

## REGULATION

### **Definition**

Wetlands regulatory and permit programs in general consist of a few basic elements: a jurisdictional scope, a method to authorize impacts to aquatic resources and assess proposed authorizations, and a method of assuring compliance. 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. State and tribal programs regulating aquatic resources fall into four main categories:

- Implementation of a CWA §401 certification program that requires federal permits and licenses to receive certification from the state or tribe in order to be valid; <http://www.epa.gov/OWOW/wetlands/regs/sec401.html><sup>1</sup>
- Implementation of a State Programmatic General Permit (SPGP) or a Regional General Permit (RGP). SPGPs and RGPs are general permits issued by the Army Corps of Engineers (Corps) that authorize activities regulated by another entity such as a state or tribe; <http://www.epa.gov/owow/wetlands/pdf/spgp.pdf>
- Assumption of the CWA §404 permitting authority, so that the state or tribe issues all CWA §404 permits for the discharge of dredge or fill of material into waters of the U.S. within the state's/tribe's jurisdiction; and <http://www.epa.gov/owow/wetlands/pdf/40cfrPart233.pdf>  
<http://www.epa.gov/owow/wetlands/pdf/40cfrPart233G.pdf>
- Implementation of a state or tribal permitting program under state or tribal laws and regulations independent of EPA or Corps review.

The effectiveness of a state or tribal regulatory program depends on clear definitions, guidelines and regulations, assignment of responsibilities, and procedures that are applied consistently by program staff and understood by the public. This applies to all aspects of the program but is particularly important for compensation, compliance and enforcement as these are highly visible to the public and the regulated community. This chapter covers the four approaches listed above that states and tribes can pursue to provide regulatory protections for wetlands and other aquatic resources. [Please note: that this is not intended to cover all aspects of each of these programmatic approaches, it is a summary highlighting the major components.]

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<sup>1</sup> Under CWA §401, a federal agency cannot issue a permit or license that may result in a discharge to waters of the U.S. until the state or tribe where the discharge would originate has waived or granted §401 certification. The central component of the §401 certification program is the state or tribe's decision to grant, grant with conditions, deny or waive certification based on the proposed project's potential to comply with water quality standards, effluent limitation guidelines, new source performance standards, toxic pollutant restrictions, and other appropriate requirements of state or tribal law.

## **Goals and Benefits**

An overarching goal of the federal CWA is to restore and maintain the physical, chemical, and biological integrity of the Nation's waters. A more specific federal goal is "No Net Loss" of wetlands in the CWA §404 regulatory program by first avoiding, then minimizing, and finally compensating for any impacts to aquatic resources caused by the discharge of dredge or fill material into waters of the U.S. This goal has been enhanced with a companion goal that calls for an "Overall Increase" in wetlands extent, functions, and quality for all federal aquatic resource programs. States and tribes may have similar or additional goals which they are trying to achieve with a regulatory program such as preservation of cultural resources.

There are several benefits to states and tribes that take an active role in regulating impacts to aquatic resources. A regulatory program allows states and tribes to manage aquatic resource protection and require restoration of acreage and function/condition to address their goals including increase the number of acres and quality of wetlands. State and tribal regulatory programs can be more protective or more comprehensive than the federal program in various ways including adopting protective standards, covering all aquatic resources in the state, not just waters covered by the Clean Water Act, or utilizing other statutes and regulations such as smart growth requirements. In addition, states and tribes can incorporate other land use regulations, goals and policies into their regulatory program and more effectively manage the resources on a watershed scale. Some regulatory program categories increase overall regulatory efficiency by reducing state/federal redundancy and provides for more effective allocation of state/tribal resources. State and tribal regulatory programs can increase integration and cooperation with state and federal resource programs to more effectively address a range of water related issues such as flood control and wellhead protection.

This chapter covers four categories of regulatory programs, each with varying levels of permit responsibility and control for the state or tribe:

- States and tribes with active CWA §401 certification programs can prohibit or place mandatory conditions or provisions on activities affecting aquatic resources that require federal permits. These conditions are added to the CWA §404 permit issued by the Corps. Certification allows states and tribes to prevent impacts that would violate narrative or numeric water quality standards or other appropriate requirement of state or tribal law (e.g. protection of traditional uses, maintenance of in-stream flow). These certifications can be for individual permits or for general permits such as the Corps' Nationwide General Permits. This authority provides states and tribes with a final say on federally permitted or licensed actions affecting wetlands and other aquatic resources within their jurisdiction without the larger investment of resources necessary to run an independent regulatory program. Many states and tribes have active CWA §401 certification programs. Some states, like North Carolina, have a strong CWA §401 certification program that works together with state mandated regulatory programs to extend state review to resources and activities not regulated under the CWA.
- For states and tribes wanting greater involvement than CWA §401 certification but without assuming the CWA §404 program, SPGPs or RGP increase efficiency by eliminating some duplication between state and federal permits but without the same

financial or administrative burden of CWA §404 assumption. SPGPs and RGP are developed in coordination with the Corps CWA §404 program staff and typically allow the state or tribe to review applications and issue permits and provides for a more streamlined permitting process. SPGPs and RGP 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 and Louisiana has an RGP in the lower portion of the state.

