

Approved: 1-31-95
Date

MINUTES OF THE SENATE COMMITTEE ON ENERGY & NATURAL RESOURCES.

The meeting was called to order by Chairperson Don Sallee at 8:00 a.m. on January 24, 1995 in Room 254-E of the Capitol.

All members were present except:

Phil Martin, Excused
Bill Wisdom, Excused

Committee staff present: Raney Gilliland, Legislative Research Department
Dennis Hodgins, Legislative Research Department
Mike Corrigan, Revisor of Statutes
Clarene Wilms, Committee Secretary

Conferees appearing before the committee:

Clark Duffy, Associate Director, Kansas Petroleum Council
Jamie Clover Adams, Kansas Fertilizer and Chemical Association
Terry Leatherman, Executive Director, Kansas Industrial Council, KCCI
Vern McKenzie, Kansas Pest Control Association, Emporia
Charles C. Steincamp, Kansas Association of Defense Counsel
Hal Hudson, Kansas State Director, National Federation of Independent Business
Whitney Damron, Pete McGill & Associates, on behalf of The Costal Corporation
and Colorado Interstate Gas Company
Bill Craven, Kansas Sierra Club
Dr. Ron Hammerschmidt, Acting Director of Health, KDHE
Chris McKenzie, Executive Director, League of Kansas Municipalities

Others attending: See attached list

The chairman called on Jack Glaves, Oxy, USA, who requested introduction of a bill which would provide the Kansas Corporation Commission with authority to include in their orders approving their plan of unitization a provision that is typical in operating agreements on drilling wells, that if an interest holder does not pay his interest he can elect to go non-consent. In this instance, if it is a dry hole he does not pay anything, if it is a good well the interest holder would pay 300 percent.

Senator Vancrum, with a second from Senator Morris moved to introduce the bill. The motion carried.

The chairman called attention to a bill draft presented earlier to members and dealing with an exemption of sand and gravel dredging from the surface-mining land conservation act. Most sand and gravel operations create recreational lakes and ponds and the area is not left in the condition which regular strip-mining would produce.

Senator Lawrence moved, with a second from Senator Emert, to introduce the bill. The motion carried.

SB-76: An Act concerning environmental compliance; establishing procedures for voluntary environmental audits

Clark Duffy, Associate Director of the Kansas Petroleum Council appeared and presented testimony in support of **SB-76**. Mr. Duffy stated that this bill would 1) under certain conditions, establish audit reports as privileged material and 2) under certain circumstances waive the penalties for violations of environmental laws if the violation was voluntarily disclosed. This legislation would encourage business and industry to develop voluntary environmental audit programs to help ensure compliance with state environmental laws, and to reduce the risk of liability and costs associated with noncompliance. (Attachment 1)

Jamie Clover Adams, Kansas Fertilizer & Chemical Association, appeared in support of **SB 76** stating it was an innovative measure which would benefit the environment through cooperation rather than adversity. Ms. Adams stated the majority of KFCA members, like most small businesses, do not have the resources to hire personnel to continually monitor all regulations to determine if a rule applies to the operation. Consequently the business must choose to either undertake an audit and determine how their practices must be changed to reach compliance

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, Room 255-E, Statehouse, at 8:00 a.m. on January 24, 1995.

or ignore environmental responsibilities with the hope that regulators won't notice. Ms. Clover did request an amendment to Section 1(c) which would include the Department of Agriculture since the majority of environmental regulations KFCA members must comply with fall under the jurisdiction of that department. (Attachment 2)

Terry Leatherman, Executive Director, Kansas Industrial Council, KCCI, presented testimony in support of **SB 76**. Mr. Leatherman told committee members that this bill is a clear example of legislation which could improve the use of audits, provide greater business understanding of needed corrective action and increased voluntary disclosure to environmental problems with regulators. (Attachment 3)

Vern McKenzie, Emporia, Kansas Pest Control Association, appeared before the committee stating his organization's support of **SB-76**. Mr. McKenzie said his organization represented 150 to 200 companies in the state and in providing pest control services within the state do have exposure to environmental contamination situations.

Charles C. (Chris) Steincamp, on behalf of the Kansas Association of Defense Counsel, appeared in support of **SB 76** noting he currently practiced environmental law with a Wichita law firm. Mr. Steincamp stated his organization believes that it is both unjust and counter-productive to punish industry for attempting to ensure their own compliance with environmental laws and regulations and that this bill which creates a privilege for an internal environmental audit materials would be of benefit to industry in Kansas. Several changes were suggested in Mr. Steincamp's testimony. (Attachment 4)

Hal Hudson, National Federation of Independent Business, appeared and presented testimony in favor of **SB - 76**. Mr. Hudson stated that while members were concerned about environmental protection, they also were concerned about harsh and unreasonable regulation. He further said the principles embodied in **SB 76** would bring a measure of reasonableness to the enforcement of environmental laws. (Attachment 5)

Whitney Damron, Pete McGill & Associates, on behalf of The Coastal Corporation and Colorado Interstate Gas Company spoke in support of **SB 76**. Mr. Damron stated the organizations he represented had visited with other proponents of this legislation and the Kansas Department of Health & Environment and included proposed amendments with his testimony. (Attachment 6)

Bill Craven, Kansas Natural Resource Council and Kansas Sierra Club, appeared concerning **SB 76**. Mr. Craven told the committee that around the country environmental audit bills were usually strongly opposed by environmental groups because too few protections are afforded to the public. However, this bill strikes a better balance than others adopted or being considered. Several minor changes were suggested in his testimony. (Attachment 7)

Ronald F. Hammerschmidt, Ph.D., Acting Director, Division of Environment, appeared before the committee in support of **SB 76**. He noted KDHE supports legislation which allows a voluntary comprehensive evaluation of a facility or industry to determine compliance with existing environmental laws, evaluate current environmental status and to formulate an environmental compliance or remediation plan to correct environmental problems. Several areas of possible clarification were pointed out in written testimony. (Attachment 8).

Information on Colorado legislation was handed to committee members. (Attachment 9).

Chris McKenzie, Executive Director, League of Kansas Municipalities, appeared before the committee. Mr. McKenzie stated Municipal courts are not normally involved as cities have not actively legislated in this area. Therefore it was recommended that a change on line 40, "and ... local " be removed. (Attachment 10).

There were some questions asked by committee members to ascertain who would be doing these audits, who would be using them and how the Department of Health and Environment's position would function in conjunction with these internal audits. Further discussion concerned repeated violation issues and whether this bill would prevent KDHE from remedial action. Mr. Duffy stated it was not felt this bill would change the current body of law.

The meeting adjourned at 8:55 a.m.

The next meeting is scheduled for January 25, 1995.

**SENATE COMMITTEE ON ENERGY & NATURAL
RESOURCES COMMITTEE GUEST LIST**

DATE: January 24, 1995

NAME	REPRESENTING
Jack Graves	Oxy
Don Schwach	KIDGR
Charles C. Heiricamp	KADC
Hal Hudson	NFIB/Kansas
Rich McKee	KS Livestock Assn.
Roy Hammerschmidt	KDHE - Forbes Field
Pat Casey	KDHE - Landon
Frances Kastner	KS Food Dealers Assn
Donald Snodgrass	KS food Dealers Assn
Jim Allen	EKOGA
John Peterson	Bronny Ferris Industries
STEVE KEARNEY	WMA
JOHN C. BOTTENBERG	WESTERN RESOURCES
BOB BROWN	mid Am Lumber Assn
Pam Somerville	KS AUTO DEALERS
ED SCHAUB	WESTERN RESOURCES INC.
Jensin Brandkenary	KTLA

SENATE BILL 76
SENATE ENERGY AND NATURAL RESOURCES COMMITTEE
CLARK DUFFY, KANSAS PETROLEUM COUNCIL
JANUARY 24, 1995

I am Clark Duffy, the Associate Director of the Kansas Petroleum Council. The Kansas Petroleum Council represents the major oil and gas companies and allied industries in Kansas. The Kansas Petroleum Council represents these companies in all sectors of the industry; exploration, production, transportation, refining, and marketing. Enhancing the environmental performance of the petroleum industry is part of the mission of the Kansas Petroleum Council. For that reason, we are a proponent of Senate Bill 76.

