

CHAPTER 97

(HB 717)

AN ACT relating to stream restoration and mitigation.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔SECTION 1. A NEW SECTION OF KRS CHAPTER 151 IS CREATED TO READ AS FOLLOWS:

As used in Sections 1 to 6 of this Act, the following definitions shall apply:

- (1) *"Compensatory mitigation" means replacement of aquatic resource functions and values adversely impacted by an activity permitted under a Section 404 permit;*
- (2) *"HUC 10 watershed" means a hydrologic unit code (HUC) watershed delineated according to the method of subdivision for the organization of hydrologic data established by the United States Geological Survey (USGS). As used in Sections 1 to 6 of this Act, "watershed" means a HUC 10 watershed;*
- (3) *"Mitigation organization" means an organization that is approved by the USACE as a mitigation bank or to manage or perform third-party compensatory mitigation under the Section 404 permit program; and is approved for such purposes under the Section 401 certification program;*
- (4) *"Mitigation Review Team" means the interagency committee established pursuant to agreement with the USACE pursuant to Section 404 of the Clean Water Act to approve proposed projects for design and construction with in-lieu monies; and perform annual reviews of ongoing and completed projects;*
- (5) *"Restoration" means restoring an altered, unstable, or converted wetland or stream to a stable condition that improves its geomorphic, biological, and chemical integrity, reduces sedimentation, provides and enhances habitat, improves health of the aquatic community and restores wetland or stream functions and values;*
- (6) *"Riparian" means the zone of living and nonliving systems that influence or are influenced by a corridor of a river, stream, or waterbody;*
- (7) *"Section 404 permit" means a permit issued by USACE under 33 U.S.C. sec. 1344 et seq. and "Section 401 certification" means a water quality certification issued under 33 U.S.C. sec. 1341;*
- (8) *"Stream restoration and mitigation" means restoration of wetlands, streams, or other waterbodies, and mitigation of adverse effects on waterbodies, in a manner consistent with Sections 404 and 401 of the Clean Water Act;*
- (9) *"USACE" means the United States Army Corps of Engineers;*
- (10) *"2020 water management planning council" means the council established under KRS 151.601; and*
- (11) *"404 In-lieu Fee Program" means a USACE-approved method for permittee satisfaction of compensatory mitigation requirements under a Section 404 permit. This method allows a permittee to provide funds to a qualified sponsor rather than undertaking a specific mitigation project or purchasing credits from an approved mitigation bank.*

➔SECTION 2. A NEW SECTION OF KRS CHAPTER 151 IS CREATED TO READ AS FOLLOWS:

- (1) *A Stream Restoration and Mitigation Authority may be established for any HUC 10 watershed in the Commonwealth. Each authority formed under this section shall be a public body corporate and politic with the authority to:*
 - (a) *Sue and be sued;*
 - (b) *Enter into contracts with public and private individuals and corporations and engage in cooperative agreements with federal, state, and local governments or agencies, utilities, special districts, and nonprofit organizations for the performance of its duties and functions under Sections 1 to 6 of this Act;*
 - (c) *Employ personnel as needed, as its fiscal resources may allow, and use the services of volunteers individually or through agreement with governmental agencies, nonprofit organizations or foundations;*

- (d) *Receive and expend funds from any source, including but not limited to private donations, charitable contributions, public grants, 404 In-lieu Fee Program, and appropriations from the General Assembly; and*
 - (e) *Acquire, sell, and hold real interests in property.*
- (2) *Nothing in Sections 1 to 6 of this Act shall be construed to empower or authorize an authority established under Sections 1 to 6 of this Act to exercise regulatory powers with respect to water resources or water quality. An authority established under Sections 1 to 6 of this Act shall not be vested with the power of eminent domain.*
 - (3) *It is the preference of the General Assembly that funds contributed by a permittee under a Section 404 Permit into an in-lieu fund for a project designed for stream restoration and mitigation be utilized within the watershed where the adverse effects occur. The General Assembly recognizes that conservation and protection of the water resources of the Commonwealth, including streams, rivers, wetlands, and riparian habitats, may involve, in addition to restoration and enhancement of aquatic and riparian habitat, proper management of wastewater and stormwater, and abatement of preexisting sources of pollution. Where an authority has been qualified by the USACE to manage an in-lieu fee or other compensatory mitigation arrangement that is approved after the effective date of this Act under Section 404, and to the extent that the USACE and the Mitigation Review Team has approved the use of such funds for elimination of preexisting sources of pollution, the authority may expend a portion of the funds for those purposes, provided that the:*
 - (a) *Funds spent on water quality improvements are a component of a stream or wetland restoration plan for replacement of aquatic resource functions and values; and*
 - (b) *Project has been reviewed and approved by the USACE and the Division of Water as being consistent with Sections 404 and 401 of the Clean Water Act.*
 - (4) *Nothing in Sections 1 to 6 of this Act shall preclude the authority, when acting as an approved qualified organization managing an in-lieu fee arrangement approved after the effective date of this Act, from combining funding from other sources with in-lieu fees in order to achieve efficiencies in stream restoration or mitigation.*

