**Private Letter Ruling**

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| **Ruling Number:** | **P-2011-011** |

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| **Tax Type:** | **Kansas Retailers' Sales Tax** |
| **Brief Description:** | **Charges for brine-impacted soil remediation services including services to dispose of unwanted soil excavated from the remediation site.** |
| **Keywords:** |  |
| **Approval Date:** | **02/22/2012** |

**Body:**

Office of Policy & Research

February 22, 2012

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RE: Your letter dated December 13, 2011

Dear XXX:

Thank you for your recent letter. You ask how Kansas sales tax applies to charges for brine-impacted soil remediation services, including services to dispose of unwanted soil excavated from the remediation site. The contaminated soil is disposed of by converting it into a slurry that is pumped into decommissioned underground gas storage caverns.

Brine-impacted soil, the oil and gas drilling operations that can produce it, the problems such soil cause, and what can be done to correct the problems are discussed in a research article entitled *Remediation of Oilfield Brine-impacted Soil Using a Subsurface Drainage System and Hay*, by Thomas M. Harris, J. Bryan Tapp, and K.L. Sublette of the University of Tulsa. The article provides:

During the production of petroleum, saline produced water is also brought to the surface. At one time it was common practice for this fluid to be discharged at the surface. Today, oilfield brine is usually re-injected into a deep geological formation, often the one from which it was withdrawn. Nevertheless, brine spills at the wellhead or tank battery are a frequent occurrence.
An oilfield brine spill will convert the soil to a saline condition (Harris, 1998). This causes established plants to perish because a high concentration of ions in the soil solution makes it difficult for plant roots to absorb water by osmosis. Contamination with oilfield brine may also produce a sodic soil. Sodic soils exhibit poor structure, characterized by a low hydraulic conductivity, because the aggregation of clay particles is inhibited when sodium ions displace other ions (notably calcium ion) from cation exchange sites. Dispersed clay particles are free to migrate in the soil water until they become lodged in, and plug off, the smaller pores in the soil.
Soil that is unable to support plant life, as result of either salinity or sodicity, will eventually succumb to erosion. The resultant "salt scar" is very costly to remediate. Therefore, it is an economic imperative that brine-impacted soil be remediated as soon as possible after the spill has occurred. On the other hand, since oilfield brine does not represent a threat to human health unless it impacts drinking water, and the contaminated land may not be that valuable (from an economic perspective), the means by which the brine components are removed from the soil must be relatively inexpensive.
In 1997, the American Petroleum Institute (API) published a field manual concerning the remediation of brine-impacted soil (Carty et al., 1997). This manual describes three separate remedial activities. The first, excavation of the contaminated soil (with appropriate disposal elsewhere), is utilized when the brine components represent a significant threat to nearby surface water (or groundwater). However, this approach should be used as a last resort because it is very expensive. The second activity involves the addition of amendments (e.g. gypsum) to improve the structure of the topsoil and encourage the downward movement of brine components through the soil profile (driven by rainfall or surface irrigation). The success of this approach is critically dependent on the characteristics of the subsoil (or underlying geologic materials); if the hydraulic conductivity of these materials is low, the brine components will remain concentrated in the topsoil. The third activity utilizes halophytes, plants capable of surviving in highly saline soil, to stabilize the topsoil. Unfortunately, the knowledge base required to match known halophytes to local climatological and ecological conditions is not yet available.

An executive summary prepared for the Kansas Corporation Commission entitled *Remediation of Leon Water Flood, Butler County, Kansas,* dated March 2003, provides in parts relevant here:

Historic oil and gas production practices in Kansas and other states in the United States in the first half of the 20th Century resulted in damage to surface soil. Production was often carried out in the absence of relevant state anti-pollution laws such as exist at the present day. As is the case in most of the world’s oil reservoirs, at some point in their history, they begin to produce large volumes of water, often 50 times more water than oil. Without regulatory control, the oil and water is sometimes released into the surface in unlined pits. It was the use of these pits that gave rise to scarring of the land.
The scars are areas where salt water and crude oil have sterilized the soil by the action of two pollutants – salinity and sodium. The salinity prevents seeds from germinating and existing plants from thriving. The sodium acts on the clays in the soil, making them swell and destroy the structure of the soil. The destruction of the soil structure makes the soil tight and prevents the soil from transmitting water into the soil or to roots in the soil zone. Remediation must address both aspects of soil scarring. The subject research prioritizes the various remediation techniques to rank their effectiveness and efficiency in Kansas. *Project Final Report, p. 7.*

Management of drilling wastes is an ongoing environmental concern. The United States Environmental Protection Agency (EPA), the Bureau of Land Management (BLM), and the Bureau of Ocean Energy Management, Regulation and Regulation, and Enforcement (BOEMRE) have issued Federal regulations that govern the management and disposal of drilling wastes. *See Drilling Waste Management Information System at*[*http://web.ead.anl.gov/dwm/*](http://web.ead.anl.gov/dwm/)*.*Kansas Corporation Commission regulation K.A.R. 82-3-603 fixes requirements for how spills of oil field fluids are handled. Oil field fluids include saltwater, oil, drilling mud, and fluid used for fractionation.