The purpose of this legislation is to encourage business and industry to develop voluntary environmental audit programs to help ensure compliance with state environmental laws, and to reduce the risk of liability and costs associated with noncompliance. Environmental audits were originally designed as an internal management tool to help business and industry comply with these laws. An environmental audit may be as simple as a "walk over the lease", or it may be as sophisticated as an integral component of a comprehensive environmental management system.

While environmental audits were designed as an internal management tool, current environmental laws and enforcement policies may have the unintended effect of discouraging such programs. By their very nature, environmental audits are designed to identify and document noncompliance. Senate Bill 76 would establish procedures which would: 1) under certain conditions, establish audit reports as privileged material, and 2) under certain circumstances waive the penalties for violations of environmental laws if the violation was voluntary disclosed.

*Senate Energy & Nat'l Resc.
January 24, 1995
Attachment 1*

SENATE BILL 76
JANUARY 24, 1995
PAGE 2

It is important that this legislation ensure that appropriate safeguards are in place to prevent abuse. I have attached to this testimony a summary of Senate Bill 76, which highlights the safeguards to prevent abuses of the privilege contained in Section 3, and the safeguards to prevent abuses of the penalty waiver contained in Section 7.

The concept in Senate Bill 76 is being recognized across the country as simply the "right way" to do business. While the specific techniques on how to achieve this objective may vary, there seems to be no disagreement with the concept. There is model legislation for states (most notably from the American Legislative Exchange Council) and five states have enacted similar legislation (the most noteworthy being Colorado's law). At the present time, a number of other states are considering this type of legislation.

This bill applies to all entities regulated by the Kansas Corporation Commission and Division of Environment and is of special interest to the petroleum industry. At its December 1994 meeting, the Interstate Oil and Gas Compact Commission adopted the attached resolution which encourages all states to consider adoption of this type of legislation. This resolution was sponsored by Kansas.

The Kansas Petroleum Council encourages your favorable consideration of Senate Bill 76.

Thank you.

SUMMARY OF SB76
PROCEDURES FOR ENVIRONMENTAL AUDITS

- SECTION 1. Defines "Audit", "Audit Report", and "Environmental Laws." Note that the bill applies to the statutes, rules and regulations of the Kansas Corporation Commission and the Division of Environment, Kansas Department of Health and Environment.
- SECTION 2. Establishes an Audit Report as privileged material except as provided in Section 3.
- SECTION 3. Establishes procedures and "safeguards" to prevent abuses of the privilege. Note that the privilege is not recognized if a court or administrative tribunal determines that:
- 1) The privilege is asserted for a fraudulent purpose,
 - 2) The party has not implemented a management system to assure compliance with environmental laws,
 - 3) The material is not subject to privilege, and
 - 4) The material shows evidence of noncompliance with the environmental laws.
- SECTION 4. Establishes procedures for the court to determine if material is privileged when the state has probable cause to believe a criminal offense has been committed.
- SECTION 5. Describes material that is not recognized as privileged in Section 2.
- SECTION 6. States that this act does not alter any existing statutory or common-law privilege.
- SECTION 7. Establishes the circumstances whereby the penalties for violations of environmental laws are waived if a person voluntarily discloses the violation. Note that the penalty is not waived if:
- 1) The disclosure was not voluntary,
 - 2) The violation was willful,
 - 3) The violation was not corrected, and
 - 4) The violation caused significant environmental harm or a public health threat.
- SECTION 8. Authorizes a court or administration tribunal to give consideration to a person who has implemented an environmental management system when determining the severity of the penalty.
- SECTION 9. Enactment clause.

RESOLUTION
Regarding An Environmental Audit Privilege

Whereas, the member states of the Interstate Oil and Gas Compact Commission have developed extensive regulatory programs for the protection of the environment; and

Whereas, the effective protection of the environment relies heavily on the commitment of the regulated public to compliance with the complex body of environmental laws; and

Whereas, state environmental protection programs strive to promote voluntary compliance with environmental laws, regulations and permits without unduly impairing the enforcement obligations of state jurisdictional agencies; and

Whereas, persons or entities subject to the environmental laws and regulations of a state should be encouraged to conduct voluntary internal environmental audits of their regulated activities; and

Whereas, for purposes hereof, an "environmental audit" refers to a voluntary internal evaluation of any facilities or operations, or of management systems related to any facilities or operations, conducted by the owner or operator, or by a consultant or independent contractor engaged by the owners or operator, in order to determine the status of compliance, to timely correct any noncompliance, and to improve overall compliance with any applicable environmental laws, regulations and permits; and

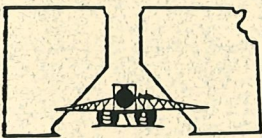
Whereas, performance of voluntary internal environmental audits will be fostered by recognition of an environmental audit privilege to protect the confidentiality of communications and documents related to such audits; and

Whereas, state enforcement programs and policies should recognize and encourage voluntary internal environmental audit programs;

Now, Therefore, Be It Resolved, that the Interstate Oil and Gas Compact Commission, convened at its Annual Meeting in Long Beach, California, December 6, 1994, urges its member states to consider such changes to present statutory and regulatory provisions and policies as are necessary (1) to recognize, subject to reasonable exceptions, an environmental audit privilege to protect from disclosure any communications or documents made, collected, or prepared for the purpose and in the course of an environmental audit, and (2) to encourage voluntary internal environmental audits by recognition of the design and implementation of environmental audit programs, voluntary disclosure and timely voluntary correction of noncompliance as mitigating factors in the exercise of a state's enforcement powers.

December, 1994

KANSAS FERTILIZER & CHEMICAL ASSOCIATION



KFCA is committed
to professional
development and
business viability for
the plant nutrient
and crop protection
industry in Kansas.

STATEMENT ON

S.B. 76

TO THE

SENATE ENERGY & NATURAL RESOURCES

COMMITTEE

SENATOR DON SALLEE, CHAIR

JANUARY 24, 1995

Senate Energy & Nat'l Resc.
January 24, 1995
Attachment 2

Mr. Chairman and members of the committee, I am Jamie Clover Adams, Director of Legislative and Regulatory Affairs for the Kansas Fertilizer and Chemical Association (KFCA). KFCA is the professional trade association for the state's plant nutrient and crop protection industry. Our nearly 500 members are primarily retail dealers, as well as distribution firms, manufacturer representatives and others who serve the industry. The bulk of our members are small businesses who feel the ever growing burden of regulatory compliance firsthand. Therefore, we appear today in support of S.B. 76 as an innovative method to help small business comply with environmental laws without fear of penalties for unwitting violations.

The plant nutrient and crop protection industry has been on the forefront of environmental protection. KFCA lead efforts to pass the fertilizer containment law to protect our groundwater and the state pesticide management area law to address localized concerns. KFCA administers the Kansas Certified Crop Advisor program, a voluntary professional certification program that requires applicators to pass a national and state exam and then maintain certification by acquiring 40 CEUs every two years. Our members learn the latest application techniques at our many schools and seminars. Companies compete fiercely for environmental awards such as Dupont's Environmental Respect Award and actively participate in dialog to protect our environment.

