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Tom Herman, Louisville
Laura Knoth, Grand Rivers
Martha Tarrant, Lexington
Mark Grisham, Paducah

KENTUCKY ENVIRONMENTAL QUALITY COMMISSION PUBLIC FORUM

May 17, 2012

Meeting Minutes

Kentucky State University
Academic Services Building
Frankfort, Kentucky

Video sites:

University of Pikeville
Pikeville, Kentucky

University of Louisville
Louisville, Kentucky

Murray State University
Murray, Kentucky

Speakers:

Jim Roe and Randy Payne, Division of Water
Aaron Keatley, Division of Waste Management
Freddie Lewis, Office of Mine Safety and Licensing

Commissioners present:

Scott Smith, Chair
Jason Delambre, Co-chair
Dr. Kimberly Holmes
Tom Herman
Mark Grisham
Laura Knoth

EQC Staff present:

Arnita Gadson, Executive Director
Janet Pinkston, Assistant

Presentations:



Jim Roe and Randy Payne, Division of Water
Floyds Fork Nutrient Total Management Daily Load Plan—plan, status, schedule, where do we go from here?
Kentucky Nonpoint Source Management Plan—what is it, why is it important? How will public input be used?
List of Impaired Streams 2012 (one of 303 lists) status

Bills that impact the Energy and Environment Cabinet:

Aaron Keatley, Deputy Commissioner, Department of Environmental Protection on HB 465

Freddie Lewis, Department of Natural Resources on HB 385

Chairman Scott Smith called the meeting to order at 6:00 p.m. and opened with approval of minutes from the Feb. 23, 2012 meeting:

Cited change on Page 10; a meeting between “EPA” and Environmental Quality Commission should be read, a meeting between the “Division of Water” and Environmental Quality Commission.

Dr. K. Holmes motioned for acceptance with changes, J. DeLambre, 2nd the motion with a unanimous vote to approve.

No public comments

Randy Payne and Jim Roe, Division of Water

Triennial Review

There are thirteen candidate streams or segments planned for designation of OSRW (Outstanding State Resource Waters). These are under the permissible clause and it is due to their exceptional biological diversity and water quality.

We have worked on a revision to Section 8 of 10:031 that has to do with permissible and automatic inclusion clauses for outstanding state resources waters. We are currently working on the automatic inclusion portion, which we have amended to be applicable for outstanding state resource waters, supporting federally listed threatened or endangered species.

There are new EPA national water quality standards for two chemicals: acrolein, a new human criteria (water + organisms); and phenol.

There is a table in 10:026 where we designate the uses of our waters for domestic water supply. That section will be updated.



In 10:031, section 1, updating nutrient criterion, we are working on language that will be more inclusive, instead of hinging it on reservoirs and streams for all water bodies. We will be clarifying it along with the definition of eutrophication, used to integrate with the indigenous aquatic community; measurable impacts, will take that into consideration.

There will be an update of domestic water supply and water bodies, along with an update of nutrient criteria and definition of eutrophication. The proposed eutrophication definition ties the resultant effects to the indigenous aquatic community.

Smith: The definition you have on eutrophication is stronger than it needs to be. I suggest you try to narrow it. I will provide suggested language. I have looked at Indiana, Tennessee, Illinois and West Virginia to see how they address this issue and I will provide it to you.

The initial sentence is dead-on, but my concern is that some of those things individually, could be understood by some, to designate the stream as impaired with nutrients by themselves. For example, some swings in pH by itself are not a eutrophication. I'm just concerned about how it is stated.

Payne: This is a concern for me too, I agree wholeheartedly. The pH and dissolved oxygen are linked and can't be construed as one or the other and I look forward to your comments. It would be helpful.

Our plans on the timeline are to file with Legislative Research Commission by mid-June, hold a public hearing, which is in essence the triennial review, the last week in August, one evening in Frankfort. If everything goes well, we could have a package approved by Jan 4, 2013.

Smith: Are outstanding resource waters listed as such only at the time these lists are published, or, during the years in between when the document is produced?

Payne: Section 8 has an automatic inclusion clause, so if a water body, or a segment fits the definition by automatic inclusion, it's automatically included in that list as well as updated. We then post a notice on the Internet and our webpage.

The rest of those water bodies are permissible. It has to wait until the triennial review, to potentially be adopted.

Smith: In the last several months, I've heard from people planning to do an activity on a water body, not aware that it is a listed stream until they are well into their project. Is there any way to get more public involvement before a stream is listed, before designated?

Payne: Well, I'm aware that it is not a perfect system yet and we'll never get there. We have increased our effort on automatic included water bodies because in times past, simply the web page was updated. We post a link on the Division of Water's webpage that these bodies are now OSRW's. We are open to suggestions.

Smith: I am seeking something prior to designation to guide decision-making.

Payne: Essentially what happens is when we find out, usually through Fish and Wildlife Service contacting us, that a threatened and endangered species has been found via survey, we quickly designate those bodies. That is the reason why the automatic inclusion provision is there, to afford some extra protection.

Smith: If you want lead time, when Fish and Wildlife finds something, they could provide a public notice to inform residents in the area. They could comment on their finding before it's designated. I see what you are saying, once it's designated, it's got to go.

Payne: That's the rule.

