6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 123 and 233

[EPA–HQ–OW–2020-0517; FRL–10017-98–OW]

RIN 2040-AG09

Criminal Negligence Standard for State Clean Water Act 402 and 404 Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA or Agency) is requesting comment on proposed Clean Water Act (CWA or the Act) regulations to clarify that state or tribal programs approved pursuant to CWA Sections 402 and 404 are not required to include the same

criminal intent standard that is applicable to the EPA under Section 309 of the CWA. The proposed regulations will provide clarity to states, tribes, regulated entities, and the public.

DATES: Comments must be received on or before [**INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER***].

ADDRESSES: You may submit comments, identified by Docket ID No. EPA–HQ–OW–2020–0517, through the Federal eRulemaking Portal at: https://www.regulations.gov/. Follow the online instructions for submitting comments. All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to https://www.regulations.gov/, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the "Public Participation" heading of the SUPPLEMENTARY INFORMATION section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via https://www.regulations.gov/ or email, as there may be a delay in processing mail. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at: https://www.epa.gov/dockets.

EPA is offering one virtual public hearing so that interested parties may also provide oral comments on the proposed rulemaking. For more information on the virtual public hearing and

to register to attend, please visit: https://www.epa.gov/npdes/. Refer to the SUPPLEMENTARY INFORMATION section below for additional information.

FOR FURTHER INFORMATION CONTACT: Nizanna Bathersfield, Office of Wastewater Management, Water Permits Division (Mail Code 4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564-2258; email address: Bathersfield.Nizanna@epa.gov.

SUPPLEMENTARY INFORMATION: This supplementary information section is organized as follows:

I. General Information

A. *Does this action apply to me?*

Entities potentially affected by this action include States, U.S. territories, and Indian Tribes that are authorized and/or seek authorization to administer the Clean Water Act (CWA) Section 402 National Pollutant Discharge Elimination System (NPDES) permitting program or the CWA Section 404 dredged or fill permitting program. This table is not intended to be exhaustive; rather, it provides a guide for readers regarding entities that this action is likely to affect. If you have any questions regarding the applicability of this action to a particular entity, consult the person identified in the preceding section.

TABLE I–1—ENTITIES POTENTIALLY AFFECTED BY THIS ACTION

Category	Examples of potentially affected entities
Federal Government	EPA when conducting oversight of programs authorized under CWA Sections 402 and 404 in states, tribes, and U.S. territories.
State, Territorial, and Indian Tribal Governments	States, Tribes, and U.S. Territories[1] that are authorized or that seek authorization to administer the CWA Section 402 NPDES permitting program and/or the CWA Section 404 dredged and fill permitting program.

B. *What action is the agency taking?*

EPA proposes to amend its requirements in 40 CFR 123.27 and 233.41 for criminal enforcement authorities to clarify that states and tribes that are authorized to or that seek authorization to administer the CWA Section 402 NPDES permitting program and/or the CWA Section 404 dredged and fill permitting program are not required to establish the same negligence standard that the CWA establishes for Federal criminal enforcement actions. Rather, EPA may approve state or tribal programs that allow for prosecution based on any negligence standard, including gross negligence or recklessness, as opposed to requiring that a state or tribe be able to establish criminal violations based on simple or ordinary negligence. EPA interprets its current regulations to allow for this approach and proposes to modify its regulations to make its interpretation of the statute clearer. Because the relevant CWA Section 402 regulatory

[1] The phrase, "State(s) and Tribe(s)" will be used in this document hereafter.

provisions are similar[2] to those in CWA Section 404 and raise the same issues, EPA proposes to make similar changes to the CWA Sections 402 and 404 permitting program regulations. Refer to the BACKGROUND section below for a more detailed description of the context and purpose for this action.

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

The proposed amendment clarifies EPA's interpretation of the CWA enforcement requirements applicable to authorized state and tribal programs under CWA Section 402 and CWA Section 404. This action does not establish new requirements but instead provides clarity for states and tribes that have been approved to administer or are interested in obtaining EPA approval to administer their own NPDES or dredged and fill permitting program under the CWA. Therefore, the proposed rulemaking would impose no incremental change to current requirements that EPA measures as compliance costs or monetized benefits.

