

**ENVIRONMENTAL AND PUBLIC
PROTECTION CABINET'S
STATUS REPORT TO THE GENERAL
ASSEMBLY ON THE KENTUCKY
CLEAN WATER ACT
SECTION 404 TASK FORCE**



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We wish to extend our sincerest appreciation to Jim Townsend for all the time and energy he has devoted to the 404 Task Force. His presence and participation throughout this process have helped us all to a better understanding of the 404 program.

PREFACE

In late 2004, Governor Ernie Fletcher asked the Environmental and Public Protection Cabinet (EPPC) to evaluate the benefits of state administration of the federal Clean Water Act Section 404 Program with the goal of improving efficiency and enhancing environmental protection. As a first step, the administration worked with the 2005 General Assembly to enact legislation that enables the state to assume the 404 program under certain conditions.

An important element of the EPPC's assessment of state assumption was the creation of the Section 404 Task Force. Believing that the best regulatory decisions are transparent, participatory and informed by the public, Secretary LaJuana S. Wilcher convened a stakeholder group to review the federal CWA Section 404 program with the goal of exploring components of a federally approvable, state 404 program that streamlines the permitting process and enhances the state's protection of the environment. Task force members were selected based on their diverse interests relative to 404 permitting and on their ability to work collaboratively. In a comprehensive, broad-based state review of the federal 404 Program, the group heard over 28 presentations from attorneys, federal and state regulators, scientists and task force members; observed a field demonstration of wetlands delineation; visited stream restoration sites and made other site visits to areas affected by the 404 program.

The task force's recommendations were created during a two-day consensus process after six months of shared learning and discussion about all aspects of 404 permitting. These recommendations, which are attached at Appendix A, set out those areas of agreement reached by the task force concerning possible improvements that could be made in the 404 program should it be administered by the state. The recommendations also note some areas where agreement was not reached. Overall, the recommendations provide a starting point for discussion concerning the content of potential regulations that will address the interests represented by this diverse task force.

This report summarizes the current status of the state's ongoing assessment of state assumption. It is being submitted to the General Assembly pursuant to KRS 224.16-050:

The cabinet shall report to the standing committees of jurisdiction over environmental protection, and appropriations and revenue, no later than January 1, 2006, on the costs, personnel requirements, and any statutory or regulatory changes needed to support state assumption of the permitting program ..., and the anticipated benefits in permit streamlining and environmental quality from state administration of the program.

While the meetings of the task force are at an end, several steps remain to be taken before permitting responsibility would be transferred to the state. The major steps are as follows:

First, the EPPC will begin meeting in early 2006 with individuals, permit applicants and members of interested organizations to continue to explore whether Kentucky should proceed down the assumption path and, if so, to understand the details that are important in order to achieve a successful state-administered 404 regulatory program. Without broad-based support from a majority of affected interests, state assumption will not be effective. In addition, the EPPC will evaluate whether additional statutory changes are necessary to promote the most efficient and environmentally responsible permitting program, consistent with the task force recommendations.

Second, the 2006 General Assembly is expected to address the question of funding. If the program is funded, the EPPC will coordinate with all interests to draft a comprehensive regulatory program in accordance with the regulatory procedures established in KRS 13A.

Third, if it appears that a regulatory program that achieves the goals described above can be accomplished, the EPPC will make a recommendation to the Governor for program assumption.

Fourth, the Governor will decide whether to seek assumption of the program from the United States Environmental Protection Agency (USEPA). Should the Governor decide to do so, he will send USEPA a letter officially seeking program delegation.

Finally, should this request be made, the USEPA will have 120 days to decide whether to approve the Governor's request for CWA Section 404 assumption.

Just as the task force recommendations were developed by Kentuckians with a broad spectrum of perspectives and interests, each additional step in this process will be undertaken with extensive opportunity for input and dialogue. This is not a program that should be crafted by state regulators behind closed doors. It is our intent to continue to engage the public in our efforts to solve rather than create problems.

As you will see from reading this report, Kentucky has the opportunity to create an efficient and effective 404 program that is tailored to the needs and concerns of the citizens of the Commonwealth and is protective of our state's abundant and valuable aquatic resources, without expanding the scope of the federal program. This report completes the initial exploratory phase of the 404 assumption process, in accordance with KRS 224.16-050. During the next few weeks we look forward to working with members of the General Assembly and the public to determine how we will move forward.

Abbreviations

| | |
|-------|---|
| ADD | Area Development District |
| ADID | Advance Identification |
| CAH | Coldwater Aquatic Habitat |
| CBI | Confidential Business Information |
| CFR | Code of Federal Regulations |
| CWA | Clean Water Act |
| DEP | Kentucky Department for Environmental Protection |
| DNR | Kentucky Department for Natural Resources |
| EIS | Environmental Impact Statement |
| EPPC | Kentucky Environmental and Public Protection Cabinet |
| EQC | Kentucky Environmental Quality Commission |
| ESA | Endangered Species Act |
| FHWA | Federal Highway Administration |
| FTE | Full-Time Employee |
| GAO | United States Government Accountability Office |
| GP | General Permit |
| KDOW | Kentucky Division of Water |
| KPDES | Kentucky Pollutant Discharge Elimination System |
| KRS | Kentucky Revised Statutes |
| KYTC | Kentucky Transportation Cabinet |
| MOA | Memorandum of Agreement |
| NRCS | Natural Resources Conservation Service |
| NEPA | National Environmental Policy Act |
| NWP | USACE's Nationwide Permit |
| NHPA | National Historic Preservation Act |
| NOI | Notice of Intent |
| NPDES | National Pollutant Discharge Elimination System (CWA Section 402) |
| PIR | Public Interest Review |
| OSRW | Outstanding State Resource Waters |
| SHPO | State Historic Preservation Office |

| | |
|-------|---|
| SMCRA | Surface Mining Control & Reclamation Act |
| USACE | United States Army Corps of Engineers |
| USDA | United States Department of Agriculture |
| USDOA | United States Department of the Army |
| USEPA | United States Environmental Protection Agency |
| USFWS | United States Fish & Wildlife Service |
| WPDG | Wetland Program Development Grant |
| WDP | Wetland Demonstration Program |

EXECUTIVE SUMMARY

Section 404 of the Clean Water Act (CWA) and its implementing regulations establish a program to regulate the discharge of dredged and fill material into waters of the United States. The term “waters of the United States” defines the extent of geographic jurisdiction of the Section 404 program and includes, but is not limited to, such waters as rivers, lakes, streams and adjacent wetlands. Regulated activities include fills for commercial and residential development, water resource projects (such as dams and levees), infrastructure development (such as highways and airports), coal mining and conversion of wetlands to uplands for farming and forestry.

Currently the program is administered in Kentucky by the United States Army Corps of Engineers (USACE) and the United States Environmental Protection Agency (USEPA), Region 4. Because USACE districts are delineated along watershed boundaries, there are currently four USACE Districts with jurisdiction over Kentucky’s waters. The administration of the 404 program by four districts has created confusion and uncertainty for the regulated public due to historical inconsistencies in implementation and difficulty in determining which district has jurisdiction at a given location. This affects regulated entities that operate statewide and across USACE’s jurisdictional boundaries. Jurisdictional uncertainty is particularly evident in Letcher County, Kentucky, where three USACE Districts have authority to exercise jurisdiction. Although the program is often criticized for imposing unnecessary time delays and economic burdens, it is recognized as being essential for maintaining and protecting the health and functions of streams and wetlands.

Governor Ernie Fletcher is committed to generating economic growth, creating jobs and making government more efficient and effective while protecting Kentucky’s natural resources. A state-run 404 program has the potential to help achieve these goals. With over 89,000 miles of rivers and streams and 324,000 acres of wetlands, Kentucky has a particular need for an effective, efficient and consistent 404 program.

Governor Fletcher requested that the Environmental and Public Protection Cabinet (EPPC) evaluate assumption and worked with the 2005 General Assembly to enact legislation that enables the state to assume the 404 program.

On May 13, 2005, with Governor Fletcher’s support, EPPC Secretary LaJuana S. Wilcher announced the creation of the Section 404 Task Force. The task force’s mission was to review the federal regulatory program implemented under Section 404 of the CWA with the goal of exploring components of a federally approvable,



state 404 program that streamlines the permitting process and enhances the state's protection of our environment.



The task force met 11 times over a 6-month period. Much of the group meeting time was spent building a common understanding of the current 404 process and interrelated state and federal programs, identifying problems with the current 404 permitting process and sharing suggestions and concerns about a state-run 404 permitting program. The task force was not asked to address *whether* the state should assume the 404 permitting

program, but instead to provide recommendations on *how* a state program could be structured to provide maximum benefit to Kentucky.

In the course of their work, the task force identified many potential benefits to the environment and the citizens of the Commonwealth through implementation of a state 404 permitting program. Among these benefits is the potential to have coordinated permit application and review processes for numerous state-regulated activities on a single project, including dredge and fill (404), floodplain construction, stormwater/wastewater discharge and surface coal mining. Additional benefits include improved opportunities for meaningful public input and enhanced oversight of mitigation and enforcement. The task force goals for a state program are process clarity, improved environmental protection, successful mitigation, meaningful public participation and efficiency. The task force concerns were that comparability with the federal program be maintained, that the program be flexible enough to accommodate the needs of many kinds of applicants and that the program be adequately staffed and supported to allow Kentucky to reap the benefits of assumption. The final work product of the 404 Task Force is a set of consensus recommendations related to the overall process for individual 404 permits, state adoption of general permits, public participation, mitigation and enforcement. These recommendations, which are attached at Appendix A, set the stage for further discussion of the framework of regulations that take into consideration the wide-ranging interests of the task force.



Public participation was encouraged throughout the course of the task force meetings. Notices of the meetings were posted on the EPPC's Web site and time was allotted at the end of the meetings for the public to comment on the day's proceedings. Members of the general public also joined the task force for the field trips to the Bernheim Research Forest and to eastern Kentucky. The task force and the Environmental Quality

Commission hosted a joint public meeting at Jenny Wiley State Resort Park, which was attended by more than 80 people. This public meeting was used to gather public input on the issues of mountaintop mining and CWA Section 404.

Although the task force meetings are at an end, the EPPC will meet with individuals, permit applicants and members of interested organizations to continue to engage the public on the issue of whether Kentucky should seek assumption. The EPPC will encourage public participation and provide extensive opportunity for open dialogue on the essential components of a successful state-administered 404 regulatory program.

The USEPA supports and encourages state assumption of the 404 program, believing that states can often be more effective administrators than the federal government on regional and local issues. State regulators are frequently more aware of local resources, issues and needs than are federal regulators and are often closer in proximity to the proposed activity locations. States may have a much better awareness of the local watersheds and aquatic resources and thus be in a better position to assess how the permitted activity will impact these resources. Additionally, states have more flexibility to adapt programs and make statutory, regulatory and programmatic changes that are consistent with the CWA should the need arise.

The 2005 General Assembly enacted legislation, KRS 224.16-050, enabling the state to seek assumption of the 404 program.¹ According to John Horne, 404 Task Force Member and General Counsel for the Kentucky Department for Environmental Protection, KRS 224.16-050 provides the statutory authority from which regulations can be promulgated to administer the program.

In order for a Kentucky 404 program to be effective, the state must be committed to establishing a sustainable program and providing the resources required to maintain it. The EPPC has estimated that a state 404 program would require 13 new staff positions and cost approximately \$1,019,340 annually. The 2006 General Assembly is expected to address the issue of funding. If the program is funded by the General Assembly and supported by a majority of stakeholders, the EPPC will work with affected interests to draft a comprehensive regulatory program to support administration of the CWA 404 permitting. These regulations will comply with the minimum federal requirements² and will adopt and incorporate existing state statutes and regulations.

