (2021).], as well as Kotzebue, which is over 70% Iñupiat,[Footnote 42: City of Kotzebue, About Us.] have raised concerns about toxic tailings from these metals impacting their health directly as well as indirectly through metal build up in subsistence foods.[Footnote 43: Environmental Justice Atlas, Red Dog mine toxic tailings to Kotzebue and Kivalina, Alaska, USA.] Culturally and physically essential plants, animals, and fish all absorb both lead and cadmium easily from their environment.[Footnote 44: ACAT 2004 at 15-16.] Environmental health hazards facing a primarily Indigenous population raise issues of environmental justice, and communities involved must have access to federal resources to respond.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble and response to comments which discusses the environmental review criteria, including that discharges not violate water quality standards and that permits consider human uses of the waters, prior to issuance of a permit. This section also makes clear that no permit shall be issued unless it complies with the section 404(b)(1) Guidelines.** ***See*** **Section IV.A.3 of the final rule preamble and response to comments regarding the requirement that all approved Tribal and State section 404 programs remain consistent with and no less stringent than the requirements of the Act and implementing regulations.**

In addition, any permit that "…(4) Discharges known or suspected to contain toxic pollutants in toxic amounts (section 101(a)(3) of the Act) or hazardous substances in reportable quantities (section 311 of the Act); (5) Discharges located in proximity of a public water supply intake; (6) Discharges within critical areas established under State or Federal law, including but not limited to National and State parks, fish and wildlife sanctuaries and refuges, National and historical monuments, wilderness areas and preserves, sites identified or proposed under the National Historic Preservation Act, and components of the National Wild and Scenic Rivers System." must be sent to EPA for review. ***See*** **40 CFR 233.51.**

Lastly, Section IV.F of the final rule preamble articulates opportunities for Tribes to raise concerns and provide input on permits that may affect their waters or interests. The scope of any particular prospective Tribal or State program, however, is outside the scope of this rulemaking. Consistency of a Tribal or State program with the CWA will be reviewed at the time the request is submitted to EPA.

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0028)

In southeast Alaska, Greens Creek Mine was initially granted a 404 permit in 1988.[Footnote 45: SRK Consulting 2009 at 155.] Since then, it has become the largest

silver mine in the United States, and recently proposed an extension of its operation despite opposition from local residents.[Footnote 46: C. Larson, Angoon residents speak out against Greens Creek Mine expansion, JUNEAU EMPIRE (May 15, 2023) (Larson 2023).] The population of Angoon, the only settlement on the island where the mine is located, is over 80% Indigenous.[Footnote 47: U.S. Census Bureau, Profile of General Population and Housing Characteristics (2020).] This community has raised concerns about health hazards related to lead tailings and their impact on the people, plants, and animals of the region.[Footnote 48: Larson 2023.] Further, community members have expressed frustration at the decision-making process and their lack of input. Angoon city council member Peter Duncan said at a public meeting, "We have no real power to stop what's going on—even if we fight it seems to happen anyways."[Footnote 49: Id.] Whether public input is actually considered and how accessible are the opportunities to participate are questions of environmental justice.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0086-0027.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0029)

Donlin Gold Mine, a proposed project that would be the largest pure gold mine in the world, was issued a 404 permit that has been challenged by local communities for failing to take full consideration of the environmental impacts of the project.[Footnote 50: Earthjustice, Southwest Alaska Tribes Fight the World's Largest Pure Gold Mine (April 6, 2023) (Earthjustice 2023).] Donlin Gold Mine would, according to EPA itself, have "potentially serious impacts on human health and environment."[Footnote 51: No Donlin Gold, What's at Stake.] Hazards from development may include degradation of subsistence resources, large scale climate effects, health issues related to tailings or failure of treatment, and containment of a pit lake.[Footnote 52: Id.] The region closest to where the mine would be developed is primarily made up of Yupik, Cup'ik, and Athabascan people who rely on local fish, plants, and other animals for subsistence.[Footnote 53: Earthjustice 2023.] More than a dozen tribes—the majority in the region—have passed resolutions opposing the mine, as well as various tribal organizations like the Association of Village Council Presidents and the Yukon Kuskokwim Health Corporation.[Footnote 54: No Donlin Gold, Tribal Opposition to Donlin.] The disparate impact on Indigenous peoples of the region, and their vocal opposition to the project, are environmental justice issues that federal environmental justice offices are better able to help navigate than a state with little to no environmental justice resources. As EPA finalizes the regulations governing state assumption, it must ensure that state programs are at least as stringent as the federal government when it comes to addressing environmental justice concerns.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0086-0027.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0030)

Projects subject to 404 permitting in Alaska present direct and indirect environmental health impacts to areas that are home to majority Indigenous populations, resulting in disproportionate environmental harms based on race. Further, these projects often lack meaningful involvement of the public in decision-making processes. Communities

impacted by these environmental justice issues would not have access to appropriate recourse if 404 permitting were assumed by Alaska without further safeguards which have not been included in the current draft rule. In considering whether to approve state 404 assumption, EPA must consider the widespread environmental justice implications and in so doing ensure that the final version of this rule reflects the concerns of affected communities, which have been fighting attacks on the Clean Water Act, and who have not been consulted on this issue at all. As the federal government, even with its environmental justice protections, has found it challenging to address the concerns of disproportionately affected communities, it will be significantly more challenging without clear safeguards outlined in a final rule. A weak framework for 404 assumptions will only serve to further embolden a deregulatory agenda that will destroy wetlands and pollute our waters in the name of profit over healthy waters and communities.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0086-0027.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0004)

On October 31, 2012, the Alaska Department of Environmental Conservation (ADEC) assumed full authority to administer the Clean Water Act Section 402 wastewater discharge permitting and compliance program in Alaska. Since ADEC assumed responsibility of the program, National Pollutant Discharge Elimination System (NPDES) permits have been managed by the agency and are called Alaska Pollutant Discharge Elimination System (APDES) permits. ADEC is typically understaffed and underfunded.[Footnote 3: See EPA Region 10, State Review Framework, Alaska, Clean Air Act and Clean Water Act Implementation in Federal Fiscal Year2017, Final Report at 5-6, 29-30, 33, 36, 56 (2019) (citing frequent staff turnover and continuing inadequate staffing) (EPA 2019 Final Report).] APDES permits are issued on five-year cycles. However, very few are renewed in a timely manner, and most are administratively extended for a minimum of one year, sometimes several years. Recent examples include APDES permits for Kensington and Greens Creek mining operations near Juneau, and the Niblack exploratory mining operation on Prince of Wales Island.

