

MINUTES OF THE HOUSE AGRICULTURE & NATURAL RESOURCES COMMITTEE

The meeting was called to order by Vice-Chairman Dan Kerschen at 9:00 a.m. on March 3, 2011, in Room 783 in the Docking State Office Building.

All members were present except:

Representative Dan Collins - Excused
Representative Rocky Fund - Excused
Representative Michael Peterson - Excused
Representative Larry Powell - Excused

Committee staff present:

Sean Ostrow, Office of the Revisor of Statutes
Raney Gilliland, Kansas Legislative Research Department
Kay Scarlett, Committee Assistant

Conferees appearing before the Committee:

Susan Metzger, Manager-Watershed Coordination Unit, Kansas Water Office
Herb Graves, Executive Director, State Association of Kansas Watersheds
Duane Hund, Contracting Officer, Mill Creek Watershed District No. 85 (written only)

Others attending:

See attached list.

Representative Hayzlett moved to approve the minutes of February 14, 15, 16, 17, 18, and 21. Seconded by Representative Arpke, the motion carried.

Hearing on HR 6009 – A resolution to change the language of conservation easement assignments from “perpetuity” to “life of the project.”

Vice-Chairman Kerschen opened the hearing on **HR 6009**. Sean Ostrow, Office of the Revisor of Statutes, explained the resolution urging the U.S. Army Corps of Engineers to accept conservation easement language for the “life of the project” and not for “perpetuity.”

Susan Metzger, Manager-Watershed Coordination Unit, Kansas Water Office, appeared in support of **HR 6009**. The Kansas Water Office feels that the alternative language proposed in this Resolution will increase landowner participation in mitigation activities while still meeting the goals of the Final Rule regarding *Compensatory Mitigation for Losses of Aquatic Resources* published in the April 10, 2008, Federal Register. She explained that compensatory mitigation requirements are triggered when an applicant proposes to discharge, dredge, or fill a wetland, stream, or other water of the United States through a Clean Water Act Section 404 permit.

While not covered in this Resolution, she shared other challenges the Kansas Water Office face with mitigation in the state. In 2008, the Kansas City District of the U.S. Army Corps of Engineers adopted stream mitigation guidelines for activities such as filling, impounding, or armoring a stream. In the first two years of implementation of the guidelines, they are learning of the impact they are having on some construction and water resource projects. Specifically, concerns have been expressed by watershed districts that their projects are at a disadvantage compared to many other projects due to the length of stream that is typically impacted. Because a large factor in determining mitigation debits is based on stream length impacted, mitigation costs can approach, and sometimes exceed, the cost of the project itself. The Kansas Water Office is working with state and federal natural resource agencies to address these concerns. (Attachment1)

Herb Graves, Executive Director, State Association of Kansas Watersheds, testified in support of **HR 6009** explaining that a Clean Water Act Section 404 permit must be issued by the U.S. Army Corps of Engineers before any watershed dam is constructed. The proven way to protect these mitigation measures is to enter into agreements with landowners through conservation easements. The State Association of Kansas Watersheds, the watershed districts of Kansas, and most importantly the landowners of Kansas feel “the life of the project” is a more understandable and acceptable term for the easement than “perpetuity.” It is their hope that with the approval of **HR 6009**, the U. S. Army Corps of Engineers will adopt the new language. (Attachment 2)

CONTINUATION SHEET

The minutes of the House Agriculture & Natural Resources Committee at 9:00 a.m. on March 3, 2011, in Room 783 of the Docking State Office Building.

Duane Hund, Contracting Officer, Mill Creek Watershed District No. 85, submitted written testimony in support of **HR 6009**. He expressed concern that federal Clean Water Act Section 404 permit requirements are not imposed uniformly among the states. (Attachment 3)

As there were no other conferees, Vice-Chairman Kerschen closed the hearing on **HR 6009**.

Subcommittee Update on HB 2272 – Exempting certain minor construction projects from state and federal water regulations.

