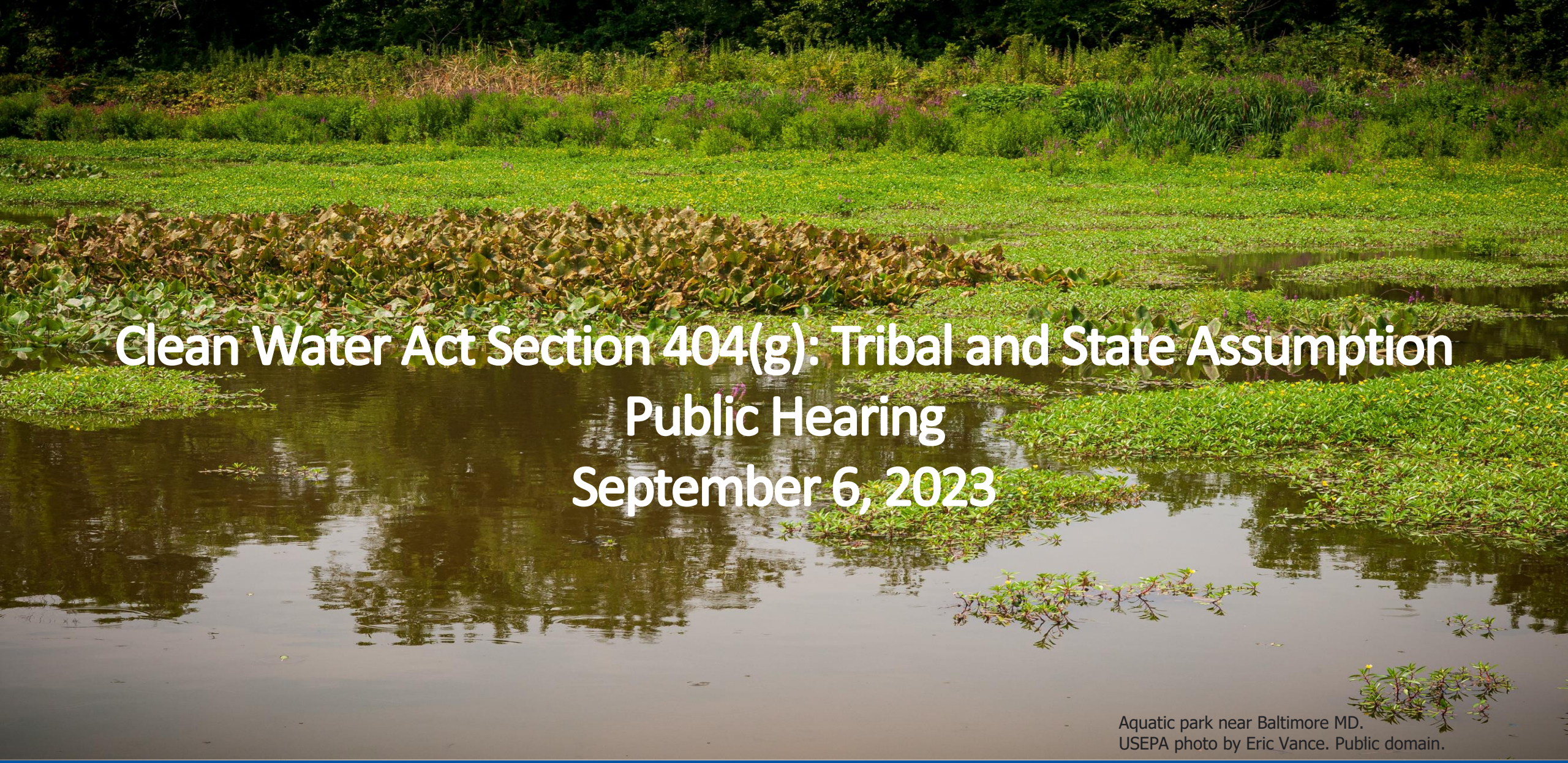
Clean Water Act Section 404(g): Tribal and State Assumption Public Hearing
September 6, 2023



