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

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Abbreviations

Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
DEC	Department of Environmental Conservation
DEQ	Department of Environmental Quality
DEP	Department of Environmental Protection
DEE	Department of Environment and Energy
DNR	Department of Natural Resources
E.O.	Executive Order
EPA	U.S. Environmental Protection Agency
ERP	Environmental Resource Permit
FTE	Full-time Equivalent
FWC	Fish and Wildlife Conservation Commission
ICR	Information Collection Request
IT	Information Technology
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NACEPT	National Advisory Council for Environmental Policy and Technology
NHPA	National Historic Preservation Act
NMFS	National Marine Fisheries Service
OMB	Office of Management and Budget
RFA	Regulatory Flexibility Act
RHA	Rivers and Harbors Act
SBREFA	Small Business Regulatory Enforcement and Fairness Act
SHPO	State Historic Preservation Officers
TAS	Treatment in a similar manner as a State
T&E	Threatened and Endangered
UMRA	Unfunded Mandate Reform Act

USACE	U.S. Army Corps of Engineers
USFWS	U.S. Fish and Wildlife Service

I Introduction

U.S. Environmental Protection Agency (EPA) is proposing the first comprehensive revisions to the Clean Water Act (CWA) section 404 Tribal and State program regulations (40 CFR 233) since 1988. The primary purpose of the proposed revision is to respond to longstanding requests from Tribes and States to clarify the requirements and processes to assume and administer a CWA section 404 permitting program for discharges of dredged and fill material. The proposed revisions would facilitate Tribal and State assumption of the CWA section 404 program by making the procedures and substantive requirements for assumption more transparent and straightforward. The proposal clarifies the minimum requirements for Tribal and State programs while allowing for flexibility in how these requirements are met. In addition, the proposed rule clarifies the criminal negligence standard for both the CWA section 402 and section 404 programs. Finally, the proposed rule makes technical revisions to remove or revise outdated references associated with the section 404 Tribal and State program regulations.

Section 404 of the CWA requires a permit for discharges of dredged and/or fill material from a point source into "waters of the United States" unless the discharge is associated with an activity exempt from permitting requirements under CWA section 404(f). Section 404(a) of the CWA gives the Secretary of the Army authority to issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into navigable waters at specified disposal sites. The CWA specifies that the Secretary of the Army acts through the Chief of Engineers, and thus the U.S. Army Corps of Engineers (Corps) generally administers the day-to-day permitting program under section 404, except where Tribes or States have an EPA-approved section 404 permitting program under section 404(g).

In 2015, EPA established the Assumable Waters Subcommittee of the National Advisory Council for Environmental Policy and Technology (NACEPT) to provide advice and develop recommendations on how EPA could clarify the meaning of section 404(g)(1) and the waters assumable by a Tribe or State. The Subcommittee issued a final report in May 2017 (Assumable Waters Subcommittee, 2017). NACEPT endorsed the report and submitted it to the Administrator on June 2, 2017. The Department of the Army issued a memorandum on July 30, 2018, supporting the Assumable Water Subcommittee's majority recommendations (Department of the Army, 2018). The proposed rule addresses issues related to EPA oversight and responds to many issues identified by Tribes and States in subsequent outreach regarding section 404 program assumption, including providing clarity regarding waters that may be assumed by Tribes and States, and clarity regarding consistency with Federal requirements, and streamlining some of the procedures that are in the existing regulatory text. This economic analysis was produced to inform the public and supports the proposed rule by assessing potential economic effects of the proposed changes to the existing regulations.

I.A Baseline Practice

Within this economic analysis, the term baseline refers to the world absent the proposed rule. The economic analysis describes the world with the proposed rule in place relative to that baseline. Thus, the baseline is a threshold from which incremental cost and benefits are determined. Under current implementation of CWA section 404(g), Tribes and States have the option of assuming administration of the section 404 program for certain waters within Tribal or State jurisdiction, subject to EPA approval. To date, no Tribes and three States (Michigan, New Jersey, and Florida) have assumed the program. When a Tribal or State section 404 program request is approved by EPA, the Tribe or State assumes program

administration. The Corps suspends processing of section 404 permits for discharges of dredged or fill material into "waters of the United States" within the relevant jurisdiction, except for those waters for which they retain permitting authority. Under current practice, the Corps retains section 404 permitting authority over waters defined in CWA section 404(g)(1)[1] (*see* Section III.A.1 for a discussion of efforts to clarify the meaning of retained waters under section 404(g)(1)). The Corps also retains section 10 permitting authority over applicable waters under the Rivers and Harbors Act (RHA).

At the time of program approval, the Tribe or State signs a Memorandum of Agreement (MOA) with EPA to clarify both parties' roles and responsibilities (40 CFR 233.13). While EPA has the authority to review all permit applications received by the Tribe or State as part of Agency oversight of assumed programs, EPA typically reviews one to two percent of applications each year corresponding to specific categories of projects negotiated in the program MOA as well as projects for which EPA review is not waived under Federal regulations (Assumable Waters Subcommittee, 2017; *see* also Supporting Statement for Information Collection Request (ICR) for the Proposed Rule). There are periods, such as during the first few years of assumption by a Tribe or State, when EPA may exercise its oversight authority to review significantly more than one to two percent of the permit applications. *See* Supporting Statement for the ICR for the Proposed Rule. Federal review cannot be waived for projects with the potential to impact critical areas that support: Federally listed species, sites listed under the National Historic Preservation Act (NHPA), components of the National Wild and Scenic River System, and similar areas (40 CFR 233.51). The Tribe or State also signs an MOA with the Corps which identifies those waters to be retained by the Corps and the procedures for transferring general permits and pending permit applications from the Corps to the Tribe or State (40 CFR 233.14).

In 1984, Michigan became the first State to assume the section 404 program (49 FR 38948). On average, Michigan processes approximately 3,000 to 4,000 section 404 permit applications each year, with 60 to 70 percent of those projects covered by the State's general permit categories (Assumable Waters Subcommittee, 2017).[2] On average, EPA reviews one to two percent of Michigan's total applications; typically those permits fall within the major discharge categories described in the State's MOA with EPA (Assumable Waters Subcommittee, 2017). However, the number and types of permits can vary greatly from year to year due to fluctuations in the economy and development interest. For example, according to Michigan's most recent section 404 annual report, 4,208 section 404 permit applications were received during the 2020 Fiscal Year (between October 1, 2019, and September 30, 2020) (Michigan EGLE, 2022). To account for potential impacts to listed historic properties, Michigan's permitting staff coordinates with the State Historic Preservation Office (SHPO). To account for potential impacts on threatened and endangered (T&E) species, permitting staff identify projects affecting areas with documented T&E species populations and coordinate with State endangered species staff. If State endangered species staff determine a potential impact on T&E species, the application is sent to the

[1] CWA section 404(g)(1) describes Corps-retained waters as "those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce, 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."

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

Federal agencies for review. EPA provides a comment letter summarizing the Federal agency review findings, including U.S. Fish and Wildlife Service (USFWS) comments about potential T&E impacts and avoidance/mitigation measures. Michigan permitting staff handles approximately 1,000 to 1,500 reports of non-compliance each year (Assumable Waters Subcommittee, 2017). Most recently, Michigan reported taking 361 compliance enforcement actions during the 2020 Fiscal Year (Michigan EGLE, 2022).

In 1994, New Jersey became the second State to assume the section 404 program (59 FR 9933). In addition to signing the required MOA with EPA identifying the permits for which Federal review is not waived, New Jersey signed a three-way Memorandum of Understanding (MOU) with EPA and USFWS that requires the State to provide applications directly to USFWS for review if the activities would affect areas known to contain Federally listed T&E species (Assumable Waters Subcommittee, 2017). Prior to 2017, New Jersey processed between 550 individual and 2,000 general permits annually (Assumable Waters Subcommittee, 2017). According to New Jersey's section 404 program annual report, the New Jersey Department of Environmental Protection processed 150 permit applications during the 2022 Fiscal Year (State of New Jersey, 2022).[3] On average each year, ten or fewer applications require review pursuant to the MOA with EPA as "major discharges", and 80 permits require coordination with USFWS consistent with the MOU (Assumable Waters Subcommittee, 2017). New Jersey also coordinates with the SHPO on 225 to 250 permits each year to account for potential effects on listed historic properties. New Jersey's Enforcement Bureau has undertaken an average of 1,000 actions annually on reports of noncompliance (Assumable Waters Subcommittee, 2017). Most recently, during the 2022 Fiscal Year, New Jersey's Enforcement Bureau reported 600 incidents, 368 of which led to field investigations, and 274 of which led to virtual investigations (State of New Jersey, 2022). New Jersey's Enforcement Bureau issued 60 violations during this time (State of New Jersey, 2022).

In December 2020, Florida became the third and most recent State to assume the section 404 program (85 FR 83553). Prior to assuming the section 404 program, Florida had an existing state-level program under which works and activities that alter the surface of land required an environmental resource permit (ERP) from the Florida Department of Environmental Protection (Florida DEP) or one of the State's five water management districts. Florida DEP estimated that the Federal section 404 permit and State ERP would overlap 85 percent of the time prior to assumption of the section 404 program and that assumption would reduce costs and potential delays for applicants by reducing two sets of permits for the same regulated activity to one joint application for both programs (Florida Department of Environmental Protection, 2020). Florida signed an MOA with EPA Region 4 to clarify the roles of both agencies under Florida's approved section 404 program, including EPA's oversight authority and identification of which permits the State is required to send to EPA for review (Martin et al., 2021). The State also signed an MOU between USFWS and the Florida Fish and Wildlife Conservation Commission (Florida FWC), which established a coordination framework where Florida DEP or Florida FWC may engage with the USFWS for T&E species coordination reviews. Additionally, an operating agreement between the Florida Division of Historical Resources and Florida DEP, which mirrors the section 106 process from the NHPA, sets forth a consultation process for assessing the potential impacts on historic properties (Martin et al., 2021). Lastly, Florida DEP signed an MOA with the Corps that addressed coordination between the two

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

agencies, including those waters the Corps retains for issuing section 404 permits (Florida Department of Environmental Protection et al., 2020).

