


# U.S. EPA Updates and Michigan Wetlands, Lakes, and Streams

Michigan Wetlands Association 2023 Conference

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# Overview

- Recent Clean Water Act Rulemakings
  - 401
  - WOTUS
  - 404(g)
- Michigan's Assumed 404 Program and EPA's review
- Sampling of Red-file Comments



Section 401  
Proposed Rule

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# Background: What is Clean Water Act (CWA) Section 401?

- Under CWA Section 401:
  - A federal agency may **not** issue a license or permit to conduct any activity that may result in any discharge into a “water of the United States”, **unless** the state or authorized tribe where the discharge would originate either issues a CWA Section 401 water quality certification or waives certification.
- Section 401 applies to **any** federal license or permit that may result in a discharge into a water of the United States.
- Section 401 Certifications in Michigan

# Background: Previous Agency Actions on CWA Section 401

- EPA promulgated regulations for water quality certification in **1971**, prior to the CWA, which created section 401.
- On **July 13, 2020**, the “Clean Water Act Section 401 Certification Rule” (“2020 Rule”) was published. This rule went into effect on September 11, 2020.
- On **January 20, 2021**, President Biden issued Executive Order 13990, “*Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis*,” which directed EPA to review and consider revising the CWA section 401 certification regulations.
- On **May 27, 2021**, Administrator Regan signed a *Federal Register* notice announcing EPA’s intention to reconsider and revise the CWA Section 401 Certification Rule found at 40 CFR 121.

# Proposed CWA Section 401 Water Quality Certification Improvement Rule

- On **June 1, 2022**, Administrator Regan signed the proposed “Clean Water Act Section 401 Water Quality Certification Improvement” rule to modernize and clarify EPA’s existing regulations at 40 CFR 121 and 40 CFR 124.53-55.

# Outreach and Engagement

- EPA hosted a series of listening sessions and a public hearing during the Summer 2022. Please visit <https://www.epa.gov/CWA-401> for more information on these events.
- The public comment period closed on **August 8, 2022**. EPA received over 27,000 public comments (Docket ID No. EPA-HQ-OW-2022-0128).

# Additional Information

- Visit **<https://www.regulations.gov>** to view the docket for this rulemaking, identified by **Docket ID No. EPA-HQ-OW-2022-0128**.
- For more information on CWA section 401 and this rulemaking, please visit **<https://www.epa.gov/CWA-401>**.
- If you have any questions, please send an e-mail to **[cwa401@epa.gov](mailto:cwa401@epa.gov)**.



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Waters of the  
United States  
Amended Rule

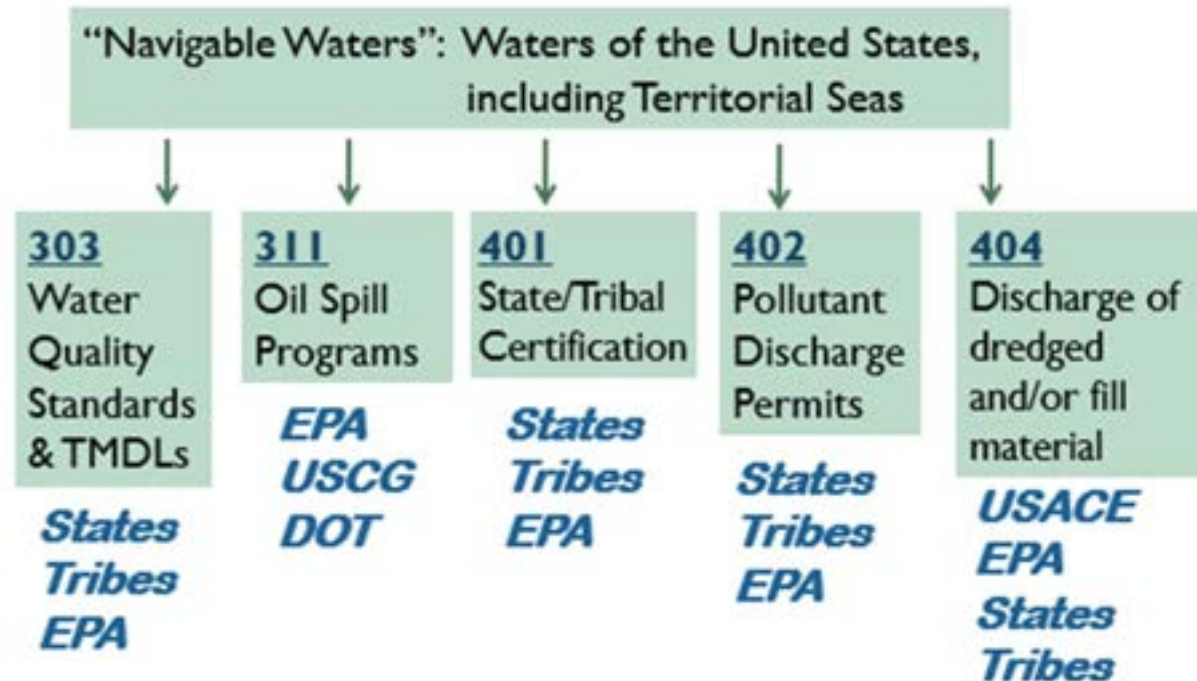
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## Background: “Waters of the United States” and the Clean Water Act