Aquatic park near Baltimore MD.
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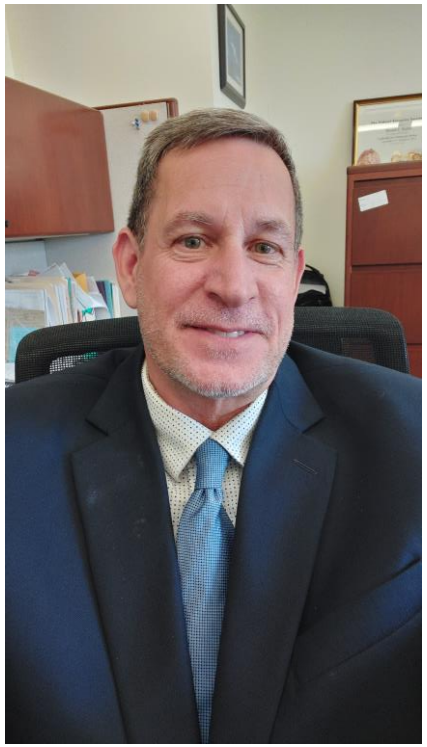
United States Environmental Protection Agency

Office of Water

Welcome and Introductions



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Overview of Today's Presentation

- **Background on CWA Section 404(g) Rulemaking**
- **Rulemaking Effort**
  - Regulatory Feedback
  - Purpose
- **Components with Proposed Changes**
  - Program Approval
  - Permit Requirements
  - Compliance and Enforcement/Federal Oversight
  - General (minor) Changes
- **Partial and Phased Assumption**
- **Economic Analysis**
- **How to Provide Comment**
- **Extra: Summary of Request for Comment**
  - This summary compilation is for convenience and will not presented

Background on CWA Section 404(g)

- Clean Water Act (CWA) Section 404 prohibits the discharge of dredged or fill material into "waters of the United States" (WOTUS) without a permit.
- Section 404(g) provides Tribes and States the authority to assume administration of the 404 program.
- The U.S. Army Corps of Engineers (Corps) retains 404 permitting for discharges into certain WOTUS – e.g., those used as a means to transport interstate and foreign commerce and adjacent wetlands.
- Three States, Michigan, New Jersey, and Florida, have sought and received approval to administer a CWA 404(g) program.

Rulemaking Effort

- **Regulatory Feedback**
  - 404(g) assumption regulations were last comprehensively updated in 1988 and are out of date.
  - Tribes and States asked EPA to clarify the requirements and procedures for assuming and administering a 404(g) program, clarify which waters are assumable, and remove State-identified barriers to assumption.
  - Federal Advisory Committee recommendations informed EPA's proposal regarding retained waters (FACA Sub-Committee on Assumable Waters 2015-2017.)
- **Early Engagement** (2018-2019)
  - States provided input verbally at meetings and via letter.
  - Tribes provided input verbally at meetings, via letter, and Tribal consultation.

Rulemaking Effort - Purpose

- **EPA is proposing to update the 404(g) regulations to:**
  - Provide clarity regarding the procedures and substantive requirements for assumption and administration of the program.
  - Address key barriers identified by Tribes and States to assuming and administering a program and expand opportunities for Tribes to meaningfully engage in permitting actions.
  - Support the cooperative federalism principles central to the CWA – including Congress' recognition that it is the primary responsibility and right of Tribes and States to prevent pollution and manage their aquatic resources.

Components with Proposed Changes

Program Approval

Program Description
Retained Waters/Adjacent Wetlands
Mitigation
Delayed Effective Date

Permit Requirements

Judicial Review
Long-Term Projects
Tribes as Affected Downstream States

Compliance and Enforcement/ Federal Oversight

Criminal Negligence Standard
Program Scope
Program Withdrawal

General Changes

Dispute Resolution
Conflict of Interest
Other Minor Changes

Program Approval – Program Description

- **Current regulations:**
  - Lists what must be included in a program description but lacks detail.
- **Proposal:**
  - Includes preamble explanation as to how to demonstrate that a proposed program is no less stringent than Federal requirements and how to demonstrate permits issued comply with the 404(b)(1) guidelines.
  - Includes regulatory language clarifying program staffing and resource requirements.
  - Includes regulatory language clarifying that the program must demonstrate that its permit review criteria are sufficient to carry out program permitting requirements.
- **Request for comment:**
  - On identification of other program description provisions needing clarity so that EPA will be able to ensure a Tribe or State is equipped to carry out program requirements.
  - On the types of information Tribes and States should provide in the program description.
  - For potential metrics Tribes and States could use to determine funding and staff sufficiency.