Subcommittee Chairman Representative Kerschen distributed copies of a proposed alternative to **HB 2272** submitted by David Barfield, Chief Engineer, Kansas Department of Agriculture, Division of Water Resources. Mr Barfield believes this alternative approach would make it unnecessary to define stream obstruction in statute and is straightforward enough to make the permit determination process previously drafted unnecessary. The Department still plans to move forward in rules and regulations with a simpler permitting process for minor projects which would require permitting. (Attachment 4)

The meeting adjourned at 9:25 a.m. The next meeting of the House Agriculture & Natural Resources Committee is scheduled for March 7, 2011.

HOUSE AG & NATURAL RESOURCES COMMITTEE
GUEST LIST

DATE: MARCH 3, 2011

[illegible]



**Before the
Agriculture and Natural Resources Committee
Testimony on HR 6009
Susan Metzger, Manager-Watershed Coordination Unit, Kansas Water Office
March 3, 2011**

Chairman Powell and members of the Committee, I am Susan Metzger, Manager of the Watershed Coordination Unit of the Kansas Water Office, and I am pleased to appear today in support of HR 6009.

Compensatory mitigation requirements are triggered when an applicant proposes to discharge, dredge, or fill a wetland, stream, or other water of the United States through a Clean Water Act Section 404 permit. According to the Final Rule regarding *Compensatory Mitigation for Losses of Aquatic Resources* published in the April 10, 2008 Federal Register, a site protection instrument is one of the 12 fundamental components of a mitigation plan. The goal of the rule is to ensure long-term protection of these sites through real estate instruments or other available mechanisms.

Both directly and indirectly, the Kansas Water Office has experienced the challenges of implementing mitigation activities when a permanent conservation easement is required. The Kansas Water Office feels that the alternative language proposed in this Resolution will increase landowner participation in mitigation activities while still meeting the goals of the Final Rule.

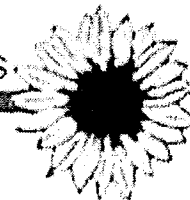
While not covered in this Resolution, we would like the opportunity to share some other challenges we face with mitigation in the state. In 2008, the Kansas City District of the U.S. Army Corps of Engineers adopted stream mitigation guidance for activities such as filling, impounding, or armoring a stream. Many stakeholders were involved in the development of the guidance. In the first two years of implementation of the guidelines, we are learning of the impact they are having on some construction and water resource projects. Specifically, concerns have also been expressed by watershed districts that their projects are at a disadvantage compared to many other projects due to the length of stream that is typically impacted. Because a large factor in determining mitigation debits is based on stream length impacted, mitigation costs can approach, and sometimes exceed, the cost of the project itself. The Kansas Water Office intends to work with the state and federal natural resource agencies to identify opportunities to address these concerns.

In summary, changes in the implementation of the Final Rule and Stream Mitigation Guidelines could reduce a burden on certain construction activities while still ensuring the proper compensation for loss of aquatic resources. We feel that HR 6009 is a step in that direction.

I appreciate the opportunity to appear today and will stand for questions at the appropriate time.



STATE ASSOCIATION
OF KANSAS WATERSHEDS



Testimony By:

Herbert(Herb) R. Graves Jr.
SAKW Executive Director

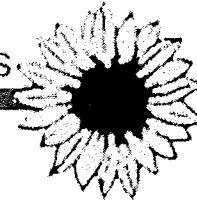
In Support of HR 6009

House Agriculture and Natural Resources Committee

Thursday, March 3, 2011



STATE ASSOCIATION
OF KANSAS WATERSHEDS.



Chairman Powell, Members of House Ag and Natural Resources,

SAKW stands in support of HR - 6009.

