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Good afternoon. My name is Nizanna Bathersfield, and I'm an attorney advisor with the water permits division in EPA's office of waste water management, and I will be providing some background information on EPA's Criminal and Negligence Intent Standard rulemaking just ahead of opening up the floor for comments at this public hearing, and thank you so much for registering to attend. But before I give that background, I'm going to turn things over to Cecelia Kane, who will be giving just a quick overview of some webinar housekeeping items.

Thank you, Nizanna. So, as a reminder, audio is available through your telephone or computer microphone and speakers, and your dial number, access code, and audio PIN are located under the audio section of your control panel on the right-hand side of your screen. If you are experiencing issues at any point, please type them into the questions box in the control panel. Otherwise, thank you for your attention, and I will turn it back over to Nizanna to continue.

Okay, great. Thanks, Cecelia. So just briefly, on December 14th, EPA proposed a rule in the Federal Register that's focused on the criminal negligence intent standard for the permitting programs that have been approved under sections 402 and 404 of the Clean Water Act. So Section 402 is the National Pollutant Discharge Elimination System permitting program, and Section 404 establishes the permitting program for discharges of dredged or fill material. So EPA's proposal seeks to clarify the agency's interpretation of the Clean Water Act, that approved programs are not required to have the same criminal intent standard that is applicable to EPA actions. So this rule making would make this clarification in the regulations at 40 CFR 123.27(a) and (b), and that regulatory provision is applicable to the NPDES permitting program under Section 402 of the Clean Water Act. It would also clarify the regulations at 40 CFR 233.41(A) and (b), and those are the regulations that are applicable to approved programs under Section 404 of the Clean Water Act.

So this slide and the following slides are intended to just give some context. So, just as background States, Tribes, and Territories can request approval from EPA to run their own NPDES programs or the dredged and fill permitting program under section 404 of the Clean Water Act. These requests can only be approved if States have the authority to enforce the program requirements. And this enforcement authority must include the ability to take both criminal and civil actions. And the requirements for that enforcement authority is set out in the regulations and, once again, that's in 123.27 for the NPDES program and 233.41 for the dredged and fill permitting program.

So these regulatory sections have very similar language describing the criminal negligence intent standard that approved programs must include. And just one little side note here is that the Clean Water Act does use the term States throughout the statute. Section 518(e) of the Clean Water Act does explain that that term includes eligible tribes. And what eligible tribes mean is those tribes that meet the treatment as a state requirements.

So let's just take a closer look at these regulatory provisions that will potentially be affected by the proposal. So this slide, and we're on slide five now, this slide lays out the requirements that may be affected by the proposal and the NPDES regulations. And, once again, that's in 40 CFR 123.27. I won't go through these in detail. I would definitely suggest that you take a closer look at them online or in the actual CFR to get a full sense of what these rights look like. But as I mentioned earlier, the sections that will potentially be affected are in subsection (a) of 123.27 and in subsection (b) of that section as well. So turning now to the potentially affected sections in the dredged and fill regulations, and, once again, those can be found at 40 CFR 233.41. The potentially affected sections would be subsection (a) and subsection (b). And, let's see. Sorry. I'm going to take a closer-- and just to help get a better

understanding of the specific changes that are being proposed, I do have those up in a couple slides. So you'll be able to see what those possible changes may be.

But before I get there, just wanted to explain that the applicable standard for EPA actions is ordinary negligence. And so the standard that applies to-- I'm sorry. I'm losing track a little bit.

So just stepping back again. So simple and ordinary negligence is the standard that EPA must meet in order to establish criminal negligence. There are three US Court of Appeals cases which have held that this is the standard that is applicable to those EPA actions. But these courts did not address whether the standard applied to approved permitting programs under the Clean Water Act. So last year, the Ninth Circuit Court of Appeals issued an unpublished decision regarding EPA's 2018 approval of Idaho's NPDES program. And in that case, which was unpublished, the court found that EPA's NPDES program requires that approved states plan to use a standard that is no greater than simple negligence. And so just one thing to note here, because this decision is unpublished, is not presidential. So what the agency is proposing to do here is to address this decision by clarifying that the agency interprets the Clean Water Act as not requiring that approved NPDES programs are required to have simple negligence, simple or ordinary negligence, as part of their enforcement authorities. And because the dredged and fill permitting program requirements under section 4 of-- that are established under section 4 of Clean Water Act are very similar to those NPDES requirements, EPA is also addressing them as part of this proposal. So as I indicated earlier, here are some of the-- here are the proposed changes to the NPDES regulations.

So first, language is being added to section (a) of this section of the CFR. And that language that is proposed to be included is here and highlighted in yellow highlight so that you can kind of see what that potentially would look like. So it says that "Any State agency administering a program shall have the authority to establish the following violations and have available the following remedies and penalties for such violations of State program requirements." The second change that is being proposed is that the note to section (a)(3)(ii), being deleted. And lastly, the last change being proposed is that language will be added to section (b)(2) of this regulation. And as you can see in yellow highlight here, it's just an exception so it makes it clear that a State may establish criminal violations based on any form or type of negligence.