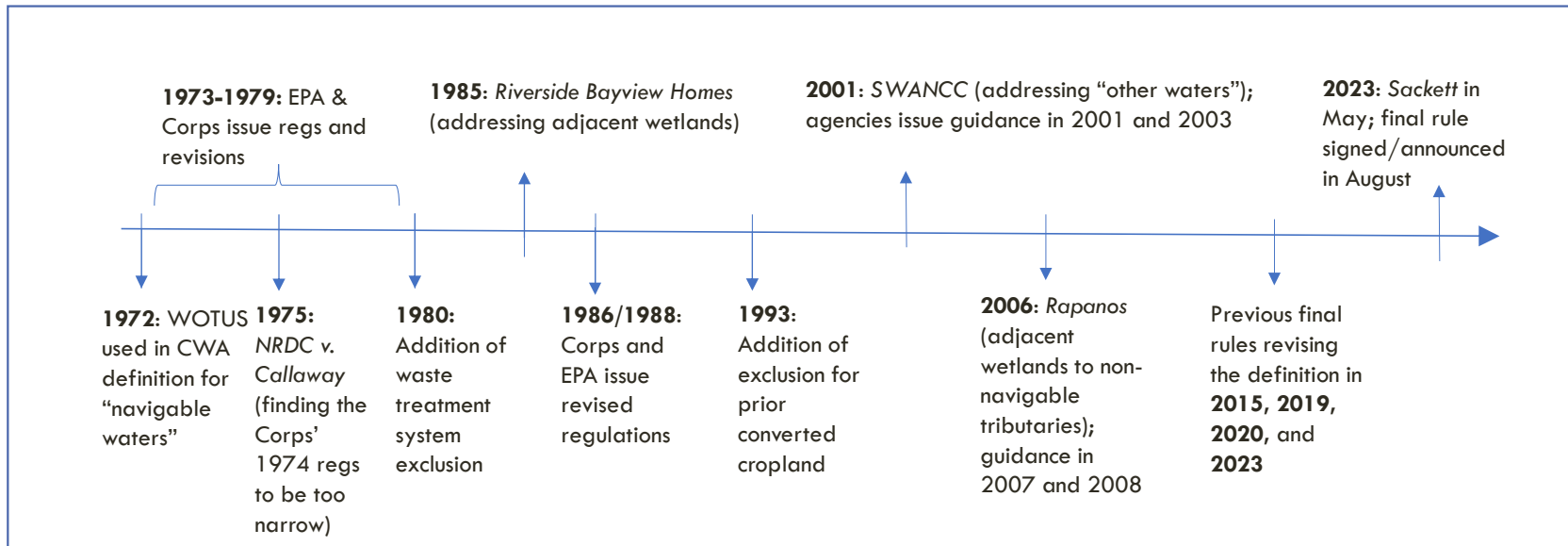
- “Waters of the United States” is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act.
- Clean Water Act regulatory programs address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial seas.”
- The Clean Water Act does not define “waters of the United States”
- The EPA and the Department of the Army have defined “waters of the United States” by regulation since the 1970s.

