

MINUTES OF THE SENATE NATURAL RESOURCES COMMITTEE

The meeting was called to order by Chairperson Carolyn McGinn at 8:30 a.m. on February 10, 2006, in Room 423-S of the Capitol.

All members were present except:
Senator Terry Bruce- excused

Committee staff present:
Raney Gilliland, Kansas Legislative Research Department
Lisa Montgomery, Revisor of Statutes Office
Judy Holliday, Committee Secretary

Conferees appearing before the Committee:
Christopher J. Tymeson, Chief Legal Counsel, Kansas Division of Wildlife and Parks
Travis Whitt, Area Coordinator for Kansas Boat Education, Kansas Division of Wildlife & Parks
William Rice, Deputy Regional Administrator, Region VII, United States Environmental Protection Agency
John W. Mitchell, Director, Bureau of Environmental Field Services, Kansas Department of Health & Environment
Ron Hammerschmidt, Kansas Department of Health and Environment
Barb Hinton, Legislative Post Auditor

Others attending:
See attached list.

Chairperson McGinn opened the hearing on **SB 417, a bill imposing certain requirements for boating.** Christopher Tymeson, Kansas Wildlife and Parks, presented the Department's testimony on this bill relating to recreational boats in Kansas (Attachment 1). Mr. Tymeson called the Committee's attention to the handout which provided amendments recommended by the Department to definitions contained in the bill, specifically defining "cargo" as skiers being pulled behind a boat; clarification on light requirements and sound; limiting skiing from sunrise to sunset; requiring a skier down flag; requiring a vessel numbering system similar to vehicle numbering to assist law enforcement in marine theft cases; and requiring that fines collected from boating violations be credited to the Boating Fee Fund. Mr. Tymeson called the Committee's attention to a copy of a letter from Kevin Kelly, Recreational Boating Safety Specialist, U.S. Department of Homeland Security, U.S. Coast Guard, favoring passage of **SB 417** (Attachment 2).

Travis Whitt, Area Coordinator for Kansas Boater Education through the Kansas Department of Wildlife and Parks, testified in favor of **SB 417** (Attachment 3). Mr. Whitt explained that the changes in the bill simplify boating regulations, and pointed out to the Committee that defining direct and audible supervision and adding the flag rule make sense, and he urged the Committee to pass the bill favorably.

Chairperson McGinn told the Committee that another meeting may need to be added to wrap up the current list of bills.

Senator Francisco questioned the term "boat livery," and asked if it pertained to a person and not a vessel. Mr. Tymeson responded that by defining as a person, it covers both.

Chairperson McGinn declared the hearing was still open on the issue, but that the Committee would move on to hear **Senate Bill 453, environmental laws; compliance audit privilege; immunity; lesser penalties for violations.** Ron Hammerschmidt, Director of Environment for KDHE, introduced John Mitchell, Director, Bureau of Environmental Field Services, Kansas Department of Health and Environment, who provided background and proposed changes to existing Kansas environmental audit privilege and immunity law (Attachment 4). Mr. Mitchell testified that EPA has blocked federal authorization for newer state environmental regulatory provisions to force Kansas to change existing audit law. He commented that the proposed changes would bring Kansas in line with other states and would remove the barriers to which EPA objects while continuing the Kansas audit privilege program.

Senator Taddiken asked if there is a problem, and Mr. Mitchell replied that he has no information on a

CONTINUATION SHEET

MINUTES OF THE Senate Natural Resources Committee at 8:30 a.m. on February 10, 2006, in Room 423-S of the Capitol.

criminal problem, but the potential is there for one.

William Rice, Deputy Regional Administrator, Region VII, United States Environmental Protection Agency, offered comments on **SB 453** (Attachment 5). Mr. Rice cited problems within the current Kansas law, the reasons that EPA cannot approve new environmental programs in Kansas, and stated that the proposed revisions in **SB 453** would resolve the issues identified by EPA with existing state law.

Senator Lee asked what the bill accomplishes, and Mr. Rice stated it removes provisions that create a legal barrier for EPA to delegate programs. Senator Lee asked if it takes away the rights from KDHE, and Mr. Rice stated that he believed it does not take away the Department's ability to administer its programs.

Chairperson McGinn recognized Barb Hinton, Legislative Post Auditor, who presented testimony in favor of **SB 453** (Attachment 6). Ms. Hinton called the Committee's attention to specific sections of a balloon on this bill (Attachment 7), and suggested adding language to the bill similar to language added last year to HB 2357 addressing self audits by insurance companies regarding access to confidential records.