Smith: Would they be receptive?

Payne: I'm not sure they would buy into it because those species that are already listed are afforded that protection under Section 7. If this is an unknown population, the protection is already there. Of course, once discovered, unlike U.S. Fish and Wildlife who protects a species no matter where it's found, it's under protection. It's in your lap to make sure you are abiding by the law, even though you may not know what you're seeing. We, by contrast, have to physically know they are present and see it before we afford the protection.

Smith: The alternative is to go out prior to a project and do a survey.

Payne: That would be wise to go and look, but at the same time if it is a mussel survey and you are talking about a big river, it is a very expensive endeavor.

Smith: If I've have a general permit, a general industrial permit or general construction permit, and that designation flips while I am in there doing my thing, does my permit get changed?

Payne: It's subject to revision, but that doesn't mean it automatically will be revised; however, during the renewal year, it may be revised. Typically, I can say, I'm not in permitting branch but when I have been called into those discussions, it's been on the renewal side when that's addressed, or obviously if something is found before a permit is issued. For example, if it was in the beginning of the application process, that is what automatic inclusion tries to address as well.



Integrated Report Vol. 1 includes 303d and 303b of Clean Water Act. It has all water bodies that have been monitored and assessed, both supporting water bodies and those that are impaired. Also, those impaired water bodies that will require TMDL.

It also has a data analysis part. Vol. 2, 303b. It lists those water bodies that do not support one or more designated uses and requires a TMDL. That is, we've targeted early July to release Vol. 1 (impaired waters). Vol. 2, a list of impaired waters, was released for the 30-day public comment period. Once we receive these, they're addressed along with comments from EPA. Vol. 2 is the approval portion. We will have an approved 2012 integrated report.

This report will focus on two basin management units--the Upper Cumberland and the Four Rivers basin management unit, and the Salt and Licking basin management unit. That's where the bulk of this work is generated. Four Rivers is the Tennessee, Mississippi, Ohio and Lower Cumberland.

Smith: The biggest problem will be the list as I see it. You have more people interested in impaired waters today than I've ever seen, and for good reason, on their heels there is TMDL. The thing I'd like for you to consider is that it takes a community to raise a child.

As you are going through these stream assessments, if you could some way make them more public so that:

- They know you are out there looking at this,
- They know it will be potentially listed as an impaired water body.

You only have 30 to 60 days to respond. If you could work with the community as you are doing these assessments, I think it would save you heartache in the future. There are people concerned and afraid that they are doing DNA analysis of nutrients and microbes.

We shouldn't be operating that way, we need to get the input from a community where this information is being gathered, so you've got the information to be able to explain or understand what's causing things to happen. I think the more public input you can get on these, the better the end product you are going to have.

Same on TMDL, that process is terribly flawed. What public sees is a document they cannot read and that's not right when you've got the financial impact that those documents have on communities and on individual operations. You need to work with regulated and non-regulated communities to get it right because there's too much at stake on both the TMDL development and the designation of those waters.

Communities must understand what you are doing so they can provide you the input you need so when you're saying why it is impaired, you've got it right. I was looking at one in South Elkhorn today, the TMDL, it's out there, this process is so critical.

Payne: It is. It's a big deal.

Smith: In the past, we managed to do these. Nobody really read them because the documents were on rural streams and the contaminants were something people could work with. But as we get more sophisticated on our approach, and as we get into those streams, we have to re-invent the process because on Floyds Fork I've learned some very difficult lessons there and they're all bad. I think we have to work hard and learn to deal with the public, getting the public the information it needs so in the long run it makes life a lot easier.

Payne: I appreciate that, any comments and thoughts folks want to send to us as well as EPA would be fine; because at the end of the day, we operate under a target set for us. It is in law, unlike a regulation.

Smith: I've not run into a single soul on classification of waters that says "I don't want to do it, we shouldn't do it." The attitude out there is "let's do it, let's do it right and if I am to blame I will fix it." They know more about these watersheds than before.

It's going to take a different and broader approach that's inclusive to everyone who knows something, or thinks they know something, to help you do a better job, not that you're doing a bad job. I'm tired of fighting at the end of these things, and I think on the front end, if people are satisfied with the data going into the models, they will be more satisfied with the data that comes out of the models. Not that they will be, but at least they will understand that it was a fair assessment of what was included. Then, we can talk about what comes out. In other words, if they think it is jaded going in, then we will have a big fight at the back end.

Knoth: I agree with Scott, I see all the things the Cabinet is going through, triennial review, Floyds Fork, TMDLs, outstanding resource waters, much of it has to do with nutrients in water. The nonpoint source report blames agriculture as the number one source of bad nutrients. At this point they are feeling pretty threatened by all of this activity. We have the Ag Water Quality Act and a mechanism to communicate and work together. I'm just not sure that it's all being used as it should be.

Smith: Four things I'd like you to take back:

TMDLs written in English so that the public can understand what work has been done and what it means. I think you can handle that in your contract. I have a master's degree in science and engineering and when I've picked up the Floyds Fork document and the South Elkhorn TMDL, I would challenge anyone to understand them, much less



anyone who has not had the benefit of the education I had. We will extract more than a pound of flesh from these communities because of these documents that should be understood; therefore it should be part of the contract

Second: **When you complete a TMDL, I'd like to know what the cost will be to the community to implement.**

Third: **Do we wish to treat TMDLs just like we do regulations where they go through the legislative review process with legislative oversight on this?**

Fourth, would be to **open up and flatten out, to get more public comment and input** on these. I think that we need to hear more from Division of Water on how these will be done in the future. Thanks for being here.

