

INTERIM JOINT COMMITTEE ON NATURAL RESOURCES AND ENERGY

Minutes of the 3rd Meeting of the 2020 Interim

August 20, 2020

Call to Order and Roll Call

The 3rd meeting of the Interim Joint Committee on Natural Resources and Energy was held on Thursday, August 20, 2020, at 1:00 PM, in Room 171 of the Capitol Annex. Senator Brandon Smith, 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., Robby Mills, John Schickel, Reginald Thomas, Johnny Ray Turner, Robin L. Webb, Whitney Westerfield, and Phillip Wheeler; Representatives Charles Booker, Adam Bowling, Terri Branham Clark, R. Travis Brenda, Randy Bridges, Myron Dossett, Jim DuPlessis, Chris Fugate, Cluster Howard, Derek Lewis, Suzanne Miles, Melinda Gibbons Prunty, Josie Raymond, Cherlynn Stevenson, Jim Stewart III, and Rob Wiederstein.

Guests: Jay Miller, Engineer, Nally and Hamilton, Enterprises (NHE); Jodi Joseph, Environmental Compliance, NHE; Les Williams, Senior Project Manager, NHE; Casey Ehorn, Chief, East Branch Regulatory Division, U.S. Army Corps of Engineers (USACE), Nashville District; and Joshua Frost, Chief, Technical Services Branch, USACE, Nashville District.

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

Nally and Hamilton, Enterprises

Les Williams stated Nally and Hamilton, Enterprises (NHE) has a project with two pending applications with the United States Army Corps of Engineers (USACE). The project began in 2004. In 2011, the project received a Surface Mining Control and Reclamation Act (SMCRA) permit and requested a jurisdictional determination. NHE began to develop a Protection and Enhancement Plan (PEP) and applied for a Kentucky Pollutant Discharge Elimination System permit.

USACE told NHE that their application cannot be reviewed without a PEP approved by the Kentucky Department of Fish and Wildlife Resources (KDFWR). The application was amended and the regulations for jurisdictional determination changed.

In 2019, the KDFWR PEP was approved and NHE is still working with USACE to have applications approved.

In response to Senator Smith, Mr. Williams stated the project affects approximately 50 employees.

Jodi Joseph stated there is no regulatory certainty with jurisdictional determination, which has financial impacts on the company.

Jay Williams stated the site is Kelly Branch in Harlan County.

Joshua Frost stated USACE undergoes regulatory and jurisdictional changes and is operating under the Navigable Waters Protection Rule.

USACE is working on two components of the Kelly Branch mine application including an alternative analysis that is required to determine if the hollow fills are the least environmentally damaging and compensatory mitigation.

In response to Senator Smith, Mr. Frost stated the current application from the Kelly Branch mine that USACE is reviewing was submitted in September of 2019. The national goal is to process 70 percent of applications within 120 days. The remaining 30 percent are more complex and controversial. The Navigable Waters Protection Rule went into effect on June 22, 2020.

In response to Senator Webb, Mr. Frost stated in the last 10 years there has been at least three jurisdictional changes. The changes can occur due to changes in climate, weather patterns, and the watershed.

In response to Representative DuPlessis, Mr. Frost stated there are various grandfather provisions, but they do not apply if a permit has not been issued.

In response to Senator Smith, Mr. Frost acknowledged there are costs to a company when an application is under review. Since 2015, USACE has issued between 7 and 16 permits per year in the Upper Cumberland River Basin.

In response to Representative Bowling, Mr. Frost stated there are currently three pending permits in the Upper Cumberland River Basin. Economics is a public interest review factor that USACE utilizes in reviewing applications.

In response to Representative Fugate, Mr. Frost stated that USACE does not prioritize permit applications because all permits are urgent.

In response to Senator Wheeler, Mr. Frost stated there are no provisional permits issued by USACE.

United States Army Corps of Engineers Regulatory Overview and Permitting Update

Casey Ehorn stated the USACE regulatory mission is to provide strong protection of aquatic resources and navigation capacity while allowing for reasonable development, enhancing the efficiency of the regulatory program, and ensuring fair and balanced decisions.

The Nashville district boundaries are based on the Cumberland River Basin and the Tennessee River Basin. USACE regulates areas and activities within those boundaries. The United States Secretary of the Army was given the authority to regulate waterways under two laws: Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act (CWA) of 1972.

On June 22, 2020, the Environmental Protection Agency and the Department of the Army implemented the Navigable Waters Protection Rule. The rule establishes the scope of federal regulatory authority under the CWA. There are four categories of jurisdictional waters and specific exclusions for many water features that have not been regulated.

There are two types of permits USACE issues. First, standard permits are project-specific and the process involves public notice, public comment, and hearings. The second type of permits are general permits that are nationwide or regional.

The regulatory decision criteria to issue a permit are based on the following: the project is not contrary to the public interest, the project complies with the CWA, and the project complies with the Mitigation Rule. A permit is denied if there is a practicable alternative, violates water quality standards, results in significant degradation, or impacts aquatic resources.

In 2020, USACE has taken final action on 107 permits in Kentucky. There are currently four general permits pending and no standard permits pending.

In response to Representative Gibbons Prunty, Mr. Ehorn stated USACE implements the regulations that are enacted by the federal government.

There being no further business, the meeting was adjourned.