I will not spend time this morning going over the provisions of the bill. I leave that to the Kansas Petroleum Council and Committee staff. I will attempt to address the broad issues and ramifications of the implementation of a voluntary self evaluation that provides privilege to companies wanting to do what's right.

KFCA supports S.B. 76 as an innovative measure which will benefit the environment through cooperation rather than adversity. Significant compliance with our environmental laws cannot be achieved through utilization of traditional enforcement methods, such as command and control, alone. We must establish

programs that offer positive reinforcement to businesses if we are to make further meaningful gains in environmental compliance.

A voluntary self-audit bill will be especially useful to KFCA members as we continue to face a plethora of environmental regulations. The majority of KFCA members, like most small businesses do not have the resources to hire personnel to continually monitor all regulations to determine if a rule applies to the operation. In many instances, the manager must be a jack of all trades. This leaves little time to delve through reams of regulations. Most times it leaves small businesses with a daunting choice. On one hand, they may wish to comply with the law and undertake an audit to determine how their practices must be changed to reach compliance. On the other hand, it may be a more logical business decision to blissfully ignore environmental responsibilities, hope regulators will be too busy to notice and come into compliance only when forced. They may fear they are already violating environmental laws, but are afraid to discover the truth. Currently, ignorance is rewarded while good faith compliance efforts create risk of punishment. S.B. 76 will bring certainty and give new life to an important management tool -- voluntary self-audits.

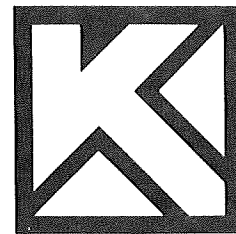
S.B. 76 is balanced and contains safeguards to insure bad actors do not abuse the system. The bill requires the business making the disclosure to make a diligent effort to resolve the violations in order for privilege to apply. KFCA believes this is a strong incentive that will enhance environmental compliance much more than threats and fines. Further, safeguards are found in Section 7 (c) to ensure bad actors do not take advantage of the system. Privilege does not apply in instances where disclosure was not voluntary, the violation was committed intentionally and willfully, the violation was not fully corrected in a diligent manner or there was significant environmental harm or a public health threat was caused by the violation.

Given our support for S.B. 76, KFCA respectfully requests it be amended at Section 1 (c) to include the Department of Agriculture since the majority of the environmental regulations KFCA members must comply with fall under the jurisdiction of that department.

It's time to move beyond the time worn "command and control" approaches. Experience has shown that cooperation gets results. And isn't that what all Kansans are interested in?

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry



835 SW Topeka Blvd. Topeka, Kansas 66612-1671 (913) 357-6321 FAX (913) 357-4732

SB 76

January 24, 1995

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

Senate Committee on Energy and Natural Resources

by

Terry Leatherman
Executive Director
Kansas Industrial Council

Mr. Chairman and members of the Committee:

My name is Terry Leatherman. I am the Executive Director of the Kansas Industrial Council, a division of the Kansas Chamber of Commerce and Industry. Thank you for this opportunity today to express KCCI's support for SB 76.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

A central test of environmental legislation is whether a proposed action will produce a desired result of improved environmental quality. If this goal can be achieved through cooperation between governmental regulators and the private sector, so much the better. SB 76 is a clear example of legislation which will improve the environment with the willing participation of the private sector.

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Attachment 3

Conducting voluntary environmental auditing is smart business. Measuring how well a company is meeting regulatory and permitting standards is important information a business needs to know. However, an environmental audit becomes a bad business decision when government environmental enforcement agencies can use audit information as the basis for prosecutions. That is why several surveys have indicated that if audit information can fuel government enforcement efforts, a business will decide to "sanitize" an audit or not perform one at all.

SB 76 reverses that line of logic. The result will be more use of audits, greater business understanding of needed corrective action, and increased voluntary disclosure to environmental problems to regulators.

Thank you for the opportunity to express KCCI's support for SB 76. I would be happy to answer any questions.

**SENATE COMMITTEE
ON ENERGY AND NATURAL RESOURCES
January 24, 1995**

Re: Senate Bill 76
Environmental Audit Privilege Act

**STATEMENT OF CHARLES C. STEINCAMP, Attorney at Law
ON BEHALF OF THE KANSAS ASSOCIATION OF
DEFENSE COUNSEL**

My name is Chris Steincamp. I am a geologist and a lawyer. I am appearing on behalf of the Kansas Association of Defense Counsel. I have been personally interested in legislation of this nature for many years and participated in the drafting of Senate Bill 76 on behalf of the Kansas Independent Oil & Gas Association. I received my B.S. degree in Geology from Kansas State University in 1989. I was thereafter employed as a petroleum geologist by Chief Drilling, Inc., Wichita, Kansas. I received my Juris Doctor *magna cum laude* from Washburn University School of Law in 1993. I currently practice environmental law with the law firm Depew AND Gillen, L.L.C., in Wichita, Kansas. I am a frequent author and speaker on environmental issues.

The current system of environmental laws and regulations provides a strong disincentive for industry to conduct internal monitoring of environmental compliance due to the threat of fines and civil cost recovery and damage actions as well as the possibility of criminal liability for violations. The Kansas Association of Defense Counsel believes that it is both unjust and counter-productive to punish industry for attempting to ensure their own compliance with environmental laws and regulations. Environmental audits are now an essential business practice and constitute a reasonable standard of care as environmental laws shift more and more toward pollution prevention rather than cleanup. The Kansas Association of Defense Counsel believes in principle that Senate Bill 76 creating a privilege

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Attachment 4

for internal environmental audit materials would be of benefit to industry in Kansas across the board from the smallest mom-n-pop filling station or dry cleaners to the largest industrial corporations. This legislation will also be of tremendous benefit to the environment in Kansas by allowing industry to become an active partner in the effort to protect our environment rather than an adversary. Although the current bill goes far toward the goal of offering much needed protection from overreaching environmental laws, KADC believes that the following changes would make the bill a more workable and enduring piece of legislation.

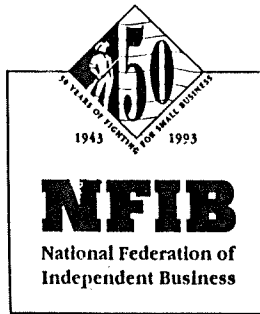
1. In Section 1(c), the definition of "environmental laws" should be changed to delete the reference to specific agencies as follows:

(c) "Environmental laws" means state environmental statutes and rules and regulations and the federal and local counterparts or extensions of such statutes and rules and regulations.

2. Section 3(d)(3) defining a "management system" should be rewritten. Possible language to be considered is as follows:

(A) A system that covers all or part of the company's operations regulated under one or more environmental statutes

Therefore, Mr. Chairman and Members of the Committee, the KADC recommends passage of Senate Bill 76 with the above changes.



**Testimony of
Hal Hudson, Kansas State Director
National Federation of Independent Business**

**Before the
Kansas Senate Energy & Natural Resources Committee
on Senate Bill 76**

Tuesday, January 24, 1995

Mr. Chairman and members of the Committee: Thank you for allowing me to provide testimony here today. My name is Hal Hudson, and I am the State Director for the Kansas Chapter of National Federation of Independent Business (NFIB), the State's largest small-business advocacy group, with about 8,000 members who employ nearly 100,000 Kansans. The average number of employees is about 10, while only one percent of our members employ over 100.

NFIB supports enactment of S.B. 76, because, while our members are concerned about environmental protection, they also are concerned about harsh and unreasonable regulation. Accidents do happen, even in the best run companies, with skilled and well trained employees. When unintentional violations of environmental law occur, companies who take the initiative to correct the violation, and promptly report both the violation and the corrective action taken, should be spared harsh and unreasonable penalties.

