Improving Regulatory Enforcement: ASWM Capacity Building Webinar Series

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Improving Regulatory Enforcement Overview

- Authorities
- Enforcement Activities
- Relationships
  - Formal Agreements
  - Informal Coordination
- Considerations
- Different Program Levels
- Missouri’s Program
- Lessons Learned
Authority for Clean Water Act
Section 401 Water Quality Certification¹

• Federal level
  • Section 401 of Public Law 92-500, the Clean Water Act of 1972 and subsequent revisions
  • Authority given directly to states and tribes
  • 40 C.F.R. § 121 (changes effective 09/11/2020)

• State level
  • Section 644.051, Missouri Revised Statutes
  • 10 C.S.R. § 20-6.060

• State program in addition to § 401?
• Case Law? Policies? Guidance?

¹ Newly effective federal § 401 rule may alter concepts.
Authority for Clean Water Act
Federal Agencies

• U.S. Army Corps of Engineers (USACE) Section 404 Department of the Army Permits
  • Sections 404 & 309 of Public Law 92-500, the Clean Water Act of 1972 and subsequent revisions
  • 33 C.F.R. § 326

• U.S. Coast Guard (USCG) Permits

• Federal Energy Regulatory Commission (FERC) licenses

• Federally Issued National Pollutant Discharge Elimination System (NPDES) Permits
Enforcement Activities

- Single or multiple media
- Single or multiple agencies
  - Example – dam construction
    - Placement of fill: federal agency, state/tribe?
    - Fish kill: fish and game agencies?
    - Endangered/Threatened species: fish and game agencies?
    - Lack of water downstream: water rights agency?
    - Contaminated soils: hazardous waste?
    - Water pollutant discharge: § 402 NDPES? state/tribe?
Memorandum of Understanding or Agreement
  • Usually requires review of legal counsel

Joint Processing Agreement
  • Outlines process and timeline
    • Specific parts for application requirements, review (app and reports), inspections/site visits, enforcement
  • Who does what, when

Joint Application/Joint Public Notice
  • Single application process for applicant’s ease of use
  • More efficient/standardized process, less time for review
  • If marketed and easier to use, maybe more submit application (i.e., less operating without authorization)?

*These agreements may no longer be an option under § 401
Relationships: Informal Coordination

• Building relationships through communication
  • Pick up the phone
  • Bounce ideas, concerns off one another
• Routine multiagency meetings
  • Types
    • Policy Development Teams
    • Informal groups
  • Frequency
    • Annual (broad in audience and topic)
    • Quarterly
    • Monthly (smaller group, specific issues)
Relationships: Informal Coordination

- Educational events
  - Group trainings (e.g., macroinvertebrate, delineation)
- Multiagency site visits/inspections
  - Use each agency’s experts to inform situation
  - Early Assistance*
  - Compliance

*Under new § 401 rule, states/tribes only have authority to inspect prior to project initiation
Considerations

• State laws and regulations
• Agreements (formal or informal)
• Staffing level
  • Small team (1-3 FTE) for entire state
  • Multiple staff or separate enforcement unit
• § 404 Assumption
• State/Tribe-only programs
Different Program Levels

- State takes the lead*
- Equal roles between federal agency and state/tribe *
- Outlined division of duties between federal agency and state/tribe (40/60 split or other variations)*
- Federal agency takes lead

*May no longer occur given the new rule, depending on S/T rules/program and relationship with federal agencies
Missouri’s Program

- 7 USACE Districts
- 5 with regulatory offices
- 3 Divisions
- Lead District Initiative
- ~1.5 FTE
Missouri’s Program*

• Federal agency takes lead
• Very rarely an enforcement action solely on §401
  • Inspect when water quality standard violations actively occurring
  • Mainly based on narrative criteria
• Formal agreement for joint public notice (old)
• No formal mechanism for enforcement
• Joint processing agreement in works for years
• Quarterly multiagency meeting reinstated recently
• Often joint site visit for known issues/concerns

*This list applies prior to federal rule effective date
Missouri’s Program

• Rule revision in process for 10 C.S.R. § 20-6.060
• Others are our eyes & ears in field (mostly)
  • Photos, description of activities, location, concerned citizen or landowner contact information
  • Activities of concern
    • Fill material damming up a stream
    • Random items used for bank stabilization (tires, vehicles)
    • Construction BMPs in a water body unless temporary (less than 6 months)
    • Heavy equipment in channel, moving material around
  • Concerns forwarded to federal agency
• Future = GIS based information
Lessons Learned

• Rule changes can shake things up greatly
• Outline process, responsibilities preferably in writing
  • Helps with staff turnover and changes in rule/policy (have a place to start from)
  • Review routinely and update as needed
• Keep pushing for communication, meetings, documents (whatever is lacking)
• Have a Plan B
• Be positive, helpful, understanding
• Know folks in different areas, agencies
Lessons Learned

- Coordinated assistance may reduce applicant/ violator frustrations
  - Reduces conflicting recommendations from different agencies (or at least provides a platform to explain differences)
  - Can reduce duplicative efforts
  - Increased education of all (more consistent response in future)
Questions? Thoughts? Experiences?
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