Overview

- Background
- What does 401 regulate?
- What is a jurisdictional stream or wetland?
- Applying for a WQC
- Reviewing a WQC
- 1-step removal/gravel excavation
- Violations
Clean Water Act and Section 401

- Goal of CWA – to restore and maintain the physical, chemical & biological integrity of nation’s waters.
- CWA is the framework for making our waters “fishable and swimmable.”
- Section 401 is written very broadly with respect to states’ ability to regulate activities and protect the state’s water quality.
Certification – CWA § 401(a)(1)

- Any applicant for a Federal license or permit to conduct any activity including the construction or operation of a facility, which may result in any discharge into navigable waters, shall obtain a certification from the state where the discharge originates stating that the discharge will comply with applicable CWA and state provisions.

- Certification – that the activity and subsequent operation will comply with state WQ standards: protect designated uses, meet criteria, and comply with antidegradation policy.
What types of federal permits?

- Any **federal license or permit**
- **3 main permits that are certified**
  - 404 (dredge and fill)
    - Majority of our applications
  - FERC (hydroelectric)
  - Section 10 (navigable waters)
    - Mostly in relation to Outstanding State Resource Waters or other Special Use Waters
State Water Quality Standards


- Existing and designated uses that must be protected and supported in a particular water body,
- The numeric and narrative criteria that support such uses, and
- An antidegradation policy necessary to maintain existing uses.
What does 401 regulate?
Regulations

- Specifically for 401:
  - 401 KAR 09:010
    - Public Notice
  - 401 KAR 9:020
    - WQC Fees and Timetable
What do we regulate?

- Section 401 Water Quality Certification is issued by the Kentucky Division of Water.

- Certifies U.S. Army Corps of Engineers Section 404 permits.

- State level of authorization for dredge or fill activities or operations below the Ordinary High Water Mark (OHWM) of a jurisdictional stream or wetland.
Regulates Dredge and Fill
401 Regulates Stream Crossings/Bridges
401 Regulates Culverts
401 Regulates bank stabilizations
401 Regulates FERC Projects
Other Common Projects

- Utility line projects
- Fill of wetlands
- Commercial/housing development
- Emergency watershed
- Transportation projects
USACE 404 Permits

- The Corps uses Nationwide Permits (NWP) and Individual Permits (IP) to regulate physical impacts to streams and wetlands.

- DOW must “certify” NWPs every 5 years when the USACE reissues.
  - Certify as written
  - Deny WQC for a NWP
  - Certify with conditions
NWP: Certify as Written

- If it qualifies for the USACE’s 404 NWP, it automatically qualifies for our general certifications

- Examples:
  - NW 1: Aids to Navigation
  - NW 2: Structures in Artificial Canals
  - NW 6: Survey Activities
  - NW 11: Temporary Recreational Structures
  - NW 28: Modifications of Existing Marinas
  - NW 40: Agricultural Activities
NWP: Denied

- NW 16: Return Water from Upland Contained Disposal Areas
- NW 17: Hydropower projects
- NW 32: Completed Enforcement Actions
- NW 38: Cleanup of Hazardous and Toxic Waste
- NW 43: Stormwater Management Facilities
- NW 44: Mining Activities

This does not mean you won’t get certified. Just that you have to get an individual certification instead.
NWP: Certified with Conditions

- The State of KY has the option to certify NWP with conditions.
- USACE NWP have limits, our conditions allow for more limitations.
- Examples:
  - Common limitations include:
    - Impacts no greater than ½ acre of wetland and 300lf of stream
    - Can not be within an OSRW
    - Can not be within a mitigation site
Other Conditions

- NW 13: Bank Stabilization
  - Can’t use creek rock, grouted rip rap, unformed concrete/asphalt or asphalt pieces

- NW 29: Residential Developments
  - No detention/retention basins in streams/wetlands

- NW 36: Boat Ramps
  - Must be less than 20ft. in width

- Have the option to require individual certification on most NWPs with conditions
Applying for a WQC
When should I apply?

- ASAP!

- As soon as you know what project you want to do, how you’re going to do it, and where; start the permitting process.