The principles embodied in S.B. 76 would bring a measure of reasonableness to the enforcement of environmental law. We believe that relief from penalties, as spelled out in Sec. 7. (a) of the bill is appropriate. While enactment of S.B. 76 will not prohibit the U.S. E.P.A. from taking any action, it would provide relief under and Kansas law. Enactment of S.B. 76 also would help send a message to Congress that federal law and E.P.A. regulations need to be revised.

I will be happy to respond to questions. Thank you.

**Testimony Submitted to the
Senate
Committee on Energy & Natural Resources**

on

Senate Bill 76

by

**Whitney Damron
of
Pete McGill & Associates**

on behalf of

**The Coastal Corporation
and
Colorado Interstate Gas Company**

January 24, 1995

*Senate Energy & Nat'l Resc.
January 24, 1995
Attachment 6*

Good morning Chairman Sallee and Members of the Senate Committee on Energy and Natural Resources,

My name is Whitney Damron of Pete McGill & Associates appearing before you today in support of SB 76 on behalf of our clients, The Coastal Corporation and Colorado Interstate Gas Company, a subsidiary of Coastal.

SB 76 is patterned after legislation adopted by the 1994 Colorado Legislature and signed into law by Governor Romer of Colorado (SB 94-139/Colorado). Colorado Interstate Gas Company was a strong supporter of that legislation and comes before you today in support of this measure as well.

The environmental audit privilege created by SB 76 is designed to increase compliance with environmental laws and regulations by encouraging companies to perform voluntary self-evaluations (or audits) and to disclose the results of those evaluations to the Kansas Department of Health & Environment (KDHE) when problems or possible violations of laws or regulations are identified. Disclosure to KDHE is voluntary and protections are contained in the bill to prohibit such reports from third party review as a privileged report.

SB 76 contains provisions to mitigate or eliminate fines and penalties if the reporting company has acted in good faith and implements appropriate remedies to remediate any problems found. However, the bill also contains provisions to withhold such preferential treatment in the case of intentional or willful violations, often referred to as a "bad actor" clause.

Coastal/Colorado Interstate Gas Company has visited with other proponents of this legislation and the Kansas Department of Health & Environment. We are strongly supportive of its concept and will work towards its passage with these entities. Based upon earlier conversations with KDHE and the Kansas Petroleum Council, we anticipate some amendments to be proposed to this bill. We have also made suggestions for minor revision and have attached several proposed amendments and comments upon areas of concern to this testimony.

We are supportive of this legislation and pledge our cooperation to working out language that is acceptable to both the industry and regulators.

On behalf of The Coastal Corporation and Colorado Interstate Gas Company, I thank you for the opportunity to present these comments in support of SB 76 and would stand for questions at the appropriate time.

Proposed Amendments to SB 76 by Coastal/ Colorado Interstate Gas Company

SB 76 An Act concerning environmental compliance; establishing procedures for voluntary environmental audits; defining terms.

- Page One, Line 17 delete "prevent noncompliance and to"

Reason: We believe this language is unnecessary. The intent of an audit is to confirm compliance with existing statutes and regulations and/or identify deviations. We also believe this language may be construed in a manner as to shift the burden of proof to a standard of proving one's self to be in compliance rather than being proven in noncompliance.

- Page One, Lines 21-22

Issue: Requiring a formal labeling process could act to inappropriately incriminate or otherwise cause unwanted disclosure for a company which fails to properly identify a document. Losing the privilege of confidentiality due to a failure to print "Audit Report: Privileged Document" on the cover would appear to be harsh penalty. A better standard may be found after the court or administrative tribunal reviews the totality of the circumstances.

- Page Two, Line 34 Change "shall" to "may"

Issue: Allow the court or administrative tribunal to make the determination of whether the privilege should be waived rather than making it mandatory.

Also, following that section regarding the implementation of a "management system", we find that entire section to be very broad and subjective. For example, on Page Three, Line 20, would it be fair to assume that an employee complaint box would suffice for "a reporting system which employees can use to report unlawful conduct within the organization without fear of retribution."?

- Page Four, Lines 21-23

If the county or district attorney consults with law enforcement agencies regarding the contents of a report that was voluntarily disclosed, yet still a privileged document, can they later use such documentation and information derived from that report against the alleged violator in a criminal action?



Kansas Natural Resource Council

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Topeka, KS 66601-2635

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Bill Ward, Lawrence

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Senate Bill 76 Environmental Audit Legislation

Testimony of Bill Craven on behalf of the Kansas Natural
Resource Council and the Kansas Sierra Club

Senate Energy and Natural Resources Committee
January 24, 1995

We appreciate the opportunity to testify.

The two groups I represent generally support self-reporting and self-monitoring of environmental compliance by businesses whose operations potentially affect the environment. Many businesses spend a great deal of money to achieve compliance regardless of the activities of Kansas' regulators. They do this out of their commitment to environmental protection, and not because they are particularly worried about Kansas' regulators. Self-reporting and monitoring shouldn't be viewed as a replacement to the enforcement and monitoring of regulators. Instead, this is a way to complement those measures.

However, you should know that around the country environmental audit bills are usually strongly opposed by environmental groups because too few protections are afforded to the public. Allowing polluters to shield their activities from the public or from victims of personal injury is contrary to the American legal tradition. The intent of many of these bills is to provide a cover-up to polluters if they simply label various documents as an "environmental audit."

This bill strikes a much better balance than the measures either adopted in, or being considered by, other states. Numerous technical and complex legal questions have been fairly addressed in this version of the bill. My input into this bill was sought and provided, and I appreciated that opportunity.

There are a couple of hyper-technical, legalistic changes I would suggest before signing off completely on this bill.

p. 2, line 41. "section" should be "subsection."

p. 5, line 37. "enforcement authority" should be "opposing party."



Senate Energy & Nat'l Resc.
January 24, 1995
Attachment 7

State of Kansas



Department of Health and Environment

Testimony presented to

Senate Committee on Energy and Natural Resources

by

The Kansas Department of Health and Environment

Senate Bill 76

KDHE supports legislation to establish procedures for conducting voluntary environmental audits. We have reviewed several existing bills considered to be the model legislation for environmental compliance and procedures for voluntary environmental audits. One such model legislation is the "Colorado Environmental Audit Bill." KDHE supports legislation which allows a voluntary comprehensive evaluation of a facility or industry to determine compliance with existing environmental laws, evaluate current environmental status and to formulate an environmental compliance or remediation plan to correct environmental problems.

KDHE's review of S.B. 76 indicates additional clarification is needed in the following areas: (1) definition of the terms audit and auditor, (2) repeated violations, (3) remediation of environmental damage, and (4) linkage of the management plan with environmental remediation. The applicability of the environmental audit may not be appropriate to use for property transfers. The industry standard or model currently being used to prepare environmental site assessments is ASTM E-1527-93 (American Society for Testing and Materials). KDHE has the ASTM E-1527-93 publication and will make this document available to the committee, if desired.

There are a number of questions related to the legal implications of the proposed bill including confidentiality, possible creation of a new evidentiary privilege, time limits on court review, impacts on sentencing guidelines, etc. These issues should be considered in reviewing this bill.

KDHE is willing to work with the committee on clarifications to the bill that the committee requests. Also included as an attachment is a copy of the Colorado Voluntary Environmental legislation.

Testimony presented by: Ronald F. Hammerschmidt, Ph.D.
Acting Director
Division of Environment
January 24, 1994

Senate Energy & Nat'l Resc.
January 24, 1995
Attachment 8

An Act

SENATE BILL 94-139

BY SENATORS Meiklejohn, Johnson, Norton, Ament, Casey, Mutzebaugh, Owens, Tebedo, and Wattenberg;
also REPRESENTATIVES Foster, Acquafresca, Armstrong, Chlouber, George, Kerns, Morrison, Pankey, Reeser, Schauer, and Taylor.