EPA anticipates that states that already administer these CWA programs will not need to make any changes to their legal authority to conform with this regulatory change. Instead, these regulatory clarifications will provide assurance to approved states that their current criminal intent standards comport with EPA's interpretation of the CWA criminal intent standard applicable to authorized state and tribal CWA Sections 402 and 404 programs. Additionally, this clarification will provide those states and tribes interested in seeking approval to administer the

[2] The regulation at 40 CFR 123.27 includes a note that is absent from 40 CFR 233.41. This note provides: "[s]tates which provide the criminal remedies based on "criminal negligence," "gross negligence" or strict liability satisfy the requirement of paragraph (a)(3)(ii) of this section." *See* 40 CFR 123.27(a)(ii).

CWA Sections 402 and 404 programs, respectively, with clarity regarding the legal authorities required for approval by EPA.

II. Public Participation

A. *Written Comments*

Submit your comments, identified by Docket ID No. EPA–HQ–OW–2020-0517, at https://www.regulations.gov/. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit: http://www2.epa.gov/dockets/commenting-epa-dockets.

EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID-19.

B. *Virtual Public Hearing*

EPA intends to hold a virtual public hearing on the proposed rulemaking. EPA is deviating from its typical approach to public hearings because the President has declared a national emergency. Because of current CDC recommendations, as well as state and local orders for social distancing to limit the spread of COVID-19, EPA cannot hold in-person public meetings at this time.

EPA will begin pre-registering speakers for the hearing upon publication of this document in the **Federal Register**. To register to speak at the virtual hearing, please use the online registration form available at https://www.epa.gov/npdes/ or contact Cortney Itle at cortney.itle@erg.com. EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Each commenter will have three minutes to provide oral testimony. Note that the testimony time may be adjusted depending on the number of registered speakers. EPA encourages commenters to provide EPA with a copy of their oral testimony electronically (via email) by emailing it to Cortney Itle. EPA also recommends submitting the text of your oral comments as written comments to the rulemaking docket. EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing is posted online at https://www.epa.gov/npdes/. While EPA expects the hearing to go forward as set forth above,

please monitor our website or contact Cortney Itle at cortney.itle@erg.com to determine if there are any updates. EPA does not intend to publish a document in the **Federal Register** announcing updates. If you require the services of a translator or special accommodations such as audio description, please pre-register for the hearing with Cortney Itle and describe your needs at least two weeks prior to the announced public hearing date. EPA may not be able to arrange accommodations without advanced notice.

III. Background

The CWA provides that states and tribes seeking approval for a permitting program under CWA Section 402 and CWA Section 404 must have adequate authority "[t]o abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement." 33 U.S.C. 1342(b)(7) and 1344(h)(1)(G). These provisions do not establish specific mens rea standards or penalties for state and tribal programs and thus do not provide specific criteria on which basis EPA could disapprove a program for lack of authority to impose criminal sanctions. In contrast, CWA 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, as well as felony liability and a higher range of penalties for "knowing violations" of the CWA in Subsection (c)(2). Beginning in 1999, three circuit courts of appeal determined that criminal negligence under CWA Section 309(c)(1) is "ordinary negligence" rather than gross negligence or any other negligence standard. *U.S. v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999); *U.S. v. Ortiz*, 427 F.3d 1278, 1282 (10th Cir. 2005); *U.S. v. Pruett*, 681 F.3d 232, 242 (5th Cir. 2012). Though courts have interpreted EPA's enforcement authority under CWA 309(c)(1) to encompass

violations committed with ordinary negligence, these courts did not address whether this provision implicates state or tribal programs implementing CWA Sections 402 or 404.

EPA's regulations currently provide that a state or tribal agency administering a program under CWA Section 402 must provide for criminal fines to be levied "against any person who willfully or negligently violates any applicable standards or limitations; any NPDES permit condition; or any NPDES filing requirement." 40 CFR 123.27(a)(3)(ii). Similarly, EPA's regulations currently provide that any state or tribal agency administering a program under Section 404 of the CWA shall have authority to seek criminal fines against any person who "willfully or with criminal negligence discharges dredged or fill material without a required permit or violates any permit condition issued under section 404… ." 40 CFR 233.41(a)(3)(ii). The regulations implementing both statutory programs also provide that the "burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must bear when it brings an action under the Act." 40 CFR 123.27(b)(2); 40 CFR 233.41(b)(2). Additionally, the implementing regulations for CWA Section 402 include a note, not present in the CWA Section 404 implementing regulations, that states, "[f]or example, this requirement is not met if State law includes mental state as an element of proof for civil violations" 40 CFR 123.27(b)(2).

