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REVISOR of STATUTES

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MEMORANDUM

To: The House Committee on Water and Environment
From: Nick Myers, Office of Revisor of Statutes
Date: January 18, 2018
Subject: House Bill 2452

House Bill 2452 amends current law to impose a time limitation on certain conservation easements that may be required as a condition of a permit issued under the Clean Water Act (CWA).

Background Information

Section 404 of the CWA requires the Corps of Engineers to issue a permit before any proposed project can discharge dredged or fill materials into certain aquatic resources. To obtain such a permit, the CWA requires an applicant to take all appropriate and practicable steps to avoid and minimize adverse impacts to aquatic resources. For certain unavoidable impacts, compensatory mitigation may be required to ensure compliance with the CWA.

Compensatory mitigation is defined as restoration, establishment, enhancement, or preservation of aquatic resources to offset unavoidable adverse impacts that remain after all appropriate and practicable avoidance and minimization has been achieved. Compensatory mitigation projects are typically accomplished through one of the following three mechanisms: Mitigation banks, in-lieu fee programs, or permittee-responsible mitigation.

Federal regulations provide that a “compensatory mitigation project must be provided with long-term protection through real estate instruments or other available mechanisms.”¹ The real estate instrument may be provided by a conservation easement, certain transfers of title, or a restrictive covenant. An individual’s permit would specify the type of long-term site protection instrument that would be required to satisfy long-term protection for compensatory mitigation projects.

¹ 33 C.F.R. § 332.7.

House Bill 2452

House Bill 2452 amends K.S.A. 58-3811 and would limit the duration of conservation easements that are either required to satisfy compensatory mitigation requirements under 33 C.F.R. § 332 or those that are imposed as a special condition of a permit pursuant to 33 C.F.R. § 325. New subsection (g)(1) would prohibit such conservation easements from being perpetual in nature and limits the duration of such easements to the “life of the project.”

New subsection (g)(2) would authorize relevant parties to petition the Division of Water Resources to determine whether the life of the project for such conservation easement has been completed and whether termination of such conservation easement is necessary. Unless the petition is meritless, the Division of Water Resources would be required to convene all relevant parties and receive evidence upon whether the life of the project has been completed before making its determination. Such a conservation easement would terminate 30 days after the Division of Water Resources has issued its determination.

“Life of the project” is defined in subsection (g)(4) and means that a conservation easement:

- (A) No longer accomplishes the purpose that such conservation easement was designed to service due to impracticability or impossibility;
- (B) is no longer beneficial to the public;
- (C) has satisfied performance standards and has satisfied the requirements of a long-term management plan; or
- (D) no longer requires a long-term management plan to ensure the sustainability of a mitigation project.