According to Florida's section 404 program annual report for the period between July 1, 2021, and June 30, 2022, the Florida DEP received over 6,000 section 404 program applications, a much larger number than Florida had anticipated (Florida Department of Environmental Protection, 2022).[4] During the reporting period, Florida DEP reviewed 193 individual permit applications and 981 general permit applications, with 1,915 permit applications still under review (Florida Department of Environmental Protection, 2022).[5] As of June 30, 2022, Florida DEP has 212 staff working within their section 404 program, and the department expects to hire an additional 33 staff to accommodate the additional workload (Florida Department of Environmental Protection, 2022). During the reporting period, Florida DEP had 1,074 suspected cases of unauthorized activities, 191 confirmed violations, and 103 suspected cases of unauthorized activities remained under investigation (Florida Department of Environmental Protection, 2022). The Florida DEP has issued 56 responses to confirmed violations (Florida Department of Environmental Protection, 2022).[6]

The approaches that Michigan, New Jersey, and Florida use for section 404 permit fees differs from Corps's approach to fees. The Corps does not currently charge a fee for general permits, and the fee for individual permits is $100 for commercial projects and $10 for private projects (USACE, n.d.). Permit fees charged by the Corps are set by Congress. Michigan charges between $50 and $2,000 for each section 404 permit, depending on the activity (Michigan EGLE, 2019). New Jersey charges $1,000 per general permit, $2,000 per individual permit for single-family homes or duplexes, and $5,000 plus $2,500 per acre of disturbed regulated area for individual permits for any activity other than single-family home or duplex construction (New Jersey Department of Environmental Protection, 2017). Florida charges no additional fees for the State section 404 program review; however, applicants must pay the regularly required fee for the ERP review in the State DEP permitting process (Florida Department of Environmental Protection, 2021).

Although only three States have assumed the section 404 program, other States (*e.g.*, Alaska, Arizona, Arkansas, Indiana, Kentucky, Maryland, Minnesota, Montana, Nebraska, North Dakota, Oregon, Virginia, and Wisconsin) have considered State assumption. Several of these States continue to pursue assumption, while others determined that assumption was not a path to continue pursuing for various reasons, including insufficient funding and lack of authority. The most common reasons States provided for considering assumption were increased permit review efficiency, more consistent protection of resources, more consistent program administration, and direction to do so by State officials (Hurld et al., 2008). Some reasons States cited for not pursuing assumption included the fact that their current State

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

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

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

program is not consistent with CWA requirements, lack of implementation funds, a desire to assume part of the section 404 program but not the entire program, and challenges in coordinating with other (non-EPA) Federal agencies to determine assumable waters and address Federally listed species (Hurld et al., 2008; U.S. EPA, 2019). No Tribes are pursuing assumption at this time.

Section II of this Economic Analysis describes baseline costs that Tribes and States (Section II.A), the Federal Government (Section II.B), and section 404 permittees (Section II.C) incur when Tribes and States assume the section 404 program. Section III summarizes the proposed revisions to the CWA section 404 Tribal and State program regulations (40 CFR 233) and associated economic impacts. Section IV discusses environmental justice considerations of the proposed rule. Section V describes uncertainties and limitations affecting the analysis.

II Costs Associated with Existing Practice under Section 404 Tribal and State Programs

This section describes costs associated with existing practice under the baseline (hereafter, baseline costs) for Tribes and States administering the program (Section II.A), the Federal Government (Section II.B), and regulated entities subject to 404 programs (Section II.C) when Tribes and States assume the section 404 program. Each section provides dollar values when available and otherwise discusses costs qualitatively. Note that baseline costs are costs incurred in the world absent the proposed rule and thus are the starting point from which costs of the proposed rule are determined. These costs are not attributable to this proposal. However, they are included here for the important context they provide.

Quantitative values included in this section for the three States that have already assumed the section 404 program (Michigan, New Jersey, and Florida) are largely drawn from annual reports submitted to EPA (Section II.A.3.2). Quantitative values for other States are drawn from feasibility studies (Section II.A.1).

The ICR for the existing CWA section 404 State-Assumed Programs regulations (EPA ICR Number 0220.16, Office of Management and Budget (OMB) Control Number 2040-0168) provides annual section 404(g)-related burden estimates for Tribes, States, and permittees under existing practice. The revised ICR (*see* the Supporting Statement for the ICR for the Proposed Rule in the docket for this rulemaking) continues to estimate total burden associated with section 404(g), with discussion of the estimated incremental burden of the proposed rule. Changes to burden estimates largely reflect updates that would apply absent the proposed rule. *See* the Supporting Statement for the ICR for the Proposed Rule in the docket for this rulemaking for further discussion on the estimates for this collection.

II.A Tribal and State Costs

Tribes and States incur initial upfront costs when first assuming the section 404 program as well as recurring costs throughout the life of the program. Section II.A.1 presents available cost estimates from section 404 assumption feasibility studies. Using cost information from the State feasibility studies and other sources, EPA discusses baseline costs for Tribes and States more generally, including initial costs for assuming the program (Section II.A.2), recurring costs for administering the program (Section II.A.3), and other costs associated with revising an assumed program (Section II.A.4). The list of potential costs is based on the small universe of States that have completed assumption (Michigan, New Jersey, Florida) as well as States that provided detailed cost estimates in their feasibility studies (Alaska, Arizona, Minnesota, Montana, Nebraska, Virginia, and Wisconsin). Given this small universe, the list of potential costs is subject to uncertainty. When Tribes and States assume the 404 program, the costs they incur also result in cost savings by the Corps. Some of the assumption costs in fact are cost transfers.

II.A.1 Example Feasibility Studies

While considering assumption, States often develop studies that discuss potential costs associated with assumption and other factors that may influence assumption feasibility. Among the States that have conducted section 404 assumption feasibility studies, Alaska, Arizona, Minnesota, Montana, Nebraska, Virginia, and Wisconsin provided detailed cost estimates for at least one aspect of section 404 program assumption or administration. Sections II.A.1.1 through II.A.1.7 present available cost estimates for each of these six States. Costs can vary between Tribes and States for myriad reasons, including but not limited

to geographic size of Tribe or State, number, density, and type of aquatic resources, and how to access those resources (*e.g.*, by plane and helicopter in Alaska).

II.A.1.1 Alaska

Alaska's section 404 feasibility study stated that the shortest possible timeframe to achieve program approval would be two years (Alaska Department of Environmental Conservation, 2023). The first 18 months would focus on hiring staff, developing program tools, and developing the section 404 program assumption request in coordination with EPA. The following six months would focus on building staff capacity in all disciplines necessary to implement the program and continuing to work with EPA to ensure a complete assumption request to facilitate a timely review. Alaska anticipates assuming the program in the third year, and that the State program would cover approximately 75 percent of the Corps' permitting workload in Alaska (Alaska Department of Environmental Conservation, 2023).

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

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

II.A.1.2 Arizona

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

II.A.1.3 Minnesota

Minnesota has comprehensive State-level water resource protection programs in place to comply with the following State laws: (1) the Wetlands Conservation Act,[7] which prohibits wetlands from being drained or filled, unless they are replaced by restoring or creating wetland areas of at least equal public value, and (2) the Public Waters Law,[8] which requires permits for projects that could impact wetlands and other public waters. Minnesota's State feasibility study discussed how permit applicants would benefit if the State assumed the section 404 program by not having to prepare separate State and Federal permit applications or devote staff time to separate permit processes, except for projects involving waters for which the Corps retains regulatory jurisdiction (Minnesota Department of Natural Resources et al., 2017). Minnesota estimated that revising State laws to match section 404 requirements would take at least two years and cost approximately $150,000 per year. The feasibility study also discussed technology upgrades needed for section 404 assumption, which would entail a one-time cost of $3 million to set up an online permitting and reporting system (Minnesota Department of Natural Resources et al., 2017).

Minnesota noted in its 2017 feasibility study (Minnesota Department of Natural Resources et al., 2017) that the extent of waters assumable by the State, relative to the waters remaining under Corps jurisdiction, is one of the most significant factors affecting the feasibility of section 404 assumption. Minnesota provided additional detail about this statement in a 2018 supplement to the feasibility study (Minnesota Department of Natural Resources et al., 2018). A mapping analysis showed that, except for first- and second-order streams, relatively few waters in Minnesota would be assumable by the State based on interpretations of CWA section 404(g)(1) regarding the extent of retained waters at the time of the analysis. Minnesota recognized that some uncertainties remained about the extent of assumable waters but also stated that the Corps' use of case-by-case determinations to identify retained waters diminishes the potential gains in permitting efficiency from State assumption (Minnesota Department of Natural Resources et al., 2018). Minnesota supported recent efforts to clarify the extent of assumable waters and encouraged EPA to implement subcommittee recommendations (*see* Sections I and III.A.1). Minnesota argued that the recommendations would significantly improve the feasibility of section 404 assumption in the State and clarify and simplify the identification of Corps-retained waters while providing a reasonable number of waters for States to assume (Minnesota Department of Natural Resources et al., 2018).

II.A.1.4 Montana

Montana's section 404 assumption feasibility study did not include detailed cost estimates but did describe staff training needs prior to program assumption (State of Montana, 2021). The report described the need to hire 8 to 10 project managers who would train with the Corps for about 20 to 24 months[9] before they could begin issuing permits (Montana Water Policy Interim Committee, 2016). Montana's State data portal shows that project management specialists at the Montana DEQ earn an average hourly

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

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

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

wage of $34.83, or approximately $72,446 per year (2021$[10]; State of Montana, 2021). After accounting for benefits,[11] total compensation equals $115,914 per person (2021$). Depending on the number of trainees, total training costs over the expected two-year period would thus be between $1.9 million and $2.3 million.

II.A.1.5 Nebraska

The Nebraska Department of Environment and Energy (Nebraska DEE) analyzed the potential cost of section 404 assumption using Corps data of section 404 permitting activities from 2010 to 2019 (Nebraska Department of Environment and Energy, 2021). Nebraska DEE estimated that 30.7 full-time employees would be needed to administer the program and process 871 permits annually.[12]

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

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

The Nebraska DEE section 404 assumption feasibility study also included a timeframe for assumption (Nebraska Department of Environment and Energy, 2021). The timeframe included the time required to (1) build a new team, (2) develop permit application forms, (3) develop MOAs with the Corps, the Nebraska SHPO, and the EPA Regional Administrator, (4) develop compliance evaluation procedures and enforcement, (5) assure the authority of laws and regulations, and (6) provide public notice for

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

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

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

stakeholder input. The entire process, from Nebraska DEE's initial assumption investigation to submission of the request package to EPA for review and approval, was expected to take approximately 4.5 years to complete.[13]

II.A.1.6 Virginia

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

Virginia DEQ estimated the section 404 permit fees required to cover costs of implementing the section 404 program at $300 per general permit but did not provide a standard fee estimate for individual permits (Minnesota Department of Natural Resources et al., 2017). Since Virginia already has a State dredged and fill program (U.S. EPA and Army, 2022) and has State general funding available to support the program, Virginia's estimated fee amounts are not intended to fund the entire section 404 program. Rather, Virginia DEQ estimated section 404 permit fee amounts to cover 10 to 25 percent of program costs, or the percentage of costs currently covered by fees for the existing State dredge and fill program (Virginia Department of Environmental Quality, 2012).[14]

The Virginia section 404 assumption feasibility study also included anecdotal evidence that section 404 permittees would be willing to pay higher section 404 permit fees if the permitting process took less time (Virginia Department of Environmental Quality, 2012). When States have State-level dredged and fill programs but do not assume the section 404 program, permit applicants must work with both the State agency and the Corps. The report mentioned stakeholder statements that State assumption of the section 404 program would create a more efficient permitting process because permittees would only deal with one agency contact. Currently, there can be disagreements between the State agency and the Corps, which slows down the permitting process. The report also referenced a conversation with the Michigan Department of Environmental Quality, which administers the State's section 404 program, regarding

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

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

Michigan's brief considerations of returning the program to the Corps because of budget constraints. Permit applicants in Michigan expressed that they would rather pay higher fees than have the program returned to the Federal Government (Virginia Department of Environmental Quality, 2012).