Payne: I wish we had more public contact because I do know education and interface with the community is vital. On Floyds Fork TMDL, it's been 18 months or two years. On the TMDL section, one of the biologists there started putting out an eco-summary, a very terse one to two-page thing, with language intended for anyone to understand, for anyone in the community, or in that watershed. Also, when we go out to monitor them for TMDL development, the people who are landowners within that watershed are made aware that this document will be made available to them as well.

It's on the Division of Water's webpage under TMDL section, the [Watershed Health Report](#), with a simple grading system from A-F on multiple perimeters. It takes all that scientific jargon and puts it in a grading system in a way the lay person can pick it up and chew on it.

So we are aware of this need and there is more to be done.

The Floyds Fork TMDL status is under development and the contract is with Tetra Tech, the vendor doing watershed modeling, working on calibrating and validating that model. As for deliverables by vendor, models are due this November. Once state government receives it from EPA and puts it together and puts in our portion of TMDL in that document, we will have that ready to go. The time frame is unknown. New TMDL will replace current TMDL for Floyds Fork watershed.

Smith: Do you know what the itinerary is for the June meeting?

Roe: It has not been set from EPA.

Smith: I'm very troubled with work EPA and Tetra Tech have done on that in terms of data input to the point where I wrote 30 pages of comments just on what data they are inputting. I have yet to hear a single word from anybody on comments I submitted. This



is supposed to be an open process. This has not been an open process and I strongly recommend you all look at it and change it in the future.

Knoth: I'd like to echo concerns from the agriculture community. We tried to explain what fertilizer was used, how it was used and even what crops actually use the stuff they were talking about. It was stuff that was very simple to agriculture, but even when we tried to explain how inaccurate some of their materials were, the response was not good, they didn't want to change anything that they had on paper and when we tried to explain some very basic things i.e. "You don't put nitrogen on soybeans," we didn't get anywhere. I'd like those concerns expressed to the Division as they work with EPA on this TMDL.

Jim Roe, Nonpoint Source and Basin Team Section Supervisor, Kentucky Division of Water

Floyd's Fork Total Maximum Daily Load (TMDL):

University of Kentucky's Kentucky Water Resources Research Institute, operating as a Center of Excellence for Watershed Management, is leading the way on stakeholder involvement. Kentucky Water Resources Research Institute is using a stakeholder process similar to the one it used for work at the U.S. Department of Energy/Gaseous Diffusion Plant in Paducah, Ky.

Goals for the Floyd's Fork Stakeholder process:

- Engage stakeholders to develop a community-driven engagement process
- Identify stakeholder perspectives about possible management strategies for the Floyd's Fork Watershed
- Provide community members with opportunities to evaluate these strategies until a working document is developed

*Future efforts to reduce nonpoint source pollution in the Floyd's Fork watershed as a result of the Nutrient TMDL development process will be driven by watershed stakeholders. It will not be driven by the U.S. Environmental Protection Agency, the Kentucky Division of Water, or the vendor Tetra Tech or Kentucky Water Resources Research Institute.

Overview of Stakeholder Engagement Process:

- Kentucky Water Resources Research Institute at UK will create an informational website about pollution in Floyd's Fork



- Kentucky Division of Water hosts a website, Facebook, and e-mail for information and questions regarding Floyd's Fork watershed.
- Power Point Presentations from previous public meetings
- Modeling report from vendor Tetra Tech

Kentucky Water Resources Research Institute is conducting confidential stakeholder interviews with key people in the Floyd's Fork watershed.

The Stakeholder Focus Group Meeting will be held July 2012 – October 2012

A Public Information Meeting is slated for December 2012

Information gathered from the stakeholder interviews, focus group, and public information meetings will be disseminated through a Public Strategy Evaluation Meeting to be held between February 2013 and April 2013, with final data analysis, and a final report, on stakeholder involvement completed by July 2013.

Putting implementation back on the community, provides equity in the situation.

Smith: I like that concept on the front end; it's what I'd like to see way in front of the process.

Knoth: How do I get on the list to make sure farmers are involved? I need to be on the mailing list.

Smith: That is a good question. Lindell (Ormsbee) made a presentation at the first meeting, but that's been nine months ago. You all have a list of interested parties. Everyone should know how to contact Lindell in order to be able to participate.

Roe: About Lindell, he is on the front end of the process right now. It looks as if he's holding kind of a confidential stakeholder interview with a small group with specific interest, i.e. stakeholders in the watershed. It will keep growing in size building up to a public information meeting by the end of this year.

They are trying to start pooling all interests together, to come up with a document that can be carried through to implementation, to figure out what will occur.

Here are ranges of dates: Confidential stakeholder focus group interviews/meetings will occur July 2012 through October 2012. I'm calling that the small group section. A broader public information meeting will be December 2012 about the stakeholder process. Data collected from these interests will be gathered to be disseminated through a public evaluation meeting sometime in the February through April 2013 range.