Through assumption of CWA Section 404 permitting, Kentucky has the opportunity to create a program that is efficient while ensuring the protection of our environmental resources. There are many steps remaining before a final decision can be made on whether to seek assumption. Throughout this evaluation process, the EPPC will work deliberately to engage all interests and achieve a program that benefits Kentucky.

¹ See KRS 224.16-050 on attached CD-ROM.

² See 40 C.F.R. Part 233 on attached CD-ROM.

SECTION 1

GOVERNOR'S CHARGE TO THE CABINET

Governor Ernie Fletcher campaigned on a promise to spur economic growth and job creation by enhancing Kentucky's business climate. One way to achieve this goal is by making state government more responsive to the needs of commercial and industrial interests. At the same time, Governor Fletcher also believes that economic growth and environmental protection are not only compatible with one another, but that they are "mutually inclusive" goals. Recognizing that a state-run 404 program has the potential to achieve these mutual goals of enhancing the economy while protecting the environment, Governor Fletcher requested that the EPPC evaluate assumption of the program. As a first step in this process, the Governor and his administration worked with the 2005 General Assembly to enact legislation that enables the state to assume the 404 program. Senate Bill 175 was sponsored by Senator Robert Stivers and signed into law by the Governor on March 31, 2005.

SECTION 2

PURPOSE OF SECTION 404 OF THE CLEAN WATER ACT

The declared objective of the Federal Water Pollution Control Act of 1972 (CWA) is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." These waters include wetlands because the protection of wetlands is deemed necessary to fulfill the objective of the CWA.³ The federal government, acting through the USEPA and the USACE, regulates the discharge of dredged and fill material into wetlands and aquatic resources under Section 404 of the CWA.



This program, administered by the USACE, has a long and controversial history. This controversy is due, in part, to the fact that the 404 permitting requirements affect how landowners manage private property.

Historically, waters of the nation, namely streams and wetlands, were predominantly viewed as obstacles to land use rather than resources. Streams flowing through the middle of valleys prevented maximum use of land and were channelized and moved to the side. Wetlands were seen as unproductive swamps that needed to be filled. Government programs existed that provided landowners with incentives to drain and fill wetlands. It is estimated that by the mid-1970s, the contiguous United States had lost

³ See 33 C.F.R. 328.3(a)(1) – (a)(7). Which wetlands are regulated under the CWA is the subject of ongoing dispute and litigation.

more than 50 percent of the wetlands present at the start of European settlement.⁴ It is estimated that Kentucky has lost more than 80 percent of its wetland acres.⁵ The loss of these wetlands has resulted in the corresponding loss of the functions that they provide.

In the last 20 years there has been a shift in attitude and an increasing realization of the ecological, economic and cultural importance of wetlands.⁶ Wetlands serve different functions depending on their type. Examples of natural functions include: flood control, water storage, food production, nutrient cycling, water quality improvement and carbon sequestration. Wetlands are among the most productive and biologically diverse ecosystems on the planet. The biodiversity of wetlands is comparable to that of tropical rain forests and coral reefs.⁷ They provide a refuge for wildlife and habitat to more than 60 percent of the federally listed threatened and endangered species found in Kentucky⁸



as well as many recreational species such as waterfowl, song birds and deer. Dr. Brian Reeder, a task force member and professor of biological and environmental sciences at Morehead State University, indicated in a presentation to the task force on November 17, 2005, in Louisville, Kentucky, that wetlands have been called the “kidneys of the landscape” because they can retain and transform nutrients and “waste.”⁹

Wetlands are also of immense economic importance. In 1991, an estimated \$59.5 million was contributed to the national economy for wetland-related ecotourism activities such as hunting, fishing, bird-watching, canoeing and photography.¹⁰ The water-filtration role of wetlands saves costs for runoff control and water treatment. Wetlands serve as a source of flood control by storing storm and flood waters. The importance of this function has been emphasized in the wake of 1993 Mississippi River Flood, the 1997 Ohio River Flood and Hurricane Katrina.

Today scientists, regulators and the public have a better understanding of the importance of wetlands conservation. Since the mid-1980s, the United States government has devoted a great deal of attention to wetlands.¹¹ In 1987, in recognition of the significance of wetlands, the Conservation Foundation convened the National Wetlands Policy Forum at the request of the USEPA. This forum was tasked with making policy recommendations on how the nation could better protect and manage its wetland resources. In 1988, the Conservation Foundation released a report introducing the goal of

⁴ “Protecting America’s Wetlands: An Action Plan. The Final Report of the National Wetlands Policy Forum,” The Conservation Foundation, p. 9, 1988.

⁵ EQC State of Kentucky’s Environment: 1994 Status Report.

⁶ “Towards the Wise Use of Wetlands,” Ramsar Convention Bureau, 1993.

⁷ See “Functions and Values of Wetlands,” EPA Fact Sheet, on attached CD-ROM.

⁸ EQC State of Kentucky’s Environment: 1994 Status Report.

⁹ See Brian Reeder’s presentation “Wetlands Functions and Values” (11/17/05) on attached CD-ROM.

¹⁰ See “Economic Benefits of Wetlands,” EPA, on attached CD-ROM.

¹¹ “Towards the Wise Use of Wetlands,” Ramsar Convention Bureau, 1993.

“no net loss” of wetland area and function.¹² In 1989, President George H. W. Bush endorsed this goal and pledged to ensure that there is "no net loss" of wetlands in the United States. On April 22, 2004, President George W. Bush announced that his administration would move beyond a policy of "no net loss" of wetlands with an aggressive new goal to have an overall increase of wetlands in the nation by restoring, improving and protecting at least three million wetland acres.¹³ Many other recommendations of the forum have also been implemented since the report was released in 1988.¹⁴

The special recognition afforded to wetland resources does not, however, discount the importance of preserving and protecting other waters of the United States, such as streams. Healthy streams provide us with many of the same functions as wetlands: flood storage and storm abatement, drought mitigation, high water quality, nutrient processing, sediment storage, aesthetic enjoyment, recreation and wildlife habitat.

While wetland restoration has been at the forefront of the nation’s environmental conscience since the 1980s, stream restoration has only recently come to center stage. Streams are important not just in their ability to transport water, but also sediment. When the physical aspects of streams are manipulated in ways that create instability, the results are often serious – increased flooding and bank erosion that may result in the loss of property, infrastructure or even human life. Other serious implications include impacts on ground water levels, water quality and habitat.

Often times when considering the importance of the aquatic community and its required habitat, one thinks only of the commercially valuable species that live in the larger systems. However, the quality of the headwaters often determines the quality of the larger river.

Streams and wetlands are complex and intricate systems that must be carefully understood in order for the regulations to be applied in a manner that is protective without being unnecessarily burdensome. The 404 Program, if properly implemented, can be a critical tool in wetland and aquatic resources protection.

SECTION 3

THE CURRENT FEDERAL CWA SECTION 404 PROGRAM

3.1. Requirements and Administration of the 404 Program

Section 404 requires anyone proposing a project to obtain a permit from the USACE, or a state with a USEPA-approved program, prior to beginning any non-exempt activity

¹² “Protecting America’s Wetlands: An Action Plan. The Final Report of the National Wetlands Policy Forum,” The Conservation Foundation, 1988.

¹³ See “President Announces Wetlands Initiative on Earth Day” on attached CD-ROM.

¹⁴ “Protecting America’s Wetlands: An Action Plan. The Final Report of the National Wetlands Policy Forum,” The Conservation Foundation, 1988.

involving the placement of dredged or fill material into waters of the United States. Exempt activities include many normal farming, ranching and silvicultural practices.¹⁵

The premise of the program is that no discharge of dredged or fill material can be permitted if it will significantly degrade the nation's waters, or if a practicable alternative exists that is less damaging to the aquatic environment. When applying for a permit, the applicant must follow the mitigation sequencing process by

- taking steps to avoid impacts to waters of the United States where practicable
- minimizing potential impacts to waters of the United States
- providing compensation for any remaining, unavoidable impacts through activities that replace the aquatic resource functional values lost or impaired by the project¹⁶

The USACE and USEPA manage the 404 program pursuant to 33 C.F.R. 320-331 and 40 CFR 230-233.¹⁷ The USACE currently manages the 404 permitting program, which entails jurisdictional determinations, issuance of permit decisions, development of policy and guidance and enforcement of Section 404 provisions.¹⁸ The USEPA develops and interprets environmental criteria used in evaluating permit applications, determines the scope of federal jurisdiction over waters, approves and oversees state assumption, identifies activities that are exempt, and reviews/comments on individual permit applications. The USEPA also has authority to veto the USACE's permit decisions. The USACE and USEPA share enforcement responsibility as set out in the 1989 Memorandum of Agreement (MOA).¹⁹

3.2. Types of 404 Permits

Activities regulated under Section 404 of the CWA are controlled by a permit review process. The USACE may authorize activities under individual or general permits depending on the magnitude of the proposed discharge. Typically, individual permits are required for those proposed activities with potentially large impacts. General permits are a tool for expediting the permitting process when the discharges are determined to have only minimal adverse effects both individually and cumulatively. General permits are developed for specific categories of activities such as boat docks or minor road crossings and may be issued on a national, regional or state level.

According to Jim Townsend, Chief of the Regulatory Branch, Louisville District, USACE, 85 percent of all fill activities in Kentucky are covered under general permits.

¹⁵ See text of CWA Section 404(f) on attached CD-ROM for complete list of exemptions. The legislation enabling state assumption of the 404 program mirrors the exemptions found in CWA Section 404(f). KRS 224.16-050(6).

¹⁶ See 1990 MOA between USEPA and the Department of the Army (USDOA) Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, on the attached CD-ROM.

¹⁷ See 33 C.F.R. Parts 320-331 and 40 C.F.R. Parts 230-233.

¹⁸ 33 C.F.R. Parts 320-331.

¹⁹ See 1989 MOA between USEPA and USDOA Concerning Federal Enforcement for the 404 Program of the Clean Water Act, on attached CD-ROM.

In Kentucky, between 500 and 600 activities per year are authorized under general permits as compared to the 50 to 60 activities that receive individual permits.²⁰

3.2.1. Individual permits

The individual permit process is designed to cover projects that require the discharge of dredged or fill material into the waters of the United States that result in impacts that cannot be considered to be minimal either individually or cumulatively, or activities not covered by general permits. The current USACE evaluation process includes:

- Application Completeness Review
- Scope of Analysis
- Public Notice
- Purpose and Need
- Alternatives Assessment
- 404(b)(1) Guidelines²¹
- Public Hearing
- Mitigation²²
- Water Quality Certification²³
- Cultural Resources²⁴
- Threatened and Endangered Species²⁵
- Public Interest Review

At the end of the permit evaluation process, the USACE project manager writes an environmental assessment and statement of findings that documents the project's compliance with Section 401, the Section 404 (b)(1) Guidelines, the National Environmental Policy Act (NEPA) and the other applicable federal laws such as the Endangered Species Act (ESA) and the National Historic Preservation Act (NHPA), as well as a finding regarding whether the project would be contrary to the public interest. This decision document records how the permit decision was made.

The USEPA has oversight over the USACE's program and has two opportunities during the permit process to exercise this oversight authority. CWA Section 404(q) is known as the elevation process; USACE and USEPA have developed an MOA that describes how

²⁰ See Jim Townsend's presentation "Individual Permitting Process" (7/22/05) on attached CD-ROM

²¹ See the following on attached CD-ROM: CWA 404(b)(1) Guidelines Revisions; the 1990 MOA between USEPA and USDOA Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines; Palmer Hough's presentation "Mitigation Sequence: Heart of CWA Section 404 Program" (11/17/05); Ron Mikulak's presentation "EPA's Roles Under Section 404 of the Clean Water Act" (10/27/05); and Jim Townsend's presentation "Individual Permitting Process" (7/22/05).