Section 404 of the Clean Water Act requires mitigation for any fill or dredging operations that adversely impacts the Waters of the US. Watershed Districts in Kansas understand and support reasonable mitigation of environmental impacts. Watershed dams can alter stream, woodland, and wetland ecosystems and must provide and protect mitigation measures that restore these environmental losses. A Section 404 permit must be issued by the Regulatory Authority, the US Army Corps of Engineers(Corps), before any watershed dam is constructed.

The proven way to protect these mitigation measures is to enter into agreements with landowners through conservation easements. The conservation easements states the parameters by which the landowner must agree to as far as the use and protection of the installed or protected mitigation measures.

The Corps, being the regulatory agency, requires that they not only be a third party to the easements, but they also must approve the final language of the easement to include the term by which the easement must remain in effect. Finally we get to the issue at hand.

The Corps stands fast on requiring the conservation easement be for a term of "perpetuity". SAKW, the watershed districts of Kansas, and most importantly the landowners of Kansas feel "the life of the project" is a more understandable and acceptable term for the easement. As long as the dam remains as a functioning structure ("life of the project"), the impacted streams, woodland, and wetlands must be offset by a preserved mitigation plan.

In most cases, landowners want to have some since of conclusion when they sign away the rights of their lands for the use by others. "Perpetuity" just has no since of termination to them. "The life of the Project" on the other hand does present a sense of conclusion because the dam is an object that they can see and relate to its existence.

After many months of back and forth debate, the Corps finally agreed to insert a kind of a SAKW exception clause in the easement language. The exception being the easement could be terminated if and when the dam would someday disappear and the landscape was returned to pre-dam days. The easement still had to be initially secured for perpetuity.

SAKW has presented its case to Col. Anthony Hofmann, Commander of the Kansas City District of the US Army Corps of engineers, who said, until regulation changes allowing such things as "life of the project" easements come down from a higher authority his hands are pretty much tied.

We have contacted Senator Roberts and Moran who both have expressed an interest in using this issue as one more example of federal regulations going beyond reasonableness and to see what could be done to accommodate Col. Hofmann's need for a higher directive.

With HR-6009 being approved and sent to the right people, it is hoped the Corps gets a very clear picture that their regulations are too rigid and lack good judgment.

SAKW appreciates the opportunity to present this written testimony and we wish your committee the best in the difficult days ahead.

Herbert R. Graves Jr.
SAKW Executive Director

Kansas House Committee on Agriculture and Natural Resources

Chairman Rep. Larry Powell
Vice Chairman Rep. Dan Kerschen
Minority Member Rep. Jerry Williams

Committee Members: Tom Arpke, Elaine Bowers, Bob Brookens, Dan Collins, Rocky Fund, Gary Hayzlett, Brett Hildabrand, Kyle Coffman, Tom Moxley, Charlotte O'Hara, Willie Prescott, Caryn Tyson, Vince Wetta, Bob Grant, Ponka-We Victors and Mike Peterson.

From: Duane Hund, Contracting Officer
Mill Creek Watershed District #85
Wabaunsee, Geary and Morris Counties

Mr. Chairman and Committee Members,

On behalf of the board of directors of the Mill Creek Watershed District we ask for your approval of House Resolution No. 6009. We need your support to send a message to the Corps of Engineers that requiring Perpetuity language within conservation easements required for Federal 404 water quality permits is clearly an over reach by the federal government.

We are annoyed that within the past 18 months the Corps has initiated this requirement upon their jurisdiction in Kansas but do not impose this requirement in other states such as our neighbors to the east in Missouri.

Watershed dams are expected to last for 100 years before decommissioning. The conservation easements should only last as long as the structure is viable. No landowner should have to give an easement for eternity. This action is an insult to the landowners who continue to preserve the very habitat the Corps seeks to mitigate. I might add the landowners in our district donate the easements for our detention dams. The least the government could do is be fair and equitable concerning the duration of conservation easements.