CONCERNING ENVIRONMENTAL SELF-EVALUATION, AND, IN CONNECTION THEREWITH, CREATING AN ENVIRONMENTAL SELF-EVALUATION PRIVILEGE AND CREATING A PRESUMPTION AGAINST THE IMPOSITION OF ANY ADMINISTRATIVE, CIVIL, OR CRIMINAL PENALTIES FOR VOLUNTARY DISCLOSURES ARISING OUT OF ANY ENVIRONMENTAL SELF-EVALUATION.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Article 25 of title 13, Colorado Revised Statutes, 1987 Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW SECTION to read:

13-25-126.5. Documents arising from environmental self-evaluation - admissibility in evidence. (1) THE GENERAL ASSEMBLY HEREBY FINDS AND DECLARES THAT PROTECTION OF THE ENVIRONMENT IS ENHANCED BY THE PUBLIC'S VOLUNTARY COMPLIANCE WITH ENVIRONMENTAL LAWS AND THAT THE PUBLIC WILL BENEFIT FROM INCENTIVES TO IDENTIFY AND REMEDY ENVIRONMENTAL COMPLIANCE ISSUES. IT IS FURTHER DECLARED THAT LIMITED EXPANSION OF THE PROTECTION AGAINST DISCLOSURE WILL ENCOURAGE SUCH VOLUNTARY COMPLIANCE AND IMPROVE ENVIRONMENTAL QUALITY AND THAT THE VOLUNTARY PROVISIONS OF THIS ACT WILL NOT INHIBIT THE EXERCISE OF THE REGULATORY AUTHORITY BY THOSE ENTRUSTED WITH PROTECTING OUR ENVIRONMENT.

(2) FOR THE PURPOSES OF THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

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Capital letters indicate new material added to existing statutes;
dashes through words indicate deletions from existing statutes and

(a) "ADMINISTRATIVE LAW JUDGE" MEANS ANY PERSON APPOINTED TO BE AN ADMINISTRATIVE LAW JUDGE PURSUANT TO PART 10 OF ARTICLE 30 OF TITLE 24, C.R.S.

(b) "ENVIRONMENTAL AUDIT REPORT" MEANS ANY DOCUMENT, INCLUDING ANY REPORT, FINDING, COMMUNICATION, OR OPINION OR ANY DRAFT OF A REPORT, FINDING, COMMUNICATION, OR OPINION, RELATED TO AND PREPARED AS A RESULT OF A VOLUNTARY SELF-EVALUATION THAT IS DONE IN GOOD FAITH.

(c) "ENVIRONMENTAL LAW" MEANS ANY REQUIREMENT CONTAINED IN ARTICLES 7, 8, 11, 15, AND 18 OF TITLE 25, C.R.S., OR ARTICLE 20 OF TITLE 30, C.R.S., IN REGULATIONS PROMULGATED UNDER SUCH PROVISIONS, OR IN ANY ORDERS, PERMITS, LICENSES, OR CLOSURE PLANS UNDER SUCH PROVISIONS.

(d) "IN CAMERA REVIEW" MEANS A HEARING OR REVIEW IN A COURTROOM, HEARING ROOM, OR CHAMBERS TO WHICH THE GENERAL PUBLIC IS NOT ADMITTED. AFTER SUCH HEARING OR REVIEW, THE CONTENT OF THE ORAL AND OTHER EVIDENCE AND STATEMENTS OF THE JUDGE AND COUNSEL SHALL BE HELD IN CONFIDENCE BY THOSE PARTICIPATING IN OR PRESENT AT THE HEARING OR REVIEW, AND ANY TRANSCRIPT OF THE HEARING OR REVIEW SHALL BE SEALED AND NOT CONSIDERED A PUBLIC RECORD, UNTIL AND UNLESS ITS CONTENTS ARE DISCLOSED BY A COURT OR ADMINISTRATIVE LAW JUDGE HAVING JURISDICTION OVER THE MATTER.

(e) "VOLUNTARY SELF-EVALUATION" MEANS A SELF-INITIATED ASSESSMENT, AUDIT, OR REVIEW, NOT OTHERWISE EXPRESSLY REQUIRED BY ENVIRONMENTAL LAW, THAT IS PERFORMED BY ANY PERSON OR ENTITY, FOR ITSELF, EITHER BY AN EMPLOYEE OR EMPLOYEES EMPLOYED BY SUCH PERSON OR ENTITY WHO ARE ASSIGNED THE RESPONSIBILITY OF PERFORMING SUCH ASSESSMENT, AUDIT, OR REVIEW OR BY A CONSULTANT ENGAGED BY SUCH PERSON OR ENTITY EXPRESSLY AND SPECIFICALLY FOR THE PURPOSE OF PERFORMING SUCH ASSESSMENT, AUDIT, OR REVIEW TO DETERMINE WHETHER SUCH PERSON OR ENTITY IS IN COMPLIANCE WITH ENVIRONMENTAL LAWS. ONCE INITIATED, SUCH VOLUNTARY SELF-EVALUATION SHALL BE COMPLETED WITHIN A REASONABLE PERIOD OF TIME. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO AUTHORIZE UNINTERRUPTED VOLUNTARY SELF-EVALUATIONS.

(3) AN ENVIRONMENTAL AUDIT REPORT IS PRIVILEGED AND IS NOT ADMISSIBLE IN ANY LEGAL ACTION OR ADMINISTRATIVE PROCEEDING AND IS NOT SUBJECT TO ANY DISCOVERY PURSUANT TO THE RULES OF CIVIL PROCEDURE, CRIMINAL PROCEDURE, OR ADMINISTRATIVE PROCEDURE, UNLESS:

(a) THE ENTITY OR PERSON FOR WHOM THE ENVIRONMENTAL AUDIT REPORT WAS PREPARED, WHETHER THE ENVIRONMENTAL AUDIT REPORT WAS PREPARED BY THE ENTITY OR BY A CONSULTANT HIRED BY THE ENTITY, WAIVES THE PRIVILEGE UNDER THIS SECTION;

(b) (I) A COURT OF RECORD, OR, PURSUANT TO SECTION

24-4-105, C.R.S., AN ADMINISTRATIVE LAW JUDGE, AFTER AN IN CAMERA REVIEW, DETERMINES THAT:

(A) THE ENVIRONMENTAL AUDIT REPORT SHOWS EVIDENCE THAT THE PERSON OR ENTITY FOR WHICH THE ENVIRONMENTAL AUDIT REPORT WAS PREPARED IS NOT OR WAS NOT IN COMPLIANCE WITH AN ENVIRONMENTAL LAW; AND

(B) THE PERSON OR ENTITY DID NOT INITIATE APPROPRIATE EFFORTS TO ACHIEVE COMPLIANCE WITH THE ENVIRONMENTAL LAW OR COMPLETE ANY NECESSARY PERMIT APPLICATION PROMPTLY AFTER THE NONCOMPLIANCE WITH THE ENVIRONMENTAL LAW WAS DISCOVERED AND, AS A RESULT, THE PERSON OR ENTITY DID NOT OR WILL NOT ACHIEVE COMPLIANCE WITH THE ENVIRONMENTAL LAW OR COMPLETE THE NECESSARY PERMIT APPLICATION WITHIN A REASONABLE AMOUNT OF TIME.