# Background: Why “Waters of the United States” Matters



# Background: “Waters of the United States” Over Time

The definition of “waters of the United States” has been a subject of dispute and addressed in several major Supreme Court cases.



# Background: Recent Events

<b>January 2023</b>	2023 Rule published – “Revised Definition of ‘Waters of the United States’”
<b>March 2023</b>	2023 Rule effective
<b>May 2023</b>	<i>Sackett</i> Supreme Court decision
<b>June 2023</b>	EPA and Army announce plans to issue a final rule
<b>July 2023</b>	EPA and Army submit final rule to OMB
<b>August 2023</b>	Final rule signature and announcement



# Changes to the “Waters of the United States” Categories

Jurisdictional Category	Key Changes to the January 2023 Rule Regulation Text	Regulatory Text Paragraph
Traditional Navigable Waters	No changes	(a)(1)
Territorial Seas	No changes	(a)(1)
Interstate Waters	Removing interstate wetlands from the text of the interstate waters provision	(a)(1)
Impoundments	No changes	(a)(2)
Tributaries	Removing the significant nexus standard	(a)(3)
Adjacent Wetlands	Removing the significant nexus standard	(a)(4)
Additional Waters	Removing the significant nexus standard; removing wetlands and streams from the text of the provision	(a)(5)

# Changes to Definitions

Definition	Key Changes to the January 2023 Rule Regulation Text	Regulatory Text Paragraph
Wetlands	No changes	(c)(1)
Adjacent	Revised definition to mean “having a continuous surface connection.”	(c)(2)
High tide line	No changes	(c)(3)
Ordinary high water mark	No changes	(c)(4)
Tidal waters	No changes	(c)(5)
Significantly affect	Deleted definition	(c)(6)

## Implementation and Outreach

<https://www.epa.gov/wotus/amendments-2023-rule>

- Webinars
- Co-regulators and stakeholder listening sessions
- Developing regionally-specific tools
- Partnership with States and Tribes



State and Tribal  
Assumption of  
Section 404 of  
the Clean Water  
Act

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## Background on CWA Section 404(g)

- Section 404(g) provides Tribes and States the authority to assume administration of the 404 program to regulate the discharge of dredged and fill material into certain "waters of the United States" (WOTUS).
- EPA approves and oversees Tribal and State 404(g) programs.

# States that Implement Section 404 of the Clean Water Act



Esri, Garmin, FAO, NOAA, USGS, EPA | Esri, USGS

# Scope of MI's Assume CWA Section 404 Program

- Michigan assumed wetlands, inland lakes, and streams include:
  - Waters of the U.S. that are not retained by the U.S. Army Corps of Engineers
- Waters retained by the Corps (Not assumed by MI) include:
  - Waters which are presently used as a means to transport interstate and foreign commerce and their adjacent wetlands.
  - Waters within the external boundaries of Tribal reservations