The point of the stakeholder perspectives is to provide watershed community members with opportunities to react and prioritize for the purpose of a working document.

Lindell expects data analysis and stakeholder involvement to be completed on or about July 2013, about a year from where we are right now. That's all I have on Floyds Fork TMDL.

Smith: What's the Division of Water doing on the model, on helping Tetra Tech? What is your involvement?

Roe: You are getting above me, I don't know.

Smith: Is there interaction?

Payne: We are collecting more data, especially biological data about the watershed to augment, to supplement, to bolster the precision of the data. That's what's ongoing right now with data gathering.

Roe: There is interaction with our Division of Water's TMDL modelers and Tetra Tech modelers, but I don't know the depth or degree of those discussions.

Smith: You're helping? They're not running that train independently are they?

Roe: No, they're not.

Smith: That entire watershed is not being listed as impaired as far as TMDL, how does that work?

Roe: Multiple segments of that watershed are impaired, and this is the nutrient TMDL, that's a tough one.

Payne: All water bodies have to be looked at whether impaired, to their relevant contribution to pollution. That's why we are gathering additional data.

Roe: The TMDL is being developed for the entire Floyds Fork watershed, right? So it'd be applicable to the entire watershed whether prior or not.

Nonpoint Source (NPS) Management Plan

History and Purpose:

- The Nonpoint Source Management Plan is required by the Federal Clean Water Act Section 319(b) – State governments must have a NPS Management Program - 319(h) is the funding mechanism for implementation. It's all the Clean Water Act, just different sub-sections.



- The 3rd Management Plan developed by state government of Kentucky, the current plan was developed in 1999 for the period of 2000-2005. The time lag is due to a lack of focus on the need for plan development by EPA and Kentucky DOW, due to other more pressing issues.

NPS Management Plan will have a 5-year lifespan, from 2012 – 2017

Goals of 2012 NPS Management Plan:

Our goal for the NPS management plan is to quantify work that the Kentucky Division of Water and project partners are performing, on a daily basis to address nonpoint pollution in Kentucky.

Why the NPS Management Plan is important:

It guides the Kentucky Division of Water's nonpoint source management plan program for the next 5 years by setting short and long-term goals and objectives.

We report progress in achieving those goals and objectives to EPA Region 4 on an annual basis.

Primarily, because it provides the public with information regarding what programs and efforts are currently going on statewide to control Nonpoint Source Management Plan pollution.

The plan is broken down into functional areas:

- Agriculture
- Forestry
- On-site wastewater
- Developed lands
- Recreation
- Resource extraction
- Groundwater
- Water quantity
- Education/outreach
- Riparian or stream modification, and
- Protection of Healthy Watersheds. "It is cheaper to protect healthy than repair impaired water bodies, so it's pretty important to us."

*The nonpoint source management plan was written with a modular technique that allows individual functional areas to be pulled out of the plan and used independently;



this is useful as an educational tool for our partners, and for the public. “When we’re called out to talk to the public on a particular subject, we want to be able to extract that section, and disseminate a clear and accurate assessment of what’s going on around the state on a sub-topic.”

Project Partners:

The Kentucky Division of Water’s nonpoint source management plan program is only one of several government agencies and non-profits working to reduce nonpoint pollution in Kentucky’s water bodies.

Prior to public comment, we issued a rough draft of the management plan to 20-30+ of our close project partners such as Kentucky Division of Conservation, Natural Resources Conservation Service, Kentucky Division of Abandoned Mine Lands, Kentucky Waterways Alliance, University of Kentucky, University of Louisville, Kentucky Division of Forestry, United States Geological Survey, United States Forest Service, etc., many entities that played a role.

Most gave substantial feedback on the work that they’re doing in the realm of NPS pollution reduction. They informed us about their programs; some of those groups wrote large sections of the plan themselves. We inserted that into the document.

We will use public comments to modify or add to the draft non-point source management plan prior to submitting to EPA Region 4 for review and approval. Currently, Kentucky Division of Water has received two public comments and one additional partner agency comment from the KY Division of Forestry.

*Public input is what our nonpoint source management plan program is built around. As you may be aware, nonpoint source management plan pollution issues are for the most part non-regulatory in nature, meaning that public support and participation are vital to implementation.

Smith: Is that distributed?

Roe: Not historically.

Smith: It would be good to involve early in the process, the people who will be impacted.

Roe: We’re relying on those organizations to do it, but there is a loss-in-translation issue.

Smith: People can be helped.



Knoth: Is it out for comment now?

Roe: The 2012 NPS management plan was released for public comment May 1, 2012 and will be open for comment through May 31, 2012. We issued a general news release from the state's Energy and Environment Cabinet. We did an additional e-mail distribution through a nonpoint source management plan listserv maintained at the Kentucky Division of Water.

Knoth: I need to be on that list too.

Roe: I'll do it.

Smith: Is this is regulatory program? An education program?

Roe: Neither, it's work on the ground statewide. A large player is NRCS, with their EQUIP funding, almost \$12 million, on best management practices for Ag water quality. They've been cut to \$9 million, but they're on the ground with work.