Kensington Mine's previous APDES permit was issued in 2015. A renewal is expected in October 2023, according to ADEC's website.[Footnote 4: ADEC, Alaska Pollutant Discharge Elimination System Individual Permit, Permit No: AK0050571 - Coeur Alaska Inc. (Apr. 28, 2017).] Multiple "minor modifications" to the permit have occurred since 2017. Greens Creek Mine's APDES permit was also issued in 2015, expired in 2020, and was just renewed in August of 2023.[Footnote 5: ADEC, Alaska Pollutant Discharge Elimination System Individual Permit, Permit No: AK0043206 – Hecla Greens Creek Mining Company (Aug. 16, 2023).] Niblack Mine's ADPES permit, also issued in 2015, was renewed in 2022 after an objection remanded the first draft renewal permit back to ADEC—there were numerous significant errors with regard to the mixing zone dilution ratio and discharge components.

Additionally, ADEC compliance inspections occur infrequently, as one mine audit in 2009 stated: "A significant imbalance between the frequency of U.S. Forest Service and ADEC site compliance inspections exists. Representatives of ADEC should increase the

frequency of compliance inspections . . . ."[Footnote 6: SRK Consulting, Environmental Audit of the Greens Creek Mine, Final Report (Mar. 2009) (SRK Consulting 2009).] Mine audits are supposedly completed every five years; however, only two audits exist on file for Greens Creek, ten years apart. EPA's Region 10 verified this during its State Review Framework Final Report in 2019. As the report stated, the "2019 Report demonstrates continuing EPA concerns related to the timely completion of formal enforcement actions and the ongoing inability of the DE [compliance and enforcement (i.e., inspection)] program to meet EPA compliance monitoring strategy goals and DEC's [compliance and enforcement] program commitments."[Footnote 7: EPA 2019 Final Report at 6.]

Failures in ADEC's 402 and Clean Air Act compliance and enforcement programs detailed in EPA's 2019 Report are unfortunately not its only deficiencies. A critically important factor related to Human Health Criteria, the Fish Consumption Rate in Alaska has not been updated for decades, even though current EPA guidance is at a much higher rate. The current Fish Consumption Rate value that ADEC is using is 6.5 grams per day per person (g/d/p),[Footnote 8: ADEC, Division of Water, Proposed Updates to Human Health Criteria (Feb. 10, 2023) (ADEC HHC Proposed Updates); see also ADEC, Human Health Criteria and Water Quality Standards.] which is about the volume of a teaspoon of salt. ADEC has been scoping this issue for years with no action, even though in 2015, EPA updated national Fish Consumption Rate recommendations to 22g/d for general populations and 142.4g/d for subsistence populations.[Footnote 9: ADEC HHC Proposed Updates.] Studies completed by Alaska Native Tribes show that the state's fish consumption is closer to 250g/d/p.[Footnote 10: Sun'aq Tribe of Kodiak, Kodiak Tribes Seafood Consumption Assessment: Draft Final Report at 90, Tlb. 43 (Feb. 2019) (Listing a mean figure of 232.8g/p/d for Kodiak Tribes for seafood consumption).] In February 2023, ADEC initiated more public scoping.[Footnote 11: ADEC, Division of Water, Human Health Criteria and Water Quality Standards.] This despite a previous Alaska work group making well-studied recommendations about this issue in 2018.[Footnote 12: ADEC, Divisesion of Water, Evaluation of Key Elements and Options for Development of Human Hseealth Criteria, Technical Workgroup Report (Nov. 13, 2018)).] Alaska lags far behind other states in updating its Fish Consumption Rate, despite having the highest per capita consumption of fish in the nation.

Alaska has routinely failed under its obligations to ensure enforcement and compliance as required by its implementation of the Clean Air Act stationary sources and APDES program.[Footnote 13: See EPA 2019 Final Report.] Yet the State now seeks assumption of the Clean Water Act's 404 program with little regard to the full weight of the responsibility. Alaska includes approximately 63% of the nation's wetland ecosystems.[Footnote 14: Jonathan V. Hall et al., Status of Alaska Wetlands, USFWS (1994).] Estimates place the total acreage at approximately 174 million acres or about 43% of the state. The adoption of the proposed 404 regulations as currently drafted would only make it easier for a state such as Alaska, which is unable to fulfill its current duties, to assume additional work that it has no hope of being able to perform adequately, endangering not only Alaska's waters and communities who depend on them but a majority of this nation's wetlands.

Agency Response: **Alaska's APDES program is outside the scope of this rulemaking.**

See **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0086-0027 regarding requirements to ensure permits issued by a Tribe or State are no less stringent than the CWA requirements and that they comply with the section 404(b)(1) Guidelines.**

Alaska Clean Water Advocacy et al. (EPA-HQ-OW-2020-0276-0086-0005)

EPA must not approve Alaska's 404 state assumption application until the conclusion of this rulemaking.

Agency Response: **Review and potential approval of an individual program request is outside the scope of this rulemaking; however, EPA notes that no request to assume the program has been received while the Agency was finalizing this rule.**

Chickaloon Native Village (EPA-HQ-OW-2020-0276-TRANS-092923-009-0001)

I work for the Chickaloon Native Village in Alaska. Our particular Native village and other Tribes in Alaska do not have the option of taking over wetland primacy, because we do not have reservations or reservation boundaries. Instead, the state of Alaska would take primacy including over lands owned by Tribes. Consultation at the federal level is far from perfect with Tribes. However, we would much rather work within an imperfect Federal Government-to-government consultation process than have no consultation at all, which is the option left by the state 404 primacy. State agencies have done an exceptionally bad job at recognizing the sovereignty of Tribes or involving Tribes on a government-to-government basis.

Agency Response: **EPA acknowledges this comment and the unique status of Alaskan Native Villages.** ***See*** **Section IV.F of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0044 for further discussion.**

Chickaloon Native Village (EPA-HQ-OW-2020-0276-TRANS-092923-009-0004)

Alaska state primacy would disproportionately harm Tribes, sacred sites, and traditional ancestral lands which are located adjacent to waters and wetlands. We continue to be concerned that Alaska will not ensure Tribes have the right to participate in natural resource decisions, including as a cooperating agency. Are there laws and regulations that would need to be changed to comply with federal law and ensure Tribal rights are protected? We continue to be concerned that the state ensures Tribal sovereignty in permitting decisions is maintained, and that the state will not ensure that Agency personnel across different permitting regimes account for all cumulative impacts under air, water and wetlands permits and disclose these potential impacts to Tribes in the public. We are concerned that the state will not ensure transparency and disclosure of all potential project impacts to Tribes and the public, so they may engage, comment, and otherwise participate.

Agency Response: **Any Tribe or State approved to assume and administer a CWA section 404 program must have the authorities to administer the program consistent with the Act, including the coordination and public notice and participation requirements which can be found at 40 CFR 233.31, 233.32 and 233.33.** ***See also*** **the**

Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0044 for further discussion.

The scope of any particular prospective Tribal or State program is outside the scope of this rulemaking. Consistency of a Tribal or State program with the CWA will be reviewed at the time the request is submitted to EPA.