²² See Palmer Hough's presentation "Mitigation Sequence: Heart of CWA Section 404 Program" (11/17/05) on attached CD-ROM.

²³ See text of CWA Section 401 and Jenni Garland's presentation "Overview of 401 Water Quality Process" (6/29/05) on attached CD-ROM.

²⁴ See NHPA Section 106 and David Pollack's presentation "Section 404 and Section 106 of the National Historic Preservation Act" (8/12/05) on attached CD-ROM.

²⁵ See Lee Andrews' presentation "CWA Section 404 and Endangered Species Act (ESA) Section 7 Consultation" (9/19/05) on attached CD-ROM.

this process occurs.²⁶ CWA Section 404(c) establishes USEPA's authority to prohibit the use of an area for disposal of dredged or fill material.²⁷ This action, sometimes referred to as a "veto," is used infrequently²⁸ by USEPA.

3.2.2. General permits

General permits are established for activities that are deemed to have a minimal impact both individually and cumulatively. General permits are only valid for five years, but are typically renewed with modifications. The general permits themselves undergo the full standard (individual) permit review, including NEPA, 404(b)(1) alternatives analysis and public interest review, prior to issuance. Projects authorized under a general permit do not undergo this level of evaluation.

There are several types of general permits available. Nationwide permits are established by USACE Headquarters with input from the districts and the public. Each nationwide permit has its own terms and limitations that establish which projects qualify for authorization. There are also general conditions and best management practices that apply to all nationwide permits, and regional conditions that may apply. Projects that do not qualify for a general permit require an individual permit. There are currently 43 active nationwide permits that will expire in March 2007.²⁹ The public notice for the new nationwide permits is expected to appear in the Federal Register in mid-2006.

Regional general permits and state programmatic general permits are developed at a district level for a particular geographic location or specific activity type. The Louisville District developed two regional general permits for Kentucky: Regional General Permit #3 for Boat Docks and Regional General Permit #32 for Sand and Gravel Dredging. A third is currently being drafted for highway projects.

3.3. Mitigation Under CWA Section 404

At the heart of the 404 permitting program is the mitigation sequencing process (i.e., avoidance, minimization and compensation) set forth in the Section 404(b)(1) guidelines and previously described in Section 3.1. The guidelines are a substantive environmental standard codified in 40 C.F.R. 230. In 1990, the USEPA and the USACE entered into an MOA that provided guidance on the implementation of these guidelines. This MOA focuses on individual 404 permits, rather than general permits or civil works projects.³⁰ Additionally, USEPA and USACE are developing joint regulations on mitigation with which a state program must be consistent.

²⁶ See 1992 MOA between USEPA and USDOA on CWA Section 404(q) and text of CWA Section 404(q) on attached CD-ROM.

²⁷ See text of CWA Section 404(c) on attached CD-ROM.

²⁸ See Section 4.3 below.

²⁹ See USACE Nationwide Permits on attached CD-ROM.

³⁰ See 1990 MOA between USEPA and USDOA Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, on attached CD-ROM.

Although compensatory mitigation is the last step of the mitigation sequencing process, it is the one that receives a great deal of attention because it comes at the end of the process, well after the avoidance and minimization steps have been taken. Compensatory mitigation is necessary to replace the functions and values of the aquatic resources lost through authorized impacts. It is critical to the goal of “no net loss.” Compensatory mitigation can be accomplished in many ways (restoration, enhancement, preservation, creation) and through many mechanisms (permittee-responsible mitigation, mitigation banks and “fees in-lieu of mitigation”).³¹

In considering mitigation options, typically, on-site is preferred over off-site and in-kind is preferred over out-of-kind. Keeping mitigation activities in close proximity to the impact site is important in the watershed-based approach to aquatic resource protection. Although there are a wide variety of projects that could benefit our nation’s waters, the purpose of compensatory mitigation under Section 404 is to replace the functions and values lost (in-kind), rather than to address other impairments (out-of-kind).

Applicants for Section 404 permits for activities in Kentucky requiring mitigation have many choices. There are multiple established wetland mitigation banks. Recently, a stream mitigation bank in eastern Kentucky was approved. Several other mitigation banks are currently being processed. There are also three “fee in-lieu of mitigation” programs that together provide this option anywhere in the state. Still, according to Palmer Hough of the USEPA, the majority of applicants prefer permittee-responsible mitigation over one of the third-party options.³² All mitigation options require extensive involvement by the regulatory agency to ensure that the mitigation is accomplished in compliance with the permit conditions and achieves the intended goals. Regardless of who performs the mitigation, successful mitigation is required for an effective 404 program.

At a national level, several publications have reported on problems with the current implementation of compensatory mitigation requirements. In 2001, the National Research Council published “Compensating for Wetland Losses under the Clean Water Act.”³³ This report finds that the national goal of “no net loss” is not being met and that the performance criteria by which success is determined are often unclear - compliance is neither assured nor achieved. These findings are consistent with the 2005 United States Government Accountability Office (GAO) report, “Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure That Compensatory Mitigation Is Occurring.”³⁴ In his presentation on mitigation, Palmer Hough reported that this federal evaluation found the USACE guidance on oversight to be vague and inconsistent.³⁵ At this time, we do not have a clear picture of the degree of mitigation success in Kentucky.

³¹ See Palmer Hough’s presentation “Mitigation Sequence: Heart of CWA Section 404 Program” (11/17/05) on attached CD-ROM.

³² See Palmer Hough’s presentation “Mitigation Sequence: Heart of CWA Section 404 Program” (11/17/05) on attached CD-ROM.

³³ “Compensating for Wetland Losses under the Clean Water Act,” National Research Council, 2001.

³⁴ See GAO Report on attached CD-ROM.

³⁵ See Palmer Hough’s presentation “Mitigation Sequence: Heart of CWA Section 404 Program” (11/17/05) on attached CD-ROM.

3.4. The Complexities of the Current 404 Permitting Process

Under the current process, an applicant for a CWA Section 404 Permit from the USACE may go through more than seven processes under the requirements of five or more agencies.³⁶ This is in addition to any local, state or federal permitting that may be required for other aspects of the project. Many of these processes require similar information that results in a duplication of information and efforts. This is not only a burden on the regulated entity, but is also problematic for the general public who may want to comment on the project. Many of these existing programs require public notice and the opportunity for a public hearing. However, the timing of the public participation is often not conducive to meaningful input. This can be due to the limited information available to the public (typically only regarding one component of the project) or due to the reluctance of applicants to make changes after extensive time and resources having already been expended for project development.

Since projects involve federal action by the USACE in the issuance of the 404 permits, compliance with the ESA and the NHPA is required. This mandates consultations with the United States Fish and Wildlife Service (USFWS) and the State Historic Preservation Office (SHPO). Projects may also trigger application of NEPA. Compliance with NEPA requires consideration of environmental impacts associated with a broad range of alternatives. Applicants must also apply to the Kentucky Division of Water (KDOW) for a CWA Section 401 Water Quality Certification. Additional permits from the KDOW may be required if the project involves construction in a floodplain (Stream Construction Permit) or if it could disturb more than one acre of ground (General Storm Water Permit). A flow chart depicting a simplified view of these processes is attached at Appendix B.

3.5. Shortcomings of the Current Process

Throughout the course of their meetings, the task force members identified what they perceived as areas for improvement in the current 404 program. Although there were some very specific individual concerns, there were a number of areas for improvement that were recognized by the entire group. Some members view the current process as being unpredictable in terms of the time and cost required to obtain a permit. Many believe that there is a lack of consistency in jurisdictional determinations and mitigation requirements between USACE districts, that enforcement is inconsistent and that the 404 process involves redundancies with state permitting processes.

³⁶ See Appendix B.

SECTION 4

STATE ASSUMPTION OF THE CWA SECTION 404 PROGRAM

4.1. Assumption Requirements

Section 404(g) of the CWA allows qualified states to assume the 404 program and administer it for the federal government. Although more than a dozen states currently administer aquatic resources/wetlands protection programs similar to the federal Section 404 process, only two states – Michigan and New Jersey - have formally assumed the program. USEPA supports and encourages state assumption because state regulators are, in most cases, located closer to the proposed activities and are often more familiar with local resources, issues, and needs than are federal regulators. By formally assuming administration of the federal regulatory program, a state can eliminate unnecessary duplication between related regulatory programs. Section 404 permit applicants would need only a state permit for dredged or fill material discharges in waters regulated by the state 404 program.³⁷

As Jim Giattina, Director of the Water Management Division, USEPA Region 4, explained in his presentation to the task force, a state must develop a wetlands permit program that is comparable to the federal program and the Governor must apply to the USEPA for assumption.³⁸ To be eligible for approval, the state program must:

- be as stringent in its scope of jurisdiction as the federal program
- regulate at least the same activities as the federal program
- provide for sufficient public participation
- ensure compliance with the Section 404(b)(1) guidelines, which provide environmental criteria for permit decisions
- have adequate enforcement authority.

When a state assumes administration of the 404 program, the USACE no longer processes 404 permits for waters under state jurisdiction. The state determines what areas and activities are regulated, processes individual permits for specific proposed activities and carries out enforcement activities. Upon assumption of the program, USEPA reviews permits that USEPA and the state have agreed are not waived, and reviews the program annually to ensure the state is operating its program in compliance with requirements of the law and regulations.

³⁷ The state cannot assume jurisdiction over waters traditionally used for navigation by interstate and foreign commerce, the so-called Section 10 waters (Section 10 of the Rivers & Harbors Act of 1899).³⁷ The federal program operated by the USACE continues to apply to these waters even after state program approval.

³⁸ See Jim Giattina's presentation "State/Tribal Assumption of the CWA §404 Program" (11/17/05) on attached CD-ROM.

4.2. Comparable Program

Although a state must ensure that certain baseline federal standards are satisfied and that the state's program is comparable to the federal program, state-assumed 404 programs need not be identical to the federal program. States must demonstrate compliance with the 404(b)(1) guidelines³⁹ and must possess the authority and ability to fund and operate the assumed program.⁴⁰ In addition, a state must have mechanisms in place for sufficient public participation,⁴¹ record-keeping,⁴² inspection,⁴³ monitoring⁴⁴ and enforcement.⁴⁵

Before USEPA approves assumption, a state must enter into MOAs with both the USEPA and USACE.⁴⁶ The USEPA MOA must address state/federal responsibilities for program administration and enforcement, classes/categories of permit applications for which USEPA waives review, annual reports and modification of the MOA.⁴⁷ The MOA with the USACE must describe the jurisdictional extent of the state's authority over waters and procedures for a smooth transition of permit processing once assumption is effective.⁴⁸

Furthermore, the EPPC would enter into an MOA with the United States Department of Agriculture-Natural Resources Conservation Service (USDA-NRCS) regarding wetlands delineation on agricultural lands or lands owned or operated by a USDA program participant.⁴⁹ The EPPC would give the same deference to wetlands delineations made by USDA-NRCS as is currently given by the USACE, as reflected in recent USACE guidance, and in compliance with the CWA and its implementing regulations.⁵⁰

Pursuant to KRS 224.16-050(4), the state's enabling legislation, the EPPC cannot impose permit conditions that are more stringent than would have been applicable if the permit were issued by the federal government.⁵¹

Beyond these minimum federal standards and the limitation imposed by KRS 224.16-050(4), the state has a great deal of flexibility to craft a program that avoids duplication and inefficiencies while preserving environmental protections. Decision-making can be expedited by integrating NEPA-like components and USACE's Public Interest Review

³⁹ See CWA 404(b)(1) Guidelines Revisions, 40 C.F.R. Part 230, and 1990 MOA between USEPA and USDOA Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, on attached CD-ROM.

⁴⁰ 40 C.F.R. 233.13.