Even the Division of Forestry bleeds into the regulatory program because loggers and timber harvesters are regulated through Division of Forestry. That is a nonpoint source pollution control, it's impactful, and a lot of people are protecting water around the state to control this type of pollution. At DOW, we are one small piece of the overall puzzle.

The plan is available for public review on the Division of Water website. Water.ky.gov comments close May 31. At present we have two public comments.

Why is the management plan important? How can public input be used?

Non-point source pollution issues are non-regulatory; therefore, we're at the mercy of the public via watershed groups and landowners and their best management practices, so public support is necessary. We don't drop a hammer on anyone, we offer a carrot of technical expertise, advice and cost-share funding, something of that nature, to try to help them modify their farm or home, to address NPS issues.

"If we don't have the public, we're out of luck."

Smith: Is that matching money, how does match work?

Roe: On 319h funding, it's 60 percent federal and 40 percent non-federal, but we are able, through creative maneuvering, to reduce cost-share burden on landowners. We try to find what we call third-party sources in non-federal match that are able to benefit the landowner to make it as easy as possible. On the other hand, we ask them to maintain best management practice for the expected lifespan. We try to make sure money spent has a long-term benefit.



Smith: How's your money looking?

Roe: It's leaner, it's actually holding well. We expect new guidance documents from EPA. Last year we went through the Office of Management and Budget and GAO review in same year.

Smith: If someone wants to apply for a 319 grant, what is the time cycle?

Roe: it's a year-long process with proposal and full-blown application. Letters of intent are due in November and the full-blown proposal is due in February, but that's subject to when EPA gives us funding. That's approximately when it comes through. We're down to \$1.3 million per year.

Smith: If someone had an idea on a grant, can they come in August or September to talk?

Roe: You can talk about new ideas year-round. The faster you talk to us, the better off you'll be. With the EPA program with which we're dealing, there are strings attached. It's not free money, so we try hard to do make the process smooth for applicants, educating them on requirements. It is a very difficult process. The earlier you start the better. To develop an application and a work plan, takes a year.

Smith: Are you the point of contact?

Roe: Yes, sir.

Aaron Keatley, Deputy Commissioner, Division of Environmental Protection

Brownfields

House Bill 465 is the only bill we pursued aggressively in the legislative session and it is related to brownfield revitalization.

Background and where we stand on some revitalization issues:

A brownfield in general is defined as any property not used adequately for its intended purpose because it's contaminated, or owners think it's contaminated. In Kentucky we have many idle properties because people aren't sure and stay away.

We not certain of the true number of brownfields in Kentucky. It's estimated that there are 8,000 brownfields here. In the North, brownfields are huge. In Kentucky, our brownfields are small and mostly rural--like a little gas station or a dry cleaner; so, we're atypical compared to many in the nation.



Division of Waste Management reviews all technical plans submitted related to remediation to make sure they are in order—what’s safe and what’s unsafe. The Division of Compliance Assistance is an outreach arm to communities and landowners.

Concerns/complications limiting clean-up and use of brownfields properties include:

1. Greenfields
“In Kentucky, we have a lot of land. It’s not like some communities that have used all available properties and it’s cost-prohibitive to go out further. We have a lot of greenfields.”
2. Liability concerns
3. Cost of clean-up (can be extensive or unknown)
4. Ability to borrow money
5. Future vision

People don’t want to make a business decision in an atmosphere of ambiguity, as far as future liability in terms, whether to take on one of these properties; banks are unwilling to give a loan.

Kentucky has made progress. In the last decade, state government has been more aggressive in pursuing federal funds for brownfield reclamation.

On technical assistance, we’ve done 60+ on-site assessments on behalf of communities. We use some of our federal dollars to eliminate their expense. It gives them more information on what they have to do to go forward. We are hands-on with consultants and landowners during the process so that they have a good technical feel for what it will take.

The Division of Compliance Assistance has been a big help. Every year, the EPA offers about \$80 million nationwide to communities to help them address brownfields. Until 2005, Kentucky got nothing. DCA started in 2006 and working on it since 2007 we have brought in \$6.5 million to the state that went directly to communities. We are first in the EPA’s Region 4, the Southeast, in monies we bring in. Other states are asking our advice now to make their states more competitive. Most federal grants go to the Northeast due to size and age of brownfields, that’s changing.

Vision is a problem. Visioning sessions, how to help communities view their properties better, to see a future with them. A lesson we learned from U.S. Corps of Engineers is to bring in a visual artist, who volunteers their time, to help communities realize a vision for what a brownfield can be after reclamation. They draw pictures for the community, giving people something to focus, a fun exercise. The artwork is quite interesting.

Progress:



- Revised cleanup standards
- Technical assistance, use state and federal resources
- Grant training
- Visioning sessions
- Tax credits, volunteer parties who clean up can be reimbursed up to \$150,000 for clean-up, or absolved of state property tax for next 3 years
- BFPP, a liability defense

On BFPP, the Federal Bonifide Prospective Purchaser liability relief concept is, if you didn't cause the problem/pollution release, you have a defense. This means if ever the federal government or a state agency says you have to do something with that property, you could argue your case in court. It's not a great level of assurance, it just means you've have tools with which to work.

