

SECTION 3: REGULATORY

Introduction

The following sections are to help Tribes and States develop regulatory programs to protect aquatic resources. First, is a section defining critical elements that characterize a regulatory program. Second, are identified actions and activities to be considered when developing a plan and/or apply for a WPDG. The next section includes examples of how actions and activities were successfully utilized in WPDG Program building projects. The final section provides additional resource links.

Definition

Tribal and State programs regulating aquatic resources may fall into one or more of the following categories:

- CWA §401 water quality certification program, which requires federally permitted or licensed activities that may result in a discharge into waters of the U.S. to receive a certification or a waiver from the State or Tribe in which the discharge originates <https://www.epa.gov/cwa-401>
- State Programmatic General Permit (SPGP) - is a general permit, under the Army Corps of Engineers (Corps), that allows a Tribe or State to authorize activities that may result in a discharge of dredged or fill material into waters of the U.S. SPGPs are often limited to specific activities, geographic areas, resource types, and/or sizes of impacts. For example, Maryland has an SPGP addressing most impacts of one acre or less.
- CWA §404(g) Tribe and State Assumption is where a Tribe or State may be authorized to issue all CWA §404 permits for the discharge of dredged or fill of material into waters of the U.S. within the Tribe or States' jurisdiction. In an assumed program, the Tribe or State is the permitting authority, provides funding and staffing for the program, and ensures the program is as or more comprehensive than the federal program. Michigan, New Jersey, and Florida have assumed the CWA §404 program.
- Tribes or States may have permitting programs under Tribal or State laws and regulations independent of EPA or Corps review.

Regulatory Program

In general, well-designed and executed wetland regulatory programs can be a critical tool for Tribes and States to use to manage and protect their wetland resources. For example, regulatory programs can enable Tribes and States to regulate development and protect important (or unique) wetland resources by avoiding, minimizing, and compensating for wetland impacts. Programs can cover aquatic resources under federal jurisdiction as well as those not protected as waters of the United States. Tribes or States may establish their program in order to have direct authority over their aquatic resources regardless of the status of federal regulatory programs.

Table 4. Phase 1: Regulatory Planning Considerations

Actions	Menu of Activities
a. Provide clear and comprehensive jurisdictional coverage of aquatic resources	<ul style="list-style-type: none"> • Define “waters of the Tribe or State,” and understand limits of waters of the United States • Make the definition of Tribal or State waters at least as inclusive as CWA (Tribal or State permit program does not need to be as comprehensive as CWA, or they can be more expansive). • Delineate wetlands in a manner that is at least equivalent (or consistent) with the federal program (Tribal or State permit program does not need to be as comprehensive as CWA). • Extend Tribal or State jurisdiction to aquatic resources that are not “waters of the United States” (e.g., isolated wetlands) • Base all water related regulatory programs within a Tribe or State on the same definition of “waters of the Tribe or State” (or even more expansive)
b. Clearly identify a comprehensive scope of activities to be regulated	<ul style="list-style-type: none"> • Adopt clear definition of regulated activities that are regulated under waters of the Tribe or State. (Tribal or State permit program does not need to be as comprehensive as CWA) • Coordinate with other CWA or Tribe or State aquatic regulatory programs to cover all impact types and methods (e.g., quality vs. quantity, point vs. nonpoint source pollution, classes of activities) • Extend Tribal or State jurisdiction to activities that are not regulated under the CWA (e.g., excavation or ditch maintenance)
c. Provide clear guidance to public on how to identify jurisdictional waters and activities	<ul style="list-style-type: none"> • Develop clear, publicly accessible guidance and/or training on how to identify waters of the state/tribe for wetlands, streams, and other waters • Develop clear, publicly accessible guidance on what activities in waters of the state/tribe require which authorizations
d. Evaluation	<ul style="list-style-type: none"> • Periodic review of state/tribal program to ensure all potentially regulated activities are addressed and take appropriate programmatic action (See next table.)

