

Developing a Regulatory Certainty Program at the State Level

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Deliverables:

- **Summary document detailing every existing regulatory certainty program in the country.**
- **Model template for states to use to improve their certainty programs or develop new certainty programs where none exist.**
- **Provide training to State Conservation Agencies in all seven NASCA regions on using the template.**
- **Final Report**

Executive Summary

The goals of this project were to:

1. Conduct a search for existing regulatory certainty programs in the United States.
2. Develop a template that states could use as a tool to improve existing regulatory certainty programs or develop new ones.
3. Provide training to every region on how to use the tool.

NASCA completed the project within the planned time frame and met each of the goals listed above. We contacted every State Conservation Agency to determine where regulatory certainty programs existed. We discovered a number of programs across the country that provided regulatory certainty, or at least an element of regulatory certainty to landowners and operators. We then developed a business planning template for use at the state level for any agency wishing to improve or develop a program of this sort. Finally, we conducted training for each region on how states should use this template.

NASCA believes that a number of interests will benefit from this work and this concept:

- Agricultural Operators and Landowners
- Regulators
- State Conservation Agencies
- NGOs
- Public
- Academia
- Conservation Districts
- NRCS
- Commodity Organizations

NASCA provided this template to all of its member agencies in early 2014 and provided an overview and training to all regions at its 2014 Board of Directors meeting. We are encouraged that at least two states, Colorado and South Dakota, are already using this template to develop regulatory certainty programs of their own. Additionally, we have received very positive comments from our members who already have certainty programs in place. Janice Wilford, administrator of Michigan's MAEAP said *"I think you have a home run because you make developing a certainty program sound straightforward and do-able. I like your template a lot!"* We also received similar reviews from Louisiana and Texas.

We are pleased to report that there were no cost overruns associated with this project, and we believe that economic value of this work will be realized many times over as states use this template to develop new regulatory certainty programs, thus resulting in a significant increase of implemented conservation practices on private lands in these states.

Introduction

NASCA defines regulatory certainty is a voluntary approach to provide “assurances” to the agricultural community so they may conduct business in a predictable regulatory setting in exchange for their implementation of BMPs to achieve enhanced environmental benefits. At the onset of this project, NASCA knew of only five states with programs of this type. Because the concept has the potential to provide benefits not only for State Conservation Agencies but a wide array of stakeholders, NASCA sought a way to facilitate the creation of more Regulatory Certainty programs across the country. Several challenges became immediately clear. First, to the best of our knowledge, only a handful of these programs existed. Second, those programs in existence were created autonomously by the state agency, and very little interstate cooperation existed in developing this type of program. Third, in large part because each of these states with regulatory certainty programs essentially "started from scratch", the process of developing these programs was laborious and took years.

NASCA's goal in this project was to develop a tool that could be used by State Conservation Agencies (or other state agencies) to expedite the process of developing a regulatory certainty process. The project was completed with funding from NRCS and NASCA as well as countless personnel hours contributed from NASCA and those State Conservation Agencies that already had regulatory certainty programs of their own.

Background

It has been proven time and again that some of the most cost-effective means of improving and protecting water quality can be made by implementing conservation practices on agricultural lands. In fact, agricultural conservation practices often provide a return on investment several times greater than other means of attempting to prevent nutrients and sediment from entering our nation’s waterways. Therefore, the implementation of agricultural best management practices (BMPs) will continue to play a key role in protecting watersheds, meeting TMDLs, and providing a host of other environmental benefits on our nation’s working lands. Some states have discovered that providing regulatory certainty in exchange for enhanced implementation of conservation practices results in a greater suite of agricultural BMPs on working lands, grants educational opportunities for the operators of our working lands, and provides a sustainable business environment for those farmers who choose to participate in these programs.

However, the problem in developing these programs is that it tends to be a slow, laborious process. Those states with regulatory certainty programs already in place typically struggled for a number of years with the development of these programs. NASCA's goal with this project is to develop a tool that expedite this process, thus

aiding states to more quickly and efficiently make regulatory certainty an option for their agricultural operators and landowners.