Feedback has been "I want certainty." Federal government doesn't provide that, but state government now does. There was much interaction with stakeholders, with industrial groups and environmental groups. We are all on the same page, eliminating contaminants in our community and having a good tax base.

We started drafting a bill last summer. We had such much support that someone else filed the bill on behalf of the Energy and Environment Cabinet.

The primary goal of House Bill 465 was to increase certainty regarding future liability. The concept was thoroughly vetted prior to the session. It was supported by a wide range of industrial, business and environmental groups. It passed unanimously in the House and Senate.

Objective 1 of HB 465: Maintain existing clean-up standards:

- Corrective action requirements remain the same.
"It's not an effort to reduce clean-up standards in Kentucky; we have a risk-based approach that is reasonable. It did not remove any responsibility from EEC, or liability for anyone responsible for a pollution release."
- Parties that caused the release remain responsible for the release

Objective 2 of HB 465: Provide liability assurances for innocent parties that purchase brownfields. In order to qualify:

- The party must meet eligibility criteria, the same criteria as for tax credits because we want to bundle these tasks
- The Energy Cabinet must OK party's proposed land use plan
- The party must provide access if clean-up or monitoring actions are needed



Objective 3: Clarify existing Underground Storage Tank liability:

UST has its own state-funded insurance program and clean-up standards unique to that program

- Kentucky Revised Statute 224.01-400 and Kentucky Revised Statute 224.01-405 clean-up standards do not apply to USTs cleaned up under the UST program
- Division of Waste Management will modify its No Further Action letters. It certainly helps banks and landowners, everybody wins

Next steps:

- The Energy Cabinet will need to file regulations related to implementation of this bill
- The public will be involved in regulation development
- The Goal is to file draft regulations in October
- Smaller provisions in the bill may be implemented as soon as it goes into effect in July.

Smith: You need to pat yourself on the back in the way that the brownfield program interacts with everyone; it's easier to get a bill passed. This is what needs to be done on watersheds so we won't be screaming and yelling at each other at the end of the day.

Freddie Lewis, Executive Director of Office of Mine Safety and Licensing

Kentucky is a leader in eliminating substance abuse among miners. The federal government doesn't want to help. State government established a Mine Substance Abuse Task Force in 2004 to address increasing concerns about the issue and conducted meetings on the topic for one year between 2004 and 2005.

The committee studied drug screening and tracking information, rehabilitation treatment options for drug and alcohol users, incentives for employers to promote a drug-free workforce and related topics. In the end, in a final report December 2005, the committee recommended:

- Substance and alcohol testing for miners
- Initial alcohol and substance abuse education and training for new and experienced miners
- Development of Voluntary Employee Assistance Programs
- Requiring individuals to demonstrate, by submitting to a drug test, that they are drug- and alcohol-free prior to receiving initial miner certification. Violation of

drug-free statutes could result in possible probation, suspension or revocation of certification

- Authority for state government to conduct post-accident drug testing

Summary of activity/enactments on the topic in 2006 i.e. Drug Free Certification of Miners:

The General Assembly enacted House Bill 207 in its 2006 session and thereby established the nation's first program to ensure miners were drug-free as part of their certification. The program became effective July 12, 2006 and required:

Certified miners must be reported to the Office of Mine Safety if they exhibit:

- Positive drug/alcohol tests in violation of employer drug policies
- Refusal to take drug/alcohol tests; and
- Positive drug/alcohol tests following employer-sponsored rehabilitation

There are 3 levels: probate, suspend and revoke.

Commissioner of the Department of Natural Resources will suspend all certifications following an unacceptable report from a licensed mine. Miners who wish to appeal suspensions receive due process hearings before the Mine Safety Review Commission. Relevant parties use hearing procedures and settlement agreements to offer second chances to miners cited.

These agreements:

- Require clean drug tests and drug abuse evaluation prior to reinstatement
- Require periodic drug/alcohol testing, as well as counseling, if recommended, and
- Sanctions for failure to meet agreement

Impacts and observations on the results:

- Since the program began, 1,575 certified miners have been reported to OMSL for violating the drug-free status of their certifications and have received sanctions
- Workloads of OMSL, Office of General Counsel and the Mine Safety Review Commission have increased profoundly due to the numbers of miners sanctioned by the program
- 23 percent of miners sanctioned have completed the terms of probation or revocation and regained some or all of their certifications
- 11 percent of miners reported have met the burdens of their appeal, or provided evidence to the Commissioner that would support rescission of their suspensions

- 45 percent of miners reported through the process fail to retain certification
- The majority of reports from licensees are for positive tests involving the abuse of prescription drugs
- Increased use of synthetic drugs such as bath salts and K-2, creating issues for employers
- The program does not deal quickly with miners reported from other states and from unlicensed mines
- The 10-day retake on pre-cert testing has created opportunities to abuse the system

If you take their card, that's it. When a miner is making \$100,000 to \$120,000 per year, and then must say to their family "I am no longer allowed to work," it's not that he's hooked on cocaine or crack or heroin, our biggest problem is prescription pain pills, it's rampant. If you go to Eastern Kentucky, there are pill mills everywhere. Miners work in tough conditions, they're beat up, it's not a TV version, they work in spots 24 inches high two miles in, you're crawling on your elbows 10-12 hours a day to make a living, that's what these guys do and so start taking pain pills.

