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Senator Dennis Pyle

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JOINT COMMITTEE ON SPECIAL CLAIMS
AGAINST THE STATE
JOINT COMMITTEE ON STATE
TRIBAL RELATIONS

February 17, 2011

Good Morning Chairman Powell and members of the committee.

Thank you for holding hearings on HB 2272 and for the opportunity to testify in support of the concept of exempting production agriculture from some costly and burdensome regulations.

What are the consequences of installing a culvert, low water crossing, stock pond, etc, for spraying, fencing, tilling, checking livestock or other agricultural purposes?

To those of us in agriculture it could be access to property, adding property value, or even added productivity.....On the other hand the consequences can also mean a lot of unnecessary regulatory requirements that impede and obstruct productivity and slowly but surely continue to erode private property rights. While these activities are exempt for production agriculture under the Clean Water Act Title 33 chapter II, part 323.4 (white handout), apparently the state is not completely exempting these activities. Let me be clear, the purpose for requesting the bill is to get these same federal exemptions for agricultural activities exempted at the state level.

For your convenience I have provided a copy of the Kansas Statutes (green handout) pertaining to these activities. Also provided are the regulations which deal with these issues. Please look closely at (blue handout) K.A .R. 5-42-1 (pg 54), K.A.R. 5-42-2 (pg 56), and others. We can clearly see the burden of cost and time to producers. Please note also the additional authority under K.A.R. 5-40-6, b (pg 13).

I would also like to point out to the committee the proposed regulatory changes submitted by the Kansas Department of Agriculture, Division of Water Resources, Water Structures, Draft Rules and Regulations 11/29/2010 (yellow handout). Please note the definition of 'minor stream obstruction' on page 8, specifically "other structures with limited impact on stream flow."

Farmers, ranchers, contractors, and most others in production agriculture just want to be productive without burdensome laws and regulation. Sometimes concerns over safety or water quality dictate and necessitate intervention. However, it is my belief that certain current regulations and proposed regulations go beyond the necessary.

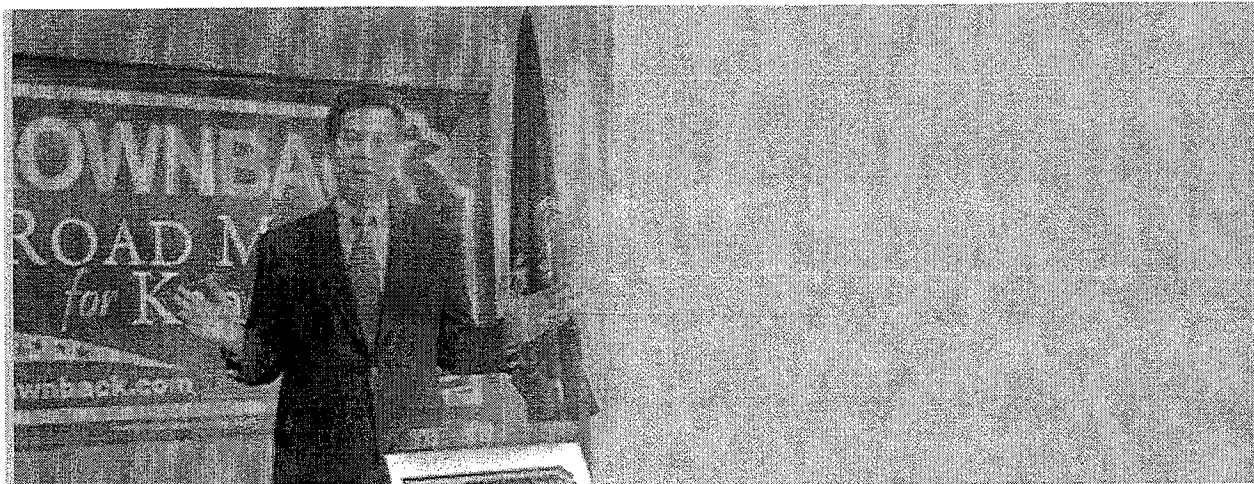
It is time to realize that the exemptions are needed, and that a lack of timely action on the legislature's part to implement these exemptions is hurting our agricultural producers.