EPA recommends that Tribes and States first identify their program specific regulatory program needs. After the needs are outlined for the program, program goals can be identified. The program goals can be used to determine which phase to enter. For example, if the goal is to develop a comprehensive and/or formal programs, Phase 1 actions and activities are the starting point. If implementation is the focus, then start with Phase 2. If program refinement or decision-making is the focus, then start with Phase 3.

EPA recommends that you design and build your program to address your specific needs, which could result in a blending of some activities from the same phase or of different phases. The phases are as follows (Table 4 – 6):

Table 5. Phase 2: Regulatory Data Collection, and Assessments Considerations

Actions	Menu of Activities
a. Adopt regulations or rules to implement Tribal or State and/or federal water quality statutes	<ul style="list-style-type: none"> • Adopt guidance to implement statutes as appropriate • Adopt regulations that identify agency goals and responsibilities for all water quality statutes
b. Develop and operate according to a clear and effective set of criteria for reviewing and responding to applications	<ul style="list-style-type: none"> • Develop publicly accessible criteria for applying for and agency review of applications • Establish reasonable timelines for initially responding to applications in regulatory guidelines • Establish reasonable timelines for providing final responses to applications in regulatory guidelines • Develop and implement internal procedures for responding to Federal agencies on permits
c. Actively review proposed impacts to the waters of the Tribe or State	<ul style="list-style-type: none"> • Actively review proposed impacts to waters of the state/tribe or waters of the United States • Develop standard practices or general authorizations for like projects impacting similar aquatic resources
d. Adopt and apply comprehensive project review criteria	<ul style="list-style-type: none"> • Adopt 404(b)(1) Guidelines or comparable review criteria for assessing and minimizing impacts • Adopt more stringent review criteria than the 404(b)(1) Guidelines
e. Coordinate among agencies, programs, and industry groups to reduce duplicative efforts by the programs and the regulated public	<ul style="list-style-type: none"> • Use joint internal and external review processes and practices • Develop clear guidelines for roles, responsibilities, and procedures for review of permits for activities that require approval from more than one state/tribal agency • Issue permit decisions with conditions that they must meet the requirements of other agency permit requirements
f. Require effective mitigation for authorized impacts	<ul style="list-style-type: none"> • Tribe or State establishes a “No Net Loss” policy for regulated aquatic resources • Require effective mitigation for authorized impacts • Tribe or State participate in or serve as Co-Chairs of Mitigation Interagency Review Teams • Require long-term protection at mitigation sites (e.g., restrictive covenant, easement, deed restriction) • Establish minimum requirements and review criteria for mitigation proposals • Require financial assurances for mitigation projects
g. Track permit/certification program activity	<ul style="list-style-type: none"> • Track permit/certification program activity • Map impact and mitigation sites • Administer and regularly update publicly accessible tracking system for impacts and mitigation

Table 6. Phase 3: Regulatory Refinement and Wetland Management Decision-Making Considerations