II.A.1.7 Wisconsin

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

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

II.A.2 Initial Costs

This section describes initial costs that Tribes and States are likely to incur to assume the section 404 program in the baseline. Initial costs may be large, upfront costs or costs divided over the first few years after program assumption. For example, Wisconsin estimated that annual costs for section 404 program implementation would be 40 percent greater (or an additional $0.4 million annually) during the first four years after program assumption than in subsequent years (State of Wisconsin, 2022). Apart from differences in the cost to complete the assumption request (Section II.A.2.1), EPA assumes that Tribes and States incur similar initial costs. EPA also assumes that many cost categories vary by extent of "waters of the United States" and average annual section 404 permit volume for each Tribe or State.

II.A.2.1 Program Request Development Costs

To assume the section 404 program, Tribes and States must assemble a request containing the information and documents described in 40 CFR 233.10 and submit the request to EPA. EPA estimates that the cost to assemble the request is higher for Tribes than for States due to an additional labor burden for seeking treatment in a similar manner as a State (TAS) for section 404(g). Tribes with TAS for other CWA programs may incur lower costs because they can use information from prior TAS efforts to streamline the program request development process.

II.A.2.2 Assumption Feasibility Study Costs

States typically spend resources investigating the feasibility of assuming the section 404 program and documenting findings in a feasibility study report prior to completing the program request. The feasibility study entails activities such as assessing required State legislative changes, determining the methodology for demonstrating compliance with section 404(b)(1) Guidelines, and estimating permit fees needed to administer the program. Feasibility study costs are expected to vary widely by State based on existing

processes and programs, the extent of "waters of the United States," and other factors. EPA anticipates that Tribes would incur similar feasibility study costs as States after accounting for differences in jurisdiction size, annual average permit volume, and extent of "waters of the United States." EPA Wetland Program Development Grants can help cover much of the feasibility study costs (Hurld et al., 2008).[15]

II.A.2.3 Hiring Costs

To assume the section 404 program, Tribes and States may need to hire staff to conduct on-site assessments, process permits, and enforce section 404 requirements. Most Tribes and States will need to hire additional staff to cover section 404 responsibilities previously handled by the Corps. EPA recognizes that some Tribes or States may be able to reassign employees from other programs, but reassigning staff from other programs may negatively affect the functionality of those other programs. *See* Section II.B.5 for a discussion of how hiring additional staff at the Tribal and State level may affect the Corps.

Recruiting, interviewing, and hiring qualified candidates for a Tribal or State section 404 program can be an expensive and time-consuming process, especially when searching for a large number of candidates with specific credentials (*e.g.*, engineers or environmental scientists with master's degrees or bachelor's degrees with equivalent years of experience, wetland delineators, etc.). None of the State feasibility studies specifically discussed hiring costs in their cost estimates. A 2021 Society for Human Resource Management Survey found that the average cost-per-hire (sum of internal and external recruiting costs divided by the number of hires) for companies is $4,683 (SHRM, 2022). This number is not specific to State governments but provides a benchmark for the potential hiring burden for each position.

The hiring costs for each Tribe and State will vary depending on total staffing needs, which will vary based on numerous factors including whether the Tribe or State has an existing water resource protection program, the number of existing staff with time available for the section 404 program, average annual permit volume (both general and individual), and enforcement demands. States with high average annual section 404 permit volume (*e.g.*, Pennsylvania, Texas) may need to hire more staff than States with low average annual section 404 permit volume (*e.g.*, Hawaii, Rhode Island; *see* Appendix A), unless existing staff have time availability to add section 404 permitting responsibilities. The estimated staffing needs in the feasibility studies for Arizona (Section II.A.1.1) and Virginia (Section II.A.1.5) support the expectation that States with higher permit volume may require more staff. Virginia's average permit volume is nearly five times higher than Arizona's (*see* Appendix A), and Virginia estimated needing four times more new staff than Arizona (Virginia Department of Environmental Quality, 2012; Arizona Department of Environmental Quality, 2018).

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

II.A.2.4 Training Costs

Staff at Tribal and State agencies may require training on how to administer the section 404 program. Florida's section 404 annual report described the length of their staff training pre-assumption and post-assumption as of June 30, 2022. Florida's staff training pre-assumption consisted of training webinars over a five-month period (from August 11, 2020 to December 8, 2020) and field delineation training over a three-year period (Florida Department of Environmental Protection, 2022). Florida's staff training post-assumption consisted of weekly training webinars over a six-month period (from December 22, 2020 to June 30, 2021) and field delineation training over a twelve-month period (from July 1, 2021 to June 30, 2022) (Florida Department of Environmental Protection, 2022). Montana's feasibility study (*see* Section II.A.1.4) described hiring eight to ten project managers to train with the Corps for about 20 to 24 months before they could begin issuing permits (Montana Water Policy Interim Committee, 2016). While Montana's anticipated training strategy involved training staff with the Corps, Tribes and States are not required to train staff for the section 404 program using any particular method.

Training costs will vary by Tribe or State depending on the number of staff who would require training, the type of training, and the length of the training. The number of trainees will likely increase for States with high permit volumes that do not already have dredged or fill permitting programs and decrease for States with low permit volumes. Staff at States with existing dredged or fill permitting programs may require less training since they can focus on learning the differences, if any, between their existing program and the approved section 404 program. Other factors that may influence the amount of training required are prior experience of the trainees as well as environmental factors and enforcement history within the Tribe or State.

II.A.2.5 IT Infrastructure Costs

Tribes and States may wish to update their IT infrastructure to administer the section 404 program. Two States included cost estimates for IT infrastructure or technology upgrades required to administer the section 404 program in their feasibility studies (*see* Section II.A.1). Minnesota estimated a one-time cost of $3 million to set up an online permitting and reporting system (Minnesota Department of Natural Resources et al., 2017), while the Virginia feasibility study estimated IT infrastructure upgrade costs of approximately $3.5 million over three years (Virginia Department of Environmental Quality, 2012). IT infrastructure costs may vary by Tribe or State. Some Tribes and States may already have the IT infrastructure necessary to administer the section 404 program, while others may need upgrades. Factors that may influence IT infrastructure costs include existing infrastructure, permit volume, and desired system complexity. Tribes and States that anticipate upgrading their IT infrastructure to administer the section 404 program can apply for grants under CWA 104(b)(3) to cover the costs.[16]

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

II.A.2.6 Effect of Existing State-Level Water Resource Protection Programs on Initial Costs

Forty-four States have some form of dredged and fill permitting programs or regulatory mechanisms for protecting State waters. State-level programs vary in comprehensiveness and scope of waters covered. The 44 States include Michigan, New Jersey, and Florida, the three States that have fully assumed the section 404 program. In addition to implementing the section 404 program, all three States have additional State-level programs to issue permits for dredged and fill activities more broadly than those in "waters of the United States" (U.S. EPA and Army, 2022). Additionally, 80 Tribes have TAS for a Water Quality Standards Program under CWA section 303(c), and 79 Tribes have section 401 TAS (U.S. EPA, 2022).

The effect of existing water resource protection programs on section 404 assumption costs is uncertain. Tribes and States with existing programs may be more familiar with environmental permitting processes, which may help reduce initial assumption and administration costs. An investigation into section 404 assumption obstacles determined that many States without existing programs in place did not progress as far into the assumption process as States with existing programs (Hurld et al., 2008). However, revising existing laws to meet section 404 requirements can take multiple years (*e.g.*, as summarized in Section II.A.1.3 above, Minnesota estimates two years). Because existing water resource programs are highly variable and State-specific, EPA cannot quantify the effect of such programs on section 404 assumption costs.

II.A.3 Annual Costs

This section describes annual costs that Tribes and States incur to implement the section 404 program in the baseline. After accounting for differences in jurisdiction size, the extent of "waters of the United States," and average annual permit volume, EPA assumes that Tribes and States incur similar annual implementation costs. Estimates from feasibility studies in this section are intended to include only ongoing, annual costs of implementing the section 404 program. However, the feasibility study estimates may also capture some initial costs (*e.g.*, average staffing needs estimates that account for higher staffing needs during the first few years of program implementation).

II.A.3.1 Full-time Staffing Needs

The main recurring cost for Tribes and States after assuming the section 404 program is for the staff needed to issue and process permits and well as enforce permit requirements. Michigan, for example, budgets for 82 full-time equivalent staff to administer their section 404 program (Michigan EGLE, 2020). In another example, Florida originally anticipated that the existing 212 employees that administer their state Environmental Resource Permit program could simultaneously manage the 404 permitting workload; however, upon approval of its program, Florida received a larger than anticipated number of section 404 permit applications and sought to hire an additional 33 staff members (Florida Department of Environmental Protection, 2022). Several State feasibility studies (*see* Section II.A.1) estimated the number of additional staff needed to administer the section 404 program: 10 for Arizona (Arizona Department of Environmental Quality, 2018), 30.7 for Nebraska (Nebraska Department of Environment

and Energy, 2021), and 40 for Virginia (Virginia Department of Environmental Quality, 2012), and 11.9 for Wisconsin (State of Wisconsin, 2022).[17]

Staffing needs for each Tribe and State will vary based on numerous factors, including the number of existing staff with time available for the section 404 program, average annual permit volume, enforcement demands, and average permit review time. Some permits will require more staff time to process than others. For example, permits for large, complex projects typically require more staff time than small projects with minimal mitigation requirements. Permit staff often engage with permit applicants early in the planning process for large, complex projects to avoid delays later in the process (USACE, n.d.). General permits typically require less processing time than individual permits. Tribes and States where nearly all issued section 404 permits are general permits (*e.g.*, Pennsylvania, West Virginia) may require less staff than Tribes and States with higher proportions of individual permits (*e.g.*, Florida, Louisiana; *see* Appendix A). However, the number of general and individual permits issued in each State without an assumed section 404 program (Appendix A) is based on section 404 permits issued by the Corps in both assumable and retained waters. The proportions of individual and general permits that States would issue after assuming the program may differ after accounting for waters retained by the Corps and the associated permit volume. In addition to staff for permit issuance, Tribes and States may require legal support to enforce permit requirements and address non-compliance issues (see Section II.A.1).