- States and tribes that have pursued assumption of the CWA §404 permitting program report doing so in order to streamline the permit review process, provide more thorough protection of aquatic resources, and achieve consistency in program administration rather than dividing authority between state and federal agencies. In an assumed program, the state or tribe is the permitting authority and provides funding and staffing for the program. While state/tribal assumed programs can be more comprehensive, they only need to be as comprehensive as the federal program. Michigan and New Jersey have assumed the CWA §404 program. For those states/tribes interested in assuming the CWA §404 permitting program there are specific regulations that must be met which can be found at <http://www.epa.gov/owow/wetlands/pdf/40cfrPart233.pdf>
- States and tribes can 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 not protected as waters of the U.S. A state or tribe may establish their own program in order to have direct authority over aquatic resources and to provide clearer permitting requirements and jurisdictional limits regardless of the status of federal regulatory programs. For example, Florida regulates all alterations to the landscape and aquatic resources, including isolated wetlands that may no longer fall under federal jurisdiction.

Many states and tribes regulate impacts to aquatic resources by implementing multiple programs from more than one category described above. In some cases, different state or tribal offices and sometimes even agencies operate the various regulatory programs described above.

All regulatory programs to varying degrees incorporate some type of avoidance, minimization and compensatory mitigation system for authorized or certified impacts to aquatic resources. This allows states and tribes to avoid and minimize impacts and guide the restoration of aquatic resource systems. For example, a regulatory program can tie mitigation ratios and credits to watershed plans in order to deter impacts to and restore the most valuable, unique, rare, or hard to replace wetlands within a watershed. Such programs demonstrate the value of and encourage development of watershed plans and data which is more readily accomplished at the state or tribal (vs. federal) level. Such efforts can lead to more informed regulatory programs in the future and to better permit decisions.

As discussed earlier, the overall effectiveness and public perception of a state or tribe's regulatory program will depend in large part on how it addresses appropriate compensation, compliance and enforcement for impacts. State and tribal programs can also focus on

compliance monitoring and assistance with other state/tribal or federal programs. This type of collaboration can greatly increase the appearance of an enforcement presence (deterrent), preventing sites from being out of compliance with the permit and helping to avoid violations and unauthorized impacts. Similarly, enforcement efforts that bring underperforming sites into compliance are critical to effective implementation and public perception of any regulatory program. In addition to the direct results of enforcement actions, practice indicates that regular and frequent inspections and appropriate enforcement mechanisms deter permit violations as the perceived risk of being caught increases, thus indirectly increasing the effectiveness of regulations.

In summary, regulatory authority allows a state or tribe to exert direct control over the management of its aquatic resources and to ensure that overarching wetland and watershed goals are met.

### **Elements of a Regulatory Program**

No matter which category or combination of categories 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 accepted, how impacts will be accounted for, and how impacts will be mitigated; and
3. **Evaluation, inspection, and enforcement of regulatory activities to ensure environmental results.**

EPA encourages 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.

### **Program Building Activities Menu**

The following actions and steps help states and tribes assess the foundation and implementation of their regulatory program(s). The meaning of specific actions and steps will vary with the overall structure of the program and depending on whether they are applied to individual or a combination of the four regulatory program categories described in the definitions section. Note: Not all actions are required or appropriate for each regulatory approach. In the last column (Program Categories), we have indicated generally which program category this action is appropriate for – CWA §401 Certification (401), SPGP/RGP, CWA §404 Assumption (404), or State/Tribal permit program (S/T).

## ELEMENTS OF A REGULATORY PROGRAM

**KEY:**

X – These steps form the basics of a successful program.

O – Steps are suggested because they are often found in a successful program, but may not be necessary.

N/A – Step not applicable to this program category.

### Objective 1: Clearly Define the Jurisdictional Scope of the Program

Actions	Steps	Program Categories			
		401 Certification	SPGP\RGP Permits	404 Assumption*	S\T Permit
<b>a. Provide clear and comprehensive jurisdictional coverage of aquatic resources</b>	Adopt definition of waters of the state or tribe at least as inclusive as CWA (S/T permit program does not need to be as comprehensive as CWA)	X	X	X	X
	Delineate wetlands in a manner that is at least equivalent with the federal program (S/T permit program does not need to be as comprehensive as CWA)	N/A	X	X	X
	Extend state/tribal jurisdiction to aquatic resources that are not “waters of the US” (e.g., isolated wetlands)	N/A	O	O	O
	Base all water related regulatory programs within state/tribe on the same definition of waters of the State	O	O	O	O
<b>b. Clearly identify a comprehensive scope of activities to be regulated</b>	Adopt clear definition of regulated activities that is as extensive as CWA (S/T permit program does not need to be as comprehensive as CWA)	N/A	X	X	X
	Coordinate with other CWA 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)	X	X	X	O
	Extend state/tribal jurisdiction to activities that are not regulated under the CWA (e.g. excavation or ditch maintenance)	N/A	N/A	O	O