Chairperson McGinn asked Committee members to read the minutes for approval at the next meeting. Chairperson McGinn advised Committee members that an extra meeting may be scheduled for next week to wrap up some issues.

There being no further comments to come before the Committee, the meeting adjourned at 9:25 a.m.

SENATE NATURAL RESOURCES COMMITTEE

Guest Roster

2/10/06

Name	Representing
Lindsey Douglas	Hein Law Firm
John Mitchell	KDHE
Dan Heskett	KDWP
Chris Tyner	KDWP
TRAVIS WHITT	
Shari Albrecht	KDHE
Erika Nighswonger	KDWP
Mary Jane Stankiewicz	KGFA/KARA
Leslie Kaufman	KS coop Council
Charles Benjamin	KS Sierra Club

**TESTIMONY ON SB 417 REGARDING BOATING LAW
TO
SENATE NATURAL RESOURCES COMMITTEE
BY CHRISTOPHER J. TYMESON, CHIEF LEGAL COUNSEL
AND
DAN HESKET, BOATING LAW ADMINISTRATOR**

February 10, 2006



**PERRY RESERVOIR – AUGUST 2003
IMPROPER LOOKOUT; IMPROPER LIGHTS; FAILURE TO HEED THE RIGHT OF
WAY**

*Senate Natural Resources
2-10-06
Attachment 1*

INTRODUCTION: History of Boating Safety and Enforcement

Steam propulsion brought about the first standards for vessels in 1800's. After several significant casualties associated with steam plants on vessels, marine safety statutes established inspection and manning requirements for steam propelled vessels, including fishing vessels. As steam propulsion became less prevalent, subsequent legislation required the inspection of most passenger and commercial vessels, regardless of the means of propulsion. This included standards to improve vessel safety in categories such as the design and construction of vessels, training and licensing of operators, and fire fighting and life saving equipment.

Documentation of vessels is the responsibility of the U.S. Coast Guard. Documentation was originally required only for large commercial vessels, but is gradually being used for smaller vessels and recreational boats for the added security it affords lenders. The National Vessel Documentation center is located in Falling Waters, West Virginia. Unlike simple registration or titling by states, the documentation procedure requires numerous forms and documents. They include the application for initial issue of certificate of documentation; the builder certificate and first transfer of title; a bill of sale on appropriate federal form; and declaration of citizenship.

Among the first statutes dealing with registration were the Federal Motorboat Act of 1910, which gave the federal government the responsibility to regulate recreational boating in the U.S., and the Federal Numbering Act of 1918, which instituted a numbering system for all undocumented vessels.

The Motor Boat Act of 1940 was the first statute to address safety on motor boats. The act dealt primarily with navigation lights and sound signals, and required motor vessels to carry life preservers and fire extinguishers. It also required motor boats carrying passengers to be operated by a licensed individual, although no license examination was required.

The Federal Boating Act of 1958 encouraged states to assume responsibility for the registration and regulation of boats for recreational use. This included numbering boats, reporting boating statistics, and furnishing the U.S. Coast Guard with statistical information. The Kansas Forestry, Fish, and Game was notified on November 16, 1959, that the proposed system was approved and would become effective January 1, 1960.

In 1960, Kansas began requiring registration for all motorboats powered by machinery over 10 horsepower. This registration requirement was extended in 1971 to include any vessel powered by machinery or sail.

Congress passed the Federal Boat Safety Act in 1971. This act was enacted to authorize the creation of federal safety standards for recreational boats used on navigable waters of the United States. At the time of enactment, over 40 million Americans engaged in recreational boating each year in approximately 9 million boats, with the usage increasing at the rate of about four thousand per week. This increase in recreational boating was accompanied by a marked increase in accidents, deaths, and injuries.

Congress recognized that the lack of adequate federal regulation contributed to the hazards of recreational boating. To address the inadequacies in existing law, Congress decided, for the first time, to enact a law that would address "the subject of safety for boats used principally for other than commercial use", i.e., recreational vessels. This legislation was to grant the United States Coast Guard the authority to promulgate design and construction standards for recreational boats.

The Boating Safety Act of 1971 was enacted to "improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast

Guard is operating, which had been the Secretary of Transportation. The Department of Homeland Security, created in 2003, now includes the U.S. Coast Guard.

The rulemaking authority has been delegated to the Commandant of the United States Coast Guard. Although manufacturers are subject to civil and criminal penalties for the violation of Coast Guard safety standards, the act does not establish any mechanisms for compensating persons injured by unsafe boats.