II.A.3.2 Annual Report

Tribes or States that have assumed the section 404 program must submit an annual report to EPA assessing their program. In these annual reports, Tribes and States must comply with the program reporting requirements of 40 CFR 233.52 and any MOA reporting requirements. The reporting requirements include:

1) An assessment of the cumulative impacts of the State's or Tribe's program on the integrity of the regulated waters;

2) Identification of areas of concern or interest;

3) The number and nature of individual and general permits issued, modified, and denied;

4) Number of violations identified, and number and nature of enforcement actions taken;

5) Number of suspected unauthorized activities reported, and number of actions taken;

6) An estimate of the extent of activities regulated by general permits; and

7) Number of permit applications received but not yet processed.

Since Tribes and States may prepare this information for their own needs (*e.g.*, program evaluation, budget justification), EPA allows the Tribe or State to select the time period for the annual report to

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

enable the Tribe or State to re-use this information for both purposes. In addition to fulfilling the reporting requirements of 40 CFR 233.52, the annual report helps Tribes and States evaluate the assumed program, identify trends and/or problems, and propose solutions to any identified problems. For staff time required to develop the annual report, Michigan estimates 120 hours annually, while New Jersey estimates 100 hours annually. *See* Supporting Statement for the ICR for the Proposed Rule.

II.A.4 Other Costs

If Tribes or States revise their programs following assumption, they will incur additional costs to meet the requirements in the regulations at 40 CFR 233.16, *Procedures for revision of State programs*. Regulations require that significant changes to the assumed program be revised within one year of the promulgation of such regulations, or two years if the revisions require statutory changes. Substantial program modifications require submission of a modified program description to the Regional Administrator. Substantial revisions include but are not limited to certain revisions that affect the area of jurisdiction, scope of activities regulated, criteria for the review of permits, public participation, or enforcement capabilities. Tribes and States may also need to provide a supplemental Attorney General's statement, program description, or other documents as necessary if EPA suspects that circumstances have changed for the program and requests such materials to evaluate the programs' compliance with the requirements of the CWA.

II.B Federal Agency Costs

EPA is responsible for oversight of assumed Tribal and State programs to ensure that the programs are consistent with applicable requirements of the CWA and that Tribal and State permit decisions adequately consider, minimize, and compensate for anticipated impacts as per the 404(b)(1) Guidelines. Additional Federal agencies provide comment on Tribal and State programs during the assumption request process and on permits that EPA reviews. EPA permit reviews will vary by Tribe or State depending upon the local resources and the content of the MOA.

II.B.1 Request Package Review

When a Tribe or State submits a request to assume the section 404 program, EPA reviews the request, publishes a notice in the Federal Register and provides the public an opportunity to comment on the request, and either approves or denies it. The Corps, USFWS, and National Marine Fisheries Service (NMFS) review and provide comments to EPA about the adequacy of the applicant's program.

II.B.2 Review of Non-Waived Permits

All section 404 permit applications received by a Tribe or State with an assumed program are subject to EPA review. EPA may waive review of permits. The MOA with the Regional Administrator specifies the categories of Tribal or State permits for which EPA will waive Federal review. EPA cannot waive review for certain categories of permits, including projects with the potential to impact critical areas that support: Federally listed species, sites listed under the NHPA, components of the National Wild and Scenic River System, and similar areas (40 CFR 233.51). The Tribe or State and EPA may include additional categories of permits for which EPA will not waive review in their joint MOA. Among States with assumed section 404 programs, EPA typically only reviews one to two percent of section 404 permits on an annual basis, which is similar to the percentage of Corps permits upon which EPA comments annually. There are instances, such as during the first few years of assumption by a Tribe or State, when EPA may

review more than one to two percent of the permit applications to ensure consistency and for enforcement and compliance purposes. *See* Supporting Statement for the ICR for the Proposed Rule.

II.B.3 Annual Report Review

EPA reviews annual reports from each Tribal or State program as part of its oversight responsibilities to assess whether the programs meet regulatory requirements. Annual reports may differ slightly by Tribal or State program, but minimum requirements are established in Federal regulations (40 CFR 233.52) and the MOA with EPA. If EPA determines that a Tribal or State assumed program is not administered in accordance with regulatory requirements, EPA works with the Tribe or State to address any deficiencies identified or, in extreme situations, initiate withdrawal of the assumed program.

II.B.4 Review of Program Revisions

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

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

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

3) If the Regional Administrator determines that the proposed revisions are substantial, he or she publishes and circulates notice to interested parties, provides opportunity for public hearing, and seeks comment from the Corps, USFWS, and NMFS.

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

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

II.B.5 Impacts to Section 404 Program Staff

Tribal or State assumption of the section 404 program would likely require staff increases at the Tribal or State agency to process and review applications, issue permits, and enforce permit requirements (*see* Section II.A.3.1). Transferring section 404 permitting authority to a Tribe or State may allow Corps staff to focus on other Corps priorities, such as civil works projects as well as result in reducing permitting times associated with issuing RHA section 10 permits, issuing permits in retained waters, providing comment on permits for which review has not been waived, and the processing of permits transferred to the Corps as a result of an EPA objection to the Tribal or State permit.

II.C Section 404 Permittee Costs

As discussed in Section I, States with assumed section 404 programs often have section 404 permit fees that are higher than the Corps fees. Several State feasibility studies (*see* Section II.A.1) stated that their section 404 permit fees would need to be higher than the Corps fees if they assumed the program. Overall, regulated entities will likely pay higher permit fees when Tribes or States assume the section 404 program.[18] However, regulated entities have indicated a willingness to pay higher fees to gain other potential benefits of Tribal- or State-administered section 404 programs, including faster permit processing time, reduced duplication of application materials, increased consistency in permit decisions, application of local knowledge, and a single point of contact (Hurld et al., 2008; Virginia Department of Environmental Quality, 2012).

Regulated entities in States with assumed section 404 programs, for example, view the higher permit fees as part of the cost of doing business, but these fees may also cover more than one permitting requirement within the States. Michigan regulated entities advocated for Michigan to retain the program when the State considered returning the program to the Federal Government due to budgetary issues, stating that they would rather pay higher fees than have the program returned to the Federal Government (Association of State Wetland Managers, 2010). When EPA reviewed Michigan's section 404 program and identified several deficiencies that required corrective actions (U.S. EPA, 2008), Michigan's Wetland Advisory Council—which is comprised of stakeholders representing local government, wetland and conservation organizations, farm organizations, businesses, and the general public—was unanimous in its preference that Michigan should retain its designation as an approved section 404 program (Wetland Advisory Council, 2012). These actions demonstrated Michigan stakeholders' commitment to retaining the program and exchanging higher permitting fees for other benefits of the program.

[18] Tribes or States that charge permit fees for their existing water resource protection program may choose not to increase permit prices upon assumption of the section 404 program. In such cases, section 404 permittees would experience small cost savings for permits on waters that previously required both Federal and Tribal or State permits since they would no longer need to pay the application fee to the Corps.

III Proposed Rule Changes and Associated Economic Impacts

EPA is proposing revisions to the CWA section 404 Tribal and State program regulations (40 CFR 233) to provide more flexibility and clarity for Tribes and States to assume authority for administering the section 404 program. EPA presented the cost of assuming the program under the existing requirements as background on baseline conditions, in the previous sections. Here we are presenting the incremental cost of the proposed rule. This section is organized to focus the discussion on proposed changes that are expected to have economic impacts, with provisions categorized as (1) program approval; (2) permit requirements, program operations, and compliance evaluation and enforcement; (3) Federal oversight; and (4) other changes. Each category is covered in a subsection, and within each of these, those provisions with *de minimis* potential impacts are summarized briefly under the "Matters with *De Minimis* Impacts" subheading. Provisions with no potential economic impacts are summarized briefly under Section III.D. The potential impact assessment is qualitative due to data limitations and uncertainties (*see* Section V for more details).

Although Section III summarizes economic impacts by provision, the combined effect of the proposed rule provisions has additional implications. For example, the proposed rule provisions would improve clarity and flexibility for Tribes and States interested in assuming the section 404 program, facilitating the assumption process and potentially increasing the number of Tribes and States that complete the assumption process. This analysis assumes the level of permitting would not change as a result of the proposed rule, as there is no data which would suggest otherwise. Additionally, entities subject to 404 programs potentially benefit from an increasing number of Tribal- and State-administered section 404 programs via faster permit processing time, reduced duplication of application materials, increased consistency in permit decisions, application of local knowledge, and a single point of contact (*see* Section II.C). Section III.E summarizes the combined effect of the proposed rule provisions in more detail.

III.A Program Approval

III.A.1 Identifying Retained Waters

III.A.1.1 Changes to Identifying Retained Waters

One of the reasons States have provided for not completing the section 404 assumption process after conducting a feasibility study was lack of clarity in section 404(g)(1), which describes which waters can be assumed by Tribes or States and which waters must be retained by the Corps. The lack of additional guidance on the meaning of section 404(g)(1) in the existing program regulations (40 CFR 233) and uncertainty regarding the scope of "waters of the United States" generally since the Supreme Court decision in *Rapanos v. United States* (547 US 715, 2006) has contributed to States expressing difficulties identifying which waters are assumable versus retained.

Under the proposed procedure, the Tribal leader, Governor, or Director, respectively, of a Tribe or State seeking program assumption would be required to submit a request to EPA that the Corps identify the subset of waters of the United States that would remain subject to Corps administrative authority to include in the assumption request. EPA is proposing to require that the Tribe or State include specific additional information to show that the Tribe or State has taken concrete and substantial steps toward program assumption. EPA is proposing to require that one of the following be included with the request: a

citation or copy of legislation authorizing funding to prepare for assumption or legislation authorizing assumption, a Governor or Tribal leader directive, a letter from a head of a Tribal or State agency, or a copy of a letter awarding a grant or other funding allocated to investigate and pursue assumption. EPA would have seven days to review and respond to the request. If the request includes the required information, then EPA would transmit the request to the Corps. If the Corps notifies the Tribe or State within 30 days of receiving the request transmitted by EPA that it would provide the Tribe or State with a retained waters description, the Corps would have 180 days from the receipt of the request transmitted by EPA to provide a retained waters description to the Tribe or State. If the Corps does not notify the Tribe or State within 30 days of the request that it intends to provide a retained waters description, the Tribe or State would prepare a retained waters description using the same approach that the Corps would use. Similarly, if the Corps had originally indicated that it would provide a retained waters description but does not provide one within 180 days, the Tribe or State may develop the retained waters description using the same approach as the Corps would use.

Under the proposed rule, the approach for identifying waters retained by the Corps the following steps would be taken: (1) take the current RHA section 10 list(s) as a starting point, (2) place waters of the United States, or reaches of those waters, from the RHA section 10 list(s) into the retained waters description if they are known to be presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce; (3) add any other waters known by the Corps or the Tribe or State 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, including all waters which are subject to the ebb and flow of the tide; (4) add wetlands that are adjacent to the foregoing waters consistent with the administrative boundary articulated in the Tribal-Corps or State-Corps Memorandum of Agreement, and (5) for State assumption, add waters in Indian country as appropriate.