➔SECTION 3. A NEW SECTION OF KRS CHAPTER 151 IS CREATED TO READ AS FOLLOWS:

- (1) *Any 2020 water management planning council located in a given HUC 10 watershed or portion of a given HUC 10 watershed may contact the water service coordinator in the area development district that serves the council and request assistance with the establishment of a Stream Restoration and Mitigation Authority.*
- (2) *If there is a request by a 2020 water management planning council to develop a Stream Restoration and Mitigation Authority for a HUC 10 watershed, and if that watershed extends through more than one (1) area development district, the water service coordinator shall contact the water service coordinators of the affected area development districts and inform them of the request to form a Stream Restoration and Mitigation Authority.*
- (3) *The water service coordinators shall request the 2020 water management planning councils submit their list of nominees for the Stream Restoration and Mitigation Authority, and the water service coordinator shall forward those lists to the Governor for appointment in accordance with Section 4 of this Act.*
- (4) *Any 2020 water management council located in the watershed may elect at any time not to participate in a Stream Restoration and Mitigation Authority by indicating the election in a resolution. However, that election shall not limit the right of any other 2020 water management council to establish a Stream Restoration and Mitigation Authority for that watershed.*

➔SECTION 4. A NEW SECTION OF KRS CHAPTER 151 IS CREATED TO READ AS FOLLOWS:

- (1) *Members of a Stream Restoration and Mitigation Authority established under Sections 1 to 6 of this Act shall reside or have a real property interest in the given watershed and shall serve as ex officio members of the 2020 water management planning councils established under KRS 151.601(1) that lie within a given watershed.*
- (2) *Each authority shall be comprised of the following members appointed by the Governor:*

- (a) *If there is a sewer utility or utilities serving all or a portion of the HUC 10 watershed, one (1) representative of these utilities;*
 - (b) *If there is a water utility or utilities serving all or a portion of the HUC 10 watershed, one (1) representative of these utilities;*
 - (c) *Two (2) representatives of conservation organizations, with one (1) selected from a local watershed organization if possible;*
 - (d) *Three (3) representatives of business or industries with facilities or operations located within the watershed, selected to provide representation from development, manufacturing and extractive industry sectors, if possible;*
 - (e) *Two (2) representatives from the local governments whose jurisdictional boundaries include all or a portion of the watershed, with one (1) representing the largest incorporated municipality in the watershed if any, and the other representing county government; or in the absence of an incorporated municipality whose jurisdictional boundaries include all or a portion of the watershed, two (2) representative of county government;*
 - (f) *One (1) representative of the Soil and Water Conservation District in which the watershed is located;*
 - (g) *One (1) representative of an organization representing aquatic recreation interests;*
 - (h) *One (1) representative of the agricultural land use sector; and*
 - (i) *One (1) representative of a nonprofit organization managing grants affecting all or any portion of the watershed, in order to support local efforts by schools, local governments, nonprofit organizations, and volunteers to accomplish the goals of improving water quality, addressing solid waste problems, and promoting environmental awareness and education.*
- (3) *Members shall serve four (4) year terms, except the first members of the authority shall serve for terms of years as follows:*
- (a) *Four (4) members shall serve for a term of four (4) years;*
 - (b) *Four (4) members shall serve for a term of three (3) years; and*
 - (c) *The remaining members shall serve for a term of two (2) years.*
- (4) *Members of the authority may be reappointed. A vacancy in an unexpired term shall be filled for the unexpired portion of the term in the same manner as the original appointment to that term.*
- (5) *Members of the authority shall serve without pay but may be reimbursed by the authority, as fiscal resources allow, for reasonable expenses incurred to carry out their work.*
- (6) *Each authority shall elect officers to serve annual terms, adopt bylaws, establish an annual budget, and when appropriate, may establish advisory committees and policies it deems necessary for the authority's operation.*
- (7) *The authority may remove any member at the member's request or due to poor attendance at meetings.*
- (8) *Any organization meeting the following conditions may become a Stream Restoration and Mitigation Authority for the purposes of Sections 1 to 6 of this Act:*
- (a) *The organization was created as an instrumentality of one (1) or more local governments pursuant to KRS Chapter 65 or 273 for the purposes of planning and implementing stream restoration and water quality enhancement projects on a watershed basis;*
 - (b) *The organization was established prior to January 1, 2008;*
 - (c) *The organization has adopted a resolution by majority vote to become a Stream Restoration and Mitigation Authority, and has informed the water service coordinator or coordinators in the watershed; and*
 - (d) *The membership of the organization's governing body has been expanded to include representatives as identified under subsection (2) of this section. The terms of office for existing members of Stream Restoration and Mitigation Authorities established under this subsection shall continue in the same*

manner until the date that the term expires. New members shall be appointed in the manner prescribed under subsections (2), (3), and (4) of this section, except that newly appointed members shall serve four (4) year terms.