Under this Act, the Coast Guard's authority to issue minimum safety standards is "permissive and not mandatory", and before establishing any safety regulations, the Coast Guard is required to consult with the National Boating Safety Advisory Council, which is comprised of seven state boating officials, seven industry representatives, and seven members from national recreational boating organizations and from the general public.

Before issuing any regulations under this Act, the Coast Guard must comply with the formal rulemaking procedures of the Administrative Procedure Act, which requires public notice and comments on a rule before it becomes effective.

This Act also contains two provisions addressing the effect of Coast Guard regulations on state law. First, Congress included a preemption clause providing, in pertinent part, that: "Unless permitted by the Secretary under section 4305 of this title, a State or political Subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 of 46 U.S.C." Second, Congress included an anti-preemption provision, or savings clause, providing that: "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law."

In 1980 the Federal Boating Safety Act of 1971 was amended to the Recreational Boating Safety and Facilities Improvement Act which had the following goal: "[T]he purpose of this Act [is] to improve recreational boating safety and facilities and to foster greater development, use, and enjoyment of all the waters of the United States by encouraging and assisting participation by the several States, the boating industry, and the boating public in the development, administration, and financing of a national recreational boating safety and facilities improvement program; by authorizing the establishment of national construction and performance standard for boats and associated equipment; and by creating more flexible authority governing the use of boats and equipment."

This Act also established the Aquatic Resources Trust Fund, also known as the Wallop/Breaux Trust Fund. The fund consists of excise taxes, attributable to motor boat fuels and fishing equipment, along with import duties on fishing equipment, yachts, and pleasure boats, interest earned on the funds and excise taxes attributable to gasoline used in small engines.

The Boating Safety Account, administered by the United States Coast Guard, receives millions of dollars from the Wallop/Breaux Trust Fund. These funds are distributed into several federal and state projects. The remaining Sport Fish Restoration Account funds are then apportioned to States and eligible territories. Of these funds, 12.5% must be used for motorboat access.

In order for state and eligible territories to receive these funds, they must have a program that includes the following: 1. an approved vessel numbering system; 2. a cooperative boating safety assistance program with the USCG in that state; 3. sufficient patrol and other activity to insure adequate enforcement of applicable state boating safety laws and regulations; 4. an adequate state boating safety education program that includes the dissemination of information concerning the hazards of operating a vessel when under the influence of alcohol or drugs; and 5. a system approved by the USCG for reporting marine casualties.

To qualify for state recreational boating facility improvement funds, states must have following: 1. a complete description of recreational boating facility improvement projects to be undertaken; and 2. consult with state officials responsible for the statewide comprehensive outdoor recreation plan required by the Land and Water Conservation Funds Act of 1965.

Federal funds appropriated by Congress for the State Recreational Boating Safety programs are distributed three ways and are a 50-50 match. State allocations are determined as follows: One-third shall be allocated equally each fiscal year among eligible states. One-third shall be allocated among eligible states that maintain a state vessel numbering system and a marine casualty reporting system. This allows the amount allocated each fiscal year to be in the same ratio as the number of vessels numbered in that state. One-third shall be allocated each fiscal year in the same ratio that each state spent on the RBS program the previous fiscal year.

There are four objectives of the State Recreational Boating Safety program described as: 1. improve demonstrated knowledge, skills, abilities, and behaviors of boaters; 2. improve safety of boats and their associated equipment; 3. support improvements to the physical and operational boating environment; and 4. support improvements to intermodal and interagency cooperation, coordination, and assistance.

Recommendations:

Statistic: Kansas has 97,748 registered pleasure boats as of 12/31/2005

Modify or add new definitions:

K.S.A. 32-1102 is recommended to be amended by adding the following definitions:

(t) "Boat Livery"

Under current statute K.S.A. 32-1148. Boat Liveries; duties; explains what type of records and procedure a livery must perform, but there isn't a definition of what a boat livery is making the statute incomplete. **STATISTIC- NUMBER OF LIVERIES IN KANSAS IS 65.**

(u) "Cargo"

The definition of cargo is needed to clarify a problem that exist with boaters, specifically personal watercraft users who are pulling water skiers, tubers, etc., behind their vessels. K.S.A. 32-1126 addresses vessel carrying capacity. The boating population many times is not aware that they should count the individuals being towed toward their total carrying capacity and this definition would clarify this. Reasons to count those individuals being towed include persons needed to be retrieved from the water (injury, tired, equipment failure) will be placed into a vessel increasing the capacity of the vessel. Towing equipment or passengers affect how a vessel will handle, and if the capacity of the vessel is at its maximum, then the extra personnel being towed will add an extra burden on the vessel's handling capability. The definition of "passenger" means any individual who obtains passage or is carried in or on a vessel. Although vague, anyone who is transported from one point to another by a vessel, whether occupying the vessel or being towed, is acquiring passage and would be considered a passenger. The definition of "Cargo" would help clarify this problem. **STATISTIC-PWC TOWING VIOLATIONS: 2001 = 17, 2002 = 36, 2003 = 21, 2004 = 11, 2005 = 6**