To clarify the extent of adjacent wetlands over which the Corps retains administrative authority following Tribal or State assumption, EPA proposes that the Corps retain administrative authority over all jurisdictional wetlands "adjacent" to retained waters[19] except that the geographic extent of the Corps' permitting authority would be limited by an agreed-upon administrative boundary. The Corps would retain permitting authority over the adjacent wetlands waterward of the administrative boundary. The Tribe or State would assume permitting authority over any other adjacent wetlands landward of the administrative boundary. The administrative boundary between retained and assumed wetlands would be set jointly by the Tribe or State and the Corps, but a 300-foot administrative boundary would be established as a default if no other boundary between retained and assumed adjacent wetlands is established.

To plan for individual project proposals that may impact both waters retained by the Corps and waters assumed by a Tribe or State, EPA is requiring that a process for determining the allocation of permitting authority in this situation be negotiated and addressed in the program description and the MOA between the Tribe or State and the Corps, which would allow for regional differences and flexibility to best meet

[19] The agencies currently interpret the term "adjacent" consistent with the Supreme Court's decision in *Sackett v. EPA*, No. 21-454 (U.S. May 25, 2023).

the conditions of individual Tribes and States. Under the default approach in the proposed rule, the Corps shall issue a section 404 permit for the discharges to adjacent wetlands or portions of adjacent wetlands that are waterward of the administrative boundary. The Tribe or State shall issue a section 404 permit for discharges to adjacent wetlands or portions of adjacent wetlands that are landward of the administrative boundary. In addition, EPA proposes to remove the provision in the existing regulations emphasizing that modifications to the extent of the retained waters description always constitute substantial revisions to a Tribal or State program. Note, however, that under this proposal changes in geographic scope of an approved Tribal CWA section 404 program are substantial where the Tribe seeks to include additional reservation areas within the scope of its approved program. EPA is also proposing that the program description must specify that the Tribal or State program would encompass all waters of the United States not retained by the Corps. Finally, EPA proposes to remove the term "traditionally" from the term 'traditionally navigable waters' in the following provision: "[w]here a State permit program includes coverage of those ~~traditionally~~ navigable waters in which only the Secretary may issue 404 permits, the State is encouraged to establish in this MOA procedures for joint processing of Federal and State permits, including joint public notice and public hearings." 40 CFR 233.14(b)(2).

III.A.1.2 Potential Impacts Associated with Identifying Retained Waters

The proposed procedure for determining the extent of waters over which the Corps would retain administrative authority following Tribal or State assumption would likely generate net benefits for those Tribes and States assuming the section 404 program. The use of RHA section 10 lists as a starting point for determining which waters would be retained by the Corps would improve the predictability of retained waters. The improved predictability would help Tribes and States develop more accurate program assumption plans, potentially reduce assumption investigation costs, and increase permitting efficiency during the program's administration. Determining which waters are presently used or susceptible to use as a means to transport interstate or foreign commerce is, to some extent, inherently a case-specific process. EPA anticipates that the proposed process would improve predictability of which waters are retained and reduce the need for the Corps to identify retained waters on a case-by-case basis when a permit is received. Since States have said that the use of case-by-case determinations diminishes potential gains in permitting efficiency from State assumption (*see* Section II.A.1.3), the proposed procedure would help Tribes and States retain gains in permitting efficiency from State assumption. However, depending on the selected administrative boundary, using the administrative boundary to determine assumable adjacent wetlands may increase the extent of adjacent wetlands assumed, which may increase annual costs for Tribes and States to administer the program from the existing baseline. The Agency projects that, to the degree that the former effect results in saving time during the section 404 permitting process, the former effect would predominate the latter effect, such that the overall effect would be positive. The Agency notes, however, that the overall effect is not unambiguously positive.

The proposed procedure could also make section 404 assumption more appealing to Tribes and States and may, over time, increase the number of assumed programs. In addition to Minnesota stating that the extent of assumable waters is the factor that most affects assumption feasibility (*see* Section II.A.1.3), several other States have requested additional clarification about which waters are assumable and which waters would remain under Corps jurisdiction. In fact, EPA established the Assumable Waters Subcommittee partly in response to a request by three State associations to provide additional clarifications about assumable and retained waters (Environmental Council of States et al., 2014). The

proposed procedure for determining retained waters, including the approach for adjacent wetlands, is consistent with the approved extent of the Florida, Michigan, and New Jersey programs. Thus, no changes to their existing program scope would be required, so the proposed rule would not affect states with existing programs from this aspect of the proposal.

Clarifications regarding which waters are assumable may also reduce Corps costs by reducing the number of case-by-case determinations to identify assumable and retained waters. The flexibility in the procedure for determining retained waters and their adjacent wetlands would preserve the Corps' authority over waters and wetlands to the extent necessary to allow the Corps to address activities that may adversely impact navigability, particularly since the Corps still has the opportunity to provide comment on Tribe- or State-issued permits and retains RHA section 10 permitting authority for all Tribal or State assumed waters subject to RHA section 10. Thus, the Corps may experience cost savings under the proposed procedure without it hindering their ability to protect navigable waters. Entities subject to assumed 404 programs may also experience cost savings and permitting efficiency from increased clarity regarding which agency has permitting authority over a given waterbody.

Tribes or States and Federal agencies may incur additional upfront costs from the proposed revisions to the assumption request requirements and MOA requirements sections of the regulations. The proposed rule would require Tribes or States to request a retained waters description from the Corps and incorporate a retained waters description in the program request. If the Corps does not respond to the request or fails to deliver a retained waters description within 180 days of the request, Tribes or States may need to develop their own list. EPA would also require that Tribes and States add descriptions to their program assumption request and their MOA with the Corps of their procedures for projects proposing discharges to both retained and assumed waters. Although the proposal requires additional program assumption request and MOA components that would likely increase the time required to assemble the assumption materials, the upfront effort would likely increase efficiency and reduce back-and-forth communication during EPA's review of the program submission as well as during program administration. Federal agencies may also face additional upfront costs: (1) EPA may spend additional time reviewing assumption requests, and (2) the Corps may spend time developing the retained waters description per the process described in the proposed rule and summarized above, and extra time developing MOAs with Tribes or States to develop approaches to address projects proposing discharges to both retained and assumed waters. However, the description of retained waters and how to coordinate permitting for projects that may have discharges into both assumed and retained waters have always been required as part of the MOAs and program description.

Lastly, the proposed rule could reduce costs associated with revisions to the Corps' retained waters lists by removing the provision about how such changes constitute substantial revisions to a State program. EPA retains the flexibility to deem major changes to the retained waters description as substantial revisions; however, many modifications to the retained waters description may only require the Regional Administrator to notify the Governor, Tribal leader, or Director of the State agency of the changes via letter and post the letter on the relevant pages of EPA's website. This change reflects cost savings for Federal agencies since the "substantial revision" procedure, as described in 40 CFR 233.16(d)(3), requires the Regional Administrator to publish and circulate notice to relevant stakeholders, provide opportunity for a public hearing, consult with the Corps, USFWS, and NMFS, and publish notice of the approval or denial decision in the Federal Register.

III.A.2 Effective Date

III.A.2.1 Changes to the Effective Date

The existing regulations provide that the transfer of permitting authority to a Tribe or State shall not be considered effective until notice of EPA's program approval appears in the Federal Register. *See* 40 CFR 233. EPA is proposing to revise the regulations to provide that the transfer of an approved section 404 program to a Tribe or State takes effect 30 days after publication of the notice in the Federal Register, except where EPA and the Tribe or State have established a later effective date of up to 120 days from the date of notice in the Federal Register. EPA proposes to allow more than 30 days only when a Tribe or State's specific circumstances justify the need for additional time before assuming administration of the program. The effective date would be specified in the MOA with EPA, and the program description would specify the steps the Tribe or State would take, if any, after EPA approval to fully administer its program. Establishing a short, clearly defined period of time between program approval and Tribal or State assumption of program administration benefits the public and entities subject to 404 programs by providing advance notice of the date of program transfer and supporting the smooth transition of program functions, while limiting any uncertainty that could arise with a longer transition period. Hence, this change would improve clarity and provide greater flexibility for Tribes and States for transfer of the section 404 program from the Corps.

III.A.2.2 Potential Impacts Associated with a Delayed Effective Date

Allowing Tribes and States some flexibility to set the effective date for transferring the section 404 program from the Corps would provide them with the additional time needed to implement changes required to administer the program. As discussed in Section II.A.2, initial costs to administer the program may include hiring and training costs for staff as well as IT infrastructure costs for data storage and processing. EPA expects that Tribes and States would begin these processes prior to EPA's approval, and indeed, they would need to detail many of their staffing and similar plans in the program description. However, Tribes and States may need to wait to take certain steps until EPA has approved their program. Allowing Tribes and States 30 days between program approval and the effective date would provide greater flexibility for Tribes and States to ramp up the capabilities required to administer the program, particularly for Tribes and States with no existing dredged or fill program, and may make program assumption more attractive for additional Tribes and States.

Under the proposed rule, Tribes and States that need more than 30 days to begin administering their section 404 program may request up to 120 days until the effective date. In such cases, Tribes and States would be required to include in their program description the steps they would take after EPA approval to fully administer their program, including the timeline for any hiring and training of staff, and assurance of funding for these activities. This requirement would add additional time to prepare the request package for Tribes and States that need more than 30 days to begin administering their program. Efforts to more clearly define when program administration responsibilities transfer from the Corps to the Tribe or State would provide additional clarity for entities subject to assumed 404 programs regarding the appropriate contact for any permit-related communications and potentially reduce costs for these regulated entities during the transition.

There may be cases in which a Tribe or State realizes after it first requests a delayed effective date that it is no longer able to assume the section 404 program by the approved effective date. If this occurs, the proposed changes may also (1) increase labor burden for both the Tribe or State and Federal agencies, and (2) create some uncertainty for entities subject to 404 programs regarding when or whether a Tribe or State would begin to fully administer its program. In such cases, Tribes and States could coordinate with EPA to engage in further public notice and comment to change the effective date, or voluntarily transfer program responsibilities back to the Corps. Additional public comment and notice would require additional staff time for both the Tribe or State and EPA, whereas the option to transfer program responsibilities back to the Corps would likely require additional Corps staff time to undo any plans to transfer program responsibility to the Tribe or State and communicate the change in plans to the public. Since the program may (or may not) be transferred back to the Corps, entities subject to 404 programs would face some level of uncertainty regarding who would be administering the program.

III.A.3 Matters with *De Minimis* Impacts to Program Approval Associated with the 404(g) Program

III.A.3.1 Program Assumption Requirements

The Agency proposes to revise 40 CFR 233.11(d) and (g) to clarify that as part of the application package for program assumption Tribes and States would provide additional information showing that the applicant has the financial capacity to meet the requirements under 40 CFR 233 subpart C through E for permit issuance, program operations and compliance and enforcement, and the operational capacity to meet the compliance and enforcement requirements under 40 CFR 233 subpart E.