⁴¹ 40 C.F.R. 233.32.

⁴² 40 C.F.R. 233.23(7).

⁴³ 40 C.F.R. 233.23(8).

⁴⁴ 40 C.F.R. 233.23(7).

⁴⁵ 40 C.F.R. 233.41(e).

⁴⁶ 40 C.F.R. 233.13 and 233.14.

⁴⁷ 40 C.F.R. 233.13 (1994).

⁴⁸ 40 C.F.R. 233.14.

⁴⁹ See KRS 224.16-050(7) on attached CD-ROM.

⁵⁰ See KRS 224.16-050(7) on attached CD-ROM.

⁵¹ See KRS 224.16-050(4) on attached CD-ROM.

factors⁵² into the 404 process and executing one overall alternatives and public interest evaluation. Overlap and redundancies can be eliminated while preserving effective consideration of aquatic resource impacts. The EPPC would enter into MOAs with the USFWS and SHPO to establish efficient coordination procedures for the protection of threatened and endangered species and historic and cultural resources. The program can require early and informed interagency coordination to direct efforts on reaching environmentally sound decisions. Similarly, the opportunity for early public participation would allow applicants to be aware of potentially controversial issues that could create hindrances later in the process. This early awareness of public concerns would allow the applicant to adjust the project, if appropriate, before too many resources had been expended on project development. This will also make the public participation more meaningful by including it at a point when the project outcome could be influenced.

4.3. EPA Oversight of Section 404 Programs and the KPDES Program

One of the concerns expressed by the regulated community during the task force meetings is that USEPA oversight of 404 permitting would intensify if the state assumes the program. Federal oversight, including USEPA's objection to state-issued permits, is part of state assumption. However, in Michigan and New Jersey, the two states that have assumed the 404 program, USEPA objection to state-issued permits has proven to be extremely rare. This practice is consistent with USEPA's current role in USACE's 404 permitting. Although the USEPA has the power to formally object or "veto" USACE's permits,⁵³ it has exercised this authority only 11 times since the regulations went into effect in October 1979.

USEPA oversight of [state-delegated](#) CWA 402 National Pollutant Discharge Elimination System (NPDES) permit programs is nearly identical to its oversight of state-assumed 404 programs. In 1983, USEPA delegated the NPDES Program to Kentucky (KPDES). USEPA may object to a KPDES permit that it finds to be "outside the guidelines and requirements of the Act." If USEPA has objections to permit issuance, which occurs infrequently, these objections are resolved through discussions and/or permit modifications. In over 20 years of state administration of the KPDES program, there was only one instance where the state did not satisfy the USEPA's objections; the permit reverted to the USEPA for issuance.

For the 404 program, USEPA oversight takes place through individual permit review and annual program-wide review. Individual permit review is required for a small percentage of activities that generally include larger discharges with serious impacts. USEPA and the state can agree to the waiver of federal review on specified classes and categories of permits in the MOA, which must be finalized prior to assumption. USEPA has 90 days to notify the state of its intent to comment, object or make recommendations on a permit.

⁵² See 33 C.F.R. Part 320 and Jim Townsend's presentation "Public Interest Review" (8/12/05) on attached CD-ROM.

⁵³ See 1992 MOA between USEPA and USDOA on CWA Section 404(q) and text of CWA Section 404(q) on attached CD-ROM.

The state cannot issue a permit over USEPA's objection. In practice, USEPA will negotiate with the state agency to resolve concerns that may otherwise draw a formal objection to a permit. In the event that the state neither satisfies USEPA's objections or requirement for a permit condition nor denies the permit, the permit reverts to the USACE for processing.

Michigan was the first state to assume the CWA 404 program. Michigan received final approval of its 404 program in August 1984. Pursuant to the 1983 MOA, USEPA Region 5 waived federal review of the vast majority of applications⁵⁴ and reviews only about one percent of all applications received. USEPA has formally objected to Michigan's issuance of permits only 7 times in the 21 years that the state has managed the program.

In 1993, New Jersey was granted authority by the USEPA to administer the New Jersey Freshwater Wetlands Protection Act Program in place of the federal Clean Water Act Section 404 Program throughout most of the state. During the last 12 years, USEPA has objected to permit issuance once.

4.4. Statutory and Regulatory Authority

In 2005, the General Assembly granted the EPPC the statutory authority from which regulations can be promulgated to administer the program. This authority is found in KRS 224.16-050.⁵⁵ Should Governor Fletcher decide to seek 404 assumption, the EPPC will promulgate comprehensive regulations that will address all issues necessary for the proper implementation of the program. These regulations will comply with the minimum federal requirements⁵⁶ and will adopt and incorporate existing state statutes and regulations. Additional changes may be needed for maximum streamlining of the 404 program in combination with existing EPPC programs.

An approved state program must be conducted in accordance with the federal requirements of 40 C.F.R. Part 233⁵⁷ – the 404 State Program Regulations. The Regulations set out the procedures for program operation (requirements for public participation, permit application, permit review and issuance) and the minimum requirements for compliance and enforcement. If Kentucky decides to seek assumption, it must promulgate regulations to support assumption of the program. These regulations must comply with the requirements for state assumption found in 40 C.F.R. Part 233. In addition, numerous existing state statutes and regulations will be utilized for administration of the program.⁵⁸

The state program would maintain current federal exemptions of certain activities associated with normal farming, silviculture and ranching from permit requirements as

⁵⁴ See MOA on attached CD-ROM.

⁵⁵ See KRS 224.16-050 on attached CD-ROM

⁵⁶ See 40 C.F.R. Part 233 on attached CD-ROM.

⁵⁷ See 40 C.F.R. Part 233 on attached CD-ROM.

⁵⁸ For example, applicable penalties are set out in KRS 224.99-010; applicable hearing and appeals procedures are found in KRS 224.10-410 through KRS 224.10-470; Kentucky Administrative Regulations, General administrative hearing practice provisions, 401 KAR 100:010; and Administrative hearing regulations, 400KAR Chapter 1.

found in CWA Section 404(f). These exemptions are explicitly referenced in KRS 224.16-050.⁵⁹

4.5. Staffing and Funding Requirements

EPPC surveyed the four USACE districts that currently administer the CWA Section 404 program in Kentucky. This survey indicated that the USACE allocates approximately 14 full-time employees (FTE) annually for the technical review of 404 projects in Kentucky. Since the USACE districts have watershed boundaries rather than state line boundaries, it is unusual for a project manager to be assigned only Kentucky projects. As such, the number of USACE FTE years spent reviewing Kentucky Section 404 projects is an estimate.

EPPC anticipates that a state-administered CWA Section 404 program would require eighteen staff positions including 2 supervisors, 2 support staff, and 14 technical staff. The existing 401 Water Quality Certification Section staff of 5 employees would be absorbed into the new program, leaving a need for 13 new employees. These new positions would include:

- Environmental Control Supervisor (1)
- Administrative Specialist II (1)
- Environmental Engineer I (2)
- Environmental Biologist III (3)
- Environmental Biologist II (6)

Looking at the first five years of the program, the expected average cost to the Commonwealth for a state-run CWA Section 404 program would be \$1,019,340 annually.

The USEPA has grant programs available to the state, local and tribal governments to help fund studies and wetland program development. These Wetland Program Development Grants (WPDGs), however, cannot fund day-to-day program implementation. These grants are competitive and awarded on an annual basis.

EPPC successfully competed for and received a 2004 Wetland Program Development Grant for the amount of \$181,588. This money has been used primarily to pay for staff time spent on assumption evaluation. Additionally, EPPC has received a 2005 Wetland Program Development Grant award from the USEPA to increase the capacity of the existing 401 program. This grant provides \$540,000 over a three-year period to help fund three new Environmental Biologist III positions to build inspection and enforcement capacity in the program and additional staff training.

In addition to the WPDGs, which are available annually, the USEPA piloted a one-time State/Tribal Environmental Outcome Wetland Demonstration Program (WDP) grant in 2005. This WDP grant provided money to states and tribes for demonstration projects

⁵⁹ See text of KRS 224.16-050(6) on attached CD-ROM

designed to determine the extent to which wetland program implementation (both regulatory and non-regulatory) achieves positive environmental outcomes – in particular, no net loss, net gain and protection of vulnerable wetlands. Unlike WPDG funding, the WDP grant could be used to help off-set the cost associated with maintaining a program’s existing functions. New authority from Congress specifically to fund program implementation will likely be required for USEPA to continue to fund WDP-like projects. However, should this money become available again, Kentucky could compete for grant awards that could be used to assist the Commonwealth in funding a state CWA Section 404 program.⁶⁰

SECTION 5

KENTUCKY CWA SECTION 404 TASK FORCE

On May 13, 2005, with Governor Fletcher’s support, EPPC Secretary LaJuana S. Wilcher announced the Section 404 Task Force. The task force’s mission was to review the federal regulatory program implemented under Section 404 of the CWA with the goal of exploring components of a federally-approvable, state program that streamlines the permitting process and enhances the protection of Kentucky’s environment.



5.1. Task Force Meetings

The task force had 11 meetings over a six-month period beginning on June 13, 2005, and ending on November 30, 2005.⁶¹ In addition to the task force members, the meetings were attended by members of the public and invited representatives of state and federal agencies who provided the task force with essential regulatory and programmatic background information and first-hand accounts of the complexities of this program. During these meetings, regulatory and scientific professionals gave presentations on a variety of topics, including an overview of the current federal regulatory program, the functions and values of streams and wetlands and mitigation required for loss of streams and wetlands.

⁶⁰ The selection criteria that are being used for the Wetland Demonstration Program Pilot grant are included on the attached CD-ROM. While the grant criteria are not the criteria needed for a state to assume the 404 program, it is USEPA’s expression of the elements for a comprehensive state wetland program.

⁶¹ See task force meeting summaries on attached CD-ROM.



The task force was provided an extensive overview of the current Section 404 process. Representatives from the USEPA and the USACE actively participated and gave numerous presentations to educate the task force on the current program. Representatives from the USFWS, the State Historic Preservation Office – the Kentucky Heritage Council, KDOW, USACE and USEPA discussed the overlap and interaction of Section 404 with NEPA, the ESA, the NHPA, the Swampbuster Provisions of the Food Security Act, and Kentucky’s 401 Water Quality Certification and Floodplain Construction Programs.

The task force heard a joint presentation by Greg Peck, Chief of Staff, Office of Water, USEPA, and Jim Giattina, Director, Water Management Division, USEPA Region 4, on the USEPA’s requirements for state assumption.⁶² Mr. Peck focused on the state assumption process, including timelines, and some of the expected challenges and benefits of state assumption. He emphasized that USEPA should be an advocate for state assumption. Mr. Giattina followed with an overview of the permit process for state assumed CWA 404 programs and USEPA’s oversight.

A recognized goal of assumption is to base decisions on good science to ensure that aquatic resources of the state are protected from significant degradation from the discharge of dredged and fill materials and that wetlands and stream mitigation efforts have long-term success. An understanding of stream/wetland functions and values is essential for creating or restoring self-sustaining streams and wetlands. To that end, the task force heard several presentations on the functions and values of streams and wetlands. USEPA gave an overview of the required mitigation sequence found in the CWA 404(b)(1) guidelines,⁶³ which requires that applicants for 404 permits avoid impacts to aquatic resources; if avoidance is not practicable, applicants must minimize impacts and provide compensation for any remaining, unavoidable impacts.

Field trips held in conjunction with task force meetings helped the group better understand the complexities of



⁶² See November 17-18, 2005, Meeting Summary on attached CD-ROM.