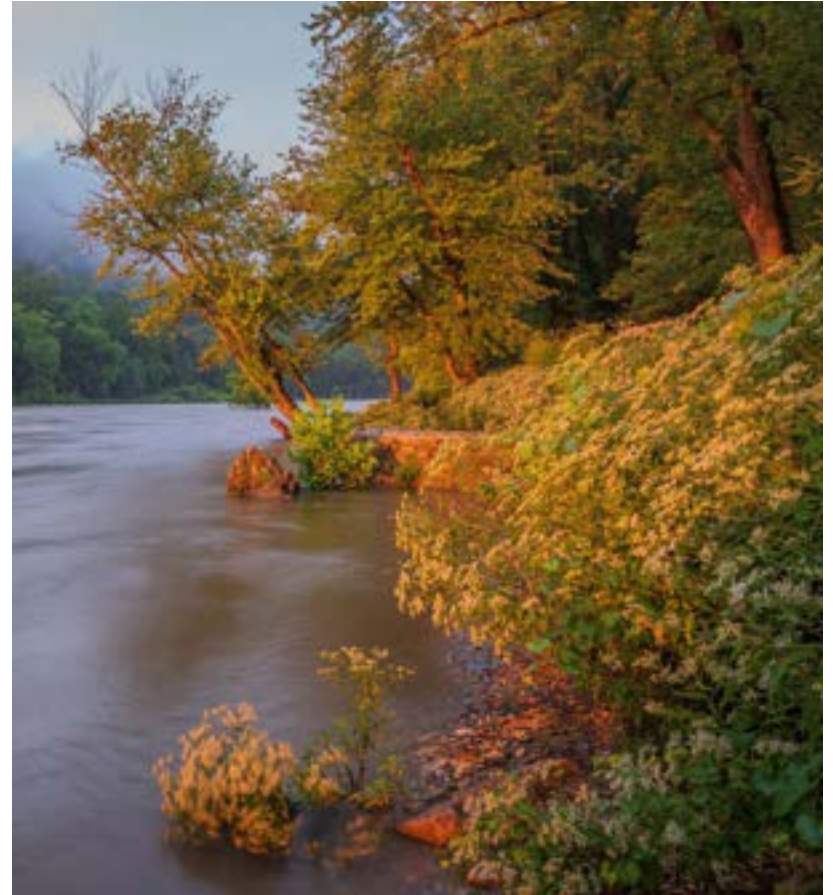
## 404(g) Rulemaking Effort

EPA is proposing to update the 404(g) regulations to:

- Provide clarity
- Address state-perceived “barriers” to assumption.
- Update the regulations for consistency with statutory changes, court decisions, policy updates, and advances in technology.
- Address input from Tribes and States.

# Proposal Addresses

- Program approval and procedures.
- Implementation issues
- Clarification on retained waters
- Compliance and enforcement
- Tribal interests
- Other Changes
- Economic analysis



# How to Provide Comments

- **Public Comment Period**

- The 60-day public comment (Docket ID No. EPA-HQ-OW-2020-0276) began August 14 and ends October 13, 2023

- **Upcoming engagement:**

- Public Hearing: September 6, 2023, 3:30-7:30pm EDT
- State Input Session: August 24, 2023, 1:30-4:30pm EDT

- **Tribal Consultation**

- 60-day consultation period began on July 19, 2023, and will close on September 17, 2023.
- Tribal Input Sessions: August 15, 2023, 2:30-4:30pm EDT  
August 30, 2023, 2:30-4:30pm EDT

- **For information on providing comments, please visit:**

[Proposed Revision to CWA 404\(g\) Regulations](#)