They're good people with a bad addiction that controls their life, they can't function. It's everywhere. Legally, bath salts and K2 are new problems for employers. There are a lot in Western Kentucky--little stores pop up and it's legal.

If you fail a test today, we'll give you 10 days to go home, study, clean up. But they go to GNC, and we can detect users with a thick tongue. If a miner fails a test in Kentucky, they go to work in West Virginia or Tennessee and their card is returned. People find ways around the laws.

HB 385 represents improvements in drug-free workplace efforts:

1. It allows Kentucky to quickly address reported violations from states with reciprocal certification agreements and non-licensed mines;
2. It treats those individuals reported by licensees and those who fail pre-certification tests in the same manner;
3. It provides treatment for miners reported for the first time, allowing certificates to be reinstated following an evaluation for substance abuse; the completion of a treatment program and a clean drug test, in lieu of an appeal or revocation

It changes the panel of drugs we test for each year because users get smart to what you're testing for.

In mine safety, you aren't measured by the good to be honest, you'll never know how many you helped get home, but you must do what's right for Kentucky to provide a safe workplace so they can provide for families. They're good people with bad habits who



need help. We can't have them working in our coal mines. I am not against these people, I love them but they have bad habits and need help and rehabilitation.

Grisham: I applaud your efforts, zero tolerance. This reminds me of the nuclear power plants of the '70s, random drug testing. How are we controlling say Loritab prescriptions for those who go down in the hole? I am from a family that either farms or mines—Old Bens, Sahara.

There is a bio-assay sample/test. You're evaluated by medical professionals, and they let you heal up, not because of any wrong-doing. There is no way to control this.

Lewis: Basically, that's controlled through a company's drug policies. Anytime, a miner has a nerve pill, a pain pill, or muscle relaxer prescription, they're required to give the prescription to their supervisor due to operating heavy equipment.

We've come a long way since then because now you can fail a test for abusing a prescription. Now we test for levels, but the law needs more bite, a mandatory policy at the vendor level.

We led the nation on the drug law, but it's not a mandatory law. What we did, we offered mine owners a 5 percent reduction in their compensation if they had a drug policy. It has never been made a mandatory law. I can't go to a boss and say "You test them now."

If I were an owner, I'd want a good drug policy, but fly-by-nights don't test their employees. We find fly-by-nights that say: "Hey, that's all I can get for employees, leave us alone. Don't come up here talking about drugs because I'm having trouble getting employees as it is."

Smith: If you as an inspector see someone impaired, what can you do?

Lewis: I would go to his supervisor, our law says that if they are "stupored," meaning you are kind of out of it, you can't go underground. I can suggest sending him for a drug test and I would not let him leave the property by himself. I would call a family member or police, but I can't detain him. You are the mine inspector, not the state police.

Smith: But you can remove him from the operation?

Lewis: Absolutely, you can remove him but you've just have to be careful how to do it.

Delambre: These fly-by-nights you've mentioned, can they hire uncertified miners?

Lewis: No, absolutely not.



Delambre: So people with a drug problem can go to those and know they won't be tested.

Lewis: That's what we run into. We try to get owners to come on board and say "Why wouldn't you want a drug policy?" In KY Office of Mine Safety and Licensing, that the rest of the nation lacks, we have analysts who sit with foremen and operations officers and teach and train on the job in every district. We've offered and we say "We want you to produce coal, we just want you to do it safely and by the law, that's all we ask."

I remember Darby May 2006 was the toughest day of my life as a miner, after recovering bodies. As a minister, I was asked to go to the church where victims of mine disaster were gathered. They were devastated.

EQC Discussion:

Smith comments and discussion: The current form exceeded my expectations--oil and gas. New gas finds, wet gas, shutting wells. Kentucky is a dry gas state. How are wells closed down and sealed up?

I like the looks of the State of the Environment document; it exceeded my expectations in its current form.

Double-check your schedules and get back to Arnita. What issues would you like to discuss where oil and gas is concerned. One of the issues we thought we might need to address, because of the new gas finds east and north of here, are what they call wet gas. Kentucky is a dry gas state, so we don't have the oil and gas issues this year, I thought we would have. The fact that they are shutting these in on landowners, brings about a need to see how these wells are being cleaned up.

Delambre: We will be talking about the quarterly meetings?

Smith: Send us what you are thinking. What we do, how we do it, what we need as an organization on how to be better--issues may want to address in quarterly meetings next year.

Gadson: If you don't mind, I can send out some tentative dates for quarterly meetings. We missed a quarterly meeting, so look at dates convenient to you. Do you still want Division of Water to meet with us for the annual meeting?

Smith: Yes. There are a tremendous number of issues out, in engaging the public; we need to have that information out on our website so the public understands when things are going to happen. These things are too critical to the public I don't care where you're sitting, to what's going on--when do I have to comment? When do certain things become effective?

Over the past 20 years, several issues didn't impact communities the way they do now. On some water issues, change can become a half-billion dollar investment. What does that mean? Not saying it shouldn't be done, but that community needs to be aware of what's going on and they don't know.

Gadson: Want to make it a recommendation?