Program Approval – Retained Waters and Adjacent Wetlands

- **Current regulations:**
  - Lack clarity and transparency. The regulations note that the Tribe or State obtains identification of retained waters from the Corps.
- **Proposal:**
  - Includes a procedure to facilitate determination of the extent of waters over which the Corps would retain authority.
    - Requires the Tribe or State to provide information showing they have taken concrete and substantial steps toward program assumption and submit this to EPA.
    - Provides a timeline for the Corps to indicate intent to develop a retained waters description and 180 days to provide the description or the Tribe or State may develop the description.
    - Directs that development of the retained waters description start with the published list of Rivers and Harbors Act section 10 waters.
    - Provides for an agreed upon administrative boundary identifying the geographic extent of the Corps' administrative authority within adjacent wetlands; a 300-foot default is proposed.
    - Proposes a default approach for project proposals straddling the administrative boundary.

Program Approval – Retained Waters and Adjacent Wetlands cont.

- **Proposal continued:**
  - Includes regulatory language providing discretion to Regional Administrator to determine whether or not changes in the retained waters description would constitute "substantial" program revisions. Currently all changes to retained waters are "substantial."
- **Request for comment:**
  - On the proposal, and alternatives, regarding the process and timelines associated with developing the retained waters description.
  - On the information to be provided to demonstrate the Tribe's or State's commitment to pursuing assumption.
  - As to how to increase public transparency and participation in the development of the retained waters description.
  - On the proposed approach to determine the extent of retained adjacent wetlands as well as alternative approaches, codify a default administrative boundary, and process projects straddling the administrative boundary.
  - On the proposed approach to modify the extent of retained waters.

Program Approval – Mitigation

- **Current regulations:**
  - Focus on mitigation requirements when the Corps is the permitting authority.
- **Proposal:**
  - Provides recognition of Tribal and State roles and requirements for compensatory mitigation.
  - Includes provision for EPA review of certain mitigation instruments established by Tribes and States.
  - Requires a description of the Tribe's or State's compensatory mitigation program be included in the Program Description.
- **Request for comment:**
  - On the need for additional specificity on the requirements for compensatory mitigation.
  - On whether or not third-party compensation mechanisms should be provided to EPA and other Federal and State agencies for review.

Program Approval – Delayed Effective Date

- **Current regulations:**
  - State that Tribal or State program implementation is effective upon EPA's notice of approval in the Federal Register. States have requested a delay between approval and implementation.
- **Proposal:**
  - Provides a default 30-day delay between EPA approval and when the Tribe or State begins administration of the program.
  - Includes flexibility, allowing for the time period to be extended to 120 days.
- **Request for comment:**
  - On whether the regulations should include a default effective date, and if so, should there be flexibility in its duration.

Permit Requirements – Judicial Review

- **Current regulations:**
  - Require the program description to include a description of the Tribe's or State's judicial review procedures but do not explicitly require a particular standard for that procedure.
- **Proposal:**
  - Clarifies that State 404(g) programs must provide for judicial review of decisions to approve or deny permits to the same extent as the opportunities provided under Federal law**.**
- **Request for comment:**
  - On whether to provide any greater specificity with respect to the standards for judicial review.
  - On additional examples of what could constitute an unacceptable narrowing of the class of persons who may challenge the approval or denial of permits.
  - On whether, and to what extent, this requirement should apply to Tribal section 404 programs.

Permit Requirements – Long-Term Projects

- **Current regulations:**
  - Do not address how certain projects that may not be completed within the five-year CWA statutory limitation could be permitted.
- **Proposal:**
  - Provides a process for permitting long-term projects that is consistent with the statutory limitation.
  - Provides predictability for permittees.
  - Includes sufficient information for the public, Tribes, and States to consider the full scope of impacts from the discharges.
- **Request for comment:**
  - On the proposed process, and alternatives, to processing permits associated with long-term projects.

Permit Requirements – Tribes as Affected Downstream States

- **Current regulations:**
  - Provide Tribes with TAS* for CWA section 404 the opportunity to provide comment on and suggest conditions for permits that may impact Tribal waters.
- **Proposal:**
  - States that Tribes with TAS for any CWA program would have the opportunity to comment as an "affected state" on Tribal- or State-issued 404 permits that may affect reservation waters.
  - Provides a streamlined process for Tribes to obtain TAS for the sole purpose of commenting on Tribal- or State-issued 404 permits.
  - States that Tribes could request EPA review of permits that may affect Tribal rights or interests.
- **Request for comment:**
  - On these and other approaches for providing additional opportunities for involvement by Tribes whose waters and interests both on and off reservation may be affected by a proposed Tribal- or State-issued 404 permit.