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

Since Tribes and States are already required to include descriptions of available funding, staffing, and compliance evaluation and enforcement programs in their assumption request packages, the proposed provision is not a substantial change from the baseline as it does not prescribe any specific metrics that Tribes and States must meet; thus, the Agency concluded that the economic impacts of the proposed changes to the program assumption requirements would be *de minimis*. Under the baseline, Tribes and States are already spending time to include such information in their assumption request packages, and EPA is already considering this information and the Tribe's or State's ability to implement the program when reviewing the assumption request. The proposed revisions do have the following benefits: (1) providing additional clarity to Tribes and States regarding the level of detail about available funding, staffing, and compliance evaluation and enforcement programs that should be included in the assumption request, and (2) addressing concerns expressed during EPA's engagement with Tribes and States and other organizations that there are no thresholds to be met to ensure a State is capable of adequately administering the section 404 program.

The impact of the proposed provision on costs is not quantifiable but likely to be minimal. Since EPA already considers a Tribe's or State's ability to implement the section 404(g) program when reviewing the

assumption request under the baseline, the additional clarity in the proposed provision may actually reduce costs by reducing the potential need to resubmit an assumption request, as Tribes and States are more likely to meet the information requirements in their initial request for assumption. However, the additional clarity may cause Tribes and States to spend more time developing descriptions to include in the assumption request package, and EPA's review burden may also minimally increase. The Agency projects that the former effect dominates the latter, but this is not certain; either way, the Agency concluded that the costs of program assumption requirements to Tribes and States would be *de minimis*. Thus, the Agency is seeking comment on the potential costs and cost savings associated with the proposed revisions to 40 CFR 233.11(d) and (g).

III.A.3.2 Mitigation

EPA is proposing to require that the program description in the assumption request includes the Tribe's or State's proposed approach for ensuring that all permits would comply with the substantive criteria for compensatory mitigation consistent with the requirements of the CWA 404(b)(1) Guidelines at 40 CFR part 230, subpart J. The proposed rule would clarify that the Tribe's or State's approach to mitigation may deviate from the specific requirements of subpart J to the extent necessary to reflect Tribe or State administration of the program as opposed to Corps administration, but may not be less stringent than the requirements of subpart J. For example, a Tribal or State program may choose to provide for mitigation in the form of banks and permittee-responsible compensatory mitigation but not establish an in-lieu fee program. This requirement may impose a slight and *de minimis* addition of time and resource burden to Tribes and States when developing their assumption request; however, as the regulations at 40 CFR part 230, subpart H currently require compensation associated with discharges, EPA is already considering mitigation during assumption approvals. Thus, the impacts of this provision are likely to be minimal. *See* Section III.B.2.2 for additional details about the mitigation provision in the proposed rule and its potential impact on section 404(g) operations and compliance.

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

III.B.1 Expanding Input from Tribes

III.B.1.1 Changes to How Tribes Can Provide Input

Under the existing regulations, States must (1) provide notice for each section 404 permit application to the public and any other State whose waters may be affected, and (2) provide an opportunity for a public hearing before ruling on each application. Additionally, potentially affected States are provided an opportunity to submit written comments and suggest permit conditions within the public comment period. If the permitting State chooses not to implement the suggested permit conditions, the affected State and the EPA Regional Administrator must be notified of this decision by the permitting State and the permitting State's reasons for doing so. The existing regulations interpret the term "State" to encompass Tribes that meet the requirements for section 404 program assumption.

EPA is proposing three changes to section 404 permitting comment and review provisions as they relate to Tribal interests. First, EPA is proposing that Tribes and States that have assumed the section 404 program consider applicable Tribal comments and suggested permit conditions regarding permits that

may affect the biological, chemical, or physical integrity of their reservation waters. The provision would expand Tribal considerations to not only include those Tribes with TAS for section 404 but also include downstream Tribes that have been approved for TAS for *any* CWA provision. Second, EPA is proposing to establish a provision providing opportunities for Tribes that have not yet been approved for TAS for any CWA provision to apply for TAS solely for the purpose of commenting as a downstream Tribe on section 404 permits. Third, EPA is proposing to provide an opportunity for Tribes to request EPA review of permits that may affect Tribal rights or interests, even if Federal review has been waived.

III.B.1.2 Potential Impacts Associated with Expanding Input from Tribes

All three of the proposed changes would provide Tribes with more opportunities to participate in the section 404 permitting process when a State assumes the program, increasing the likelihood that granted permits are not adverse to Tribal interests and enabling better protection for their aquatic resources. The environmental justice benefits of the proposed changes are discussed in more detail in Section IV.

Tribes with TAS for a CWA provision whose waters may be affected by a State section 404 permit may face additional time costs when providing written comments and recommendations during the public comment period. Tribes without TAS would also face additional costs if they choose to apply for TAS for the purpose of commenting on section 404 permits. Tribes interested in this TAS opportunity would need to demonstrate their capability solely for the purpose of submitting comments as a downstream Tribe. The Information Collection Request (ICR) associated with this rulemaking estimates the burden associated with this information collection to require approximately 113 burden hours and approximately $10,000 per tribal TAS request. As the preamble and the supporting statement to the ICR explains, while this estimate is based on best available information, this is likely an overestimate of the burden for the information collection associated with TAS. ICRs are renewed on a three-year cycle, and as more information related to burden associated with this information collection becomes available, this burden may be revised.

States that have assumed the section 404 program may incur an additional time and resource burden to consider comments from Tribes with TAS for any CWA provision whose waters may be affected by a section 404 permit. States would have to provide an opportunity for potentially affected Tribes to submit written comments within the public comment period and recommend permit conditions. Additionally, if States do not accept Tribal recommendations, they would need to notify the affected Tribe and the EPA Regional Administrator.

EPA may also experience small costs due to the proposed change. The EPA Regional Administrator would have an increased time burden to review notices if States do not address Tribal comments and recommendations. EPA would also experience a time burden when reviewing Tribal applications for TAS solely for the purpose of commenting on section 404 permits. The ICR associated with this rulemaking estimates the EPA burden associated with this information collection to require approximately 205 hours and $15,000 annually. As mentioned above, this could be an overestimate of burden. However, EPA anticipates that the process for review of Tribal applications would be straightforward since there are unlikely to be problems regarding Tribal regulatory authority in this limited TAS context. Lastly, EPA may experience small costs when Tribes request EPA review of permit applications, which would require EPA to request public notice and provide a copy of the notice and other information needed for review of the application to the Corps, the USFWS, and the NMFS. EPA is also likely to spend time and resources

conducting its own review of these permits. Given the expanded TAS provisions, EPA anticipates that Tribes would use this opportunity in limited circumstances and that this procedure would not be used for every permit application under public notice.

III.B.2 Matters with *De Minimis* Impacts to Permitting, Operations, and Compliance Associated with the 404(g) Program

III.B.2.1 5-Year Limit on Permits and Long-Term Permits

Certain projects by their nature may be long-term (*e.g.*, residential or commercial developments, energy or mining projects, transportation corridor development) and require section 404 permit coverage for long periods. EPA is proposing a process for permitting long-term projects that is consistent with the requirement that Tribal or State section 404 permits not exceed five years and that provides sufficient information for the Tribe or State to consider the full scope of impacts to the aquatic environment and ensure compliance with 404(b)(1) Guidelines. To minimize unnecessary effort and paperwork, and to provide the Tribe or State and the public with information that can assist with the successful permitting of a project, the Agency is proposing that applicants for projects with a planned schedule which may extend beyond the initial five-year permit application period submit a 404(b)(1) analysis for the full project with the application for the first five-year permit. For example, an applicant seeking permit coverage for a 15-year, multi-phase housing development project would provide information about all phases of the project, covering its full 15-year term, in its permit application. If this project were anticipated to involve the construction of two hundred homes in years 0-5, two hundred homes in years 5-10, and two hundred homes in years 10-15, the permit application would provide information about the construction of all six hundred homes.

That way, the applicant would only need to modify the 404(b)(1) analysis to the extent necessary when submitting applications for subsequent five-years permits. The proposed process would also lead to more consistency in subsequent five-year permitting decisions since permitting Tribes and States would be provided with more complete information on project activities. Although there is a higher upfront cost to applicants in providing this information, applicants would benefit from greater regulatory certainty in subsequent five-year permit decisions. EPA expects that the permit applicant process for permits after the initial five-year permit application would be easier and simpler because the applicant and the Tribe or State would have already analyzed the full project. Thus, the Agency concluded that both permit applicants and Tribes and States would experience (1) *de minimis* benefits associated with greater regulatory certainty resulting from more complete, upfront information in initial permit applications, and (2) *de minimis* costs to provide or review more complete information in the initial permit applications.

Providing information about all phases of the project does not authorize dredged and fill activity beyond the five-year permit term. Moreover, unless there has been a change in circumstance related to an authorized activity, the same information should be provided in subsequent applications for later stages of the long-term project, such as applications authorizing activity in years 6-10 of the project, years 11-15 of the project, and so forth. If there has been a change in circumstance related to an authorized activity following approval of a five-year permit, the Agency is proposing that the applicant modify the 404(b)(1) analysis for subsequent five-year permits.

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

The proposed process would prevent applicants from providing limited information only on activities within the first five-year period of projects and ensures an accurate accounting of their cumulative impacts. As such, the proposed process would improve environmental protections by ensuring that the scope of impacts associated with a complete project are factored into permitting decisions for each five-year permit. EPA believes the costs associated with the proposed process would be *de minimis*, and requests information on the benefits, costs, and any other potential impacts of this proposed process.

III.B.2.2 Mitigation

EPA is proposing to require Tribes and States that choose to use third-party compensation mechanisms such as mitigation banks or in-lieu fee programs, to submit instruments associated with these mechanisms, if any, to EPA, the Corps, USFWS, NMFS, and any Tribal or State resource agencies to which the Tribe or State committed to send draft instruments in the program description for comment prior to approving the instrument. This requirement does not include permittee-responsible mitigation instruments. If EPA comments that the instrument fails to comply with the description of the Tribe's or State's proposed approach to ensuring compliance with the substantive criteria for compensatory mitigation (found in subpart J), the Tribe or State cannot approve the final compensatory mitigation instrument until EPA notifies them that the final instrument ensures compliance with this approach.

EPA expects compliance costs associated with this provision to be *de minimis* since existing practice by Tribes and States already account for mitigation requirements, and the use of mitigation banking and/or in-lieu-fee programs as mechanisms for compensatory mitigation is not required. If Tribes and States choose to use mitigation banks and/or in-lieu-fee programs as mechanisms for compensatory mitigation, they may face some additional resource costs for the time needed to submit bank and in-lieu-fee instruments to EPA and other Federal agencies and address any comments received to ensure compliance with the criteria for compensatory mitigation. However, the additional time required for EPA and Federal agency review may serve to better facilitate the development of successful compensatory mitigation instruments, minimize environmental impacts, and ensure the success of assumed programs. Thus, the Agency concluded that this requirement would lead to *de minimis* benefits for both permit applicants and Tribes and States.