# EPA Oversight of Michigan's Assumed CWA Section 404 Program

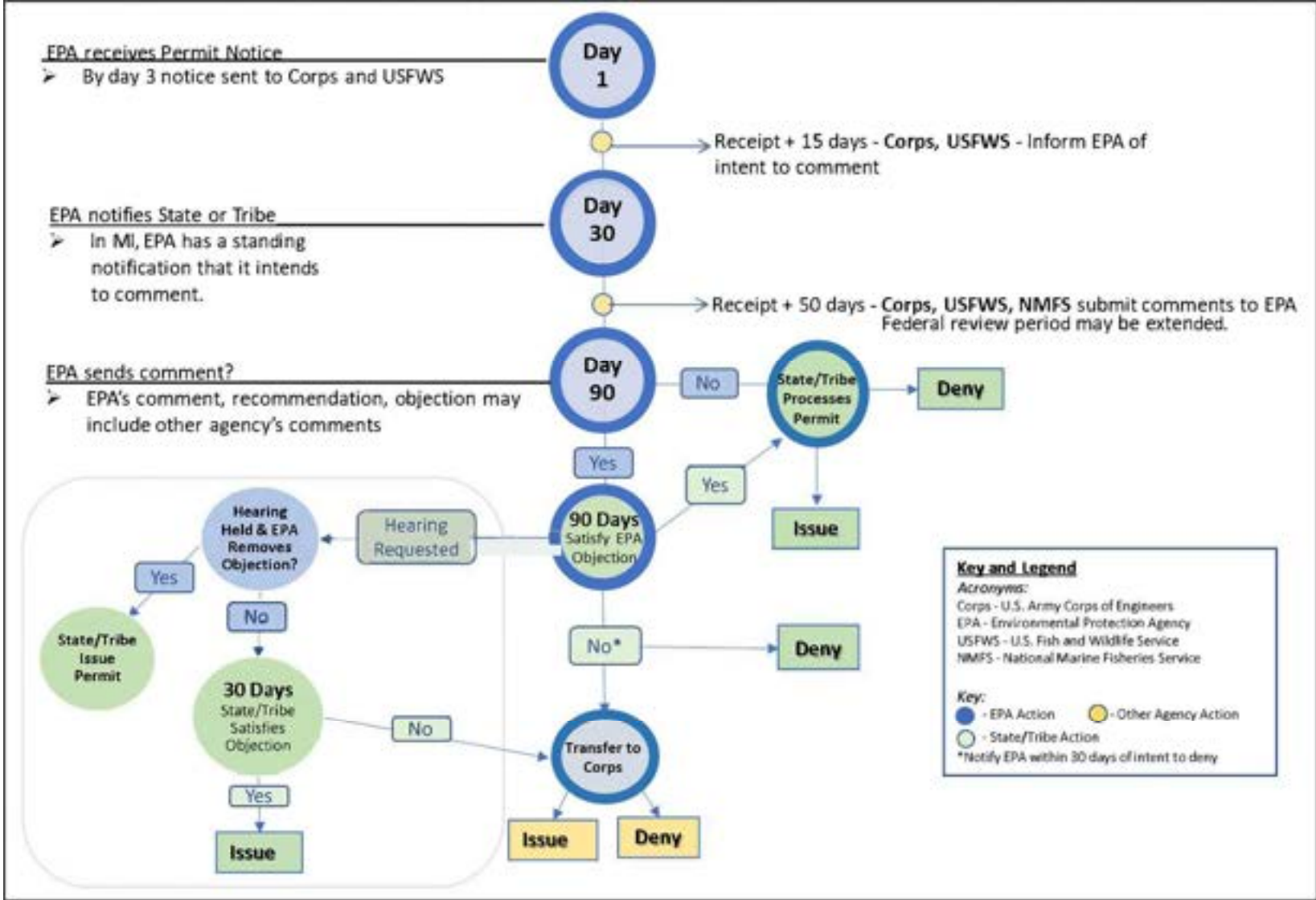




# Michigan Non-Waiver Categories

- Draft general permits
- Major discharges:
  - i) Affect one or more acres of wetland.
  - ii) Include new construction of breakwaters or seawalls with a total length of more than 1,000 feet.
  - iii) Include enclosure of more than 300 feet of a stream in one or more segments.
  - iv) Require relocation or channelization of more than 1000 feet of a stream in one or more segments.
- Discharges with reasonable potential to affect threatened or endangered species
- Discharges that may adversely impact waters of another State\*
- Discharges with known or suspected toxic or hazardous pollutants
- Discharges proximal to public water supply intakes
- Discharges within critical State/Federal areas

\* State as defined in the regulations includes eligible Tribes



# How many projects does EPA review?

Out of ~1,300 individual permits issued by EGLE

EPA reviewed 31\* Public Notices

No Comment: 13

General Comments: 17

Objection: 1

\*FY2020 data from EGLE annual report.