* TAS – Treatment in a similar manner as a state.

Compliance and Enforcement – Criminal Enforcement

- **Current regulations:**
  - Do not clearly articulate EPA's current statutory interpretation – that EPA may approve Tribal or State programs that allow for prosecution of violations under any criminal negligence standard, for purposes of Tribal and State CWA section 402 and 404 programs.
- **Proposal:**
  - Clarifies that Tribes and States that are authorized to administer the CWA section 402 and 404 permitting programs, or that seek authorization to do so, are required to authorize prosecution based on a criminal intent of any form of negligence, which may include gross negligence.
- **Request for comment:**
  - On these proposed changes.
  - Regarding the extent to which States have implemented or relied upon the authority to prosecute violations of the CWA section 402 or 404 programs based on simple negligence.

Federal Oversight – Program Scope

- **Current regulations:**
  - Provide that Tribes and States may not impose requirements less stringent than Federal requirements.
  - Require Tribal and State programs regulate all non-exempt discharges into all WOTUS except those retained by the Corps.
- **Proposal:**
  - Clarifies that Tribal and State programs may not compensate for making one requirement more lenient than required by making another requirement more stringent than required.
  - Clarifies that the Tribe or State must all times have authority to issue permits for discharges to all WOTUS within its jurisdiction not retained by the Corps; at no time can there be a gap in permitting authority.
  - Provides regulatory language to codify EPA's position that the Tribe or State is responsible for administering all portions of a section 404(g) program.
- **Request for comment:**
  - On the codification of these longstanding principles.
  - On how Tribes and States can demonstrate that permits it issues are no less stringent than a permit for the same discharge if issued by the Corps.

Federal Oversight – Program Withdrawal

- **Current regulations:**
  - Provide that a Tribe or State may voluntarily return program responsibilities back to the Federal Government.
  - Provide a formal adjudicatory process for withdrawal of an approved 404 program.
- **Proposal:**
  - Streamlines the current program withdrawal process to increase clarity and harmonize the 404 program withdrawal procedures with the approval procedures.
- **Request for comment:**
  - On recommendations to modify the proposed withdrawal procedure.
  - On suggestions to extend or shorten deadlines for the Tribe or State to come into compliance with the CWA and implementing regulations.
  - On suggestions for modifying the proposed opportunities for public input.

General Changes - Dispute Resolution

- **Current regulations:**
  - Do not specifically address dispute resolution.
- **Proposal:**
  - Provides a provision that would clarify EPA's role in facilitating the resolution of potential disputes between the Tribe or State and Federal agencies.
  - Allows flexibility for resolution or elevation procedures to be specifically articulated in the Tribal or State Memoranda of Agreement or resolved on a case-by-case basis.
- **Request for comment:**
  - On the proposal and other approaches to dispute resolution.
  - On the role EPA should play in dispute resolution.

General Changes – Conflict of Interest

- **Current regulations:**
  - Prohibit any public officer or employee with a direct personal or pecuniary interest in a matter before an Agency make this interest known and refrain from participating in such decisions.
- **Proposal:**
  - Expands the prohibition to participate in an Agency decision to any individual, if they have a conflict of interest and any entity that plays a role in permitting decisions.
  - Clarifies it applies to decisions by the Agency as well as any entity reviewing decisions of the Agency.
  - Recommends that Tribes and States consider inclusion of mechanisms which increase transparency and objectivity into the permit self-issuance process.
- **Request for comment:**
  - On the proposed revision to the conflicts of interest regulatory prohibition.
  - Regarding EPA's conclusion that no amendment to the regulations is warranted regarding Tribal and State permit self-issuance and whether any procedures could be established to ensure public confidence in self-issued permits.

General Changes – Other Changes

- **Proposal:**
  - Provides editorial and certain minor updates to 40 CFR parts 232 and 233 to update outdated citations.
  - Provides technical edits to 40 CFR part 124 to clarify that the part 124 regulations do not apply to Tribal or State section 404 programs.
  - Provides other non-substantive changes addressing electronic forms, EPA office locations, docket location, etc.
  - Provides assessment of potential impacts of the proposal on existing State section 404 programs.
- **Request for comment:**
  - On all aspects of the minor updates.
  - On identification of additional technical corrections EPA should make.
  - On identification and comment on impacts of the proposal to existing 404 programs.

