Association of State Wetland Managers
Wetland Regulatory Capacity Building Series

Building Regulatory Capacity for Aquatic Resource Programs:
A Checklist of Initial Considerations

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This resource provides an overview of key elements related to building regulatory programs at the state/tribal level and considerations for agencies embarking on this work.

The building of regulatory capacity occurs after a state/tribe has determined what their goals are for the wetland resource, and how the various options would meet these goals. Building regulatory capacity is an ongoing process for most state-and tribal-run water resource programs. Identifying and interpreting legal statutes, communicating rules to the regulated community, and enforcing these rules takes a coordinated and concerted agency wide effort. To ensure that this effort is productive and staff time is not wasted, it is important for agency leadership to design a clear plan and involve stakeholders whenever new regulations are being developed or implemented, or when new statutes are interpreted, and existing statutes are reinterpreted. This plan should identify the regulated community, the permits they are required to obtain, any enforcement mechanisms, and relevant state agencies.

Throughout this process, it is important to issue clear, consistent guidance and request for comment to the regulated community about proposed regulations, permits, and penalties. The better the regulated community understands the regulations and procedures, the easier it will be to achieve compliance. This may mean having staff arrange meetings with project proponents/key stakeholders in the state, on tribal lands, or attending and presenting at meetings where the regulated community will gather in person. This will give staff the opportunity to make connections with those who are regulated and allow them to ask questions and better understand the regulations.

The end goal of building regulatory capacity should be having the regulated community efficiently and effectively comply with requirements. To reach this goal, relevant, targeted regulatory tools should be developed and implemented by the state/tribe. Staff should look to the methods of other states and tribes to see what policies have achieved the highest compliance and whether those methods are adaptable to their own state or tribal context. Most states and tribes interact closely with the regulated community, holding meetings and

informational sessions to ensure that everyone is up to date on the latest regulation and permit requirements. Site checks with the threat of fines or cessation of work orders are often an incentive for the regulated community to comply. Site checks also educate staff on what development projects look like in reality, rather than just on paper. Whatever regulatory approaches are selected, it is essential that they complement each other and act as checks and balances to each other.

The following checklist provides some tasks for consideration by states and tribes seeking to build regulatory capacity:

Scoping Potential Regulatory Changes or Explanations

- **Bring Together Information Providers from the Start of the Rulemaking Process**
    - States and tribes should include key information providers from the start of the capacity building process, exploring with them what new/modified regulatory elements might be necessary. Make sure that those who will have a role in implementing, enforcing, and complying with these changes are at the table as early as possible.
    - Participants can include agency technical staff, data managers at the agency, other agency policymakers, stakeholders from the regulated community, academic scientists, and the general public.
    - "Key" participants will be affected by the geographic reach of potential regulatory changes or explanations, and the activities regulated.
    - While initial exploration may remain internal, engagement of stakeholders early in the process has been shown to be key in regulations' successful approval and adoption, as well as improve future compliance within the regulated community.

- **Understand state/tribal processes for collaborative policymaking.**
    - Identify state/tribal processes that direct how policy input is sought and reflected in regulatory changes. Understand these limitations and opportunities before engaging with outside participants.
    - Identify the following points of contact and connect to request that state/tribal agency perspectives are represented in the regulatory scoping process:
        - Who has primary responsibility for the development of these regulations?
        - What agency/department has primary responsibility for promulgation of the regulations?
        - Which agency/department has liability with respect to assuring compliance?
        - Is there executive level support for new or expanded regulations?

- **Understand Existing Statutory Authorities as a Regulatory Basis**
  - Determine if existing state/tribal regulations are less or more protective than federal minimums:
    - At the federal level, the Clean Water Act serves as the foundation of federal wetland protections. All federal regulations are rooted in the Clean Water Act and permit programs are based on these regulations.
    - State and tribal agencies should understand how their regulations and statutes compare to the federal minimums. Are the regulations and statutes more or less stringent, either in scope (waters covered) and stringency (requirements and enforcement)? Furthermore, state or tribal agencies should understand if their own regulations fully implement their underlying state and tribal statutory authority.
    - Without state level statutes, a state must rely on the policies and procedures of EPA and the Corps.

- **Identify Appropriate Statutes, Rules, and Policies that Can be Used by the State /Tribe**
  - Questions to consider:
    - Are there existing standards for wetland management, and do these need to be developed or revised?
    - Is there existing legislation in place that allows or facilitates the establishment of permitting fees?
    - Are adequate personnel and infrastructure in place for implementation, and if not, what is needed?
    - What documentation is available to communicate processes (for example: process flow charts)?
    - What penalties need to be created for non-compliance with new regulations?
    - What appeals process/mechanisms will be used or need to be created to support the new laws/regulations?

- **Identify and Document the Regulated Community**
  - The regulated community that the new regulatory elements may affect should be clearly defined and invited to participate.
  - Staff should think about how regulations will be conducted on the ground and work to make the regulations clear and specific for the regulated community.
  - Identify:
    - What is the geographic reach of the new regulations? (Statewide, specific counties, local government units)?