On September 10, 2020, the Ninth Circuit Court of Appeals issued an unpublished decision that granted in part and denied in part the Idaho Conservation League's petition for review of EPA's approval of Idaho's NPDES permitting program. *Idaho Conservation League v. US EPA*, no. 18-72684 (September 10, 2020). Relying on the Ninth Circuit case law cited above, which holds that EPA enforcement actions are subject to a simple negligence standard, the court

determined that EPA abused its discretion in approving a mens rea standard of gross negligence because it is "'greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action…' 40 CFR 123.27(b)(2)." The court recognized that "a state program need not mirror the burden of proof and degree of knowledge or intent EPA must meet to bring an enforcement action," citing EPA's Consolidated Permit Regulations, 45 FR. 33290, 33382 (May 19, 1980), but held that EPA's current regulations at 40 CFR 123.27(b)(2) require a state plan to employ a standard "no greater than" simple negligence, such as strict liability or simple negligence. *Slip op.* at 3. Because the decision is unpublished, it is not precedential except for as the law of the case. See Ninth Cir. Rule 36-4.

Overview of This Proposal

The CWA and its implementing regulations require that in order to avoid EPA disapproval, States and tribes must have certain legal authorities in place pertaining to permit issuance, and compliance and enforcement, including criminal enforcement. EPA does not interpret the CWA to require that states and tribes establish the same negligence standard that the CWA establishes for Federal enforcement actions. The current regulations describing the criminal intent standard applicable to state and tribal programs at 40 CFR 233.41(a)(3)(ii) and 40 CFR 123.27(a)(3)(ii) do not clearly articulate EPA's interpretation of the statute that it may approve state or tribal programs that allow for prosecution based on any negligence standard, including those negligence standards with a gross negligence mens rea requirement. This proposal sets forth regulatory revisions that are consistent with this interpretation.

Statutory and Regulatory Framework for EPA's Interpretation

While EPA's own enforcement authority under CWA Section 309(c)(1), 33 U.S.C. 1319(c)(1), as interpreted by the courts, requires only proof of ordinary negligence, that provision does not apply to state or tribal programs. As noted above, the CWA requires that EPA "shall approve" a state's application if it determines that the state has 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). EPA has consistently maintained that nothing in the text of CWA Sections 402 or 404 requires identical enforcement authority between states or tribes and EPA. *See NRDC v. U.S. EPA*, 859 F.2d 156, 175, 181 (D.C. Cir. 1988) (upholding EPA's decision not to require state or tribal programs to incorporate the maximum penalty amounts in CWA Section 309 as a "reasonable accommodation" of "the competing objectives of regulatory uniformity and state autonomy") (citing *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 865 (1984).

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

reports to *at least the same extent* as required in section 1318 of this chapter," 33 U.S.C. 1344(h)(1)(B); 1342(b)(2)(B) (emphasis added). Similarly, CWA Section 404(h)(1)(B) requires state-issued permits to "apply, and assure compliance with, *any applicable requirements of this section*, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title…" 33 U.S.C. 1344(h)(1)(A)(i) (emphasis added); and CWA Section 402(b)(1)(A) requires states to issue permits in compliance with "sections 1311, 1312, 1316, 1317, and 1343 of this title." 33 U.S.C. 1342(b)(1)(A). The more general language used to address required state and tribe authorities to abate violations, and the absence of any citation to CWA Section 309, indicates that Congress allowed for variability between state or tribal approaches to certain aspects of enforcement. *See* 33 U.S.C. 1342 (b)(7).

EPA interprets the Agency's implementing regulations for CWA Sections 402 and 404 to allow for approved state and tribal programs to have different approaches to criminal enforcement than the Federal government's approach. As noted above, EPA's interpretation is consistent with the D.C. Circuit's decision in *NRDC*, 859 F.2d at 180–81. There, the petitioner challenged the validity of 40 CFR 123.27(a)(3) on the theory that it did not require states to have the same maximum criminal penalties as the federal program. *NRDC*, 859 F.2d at 180. The court reasoned that the petitioner's argument involved a "logical infirmity" because it "presume[d] an unexpressed congressional intent that state requirements must mirror the federal ones," which is "inconsistent with the elements of the statutory scheme limiting operation of the provisions to enforcement efforts at the national level and explicitly empowering the Administrator to set the prerequisites for state plans." *Id.* at 180 (discussing 33 U.S.C. 1314(i)(2)(C)). The D.C. Circuit recognized EPA's "broad[] discretion to respect state autonomy in the criminal sector" and that the regulations "reflect the balancing of uniformity and state autonomy contemplated by the