Orutsararmiut Traditional Native Council (EPA-HQ-OW-2020-0276-TRANS-092923-011-0001)

Having the 404 state assumption is one of the biggest concerns that I see for Alaska Natives. As a collective, we have the most amount of Tribes within our state than any other state within the United States of America, and as it already is, the state does not have the respect for Tribes and their concerns and the indigenous traditional ecological knowledge that they hold when it comes to these 404 permits. We've gone through state litigation on one of the mining projects and even when the Alaska Superior Court judge decides on the Tribe's behalf, the Department of Environmental Conservation sticks with their decision, regardless of any evidence and they completely function in a way that is not conserving the environment within the state, and with the complexities that lie within being sovereign Tribal governments, we have also for-profit Native corporations that hold all of the land and mineral rights.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-TRANS-092923-009-0004.**

Orutsararmiut Traditional Native Council (EPA-HQ-OW-2020-0276-TRANS-092923-011-0002)

So, I think that as the guidance's that have come from the office, the Executive Office of the President, to have this good, clear, robust consultation we need to keep the Tribes in mind, especially in the state of Alaska. Because too often they are not taken into consideration, and the state is always looking for a way to economically prosper, while all of us here in Southwest Alaska, in the Yukon-Kuskokwim Delta, we have fifty-five thousand square miles. There's fifty-six villages that all have their own governments. Here, on the Kuskokwim ninety percent of the meat that we consume is fish, and when the state is deciding to pursue projects for their economic prosperity, we're going to be suffering in our access to food. And I already know, with sitting on the City Council, that the Department of Environmental Conservation wants to get rid of the NEPA process so it will be a more streamlined process, and as the person I am, looking out for our future generations, that is such a big disrespect to the indigenous populations. So, I highly recommend that the EPA do not move forward with the 404 state assumptions. Thank you so much for your time.

Agency Response: ***See*** **Section V of the final rule preamble and response to comments for discussion as to how this final rule is consistent with all applicable Executive Orders.** ***See also*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0044.**

Wetlands Coordinator for Confederated Salish and Kootenai Tribes (CSKT) (EPA-HQ-OW-2020-d0276-TRANS-083023-001-0001)

Comment 1

A third attendee inquired through the chat about additional funding availability if CSKT were to apply for a section of 404g.

Agency Response: Funding for Tribal or State programs is outside the scope of this rulemaking.

4. General comments on authority to administer a section 404 program

Region 10 Tribal Operations Committee (RTOC) and National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0070-0008)

IV. Jurisdiction over Indian country is not a matter for EPA determination.

Tribes possess inherent sovereignty. Conventionally, Federal ability to regulate Tribal affairs and Tribal lands comes from affirmative Congressional action. Congress has not delegated to EPA the power to determine whether States have authority over Tribal lands. Therefore, by making elements of the proposed rule contingent upon "EPA determin[ing] that a State has authority to regulate discharges into waters in Indian country," the rule misunderstands Federal Indian law to the potential detriment of Tribes. The procedure for these determinations matters, and Tribal sovereignty should not be undermined by administrative overreach.

Agency Response: As recognized in EPA's regulations, in many cases, States lack authority under the CWA to regulate activities covered by the section 404 program in Indian country. *See* 40 CFR 233.1(b). Thus, the Corps will continue to administer the program in Indian country unless EPA determines that a State has authority to regulate discharges into waters in Indian country and approves the State to assume the section 404 program over such discharges. When a Tribe or State is preparing to submit a section 404 program request, EPA will work with the appropriate Tribal, Federal, and State entities to ensure the scope of the program is consistent with governing law.

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-SD-0012)

- EPA must make clear to each state that its assumption of authority does not extend to Indian country. Tribes themselves, or the federal government by way of ACE, determine what activities may take place on trust or reservation lands or other areas of Indian country, and state laws do not apply there.

Agency Response: *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0070-0008.

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0026)

EPA's proposed regulations specifically state that "the Corps will continue to administer the [Section 404] program in Indian country unless EPA determines that a state has authority to regulate discharges into waters in Indian country and approves the State to assume the section 404 program over such discharges." Id. at 55285. As an initial matter, it is not up to EPA to determine whether a state has jurisdiction in Indian Country. Questions or uncertainties about state jurisdiction in Indian Country must be first addressed with the affected tribe, and EPA must maintain a presumption that there is no state jurisdiction in Indian Country. If there is still a dispute, then the proper avenue is for a federal judiciary or Congress, not EPA, to determine.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0070-0008.**

EPA's approval of any Tribal or State section 404 program is a final agency action subject to judicial review.

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0003)

The United States Supreme Court has recognized the central importance of fishing for tribes: it is "not much less necessary to the existence of the Indians than the air they breathed." United States v Winans, 198 U.S. 371, 381 (1905). And the reserved right to take fish impliedly reserved both the access required to exercise the right and the habitat necessary to fulfill its purpose, that is, sufficient to keep waterways and wetlands suitable for fish reproduction and tribal harvest. E.g., id. at 381-82; United States v. Washington ("Culverts"), 853 F.3d 946, 966 (9th Cir. 2017), aff'd, 138 S.Ct. 1832 (per curiam); Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist., 763 F.2d 1032 (9th Cir. 1985).

Structures and activities that will physically obstruct the waters where tribal citizens have a treaty right to fish and, in doing so, will "eliminate a part of the Tribes' usual and accustomed fishing ground (and their right of access to that ground)" are prohibited. See, e.g., Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988) (granting injunction against the construction of marina that would eliminate access to Muckleshoot Tribe's and Suquamish Tribe's U&A fishing area and deny the tribes the ability to exercise treaty rights at the site). And the Corps has no authority to permit an interference with the Tribes' ability to exercise their treaty fishing rights in their U&A. See, e.g., Northwest Sea Farms, Inc. v. U.S. Army Corps of Engineers, 931 F. Supp. 1515, 1520-22 (W.D. Wash. 1996) (affirming Corps' denial of permit for salmon net pens because of project's interference with Lummi Nation's treaty fishing rights, including elimination of access to U&A fishing area); Confederated Tribes of Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D. Or. 1977) (Army cannot build dam and flood tribal fishing places, where Congressional authorization does not expressly provide for taking of treaty fishing rights).

The Treaty Tribes have the right to take fish in all of the waters and shorelines within their U&A. E.g., Winans, 198 U.S. at 381-82 (finding that the off-reservation fishing rights reserved by the Tribes "imposed a servitude upon every piece of land as though described therein"); Muckleshoot Indian Tribe, 698 F. Supp. at 1511 ("Further, this right of taking

fish is reserved at all usual and accustomed grounds"); Northwest Sea Farms, 931 F. Supp. at 1521 ("The site in question need not be the primary or most productive one for fishing."). And the Tribe's members have the right to follow the fish wherever they might swim in our U&A, now and in the future, regardless of where tribal members may fish today or may have fished in the past. E.g., United States v. Washington, 384 F. Supp. 312, 351-52 (W.D. Wash. 1974) (finding that local fish supplies varied and that tribes traditionally shifted fishery locations in response to relative abundance).

