

# Criminal Negligence Standard/State Clean Water Act Programs: U.S. Environmental Protection Agency Proposed Regulatory Clarification



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

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The United States Environmental Protection Agency (“EPA”) is proposing in a December 14th Federal Register Notice a regulation to “clarify” certain requirements for state or tribal programs approved pursuant to Clean Water Act Sections 402 and 404. See 85 Fed. Reg. 80713.

EPA states that the state and tribal programs are not required to include the same criminal standard that is applicable to the federal agency under Section 309 of the Clean Water Act.

Like most federal environmental statutes, the Clean Water Act provides that states and tribes can obtain delegation to implement through permitting and enforcement the program. The Section 402 and 404 programs may each be delegated to a state or tribe if they meet certain requirements. For example, states and tribes seeking approval for a permitting program under Sections 402 or 404 must have adequate authority:

... to abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement. 33 U.S.C. 1342(b)(7) and 1344(h)(1)(G).

EPA states in the preamble to the proposed regulation that the previously cited provisions do not establish specific mens rea standards or penalties for state and tribal programs. As a result, the agency believes they do not provide specific criteria on which EPA could disapprove a program for lack of authority to impose criminal sanctions.

EPA notes that Section 309(c) of the Clean Air Act provides the agency with enforcement authority to establish misdemeanor criminal liability in Subsection (c)(1) and a range of penalties for negligent violations of specified provisions as well as felony liability and a higher range of penalties for “knowing violations” which is found in Subsection (c)(2) of the Clean Water Act.

The federal agency expresses concern that its current regulations describing the criminal intent standard applicable to state and tribal programs do not:

... clearly articulate EPA’s interpretation of the statute that it may approve state or tribal programs that allow for prosecution based on any negligence standard, including those negligence standards with a gross negligence mens rea requirement.

As a result, EPA believes there was a need to specifically provide clarification through the proposed regulation. Consequently, the federal agency is stating that appropriate interpretation of the Clean Water

Act allows it to approve state or tribal programs that provide for prosecution based on any negligent standard which includes gross negligence or recklessness.

A copy of the Federal Register preamble can be downloaded [here](#).