(II) FOR THE PURPOSES OF THIS PARAGRAPH (b) ONLY, IF THE EVIDENCE SHOWS NONCOMPLIANCE BY A PERSON OR ENTITY WITH MORE THAN ONE ENVIRONMENTAL LAW, THE PERSON OR ENTITY MAY DEMONSTRATE THAT APPROPRIATE EFFORTS TO ACHIEVE COMPLIANCE WERE OR ARE BEING TAKEN BY INSTITUTING A COMPREHENSIVE PROGRAM THAT ESTABLISHES A PHASED SCHEDULE OF ACTIONS TO BE TAKEN TO BRING THE PERSON OR ENTITY INTO COMPLIANCE WITH ALL OF SUCH ENVIRONMENTAL LAWS.

(c) A COURT OF RECORD, OR, PURSUANT TO SECTION 24-4-105, C.R.S., AN ADMINISTRATIVE LAW JUDGE, AFTER AN IN CAMERA REVIEW, DETERMINES THAT COMPELLING CIRCUMSTANCES EXIST THAT MAKE IT NECESSARY TO ADMIT THE ENVIRONMENTAL AUDIT REPORT INTO EVIDENCE OR THAT MAKE IT NECESSARY TO SUBJECT THE ENVIRONMENTAL AUDIT REPORT TO DISCOVERY PROCEDURES:

(d) A COURT OF RECORD, OR, PURSUANT TO SECTION 24-4-105, C.R.S., AN ADMINISTRATIVE LAW JUDGE, AFTER AN IN CAMERA REVIEW, DETERMINES THAT THE PRIVILEGE IS BEING ASSERTED FOR A FRAUDULENT PURPOSE OR THAT THE ENVIRONMENTAL AUDIT REPORT WAS PREPARED TO AVOID DISCLOSURE OF INFORMATION IN AN INVESTIGATIVE, ADMINISTRATIVE, OR JUDICIAL PROCEEDING THAT WAS UNDERWAY, THAT WAS IMMINENT, OR FOR WHICH THE ENTITY OR PERSON HAD BEEN PROVIDED WRITTEN NOTIFICATION THAT AN INVESTIGATION INTO A SPECIFIC VIOLATION HAD BEEN INITIATED; OR

(e) A COURT OF RECORD, OR, PURSUANT TO SECTION 24-4-105, C.R.S., AN ADMINISTRATIVE LAW JUDGE, AFTER AN IN CAMERA REVIEW, DETERMINES THAT THE INFORMATION CONTAINED IN THE ENVIRONMENTAL AUDIT REPORT DEMONSTRATES A CLEAR, PRESENT, AND IMPENDING DANGER TO THE PUBLIC HEALTH OR THE ENVIRONMENT IN AREAS OUTSIDE OF THE FACILITY PROPERTY.

(4) THE SELF-EVALUATION PRIVILEGE CREATED BY THIS SECTION DOES NOT APPLY TO:

(a) DOCUMENTS OR INFORMATION REQUIRED TO BE DEVELOPED.

MAINTAINED, OR REPORTED PURSUANT TO ANY ENVIRONMENTAL LAW OR ANY OTHER LAW OR REGULATION;

(b) DOCUMENTS OR OTHER INFORMATION REQUIRED TO BE AVAILABLE OR FURNISHED TO A REGULATORY AGENCY PURSUANT TO ANY ENVIRONMENTAL LAW OR ANY OTHER LAW OR REGULATION;

(c) INFORMATION OBTAINED BY A REGULATORY AGENCY THROUGH OBSERVATION, SAMPLING, OR MONITORING;

(d) INFORMATION OBTAINED THROUGH ANY SOURCE INDEPENDENT OF THE ENVIRONMENTAL AUDIT REPORT OR ANY PERSON COVERED UNDER SECTION 13-90-107 (1) (J) (I) (A), C.R.S.;

(e) DOCUMENTS EXISTING PRIOR TO THE COMMENCEMENT OF AND INDEPENDENT OF THE VOLUNTARY SELF-EVALUATION;

(f) DOCUMENTS PREPARED SUBSEQUENT TO THE COMPLETION OF AND INDEPENDENT OF THE VOLUNTARY SELF-EVALUATION; OR

(g) ANY INFORMATION, NOT OTHERWISE PRIVILEGED, INCLUDING THE PRIVILEGE CREATED BY THIS SECTION, THAT IS DEVELOPED OR MAINTAINED IN THE COURSE OF REGULARLY CONDUCTED BUSINESS ACTIVITY OR REGULAR PRACTICE.

(5) (a) UPON A SHOWING BY ANY PARTY, BASED UPON INDEPENDENT KNOWLEDGE, THAT PROBABLE CAUSE EXISTS TO BELIEVE THAT AN EXCEPTION TO THE SELF-EVALUATION PRIVILEGE UNDER SUBSECTION (3) OF THIS SECTION IS APPLICABLE TO AN ENVIRONMENTAL AUDIT REPORT OR THAT THE PRIVILEGE DOES NOT APPLY TO THE ENVIRONMENTAL AUDIT REPORT PURSUANT TO THE PROVISIONS OF SUBSECTION (4) OF THIS SECTION, THEN A COURT OF RECORD OR, PURSUANT TO SECTION 24-4-105, C.R.S., ANY ADMINISTRATIVE LAW JUDGE, MAY ALLOW SUCH PARTY LIMITED ACCESS TO THE ENVIRONMENTAL AUDIT REPORT FOR THE PURPOSES OF AN IN CAMERA REVIEW ONLY. THE COURT OF RECORD OR THE ADMINISTRATIVE LAW JUDGE MAY GRANT SUCH LIMITED ACCESS TO ALL OR PART OF THE ENVIRONMENTAL AUDIT REPORT UNDER THE PROVISIONS OF THIS SUBSECTION (5) UPON SUCH CONDITIONS AS MAY BE NECESSARY TO PROTECT THE CONFIDENTIALITY OF THE ENVIRONMENTAL AUDIT REPORT. A MOVING PARTY WHO OBTAINS ACCESS TO AN ENVIRONMENTAL AUDIT REPORT PURSUANT TO THE PROVISIONS OF THIS SUBSECTION (5) MAY NOT DIVULGE ANY INFORMATION FROM THE REPORT EXCEPT AS SPECIFICALLY ALLOWED BY THE COURT OR ADMINISTRATIVE LAW JUDGE.

(b) (1) IF ANY PARTY DIVULGES ALL OR ANY PART OF THE INFORMATION CONTAINED IN AN ENVIRONMENTAL AUDIT REPORT IN VIOLATION OF THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (5) OR IF ANY OTHER PERSON OR ENTITY KNOWINGLY DIVULGES OR DISSEMINATES ALL OR ANY PART OF THE INFORMATION CONTAINED IN AN ENVIRONMENTAL AUDIT REPORT THAT WAS PROVIDED TO SUCH PERSON OR ENTITY IN VIOLATION OF THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (5), SUCH PARTY OR OTHER PERSON OR ENTITY IS LIABLE FOR

ANY DAMAGES CAUSED BY THE DIVULGENCE OR DISSEMINATION OF THE INFORMATION THAT ARE INCURRED BY THE PERSON OR ENTITY FOR WHICH THE ENVIRONMENTAL AUDIT REPORT WAS PREPARED.

(II) IF ANY PUBLIC ENTITY, PUBLIC EMPLOYEE, OR PUBLIC OFFICIAL DIVULGES ALL OR ANY PART OF THE INFORMATION CONTAINED IN AN ENVIRONMENTAL AUDIT REPORT IN VIOLATION OF THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (5) OR KNOWINGLY DIVULGES OR DISSEMINATES ALL OR ANY PART OF THE INFORMATION CONTAINED IN AN ENVIRONMENTAL AUDIT REPORT THAT WAS PROVIDED TO SUCH PUBLIC ENTITY, PUBLIC EMPLOYEE, OR PUBLIC OFFICIAL IN VIOLATION OF THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (5), SUCH PUBLIC ENTITY, PUBLIC EMPLOYEE, OR PUBLIC OFFICIAL SHALL BE GUILTY OF A CLASS 1 MISDEMEANOR, MAY BE FOUND IN CONTEMPT OF COURT BY A COURT OF RECORD, AND MAY BE ASSESSED A PENALTY NOT TO EXCEED TEN THOUSAND DOLLARS BY A COURT OF RECORD OR AN ADMINISTRATIVE LAW JUDGE.