The Corps may not authorize an activity that would eliminate access to any portion of the Treaty Tribes' U&A fishing areas. See, e.g., Muckleshoot Indian Tribe, 698 F. Supp. at 1515 ("No case has been presented to this Court holding that it is permissible to take a small portion of a tribal usual and accustomed fishing ground, as opposed to a large portion, without an act of Congress, or to permit limitation of access to a tribal fishing place for a purpose other than conservation."); id. at 1514 ("The federal, City and private defendants here do not have the ability to qualify or limit the Tribes' geographical treaty fishing right (or to allow this to occur through permits) by eliminating a portion of an Indian fishing ground for a purpose other than conservation.").

Agency Response: Nothing in this final rule affects Tribal treaty rights.

Port Gamble S'Klallam Tribe (PGST) (EPA-HQ-OW-2020-0276-0078-0004)

Both EPA and the Corps are required to and have committed to uphold Port Gamble S'Klallam treaty rights. EPA, in August 2021, and the U.S. Department of Defense, in October 2021, signed the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights (Treaty Rights MOU), which provides that:

Treaty-protected rights to use of and access to natural and cultural resources are an intrinsic part of tribal life and are of deep cultural, economic, and subsistence importance to tribes. Many treaties protect not only the right to access natural resources, such as fisheries, but also protect the resource itself from significant degradation. Under the U.S. Constitution, treaties are part of the supreme law of the land, with the same legal force and effect as federal statutes. Pursuant to this principle, and its trust relationship with federally recognized tribes, the United States has an obligation to honor the rights reserved through treaties, including rights to both on and, where applicable, off-reservation resources, and to ensure that its actions are consistent with those rights and their attendant protections.

Accordingly, the Parties recognize the need to consider and account for the effects of their actions on the habitats that support treaty-protected rights, including how those habitats will be impacted by climate change....

The Supreme Court has explained that Indian treaties are to be interpreted liberally in favor of tribes, giving effect to the treaty terms as tribes would have understood them, with ambiguous provisions interpreted for their benefit. Treaties are to be interpreted in accordance with the federal Indian canons of construction, a set of longstanding principles developed by courts to guide the interpretation of treaties between the U.S. government

and Indian tribes. This means that federal agencies must give effect to treaty language and ensure that federal agency actions do not conflict with tribal treaty and reserved rights.

Agency Response: Nothing in this final rule affects Tribal treaty rights.

Tulalip Tribes of Washington (EPA-HQ-OW-2020-0276-0082-0003)

While Tulalip agrees with the EPA's recognition that states lack the authority to assume Section 404 permitting within Indian Country, Tulalip strongly disagrees with EPA's insinuation of its own authority to approve state assumption of Section 404 within Indian Country.

Agency Response: *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0070-0008.

5. General comments on stakeholder engagement

Buena Vista Rancheria of Me-Wuk Indians (EPA-HQ-OW-2020-0276-0053-0011)

Lastly, Buena Vista Rancheria requests that maps of Section 10 waters and their retained adjacent wetlands be made available for the public.

Agency Response: EPA is not requiring Tribes and States to create maps of section 10 waters and retained adjacent wetlands that would be available to the public, as there may be other ways to present this information that are similarly informative and that are consistent with CWA requirements. EPA encourages Tribes and States that assume the program to provide as much transparency as possible on the extent of assumed and retained waters. Maps are a potential useful tool, though final determinations regarding jurisdiction need to be made on case-by-case bases as maps are static while aquatic resources may be altered over time.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0004)

Additionally, the Conservation Organizations remain very disappointed and object to the fact that EPA has proposed these rules while failing to engage with communities and advocates on the matter. EPA documents show that the agency has spent years soliciting input from states about 404 assumption and hearing from them as to what states would like to see changed and what standards for assumption states would prefer to see eased. EPA has not engaged with communities and advocates in developing these regulations, and its engagement with Tribes has been minimal to the point of nonexistence. EPA's lopsided failure to engage with communities, advocates, and affected Tribes has occurred even though these rules concern public resources that will be affected for decades if not all time. Continuing in that vein, EPA's sixty-day comment period, and its summary denial of several requests for an extension, unreasonably requires members of the public to analyze and draft comments on hundreds of pages of regulatory text, legal analysis, and supporting documentation. As a result, the proposed rule fails to address many of the public's concerns.

Agency Response: The regulations located at 40 CFR 233 articulate the process and requirements for Tribes and States to assume and administer a section 404

permitting program, As Tribes and States cannot impose less stringent requirements than the federal program, EPA does not think this rulemaking will adversely affect public resources. EPA sought input from the public during a Federal Advisory Committee (2015-2017) and during the public comment period. For a more robust discussion of engagement of Tribes and States and EPA's public outreach efforts generally, see Section III.B of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-TRANS-082423-001-0001.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0057)

EPA has claimed that because biological opinions are not ordinarily subject to notice and comment, the public has no right to review and comment on a programmatic biological opinion that articulates processes on which a state relies to claim that its program, and permits issued under the program, will not jeopardize ESA species or adversely modify critical habitat. EPA has said this is true even where the biological opinion contains the permit-level process used to demonstrate that a state program satisfies the 404(b)(1) Guideline to ensure no jeopardy.
However, EPA must ensure that the public has an opportunity to comment on all program components that are relied upon to demonstrate a state program meets the minimum requirements of the Clean Water Act, even when those components are contained in a biological opinion.

EPA should take this rulemaking opportunity to ensure that all materials on which a state relies to claim that it meets the requirements for assumption are made available to the public for comment. An application should therefore not be deemed complete (for purposes of notice and comment as well as EPA's statutory deadline to act on an assumption request) until all components have been submitted to EPA and made available to the public. To the extent those components may appear in a document that would not ordinarily be subject to notice and comment is beside the point. EPA should ensure that the public is given an opportunity to comment on all components of a state's proposed program, regardless of where that information appears.

Agency Response: ***See*** **Section IV.A.2 of the final rule preamble addressing Endangered Species Act compliance.** ***See also*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0063-0013.**

National Tribal Water Council (NTWC) (EPA-HQ-OW-2020-0276-0074-0002)

The NTWC has always valued our opportunities to provide early input and tribal perspectives to EPA on rulemaking and implementation of the CWA, through informal Q & A at our monthly meetings, and in formal submitted comments. But when clearly articulated concerns for the protection of tribally significant resources and specific recommendations for improved policy do not result in demonstrable changes from draft to proposed rule, it is discouraging.

Agency Response: EPA acknowledges this comment. The final rule addresses many concerns raised by Tribes during early engagement efforts, including ways in which Tribes can meaningfully engage with Tribal and State section 404 programs. ***See***

Sections IV.C.2 and IV.F of the final rule preamble for discussion of provisions that will facilitate Tribal engagement in the permitting process.

Alaska Department of Environmental Conservation (DEC) (EPA-HQ-OW-2020-0276-TRANS-082423-001-0001)

Did EPA share a draft of this proposed rule with any State or Tribe prior to publishing the proposed rule in the federal register?