So in a similar fashion, changes are being proposed to 40 CFR section 233.41. The first change is that the term remedies will be replaced with the word penalties just for clarity in section (a)(3) of that section of the regs. The second change being proposed is language will be added to (a)(3)(ii), again, in 233.41, just clarifying that the intent is to focus in on criminal points. So that's sort of a minor clarification being suggested here. And lastly, language will be potentially added to subsection (b)(2). And similar to the change in the NPDES regulations, there is that language in yellow highlight is being added which says that "Except that State may establish criminal violations based on any form or type of negligence."

So in terms of next steps, a written transcript of today's proceedings will be prepared and will be publicly available. And just as a reminder, the public comment period is scheduled to close on January 13th which is just next week. And if you would like to submit any written comments, those can be submitted through the Federal eRulemaking portal, and the link is here. It's at [regulations.gov](https://www.regulations.gov). You do need to use the docket ID for this rulemaking which is EPA-HQ-OW-2020-0517. And EPA will consider the comments provided here today, as well as any written comments that you might choose to submit in moving forward with the rulemaking. So this is all the information that I have to share at this point and now I'll turn things over to Courtney Itle who will be managing any comments you'd like to provide. And really look forward to hearing what you have to say about this.

[silence]

I don't know if Courtney is on.

Oh, I apologize. I was on mute [laughter], sorry. Thanks a lot, this is Courtney Itle, I'm with ERG. I'm a contractor to EPA, and I'll be serving as facilitator as this hearing's public comments. And I'm working with my colleague, Cecilia, who's the webinar coordinator for this hearing. As Nizanna said, the purpose of this meeting is for EPA to hear oral public comments, so I'll describe the comment process. We have one commenter that is pre-registered to make an oral comment, and we'll hear that commenter first. Anyone else participating in the hearing today is welcome to make a comment, so if you'd like to make a comment, please type into the GoTo meeting question box, and we'll take any additional commenters in the order they're received.

To minimize background noise, we have all attendees muted right now. I will call on each commenter when it's your time to speak. At that point, Cecilia will unmute your line and you'll know you've been unmuted because you'll hear an automated voice. Please start by stating your name and affiliation. If you're representing yourself, you can just indicate that. Each commenter will have a maximum of 10 minutes to speak. I will keep track of the time and I'll let you know when you're getting close to the time limit. If you have more to say that you're not able to fit into the time limit, you're welcome and encouraged to submit the additional information as a written comment within the public comment deadline. And finally, if any of you have any technical difficulties or, either if you're a commenter or a listener, please feel free to type into the question box. Cecilia will work to troubleshoot any issues. So, we will begin with our pre-registered commenter, so I'd like to call in Dominique Burkhardt to provide comments. Cecilia will unmute you. And please remember to begin by stating your name and affiliation.

Dominique, you've been unmuted and if you would like to unmute yourself as well and provide a comment at this time, you're welcome to do so.

Thank you. Good afternoon, my name is Dominique Burkhardt, and I'm an attorney with Earthjustice. I'm briefly providing comments today on behalf of Earthjustice which will be discussed more fully in our written comments that will be submitted next week. We are urging the EPA to withdraw this proposed rulemaking regarding 402 and 404 negligence criminal intent standards. It is our position that this rulemaking is unlawful. Especially as to the proposed amendment to the section 404 regulation 40 CFR section 233.41 subsection (b)(2). The proposed rule does not comply with the Clean Water Act section 309(c)(1)(a) in which the negligence standard has been interpreted consistently to mean ordinary negligence. Enforcement of the Clean Water Act, whether under the Federal or State assumed program, is critical to ensuring maximum protections to the environment. If this rule were approved, it would allow for inconsistent enforcement between Federal and State programs, or among different State programs, which is an unreasonable outcome. The recent Ninth Circuit opinion in Idaho Conservation League v. EPA was correct that a State program must employ a standard no greater than simple negligence at a minimum as required under section 309(c) of the act, and that the approval of the State standard of gross negligence is improper. For all of these reasons and reasons we'll provide in more detail, we urge the EPA to withdraw this proposed rule. Thank you.

Okay, thank you Dominique. We do not have anyone else that has made it known they would like to make a comment. We'll just wait for a few minutes here to give everyone time in case anyone would like to make a comment that they can type that into the question box, and I will call on you. So we'll just wait a few minutes.

[silence]

Okay, so it seems like we don't have any other comments that people would like to provide at this time. So I just wanted to say thank you so much for participating in today's hearing, and so just as a reminder, the comment period closes on January 13th. So if you would like to submit written comments, that would be the time to provide them, and those comments do need to be submitted to the docket. And the docket number, again, is EPA-HQ-OW-2020-0517. And more information about-- and the link to the docket is provided on EPA's website, so. There is a webpage for this rule and you can get access to that information there. So thank you so much. I really appreciate you taking the time to attend.