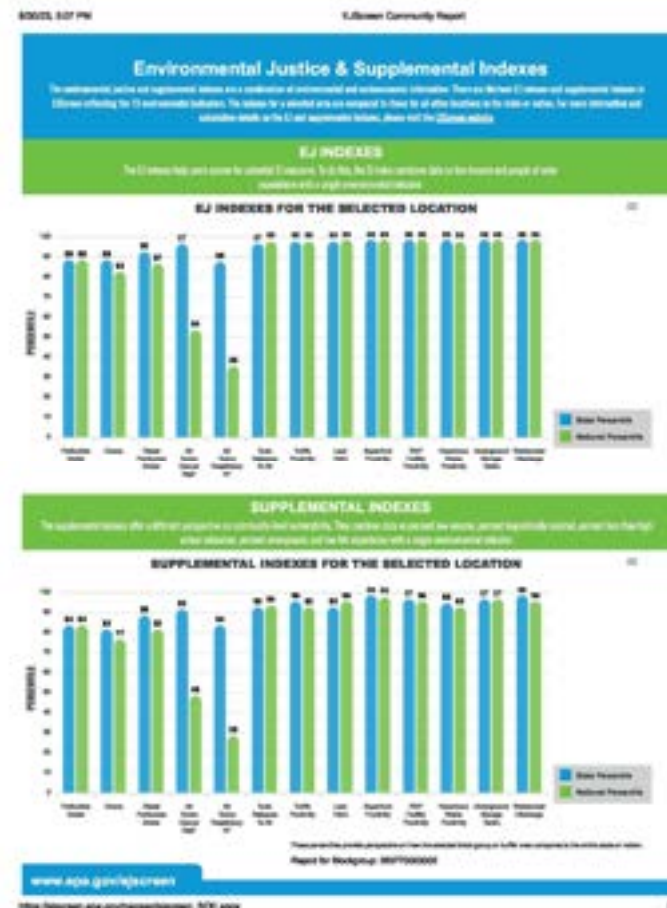
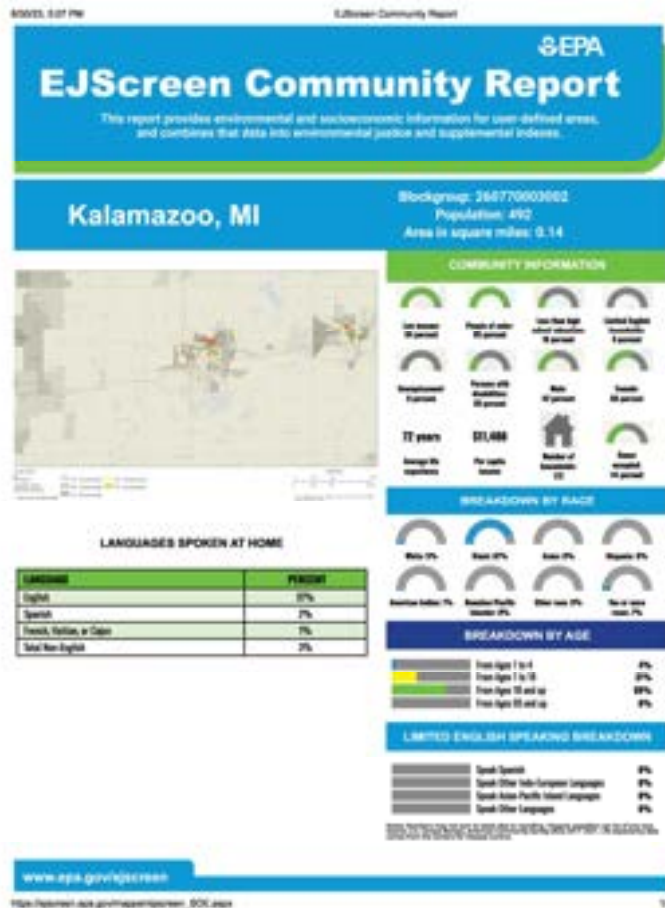
# EPA Comments- 404(b)(1) Guidelines

- Significantly Affect Review
- Review Sequence
  - Avoidance
  - Minimization
  - Compensatory Mitigation





# Environmental Justice Review



# Best Management Practices (BMPs) and Low Impact Development (LID)



<https://www.epa.gov/nps>

# Projects that take longer than 5-years to construct/ Piecemealing?

- Provide a full site plan, impacts, and timeline for the complete project and explain phases
- Verify and demonstrate that all phases need to be on one site.
- Describe alternatives analysis in light of the entire project
- If there are larger wetland areas on the site that are being avoided, consider a conservation easement.





# Questions

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