Agency Response: EPA did not share drafts of the proposed rule to any individual entities prior to publishing the proposal.

Fort. Berthold/Three Affiliated Tribes (EPA-HQ-OW-2020-0276-TRANS-083023-003-0001)

Comment 1

A fifth attendee asked if the slides would be emailed to participants on the call.

Agency Response: Slides are posted on EPA's website as well as in the docket associated with this rulemaking.

Fort. Berthold/Three Affiliated Tribes (EPA-HQ-OW-2020-0276-TRANS-083023-003-0002)

Comment 2

The attendee said to expect MHA Nation'sa response from her organization's leadership in regard to the presentation provided during the input meeting.

Agency Response: EPA appreciates all comments provided during these input sessions.

Environmental Confederation of Southwest Florida (EPA-HQ-OW-2020-0276-TRANS-092923-002-0004)

one of the questions you asked about is more community involvement. And I echo everything that [speaker number six; Christine Reichert] Earthjustice said. And when you have this much information and you tell the public they get three minutes to comment on what probably took you an hour, which was a great presentation, that really isn't engaging the public, so I would consider, even my county commissioners let us have five minutes.

Agency Response: EPA acknowledges the comment. EPA limited speaker comments to three minutes to ensure everyone had an opportunity to speak. At the public hearing, once those registered to speak had spoken, others at the meeting were provided the opportunity to speak and the previous speakers were provided additional time to provide comments.

Sierra Club (EPA-HQ-OW-2020-0276-TRANS-092923-004-0006)

These rules need to improve the timing, the processes for the public to find, to track, to comment. For government officials to evaluate, to approve, to withdraw, to revisit, for our applications, including the inadequate state assumption, so devastating here in Florida.

Agency Response: **The final rule makes clarifications and revisions to the regulations with respect to timing and opportunities to comment on assumption requests and permit applications. *See* Sections IV.B.2, IV.B.3, IV.B.4, IV.C, and IV.F of the final rule preamble for discussion on these revisions. *See also* Section IV.E.2 of the final rule preamble for revisions to the withdrawal procedures. EPA notes that on February 15, 2024, the U.S. District Court for the District of Columbia issued an order vacating the EPA's approval of the Florida's CWA section 404 assumption request. The U.S. Army Corps of Engineers is the section 404 permitting authority within Florida at this time.**

Responsible Growth Management Coalition (EPA-HQ-OW-2020-0276-TRANS-092923-007-0007)

"Will we be able to find a recording of this Zoom to review and share with others and/or will there be a transcript available? If so, where will we find the link for the Zoom recording or transcript?"

Agency Response: **The public meeting recording can be viewed on** YouTube **or from** EPA's website**.**

K. Out of scope

1. Request to expand or exercise authority

State of Utah, Public Lands Policy Coordinating Office (EPA-HQ-OW-2020-0276-0056-0001)

The State appreciates the opportunity to submit comments on this Proposed Rule. Utah generally supports the Proposed Rule and encourages the Environmental Protection Agency ("EPA") to explore additional avenues allowing states to assume more management authority over natural resources within their borders.

Agency Response: **EPA acknowledges this comment. State management of natural resources aside from assumption of the CWA section 404 program is outside the scope of this rulemaking.**

South Florida Wildlands Association (EPA-HQ-OW-2020-0276-TRANS-092923-010-0007)

I request the EPA to use its authority, after a careful review of how Florida's assumption on 404 permitting is actually playing out with regard to the federal protections Congress put in place decades ago, to rescind Florida's authority to issue 404 permits. We will provide more data on the permits that have been issued, and those still coming up for review in our written comments to your office. EPA has that authority under the regulations for this program, and all the agreements signed between EPA, FDEP, USFWS, and the Florida FWC. Thank you.

Agency Response: **Implementation and oversight of individual State CWA section 404 programs is outside the scope of this rulemaking. *See* Sections IV.A.3, IV.B.2 and IV.B.3 of the final rule preamble regarding the requirement that Tribal and State programs cover all "waters of the United States" not retained by the Corps of Engineers. EPA notes that on February 15, 2024, the U.S. District Court for the**

District of Columbia issued an order vacating the EPA's approval of the Florida's CWA section 404 assumption request. An appeal of this decision is pending. The U.S. Army Corps of Engineers is currently the section 404 permitting authority within Florida.

2. Definitions of "waters of the United States"

Anonymous (EPA-HQ-OW-2020-0276-0046-0001)

In response to the recent Sackett Supreme Court decision, the EPA appears to be shifting the regulatory responsibility of wetlands to individual states. Sackett has drastically reduced the extent of wetland protection under federal law, so federal programs that allow states to regulate wetlands themselves are crucial. Now, the main realm of wetland regulation will be state law, in states such as California and Florida that define "waters of the state" more broadly than the federal CWA.

Agency Response: Section 404 of the Clean Water Act (CWA) establishes a program to regulate the discharge of dredged or fill material into navigable waters, defined as "waters of the United States," and section 404(g) gives States and Tribes the option of assuming the permitting responsibility and administration of the section 404 permit program for certain waters. Therefore, any changes in the scope of waters of the United States will impact the scope of waters subject to the section 404 permit program. Comments regarding the definition of "waters of the United States," however, are outside the scope of this rulemaking.

Buena Vista Rancheria of Me-Wuk Indians (EPA-HQ-OW-2020-0276-0053-0009)

While BVR has read the proposed rulemaking and has provided comments, there is still a lack of understanding about how the recent changes to the definition of Waters of the United States ("WOTUS"), caused by the May 25, 2023 Sackett decision, fit into and affect this proposed rulemaking. Additionally, EPA published on August 29, 2023 a final rules to amend the final "Revised Definition of 'Waters of the United States'" rule. EPA and Army Corps have not done enough outreach to Tribes to articulate the implications of the Sackett decision, its new revised rule, and how these relate to the CWA 404(g) program.

Agency Response: *See* the Agency's Response to Comment EPA-HQ-OW-2020-0276-0046-0001 and Section III.A of the final rule preamble regarding the scope of this rulemaking.

The Petroleum Alliance of Oklahoma (EPA-HQ-OW-2020-0276-0055-0013)

III. JUDICIAL DECISION REQUIRES THE PROPOSAL BE REVISITED

On May 25, 2023, the United States Supreme Court released its decision in Sackett v. EPA [Footnote 11: U.S. (2023), 143 S. Ct 1322 (May 2023).]. The Court held that the Clean Water Act's use of the term "waters" refers only to geographic features commonly understood as "streams, oceans, rivers, and lakes and to adjacent wetlands that are indistinguishable from those bodies of water due to a continuous surface connection." In

doing so, the Court borrowed heavily from the plurality opinion in Rapanos v. United States [Footnote 12: 547 U.S. 715, 126, S. Ct. 2208 (2006).].

