

HOUSE BILL No. 2272

By Committee on Agriculture and Natural Resources

2-10

1 AN ACT concerning water; relating to regulation by the department of
2 agriculture, division of water resources.

3
4 *Be it enacted by the Legislature of the State of Kansas:*

5 Section 1. (a) As used in this section:

6 (1) "Construction site" means any site involving the erection of
7 buildings, roads and other discrete structures and the installation of
8 support facilities necessary for construction and utilization of such
9 structures. Construction site includes, but is not limited to, any other land
10 areas which involve land-disturbing excavation activities, including
11 quarrying or other mining activities, where an increase in the runoff of
12 sediment is controlled through the use of temporary sedimentation basins.

13 (2) "Cultivating" means physical methods of soil treatment employed
14 within established farming or ranching lands on a farm or ranch to aid
15 and improve their growth, quality or yield.

16 (3) "Established operation" means on-going farming, silviculture or
17 ranching activities, including activities on areas lying fallow as part of a
18 conventional rotational cycle. Activities which bring an area into
19 farming, silviculture or ranching use are not part of an established
20 operation. An operation ceases to be established when the area on which
21 it was conducted has been converted to another use or has lain idle so
22 long that modifications to the hydrological regime are necessary to
23 resume operations.

24 (4) "Harvesting" means physical measures employed directly upon
25 farm or ranch crops within established agricultural lands to bring about
26 their removal from farm, forest or ranch land, but does not include the
27 construction of farm or ranch roads.

28 (5) "Minor drainage" means the discharge of dredged or filled
29 material:

30 (A) Incidental to connecting upland draining facilities to waters
31 within this state adequate to effect the removal of excess soil moisture
32 from upland croplands. Construction and maintenance of upland
33 facilities, such as ditching and tilling, incidental to the planting,
34 cultivating, protecting or harvesting of crops, involve no discharge of
35 dredged or fill material into waters of the state, and as such never require
36 a section 404 permit or any further authorization or permit of the Kansas

1 water office or the department of agriculture, division of water resources;

2 (B) for the purpose of installing ditching or other such water control
3 facilities incidental to planting, cultivating, protecting or harvesting of
4 rice, cranberries or other wetland crop species, where these activities and
5 the discharge occur in waters within this state, which are in established
6 use for such agricultural wetland crop production;

7 (C) for the purpose of manipulating the water levels of, or regulating
8 the flow or distribution of water within, existing impoundments, which
9 have been constructed in accordance with applicable requirements of the
10 clean water act, 33 U.S.C. §§ 1251-1387, which are in established use for
11 the production of rice, cranberries or other wetland crop species.
12 Subsections (a)(5)(B) and (a)(5)(C) apply to areas that are in established
13 use exclusively for wetland crop production as well as areas in
14 established use for conventional wetland/non-wetland crop rotation where
15 such rotation results in the cyclical or intermittent temporary dewatering
16 of such areas; and

17 (D) the discharges of dredged or fill material incidental to the
18 emergency removal of sandbars, gravel bars or other similar blockages
19 which are formed during flood flows or other events, where such
20 blockages close or constrict previously existing drainageways and, if not
21 promptly removed, would result in damage to or loss of existing crops or
22 would impair or prevent the plowing, seeding, harvesting or cultivating of
23 crops on land in established use for crop production. Such removal does
24 not include enlarging or extending the dimensions of, or changing the
25 bottom elevations of, the affected drainageway as it existed prior to the
26 formation of the blockage. Removal must be accomplished within one
27 year of discovery of such blockages in order to be eligible for exemption.

28 (6) "Plowing" means all forms of primary tillage, including
29 moldboard, chisel or wide-blade plowing, discing, harrowing and similar
30 physical means utilized on farm, forest or ranch land for the breaking up,
31 cutting, turning over or stirring of soil to prepare it for the planting of
32 crops. Plowing does not include the redistribution of soil, rock, sand or
33 other surficial materials in a manner which changes any area of the waters
34 of the state to dry land. Plowing does not involve a discharge of dredged
35 or fill material.

36 (7) "Section 404 permit" means a permit issued pursuant to the clean
37 water act, 33 U.S.C. §§ 1251-1387.

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

41 (9) "Silviculture" means the care and cultivation of forest trees.

42 (10) "Stock pond" means a natural or manmade impoundment of
43 water appurtenant to an agricultural operation and used for beneficial

1 agricultural purposes.

2 (b) Minor drainage in waters of the state is limited to drainage
3 within areas that are part of an established farming or silviculture
4 operation and does not include drainage associated with the immediate or
5 gradual conversion of a wetland to a non-wetland or conversion from one
6 wetland use to another.

7 (c) Except as provided in subsections (d) and (e) and
8 notwithstanding any other law to the contrary, any discharge of dredged
9 or fill material that may result from any of the following activities is not
10 prohibited by or otherwise subject to regulation under 33 U.S.C. § 404 or
11 any other state law, rule or regulation:

12 (1)(A) Normal farming, silviculture and ranching activities, such as
13 plowing, seeding, cultivating, minor drainage and harvesting for the
14 production of food, fiber and forest products, or upland soil and water
15 conservation practices.

16 (B) To be exempt, the normal farming, silviculture and ranching
17 activities shall be part of an established operation. If such activity takes
18 place outside waters within this state or if it does not involve a discharge,
19 such activity does not require a section 404 permit or any further
20 authorization or permitting of the Kansas water office or the department
21 of agriculture, division of water resources, whether or not it is part of an
22 established farming, silviculture or ranching operation.