➔ SECTION 5. A NEW SECTION OF KRS CHAPTER 151 IS CREATED TO READ AS FOLLOWS:

- (1) *Stream Restoration and Mitigation Authorities established under Sections 1 to 6 of this Act shall work in close partnership with local, state, and federal agencies in actively advocating for the restoration, protection, and enhancement of the watershed through stream restoration and mitigation projects. To this end, an authority may:*
- (a) *Recommend proposed stream restoration and mitigation projects to the 404 Mitigation Review Team for its consideration; and*
 - (b) *Undertake the management of stream restoration and mitigation projects and may, in accordance with policies and regulations of the USACE, seek approval to be designated by the USACE as a qualified mitigation organization.*
- (2) *Stream Restoration and Mitigation Authorities may:*
- (a) *Establish a technical advisory committee, soliciting participation from representatives of area utilities and water, sewer and sanitation districts; federal, state, and local governments, and agencies thereof, consultants, colleges and universities to assist the authority in the prioritization of proposed mitigation projects, the management of mitigation projects, and in other efforts to improve watershed management;*
 - (b) *Review and comment on plans developed by federal, state, and local government agencies which relate to the watershed management, and identify and recommend areas in which improved coordination of planning and project design could, on a case-by-case and a systemic basis, result in greater efficiencies and better outcomes for watershed management and water resource protection;*
 - (c) *Initiate, sponsor, and participate in educational programs to increase public awareness and stakeholder involvement in water resources protection and watershed management;*
 - (d) *Prepare a six (6) year work plan, with annual review, for improvement of the water resources of the watershed, including the:*
 - 1. *Identification and prioritization of site-specific stream restoration projects;*
 - 2. *Development of recommendations for coordination of infrastructure improvements and water resource enhancement;*
 - 3. *Solicitation of public participation in development of the work plan and of other strategies for water resource improvement and watershed management; and*
 - 4. *Description of accomplishment during the previous year, and the status of projects undertaken by the authority of other entities within the watershed;*
 - (e) *Review project proposals for mitigation or restoration within the watershed to assure that the appropriate benchmarks and monitoring of preproject and postproject hydrologic and biologic conditions are included in the mitigation and restoration projects in order to measure success in achievement of the project goals;*
 - (f) *Conduct pilot, or demonstration projects for stream restoration and mitigation; and*
 - (g) *Contract for technical assistance in undertaking any of the responsibilities authorized under Sections 1 to 6 of this Act.*
- (3) *Stream Restoration and Mitigation Authorities shall report to the Legislative Research Commission by October 31 of each year on any stream restoration and mitigation work performed by the authority in the watershed, including the amount of mitigation funds received from USACE or from a permittee under a Section 404 permit approved by the USACE, and any funding received from all sources and a listing of upcoming restoration and mitigation projects authorized by the USACE or the Department for Environmental Protection.*

- (4) *When performing any stream restoration or mitigation activity, the authority shall comply with all permitting procedures set out in federal and state statutes and associated regulations of the USACE and the Kentucky Environmental and Public Protection Cabinet, and other local, state, and federal agencies, as appropriate.*
- (5) *The work plan provided for in paragraph (d) of subsection (2) of this section shall not be construed as amending or affecting plans developed under local, state, or federal law, including plans developed under Section 208 of the Federal Water Pollution Act, 33 U.S.C. sec 1288.*

➔SECTION 6. A NEW SECTION OF KRS CHAPTER 151 IS CREATED TO READ AS FOLLOWS:

- (1) *Stream Restoration and Mitigation Authorities established under Sections 1 to 6 of this Act may conduct one (1) or more of the following restoration and mitigation activities as pilot projects, identified within its watershed plan:*
 - (a) *Restoration and mitigation of impairments or permanent loss of water resources due to mining operations;*
 - (b) *Restoration and mitigation of impairment or permanent loss of water resources due to highway or road construction;*
 - (c) *Restoration and mitigation of impairment or permanent loss of water resources due to agricultural or sivicultural operations; or*
 - (d) *Restoration and mitigation of impairment or permanent loss of water resources due to residential or commercial building construction.*
- (2) *If a Stream Restoration and Mitigation Authority undertakes a project that does not otherwise require development and submittal to a state or federal agency of a plan with standards and criteria for evaluating project success, the authority shall develop standards and criteria for evaluating the project's success. The authority shall include an account of the pilot projects findings in the report required under subsection (3) of Section 5 of this Act.*

Signed by Governor April 14, 2008.