(6) NOTHING IN THIS SECTION LIMITS, WAIVES, OR ABROGATES THE SCOPE OR NATURE OF ANY STATUTORY OR COMMON-LAW PRIVILEGE.

(7) A PERSON OR ENTITY ASSERTING A VOLUNTARY SELF-EVALUATION PRIVILEGE HAS THE BURDEN OF PROVING A PRIMA FACIE CASE AS TO THE PRIVILEGE. A PARTY SEEKING DISCLOSURE OF AN ENVIRONMENTAL AUDIT REPORT HAS THE BURDEN OF PROVING THAT SUCH PRIVILEGE DOES NOT EXIST UNDER THIS SECTION.

(8) NOTWITHSTANDING THE PROVISIONS OF SUBSECTION (3) OF THIS SECTION, THE EXISTENCE OF AN ENVIRONMENTAL AUDIT REPORT SHALL BE SUBJECT TO DISCOVERY PROCEEDINGS PURSUANT TO THE RULES OF CIVIL PROCEDURE, CRIMINAL PROCEDURE, OR ADMINISTRATIVE PROCEDURE; EXCEPT THAT THE CONTENTS OF SUCH A REPORT OR ANY OTHER PRIVILEGED INFORMATION CONTAINED HEREIN SHALL REMAIN CONFIDENTIAL.

(9) THIS SECTION APPLIES ONLY TO ALL VOLUNTARY SELF-EVALUATIONS THAT ARE PERFORMED DURING THE PERIOD BEGINNING ON THE EFFECTIVE DATE OF THIS ACT AND ENDING JUNE 30, 1999.

SECTION 2. 13-90-107 (1), Colorado Revised Statutes, 1987 Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW PARAGRAPH to read:

13-90-107. Who may not testify without consent. (1) There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:

(j) (I) (A) IF ANY PERSON OR ENTITY PERFORMS A VOLUNTARY SELF-EVALUATION, THE PERSON, ANY OFFICER OR EMPLOYEE OF THE ENTITY OR PERSON INVOLVED WITH THE VOLUNTARY SELF-EVALUATION, IF A SPECIFIC RESPONSIBILITY OF SUCH EMPLOYEE WAS THE PERFORMANCE OF OR PARTICIPATION IN THE VOLUNTARY SELF-EVALUATION OR THE

PREPARATION OF THE ENVIRONMENTAL AUDIT REPORT, OR ANY CONSULTANT WHO IS HIRED FOR THE PURPOSE OF PERFORMING THE VOLUNTARY SELF-EVALUATION FOR THE PERSON OR ENTITY MAY NOT BE EXAMINED AS TO THE VOLUNTARY SELF-EVALUATION OR ENVIRONMENTAL AUDIT REPORT WITHOUT THE CONSENT OF THE PERSON OR ENTITY, OR UNLESS ORDERED TO DO SO BY ANY COURT OF RECORD, OR, PURSUANT TO SECTION 24-4-105, C.R.S., BY AN ADMINISTRATIVE LAW JUDGE. FOR THE PURPOSES OF THIS PARAGRAPH (j), "VOLUNTARY SELF-EVALUATION" AND "ENVIRONMENTAL AUDIT REPORT" HAVE THE MEANINGS PROVIDED FOR THE TERMS IN SECTION 13-25-126.5 (2).

(8) THIS PARAGRAPH (j) DOES NOT APPLY IF THE VOLUNTARY SELF-EVALUATION IS SUBJECT TO AN EXCEPTION ALLOWING ADMISSION INTO EVIDENCE OR DISCOVERY PURSUANT TO THE PROVISIONS OF SECTION 13-25-126.5 (3) OR (4).

(II) THIS PARAGRAPH (j) APPLIES ONLY TO VOLUNTARY SELF-EVALUATIONS THAT ARE PERFORMED DURING THE PERIOD BEGINNING ON THE EFFECTIVE DATE OF THIS ACT AND ENDING JUNE 30, 1999.

SECTION 3. Part 1 of article 1 of title 25, Colorado Revised Statutes, 1989 Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW SECTION to read:

25-1-114.5. Voluntary disclosure arising from self-evaluation - presumption against imposition of administrative, civil, or criminal penalties. (1) FOR THE PURPOSES OF THIS SECTION, A DISCLOSURE OF INFORMATION BY A PERSON OR ENTITY TO ANY DIVISION OR AGENCY WITHIN THE DEPARTMENT OF HEALTH REGARDING ANY INFORMATION RELATED TO AN ENVIRONMENTAL LAW IS VOLUNTARY IF ALL OF THE FOLLOWING ARE TRUE:

(a) THE DISCLOSURE IS MADE PROMPTLY AFTER KNOWLEDGE OF THE INFORMATION DISCLOSED IS OBTAINED BY THE PERSON OR ENTITY;

(b) THE DISCLOSURE ARISES OUT OF A VOLUNTARY SELF-EVALUATION;

(c) THE PERSON OR ENTITY MAKING THE DISCLOSURE INITIATES THE APPROPRIATE EFFORT TO ACHIEVE COMPLIANCE, PURSUES COMPLIANCE WITH DUE DILIGENCE, AND CORRECTS THE NONCOMPLIANCE WITHIN TWO YEARS AFTER THE COMPLETION OF THE VOLUNTARY SELF-EVALUATION. WHERE SUCH EVIDENCE SHOWS THE NONCOMPLIANCE IS THE FAILURE TO OBTAIN A PERMIT, APPROPRIATE EFFORTS TO CORRECT THE NONCOMPLIANCE MAY BE DEMONSTRATED BY THE SUBMITTAL OF A COMPLETE PERMIT APPLICATION WITHIN A REASONABLE TIME.

(d) THE PERSON OR ENTITY MAKING THE DISCLOSURE COOPERATES WITH THE APPROPRIATE DIVISION OR AGENCY IN THE DEPARTMENT OF HEALTH REGARDING INVESTIGATION OF THE ISSUES IDENTIFIED IN THE DISCLOSURE.

Need criteria for appropriate techniques + technology in correcting compliance

(2) FOR THE PURPOSES OF PARAGRAPH (C) OF SUBSECTION (1) OF THIS SECTION, UPON APPLICATION TO AND AT THE DISCRETION OF THE DEPARTMENT OF HEALTH, THE TIME PERIOD WITHIN WHICH THE NONCOMPLIANCE IS REQUIRED TO BE CORRECTED MAY BE EXTENDED IF IT IS NOT PRACTICABLE TO CORRECT THE NONCOMPLIANCE WITHIN THE TWO-YEAR PERIOD. A REQUEST FOR A DE NOVO REVIEW OF THE DECISION OF THE DEPARTMENT OF HEALTH MAY BE MADE TO THE APPROPRIATE DISTRICT COURT OR ADMINISTRATIVE LAW JUDGE.

(3) IF A PERSON OR ENTITY IS REQUIRED TO MAKE A DISCLOSURE TO A DIVISION OR AGENCY WITHIN THE DEPARTMENT OF HEALTH UNDER A SPECIFIC PERMIT CONDITION OR UNDER AN ORDER ISSUED BY THE DIVISION OR AGENCY, THEN THE DISCLOSURE IS NOT VOLUNTARY WITH RESPECT TO THAT DIVISION OR AGENCY.

