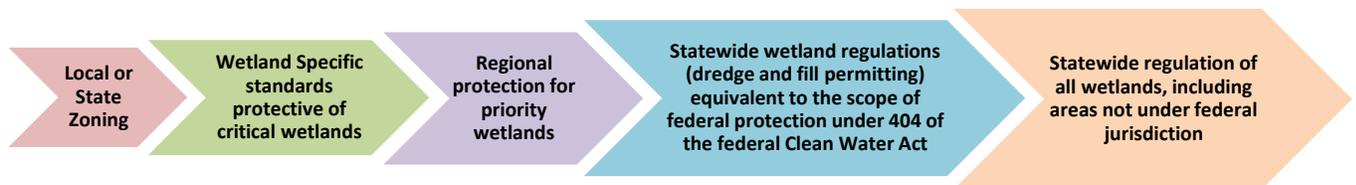

CHAPTER 5: REGULATION

Some states view the regulation of wetland alteration (dredge and fill) as the foundation of a state wetland program, and build other components - e.g. mapping, wetland assessment methods, and mitigation – to address regulatory needs. In other states, regulation has been viewed as the culmination of program development, making use of state expertise to ensure protection of identified essential resources. There are examples of successful regulatory programs that have evolved from either direction.

Because wetland/dredge and fill regulations are in effect nationally under §404 of the Clean Water Act (33 U.S.C. §1251 et seq.) most state regulatory programs are coordinated to some degree with the permitting program administered by the U.S. Army Corps of Engineers (Corps). For those states that have not previously administered a regulatory program, an initial consideration may be the extent of responsibility that the state wishes to assume relative to the federal program, as discussed below. States or tribes that are currently regulating wetland alteration may wish to consider modification or expansion of state and tribal responsibilities.

Options for state/tribal regulatory programs: level of resource protection provided

Particular needs of a state or tribe may be met by a range of regulatory options. Generally speaking, more advanced regulatory approaches provide more comprehensive regulatory protection, but are also more costly to administer and require greater expertise. Each state will need to evaluate public interest, need for wetland protection (based on both rarity of resources and development pressure), and available financial support. A general continuum of basic to more advanced programs may be described as follows.

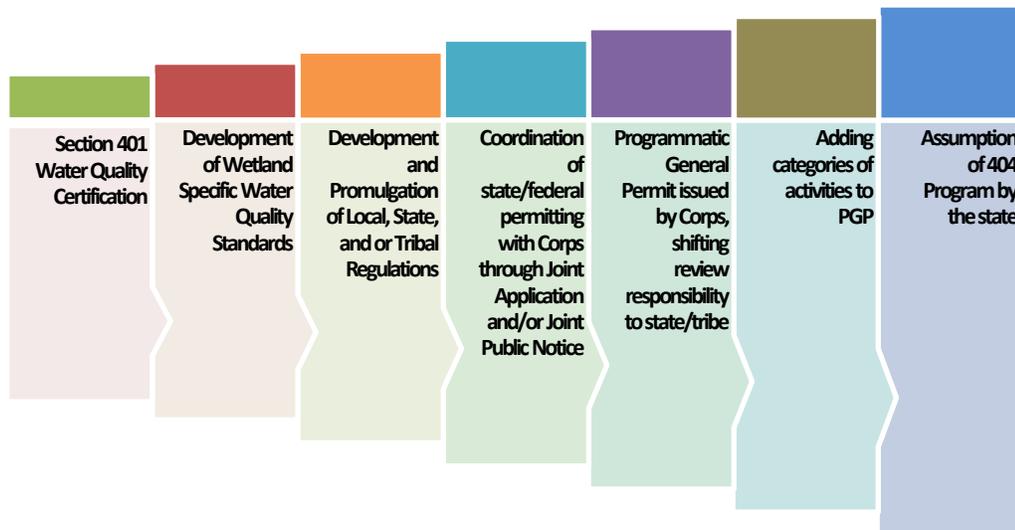


- **Local or state zoning.** Basic protection for wetlands may be provided by zoning provisions that limit defined land uses in wetlands, or that require setbacks from wetlands.
- **Wetland specific standards protective of critical wetlands.** Wetland water quality standards in use by a state or tribe may identify critical wetland areas – such as habitat for rare species, special cultural areas, or groundwater recharge areas – and provide additional protection for defined wetlands.