Actions	Menu of Activities
a. Monitor the implementation of permit/certification conditions	<ul style="list-style-type: none"> • Track # of pre-operation inspections performed by the certifying authority under 40 CFR 121.11(a) • Track# of times certifying authority provides support to Federal agency on enforcement/compliance with certification conditions
b. Enforce aquatic resource protections	<ul style="list-style-type: none"> • Develop and implement enforcement and compliance mechanisms to monitor compliance and deter violations • Set timeframe for sites to come into compliance
c. Ensure impact assessments and mitigation crediting lead to replacement of aquatic resources with similar structural, functional or condition attributes	<ul style="list-style-type: none"> • Develop or adopt functional or condition assessment methodologies • Establish performance standards and success criteria for mitigation • Evaluate mitigation against reference and pre-impact sites regularly; revise performance standards, review criteria, and/or functional/condition assessment methods accordingly • Coordinate regulatory programs with other entities conducting restoration to share best practices, mitigation/restoration priorities, and/or assessment methodologies
d. Incorporate the watershed approach into the regulatory decision-making process	<ul style="list-style-type: none"> • Establish methods for determining cumulative impacts to aquatic resources within a watershed • Evaluate cumulative impacts to aquatic resources within a watershed, with consideration given to communities with environmental justice concerns • In addition to required guidelines, use watershed plans to guide permitting and restoration priorities • Consider impacts and benefits to communities with environmental justice concerns within the watershed when setting priority areas for mitigation and enforcement • Use watershed plans to set priority areas for mitigation • Use Special Area Management Plans, as appropriate
e. Perform public education and outreach about wetland protection, regulated waters and activities, and authorization process	<ul style="list-style-type: none"> • Make education/outreach documents or activities available on important programmatic topics such as: <ul style="list-style-type: none"> ○ Importance of aquatic resources ○ Regulatory program requirements ○ How to identify protected waters ○ Listing regulated activities ○ Regulatory program performance ○ Opportunities for public participation in the protection of aquatic resources, such as public notice and comment periods • Make information available through readily accessible outlets (hotline, website, brochures, etc.) and develop approaches to reaching communities with environmental justice concerns
f. Measure Environmental Results	<ul style="list-style-type: none"> • Tribe or State program develops tracking system used for: <ul style="list-style-type: none"> ○ % permitted sites that are inspected per year ○ % permits in compliance ○ % non-compliant sites where enforcement actions taken ○ % non-compliant sites brought into compliance within timeframe ○ # of unauthorized impacts brought into compliance (annual tracking) ○ % mitigation sites monitored ○ % mitigation sites established ○ % mitigation sites meeting performance goals

Resource Links

Clean Water Act section 404

- <https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404>

Clean Water Act section 404(g)

- <https://www.ecfr.gov/current/title-40/chapter-I/subchapter-H/part-233>
- <https://www.ecfr.gov/current/title-40/part-233/subpart-B>

APPENDIX A: EPA WEBSITE RESOURCES

EPA Basic Information about Wetland Restoration and Protection:

- <https://www.epa.gov/wetlands/basic-information-about-wetland-restoration-and-protection>

EPA Core Elements of Effective State and Tribal Wetlands Program document.

- https://www.epa.gov/sites/default/files/2015-10/documents/2009_03_10_wetlands_initiative_cef_full.pdf

EPA National Guidance Water Quality Standards for Wetlands:

- <https://www.epa.gov/cwa-404/national-guidance-water-quality-standards-wetlands>

EPA Partnering with Land Trusts Fact Sheet:

- https://www.epa.gov/sites/default/files/2021-01/documents/wetlands_protection_partnering_with_land_trusts.pdf

EPA Templates for Developing Wetland Water Quality Standards:

- <https://www.epa.gov/wqs-tech/templates-developing-wetland-water-quality-standards>

EPA Wetland Monitoring and Assessment Information:

- <https://www.epa.gov/wetlands/wetlands-monitoring-and-assessment>

EPA Wetlands Program Development Grants:

- <https://www.epa.gov/wetlands/wetland-program-development-grants-and-epa-wetlands-grant-coordinators>

EPA Wetland Program Development Grants [Tribal] Case Studies:

- <https://www.epa.gov/wetlands/wetland-program-development-grants-case-studies>

EPA Wetland Program Plans:

- <https://www.epa.gov/wetlands/developing-state-or-tribal-wetland-program-plan>
- <https://www.epa.gov/climate-adaptation/climate-adaptation-plans>
- <https://www.epa.gov/environmentaljustice/resources-creating-healthy-sustainable-and-equitable-communities>

EPA Wetland Restoration Fact Sheet:

- https://www.epa.gov/sites/default/files/2021-01/documents/wetland_restoration.pdf

APPENDIX B: BIBLIOGRAPHIC RESOURCES LINKS

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