



Association of State Wetland Managers Wetland Regulatory Capacity Building Series

Introduction to State and Tribal Wetland Regulatory Capacity Building

March 2021

Regulations for dredging or filling wetlands are in effect nationally under §404 of the Clean Water Act (33 U.S.C. §1251 et seq.), and Section 10 of the Rivers and Harbors Act, with permits issued by the U.S. Army Corps of Engineers (Corps). States and tribes may find that for various reasons, these programs are inadequate for meeting state or tribal needs, including both for regulatory efficiency as well as improved resource management. Some states and tribes have addressed the shortcomings of the federal programs by expanding or maximizing their authorities. Existing regulatory programs in most states and tribes are coordinated to some degree with the Corps permitting program. For those states or tribes that have not previously administered a regulatory program, an initial consideration may be the extent of responsibility that the state or tribe wishes to assume relative to the federal program to meet their own wetland management goals and objectives, as discussed below. States or tribes that are currently regulating wetland impacts may wish to consider modification or expansion of their responsibilities for improved and tailored wetland management.

There are several options for building wetland program capacity and improving wetland management. State and tribal wetland and aquatic resource regulatory programs are defined by the authority under which they operate (i.e., Clean Water Act (CWA) §404, CWA §401, state or Tribal law) and how the program is implemented. There are four primary types of wetland regulatory approaches:

1. **Use of existing authority:** States and tribes with active **CWA §401 certification programs** can prohibit certain federal permits or licenses from being issued, or if issued require that the permits or licenses include mandatory conditions.
2. **New Independent Authority:** States and tribes can also **develop their own permitting programs** to avoid, minimize, and or compensate for impacts to wetlands and other aquatic resources. These programs can cover aquatic resources under federal jurisdiction as well as those waters of the state or tribe not protected as waters of the U.S.

3. **State/Tribal Authority with Federal General Permit:** For states and tribes wanting more direct involvement than CWA §401 certification provides, but without assuming the CWA §404 program, **State Programmatic General Permits (SPGPs) or Regional General Permits (RGPs)** can increase efficiency by eliminating some duplication between state/tribal and federal permits but without the same financial or administrative burden of CWA §404 assumption.
4. **State/Tribal Assumption of Federal Program:** In a **§404 assumed program**, the state or tribe becomes the permitting authority and provides funding and staffing for the federal 404 permitting program. While state/tribal assumed programs can be more stringent than federal regulations, they only need to be “consistent with and no less stringent than” the federal program.

Additionally, states and tribes can enhance regulatory capacity by:

- **Coordinating State/Tribal and Federal permitting with Corps through Joint Application and/or Joint Public Notice.** To reduce duplication between state or tribal and federal agencies, and to assist the public, state/tribal and federal permitting actions may be coordinated. State/tribal and federal agencies may develop a joint permit application form, which may be submitted to either agency. They may use a joint public notice to seek public review. Agency staff may also seek to coordinate permitting decisions, including required permit conditions such as mitigation. They may also share mitigation banks.
- **Developing Wetland Specific Water Quality Standards.** While state/tribal water quality standards may be generally applicable to wetlands as well as other waters, states/tribes can specify more specific standards to protect wetlands. For example, criteria that protect wetlands from hydrologic modification may be included. Some states/tribes include other provisions related to impacts on wetlands, that parallel the Clean Water Act’s §404(b)(1) guidelines, in water quality standards.

No matter which category or combination of regulatory program(s) a state or tribe pursues, the effectiveness of that program will largely depend on how well the following three basic program elements are addressed:

1. Definition of the jurisdictional scope of the program to clarify what activities and aquatic resources are regulated. Jurisdiction may be tied to the CWA and /or independently defined by the state or tribal government.
2. Administration of regulatory activities, including a method of authorization and set of standards for assessing proposals that defines what will be authorized, how impacts will be accounted for, and how impacts will be mitigated.

3. Evaluation, inspection, and enforcement of regulatory activities to ensure environmental results (including avoidance, minimization, and mitigation for impacts to wetlands and other aquatic resources).

Over the years, EPA has encouraged states and tribes to pursue these three basic objectives whether interested in strengthening their CWA §401 certification program, adopting an SPGP or RGP, developing or enhancing a CWA §404 assumed program, implementing a state or tribal permitting program, or some combination of the above.

Any addition, revision, or expansion of a program requires multiple actions, including:

- assessment of state/tribal needs and priorities;
- drafting of potential regulatory language and guidance;
- provision for input from stakeholders as regulations are developed;
- development of administrative materials such as permit forms;
- development of decision-making tools such as assessment methods;
- development of computerized tracking systems; and
- staff training, among others.

Many of these actions apply to more than one step and will help to build agency capacity to the level that is desired in the long term. Even states with robust regulatory programs may continually work toward improving program implementation. Any of these actions as well as incremental changes and improvements may be included in a State/Tribal Wetland Program Plan.

To assist states and tribes in their efforts to build or improve their regulatory programs, ASWM has assembled a series of information sheets which provide basic information about each topic. ASWM's Wetland Regulatory Capacity Building Information Sheets provide summary information about each capacity building topic, then direct the reader to additional resources for more in-depth support, as well as to archived ASWM webinars on the topic that were developed as part of this project.

ASWM's Wetland Regulatory Capacity Building Information Series is designed to help states and tribes:

- Review a checklist of initial considerations for wetland regulatory capacity building.
- Learn about Wetland Program Plans as a building block for developing wetland regulatory program capacity.
- Understand sustainable funding options.
- Learn how states can work with their legislatures to garner support for regulatory activities.

- Explore ways to improve compliance and enforcement.
- Understand strategic communication approaches to help communicate regulatory program goals and increase compliance.
- Identify opportunities for integration with other programs to increase wetland program capacity.
- Learn about opportunities to partner with state wetland associations and other water associations.
- Link to ASWM resources and other online materials that can assist in informing wetland regulatory capacity building efforts.

For more information, contact:

Association of State Wetland Managers

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