- **Regional protection for priority wetlands.** In some states and tribes, regulation is carried out only in specified geographic areas – such as wetlands within the defined boundary of a Coastal Zone Management Program. Other states regulate only wetlands above a specific size (acreage), or of a particular type (e.g. vernal pools), as defined in state laws and regulations.
- **Statewide wetland regulations (dredge and fill permitting) equivalent to the scope of federal protection under §404 of the federal Clean Water Act.** State or tribal regulation may provide protection for generally the same wetlands regulated under federal law, but with provisions that are specific to the state. Criteria for permit issuance, and conditions applied to permits are developed by the state to meet their particular resource needs. States and tribes may also regulate actions that are not regulated under the Clean Water Act, such as placement of structures over the wetland, or alteration of vegetation.
- **Statewide regulation of all wetlands, including areas not under federal jurisdiction.** Since implementation of the federal Clean Water Act, Supreme Court and other legal decisions since implementation of the federal Clean Water Act have gradually limited the waters and activities subject to §404 permit requirements. Some states and tribes have taken action to regulate all state or tribal wetland areas, including isolated wetlands not protected by federal law (e.g. some prairie potholes).

Options for state/tribal regulatory programs: scope of state responsibility

The range of options for a state or tribal regulatory program generally provide for a relatively easy entry into the permit review process by allowing the state to assume a comfortable level of **state responsibility** and involvement in the federal Clean Water Act permit process from the perspective of federal agencies. The following approaches to regulation may be considered, starting with minimal state cost, staffing needs, and overall responsibility for resource protection and decision making.



- **Section 401 Water Quality Certification.** All states have the authority under §401⁷ of the Clean Water Act to review federal permit actions, and to determine whether the proposed action is acceptable under state water quality standards and other appropriate regulations. A state may object to issuance of a federal permit or license that does not meet state criteria. Many states depend primarily on §401 to control alteration of wetlands.
- **Development of Wetland Specific Water Quality Standards.** While state water quality standards may be generally applicable to wetlands as well as other waters, states can specify more specific standards to protect wetlands. For example, criteria that protect wetlands from hydrologic modification may be included. Some states include other provisions related to the alteration of wetlands, parallel the Clean Water Act’s Section 404(b)(1) guidelines, in water quality standards.
- **Development and Promulgation of Local, State, and or Tribal Regulations.** A wide range of regulations governing the alteration of wetlands may be promulgated by a state or tribe, relying on the state’s land use management authority and public trust interest in aquatic resources. Depending on state constitutional provisions, the state may also own the bottomland of wetlands in open water areas, and may exert an ownership interest in those areas.

State, local, and tribal regulations may parallel provisions of the federal Clean Water Act in protecting wetlands from avoidable alteration or destruction, or may be somewhat more or less inclusive, depending on the priorities of the state or tribe.

⁷ Link to EPA information regarding §401 water quality certification::
http://water.epa.gov/lawsregs/guidance/cwa/waterquality_index.cfm

- **Coordination of state/federal permitting with Corps through Joint Application and/or Joint Public Notice.** In order to reduce duplication between state or tribal and federal agencies, and to assist the public, state and federal permitting actions may be coordinated. State 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 encourage permitting decisions, including required permit conditions such as mitigation. They may also share mitigation banks.
- **Programmatic General Permit issued by Corps, shifting review responsibility to state/tribe.** Where state or tribal authority is at least equivalent to federal authority for specified actions, the Corps may issue a state Programmatic General Permit (PGP or SPGP), under which approval and issuance of the permit depends primarily on review by the state program. This in effect shifts responsibility for decisions on specific project categories to the state. Larger projects will still require both state and federal review. The overarching general permit document (agreement) must be renegotiated and reissued every 5 years.
- **Adding categories of activities to PGP.** As states gain regulatory experience, and the relationship between state and federal agencies matures, the Corps may add more categories to the PGP, thereby relying to a greater extent on the state agency. Expansion of a PGP may be considered as a step in a wetland program plan.
- **Assumption of 404 Program by the state.** In 1977, Congress added provisions to Section 404, allowing a state to assume full responsibility for the 404 permit program, except in traditionally navigable interest commerce waters (typically, the oceans, the Great Lakes, and large rivers such as the Mississippi or Ohio). Since then, only two states have been approved to administer the 404 program, but interest continues among states and tribes that wish to further reduce duplication, and to rely to a greater extent on state water programs and environmental criteria.

Any of these steps in development of a regulatory program may be considered in a State Tribal Wetland Program Plan. Any addition, revision, or expansion of a program requires multiple actions, including assessment of state needs and priorities; drafting of potential regulatory language and guidance; providing 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 Plan.