- What activities may be regulated, and what groups typically conduct those activities (e.g., discharges from land clearing by the homebuilding community)
- Who is responsible for compliance with permits (for example, corporation, homeowners, etc.)?
- Where in your agency does the data reside that identifies the regulated community individuals or entities? Who is responsible for this data management and communication?

- **Understand the Context for Regulatory Changes**
  - Understand the historical, political, social, economic, demographic, and regulatory information, as well as information on the water resources being regulated.
  - Know your resources - document both the regulated water resources as well as the extent of unregulated areas or exemptions, if any. This includes mapping and assessment of aquatic resources within the specified jurisdiction.

Developing Regulatory Changes or Explanations

- **Identify Regulatory Gaps**
  - Regulatory programs are based on statutes that authorize them and are implemented in ways that address well-documented needs for multiple stakeholders. It is important to identify not only resource protection needs, but also the needs of the regulated community. Regulatory certainty, efficiency and cost should all be considered when developing new regulations or establishing a regulatory program.
  - Document carefully researched justifications for filling regulatory gaps.
  - As part of this process, documenting the benefits and costs of regulation development or regulatory program building to both the agency *and* the regulated community (especially permit applicants) will be essential to making your case.
  - Questions to consider:
    - Which acts, laws, or similar enable the regulation?
    - Which acts, laws, or similar need to be created?

- **Be prepared to provide additional responses for consideration by decision makers**
  - Work with your planning team to brainstorm potential areas that will require additional responses.
  - Ensure that planning activities include stakeholders that can help the planners to think ahead about areas of concern and resolve them in advance or be prepared to respond.
  - Develop a decision-making chain to be in place for responding to more difficult or complex questions/inquiries (who needs to decide, approve, or deliver messages).

- **Work with the legislature if additional statutory authority might be necessary**
  - Because regulations must be firmly based is statute, if there is not a solid statutory case for a new regulation, it will be necessary to work with the legislature to enact or amend statutes.
  - Work with your legislative liaison or legislature contacts will be essential. See ASWM's "Working with Your Legislature to Build Regulatory Capacity" resource for more tips on this topic.
  - Highlight the benefits of new legislation, and the consequences of continuing with the existing approaches.

- **Work to Reduce Uncertainty and/or Improve Processes**
  - Reducing uncertainty often entails crafting clear expectations, requirements that are applied in the same manner as similarly situated permittees, and that include clear consequences for non-compliance.
  - Creating transparent regulatory programs with easy-to-understand content will help remove the need for applicants to understand and interpret complex information and frustration over perceived inequitable regulatory action.
  - Clear permitting or licensing standards will help to ensure the regulated community receive the right permit and that they understand what activities are allowed under the permits they have received.
  - Well-documented monitoring programs help states and tribes keep track of compliance activities and identify trends that can assist in improving both resource protection and outreach/process compliance activities conducted by the state/tribe.

- **Establish Minimum Acceptable Regulatory Standards**
  - A regulatory program should clearly define how the regulated community should and should not behave.
  - These regulatory standards should include information about which permits are needed for specific actions and what the penalties are for failing to acquire necessary permits or for violating the permit.
  - Clear regulatory standards will make communicating those standards to the regulated community easier and will help to ensure higher levels of compliance.
  - If there are to be local modifications or allowances, this should also be included in decision making and documented. If this is allowed, a process should be established and documented for how local modifications can be made.

- **Develop and/or Reconcile Necessary Regulatory Documents**
    - If existing regulations exist, identify how existing and new language/documents will be reconciled or integrated. Regulatory programs involve at least two kinds of documents:
        - Regulations and their associated preambles
        - Explanatory documents – those that unpack what is required and explain in plain English how to attain compliance, such as Q&As, technical tools, etc.
    - If new language or documents must be crafted, ensure that they function within existing limitations.
    - This process of developing regulatory documents must also include identification of how these documents are developed and maintained. The process should include plans (depending on the type of document for how documents will be reviewed/updated and on what schedule, as they should be reviewed periodically.

Implementing Regulatory Changes

- **Develop Process Flowcharts for Permitting**
    - Flowcharts and similar tools can be helpful in documenting existing processes, showing how they differ from proposed new systems that may be needed, comparing alternatives, and communicating new permitting processes once adopted.
    - Identify the activities and time required for each stage of the process. To meet this need, some options include:
        - Developing process flow charts, including the order of tasks, the timing of each element, and identifying responsible parties for each step.
        - Using this information, it will be possible to estimate the necessary staff apportionment and potential increases in staff time and expense.
    - See ASWM's document on developing regulatory flow charts for specific information about how to develop permitting process flow charts.