Act." *Id.* at 180-81. The court therefore declined "to divest the Administrator of this authority" in the face of congressional silence. *Id.*

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

Finally, EPA's longstanding interpretation that CWA Sections 402 and 404 do not require states and tribes to have identical authorities to EPA's under CWA Section 309 is consistent with the Ninth Circuit's acknowledgement in *Idaho Conservation League v. EPA* that "a state program need not mirror the burden of proof and degree of knowledge or intent EPA must meet to bring an enforcement action." *Slip op.* at 3, *citing* Consolidated Permit Regulations, 45 FR at 33382 (May 19, 1980). While EPA does not agree with the Ninth Circuit's unpublished interpretation of the Agency's regulations, this proposed rulemaking would clarify the criminal intent standards for existing and prospective state and tribal enforcement programs under CWA Sections 402 and 404.

As discussed above, this proposed rulemaking would codify the interpretation of state and tribal criminal intent requirements that EPA presented to the Ninth Circuit in the *Idaho*

Conservation League v. EPA, which is itself consistent with EPA's longstanding interpretation that state and tribal programs are not required to have the identical enforcement authority to EPA's under CWA Section 309. To the extent this interpretation is viewed as different from any earlier interpretations of CWA Sections 402 and 404 and implementing regulations, EPA has ample authority to change its interpretation of ambiguous statutory language. An "initial agency interpretation is not instantly carved in stone." *Chevron*, 467 U.S. at 863; *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("[A]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change.") (citations omitted). Rather, a revised rulemaking based on a change in interpretation of statutory authorities is well within federal agencies' discretion. *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012) (*citing FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009)). The agency must simply explain why "the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better," *Fox Television Stations*, 566 U.S. at 515. This preamble meets this standard, providing a reasoned explanation for EPA's proposal and its consistency with the CWA.

Though under this proposal EPA is not requiring states or tribes to have the same criminal enforcement authority that courts have interpreted EPA to have, the state or tribal standard would still be based on the term "negligence" in the text of CWA Section 309. Allowing states or tribes flexibility in the degree of negligence for which they are authorized to bring criminal cases balances the CWA's priorities of allowing for state and tribal autonomy with adherence to the purposes of the Act. As noted above, neither CWA Section 402(b)(7) nor CWA Section 404(h)(1)(G) requires states to abate violations in the same manner as required under CWA Section 309. The absence of any citation to CWA Section 309 in CWA Sections

402(b) and 404(h) indicates that variability may be permitted between Federal and state or tribal approaches to enforcement.

The proposed regulatory clarification reflects EPA's experience in approving and overseeing CWA state programs for over thirty years. Many states administering or seeking to administer the programs do not currently have a simple negligence standard, and indeed, may have statutory or constitutional barriers to such standards. The absence of simple negligence standards has not served as a bar to effective state enforcement programs, but the requirement to have such a standard could dissuade states and tribes from seeking to administer these programs in the future. Clarifying that states and tribes do not need a simple negligence standard in their criminal enforcement programs therefore advances the purposes of CWA Sections 402(b) and 404(g) to balance the need for uniformity with state autonomy. *See NRDC*, 859 F.2d at 181 (D.C. Cir. 1988).

This proposal does not change the standard applicable to EPA's criminal enforcement of the CWA. Under CWA Section 309, EPA retains its civil and criminal enforcement authority notwithstanding the authorization status of a state or tribal permit program.

Consistent with the CWA's requirement that states and tribes administering CWA Sections 402 or 404 permitting programs have the authority to abate civil and criminal violations, EPA is proposing to include language to clarify in 40 CFR 123.27(a) and 233.41(a)(3) that states and tribes must have the authority to "establish violations." This new language simply confirms EPA's longstanding interpretation of the effect of its regulations. EPA also proposes to remove the term "appropriate" from the current references to the degree of knowledge or intent necessary to provide when bringing an action under the "appropriate Act" from the CWA

Sections 402 and 404 implementing regulations, as these regulations only refer to actions under the CWA and no other statute. Therefore, the term "appropriate" is unnecessary. Finally, in 40 CFR 233.41(a)(3), which currently requires states and tribes to have the authority "[t]o establish the following violations and to assess or sue to recover civil penalties and to seek criminal remedies," EPA proposes to replace the word "remedies" with "penalties," as "penalties" is a more precise description of the type of relief sought in criminal enforcement actions. None of the proposed changes listed in this paragraph are intended to change the substantive effect of the regulations, but simply to clarify existing requirements.