⁶³ See CWA 404(b)(1) Guidelines Revisions, 40 C.F.R. Part 230, and 1990 MOA between USEPA and USDOA Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, on attached CD-ROM.

the program. The task force traveled to Bernheim Research Forest in Clermont to see stream relocation and restoration projects,⁶⁴ to Robinson Forest in eastern Kentucky to view a biological reference reach stream, to surface coal mining sites near Prestonsburg, Kentucky, to see reclamation and reforestation methods and to view revegetated hollowfill side drains.⁶⁵ While in eastern Kentucky, the group also visited the site of a future stream restoration project. The project creators will study how hollowfills can be designed to provide functional replacement of headwater streams and reduce the negative impacts of water discharged from hollowfills.

On September 29, 2005, the task force and the Environmental Quality Commission conducted a joint public meeting. The purpose of the meeting was to provide an opportunity to garner public input on issues related to mountaintop removal mining and Section 404 of the CWA.

During most meetings the task force had the opportunity to discuss the major presentation topics. These discussions yielded a detailed list of concerns with the current process and interests to be considered when crafting a state 404 program. In November, the task force turned to identification of goals for a state 404 program and measures of success for each of those goals. The final meeting of the task force was devoted solely to developing



and reaching consensus on recommended components and characteristics of a state-run 404 permitting program. The task force developed recommendations for the individual and general permitting process, public participation, mitigation and enforcement. These recommendations are a starting point for the development of regulations that address the interests represented by this diverse task force.

5.2. Goals of the Task Force in Development of Recommendations

To guide them in the development of recommendations for a state-run 404 program, the task force identified and agreed upon goals for the program. These consensus goals are

- process clarity,
- improved environmental protection,
- successful mitigation,
- meaningful public participation, and
- efficiency.

5.3. Recognized Benefits of State Assumption

The task force identified some of the benefits to Kentucky of a state-run 404 program. Those benefits include

⁶⁴ See August 26, 2005, Meeting Summary on attached CD-ROM.

⁶⁵ See September 29-30, 2005, Meeting Summary on attached CD-ROM.

- improved coordination between state and federal agencies involved in 404 permitting;
- clarification of application requirements, particularly at the beginning of the process;
- access to a single point of contact for all coordinating agencies;
- improved communication within state agencies with regard to other permits that may be required for a proposed project;
- integration of the permit application and review for 404, floodplain construction and, if applicable, coal mining;
- improved opportunities for timely public input;
- improved predictability of permitting requirements, costs and timelines;
- standardization of jurisdictional determinations and mitigation criteria – by eliminating the inconsistencies of multiple USACE districts;
- clarification of mitigation requirements; and
- improved follow-through on monitoring and enforcement.

5.4. Challenges to State Assumption

The task force expressed several concerns that must be addressed for successful state assumption of Section 404 permitting. By far the strongest interest is that a state-run process should not only be transparent and predictable, but also sustainable. They noted that Kentucky will need to maintain sufficient staffing and support for the program to enable timely and thorough permit review and issuance. The task force stressed that benefits of process streamlining and improved environmental protection will be forfeited if no provision is made for adequate, sustainable funding and staffing support for the program.

Other interests expressed were that the program should be flexible enough to accommodate the needs of many kinds of applicants, that federal (USEPA) intervention be minimal and not burdensome, and that a state program be comparable to the federal program in areas such as nationwide permits and public participation.

SECTION 6

THE TASK FORCE CONSENSUS PROCESS

The task force discussed and came to consensus on some recommended characteristics and components of a state-run 404 permitting program. These recommendations focused on five specific topics: how can the clarity and efficiency of the process for obtaining individual permits be improved (e.g., a guidance manual); what should be considered in the adoption of general permits; how can effective public participation be provided for in the process; how can successful mitigation be assured; and what are the characteristics of effective enforcement. Within each of these topics there were many general and specific points on which the group achieved consensus, and some points on which no consensus

was reached. The complete compilation of task force recommendations is included at Appendix A.

Before working on recommendations, the Task Force defined five consensus goals that any state-run 404 permitting process, no matter how it is structured, should achieve. The task force used these goals as guidance for its discussions of each of the specific permitting topics. Those goals are identified above in Section 5.2.

During the course of the final consensus discussions, the task force broke up into groups, each of which worked on separate topics. One group worked on public participation, mitigation, and enforcement; while a second group worked on the overall process for individual permitting. In the evening a third group, consisting of members of each of the first two groups, worked on the topic of general permits. As the groups worked, the state and federal agency resource people observed and provided information as requested by the group members. The work of each group was then presented to the task force as a whole for discussion and identification of areas of consensus.

After the final task force meeting, drafts of the task force recommendations were circulated to the task force members for comment and clarification. While the preponderance of the final draft recommendations represent unanimous consensus, they also include notations of several areas where there was no consensus. In some of these areas, the members stated that their agreement would depend on the specific details proposed for the regulatory program, and they identified the types of details they would need.

Several general themes cut across the discussions of all groups and the task force as a whole. These were factors that were recognized as contributing to successful achievement of all five of the consensus goals.

CONCLUSION

Permitting under CWA Section 404 is important to Kentucky's environmental and economic wellbeing because it helps to protect the quality of the abundant aquatic resources that we rely on for human health, tourism, quality of life and enjoyment. In its current form, 404 permitting is complex, time consuming and frequently does not provide adequate oversight of permit compliance and mitigation success. The administration of the 404 program by four districts has created confusion and uncertainty for the regulated public due to historical inconsistencies in implementation and difficulty in determining which district has jurisdiction at a given location. However, there is no reason why 404 permitting cannot be predictable, timely, effective, transparent and effective.

In their discussions of state assumption of the 404 permitting program, the 404 Task Force Members identified a number of potential benefits of state assumption, including: improved opportunities for public participation, consistent and effective enforcement of program requirements, and the potential to have coordinated permit application and review processes for numerous state-regulated activities on a single project, including dredge and fill (404), floodplain construction, stormwater/wastewater discharge and surface coal mining. The task force recommendations include some general and specific suggestions for ways to structure the program to achieve those benefits. These recommendations will be used as a starting point for continued discussions concerning the content of potential regulations.

To be successful, the EPPC must develop and support a sustainable state 404 permitting program with sufficient staff and resources to respond to the needs of the Commonwealth. The critical issue of funding is expected to be addressed by the 2006 General Assembly.

As the EPPC continues its evaluation, we will seek broader public participation that engages individuals, permit applicants and members of interested organizations to address whether the state should pursue assumption and, if so, to develop the components of a successful program. Through this comprehensive and inclusive evaluation and development process, Kentucky has the unique opportunity to greatly improve the CWA Section 404 regulatory program to the benefit of the citizens of Kentucky and the environment.

APPENDIX A

APPENDIX A: TASK FORCE RECOMMENDATIONS

404 Task Force Consensus Recommendations:* **The Individual Permitting Process** **November 29 & 30, 2005**

*Recommendations include items captured on flip charts during group discussions.

Consensus Goals for the 404 Permitting Process (from the Nov. 17, 2005 meeting):

- Improved Environmental Protection
- Successful Mitigation
- Process Clarity
- Meaningful Public Participation
- Efficiency

Guiding Principles for an Ideal State-run CWA Section 404 Permitting Process

The efficiency and effectiveness of a state-run CWA Section 404 permitting program is dependent upon sustainable funding (through a durable funding mechanism), training and resources for competent technical field and review staff, together with necessary administrative assistance, and information technology support. The Task Force did not have an opportunity to discuss possible funding mechanisms, but they did emphasize that sufficient staff would be needed to allow performance of the following tasks on a *timely* basis:

- Visit proposed project sites (site visits)
- Arrange and participate in pre-application meetings
- Make jurisdictional determinations
- Review applications for completeness
- Scan permitting documents into electronic format
- Perform comprehensive technical reviews
- Write permit decisions and conditions
- Enforce permit conditions
- Cite activities without a permit
- Inspect and monitor mitigation sites
- Maintain databases
- Comply with reporting requirements for EPA oversight

Efficiency and effectiveness are both served by “front-loading” the process. This means that all parallel permitting processes and consultations are started as early as possible in the 404 permitting process, and that all information that will be needed by the agency for administrative and technical review be identified, requested from the applicant, and provided to the agency as part of the complete application. To improve the clarity of the process, the task force suggested that the agency develop a manual that clearly describes the application process and all requirements. It was suggested that the agency establish a group of technical experts such as biologists and engineers to provide input for a 404 manual that would help streamline the process.

APPENDIX A: TASK FORCE RECOMMENDATIONS

404 Task Force Consensus Recommendations: The Individual Permitting Process, cont.

The process needs to be flexible to accommodate applicants with different levels of familiarity with the process, different degrees of project complexity and the presence or absence of a federal trigger for the NEPA process.

To improve compliance and environmental protection, it is important to be proactive in communicating to the potentially regulated community through local outlets regarding the kinds of activities that could require a permit and the process for obtaining a permit. The permitting process should be easy and user friendly, with requirements and guidelines set out in a manual that would be made available to the regulated community. An agency point of contact should be available to provide information and guidance to the applicant throughout the process. Public information about permitting could be made available in some of the following places:

- Office of the County Judge Executive, mayor or city official
- Local Planning & Zoning office
- Wherever building permits are available
- USDA – Natural Resource Conservation Service (NRCS) for the agricultural community

Pre-Application Process:

Purpose: The pre-application process is a mechanism for providing screening and direction to the applicant regarding requirements for the 404 permitting process.

In most cases, these will be most effectively and accurately addressed in a formal pre-application meeting (see below), but may also be addressed through less formal contacts.

Accessibility: The pre-application process should be flexible, non-intimidating, easily accessible and adaptable to the needs and experience of the applicant, particularly the less-experienced or small-scale operator. Prior to submitting any paperwork to initiate the process, the potential applicant should be able to obtain information about 404 permitting requirements through a local or regional agency contact.

Agency Contact: Department for Environmental Protection (DEP) should be the contact agency, with the contact being a technically knowledgeable person. The agency will document all contacts with actual and potential permit applicants. It was suggested that the initial point of contact for 404 permitting could be one technical staff person dedicated to 404 work in each watershed and working with the watershed coordinator.

Advance Identification: It was noted that at the federal level there is the advance identification of disposal areas (ADID) process that is done by USEPA in cooperation with USACE and in consultation with states or tribes. ADID is used to identify wetlands and other waters that are generally suitable or unsuitable for the discharge of dredged and fill materials. The ADID process serves as a preliminary indication of factors likely to be considered during review of a Section 404 permit application, and can be a useful tool for community planning. (USEPA website: <http://www.epa.gov/owow/wetlands/facts/fact28/html>). The state will need to provide a similar advance identification process since it is in the 404(b)(1) guidelines.

APPENDIX A: TASK FORCE RECOMMENDATIONS

404 Task Force Consensus Recommendations: The Individual Permitting Process, cont.

Notice of Intent (NOI): Prior to submitting a complete application, the potential 404 applicant shall submit an NOI that describes the location and activities proposed. This NOI will serve to alert the agency to potential permitting activity. After receipt of the NOI, the agency will distribute the NOI internally to other regulatory programs that may require a permit (KPDES, floodplain) and conduct a site visit (if appropriate).