Smith: We will get to that but tonight I want to plant the seeds, the public has got to get better informed on these issues, I don't want to go through another TMDL like I see in South Elkhorn. This was the last one that was written, not that it's a bad TMDL, it's just nobody knows what it is and what does it do?

I don't want to go through a process like I've been through on Floyd's Fork. It doesn't matter whether I'm a rabid environmentalist, or an industrialist. What's been done there is not right.

Information is not being brought into that system appropriately and you're going to have big fights at the end when it's settled up. I'd like to say it's a paradigm shift on water issues. You have communities now taking control of their stormwater. It impacts everybody but not many people know what's going on, or when it's going on, whether you're in Calvert City or Louisville or Lexington. We can do a better job, and we have to, and we need to talk about it as a group so we can make some intelligent recommendations. We are getting into some phases of implementation of programs that are fraught with big problems, if we don't try to work together as communities to address these things.

Delambre: I'd like to discuss fracking next year and how we are moving a lot of investment to gas power production and how volatility in the market is going to affect prices. It's a big issue because you are making 30-year capital investments based on the idea that gas is going to go up. Vermont has made fracking illegal in their state and this may be a trend. If anything, it will cause a concern on the price of gas.

Smith: Probably what you are looking at is having a gas person come in and tell you what's going on in Kentucky and I think what's going on isn't good although we have an ocean of gas out there, but what will be used won't be Kentucky's gas.

To get a sense of how this issue is gaining notoriety in the press and how it impacts Kentucky's position in this area. I know what will happen in our chemical plants, the wet gas has by-products that will be used to replace gas. There are pipelines under consideration today that will bring these natural gas waste by-products into our chemical areas in Western Kentucky. This means that they will replace the gas that they are using now, which puts Kentucky in a worse position than it is now.

On the other hand, as a state, but we must develop a natural gas industry, through gas biomass, etc. We must make value-added products in Kentucky using our natural gas, it's important to make that happen. Coal resources - we don't have the demand on those and won't have in the foreseeable future. We will have a big problem in certain areas of our state if we don't come up with something.

Delambre: That's one topic for discussion.

Smith: People don't get it. It should be a concern to all. We will leave pockets of unemployment statewide.

Gadson: Did I hear recommendation of the analyst program in mining?

Smith: Once we have a chance to talk about mine safety, there usually is something out there. We need some time to think about it. Maybe Dr. Holmes can make some recommendations.

This institution (KSU) has impressed me over the last several years with its environmental projects.

Holmes: KSU has 3 topical areas; maybe we can do a tour. How many recommendations has EQC had in the last year? Maybe we can follow-up.

Gadson: One recommendation and one resolution.

Smith: There is one outstanding on Pike County GIS.

Gadson: There is another one, talking grass roots here, see copies about Black Leaf neighborhood in West Louisville in your packet. You will see in some cases the DDT is 308,000 parts per billion. I was informed the standard for any one of the chemicals listed is 100 parts per billion per EPA.

The Cabinet is trying to be pro-active, out in front of this as it's a potential lawsuit waiting to happen because it's sitting in the middle of a community. There are 50 houses that surround this. I would like to see the Division of Waste get more involved.

The community is aware that EPA testing has occurred in their yards. There is a day care in the area. There is flooding in the area. There has been run-off for years. The main thing is that the final testing of the yards will not be public because of personal information. We have asked affected persons to share their information and they have agreed. The Division of Waste may be waiting for more information from EPA.

Smith: The standard has been, has this been applied according to the label on the container and has it been applied appropriately?



Knoth: The big problem is that this stuff hasn't been allowed in the U.S. in 20 years, how are you going to figure out where and when?

Gadson: Black Leaf was a distributor there for years. It is cause for concern, surface and depth contamination. Chemicals have been on site for years and now testing has given cause for concern. I will update you when I have more information, we can discuss at the annual meeting.

On the Lee's Lane landfill in Southwest Jefferson county, the Center for Disease Control, hopefully will revisit the possibility of doing a health assessment of nearby residents. Residents around the landfill want the site returned to the Superfund list, as it has been de-listed. EPA is doing some re-testing of the site.

The Metropolitan Sewer District monitors there have not worked properly for a number of years, so the community feels that the data they have been using to say everything is OK, is skewed. Equipment has been replaced; the big concern by Division of Waste is easy accessibility.

In fact, it's on Facebook, "come and race on the site." Teens in the neighborhood access the landfill via All-Terrain Vehicles; there are races where they kick up contaminated dirt.

Please visit our new EQC Facebook and YouTube sites. Janet has been the catalyst. Bobbie Ann Mason, our keynote speaker, was in The Courier Journal and the public has been calling.

We are still in partnership with WBKI on "Guardians of the Environment;" the station is seeking sponsors at a rate of \$60,000 for public service announcements.

Herman: Thank you to Kim for setting up a tour, a new building opened at KSU two weeks ago in the aquaculture division. It's state of the art, probably premier program among the 5 or 6 in the nation.

Jason Delambre made the motion to adjourn. Tom Herman seconded at 8:40 p.m.

THESE ACTIONS, ALONG WITH THE AGENDA ITEMS, MAKE UP THE OFFICIAL MINUTES, WHICH ARE ON FILE IN THE OFFICE OF THE SECRETARY

Signed by:

Date: _____



Scott Smith, Chairman