IV. Request for Comment

EPA is proposing regulations at 40 CFR 123.27 and 233.41 to clarify that authorized state and tribal programs under CWA Sections 402(b) and 404(g) are not required to establish the same negligence standard for criminal enforcement actions that the CWA establishes for Federal enforcement actions. The Agency solicits comments on the proposed rulemaking. Refer to Section II.A of this preamble for instructions on submitting written comments. Comments are most helpful when accompanied by specific examples and supporting data.

V. Statutory and Executive Orders Reviews.

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

A. *Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is not a significant regulatory action and therefore was not submitted to the Office of Management and Budget (OMB) for review.

B. *Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs*

This action is not expected to be an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

C. *Paperwork Reduction Act (PRA)*

This action does not impose an information collection burden under the PRA. This proposal would provide regulatory clarity for approved state and tribal CWA Sections 402 and 404 programs as well as for states and tribes that seek approval for their own CWA Sections 402 or 404 programs. This proposal does not create new information collection activities.

D. *Regulatory Flexibility Act (RFA)*

The Agency certifies that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This action does not impose new requirements on any entities but instead provides clarity for states and tribes that have been approved to administer or seek approval for their own CWA Sections 402 or 404 programs.

E. *Unfunded Mandates Reform Act (UMRA)*

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

F. *Executive Order 13132: Federalism*

This action does not have federalism implications. It 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. This action may be of significant interest to states that administer CWA Sections 402 and 404 programs as well as for states seeking approval to administer CWA Sections 402 or 404 programs because it clarifies the appropriate criminal intent standard states must have to enforce these programs.

G. *Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This action does have tribal implications as specified in Executive Order 13175. Although there are no federally recognized tribes that, at this time, have been approved to administer the CWA programs under either section 402 or section 404, this rulemaking will assist tribes in better understanding the applicable criminal intent standard for nearby approved state programs. This could assist tribes as they participate in state permitting processes. Additionally, this rulemaking will also inform tribes about the applicable criminal negligence intent standard as they consider whether to pursue approval for the NPDES permitting program and/or assumption of the dredged and fill permitting program.

H. *Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because EPA does not believe that there are environmental health or safety risks addressed by this action that present a disproportionate risk to children. This proposal does not change the programmatic requirements of the CWA Sections 402 and 404 programs and has no direct impacts on the environment.

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

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. *National Technology Transfer and Advancement Act*

This rulemaking does not involve technical standards.

K. *Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The proposed action does not change existing programmatic CWA Sections 402 and 404

requirements. Instead this proposed rulemaking clarifies the current requirements for the criminal intent standard that is applicable to state and tribal programs.

List of Subjects

40 CFR Part 123

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Indians—lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 233

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Indian—lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Endangered and threatened species.

Andrew Wheeler,

Administrator.

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

PART 123—STATE PROGRAM REQUIREMENTS

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

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

Subpart B – State Program Submissions

2. Section 123.27 is amended by:

a. Revising paragraphs (a) introductory text, (a)(3) introductory text, and (a)(3)(ii);

b. Removing the note that appears after paragraph (a)(3)(ii); and

c. Revising paragraph (b)(2).

The revisions read as follows:

§ 123.27 Requirements for enforcement authority.

(a) Any State agency administering a program shall have the authority to establish the following violations and have available the following remedies and penalties for such violations of State program requirements:

* * * * *

(3) To assess or sue to recover in court civil penalties and to seek criminal penalties as follows:

* * * * *

(ii) Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or limitations; any NPDES permit condition; or any NPDES filing requirement. These fines shall be assessable in at least the amount of $10,000 a day for each violation.

* * * * *

(b) * * *

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

* * * * *

PART 233—404 STATE PROGRAM REGULATIONS

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

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

3. Section 233.41 is amended by revising paragraphs (a) introductory text, (a)(3) introductory text, (a)(3)(i), and (b)(2) to read as follows:

§ 233.41 Requirements for enforcement authority.

(a) Any State agency administering a 404 program shall have authority:

* * * * *

(3) To establish the following violations and to assess or sue to recover civil penalties and to seek criminal penalties, as follows:

(i) To seek criminal fines against any person who willfully or with criminal negligence discharges dredged or fill material without required permits or violates any permit condition issued under section 404 in the amount of at least $10,000 per day of such violation.

* * * * *

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

* * * * *