The Sackett decision represents a clarification of the definition of waters of the United States and necessarily affects the scope of any assumption of section 404 authority. However, the preamble to the proposed rule does not include an analysis of how the Court's decision may affect section 404 authority. The Sackett decision preceded this proposed rule by only a few months and EPA and the Corps of Engineers only published their revised definition of "Waters of the United States" on September 8, 2023 (88 Fed. Reg, 61964.) In the absence of that guidance on the revised definition of Waters of the United States, the agency could not have fully evaluated the ramifications of the Sackett decision for purposes of section 404 authority when this proposed rule was issued. The Alliance submits that it may be wise to pause consideration of the proposed rule while the agency considers how the Court's decision, and the resulting guidance may affect assumption of section 404 authority [Footnote 13: In the preamble, EPA emphasized that the program description of the waters of the United States assumed by the state or tribe must encompass all waters of the United States not retained by the Corps. All discharges of dredged or fill material into waters of the United States must be regulated either by the state or tribe or by the Corps. 88 Fed. Reg at 55291. Given this mandate it may be wise to re-examine what a program description should include and how waters of the United States would be identified.].

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0046-0001 and Section III.A of the final rule preamble regarding the scope of this rulemaking.**

Environmental Protection Network (EPN) (EPA-HQ-OW-2020-0276-0057-0002)

Impact of Waters of the U.S. Definitions on 404 Assumption
EPN supports the recognition that the definition of waters of the U.S. (WOTUS) is likely to change over time. In the Federal Register Notice on Page 55309, EPA discusses how changes in the scope of WOTUS need to be addressed by states and Tribes that have assumed the Section 404 program. Given the recent changes in the WOTUS definition and ongoing litigation, EPN supports identifying this issue as an important aspect of program assumption. The final rule should explain how this will be addressed, both for expansion of the scope of waters and the contraction of scope, as has occurred as a result of the recent Sackett decision. In addition, the final rule needs to explain how Section 404 implementation by a state or Tribe will be affected by the definition of WOTUS in that specific geographical area. Until a nationally consistent definition is established, 27 states are implementing the pre-2015 definition along with the Sackett decision, while 23 states are implementing the 2023 definition. States, Tribes, and the public need to understand how these varying definitions will be implemented by the Section 404 authority. The final rule also needs to explain what will happen to state and Tribal 404 programs when a nationally consistent WOTUS definition is established. How will those programs be required to respond to the new definition?

EPN also recommends that EPA and the COE consider issuing guidance on how the WOTUS definition will apply in the different geographical regions of the U.S. that have very different hydrologic features. This approach has been done in the past, and EPN encourages consideration of this approach moving forward.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0046-0001 and Section III.A of the final rule preamble regarding the scope of this rulemaking.**

See **Section IV.B.2 for of the final rule preamble for discussion regarding changes to the geographic scope of a Tribal or State section 404 program.**

Comments regarding the definition of "waters of the United States," or guidance associated with the implementation of the definition of "waters of the United States" are outside the scope of this rulemaking.

Charles River Watershed Association (CRWA) (EPA-HQ-OW-2020-0276-0062-0002)

The decision in Sackett v. EPA demonstrably decreases protections for water bodies throughout the United States; allowing states to implement less protective enforcement programs could result in still weaker protections for remaining jurisdictional waters

CRWA is seriously concerned that this proposed rule could have the unintended result of severely curtailing our country's ability to effectively protect our waters and wetlands.[Footnote 2: Porter, Jeff, Surprising to see EPA now taking steps to make it easier for states to take over the Federal Government's dredge and fill permit responsibilities, Mintz (July 20, 2023), https://insights.mintz.com/post/102ijxn/surprising-to-see-epa-now-taking-steps-to-make-it-easier-for-states-to-take-o ver.] Recent legal developments, and in particular the May 25th ruling in Sackett v. EPA, have stripped many previously jurisdictional waters of their protections under the CWA. In May 2013, the Environmental Law Institute first published the results of a 50-state study that found that at that time, 19 states had laws that constrained, or in some cases, entirely eliminated "the ability of state regulators to protect waters no longer covered by the federal Clean Water Act, or whose federal protection has become uncertain."[Footnote 3: State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act. Environmental Law Institute, Project No. 0931-01 (May, 2013), https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf.] The report concluded that states were simply not "filling in the gap," in the way that Congress likely intended.[Footnote 4: Id.] A narrowed jurisdictional scope for qualifying wetlands and waterways under the Clean Water Act could also potentially lead to pressure to reduce state wetland jurisdiction to coincide with the Federal definition, a step that Massachusetts' regulated community has already considered in the past. More than ever, EPA should be considering how to strengthen protections and provide states with a strong federal regulatory floor or framework to utilize in the wake of destabilizing rulings such as the Sackett decision.

At the very least, current uncertainty around the protections of many waterbodies, wetlands, and waterways would appear to litigate against further efforts to delegate

regulatory responsibilities at this time, especially given "[t]he fact that EPA and several State Attorneys General disagree over Sackett's impact, as evidenced by three currently stayed litigations in Kentucky, Texas, and North Dakota."[Footnote 5: Supra note 2.] Instead, with this rulemaking, EPA aims to actively increase the ease of delegating § 404 permitting. CRWA is disturbed by the very real possibility that a future deregulatory administration, coupled with states uninterested - or unable - to protect previously jurisdictional waters could weaken protections for our nation's hydrological system.

Agency Response: EPA disagrees with the comment stating that this rule could severely curtail our country's ability to effectively protect our waters and wetlands. This rule both facilitates the assumption process and clarifies minimum requirements for Tribes and States to ensure the program is administered consistent with the CWA. The scope of "waters of the United States" and a Tribe or State's management of waters beyond the scope of the CWA is outside the scope of this rulemaking. *See* Section IV.D of the final rule preamble for discussion of the Agency's rationale regarding criminal enforcement standards applicable to Tribal and State section 404 programs.

Anonymous (EPA-HQ-OW-2020-0276-0065-0001)

The CWA only covers certain waters in the US. These waters are defined as "navigable waters, defined as 'waters of the United States'" listed in the Background section 2. CWA Section 404 paragraph. The definition of navigable water of the US only includes water routes that are or have been used to transport commerce. This does not include the wetlands and marsh areas that have fragile environments.

Does the EPA plan to extend protection of dredged and fill materials over the wetland and marsh areas?

Agency Response: The scope of "waters of the United States" is outside the scope of this rulemaking. The current definition of navigable waters under the CWA is addressed in the *Revised Definition of "Waters of the United States"; Conforming*. To track current implementation nationally please visit the EPA's "waters of the United States" website**.**

Florida Department of Environmental Protection (FDEP) (EPA-HQ-OW-2020-0276-0066-0003)

State programs like Florida's can also provide additional protection to waters beyond the scope of EPA's authority. For example, Florida law defines "waters of the state" to mean "any and all water on or beneath the surface of the ground or in the atmosphere, including natural or artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground, as well as all coastal waters within the jurisdiction of the state." § 373.09, Fla. Stat. Following the Supreme Court's decision in Sackett v. EPA, 598 U.S. 651 (2023), which correctly determined that EPA's CWA authority over Waters of the United States ("WOTUS") extends only to geographical features described in ordinary parlance as "streams, oceans, rivers and lakes" and to adjacent wetlands that are "indistinguishable" from those bodies

of water due to a "continuous surface connection," state programs (such as Florida's ERP Program) can provide additional regulatory protection for non-WOTUS waters.