(4) IF ANY PERSON OR ENTITY MAKES A VOLUNTARY DISCLOSURE OF AN ENVIRONMENTAL VIOLATION TO A DIVISION OR AGENCY WITHIN THE DEPARTMENT OF HEALTH, THEN THERE IS A REBUTTABLE PRESUMPTION THAT THE DISCLOSURE IS VOLUNTARY AND THEREFORE THE PERSON OR ENTITY IS IMMUNE FROM ANY ADMINISTRATIVE AND CIVIL PENALTIES ASSOCIATED WITH THE ISSUES DISCLOSED AND IS IMMUNE FROM ANY CRIMINAL PENALTIES FOR NEGLIGENT ACTS ASSOCIATED WITH THE ISSUES DISCLOSED. THE PERSON OR ENTITY SHALL PROVIDE INFORMATION SUPPORTING ITS CLAIM THAT THE DISCLOSURE IS VOLUNTARY AT THE TIME THAT THE DISCLOSURE IS MADE TO THE DIVISION OR AGENCY.

(5) TO REBUT THE PRESUMPTION THAT A DISCLOSURE IS VOLUNTARY, THE APPROPRIATE DIVISION OR AGENCY SHALL SHOW TO THE SATISFACTION OF THE RESPECTIVE COMMISSION IN THE DEPARTMENT OF HEALTH OR THE STATE BOARD OF HEALTH, IF NO RESPECTIVE COMMISSION EXISTS, THAT THE DISCLOSURE WAS NOT VOLUNTARY BASED UPON THE FACTORS SET FORTH IN SUBSECTIONS (1), (2), AND (3) OF THIS SECTION. A DECISION BY THE COMMISSION OR THE STATE BOARD OF HEALTH, WHICHEVER IS APPROPRIATE, REGARDING THE VOLUNTARY NATURE OF A DISCLOSURE IS FINAL AGENCY ACTION. THE DIVISION OR AGENCY MAY NOT INCLUDE ANY ADMINISTRATIVE OR CIVIL PENALTY OR FINE OR ANY CRIMINAL PENALTY OR FINE FOR NEGLIGENT ACTS IN A NOTICE OF VIOLATION OR IN A CEASE AND DESIST ORDER ON ANY UNDERLYING ENVIRONMENTAL VIOLATION THAT IS ALLEGED ABSENT A FINDING BY THE RESPECTIVE COMMISSION OR THE STATE BOARD OF HEALTH THAT THE DIVISION OR AGENCY HAS REBUTTED THE PRESUMPTION OF VOLUNTARINESS OF THE DISCLOSURE. THE BURDEN TO REBUT THE PRESUMPTION OF VOLUNTARINESS IS ON THE DIVISION OR AGENCY.

(6) THE ELIMINATION OF ADMINISTRATIVE, CIVIL, OR CRIMINAL PENALTIES UNDER THIS SECTION DOES NOT APPLY IF A PERSON OR ENTITY HAS BEEN FOUND BY A COURT OR ADMINISTRATIVE LAW JUDGE TO HAVE COMMITTED SERIOUS VIOLATIONS THAT CONSTITUTE A PATTERN OF CONTINUOUS OR REPEATED VIOLATIONS OF ENVIRONMENTAL LAWS, RULES, REGULATIONS, PERMIT CONDITIONS, SETTLEMENT AGREEMENTS, OR ORDERS ON CONSENT AND THAT WERE DUE TO SEPARATE AND DISTINCT EVENTS GIVING RISE TO THE VIOLATIONS, WITHIN THE THREE-YEAR PERIOD PRIOR

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TO THE DATE OF THE DISCLOSURE. SUCH A PATTERN OF CONTINUOUS OR REPEATED VIOLATIONS MAY ALSO BE DEMONSTRATED BY MULTIPLE SETTLEMENT AGREEMENTS RELATED TO SUBSTANTIALLY THE SAME ALLEGED VIOLATIONS CONCERNING SERIOUS INSTANCES OF NONCOMPLIANCE WITH ENVIRONMENTAL LAWS THAT OCCURRED WITHIN THE THREE-YEAR PERIOD IMMEDIATELY PRIOR TO THE DATE OF THE VOLUNTARY DISCLOSURE.

(7) EXCEPT AS SPECIFICALLY PROVIDED IN THIS SECTION, THIS SECTION DOES NOT AFFECT ANY AUTHORITY THE DEPARTMENT OF HEALTH HAS TO REQUIRE ANY ACTION ASSOCIATED WITH THE INFORMATION DISCLOSED IN ANY VOLUNTARY DISCLOSURE OF AN ENVIRONMENTAL VIOLATION.

(8) UNLESS THE CONTEXT OTHERWISE REQUIRES, THE DEFINITIONS CONTAINED IN SECTION 13-25-126.5 (2), C.R.S., APPLY TO THIS SECTION.

(9) THIS SECTION APPLIES ONLY TO VOLUNTARY DISCLOSURES THAT ARE MADE AND VOLUNTARY SELF-EVALUATIONS THAT ARE PERFORMED DURING THE PERIOD BEGINNING ON THE EFFECTIVE DATE OF THIS ACT AND ENDING JUNE 30, 1999.

SECTION 4. Effective date - applicability. This act shall take effect upon passage and shall apply to all legal actions and administrative proceedings commenced on or after said date.

SECTION 5. No appropriation. The general assembly has determined that this act can be implemented within existing appropriations, and therefore no separate appropriation of state moneys is necessary to carry out the purposes of this act.

SECTION 6. Safety clause. The general assembly hereby

finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Tom Norton
Tom Norton
PRESIDENT OF
THE SENATE

Charles E. Berry
Charles E. Berry
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Joan M. Aldi
Joan M. Aldi
SECRETARY OF
THE SENATE

Judith M. Rodriguez
Judith M. Rodriguez
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

APPROVED June 1, 1994 at 1:28 p.m.

Roy Romo
Roy Romo
GOVERNOR OF THE STATE OF COLORADO



**League
of Kansas
Municipalities**

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LEGISLATIVE TESTIMONY

TO: Senate Energy and Natural Resources Committee
FROM: *Chris* Chris McKenzie, Executive Director
DATE: January 24, 1995
RE: Testimony on SB 76, Concerning Environmental Audits

Thank you for the opportunity to testify today concerning SB 76. As you know, the major thrust of this legislation is to provide an incentive for the conduct of environmental audits by providing that such audits shall be privileged and not subject to admission as evidence in a criminal prosecution of any person, company, etc. Further, the bill provides a rebuttable presumption of immunity if a person makes a voluntary disclosure of a violation of environmental laws.

As a matter of state policy the legislature may wish to extend such evidentiary privileges and immunity to persons that engage in these actions. In fact, creating incentives for more aggressive environmental audit preparation may be a very desirable state goal. As a representative of the 543 member cities of the League of Kansas Municipalities, however, I respectfully question the inclusion of language making it applicable to **local counterparts** of state environmental statutes and rules and regulations in this legislation. Such references constitute preemption of local powers that would appear unnecessary now and in the foreseeable future.

As an initial matter, due to the wide ranging state and federal environmental legislation, cities have not actively legislated in this area, and I do not expect this to change in the future. Municipal courts generally hear cases involving misdemeanor matters, and I am not familiar with any city which has yet legislated an environmental "crime" which is prosecuted in municipal court other than littering, spitting on the sidewalk, etc.

In short, we recommend that the words "**and...local...**" in line 40 and any other place it appears in the bill be removed in light of current and anticipated municipal practices. Consequently, it is unnecessary to preempt local powers that have not yet been and will not likely be exercised.

Thank you again. Please let me know if you have any questions.

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