Pre-application Meeting: After submitting an NOI, the applicant may request a pre-application meeting. This meeting is not a regulatory requirement. The meeting will be coordinated by an agency staff member who is adequately qualified, and who will act as the point of contact for the applicant. The contact will be available as locally as possible (i.e., at a regional office) if it can be done consistently and with adequate expertise. The meeting will be arranged in a timely manner (time will need to be specified) by the agency contact in consultation with the applicant and will involve internal and external (SHPO, USFWS, KDFWR) agency participants as appropriate to the project location, type and complexity, and the types and amount of information the applicant intends to bring to the meeting. It is expected that some applicants will bring to the meeting surveys, data, site maps and other information about the project and site, while others will have gathered less information prior to the meeting. The purpose of the pre-application meeting is to provide information and guidance to the applicant as stated above under **Pre-application Process**. The expected outcomes of the Pre-application meeting for the applicant and agency are:

- Determination of whether the project activity is exempt from permitting;
- A checklist from the agency of what will be required for the complete application (checklist to be given at the conclusion of the pre-application meeting);
- Any determinations that can be made at the pre-application meeting by the agency regarding jurisdiction, type of permit, acceptability of applicant surveys or data, etc. Because the level of information and review may not be sufficient to support final “official” outcomes, these determinations will carry a caveat to the effect of “the applicant is advised that the accuracy of these determinations is limited by the information presented at this time, and may not be valid if conditions change;”
- Determination of requirements for the complete application in terms of information, surveys, analysis, NEPA process (or state equivalent), public participation, and public interest review;
- Determination of eligibility of the project for a general permit, or changes in the proposed project design that could allow the project to be covered by a general permit;
- Determination of other permits that could be required for the project;
- Determination of water quality/anti-degradation concerns – give the applicant and permitting staff a heads up early to allow for any impact to project design (early decision on individual or general permit, identification of receiving waters and effluent limits);
- Alert in-house floodplain/water quality group; and
- Determination of the circumstances or site conditions that could trigger the need for additional information or actions by the applicant, or may require application for an individual permit.

APPENDIX A: TASK FORCE RECOMMENDATIONS

404 Task Force Consensus Recommendations: The Individual Permitting Process, cont.

Recourse: One option suggested (**not consensus**) included providing a central office “hotline” for regional personnel and applicants to use if questions arise or there are concerns about inconsistencies. Another is to very quickly follow up the regional meeting with a central office confirmation. This would require promptly sending all information to the central office.

Public Participation Plan Developed in Pre-Application Meeting:

- Would not be required for all proposed projects
- Public notice would be commensurate with the expected amount of impact of the proposed project
- Could include an early meeting with adjacent landowners (see below)

Jurisdiction/Delineation Determination:

- May take place (preliminary determination) at site visit.
- Applicant may need to do further work to submit for formal determination.
- Agency letter formally defining jurisdiction or lack thereof should come from central permitting technical staff.
- By signing a formal written agreement to accept that everything in the project area is jurisdictional with respect to streams, an applicant can bypass the time required for determining jurisdiction.

Proof of Public Participation is Required for Complete 404 Permit Application (as stated below):

- Informal letter notification by applicant to public (adjoining landowners) of public meeting
- Submit sign-in sheet as proof of meeting and attendance
- Each page should include date, subject of meeting, sheet number and total number of pages (e.g., “2 of 3”)
- Final page has applicant verification with signature
- Required for Individual permits and where required under program requirements (such as coal permit conference)
- Give adjoining landowners notice
- Public meetings held for transportation processes (NEPA scoping requirements) would satisfy this requirement, as would any similar process (such as that required by Louisville planning and zoning)

The Complete 404 Application:

- Provides all information needed by resource agencies to do their review
 - E.g.: archeological survey by competent individual
- 401 and 404 should be integrated into the permit application and review process

APPENDIX A: TASK FORCE RECOMMENDATIONS

404 Task Force Consensus Recommendations: The Individual Permitting Process, cont.

- If it is decided to include a NEPA-like process in the state 404 program, the information for a NEPA analysis would also be included in the complete application (see later discussion regarding the inclusion of a NEPA-like process)
- **Comment:** Would not require 402 (KPDES) application information - too early to apply for discharge permit, although EPA mentioned that compliance with CWA Section 402 would be necessary for a complete section 404 technical review if there was to be a discharge from the project.
- For projects involving activities within the regulated floodplain, incorporate information required for review under the floodplain construction permit process in the complete 404 application.
- Flexibility is needed when evaluating an application for completeness so that when only minor information is missing the application is not unduly delayed. One option is to have a technical person review the application, rather than an administrative person.
- Proof of informal public meeting is part of the complete application (although it may be discussed in the pre-application process)
- Equivalent carried out as part of another process is acceptable (planning and zoning, NEPA, etc.)
- Alternatives analysis (non-NEPA) from applicant
- Impacts analysis and measures to avoid, minimize, compensate for impacts
- Proposed compensatory mitigation plan
- Administratively complete application triggers mandatory review timelines
- Public notice may be drafted by applicant and included in complete application to expedite publishing of public notice

Electronic Submittal of 404 Permit Application:

- The agency will encourage electronic submittal of 404 applications and consider posting of the applications on the agency website for public review.
- The electronic submittal system will be designed to address issues of Confidential Business Information (CBI).
- Paper applications will be scanned into a pdf.
- Full electronic submittal (with an online application) will be designed so that application tracking databases will be automatically populated.
- **Concern** – will the personnel and resources be available to scan the application on a timely basis (consistent with public notice comment period)?
- **Concern** – will there be firewall problems for applicants trying to submit electronic applications?

APPENDIX A: TASK FORCE RECOMMENDATIONS

404 Task Force Consensus Recommendations: The Individual Permitting Process, cont.

Public Notice/Agency Notification:

- Public notice will be issued and interested agencies notified by the agency when the complete application has been received
- To fulfill its purpose, the public notice needs to contain sufficient information to alert the reader to activities of interest in an area of interest to him or her.
- The form of the public notice and agency notification will be consistent with federal requirements.
- The agency will hold a public hearing when substantial public interest exists.
- If the 404 permit application and process is incorporated into the process for surface mine permitting, the combined public notice for the mining and 404 permits will be advertised as per regulations under SMCRA (Surface Mining Control and Reclamation Act), for 4 consecutive weeks, with the last advertisement running after the application has been determined to be administratively complete.
- The agency will need to determine if the 404 public notice can be posted according to the current DEP 402 (KPDES) notification process; the current USACE 404 public notice includes much more information than the public notices for KPDES permits. The agency needs to find out if USEPA would accept as sufficient the availability of this information (online or upon request from the agency) rather than requiring noticing the information in the agency 404 public notice.

Mandatory Review Timelines (and Consequences):

- It is important to have hard timeframes that give applicants an idea of when a permit decision might take place if no reworking or redesign of the project is required that would cause the applicant to withdraw the application for long periods of time.
- Timeframes and timeframe clock-out functions need to be clear and available in the manual (for both applicants and reviewers).
- Timeframes should not be set too long.
- What are the consequences to the agency of exceeding the timeframe?
 - There should be no provision for a default permit if the timeframe is exceeded.
 - There should be no provision for outside (consultant) review.
 - **Comment:** Need to define consequences of failure to meet targeted review timeframes.
- The right of mandamus to seek agency action already exists. There should be no further legal provision, for instance, for recovery of attorney fees for citizen lawsuits.
- Mandatory timeframes should be met by having adequate technical staff and resources to review in a timely manner; avoid creating a situation that results in cursory review of applications in response to court order or legal action.
- The ability to meet timeframes is resource dependent. The Cabinet needs to comply with permitting timeframes by having adequate staff and resources to review in a timely manner.

APPENDIX A: TASK FORCE RECOMMENDATIONS

404 Task Force Consensus Recommendations: The Individual Permitting Process, cont.

- Consider the option of providing accelerated permitting to participants in the KY EXCEL program.

Coordination with Other Agencies and On Other (Parallel) Permitting Actions:

- The agency will distribute the application information and initiate consultation with outside agencies (such as SHPO, USFWS, KDFWR).
- Provide an expedited process for applicants such as the Kentucky Transportation Cabinet (KYTC) who have consulted with other agencies externally, whereby written documentation of consultation and resulting findings from the consulting agency will be accepted by the permitting agency as proof of fulfilling federal requirements for consultation (as long as no conditions have changed), without going through the motions of consultation again.

Environmental Technical Review:

- This process includes alternatives analysis review for compliance with 404(b)(1) guidelines, “public interest review” (or equivalent), any NEPA-like impacts and alternatives analysis, and evaluation for compliance with federal statutes such as the Endangered Species Act and National Historical Preservation Act.
- As part of the environmental technical review, the applicant needs to receive public comments from the agency and respond.
- The process design goal for environmental technical review is to
 - Combine as many of the separate reviews into a single review as possible without sacrificing the goals of any one of the reviews;
 - Retain comparability with the USACE process.

Environmental Technical Review- Who does it?

Coal Mine Permitting

- For coal, as much of administrative review as possible would be conducted by Department for Natural Resources (DNR) staff, technical water quality review would take place in DEP
- Single application for coal mining – combined SMCRA/404 application
- Single point of contact would be the DNR permit reviewer
- **Concern:** Would need to provide training and staff with the technical ability to evaluate parts of the 404 application that are not now required in coal mining application (i.e. alternative analysis, mitigation)
- **Comment:** Need to consider the consequences of combining applications on the regulatory requirements under each of the programs (maintain as is rather than combine), and legal challenges to any record of decision on the combined application.

All other permits would go through DEP.

APPENDIX A: TASK FORCE RECOMMENDATIONS

404 Task Force Consensus Recommendations: The Individual Permitting Process, cont.

Environmental Technical Review- How would it be done efficiently?

- Technical review will be same as/similar to current USACE review.
- The agency will identify ways to shorten the timeline, if possible
- **Concern:** Efficiency of review will depend on both adequate staff, training, and support for agency staff, and consultants/applicants who are knowledgeable and able to submit a technically complete application.
- To expedite the permitting process, the agency point of contact will use telephone or email to contact the applicant regarding deficiencies and information needs (although record-keeping may require a follow-up hard copy letter)

Adoption of a NEPA-like process in state 404 Permitting:

- **NOTE:** It was suggested that the State conduct a NEPA-like review in absence of federal involvement. However, there is **no consensus** on this point.
- Some of the NEPA issues raised are
 - There is nothing (legally) that precludes the state from requiring a NEPA-like process.
 - The federal NEPA process is perceived by some as burdensome and time-consuming; by others it is perceived as an essential and effective process that has worked well to protect the environment.
 - Task Force members want more specifics about the review criteria, and more clarity about what thresholds would be used to trigger NEPA-like review.
 - A state NEPA-like review cannot be more stringent than the federal review.
 - Applicants could be considerably burdened if requirements are altered.
 - Can we take the best of the NEPA process for the state program?
 - One suggestion was that the state conduct an Environmental Analysis for all individual permits to include the analysis of broader environmental impacts and alternatives with no option for the longer Environmental Impact Statement (EIS).
 - General permits should not require a NEPA-like process.

Agency coordination for projects subject to federal NEPA process:

- This process will be important for transportation projects that have Federal Highway Administration (FHWA) funding.
- Do not duplicate NEPA analysis and work done by FHWA or other federal agency in process of state 404 permitting

APPENDIX A: TASK FORCE RECOMMENDATIONS

404 Task Force Consensus Recommendations: The Individual Permitting Process, cont.

- Permitting agency needs to participate in NEPA process (be a cooperating agency in the NEPA review), and identify at that time any additional information that will be needed to satisfy 404(b)(1) guidelines.
- Allow any information or studies beyond those required by NEPA to be supplemental information submitted by the applicant added to the NEPA review
- Timely review of additional analysis required for the 404 process

PIR (Public Interest Review):

- EPA would expect state to conduct a Public Interest Review (PIR) or some equivalent in order to be comparable to the current process.
- PIR is acceptable, with safeguards and due process assurances.
- Because PIR may overlap with existing processes already used in Kentucky (e.g., Area Development District Clearinghouse) the agency should determine if any of these existing processes will be acceptable to EPA as an equivalent analysis.
- To avoid appearing arbitrary, the agency needs to base PIR on a defensible record and criteria that can be tested.
- There should be a review mechanism for the PIR decision and a test of whether the proposed action is in or contrary to the public interest. (See 33 C.F.R. 320).
- Other Agencies who might be included in the coordination and review process for public interest review:
 - Local Planning and Zoning impact/coordination done as part of review
 - Local health departments
 - City/County officials
 - ADDs (area development districts) – planner

APPENDIX A: TASK FORCE RECOMMENDATIONS

404 Task Force Consensus Recommendations: General Permits November 29 & 30, 2005

*Recommendations include items captured on flip charts during group discussions.