Methods

NASCA has contacted all 50 states and conducted interviews to determine where fully implemented certainty programs exist, where programs with elements of regulatory certainty exist, and where states are in some stage of planning to develop certainty programs. Additionally, we held a facilitated session in San Antonio, Texas on January 28, 2013 to share commonalities of existing certainty programs and to harvest data on other certainty endeavors around the country. Additionally, NASCA's Executive Director and officers visited several states where regulatory certainty programs existed to glean information about the programs.

After researching existing programs, NASCA worked at length with the managers and practitioners of those regulatory certainty programs to define commonalities amongst those states during the development of their programs. We also gathered information on what works well, what doesn't work well, legal hurdles, barriers to success, program components, and stakeholders to include during program development. NASCA used this information to formulate a tool to facilitate the creation and implementation of regulatory certainty in a state program format.

Concurrently, NASCA hosted a webinar focused on agricultural certainty on February 13, 2013. Over 70 participants from 22 states joined the presentation, which highlighted certainty programs from Louisiana, Michigan, Minnesota, New York, Virginia, and Texas as well as a presentation from Bill Berry of NACD. The purpose of the presentation was to showcase existing certainty programs and to promote the concept.

NASCA has also held training sessions with its Board of Directors and with its general membership. This training was designed to help member states in every region use the tool to facilitate program development.

Conclusions

Many people acknowledge that regulatory certainty programs are good for everyone as they provide numerous "win-win" opportunities. However, any time change is suggested there will always be those who resist. First of all, designing, developing, and implementing a regulatory certainty program is work. Someone must do the work and there are costs involved. Second, a program of this nature requires buy-in from a diverse network of stakeholders. This group will invariably represent a wide array of opinion about how to best attain environmental improvements related to food and fiber production. It is vital to convince all stakeholders that the implementation of a

certainty program will provide benefits versus the status quo. Appendix A of the attached business plan template is a document we have entitled *Regulatory Certainty: What's in it for me?* This document may be of use as a quick reference when attempting to "sell" the program to a variety of stakeholders.

It is imperative to engage as many partners as possible when designing a regulatory certainty program. Assuming you have successfully "sold" the program to all stakeholders, your next step is to recruit partners to help develop the program. This may add time to the front end of the development process, but it will save time in the end. Partners who help design the program will have a feeling of ownership and are likely to endorse program implementation. Groups who are not engaged to help develop the program are more likely to become critics and challenge every step of program implementation. This is a situation where it is better to "sweat in training rather than bleed in battle." Take the time to evaluate all stakeholders and enlist as many as partners as you can. Develop formal signed agreements with your partners to spell out expectations from each partner. Remember, a partner's role is more than just helping to dictate how the program will or will not function. Partners should also bring resources of their own to the table to help build the program. A sample partner agreement is available in Appendix C of the attached business plan template. Potential partner groups for a regulatory certainty program may include:

- Governor's Office
- State Department of Agriculture (various programs or sections)
- State DNR (various programs or sections)
- State DEQ or DEP
- Selected members and committees of the State Legislature
- State League of Local Governments
- County Governments
- Universities and colleges
- Extension Service
- State Association of Conservation Districts
- Farm Bureau
- Commodity Groups
- Livestock associations
- Nurseryman's Association
- Agricultural Marketing Organizations
- Agricultural Lenders
- NGOs with an interest in water quality, air quality, or habitat management
- Environmental Groups
- NRCS State Office/ State Technical Committee
- EPA Regional Office

The first question to ask about legislation when considering building a certainty program is whether your state already has legislation in place that will support a

certainty program. Odds are it does not, but it happens on occasion. For example, Michigan began building its certainty program under the auspices of its *Natural Resources and Environmental Protection Act of 1994*. However, full implementation of the program required new legislation, which was passed in 2011. Most states, however, prefer to develop legislation that will support the program in the early phases of its design.