III.C Federal Oversight

III.C.1 Withdrawal Procedures

III.C.1.1 Changes to Withdrawal Procedures

Under the existing regulations, Tribe- or State-assumed section 404 program withdrawal proceedings are conducted as an adjudicatory hearing. Since the adjudication process is not required by the statute, it creates an unnecessary resource burden for EPA, Tribes and States, and stakeholders. EPA is proposing to simplify the withdrawal procedure by removing the adjudicatory process and establishing procedures that

are more similar to those used for approval than the existing approach.[20] The proposed rule would streamline the withdrawal process, making it less time- and resource-intensive.

Under the proposed provision, if the Regional Administrator finds that a Tribe or State is not administering the assumed program consistent with the requirements of the CWA and part 233, he or she would notify the Tribe or State of the alleged noncompliance, which would have 30 days to demonstrate compliance. If the Tribe or State demonstrates compliance, the Regional Administrator would notify them that no other action is necessary. However, if the Tribe or State fails to adequately demonstrate compliance within 30 days, EPA would schedule a public hearing to discuss withdrawal of the Tribal or State program. If, after the hearing, the Administrator finds that the Tribe or State is not in compliance, he or she would notify the Tribe or State of the specific deficiencies of the program and provide 90 days for the Tribe or State to carry out remedial actions specified by the Administrator to bring the program into compliance. If the Tribe or State completes the remedial action within the 90 days or is found to be in compliance after the hearing, the withdrawal proceeding would be concluded. If the Administrator determines that the assumed program should be withdrawn, the decision would be published in the *Federal Register*, and the Corps would resume permit decision-making under section 404 in the affected Tribe or State.

Enhancing administrability does not mean that EPA intends to take program withdrawal lightly, and EPA's experience with CWA programs reflects that this process has been carefully and rarely used. Consistent with EPA's longstanding practice, the Agency would first seek to resolve program concerns and help enable Tribes and States to administer the section 404 program consistent with the requirements of the CWA and its implementing regulations. EPA is committed to working with Tribes and States through mechanisms such as annual program report reviews, informal program reviews, and formal program reviews to identify program challenges and recommended steps for resolution.

III.C.1.2 Potential Impacts Associated with Withdrawal Procedures

A more streamlined section 404 program withdrawal process (*i.e.*, removal of the adjudicatory procedure) would reduce costs for EPA, Tribes and States, and stakeholders by reducing time and resource burden during any withdrawal considerations. Additionally, since the proposed rule would establish withdrawal procedures that are more similar to procedures used for approval than the existing approach (*e.g.*, by requiring a public hearing to discuss a Tribe's or State's withdrawal), it may enhance the administrability and public understanding of the withdrawal process. Lastly, the proposed rule may lead to environmental benefits to the extent that (1) Tribes and States are able to more efficiently remedy any deficiencies in their assumed section 404 program during the withdrawal procedure, or (2) the section 404 program is returned to the Corps with reduced delay when Tribes or States do not remedy deficiencies within the specified timeframe.

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

III.C.2 Matters with *De Minimis* Impacts to the 404(g) Program

III.C.2.1 Minor Changes to Annual Reporting

The proposed rule would require that assumed programs provide statistics on mitigation and staffing resources. Since this is already practice for existing assumed programs, the Agency expects that this change would have *de minimis* or potentially no economic impacts.

III.D Matters with No Associated Change

The Agency has concluded that there is no substantive change of regulatory practice within the proposed rule associated with matters relating to conformance with the 404(b)(1) Guidelines, conflict of interest, partial or phased assumption, 40 CFR 124 revisions, criminal enforcement, dispute resolution, ensuring program consistency with the CWA, judicial review, or impacts on existing and future State programs. Conflict of interest provisions already exist for Tribal and State employees; under the proposed rule, the provisions would apply to any person or entity who participates in the permit decision making process. Since the proposed change provides procedural recommendations but does not require that Tribes and States follow specific procedures, any associated costs or benefits from their implementation would not be attributable to the proposed rule. Regarding dispute resolution, the proposed rule clarifies that EPA may facilitate the resolution of disputes between Tribes or States and Federal Agencies. Existing CWA section 404(g) regulations already provide a number of mechanisms for resolving disputes. For example, Tribes or States must provide for administrative and judicial procedures, and EPA already provides comments on Tribal or State permits. However, to the extent that the provision leads Tribes and States to more frequently reach out to EPA to facilitate dispute resolution, there may be a potential shift in associated costs from Tribes or States to EPA. For more information on these issues, *see* the Preamble to the Proposed Rule. If for the final rule, changes are made on these topics that could lead to economic impacts, including *de minimis* economic impacts, the Economic Analysis for the Final Rule would address said changes.

III.E Summary of Potential Impacts

The primary intention of the proposed revisions to CWA section 404(g) Tribal and State program regulations (40 CFR 233) is to create more transparency and clarity for Tribes and States seeking to assume the section 404 program and for those who have already assumed the program. Clarifications and flexibility provided by the proposed rule are intended to facilitate the assumption process and potentially increase the number of Tribes and States that complete the assumption process, as well as to ensure that Tribes and States would administer the programs consistent with the requirements of the CWA. Since Tribal and State programs may not impose conditions less stringent than those required under Federal law, EPA does not anticipate any negative environmental impacts under the proposed rule. Clarifications provided by the proposed rule, particularly regarding information requirements for program assumption requests and long-term permits, would also benefit the public by ensuring that sufficient information is available during evaluations and public comment periods to protect public interests (*e.g.,* environmental quality).

Federal agencies such as the Corps potentially benefit from an increasing number of Tribal- or State-administered section 404 programs since it would free up their resources to focus on other priorities. Lastly, entities subject to section 404 programs may also potentially benefit from an increasing number of

Tribal- and State-administered section 404 programs. Section 404 permit fees may increase relative to the Corps fees, though it is possible that Tribal or State assumption could lead to faster permit processing time, reduced duplication of application materials, increased consistency in permit decisions, and application of local knowledge (this can vary and depends on the way the Tribe or State administers the program).

Table III-1 summarizes potential impacts of proposed rule provisions on Tribes and States, Federal agencies, and regulated entities. The table is intended to provide a concise summary of potential impacts. Unlike most EPA regulations, which reduce pollution, the proposed rule is a procedural Federal proposal that would clarify the requirements for assumption and administration of the section 404 program. Benefits of the proposed rule represent elements like flexibility, transparency, efficiency, and clarity provided by the rule, while costs include either cost savings or incremental costs resulting from the proposed rule. Benefits of the proposed rule would be mainly positive impacts accruing to Tribes, States, regulated entities, Federal agencies, and the public. Costs of the proposed rule would be mainly negative (*i.e.*, cost savings), with some positive (*i.e.*, incremental costs) impacts borne by Tribes, States, regulated entities, and Federal agencies.

Table III-1 shows the following *benefit* categories to be the most significant: identifying retained waters, effective date, and expanding input from Tribes. The benefits of identifying retained waters include (1) an increased likelihood that Tribes and States can determine whether it is advantageous to apply to assume the section 404 program and (2) a reduced likelihood of case-by-case determinations by the Corps to determine if a water is retained. Since case-by-case determinations both slow down and make more uncertain the outcomes of the section 404 permitting process, limiting the use of such determinations is a significant benefit to regulated entities subject to 404 programs. The benefit of the effective date change is to ensure that Tribes and States have necessary time to prepare for assumption. The benefit of expanding input from Tribes is ensuring that the voices of those downstream are heard. Table III-1 also shows that "expanding input from Tribes" has the most significant cost implications (*i.e.*, incremental costs). These incremental costs are largely analysis costs, and the Agency expects these to be smaller than the benefits just described. Thus, EPA has reasoned that the benefits of the proposed rule justify the costs. Additionally, cost savings from other provisions may result in overall cost savings from the proposed rule.

EPA did not examine the incremental impacts associated with individual Tribal or State program administration, individual Tribal or State fee programs, and other incremental budget impacts because of significant uncertainty regarding such impacts. EPA is not forecasting which States would adopt the program as a result of the Proposed Rule, nor the incremental costs of administering the program under the Proposed Rule; such forecasting would be highly uncertain due to both a lack of data and high variability between States. EPA acknowledges that more States or Tribes could assume responsibility for permitting under this program as a result of the Proposed Rule but does not expect this to impact benefits or costs.

Section III provides additional details about potential impacts of each proposed rule provision. EPA welcomes comment or feedback to inform this analysis at the final rule stage.

Table III-1. Summary of potential economic implications of the proposed rule

Provision	Benefits	Costs
Identifying Retained Waters	Positive for T/S and RE	Uncertain for T/S; cost savings for RE
Effective Date	Positive for T/S; uncertain for RE	Cost savings for T/S; uncertain for RE
Program Assumption Requirements	*de minimis* for T/S; none for RE	*de minimis* for T/S; none for RE
Mitigation	*de minimis* for T/S and RE	*de minimis* for T/S; none for RE
Expanding Input from Tribes	Positive for T/S; uncertain for RE	Incremental costs for T/S and RE
5-Year Limits on Permits and Long-Term Permits	*de minimis* for T/S and RE	*de minimis* for T/S and RE
Withdrawal Procedures	Positive for T/S and RE	Cost savings for T/S; uncertain for RE
Minor Changes to Annual Reporting	*de minimis* for T/S; none for RE	*de minimis* for T/S; none for RE

Notes: T/S = Tribes and States; RE = regulated entities subject to section 404 programs

IV Environmental Justice Considerations

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

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

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

The proposed rule would provide numerous benefits to Tribes, who may experience environmental justice concerns, including (1) additional clarity and flexibility to facilitate Tribal section 404 program assumption, (2) additional opportunities for potentially affected Tribes to participate in the section 404 permitting process, (3) additional consideration of Tribal rights and resources in section 404 permitting decisions, and (4) clarity regarding public participation in the section 404 permitting process.

The proposed rule would create more transparency and clarity for Tribes and States seeking to assume the section 404 program and for those who have already assumed the program. For example, the proposed rule addresses concerns about the extent of waters that would remain under Corps jurisdiction by implementing a procedure that would simplify the designation of adjacent wetlands (Section III.A.1). Additionally, proposed changes include examples of how Tribes and States can demonstrate sufficient authority to issue permits that assure compliance with 404(b)(1) Guidelines. Tribal and State assumption of the section 404 program represents a transfer of authority from the Federal Government to Tribes and States. Existing regulations require that assuming Tribes and States may not impose conditions less stringent than those required under Federal law, so the environmental impacts of permitted projects would not worsen due to this authority transfer. If States have stricter environmental requirements than Federal standards, water quality impacts could improve from the potential increased efficiency associated with the transfer of authority and have positive environmental justice effects.