Agency Response: EPA agrees that Tribal and State programs can protect waters other than "waters of the United States." The extent of "waters of the United States" is beyond the scope of the scope of this rulemaking.

Earthjustice et al. (EPA-HQ-OW-2020-0276-0068-0027)

As EPA is aware, for nearly two years Florida flouted a federal court's vacatur of the Navigable Waters Protection Rule and EPA's directives to follow the law on the definition of waters of the United States. See supra pp. 11-12. In light of Florida's failure to regulate waters of the United States, EPA must plainly require that states at all times follow EPA and Corps guidance on the applicable definition of waters of the United States. EPA must also provide that failure to do so will result in the initiation of withdrawal of approval proceedings. The Florida experience teaches that a state willing to flout federal law will exploit a federal agency's trepidation. EPA's regulation must make clear that failure to follow federal law will lead to withdrawal of approval.

Agency Response: The implementation of any particular State program is outside the scope of this rulemaking. EPA notes that on February 15, 2024, the U.S. District Court for the District of Columbia issued an order vacating the EPA's approval of the Florida's CWA section 404 assumption request. An appeal of this decision is pending. The U.S. Army Corps of Engineers is currently the section 404 permitting authority within Florida.

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0002)

However, the proposed rule provides virtually no context on the interplay between program assumption and the recent Supreme Court decision in Sackett v. EPA, instead minimizing this complex inquiry into arbitrary default rules that have no basis in fact or law.[Footnote 2: Sackett v. EPA, No. 21–454 (U.S. May 25, 2023).] This rule consequently does not fairly apprise interested parties of all significant subjects and issues involved in the Assumption Rule in clear violation of the Administrative Procedures Act.[Footnote 3: 5 U.S.C. § 553(b)(3); Am. Iron & Steel Inst. v. Envtl. Prot. Agency, 568 F.2d 284 (3d Cir. 1977); Chocolate Mfrs. Asso. v. Block, 755 F.2d 1098 (4th Cir. 1985)]

Agency Response: *See* Section III.A of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0046-0001 regarding the scope of this rulemaking.

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0003)

While EPA's proposed Assumption Rule is nearly 200 pages and purports to offer substantive information on a host of programmatic changes, it is completely bereft of any information on the most important and substantial issue in relation to the wetlands program – the context of this rule in a post-Sackett world. EPA's failure to provide any context on Sackett – sans two brief footnotes – bars the public from meaningfully commenting on perhaps the most significant subject related to the Assumption Rule, leaving the entire proposal in violation of the Administrative Procedures Act.

Agency Response: **This rulemaking does not affect the scope of "waters of the United States." While a Tribe or State dredged or fill permitting program may be broader than the scope of the CWA, the geographic scope of an approved Tribal or State CWA section 404 programs is limited to certain "waters of the United States." As such, the rulemaking appropriately does not discuss the *Sackett* decision. *See* Section III.A of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0046-0001.**

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0004)

The Administrative Procedure Act ("APA") requires a notice of proposed rulemaking to include detailed description of the significant subjects and issues involved."[Footnote 4: 5 U.S.C. § 553(b)(3).] Notice that is too vague or incomplete in describing the subject and issues involved is generally deemed inadequate, as it fails to apprise parties of the rule's complete subject matter and denies a fair opportunity to comment and participate.[Footnote 5: Small Refiner Lead Phase-Down Task Force v. U.S. EPA, 705 F.2d 506, 549 (D.C.Cir. 1983)] Notice must instead be "sufficiently descriptive" on the substance and issues of the proposed rule to enable interested to present their views on the entire contents of the rule.[Footnote 6: Kennecott v. EPA, 780 F.2d 445, 452 (4th Cir. 1985); NRDC. v. United States EPA, 824 F.2d 1258, 1284 (1st Cir. 1987)] These requirements are "basic to administrative law" and crucial to ensuring that EPA makes an informed decision, taking into account public expertise.[Footnote 7: Chocolate Mfrs. Ass'n 755 F.2d at 1102 (4th Cir. 1985); Spartan Radiocasting Co. v. FCC, 619 F.2d 314, 321 (4th Cir. 1980).]

The jurisdictional definition of wetlands is clearly "of the subject and issues involved" in the proposed rulemaking as contemplated by the APA. Without meaningful discussion of this rule's impact, the notice provides no opportunity for the public to meaningfully comment. The only substantive reference to Sackett is in a single footnote in reference to the EPA's illegal attempt to set an arbitrary "administrative boundary" default of for adjacent wetlands at approximately 300- feet.[Footnote 8: Clean Water Act Section 404 Tribal and State Program Regulation, RIN 2040-AF83 at 32 (2023)] The notice does not further discuss how this administrative boundary functions in relation to the definition of adjacent wetlands. More important, the notice reduces what must be a fact- based inquiry into defining adjacent to an arbitrary line that violates the Clean Water Act and denies reality. Adjacent wetlands do not end at 300 feet. In fact, EPA acknowledges that "large wetland complexes can extend tens or even hundreds of miles" in connection with the main river.

Agency Response: ***See*** **Section IV.B.2 of the final rule preamble. EPA did not finalize its proposed approach to administrative boundaries. The default understanding is that the Corps would retain administrative authority over all jurisdictional wetlands "adjacent" to retained waters, as that term is defined in 40 CFR 120.2. The definitions in 40 CFR 120.2 are outside of the scope of this rulemaking.** ***See also*** **Section III.A of the final rule preamble and the Agency's Response to Comment EPA-HQ-OW-2020-0276-0046-0001.**

Center for Biological Diversity (EPA-HQ-OW-2020-0276-0083-0005)

The resulting confusion and absence of meaningful discussion makes it nearly impossible for a person to be fairly apprised of the issues. For example, the Sackett opinion raises serious questions about which waters are even assumable by states under the Clean Water Act. EPA must analyze this issue and describe its interpretation of Sackett in this context so that the public has meaningful notice regarding which waters may be affected by the proposed regulations.

Then, given a new opportunity to comment that meaningfully integrated Sackett into the decision, commentors would "have their first occasion to offer new and different criticisms which the Agency might find convincing" and relevant to the Assumption Rule.[Footnote 9: NRDC, 824 F.2d at 1284.] An illegal default rule is not a substitute for a meaningful discussion or application of Sackett. Absent this information, this notice violates the APA and provides not meaningful opportunity to comment.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0083-0004. The effect of the** ***Sackett*** **decision is not the focus of this rule and are not within its purview.**

California State Water Resources Control Board (EPA-HQ-OW-2020-0276-TRANS-082423-003-0001)

Comment 1

Sackett Decision has left a lot of uncertainty about how the Corps will implement its new jurisdictional boundary, but it seems clear that the gap between non-assumable waters and waters outside of Corps jurisdiction has been greatly reduced. Does EPA have any information about what kinds of waters would still be assumable post-sackett[?]

