

INTERIM JOINT COMMITTEE ON NATURAL RESOURCES AND ENERGY

Minutes of the 3rd Meeting of the 2021 Interim

August 5, 2021

Call to Order and Roll Call

The 3rd meeting of the Interim Joint Committee on Natural Resources and Energy was held on Thursday, August 5, 2021, at 1:00 PM, in Room 154 of the Capitol Annex. Representative Jim Gooch Jr., Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Brandon Smith, Co-Chair; Representative Jim Gooch Jr., Co-Chair; Senators C.B. Embry Jr., Denise Harper Angel, John Schickel, Adrienne Southworth, Johnnie Turner, Robin L. Webb, Whitney Westerfield, and Phillip Wheeler; Representatives John Blanton, Adam Bowling, Randy Bridges, Tom Burch, McKenzie Cantrell, Myron Dossett, Ryan Dotson, Jim DuPlessis, Patrick Flannery, Chris Fugate, DJ Johnson, Norma Kirk-McCormick, Mary Lou Marzian, Suzanne Miles, Melinda Gibbons Prunty, Attica Scott, Pamela Stevenson, Bill Wesley, and Richard White.

Guests: Lee Crume, President and CEO, Northern Kentucky Tri-Ed; John Cox, Manager, Public Affairs, Kentucky Chamber of Commerce; Rich Storm, Commissioner, Kentucky Department of Fish and Wildlife Resources (KDFWR); Rob Lewis, Engineer, FILO program, KDFWR; Scott Porter, Legal Staff, KDFWR; George Howard, CEO, Restoration Systems; and Tom Fitzgerald, Director, Kentucky Resources Council.

LRC Staff: Stefan Kasacavage, Tanya Monsanto, Janine Coy, and Rachel Hartley.

Economic Development and the Role of the Fee-In-Lieu-Of Program

John Cox stated the Clean Water Act (CWA) requires a company to obtain a Section 404 permit for a project from the United States Army Corps of Engineers (USACE) if construction will disturb a stream or wetland. In the last 10 years, about 450 Kentucky development projects have required the Section 404 permit, and obtaining the permit can sometimes take years.

The Kentucky Chamber of Commerce became involved with the process of obtaining permits about a year ago. Problems were discovered in the permitting process that could potentially deter companies from investing in projects in Kentucky. The

KDFWR currently manages the process and is backlogged. A company can speed up the permitting process by paying the Fee-In-Lieu-Of (FILO) to KDFWR. In 2019, the FILO program had approximately \$148 million.

There are currently nine counties in northern Kentucky, and all or parts of 15 eastern Kentucky counties have limited access to the FILO program.

Lee Crume stated FILO needs to spend funds in the same or adjoining watershed where the disturbance necessitating the FILO payment occurred. Also, the credits need to be more affordable.

Senator Webb stated the primary goal should be to maintain the purpose of the CWA.

In response to Senator Schickel, Mr. Crume stated there are zero credits available for northern Kentucky.

In response to Representative Gooch, Mr. Crume stated the KDFWR is working with USACE to create a larger pool of credits.

Fee-In-Lieu-Of Program's Regulatory Arm: KDFWR and USACE

Rich Storm stated the FILO program provides a mechanism to help ensure sustainability in land development. Kentucky's FILO program operates within a mitigation framework under the control of the USACE. The FILO program restores water quality and habitat as well as supporting hundreds of jobs in Kentucky.

To date, the FILO program has restored more than 130 miles of streams and added 6,300 acres of wildlife management areas. Since September 2020, the FILO program has purchased over 4,300 acres of projects in the following counties: Boone, Boyd, Clay, Clinton, Cumberland, Elliott, Graves, Jackson, Lewis, Morgan, Monroe, and Rowan. Currently, there are 49 pending projects with more than 2,900 acres under contract. The FILO program's current balance is \$166 million, and 85 percent is already obligated to projects.

Scott Porter stated the basic premise of the Section 404 permitting program is that no discharge shall be permitted if a practicable alternative exists that is less damaging to the aquatic environment or if the discharge would cause the nation's waters to be significantly degraded.