Regulatory Certainty legislation varies greatly from state to state. Some states pass legislation that is fairly simple while other state statutes are far more complex. Also, some of these laws are tremendously comprehensive while others may target only particular issues related to certainty. An example of a simple yet comprehensive law is the SB503 legislation passed in Texas in 1993. It appointed the Texas State Soil and Water Conservation Board as "the lead agency in Texas for activity relating to abating agricultural and silvicultural nonpoint source pollution." In a single legislative action Texas took the authority over agricultural and silvicultural runoff out of the hands of traditional regulators and provided producers the opportunity to comply with state water quality laws through traditional, voluntary, incentive-based programs. While this was a bold step for Texas legislators, it is a model that has not been replicated since then. Odds are that this model would be unlikely to reproduce in most places today.

However, there is an element of the Texas program that has been replicated in several other states. In Texas, an operator who is in compliance with an approved conservation plan is presumed in compliance with State water quality standards. This concept is also the basis of certainty programs in Louisiana, Minnesota, New York, and Wisconsin. It is also the basis of regulatory programs in Kentucky and Oregon that are administered in producer-friendly ways. Several other certainty programs are similar but designed with slightly different outcomes. In Virginia and Maryland, for example, producers may choose to participate in the programs with the promise that those who follow approved conservation plans will not be immediately subject to new regulations that evolve pertaining to the Chesapeake Bay. In Maine producers in compliance with an approved conservation plan are considered in compliance with municipal laws and cannot be considered a public nuisance based on complaints. Certainty programs in Michigan and Utah are based on verifications that all pollution risks on the operation have been addressed by the operator. In Massachusetts and Mississippi, programs are not statewide and focus more on water quantity than quality, although water quality comes into play as a result of the BMPs implemented.

In reviewing State regulatory certainty laws, many of the programs contain some common elements:

1. Participation is voluntary.
2. The State water quality agency is a supportive partner of the program.
3. There is a mandatory education component of the program. In some case continuing education credits are also mandatory to maintain certification.

4. There is a process to evaluate pollution risk associated with the operation.
5. A plan is put into place to address these pollution risks.
6. There is a formal verification or recognition process to affirm that risks have been addressed.
7. Verification provides regulatory certainty.
8. This regulatory certainty is defined in statute.
9. There is an expiration term for this verification.
10. There is a process for re-verification.

This list is clearly an over-simplified summary of various certainly laws, but it does provide a basic framework for drafting statute for new State regulatory certainty programs. In most cases the intricacies of the program are dealt with in regulation rather than in statute. Several existing statutes are provided in Appendix D of the attached business plan template.

While it is widely accepted that regulatory certainty programs provide environmental benefits, it is also critical to demonstrate the economic benefits that this type of program will provide. Greater transparency in all levels of government necessitates the need to provide substantial return on investment with taxpayer dollars. The ability to gain support from state-level decision-makers depends on the program's cost-effectiveness.

The outcome of this project is the development of a Business Plan Template for Regulatory Certainty Programs. NASCA's objective in developing this template was to make a tool available to State Conservation Agencies that would facilitate and expedite the process of developing certainty programs in their particular states. We believe we have been successful in this endeavor.

NASCA provided this template to all of its member agencies in early 2014 and provided an overview and training at its annual meeting in September of this year. We are encouraged that at least two states, Colorado and South Dakota, are using this template to develop regulatory certainty programs of their own. Additionally, we have received very positive comments from our members who already have certainty programs in place. Janice Wilford, administrator of Michigan's MAEAP said *"I think you have a home run because you make developing a certainty program sound straightforward and do-able. I like your template a lot!"* We also received similar reviews from Louisiana and Texas.

The challenge from this point forward will be to continue to promote the concept of regulatory certainty. NASCA will continue to endorse the concept and will make this business plan template available to any agency or organization that requests it. Additionally, we will make this document available on our website at <http://www.nascanet.org/index.php/forums/forum/resource-center/>.

Appendices

Please find attached the business plan template NASCA developed for states to use in creating regulatory certainty programs. The template also has its own appendices which contains several useful resources concerning regulatory certainty.