\* Completion of the CWA §404 actions in this table does not constitute CWA §404 assumption. The requirements for assumption can be found at <http://www.epa.gov/owow/wetlands/pdf/40cfrPart233.pdf>.

Actions	Steps	Program Categories			
		401 Certification	SPGP\RGP Permits	404 Assumption*	S\T Permit
<b>c. Provide clear guidance to public on how to identify jurisdictional waters and activities</b>	Develop clear, publicly accessible guidance and / or training on how to identify waters of the State for wetlands, streams, and other waters	O	X	X	X
	Develop clear, publicly accessible guidance on what activities in waters of the state require what authorizations	N/A	X	X	X
<b>d. Evaluation</b>	Periodic review of state/tribal program to ensure all potentially regulated activities are addressed, and take appropriate programmatic action	O	X	X	O

## Objective 2: Administer Regulatory Activities Efficiently and Consistently

Actions	Steps	Program Categories			
		401 Certification	SPGP/RGP Permits	404 Assumption*	S/T Permit
<b>a. Adopt regulations or rules to implement State/Tribal and/or federal water quality statutes</b>	Adopt guidance to implement statutes as appropriate	X	X	X	X
	Adopt regulations that identify agency goals and responsibilities for all water quality statutes.	O	X	X	X
<b>b. Develop and operate according to a clear and effective set of criteria for reviewing and responding to applications</b>	Develop publicly accessible criteria for applying for and agency review of applications	X	X	X	X
	Establish reasonable timelines for initially responding to applications in regulatory guidelines	O	X	X	X
	Establish reasonable timelines for providing final responses to applications in regulatory guidelines	X	X	X	X
	Develop and implement internal procedures for responding to federal actions on permits	X	N/A	N/A	N/A
<b>c. Actively review proposed impacts to waters of the state</b>	Actively review proposed impacts to waters of the state	X	X	X	X
	Develop standard practices or general authorizations for like projects impacting similar aquatic resources	N/A	O	O	O
<b>d. Adopt and apply comprehensive project review criteria</b>	Adopt 404(b)(1) Guidelines or comparable review criteria for assessing and minimizing impacts	O	X	X	O
	Adopt more stringent review criteria than the 404(b)(1) Guidelines	O	O	O	O

\* Completion of the CWA §404 actions in this table does not constitute CWA §404 assumption. The requirements for assumption can be found at <http://www.epa.gov/owow/wetlands/pdf/40cfrPart233.pdf>.

Actions	Steps	Program Categories			
		401 Certification	SPGP\RGP Permits	404 Assumption*	S\T Permit
<b>e. Coordinate among agencies, programs, and industry groups to reduce duplicative efforts by the programs and the regulated public</b>	Use joint review processes and practices	O	O	O	O
	Develop clear guidelines for roles, responsibilities, and procedures for review of permits for activities that require approval from more than one state / tribal agency	O	O	O	O
	Issue permit/certification decisions conditioned that they must meet the requirements of other agency permit decisions	O	O	O	O
<b>f. Require effective mitigation for authorized impacts</b>	Require effective mitigation for authorized impacts	X	X	X	X
	Require long-term protection at mitigation sites (e.g. restrictive covenant, easement, deed restriction)	O	O	O	O
	Establish minimum requirements and review criteria for mitigation proposals	O	O	O	O
	Require financial assurances for mitigation projects	O	O	O	O
<b>g. Track permit\ certification program activity</b>	Track permit\ certification program activity	X	X	X	X
	Map impact and mitigation sites	O	O	O	O
	Administer and regularly update publicly accessible tracking system for impacts and mitigation	O	O	O	O



Actions	Steps	Program Categories			
		401 Certification	SPGP\RGP Permits	404 Assumption*	S\T Permit
<b>h. Track / Evaluate</b>	Program Development: <ul style="list-style-type: none"> <li>• Adoption of state, tribal, or municipal rules to protect wetlands</li> <li>• Track state/tribal resources receiving protection beyond federal requirements (aquatic resource types and/or activities regulated)</li> </ul>	O	O	O	O
	Program Implementation: <ul style="list-style-type: none"> <li>• # of 401 certifications waived without review</li> <li>• # of applications reviewed</li> <li>• # of permits/certifications issued annually</li> <li>• % applications responded to on schedule</li> <li>• % projects whose impacts changed from initial application to issuance/certification</li> <li>• Ratio of impacted aquatic resources to mitigation required by aquatic resource type (e.g. wetland acres, stream linear feet)</li> </ul>	O	O	O	O