The discussions quoted above show a range of actions that can be taken to remediate brine impacted soil. If necessary, all of these actions can be taken on the same area of impacted soil. One is to work minerals (e.g. gypsum) into the impacted soil. Another is to plant halophytes, which are plants like saltbush or sea lavender that can flourish in salty soil. The third is to excavate the soil, remove it, and dispose of it in an environmentally sound manner. You ask whether Kansas sales tax applies to excavation services to remove the soil and to services to grind the soil into smaller particles which are mixed with liquids to create a slurry that is pumped into decommissioned underground gas storage caverns.

Kansas retailers’ sales tax is not imposed on soil excavation services if the charges for excavation are not lumped together as part of a taxable installation charge. *See In Re Bernie’s Excavating Company, Inc.,* 13 Kan.App. 2d 476, 772 P.2d 822 (1989). For example, charges for excavating a trench and installing buried pipe in it are fully taxable if both services are billed as a single lump sum charge for taxable pipe installation. However, if the customer invoice shows one charge for pipe installation and another for excavating the trench, the charge for excavation is not subject to Kansas sales tax. Accordingly, Kansas sales tax does not apply to separately stated charges for excavating brine impacted soil or to a lump sum charge for nontaxable remediation services that recovers the service provider’s excavation costs as part of the single, undifferentiated customer charge.

The Kansas retailers’ sales tax act (Act) levies sales tax on retail sales of tangible personal property and on retail charges for the taxable services enumerated in the Act. No service enumerated in the Act can be construed so broadly that it includes disposal services. Over the years, the department has ruled Kansas sales tax is not imposed on charges for sewer services, trash hauling, pumping out septic tanks, and disposing of salt water produced at a gas or oil well, as well as other similar services.

The services performed to transform excavated soil into a slurry that can be pumped into decommissioned gas caverns are also nontaxable disposal services, as it the pumping service itself. Accordingly, charges billed to a customer for: (1) excavating brine impacted soil, (2) hauling it to a pumping station, (3) changing the soil into a slurry, and (4) pumping it into the ground are not subject to Kansas sales tax.

K.S.A. 79-3606(n) exempts:

(n) **all sales of tangible personal property which is consumed in**the production, manufacture, processing, mining, **drilling,**refining or compounding of tangible personal property,**the treating of by-products or wastes derived from any such production process,** the providing of services or the irrigation of crops for ultimate sale at retail within or without the state of Kansas; and any purchaser of such property may obtain from the director of taxation and furnish to the supplier an exemption certificate number for tangible personal property for consumption in such production, manufacture, processing, mining, drilling, refining, compounding, treating, irrigation and in providing such services;

Salt water produced at a oil or gas well site is a by-product of oil and gas drilling and production operations. When the salt water is dumped on the ground, the salt often combines with the soil and remains there as waste from the oil and gas operations

This means a service provider that provides soil remediation services to third-parties can claim exemption on its purchases of gypsum, hay, manure, fertilizer, and commercial products like RestorNhance and Soil Saver, that are spread on brine impacted soil. The consumed in production exemption only extends to items that is “consumed, depleted or dissipated in one year.” *K.S.A. 2010 Supp. 79-3602(dd).*Therefore, gravel, limestone, new soil, halophilic plants, tile, liners, netting, and similar items that are purchased and installed as part of a soil remediation project are taxable when purchased by the service provider. After installation, all of these things remain in place for years and are not “consumed, depleted or dissipated in one year.” See *In re George Angle d.b.a. Frontier Oil Company,* 11 Kan.App. 2d 62, 713 P.2d 962 (1986).*(Down hole cement and casing that line a well bore are not consumed in production.)*

This is a private letter ruling pursuant to K.A.R. 92-19-59. It is based solely on the facts provided in your request. If it is determined that undisclosed facts were material or necessary to an accurate determination by the department, this ruling is null and void. This ruling will be revoked in the future by the operation of law without further department action if there is a change in the statutes, administrative regulations, or case law, or published revenue ruling, that materially effects this private letter ruling.

Sincerely,

Thomas E. Hatten
Attorney/Policy & Research

**Date Composed: 03/12/2012 Date Modified: 03/12/2012**