Partial and Phased Assumption

- **Current regulations:**
  - State that that partial programs are not approvable under section 404.
- **Proposal:**
  - Retains EPA's interpretation that the statute does not authorize partial assumption.
  - Clarifies to the public and the regulated community as to which waters are being assumed.
  - Recognizes that Tribes and States not interested in full assumption can already take on a major role in the permitting process even without assuming the section 404 program.

Economic Analysis

- **EPA has produced a qualitative economic analysis on the proposed rule.**
- **EPA found that compared to the existing regulations, the proposed rule:**
  - Could have unquantified costs and benefits associated with identifying retained waters, establishing an effective date, expanding input from tribes, and implementing the streamlined withdrawal procedures.
  - Would have de minimis impacts resulting from changes to the program assumption requirements, mitigation, the 5-year limit on permits, and annual reporting.

How to Provide Comments

- The 60-day public comment period for this action (Docket ID No. EPA-HQ-OW-2020-0276) began on August 14, 2023, and will close on October 13, 2023.
- To provide comments on the proposal, please visit: Regulations.gov
  - Reference Identification Number: 2040-AF83
  - Docket ID: EPA-HQ-OW-2020-0276
- EPA anticipates finalizing the proposal in early summer of 2024.

Questions

Please send all rulemaking questions to:

404g-rulemaking@epa.gov

For more information about CWA section 404 program assumption, please visit EPA's website at

https://www.epa.gov/cwa404g

Thank You

Aquatic park near Baltimore MD.
USEPA photo by Eric Vance. Public domain.

Summary of Request for Comment

- **Program Description:**
  - On identification of other program description provisions needing clarity so that EPA will be able to ensure a Tribe or State is equipped to carry out program requirements.
  - On the types of information Tribes and States should provide in the program description.
  - For potential metrics Tribes and States could use to determine funding and staff sufficiency.
- **Retained Waters and Adjacent Wetlands:**
  - On the proposal and alternatives regarding the process and timelines associated with developing the retained waters description.
  - On the information to be provided to demonstrate the Tribe's or State's commitment to pursuing assumption.
  - As to how to increase public transparency and participation in the development of the retained waters description.
  - On the proposed approach to determine the extent of retained adjacent wetlands as well as alternative approaches, codify a default administrative boundary, and process projects straddling the administrative boundary.
  - On the proposed approach to modify the extent of retained waters.

Summary of Request for Comment

- **Mitigation:**
  - Is there need for additional specificity on the requirements for compensatory mitigation.
  - Should third-party compensation mechanisms be provided to EPA and other Federal and State agencies for review.
- **Delayed Effective Date:**
  - Should the regulations should include a default effective date, and if so, should there be flexibility in its duration.
- **Judicial Review:**
  - On whether to provide any greater specificity with respect to the standards for judicial review.
  - On additional examples of what could constitute an unacceptable narrowing of the class of persons who may challenge the approval or denial of permits.
  - On whether, and to what extent, this requirement should apply to Tribal section 404 programs.
- **Long-Term Projects:**
  - On the proposed process, and alternatives, to processing permits associated with long-term projects.

Summary of Request for Comment

- **Tribes as Affected Downstream States:**
  - On these and other approaches for providing additional opportunities for involvement by Tribes whose waters and interests both on and off reservation may be affected by a proposed Tribal- or State-issued 404 permit.
- **Compliance and Enforcement:**
  - On these proposed changes.
  - Regarding the extent to which States have implemented or relied upon the authority to prosecute violations of the section 402 or 404 programs based on simple negligence.
- **Program Scope:**
  - On the codification of these longstanding principles.
  - On how Tribes and States can demonstrate that permits it issues are no less stringent than a permit for the same discharge if issued by the Corps.

Summary of Request for Comment

- **Program Withdrawal:**
  - On recommendations to modify the proposed withdrawal procedure.
  - On suggestions to extend or shorten deadlines for the Tribe or State to come into compliance with the CWA and implementing regulations.
  - On suggestions for modifying the proposed opportunities for public input.
- **Dispute Resolution:**
  - On the proposal and other approaches to dispute resolution.
  - On the role EPA should play in dispute resolution.
- **Conflict of Interest:**
  - On the proposed revision to the conflicts of interest regulatory prohibition.
  - Regarding EPA's conclusion that no amendment to the regulations is warranted regarding Tribal and State permit self-issuance and whether any procedures could be established to ensure public confidence in self-issued permits.
- **Other Changes:**
  - On all aspects of the minor updates.
  - On identification of additional technical corrections EPA should make.
  - On identification and comment on impacts of the proposal to existing 404 programs.