Thank you for your time and consideration.

House Ag & Natural Resources
February 17, 2011
Attachment 1

*Lichita
Fagle
August*

Brownback: reduce taxes and regulation for business



Sen. Sam Brownback discusses economic road map

Sen. Sam Brownback today promised lower taxes and reduced regulation for business if he is elected governor.

He said he plans to create an "office of the repealer" to target outdated or ineffective regulations.

He also said he will create a citizen advisory panel to recommend deletion of state laws and regulations.

Brownback vowed to continue the now 10-year fight to win Boeing a contract to build the next generation of Air Force tanker planes.

He said he plans to pursue allegations that the government of Brazil is violating international trade agreements by subsidizing Brazillian planemaker Embraer.

The economic provisions are part of the first of several major policy statements Brownback will be issuing as part of his campaign "Road Map for Kansas."

- By Dion Lefler

Read more: <http://blogs.kansas.com/gov/2010/08/10/brownback-reduce-taxes-and-regulation-for-business/#ixzz1EE2gd4bL>

TITLE 33 - NAVIGATION AND NAVIGABLE WATERS

CHAPTER II - CORPS OF ENGINEERS, DEPARTMENT OF THE ARMY, DEPARTMENT OF DEFENSE

PART 323 - PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES

323.4 - Discharges not requiring permits.

(a) General. Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in 323.4(a)(1)(iii). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation.

An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.

(iii)(A) Cultivating means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality or yield.

(B) Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.

(C)(1) Minor Drainage means: (i) The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands.

(Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a section 404 permit.); (ii) The discharge of dredged or fill material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvicultural wetland crop production; (iii) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of CWA, and which are in established use for the production of rice, cranberries, or other wetland crop species. (The provisions of paragraphs (a)(1)(iii)(C)(1) (ii) and (iii) of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/non-wetland crop rotation (e.g., the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas.) (iv) The discharges of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar

blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production.

Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year of discovery of such blockages in order to be eligible for exemption.

(2) Minor drainage in waters of the U.S. is limited to drainage within areas that are part of an established farming or silviculture operation.

It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

(D) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

(E) Seeding means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

(3) Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches.

Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

(4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the U.S. The term construction site refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.

(5) Any activity with respect to which a State has an approved program under section 208(b)(4) of the CWA which meets the requirements of sections 208(b)(4) (B) and (C).

(6) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. These BMPs which must be applied to satisfy this provision shall include those detailed BMPs described in the State's approved program description pursuant to the requirements of 40 CFR 233.22(i), and shall also include the following baseline provisions: (i) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the U.S. shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions; (ii) All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into waters of the U.S.; (iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows; (iv) The fill shall be properly stabilized and maintained during and following construction to prevent erosion; (v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself; (vi) In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the U.S. shall be kept to a minimum; (vii) The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body; (viii) Borrow material shall be taken from upland sources whenever feasible; (ix) The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species; (x) Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist; (xi) The discharge shall not be located in the proximity of a public water supply intake; (xii) The discharge shall not occur in areas of concentrated shellfish production; (xiii) The discharge shall not occur in a component of the National Wild and Scenic River System; (xiv) The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and (xv) All temporary fills shall be removed in their entirety and the area restored to its original elevation.

(b) If any discharge of dredged or fill material resulting from the activities listed in paragraphs (a) (1) through (6) of this section contains any toxic pollutant listed under section 307 of the CWA such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a section 404 permit.

(c) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a) (1) through (6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A conversion of a section 404 wetland to a non-wetland is a change in use of an area of waters of the United States. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.

(d) Federal projects which qualify under the criteria contained in section 404(r) of the CWA are exempt from section 404 permit requirements, but may be subject to other State or Federal requirements.