The definition of waters in the United States was revised and extremely limited in scope during the Trump administration. Under the revisions, the CWA expressly excludes certain waters and water features from the definition, which significantly affects Kentucky.

In 2008, the CWA was amended to establish a preferential order for mitigation. If a mitigation bank, in good standing, exists within a service area, the permit applicants are directed to use mitigation banks. If there is no established mitigation bank in good standing within a service area, permit applicants are directed to use the FILO program or perform their own mitigation.

Funds collected by the FILO program are restricted by federal rules, and the expenditures are subject to USACE approval. FILO funds are used to acquire mitigation properties and to design, construct, monitor, and manage mitigation and restoration projects.

In response to Representative Gooch, Mr. Lewis stated the problem is starting the projects, not finding them. Mr. Porter stated acquisition can slow the process.

In response to Senator Southworth, Mr. Lewis stated funds are not allocated until USACE has approved. The funds remain unspent until the bidding for construction begins.

Senator Wheeler criticized USACE regarding a project in his district and stated funds should be used where they are needed most.

The Role and Function of Mitigation Banks

George Howard stated mitigation is rooted in the CWA. The North Carolina Division of Mitigation Services is very successful. Since 1996, the program has received \$569 million in payments from developers and built more than 649 compensatory mitigation sites.

The solution that emerged in North Carolina is not complex and required no legislation. It was a change in the contracting and procurement approach. Over a period of five years, North Carolina moved from distributed contracting to a more risk adverse system where mitigation providers with private employees guarantee the mitigation.

Mr. Howard gave the following recommendations for Kentucky's FILO program:

- Issue "Full Delivery" requests for proposals (RFPs) in the areas with the greatest backlog.
- Empower and encourage the FILO program employees, through statute, if necessary, to administer full delivery contracts.
- Add the necessary employees and adjust compensation and to attract and retain licensed professionals to administer a comprehensive purchasing program.

- Allow contractors to purchase the necessary land rights at free market prices; do not burden the land acquisitions with state procurement rules and appraised prices. This is a fantastic opportunity for rural landowners.
- Place the risk of compensatory mitigation credit delivery and all the unanticipated issues that arise at environmental restoration projects on the private sector, and not on the FILO program.
- Involve the Transportation Cabinet. No road work should ever be paused or reconsidered due to mitigation. Kentucky has a statewide FILO program and the Transportation Cabinet should utilize it.
- Petition the USACE to support Kentucky in cleaning up its balance of unfulfilled credits using the full delivery method.
- The committee should request a detailed accounting and definition of the “allocated” dollars. What stage is the project or watershed in? How much money has been spent on “allocated” projects and on what? This information could be used to determine how much “allocated” funding is available for full delivery.
- Finally, after analysis of the data, and successful pilot RFPs, determine a point where “allocated” funds should be re-programmed to full delivery RFPs. This should be at least half of the unfulfilled balance of mitigation credits paid for by the public, or any project more than five years old, whichever is greater.

Tom Fitzgerald stated a mitigation bank is an aquatic resource area that has been restored, established, enhanced, or preserved for the purpose of providing compensation for unavoidable impacts.

Historically, the mitigation was the responsibility of the permittee. Because mitigation must be completed before commencing new projects, many of the mitigation projects were not of great quality and implementation of economic development projects was delayed. In response, USACE developed mitigation tools and separated the responsibility of mitigation from the permit. The changes benefited all parties involved.

The FILO program should be revisited and adjusted to ensure development and land use changes do not occur at the cost of sacrificing clean water and fisheries.

Mr. Fitzgerald stated there are two concerns: (1) to recognize, support, and encourage the efforts of the private sector to create and expand the use of mitigation banks and (2) to consider a range of options to shorten the temporal lag between when the fee is paid and when the money is spent.

In response to Senator Wheeler, Mr. Howard stated Kentucky’s FILO program can be improved and should operate as efficiently as possible.

There being no further business, the meeting was adjourned.