General Permits (GPs):

- Nationwide permits (NWP) – rather than continue to layer on more requirements, any renewal should examine outdated requirements as well as add new requirements
- Reinstate (adopt) the most used nationwide permits (see note below regarding NWP 21)
- Have input from NWP stakeholders before proposing adoption or changes in NWP for assumption.
- Include NWP 23 in those adopted (used by KYTC) for sites categorically excluded by another federal agency under NEPA (already determined no or minimal impact).
- Evaluate other permits used in KY for overlaps (eliminate) or special considerations used in specific industries (keep).
- State could adopt its own GPs that are related to thresholds.
- Make sure that the conditions of NWP are communicated to the public (and understood) particularly those related to agriculture.
- Adopt NWP and continue to update as USACE makes changes in theirs
- Need to adopt a process for proposing, reviewing and issuing general permits.
- Make sure state and federal agency staff also understand and have training to assist applicants and those requiring permits.

NOTE: There is no consensus regarding adoption of NWP 21 (coal mining). The coal industry has a strong interest in the preservation of NWP21 for mining. Some task force members recommend adopting NWP 21 as it currently exists, then making changes as required over time to keep it consistent with the USACE NWP21. Other task force members feel it should be adopted only if the alternatives and mitigation reviews are rigorously performed to assure that only minimal impacts are authorized under the general permit. Many believe that we need a definition of minimal impact.

Can We Simplify and Reduce the Number of Nationwide Permits? (to help small cities, mom and pop operations)

- Consider defining permits by impacts and not activity (focus on resource protection)
- Use impact thresholds:
 - Base thresholds on values and functions
 - Thresholds could be based on fraction of acre of wetland and linear feet of streams:
 - <0.5 or <0.1 acre of wetland
 - < 100 linear feet of stream (point made that need 200-300 feet for a road crossing that would be a typical NWP)
- In order to use functions and values to describe impact thresholds, would need to know what those are – how to measure what needs to be replaced. Need system for determining functions and values.

APPENDIX A: TASK FORCE RECOMMENDATIONS

404 Task Force Consensus Recommendations: General Permits, cont.

Nationwide Permits and Mitigation:

- Some NWP now have provision for mitigation (did not in past)
- Would like to define thresholds for NWP
- Threshold below which no mitigation is required
- Threshold above which applicant must get individual permit
- Range in between in which applicant will be required to do some mitigation.
- KYTC has a strong interest in maintaining the current interpretation of NWP 14.
- **NOTE:** It was suggested that the upper threshold for the NWP might be raised to allow a higher degree of impact if some mitigation is allowed under the NWP.

Jurisdiction:

- Ongoing jurisdictional determination questions about what is considered a stream and consequently what needs to be mitigated.
- There are jurisdictional waters that do not need to be mitigated, such as concrete ditches and other limited waters that have very low functions and values.

What happens to General Permits at the time of assumption?

- Make sure to plan for a smooth transition for all permitting, enforcement, and monitoring functions – so that there is continuity at time of assumption.
- MOA with USACE would specify what happens to ongoing enforcement actions at time of assumption.

APPENDIX A: TASK FORCE RECOMMENDATIONS

404 Task Force Consensus Recommendations: Public Participation November 29 & 30, 2005

*Recommendations include items captured on flip charts during group discussions.

Contents:

- Information/education about public participation, for applicants and the public
- Submitting, viewing and commenting on applications
- Public meetings
- Public hearings
- Other issues & comments

Information/Education About Public Participation For Applicants and the Public:

- The Permitting Manual should highlight the value of early public input as a cost-saving and time-saving option.
- The permitting agency should educate the public, via a 404 Web site and brochures, as to:
 - Roles of agencies,
 - Permit review process,
 - Participation rights,
 - Scope of programs, and
 - How the programs affect the public.

Viewing and Commenting on Applications:

- Applications are submitted electronically.
- Computer program will automatically reject incomplete applications.
- Agency will verify adequacy within a predictable and quick timeframe.
- Once accepted, the application becomes available for public viewing on a 404 Web site, in a user-friendly format (i.e., searchable by county and other user-friendly variables).
 - **Note:** Agency must accommodate potential applicants without electronic access, e.g. allow paper applications that would be scanned by the agency.
- If public comments are not required, General Permits may not need to go into the system individually.
- Agency would post an activity report that would include a list of authorized permits. This would include a listing of General Permits issued for public information, but not subject to public comment period.
- Permitting agency maintains an E-mailing list to notify interested parties when an application is “logged in.”

APPENDIX A: TASK FORCE RECOMMENDATIONS

404 Task Force Consensus Recommendations: Public Participation, cont.

- Public may submit comments through the Web site.
- Initial applications, as posted for public review, should include at least:
 - The proposed project description
 - Map
 - How public can provide input

Public Meetings:

- For individual permit applications, the state will require that a public meeting be held early in the process while many alternatives remain as viable options.
- Further, applicants (and the state) are encouraged, in general, to conduct early, proactive and comprehensive public participation.
- Public meetings held for transportation processes (NEPA scoping requirements) would satisfy this requirement, as would any similar process (such as that required by Louisville for planning and zoning).

Notification Options Include at Least:

- Public meeting(s) with applicant, public and regulator(s)
- Notice to of adjacent landowners, including identification of alternatives
- Notice to those in an impact area or circumference (similar to Planning & Zoning methods)
- Notice to affected public stakeholders, adjacent landowners
- Public meetings
- Newspaper notices
- Church and other private site notices (voluntary, i.e., cannot be required)
- Local radio
- Local access TV
- Courthouse postings

NOTE: Projects with greater potential for a higher degree of impact require more public participation (Functions and values system is crucial to measuring degree of impact; see “Mitigation” discussion)

- Public notice and participation requirements may include some of the items listed above, depending on the nature, scope and impact of the project.
- The criteria for deciding “degree of impact” are crucial and complex.
- The ability to make Kentucky-specific distinctions about degree of impact is an advantage of assuming the program.

APPENDIX A: TASK FORCE RECOMMENDATIONS

404 Task Force Consensus Recommendations: Public Participation, cont.

Public hearings:

- Permitting agency will make a presentation, including:
 - Brief statement of project purpose and description.
 - Information about potential impacts (on individuals, general public and the environment), which is meaningful, accurate and comprehensive.
 - Clarification of the impact of and response to public input.
- Public will provide testimony.
- Permitting agency will respond (later) to significant issues raised.

The permitting agency can use mediation as a tool for conflict resolution. **Note:** this is resource-intensive, but very useful tool

Other Issues & Comments:

Agency may ignore public comment that is added too late if the commenting party did not include the specific issue in earlier testimony or comment.

APPENDIX A: TASK FORCE RECOMMENDATIONS

404 Task Force Consensus Recommendations: Mitigation November 29 & 30, 2005

*Recommendations include items captured on flip charts during group discussions.

Topics covered:

- Measuring functions & values
- Mitigation design
- Options (Onsite, Offsite, In lieu fees, Banking)
- Monitoring
- Research
- Other issues & comments

Measuring Functions & Values:

- It is critical to develop a consistent, fair way to measure the functions and values lost and the mitigation requirements, options, and measures for success.
- Developing region-specific criteria is a high priority for the program, and should be developed within one year – plus, be refined over time.
Note: The group acknowledges that this is an aggressive timeline, but feels that development of region-specific criteria should take place as rapidly as possible.
- The criteria can be developed based on existing protocols, e.g. Rapid Bioassessment, Index of Biological Integrity, Hydrogeomorphological Measures, Reference Reach streams, and the systems the Corps has developed and is developing.

The following (long-term) factors will be considered:

- Hydrologic
- Ecological
- Hydrogeomorphic/landscape
- Temporal (transition, i.e. from loss to mitigated)
- Habitat/structural

Being site-specific with these protocols is a benefit of a Kentucky-based program. The degree of mitigation required will depend on the impact (see criteria, above)

Comments:

- A consistent system will facilitate the applicant's ability to calculate mitigation requirements, which the applicant needs to be able to do as early in the process as possible.
- A consistent system will enable legitimate, science-based challenges using the accepted methodology.

APPENDIX A: TASK FORCE RECOMMENDATIONS

404 Task Force Consensus Recommendations: Mitigation, cont.

Mitigation Design:

- Mitigation design application must be reviewed by personnel with adequate expertise.
- The agency has the option of contracting out complex design review. However, using this option would require rigid policies to protect against conflicts of interest, clarification that the agency retains responsibility for compliance with regulations and statutes, and assurance that such contracts would not interfere with public access or public review.
- Agency should allow some flexibility about timing of design & installation (especially for onsite projects)

Options (On-site, Off-site, In lieu fees):

- Which option to use should be evaluated using
 - Functions and values criteria
 - Regional specificity
 - Slope specificity
- Do not make the cost of mitigation so high that it discourages on-site mitigation. (**Clarification:** Level the playing field between on-site, off-site and in-lieu fee mitigation so that the cost of each is similar, and do not make on-site mitigation more expensive relative to in-lieu fee.

On-site:

On-site may generally be best, but not necessarily, especially for:

- urban areas
- where water quality is bad and not practicably restorable (**Clarification offered:** where restoration of hydrogeomorphic, ecological and hydrological functions and values are not feasible because of past urban development)
- small sites
- linear transportation projects

The permitting agency will not allow activities that cannot be effectively mitigated. The permitting agency will need to define “effective mitigation.” (**Note:** Possibilities suggested by task force members include reference reach streams or headwater stream with a 20 percent or greater slope, and the cumulative impact of past permitting on watersheds. This should also include exceptional waters, CAHs (cold water aquatic habitat), and outstanding state resource waters (OSRWs). Functions and values criteria and hydrological evaluation on a watershed level will be used to characterize such situations).

Some projects may require a mixture of on-site and off-site mitigation, e.g. a project may mitigate hydrology/flooding on-site, but mitigate ecological impacts off-site.

APPENDIX A: TASK FORCE RECOMMENDATIONS

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404 Task Force Consensus Recommendations: Mitigation, cont.

Provide incentives for mitigation above and beyond requirements (on-site or off-site only). Banking credits/advance mitigation is an acceptable incentive.

Off-site mitigation:

There is a general preference for mitigating close by. However, the Watershed Management Framework Program should be used to help identify suitable off-site projects/opportunities. Coordinate with that program, for leverage and to obtain functions and values information.

In-lieu fees:

- Fees should be set at a level that is comparable to the cost of on-site mitigation (including costs of monitoring, maintenance and temporal losses). Fees will vary, based on:
 - Size of watershed (larger watershed, higher cost)
 - Urban vs. rural locations (urban is higher cost due to land values)
- The permitting agency will identify pre-designated sites, associated with specific watersheds, to minimize temporal losses.
- Use of in lieu fees should address functions and values specific to the permitting program.

Banking:

- Off-site wetland banking is a favorable option for small, isolated wetlands, because of their cumulative value.
- Need ground rules/parity for stream mitigation banking

Mitigation Monitoring

- Provide financial assurance for monitoring. One idea is to establish an escrow account for maintenance & monitoring project. Build monitoring and maintenance costs into all three options; in-lieu fees and mitigation options should have financial parity.
- Develop and use fair and consistent monitoring standards to determine frequency and monitoring functions, incorporating:
 - Scale of project
 - Cost of monitoring
 - Functions and values methodology (see above)
- Develop monitoring standards that:
 - Recognize that a trajectory towards success is sometimes sufficient
 - Use benchmarks
 - Focus especially on hydrologic and ecological functions – for wetlands, hydrologic functions are obviously crucial
 - Require one good physical monitoring (requirements need to be specified)
 - Require annual qualitative monitoring, e.g. photos and status of key indicators (agency may require more analysis).