Agency Response: Section IV.B.2 of the final rule preamble sets out clear time frames and procedures for determining which "waters of the United States" are to be retained by the Corps when a Tribe or State assumes administration of a section 404 program. Precisely which waters are to be assumed and which will be retained will be determined on an individual Tribal or State basis as part of the assumption process. ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0083-0004. The** ***Sackett*** **decision does not affect this final rule's procedures for distinguishing between retained and assumed waters.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-1-0001)

After more than a year ignoring federal law, it is time for EPA to require Florida to stop applying the long-vacated 2020 Navigable Waters Protection Rule ("NWPR"). Florida's refusal to comply with federal law threatens national waters and wetlands, as well as the wildlife and communities that depend on them.

As you know, Florida assumed jurisdiction over the Clean Water Act's Section 404 dredge and fill permitting program on or about December 22, 2020. Since that time, the state has applied the NWPR definition of "waters of the United States" to determine the scope of its 404 jurisdiction. On August 30, 2021, a federal court vacated the NWPR as unlawful at

the time of its adoption. Pasqua Yaqui Tribe, et al. v. U.S. Env't Prot. Agency, et al., No. CV-20-00266- TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021). Accord Navajo Nation v. Regan, No. 2:20-CV-00602, 2021 WL 4430466 (D.N.M. Sept. 27, 2021). As the Court observed, the NWPR substantially reduced the number of waterways, including wetlands, protected under the Clean Water Act as compared to prior rules and practices. Pasqua Yaqui Tribe, 2021 WL 3855977, at *5.

On September 1, 2021, we notified the Florida Department of Environmental Protection ("DEP") of its obligation to abide by the vacatur of the NWPR. Letter from Tania Galloni, Earthjustice, to Shawn Hamilton, Fla. Dep't Env't. Prot., Sept. 1, 2021 (Attachment 1). As we explained, it was critical that Florida act immediately to ensure protection of all waterways covered by the Clean Water Act. DEP did not respond.

Agency Response: Implementation and oversight of an individual State CWA section 404 program is outside the scope of this rulemaking. *See* Sections IV.A.3, IV.B.2 and IV.B.3 of the final rule preamble regarding the requirement that Tribal and State cover at least all "waters of the United States" not retained by the Corps of Engineers. EPA notes that on February 15, 2024, the U.S. District Court for the District of Columbia issued an order vacating the EPA's approval of the Florida's CWA section 404 assumption request. An appeal of this decision is pending. The U.S. Army Corps of Engineers is currently the section 404 permitting authority within Florida.

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-1-0002)

Also in September 2021, the U.S. Army Corps of Engineers ("Corps") and U.S. Environmental Protection Agency ("EPA") announced that they had halted implementation of the NWPR nationwide and returned to the pre-2015 regulatory regime to define waters of the United States. Current Implementation of Waters of the United States, U.S. Env't Prot. Agency, https://www.epa.gov/wotus/current-implementation-waters-united-states (updated Dec. 20, 2021) (Attachment 2). But still DEP continued to apply NWPR.

By letter to DEP dated December 9, 2021, EPA affirmed that the Clean Water Act and its implementing regulations require Florida to administer its 404 program consistent with the definition of "waters of the United States" under the pre-2015 regulatory regime. Letter from Daniel Blackman, U.S. Env't Prot. Agency, to Emile Hamilton, Fla. Dep't Env't Prot., Dec. 9, 2021(Attachment 3). EPA then reiterated Florida's obligation to apply the pre-2015 regulatory regime in its January 31, 2022, letter. Letter from Jeaneanne Gettle, U.S. Env't Prot. Agency, to John Truitt, Fla. Dep't Env't Prot., Jan. 31, 2022 (Attachment 4). Still, DEP refused to conform to the law.

Now for more than a year, Florida has continued to apply the unlawful, vacated NWPR to 404 actions, including determinations that no permit is required, enforcement and compliance decisions, and the issuance of general permits. We understand that DEP has been continuing to use the vacated portions of the Code of Federal Regulations containing the NWPR's definition of waters of the United States for making jurisdictional determinations, and the agency is publicly directing the regulated community to the

vacated definition. WOTUS Determinations, Fla. Dep't Env't Prot., https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/wotus-determinations (last visited January 17, 2022) (using the "waters of the United States" definition in 40 C.F.R. 120—NWPR at the time—in option three for performing jurisdictional determinations) (Attachment 5). Florida is flouting federal law, and EPA is failing to step in.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0068-SD-1-0001.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-1-0003)

DEP has attempted to justify this flagrant violation in a number of ways, including saying the state was waiting for EPA's clarification, then that the state had a year to comply with the change in federal law, and finally that a new rule would add another one-year period for the state to come into compliance. See, e.g., House Environment, Agriculture and Flooding Subcommittee Hearing, at 21:10–24:15, https://www.myfloridahouse.gov/ VideoPlayer. aspx?eventID=7473. None of those rationalizations hold water. Rather, they reveal that Florida's actions are nothing more than the willful failure to regulate waters of the United States in Florida.

EPA has allowed Florida to violate the law for too long. More than one year has passed since the court issued its decision in Pasqua Yaqui Tribe, and more than one year has passed since EPA notified DEP that it must apply the pre-2015 regulatory regime. And EPA has codified a new definition of waters of the United States, which Florida will no doubt delay in implementing for as long as possible. In the meantime, wetlands properly protected as waters of the United States are being destroyed across the state.

EPA must ensure that DEP comes into compliance and stops applying NWPR to the detriment of Florida's precious wetlands. Continued inaction is a de facto acceptance of DEP's flagrant disregard of the law, and EPA cannot turn a blind eye while Florida's critical wetlands are degraded and developed. We formally request a meeting with EPA to discuss this ongoing issue to ensure that DEP follows the law.

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0068-SD-1-0001.**

Earthjustice (EPA-HQ-OW-2020-0276-0068-SD-3-0011)

And EPA must ensure that states assuming the program regulate all waters of the United States, especially when there are changes to that definition. Florida's assumed program, for example, is still illegally applying the vacated Trump rule for defining waters of the United States, despite vacatur of that rule by two federal district courts and despite being directed by EPA to apply the pre-2016 regulatory regime [Footnote 5: Letter from Frederick Thompson, Acting Deputy Regional Administrator, EPA, to Emile D. Hamilton, Fla. Dep't of Env't Prot., May 23, 2022.].

Agency Response: ***See*** **the Agency's Response to Comment EPA-HQ-OW-2020-0276-0068-SD-1-0001.**