Thank you for your support of House Resolution No. 6009

Sincerely,

Duane Hund
32409B E. Springcreek Road
Paxico, Kansas 66526

785-636-5477

dhund@ksu.edu

House Ag & Natural Resources
March 3, 2011
Attachment 3

Judy Marks

From: Barfield, David [David.Barfield@KDA.KS.GOV]
Sent: Wednesday, February 23, 2011 6:54 PM
To: 'judy.marks@house.ks.gov'
Subject: Fw: proposed substitute for HB 2272

Fyi
David Barfield

From: Barfield, David
Sent: Wednesday, February 23, 2011 06:41 PM
To: dan.kerschen@house.ks.gov <dan.kerschen@house.ks.gov>; willie.prescott@house.ks.gov <willie.prescott@house.ks.gov>; vince.wetta@house.ks.gov <vince.wetta@house.ks.gov>; Dennis.Pyle@senate.ks.gov <Dennis.Pyle@senate.ks.gov>
Cc: Wilson, Chris; Steve Swaffar <swaffars@kfb.org>; john@kla.org <john@kla.org>; Raney Gilliland <Raney.Gilliland@KLRD.ks.gov>; Graves, Paul
Subject: proposed substitute for HB 2272

Representatives Kerschen, Prescott, and Wetta, Senator Pyle and others,

As requested in response to the sub-committee's discussion, below is a proposed alternative to HB 2272 and explanation. It entirely replaces our previous proposed alternative. With this approach, we do not believe it necessary to define stream obstruction in statute. We also believe it straightforward enough to make the permit determination process previously drafted unnecessary (we still plan to move forward in regulations with a simpler permitting process for minor projects which would require permitting).

New sections, likely 82a-301(c) and (d)

(c) The prior written consent or permit of the chief engineer required by subsection (a) shall not apply to water obstructions that meet all of the following requirements:

(1) The water obstruction is not a dam as defined in subsection (b),

(2) The water obstruction does not permanently impound water,

(3) The water obstruction is not located within an incorporated area,

(4) The water obstruction is completely located in excess of 500 feet from any property boundary, and

(5) The watershed area above the obstruction is 640 acres or less.

(d) In the event the chief engineer determines that it is necessary for the protection of life or property, a water obstruction that is not permitted pursuant to subsection (c) shall be required to be permitted as provided in subsection (a).

Here is some explanation on the proposal:

House Ag & Natural Resources
March 3, 2011
Attachment 4

- We did NOT strictly limit the language to farm operations. The limitations to unincorporated areas and the required distances to adjacent properties will cause this "exemption" to be applied in rural areas and mostly to farm operations. However, we have a set of applications we expect to receive in the future for roads to access wind farms that we think can and should be exempted under these provisions.
- We have NOT limited it to culverts and low water crossings but instead have limited all stream obstructions we permit EXCEPT dams or structures that permanently impound water. We feel with the setback distances and other limitations, there should be little potential for impact to neighbors, except for dams and structures that impound water.
- We felt set back distances was the most straightforward and understandable way to minimize the potential for these projects to effect others. The proposed distance represents our judgment of the distance needed, at least for the vast majority of the cases, to prevent projects from backing water onto another property upstream and for the effect of projects to be minimized downstream.
- For this specific exemption, we are proposing a 640 acres drainage area statewide (we will still use the 240/320/640 acres for projects not meeting these requirements).
- Rather than a waiver or exemption of jurisdiction, section (c) allows a individuals wishing to construct projects meeting these requirements to do so without prior consent of the chief engineer. Section (d) states that if there is a problem, the chief engineer can require a permit. This was our understanding of the sub-committee's desire.

Raney, please forward this on to the appropriate committee staff.

Please let us know if there are any questions. We would be happy to meet with the subcommittee for additional discussion if and when needed.

Thanks.

David W. Barfield

Chief Engineer
Kansas Department of Agriculture, Division of Water Resources
785-296-3710

David.Barfield@kda.ks.gov

<http://www.ksda.gov/dwr>

<http://www.ksda.gov/dwrcurrents>