Examples of regulatory elements and specific actions in approved state and tribal program plans

- Explore the feasibility; find sites and sponsors of In Lieu Fee Programs and Mitigation Banks. [NM]
- Develop a proactive, systematic approach to locate and pursue large, unreported violations on a landscape-level scale. [NH]
- Identify opportunities to streamline permit procedures and forms. [NH]
- Solicit legislative authorization to commence development of a professional wetland delineator certification program. [FL]
- Nebraska will continue to play a role in advocating for the importance of wetlands by providing input into federal regulatory actions (e.g., Clean Water Act), federal policies (e.g., the Farm Bill), and local decision making (such as community planning). [NE]
- Provide annual training on wetland assessment procedures (Ohio Rapid Assessment Method for Wetlands, Vegetation Index of Biotic Integrity, Amphibian Index of Biotic Integrity, etc.) to Ohio EPA staff and the general public, including other state and federal agencies and private environmental professionals. [OH]
- Implement Section 401 Clean Water Act permitting. [Hualapai Tribe]
- Draft Phase 1 regulations for the discharge of dredge and fill material that complement the USEPA/Corps' 404 (b)(1) Guidelines and the federal Compensatory Mitigation Rule. [CA]
- Department of State Lands submittal to EPA for assumption of the CWA 404 permitting authority and if feasible, implementation of 404 assumption. [OR]

General considerations and challenges

States and tribes that are planning for establishment or modification of a wetland regulatory program will need to weigh numerous concerns, opinions, and opportunities. Most permit programs require ongoing adjustments to address both social and scientific concerns.

The following list of issues may help to guide thinking during strategic planning.

- **Political support.** How strong is support for, or at least acceptance of, regulation among various interest groups? Should the strategic plan include additional education and consensus building?
- **Cost, staff needs, and financial support.** The cost of different levels of regulation varies greatly. Providing comments through a 401 water quality certification program can be much less costly, for example, than administering a full permit program. Do not

overlook the cost of enforcement, which can be much higher per case than review and issuance of a permit. Development of a realistic budget and identification of funding needs and sources are a critical strategic element.

- **Priority wetlands and associated aquatic resources.** Given the available level of financial and political support, and realistic program expectations, where should regulatory efforts be focused? Is expanded protection needed for particular types of wetlands, or to support maintenance of certain ecological services? For example, is a new initiative needed to provide coastal protection or flood storage in the context of sea level rise? Are there gaps in resource protection resulting from federal regulatory changes?
- **Scope of jurisdiction.** What wetlands will be protected by the program, in terms of size, type, and/or location? How will regulated wetlands be identified? Is development of a mapping system a strategic need?
- **Leveraging protection through cooperation with other programs.** Many states work with transportation agencies to coordinate needed planning and construction, while freeing up federal permitting resources to focus on other issues. State wetland programs may also draw on the expertise of state fish and wildlife biologists, nonpoint source managers, or state floodplain engineers. Coordinated efforts make sense in terms of resource management and best use of limited staff resources. Strategic plans may examine new relationships among existing agencies and organizations.
- **Staff training.** Regulatory staff need multiple kinds of expertise. They must be able to exercise sound judgment regarding proposed impacts based on their knowledge of aquatic resources, and on any specialized assessment tools or models developed to support the regulatory program. In addition, they need to understand legal issues, regulatory criteria, and potentially the handling of enforcement. Staff may be asked to use technical mapping equipment including GIS and GPS, and to maintain regulatory databases. Skills in working with private citizens who may be unfamiliar with permit requirements are also important.

The success of a regulatory program thus often rests with the strength of staff recruitment and training. Joint training with partnering agencies may be essential where regulatory responsibilities are shared.

- **Program evaluation and reporting.** Program evaluation provides a feedback loop for measuring program success which can in turn lead to identification of future action. In addition, in anticipation of permits where budgets are tight or there is a need to provide information on program accomplishments, annual reports can be very valuable in gaining and retaining program support.

Some pros and cons of state regulatory programs

Why regulate wetland alteration? Given that the Clean Water Act provides national protection for wetlands, the need for state, tribal, and local regulations is frequently questioned. Wetland regulations are frequently controversial – yet at least 20 states issue permits for dredge and fill activities in wetlands and others carry out 401 certification federal permit review to varying extents.

The cited benefits of state or tribal wetland regulation include the following.

- In a state or tribal wetland program, staff with expertise in local resource needs will use professional judgment to allow, prohibit, or condition alteration of wetland resources. Their knowledge of priority state issues and related state aquatic programs, backed by support by the administration and the state legislature, results in relatively strong protection of wetland resources.
- State programs are frequently more efficient than federal programs, relying on local staff and local offices to provide a prompt permitting decision. State permit programs often integrate multiple regulatory reviews (e.g. coastal zone, floodplain) to further streamline regulations.
- Many state regulations fill gaps in federal law, protecting small but locally significant wetland areas, or activities that are not regulated under the Clean Water Act. State laws may protect ecosystem services that are not a focus of federal law.
- Integration of state and federal dredge and fill permitting can integrate federal and state perspectives and expertise leading to greater overall efficiency, profitability and accountability benefiting permit applicants and the public at large.

On the other hand, state regulatory programs are costly to operate, can be complex and controversial, and are to an extent duplicative of federal requirements. In making a decision regarding whether to regulate wetland impacts, and the desired scope of regulation, a state will need to balance all of these factors to define program goals, and strategic steps to achieve those goals.