- **Identify Necessary Program Staffing and Resources to Support New Regulatory Elements**
    - Use process charts and checklists (above) to assist in estimating the amount of staff time and the staff qualifications required to implement a new regulatory element.
    - What staffing positions are needed to manage the new regulatory elements and ensure those new elements are effectively integrated into existing programs? These may include, but are not limited to, those responsible for:
        - Reviewing and approving permits or other actions.
        - Providing technical support to the regulatory community, as part of compliance assistance.
        - Enforcing regulatory compliance.

- Providing program/staff oversight.
        - Administrative support for the flow, screening, and circulation of applications for review.
    o Questions to consider:
        - Can existing staffing manage the new elements?
        - What are the potential types and frequency of regulatory enforcement necessary for any new elements? What changes in staffing would be required?
        - What qualifications do they need to have?
        - How many hours of their time will be required to implement the new regulatory elements?
        - What additional resources beyond staffing may be needed to implement the regulatory changes? These may include outside expertise, data management services, facilitators for stakeholder processes, equipment and technology expenses, and other expenditures.
    o Crafting a budget analysis for these changes will support financial decision-making and justifications for legislative decision making.
        - What additional sources of support are needed to accommodate these changes?
        - Where will these sources of support come from?

- **Ensure that Permit Applications are Easy to Access**
    o The easiest way for the regulated community to navigate the permitting process is for agencies to put the permits on their website with clear instructions and a way for questions to be asked of agency staff. If permits are hard to find and the bureaucracy is hard to navigate, achieving compliance will be more difficult for states. Well-crafted online web pages can help achieve this goal.

Implementing Regulatory Changes

- **Develop Specific Outreach Strategies**
    o The regulating agency should invest in an outreach and technical assistance strategy to ensure that the regulated community knows that they are regulated and how to comply.
    o Because the statutes that the regulations are based on will be potentially difficult for the layperson to understand, agency communications to the regulated community should include clear, easy to understand language, and examples of what is and is not allowed under the regulation(s).

- **Establish Internal and External Trainings Programs and Guidelines**
  - For Internal Agency Staff:
    - Training agency staff, the regulated community, and contractors on new regulatory policies is critical to the success of any new regulatory effort.
    - Well-crafted trainings that include opportunities to ask questions and apply what they have learned to different real-world scenarios help increase the likelihood that agency staff members and the regulated community are on the same page and understand the new rules and guidelines.
  - For Stakeholders and the General Public
    - Ensure that these audiences are aware of trainings and tailor training content and style to meet the needs of those audiences
  - Trainings should be built strategically into long-term agency strategies rather than individual programs to ensure that trainings are not tied to individual programs that may end.

- **Determine How Regulatory Data Will be Managed and Integrated into Systems**
  - A strong regulatory program is developed and maintained based on access to accurate and timely information. This requires strong data management capacity.
  - Ensure that there is data transparency and plans on how data will be accessible by and shared with the public. In many cases, putting some data in the hands of the public can help generate support for regulatory actions taken by a state or tribe.
  - Identify:
    - Can the new regulatory elements be managed by existing data or permitting systems? If so, what changes need to be made/elements added? Is there the capacity to do this? What permissions are needed to do so?
    - If not, what data management systems need to be created? Will development or management be managed in-house or through other agencies or service providers? How will data security and reliability be assured? Is there are adequate support for ongoing maintenance and improvements?
    - How will the data that is needed be integrated into the regulatory system? What changes are necessary to ensure data is available when and how it is needed by the regulatory program?
    - How will the public access regulatory data? What part of the data needs to be kept confidential?
    - What report will need to be generated? On what schedule?

- **Establish Site Visits or Other Monitoring Programs**
  - Both planned and surprise site visits are effective tools for ensuring regulatory compliance.
  - When training agency staff to conduct site visits, work to ensure that consistent safety standards are followed. This may include medical monitoring for inspection staff.
  - Develop a checklist for both the process of conducting the site visit and the content of the site visit inquiries (e.g., for everything from equipment the staffer needs to bring, a list of all environmental permits held by the facility (not just permits for discharge into water) to appropriate job site attire, to the questions that will be posed to the developer and any inspections that will take place).
  - Many construction sites have strict safety requirements, so it is important that all rules are followed by staff. Make sure to bring appropriate footwear, hardhat, and appropriate clothing for these situations. State/tribes may provide this equipment to staff.

- **Determine Financial Elements of the Regulatory Program**
  - Establish fee structures fines, or other expenses to the regulated community as deemed necessary.
  - Determine how these costs will be collected.
  - Identify the documentation required to document payments.
  - Determine how payments will be managed in agency financial systems.

For more Information on Developing Regulatory Capacity, ASWM suggests the following resources:

  - [ASWM Wetland Program Plan Handbook](#)
  - [EPA's Enhancing State and Tribal Programs (ESTP) Website](#)
  - [EPA Core Element Framework - Wetland Regulation](#)
  - [ASWM's Regulatory Capacity Building Webinar Series Recordings](#)

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