**404 Task Force Consensus Recommendations:
Mitigation, cont.**

- Applicant monitoring reports:
 - Permitting agency will verify monitoring reports.
 - Applicant will complete a monitoring checklist, showing degree of completeness for different benchmarks (e.g., 40 percent complete, etc.)
 - Reports and checklist will be electronically stored for public viewing (on 404 Web site) and for scientific analysis.

Research:

Universities should be encouraged to analyze monitoring data to see what is working.

Other issues/ideas:

The permitting agency will work with the Corps of Engineers to make permitting activity in Section 10 waters similar to permitting activity in the state-assumed program.

Note: The Division of Water has published mitigation monitoring guidelines, but their application is somewhat limited/lacking with respect to larger projects in larger watersheds. Monitoring requires cross-sectional measurements, but these can be misleading if their siting is inappropriate, and numerous cross-sections may not be a practicable or effective approach to monitoring large areas.

APPENDIX A: TASK FORCE RECOMMENDATIONS

404 Task Force Consensus Recommendations: Enforcement November 29 & 30, 2005

*Recommendations include items captured on flip charts during group discussions.

Establish Pass-fail Criteria for Mitigation Projects

- Use functions and values
- Do not be too rigid; remember that natural systems change
- Develop performance standards

Use existing field office structure, with additional training, for enforcement functions.

For enforcing mitigation projects, trained field staff will:

- Conduct a field check to validate accuracy of as-built report (applicant submits the as-built)
- Make site visit within one year, during the growing season (project- and species-specific)
- Use annual monitoring reports to decide (Best Professional Judgment) if and when to make other periodic, visual inspections
- Collect data on functional values after 5 years
- Inspect prior to release of permit

For project construction enforcement, trained staff will:

- Conduct on-site inspection during the project construction process if the project is complex, changes are made, or if the public has expressed concern.

Allow after-the-fact permitting for unpermitted activity for projects that are permissible, with penalties, similar to existing permitting programs, with:

- fines
- restitution
- restoration or mitigation through supplemental environmental projects

Post enforcement information on the 404 Web site:

- Inspection reports
- Notices of violation
- Finalized enforcement actions
- List of violators and fines

APPENDIX A: TASK FORCE RECOMMENDATIONS

**404 Task Force Consensus Recommendations:
Enforcement, cont.**

Other issues/ideas:

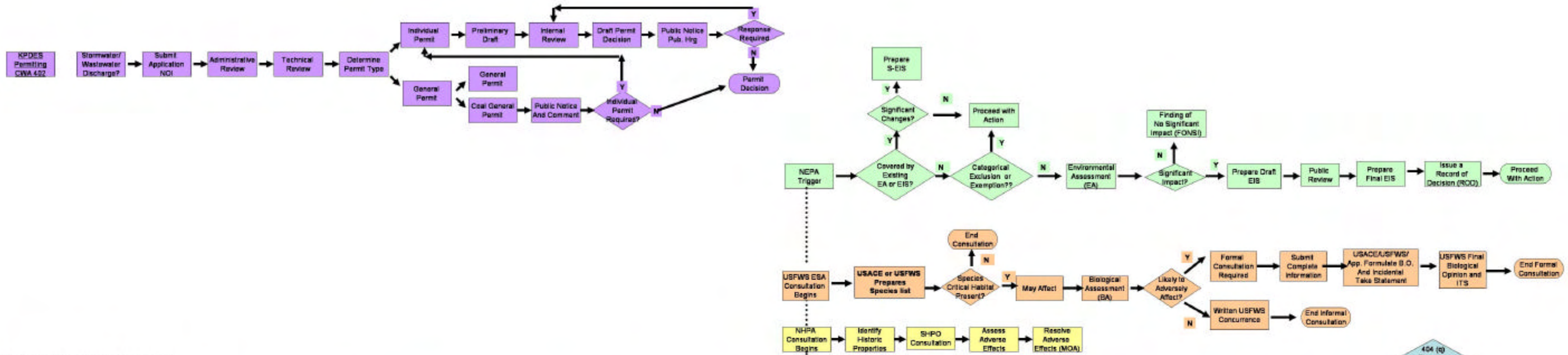
- Teach people where and how to access enforcement information
- The agency was asked to consider revising enforcement procedures to allow a complaining party whose complaint results in enforcement action to participate fully in the informal settlement process regarding the NOV rather than just intervention in formal proceedings.

Comment: The credibility of program is at risk if enforcement is not transparent - visible to the public

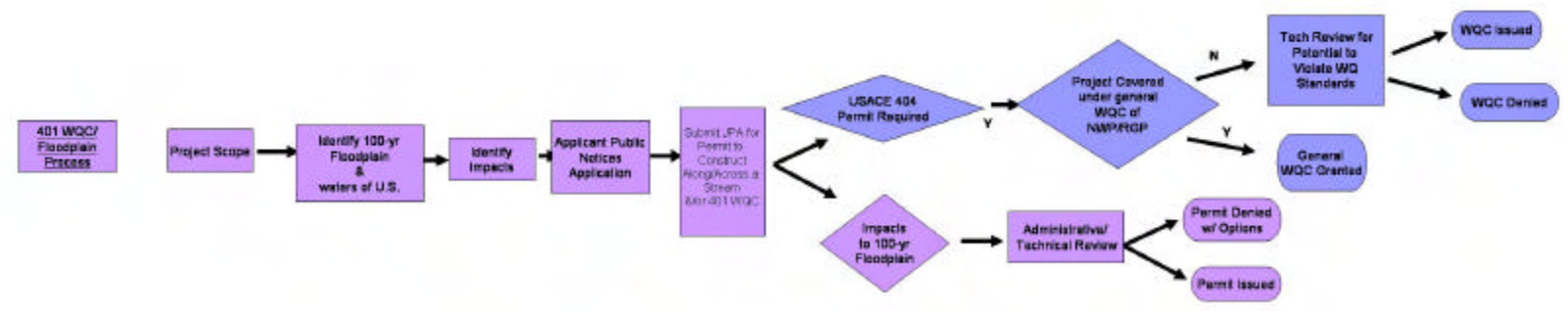
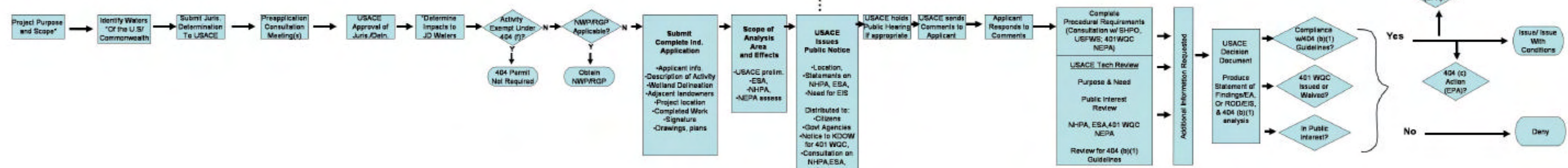
Comment: Wetlands enforcement needs to consider all aspects of the program, including permit or permit condition compliance, mitigation compliance and unauthorized activities.

APPENDIX B

Typical Processes Associated with CWA Section 404 Permitting



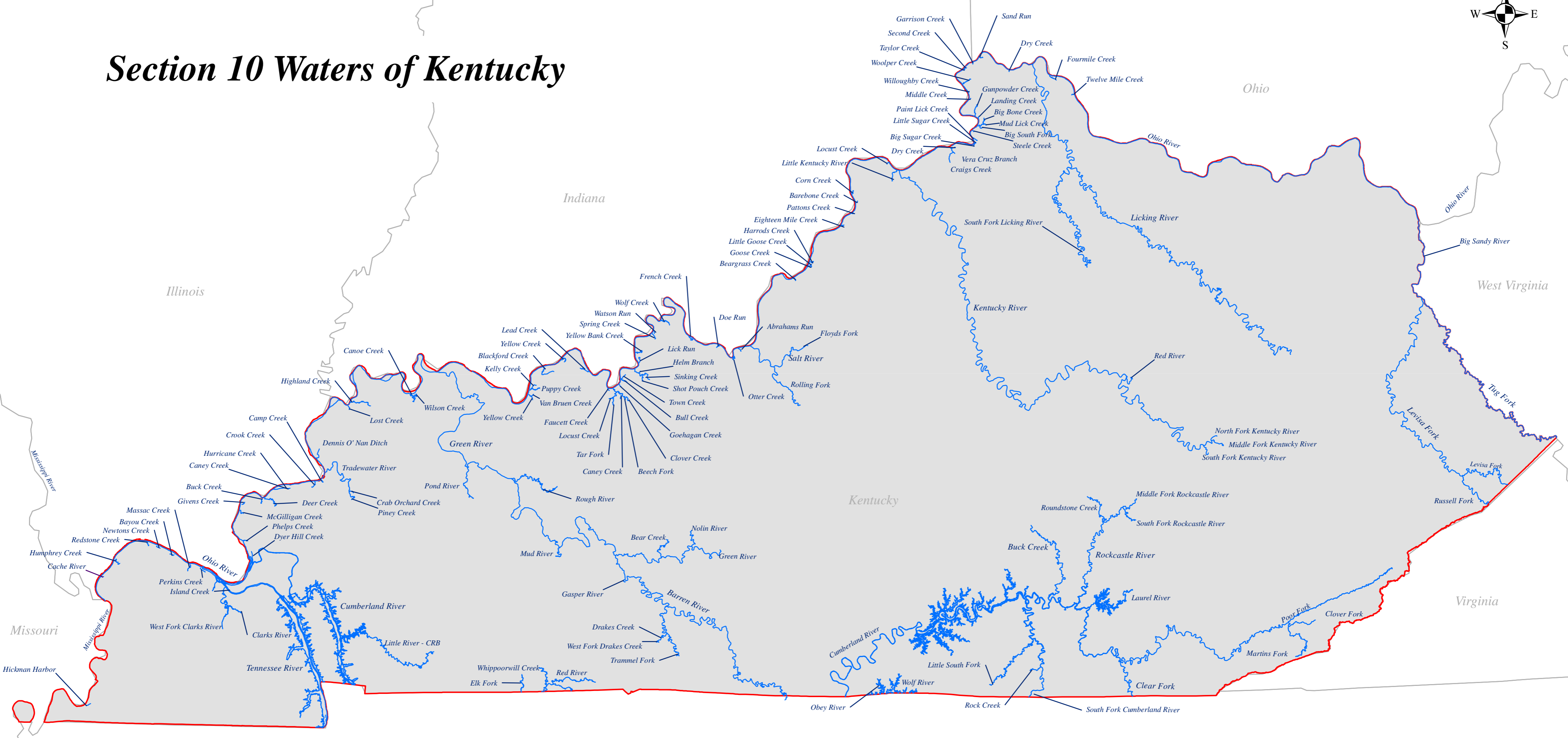
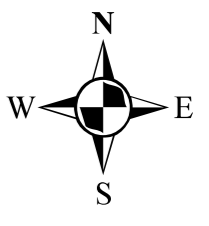
404 Process (Individual Permit)





- Concurrent Processes
- USACE 404 Permitting Process
- KDOW 401 Water Quality Certification
- KDOW Permitting Process (KPDES, Floodplain)
- SHPO/NHPA Consultation Process
- USFWS/ESA Consultation Process
- NEPA Process

APPENDIX C

Section 10 Waters of Kentucky



Legend

-  Section 10 Segments*
-  KY State Boundary

* all measurements are approximate and not to be used as Section 10 determination
 Last revised: 12.6.05