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

30 (3) Construction or maintenance of farm or stock ponds or irrigation
31 ditches, or the maintenance, but not construction, of drainage ditches.
32 Discharges associated with siphons, pumps, headgates, wingwalls, weirs,
33 diversion structures and such other facilities as are appurtenant and
34 functionally related to irrigation ditches are included in this exemption.

35 (4) Construction of temporary sedimentation basins on a construction
36 site which does not include placement of fill material into waters of the
37 state.

38 (5) Any activity in relation to an approved program under section
39 208(b)(4) of the clean water act, 33 U.S.C. §§ 1251-1387, which meets
40 the requirements of sections 208(b)(4)(B) and (C) of such act.

41 (6) Construction or maintenance of farm roads, forest roads or
42 temporary roads for moving mining equipment, where such roads are
43 constructed and maintained in accordance with best management

1 practices to assure that flow and circulation patterns and chemical and
2 biological characteristics of waters of the state are not impaired, that the
3 reach of the waters of the state is not reduced, and that any adverse effect
4 on the aquatic environment will be otherwise minimized. Such best
5 management practices, which shall be applied to satisfy this provision,
6 shall include those detailed best management practices described in the
7 state's approved program description pursuant to the requirements of 40
8 C.F.R. 233.22(i), and shall also include the following baseline provisions:

9 (A) Permanent roads for farming or forestry activities, temporary
10 access roads, for mining, forestry, ranching or farm purposes and skid
11 trails for logging in waters of the state shall be held to the minimum
12 feasible number, width and total length consistent with the purpose of
13 specific farming, ranching, silviculture or mining operations, and local
14 topographic and climatic conditions;

15 (B) all roads, temporary or permanent, shall be located sufficiently far
16 from streams or other water bodies, except for portions of such roads
17 which must cross water bodies, to minimize discharges of dredged or fill
18 material into waters of the state;

19 (C) the road fill shall be bridged, culverted or otherwise designed to
20 prevent the restriction of expected flood flows;

21 (D) the fill shall be properly stabilized and maintained during and
22 following construction to prevent erosion;

23 (E) discharges of dredged or fill material into waters of the state to
24 construct a road fill shall be made in a manner that minimizes the
25 encroachment of trucks, tractors, bulldozers or other heavy equipment
26 within waters of the state, including adjacent wetlands, that lie outside the
27 lateral boundaries of the fill itself;

28 (F) in designing, constructing and maintaining roads, vegetative
29 disturbance in the waters of the state shall be kept to a minimum;

30 (G) the design, construction and maintenance of the road crossing
31 shall not disrupt the migration or other movement of those species of
32 aquatic life inhabiting the water body;

33 (H) borrow material shall be taken from upland sources whenever
34 feasible;

35 (I) the discharge shall not take or jeopardize the continued existence
36 of, a threatened or endangered species as defined under the endangered
37 species act, 16 U.S.C. § 1531, et seq., or adversely modify or destroy the
38 critical habitat of such species;

39 (J) discharges into breeding and nesting areas for migratory
40 waterfowl, spawning areas and wetlands shall be avoided if practical
41 alternatives exist;

42 (K) the discharge shall not be located in the proximity of a public
43 water supply intake;

1 (L) the discharge shall not occur in areas of concentrated shellfish
2 production;

3 (M) the discharge shall not occur in a component of the national wild
4 and scenic river system;

5 (N) the discharge of material shall consist of suitable material free
6 from toxic pollutants in toxic amounts; and

7 (O) all temporary fills shall be removed in their entirety and the area
8 restored to its original elevation.

9 (d) If any discharge of dredged or fill material resulting from the
10 activities listed in (a)(1) through (a)(6) contains any toxic pollutant listed
11 under section 307 of the clean water act, such discharge shall be subject
12 to any applicable toxic effluent standard or prohibition and shall require a
13 section 404 permit.

14 (e) Any discharge of dredged or fill material into waters of the state
15 incidental to any of the activities identified in (b)(1) through (6) shall
16 have a permit if it is part of an activity whose purpose is to convert an
17 area of the waters of the state into a use to which it was not previously
18 subject, where the flow or circulation of waters within this state may be
19 impaired or the reach of such waters reduced. Where the proposed
20 discharge will result in significant discernible alterations to flow or
21 circulation, the presumption is that flow or circulation may be impaired
22 by such alteration. A conversion of a section 404 wetland to a non-
23 wetland is a change in use of an area of waters within this state. A
24 discharge which elevates the bottom of waters within this state without
25 converting it to dry land does not thereby reduce the reach of, but may
26 alter the flow or circulation of, waters within this state. Any discharge of
27 dredged or fill material incidental to the construction of any canal, ditch,
28 dike or other waterway or structure which drains or otherwise
29 significantly modifies a stream, lake, swamp, bog or any other wetland or
30 aquatic area constituting waters of the state requires a section 404 permit.

31 (f) The provisions of this section shall be severable and if any
32 phrase, clause, sentence or provision of this section is declared to be
33 contrary to the constitution of any state or of the United States or the
34 applicability thereof to any government, agency, person or circumstance
35 is held invalid, the validity of the remainder of this section and the
36 applicability thereof to any government, agency, person or circumstance
37 shall not be affected thereby.

38 Sec. 2. This act shall take effect and be in force from and after its
39 publication in the Kansas Register.