



# Association of State Wetland Managers Wetland Regulatory Capacity Building Series

## Improving Wetland Regulatory Compliance and Enforcement

March 2021

Developing a comprehensive, coordinated 404 enforcement program is a necessary part of any state wetland regulatory program. States developing enforcement programs will need to integrate formal relationships and agreements with the Corps and EPA, as well as potentially with other agencies. These agreements should be well-crafted and formalized, so that all involved parties understand which agency takes the lead under which circumstances.

EPA and the Corps have a Memorandum of Agreement documenting which agency takes the lead under different scenarios. Because the Corps is the *permitting* agency, the Corps takes the lead when there is a violation of a Corp-issued permit. However, EPA and the Corps jointly decide which agency will take the lead for violations involving an unpermitted discharge.

After official agreements are made, it is important to determine the consequences for violations and how rules will be enforced. These rules should be formally documented and carried out consistently.

Enforcement rules must be designed to take into account key conditions of a violation. For example, regulators should ask questions like: Is this the violator's first violation? Is the violator a small landowner who may not know the rules? What is the cost of the damage? What is the extent of the damage? Is remediation necessary? Did the landowner profit from the violation? Penalties should take into account the answers to these questions to ensure that the so-called cost to the violator is fair and equitable.

Growing an enforcement program takes time, in many cases several years to become fully operational. Recruiting and hiring staff to work on compliance can be challenging and states have reported high turnover that leads to ongoing hiring and training needs.

State leaders should have a clear understanding of the rules and regulations that they are enforcing. It is also important for enforcement staff to have a field presence. Enforcement staff usually understand their state/tribe's rules more thoroughly through hands on trainings and extensive experience with in-person field inspections. States and tribes also report that an in-field presence has been shown to encourage developers and landowners to be in better compliance with regulations. The following suggestions for specific actions around ways to develop or strengthen enforcement programs have been developed from national dialogues and peer-to-peer sharing in 2020 and 2021.

## **Establish jurisdiction and develop a strong regulatory or legal foundation**

You want to have something on the books that shows why you have a stake in the protection of water resources. On the federal level there are statutes like the Clean Water Act. On the state side you may have some interest beyond the 404 program that demarks interest in the protection of aquatic resources. You should also be aware of case law. If your guidance is vague then a court could interpret your guidance which could be good or bad for the policy. It is best to ensure that the guidance and policies are firmly rooted in statute so there is little room for interpretation.

## **Establish and adopt written policies and procedures for enforcement**

This will ensure that you consistently, equitably, and fairly follow your policies and guidance. Group trainings will help get everyone on the same page and ensure that enforcement is conducted consistently. Make it someone's job to review all enforcement rulings to ensure consistency. Guidance should be consistently followed yet flexible enough to allow for some descension. The policies and procedures should cover factors such as:

- Is the noncompliance willful or negligent?
- Is the noncompliance a paper one (not filing monitoring reports) or a physical one (filling in a wetland)?
- How frequent is the noncompliance?
- How much did the landowner benefit from the noncompliance?
- Is the landowner or permittee a large entity or a small “mom and Pop” operation?
- What actions did the landowner or permittee take to remediate the noncompliance?

## **Work to secure sustainable funding and staffing for enforcement activities**

There are a variety of potential funding sources for environmental enforcement programs including general revenues, pollution taxes or fees, inspection charges, permit or license fees. Some of the most successful regulatory programs receive a significant amount of funding separate of the state budgeting process. This allows the agency to operate independent of state budget constraints<sup>i</sup>. Be prepared for staff turnover as you develop new compliance and enforcement programs.

## **Develop investigation tools, procedures, and plans**

States and tribes should develop enforcement checklists, plans, and specific procedures for site visits. Arriving for a site inspection prepared is essential, as unpreparedness can look unprofessional and damage an agency's reputation and can also lead to inspectors missing important evidence of noncompliance. Prioritize efforts that include public outreach and education. If everyone is on the same page the entire enforcement program will flow smother from permitting to inspection and investigation. Again, training staff will help keep everyone on the same page with the same information. However, these trainings will need to extend beyond agency staff to ensure that both the regulated community understands the procedure and lawmakers who are developing the statutes that your agency depends on to regulate. An uninformed regulated community creates more work for the agency, while uninformed lawmakers could undermine regulations and statutes that are working<sup>ii</sup>.

## Enforcement tools, activities, and compliance mechanisms

There are several options for state and federal agencies when looking to enforce rules and penalize violations:

- First, there are administrative orders. Filing an administrative order against a violator will request information from the violator while also serving as notice to them that they may be in violation of a rule. They can also be used to request site access. Administrative orders can be bilateral (an agreement between the agency and the respondent) or a unilateral order (an agency orders the respondent to do some task).
- Second, there are financial penalties. Financial penalties function as a deterrence and encourage fair and equitable treatment of the regulated community. Penalties also take into consideration any advantage that may have been gained by not getting the proper permit. For example, if someone wants to build condos because the market is hot, that economic benefit will be considered when determining the penalty to ensure there is no benefit to not getting the permit or violating the permit.
- Third, there are compliance mechanisms. It is easiest to encourage permittees to comply with existing rules without using enforcement tools. Site visits and having staff in the field will encourage permittees to comply in order to avoid punishment.
- Fourth, there are injunctions. Injunctions are court orders that stop a current activity or prohibit an intended activity.

## Use a decision matrix tool

This is one way to ensure that your regulators act consistently and understand how to resolve violations and establish compliance. Matrixes need to be simple and easy to understand but comprehensive enough that it covers most problems. It will also help to assess the seriousness of a violation which will allow your agency to carry out enforcement consistently.

## Communicating compliance and enforcement

When communicating compliance and enforcement, it will be important for your agencies to develop both formal agreements and informal agreements across relevant agencies and with the Corps. Formal agreements should be between relevant agencies and should lay out how the agencies will work together on enforcement. This allows you to develop joint applications for applicants, streamlining the process for them and allowing for faster agency review.

Agency staff should also work to develop informal agreements and open lines of communication with their colleagues at other agencies. Agencies in some states have put together routine multiagency meetings. They can be as frequent as you need but having the relationships established are helpful for staff in various agencies. Informal communication can also include educational events where you have interagency trainings using the expertise in the various agencies.

## Lessons learned and challenges

It takes time to develop an enforcement program. You often take on enforcement on top of your typical workload so you can't take on all the violations at once. Make sure that you write your compliance rules for your audience. Be specific with record keeping, planning, and follow through. Ensure that if a developer is planning to construct a remediation wetland with complex topography, they don't construct a stormwater pond instead. If construction sites are required to keep logs of environmental conditions make sure to specify how long they need to keep the records.

### **For more information, contact:**

Association of State Wetland Managers

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<sup>i</sup> Carlson, A.E. (2017) Regulatory capacity and state environmental leadership: California's climate policy. Fordham Environmental Law Review. Vol 24. Number 1. Article 3. Retrieved from:

<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1699&context=elr>

<sup>ii</sup> Jones D., Honorato I. (2016) Capacity Building and Collaboration: Enforcement Training to Build Capacity that Ensures Environmental Protection. In: Pink G., White R. (eds) Environmental Crime and Collaborative State Intervention. Palgrave Studies in Green Criminology. Palgrave Macmillan, London. [https://doi.org/10.1007/978-1-137-56257-9\\_3](https://doi.org/10.1007/978-1-137-56257-9_3)