- Both the KDOW and USACE will need to be contacted.
Applying for a 401 WQC

- Fill out the Application for Permit to Construct Across or Along a Stream and/or Water Quality Certification
- Can be found on the DOW website
- Application will be reviewed for completeness
- If not complete, a Notice of Deficiency will be issued

- Project will be evaluated to determine the following:
  - Does it need a WQC?
  - Does it qualify for a NWP?
  - Is a Certification fee necessary?
## Certification Decisions

### GENERAL CERTIFICATION OF A NATIONWIDE PERMIT

- Suitable for smaller impacts (usually under 300 linear feet for streams; 0.5 acre for wetlands);
- Usually reviewed and issued within 30 days or less;
- Less extensive review
- Unless it is requested, general certifications letters are not issued

### INDIVIDUAL CERTIFICATION

- Used for larger impacts;
- More extensive review;
- Detailed plans required;
- Projects reviewed within 30 days of receipt to determine if additional information is required.
- Requires public notification and may require an Individual Water Quality Certification Fee
401 Water Quality Certification Fees

1. Streams:
   1. $1,000 for an impact greater than 500 linear feet but less than 1,000 linear feet
   2. $2,500 for an impact of 1,000 linear feet to 5,000 linear feet
   3. $5,000 for an impact greater than 5,000 linear feet

2. Wetlands:
   1. $500 per acre of impacted wetland
   2. This fee shall not exceed $5000
Exempt from Certification Fee

- General WQC (NWP)
- Agricultural Operations
- Personal Residences
WQC Timetable

- Floodplains and WQC are together
  - Floodplains moves much faster than 401
- 30 days to determine if more info is needed
- Goal is to complete certification in 180 days
- Federal law gives us a year
WQC Timetable

- Timetable can “stop” for:
  - Waiting on applicant to respond to NOD
  - During the Public Notice
  - Waiting on certification fees
  - Time in which the certification, application, decision or related matter is the subject of litigation
Review of § 401 Application

- States can review:
  - long-term and indirect impacts
  - §401(d) requires state to assure compliance with state surface water standards (§401 KAR 10:031) in light of permitted “activity,” including minimum stream flows requirement.

- Protect attainment of chemical criteria and the preservation of designated uses (§401 KAR 10:026).
  - Warm water aquatic habitat
  - Cold water aquatic habitat
  - Primary contact recreation
  - Secondary contact recreation
  - Domestic water supply
  - Outstanding state resource water
Technical Information

- Name and length of stream(s) impacted
- Acres of wetland(s) impacted
- Before photographs
- Proposed Work Plans and Specifications
  - How will it be constructed?
  - Materials
- Construction schedule
- Structure details
- Revegetation plan
  - Species list (existing and proposed)
- Sediment & Erosion Control plan
- Remediation/Mitigation Plan (includes monitoring requirements)
- Success Criteria
- Permanent Protection
  - Conservation Easement
  - Deed Restriction
Types of Mitigation

– Mitigation Bank Credits

– In-lieu Fee Program Credits

– Permittee-responsible Mitigation (on-site and in-kind)

– Permittee-responsible Mitigation (watershed approach)

– Permittee-responsible Mitigation (off-site or out-of-kind)
Stream Restoration
I have my certification! Now what?

- Read **ALL** of your certification
- Submittals
  - What do you need to be giving to the DOW?
- Conditions
  - What are your restrictions?
- Monitoring?
  - What do you need to submit as a report? When? How many years of monitoring?
- Renewal
  - When/how do you get a renewal?
Kentucky Division of Water 401 Water Quality Certification Process

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into jurisdictional waters

Request additional information from applicant (Issue a Notice of Deficiency)

Submit application for water quality certification

Application complete

Yes

Does the activity qualify for and meet the conditions for general certification of a nationwide permit

Yes

Issue general water quality certification for nationwide permit (if requested by the applicant)

No: Activity does not qualify for or meet the conditions for general certification of a nationwide permit OR the activity occurs in a Special Use Water OR the U.S. Army Corps of Engineers determines it will require an individual 404 permit

Individual water quality certification: Water quality certification application fee payment for and fee is submitted; site visit is conducted, impact(s) & plan(s) are reviewed, special conditions are created if needed, and public notice is posted.

Applicant submits additional information

No

Yes

Review/Respond to comments

30-day Public Notice comments received and processed

Yes

No

Water quality certification or Agreed Order issued

Issue or deny certification; certification process is revised with changes in activities and or conditions

Activity begins per certification conditions

Begin compliance and monitoring phase of mitigation requirements

Process is suspended or certification is not issued
Extras!
One-Step Removal

- Material removed must be placed outside of the floodplain.
- Removal of vegetation should be limited to dead snags, loose debris and live vegetation that obstructs stream flow. Stumps and roots should be left alone.
- If equipment is needed, work from bank.
- Work quickly and during low flow or no flow cond.
- Not during fish spawning season (April 15-June 15)
- Impact the area the least amount possible and restore to original conditions once work is complete.
Gravel Excavation

- Same as 1-step removal, but restricted to gravel bars
- Should only excavate to 12 inches above waterline
- A buffer of 10 feet should be maintained between the stream bank and the work area
- Frequency should be limited to the greatest extent possible (i.e., once to once every year)
  - Keep in mind many streams are too small to accommodate gravel excavation in an environmentally sound manner
Violations
Questions?