**Objective 3: Evaluate Regulatory Activities to Ensure Environmental Results**

Actions	Steps	Program Categories			
		401 Certification	SPGP\RGP Permits	404 Assumption*	S\T Permit
a. <b>Monitor the implementation of permit / certification conditions</b>	Track: <ul style="list-style-type: none"> <li>• % 401 certification conditions that are incorporated into the final permit</li> <li>• % 401 certification or State water quality permit conditions executed</li> </ul>	X	N/A	N/A	N/A
	Track: <ul style="list-style-type: none"> <li>• % post-construction sites monitored for compliance with permit conditions</li> <li>• % post-construction sites in compliance with conditions</li> </ul>	O	X	X	X
b. <b>Enforce aquatic resource protections</b>	Develop and implement enforcement and compliance mechanisms to monitor compliance and deter violations	X	X	X	X
	Set timeframe for sites to come into compliance	O	O	O	O
c. <b>Ensure impact assessments and mitigation crediting lead to replacement of aquatic resources with similar structural, functional or condition attributes</b>	Develop or adopt functional or condition assessment methodologies	O	O	O	O
	Establish performance standards and success criteria for mitigation	X	X	X	X
	Evaluate mitigation against reference and pre-impact sites regularly; revise performance standards, review criteria, and/or functional/condition assessment methods accordingly	O	O	O	O
	Coordinate regulatory programs with other entities conducting restoration to share best practices, mitigation/restoration priorities, and/or assessment methodologies	O	O	O	O

\* Completion of the CWA §404 actions in this table does not constitute CWA §404 assumption. The requirements for assumption can be found at <http://www.epa.gov/owow/wetlands/pdf/40cfrPart233.pdf>.

Actions	Steps	Program Categories			
		401 Certification	SPGP\RGP Permits	404 Assumption*	SVT Permit
<b>d. Incorporate the watershed approach into the regulatory decision-making process</b>	Establish methods for determining cumulative impacts to aquatic resources within a watershed	O	O	O	O
	Evaluate cumulative impacts to aquatic resources within a watershed	O	O	O	O
	In addition to required guidelines, use watershed plans to guide permitting and restoration priorities	O	O	O	O
	Use watershed plans to set priority areas for mitigation	O	O	O	O
	Use watershed plans to set priority areas for enforcement	O	O	O	O
	Use Special Area Management Plans, as appropriate	O	O	O	O
<b>e. Perform public education and outreach about wetland protection, regulated waters and activities, and authorization process</b>	Make education/outreach documents or activities available on important programmatic topics such as: <ul style="list-style-type: none"> <li>• Importance of aquatic resources</li> <li>• Regulatory program requirements</li> <li>• How to identify protected waters</li> <li>• Listing regulated activities</li> <li>• Regulatory program performance</li> <li>• Opportunities for public participation in the protection of aquatic resources</li> </ul>	O	O	O	O
	Make program information available through readily accessible outlets (hotline, website, brochures, etc.)	X	X	X	X
<b>f. Measure Environmental Results</b>	Track: <ul style="list-style-type: none"> <li>• % permitted sites that are inspected per year</li> <li>• % permits in compliance</li> <li>• % non-compliant sites where enforcement actions taken</li> <li>• % non-compliant sites brought into compliance within timeframe</li> <li>• # of unauthorized impacts brought into compliance (annual tracking)</li> <li>• % mitigation sites monitored</li> <li>• % mitigation sites established</li> <li>• % mitigation sites meeting performance goals</li> </ul>	O	O	O	O

## Resources

- Basic Regulatory Fact Sheet at:  
[http://www.epa.gov/owow/wetlands/pdf/reg\\_authority\\_pr.pdf](http://www.epa.gov/owow/wetlands/pdf/reg_authority_pr.pdf) (PDF) (2 pp, 688K, [About PDF](#))
- The Conservation Foundation (1989). *Recommendations for Comprehensive State Wetlands Programs*. October.
- Environmental Law Institute (2005-2007). *State Wetland Program Evaluation: Phases I-IV*. Washington, D.C. Accessed at <http://www.eli.org>.
- [Tribal Wetland Program Highlights](#) | [PDF version](#) (93 pp, 1.8MB, [About PDF](#))
- US Army Corps of Engineers (1996). *Proposed Regulatory Guidance Letter on Programmatic General Permits*. April. Accessed at <http://www.epa.gov/owow/wetlands/pdf/spgp.pdf> (PDF) (4 pp, 25K, [About PDF](#)).
- World Wildlife Fund (1992). *Statewide Wetlands Strategies: A Guide to Protecting and Managing the Resource*. May.