The proposed rule would also provide additional opportunities for Tribes that do not wish to pursue assumption to play a more active role in the section 404 permitting process (Section III.B.1). For example, EPA proposes a regulatory provision which would clarify that affected Tribes approved for TAS

for any CWA provision, rather than for section 404 alone, may provide comment and recommend conditions on section 404 permits. This interpretation greatly expands opportunity for Tribal participation in the section 404 permitting process since no Tribes have applied to assume the section 404 program but nearly half of Federally recognized Tribes have been approved for TAS for other CWA provisions. If an affected Tribe has provided a comment suggesting conditions on a proposed permit and the permitting Tribe or State chooses not to implement the suggested permit conditions, the affected Tribe and the EPA Regional Administrator must be notified of this decision and the permitting State's reasons for doing so. In general, the proposed changes would promote greater consideration of Tribal rights and resources.

In addition, EPA proposes a regulatory provision that would allow potentially affected Tribes the opportunity to obtain TAS solely for the purposes of commenting on section 404 permits. This provision would provide an avenue for Tribes that do not have the resources or the desire to assume the section 404 program and have not obtained TAS for other CWA purposes to provide input and request consideration of suggested permit conditions for potential impacts of section 404 permits on their reservation waters. The Agency seeks comments as to whether there are barriers to seeking TAS for the purpose of commenting on 404(g) permits, or other barriers relating to that purpose, that the Agency should be aware of.

Lastly, EPA also proposes a regulatory provision that would allow Tribes the opportunity to request EPA review of permits that may be viewed as potentially affecting Tribal rights or interests, even if Federal Agency review has been waived. This provision would help to ensure that Tribal rights and resources are being considered and protected by virtue of EPA's oversight of these permit applications. Both increased Tribal participation and EPA review of section 404 permits on a Tribe's behalf may also result in environmental benefits as permitting States would be more likely to have relevant water quality information that could inform section 404 permitting decisions.

Ultimately, the proposed rule would enable Tribes and States that have assumed the section 404 program to better account for potential impacts to Tribes or Tribal interests when making permitting decisions. In addition to the examples provided above, the proposed rule regarding conformance with 404(b)(1) Guidelines would require that permitting Tribes and States notify potentially affected Tribes regarding permit applications that may affect waters, areas, uses, or other interests of importance to them.

Another potentially positive environmental justice impact of the proposed rule is an improved ability for community groups to participate in the section 404 permitting process. The requirements for State-assumed section 404 programs to allow for judicial review in State courts may improve public ability to participate in the permitting process. The proposed rule intends to ensure public participation in all aspects of the development and implementation of regulations or limitations on discharges. Additionally, for long-term projects which require multiple five-year permits, EPA proposes to clarify that all aspects of the public notice requirements set forth in 40 CFR 233.30, 233.32, and 233.34 apply. This clarification would ensure the opportunity for public participation in the case of long-term permits. Finally, EPA is proposing a process that would require applicants for long-term projects lasting more than five years to describe the full scope of the project's impacts to waters of the United States in their initial five-year permit application, which would help ensure consideration of potential cumulative impacts of the proposed project (Section III.B.2.1). In general, the proposed changes would increase public engagement

in the section 404 permitting process, and, in turn, result in permit decisions that are more protective of environmental resources.

V Data Limitations and Uncertainties

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

Table V-1: Limitations and uncertainties in estimating effects of the proposed rule

Uncertainty/Data Limitation	Notes
Uncertainty regarding Tribal and State response to the proposed rule	Although only three States have assumed the section 404 program to date, several other States are actively pursuing assumption or have investigated assumption in the past (*e.g.*, Alaska, Arizona, Arkansas, Kentucky, Maryland, Minnesota, Montana, Nebraska, North Dakota, Oregon, Virginia, and Wisconsin). States identified issues they considered barriers to assumption and possible remedies during discussions with EPA held while they investigated assuming the program. Although the proposed rule addresses many known barriers, how Tribes and States would respond (*i.e.*, whether they complete the assumption process and how quickly) is uncertain.
Uncertainty regarding the magnitude of costs and benefits of the proposed rule	The proposed rule addresses many known barriers to program assumption. The magnitude of costs and benefits resulting from the proposed rule, however, is uncertain due to many factors, including difficulty estimating nationally representative baseline costs due to the small sample size of States that have assumed the program to date (three States and no Tribes), uncertainty regarding baseline effects of State identified barriers on each Tribe or State, level of assumption planning prior to the proposed rule, and existing Tribal and State programs and infrastructure. For Tribes or States actively pursuing assumption, the proposed rule would likely result in cost savings and benefits. However, for Tribes and States not pursing assumption, the proposed rule would have no economic impacts. Impacts of the proposed rule on Tribes are especially difficult to assess since no Tribes have assumed the section 404 program or completed a feasibility study, but as discussed in Section IV, the proposed rule would increase opportunities for Tribes to participate in the section 404 process without assuming the section 404 program.
Uncertainty regarding the change in permit requests after state assumption	Due to the small sample size of States that have assumed the program to date, there is a great deal of uncertainty regarding how program assumption will affect the magnitude of permit requests, if at all. Although Florida received a larger than anticipated number of permits after assuming the section 404 program, Florida's experience may not be representative of other Tribes or States that may assume the program in the future. Therefore, EPA did not project changes in permit requests after assumption of the section 404 program.

VI Statutory and Executive Order Reviews

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

VI.A RFA and SBREFA

The Agency certifies that this rule will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. Section 404(g) of the CWA allows for Tribes and States to assume the section 404 permitting program, and this proposed rule would clarify assumption requirements for Tribes and States to ensure compliance with CWA 404(b)(1) Guidelines. Without the proposed rule, entities (both large and small) would still have to comply with the CWA 404(b)(1) Guidelines, regardless of whether the section 404 program is assumed or not and regardless of the changes in this proposed rule.

VI.B Paperwork Reduction Act

In accordance with the Paperwork Reduction Act, EPA has an OMB-approved ICR for the existing CWA section 404 State-Assumed Programs regulations (EPA ICR Number 0220.16, OMB Control Number 2040-0168). This is a rulemaking ICR which will simultaneously function as a renewal. ICRs are developed based on available information about how a regulation may affect a respondent. The total annual burden for respondents, which includes Tribes, States, and permittees, decreases when compared to the estimates in the current collection. These changes are mainly due to refinements in how the estimates are calculated, updated information regarding the average annual number of permits issued, and updated information regarding consultation burdens. The total ICR estimates are based on the overall burden of section 404(g), not the incremental burden of the proposed rule. However, some incremental costs of the proposed rulemaking are included in proposed ICR revision. *See* the Supporting Statement for the ICR for the Proposed Rule in the docket for this rulemaking for further discussion on the estimates for this collection.

VI.C Unfunded Mandate Reform Act

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

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

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

State	2013	2014	2015	2016	2017	2018	Average, 2013-2018
AK	638	473	483	488	603	430	519
AL	743	504	485	446	558	593	555
AR	1,370	911	1,147	1,068	609	555	943
AZ	278	506	177	362	220	337	313
CA	2,091	1,989	1,666	2,663	2,294	2,238	2,157
CO	883	1,393	773	892	1,759	936	1,106
CT	257	250	241	325	440	284	300
DE	92	154	83	97	78	95	100
FL	1,644	1,649	1,759	1,826	2,149	2,238	1,878
GA	872	746	709	1,550	943	932	959
HI	31	25	21	49	28	57	35
IA	1,099	1,091	809	851	845	726	904
ID	604	608	519	516	643	743	606
IL	1,863	1,486	1,026	1,479	1,219	1,151	1,371
IN	1,020	841	1,033	1,101	1,172	1,227	1,066
KS	1,964	597	672	613	838	616	883
KY	613	550	452	874	557	445	582
LA	2,662	3,903	2,617	1,945	1,638	1,598	2,394
MA	289	300	435	460	521	435	407
MD	1,563	1,271	1,035	540	1,056	1,182	1,108
ME	425	421	429	451	565	653	491
MN	1,224	1,059	1,064	1,062	1,004	1,377	1,132
MO	1,972	1,390	1,920	3,057	1,862	1,569	1,962
MS	736	620	476	776	827	730	694
MT	585	539	425	527	536	376	498
NC	1,524	1,647	1,524	1,758	1,640	2,124	1,703
ND	683	710	668	623	375	470	588
NE	633	593	477	633	672	658	611
NH	454	363	343	486	350	482	413
NM	208	378	411	260	207	205	278
NV	126	73	85	46	65	56	75
NY	1,956	2,130	1,954	2,241	2,161	1,738	2,030
OH	1,487	1,850	1,859	1,496	2,703	1,550	1,824
OK	469	517	493	393	635	556	511
OR	883	608	562	694	778	552	680
PA	7,651	6,326	5,863	5,967	4,890	2,407	5,517
RI	80	47	36	50	52	44	52
SC	572	436	438	749	832	802	638

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

State	2013	2014	2015	2016	2017	2018	Average, 2013-2018
SD	332	312	268	371	371	405	343
TN	1,245	1,210	1,124	1,518	1,003	1,184	1,214
TX	3,684	3,344	5,105	3,052	2,078	4,035	3,550
UT	449	360	308	342	397	313	362
VA	1,515	1,370	1,378	1,563	1,502	1,524	1,475
VT	491	398	273	242	261	293	326
WA	1,605	856	858	718	1,803	1,418	1,210
WI	1,752	1,857	2,124	2,036	1,992	2,349	2,018
WV	2,781	2,409	1,837	1,720	2,897	3,624	2,545
WY	235	189	178	237	293	232	227

Source: U.S. Army Corps of Engineers

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

State	Individual	% Total	General	% Total
AK	89	17.2%	430	82.8%
AL	44	8.0%	511	92.0%
AR	34	3.6%	909	96.4%
AZ	11	3.6%	302	96.4%
CA	178	8.2%	1,979	91.8%
CO	19	1.7%	1,087	98.3%
CT	8	2.7%	291	97.3%
DE	11	10.5%	89	89.5%
FL	440	23.4%	1,437	76.6%
GA	63	6.5%	896	93.5%
HI	7	19.4%	28	80.6%
IA	38	4.2%	866	95.8%
ID	8	1.3%	598	98.7%
IL	39	2.8%	1,332	97.2%
IN	19	1.8%	1,047	98.2%
KS	22	2.5%	861	97.5%
KY	52	9.0%	530	91.0%
LA	254	10.6%	2,140	89.4%
MA	17	4.1%	390	95.9%
MD	58	5.2%	1,050	94.8%
ME	7	1.5%	484	98.5%
MN	106	9.4%	1,025	90.6%
MO	37	1.9%	1,925	98.1%
MS	46	6.6%	649	93.4%
MT	16	3.1%	482	96.9%

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

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

Source: U.S. Army Corps of Engineers