(v) "State of Principle Use" and (w) "Use"

These definitions mirror the Code of Federal Regulations 33-173.3 Title 33 which are the requirements of the states to meet a federally approved registration system. Persons who register their vessels in the State of Kansas must list their "State of Principle Use" on their registration applications today.

(x) "Abandoned Vessel"

This definition is needed for proposed legislation dealing with marine theft and insurance fraud issues and giving law enforcement officers guidelines in dealing with abandoned boats when owners of property call for assistance. There are current statutes

dealing with motorized vehicles, theft of vehicles, abandoned vehicles, etc., but vessels do not meet these definitions found in the Chapter 8 statutes dealing with traffic and automobiles.

Statutory modification:

Sec. 2 K.S.A. 32-1110– by adding as its state of principle use, brings this numbering requirement into direct compliance with the United States Coast Guard, Federal Code of Regulation, Title 33. This code sets the standards for the states to meet a federally approved registration system. It is also currently listed on the departments Vessel Registration Application, Item #19, but is not defined or addressed in statute.

APPLICATION FOR CERTIFICATE OF NUMBER KANSAS BOATING ACT

1. Name(s) _____ <small>Please Print (Last, First, Initial)</small>		3. Present No. on Boat _____		4. Yr. Boat Built _____		5. Boat Length (in ft.) _____			
Address _____		6. Boat Make _____		7. Hull ID No. _____					
City _____ State _____ Zip _____		8. Hull Material <input type="checkbox"/> Aluminum <input type="checkbox"/> Steel <input type="checkbox"/> Outboard <input type="checkbox"/> Jet <input type="checkbox"/> Wood <input type="checkbox"/> Cloth <input type="checkbox"/> Inboard <input type="checkbox"/> Air <input type="checkbox"/> Rubber <input type="checkbox"/> Other <input type="checkbox"/> In-Outboard <input type="checkbox"/> Row <input type="checkbox"/> Fiberglass <input type="checkbox"/> Sail <input type="checkbox"/> Sailboard <input type="checkbox"/> None <input type="checkbox"/> Aux/Sail <input type="checkbox"/> Canoe		9. Propulsion <input type="checkbox"/> Outboard <input type="checkbox"/> Jet <input type="checkbox"/> Inboard <input type="checkbox"/> Air <input type="checkbox"/> In-Outboard <input type="checkbox"/> Row <input type="checkbox"/> Sail <input type="checkbox"/> Sailboard <input type="checkbox"/> None		10. Fuel <input type="checkbox"/> Gasoline <input type="checkbox"/> Electric <input type="checkbox"/> Diesel <input type="checkbox"/> None		11. Use <input type="checkbox"/> Pleasure <input type="checkbox"/> Livery <input type="checkbox"/> Cabin Cruise <input type="checkbox"/> Houseboat <input type="checkbox"/> Jet Ski <input type="checkbox"/> Sailboard	
Phone _____		13. Motor Hk. _____ Motor Year _____		Trailer Length _____		Trailer Yr. _____			
2. Birthdate of Owner _____ <small>(month, day, yr)</small>		14. Cap HP Rating _____		15. Toilet (yes/no) _____		16. Date Purchased Boat _____			
		17. Purchased From: <input type="checkbox"/> Out of State Dealer <input type="checkbox"/> Kansas Dealer <input type="checkbox"/> Private Individual		PROVIDE SALES TAX RATE (if)		Name _____			
		18. County Boat Stored _____		19. State of Principal use _____					

I certify the above information is true and correct.

20. Sign Here: X _____
Signature (do not print)

Sec. 3 K.S.A. 32-1111 – Vessels documented under the authority of the United States Coast Guard are not permitted to receive a registration of numbers from the states, or allowed to be counted by the states towards the total figure of registered boats, however, states may register these documented vessels to allow payment of the registration fee towards the state’s boating fee fund. These vessels are utilizing Kansas waters and have not contributed towards any user fee for upgrading facilities, providing safety measures, such as law enforcement and navigational aids, as the smaller recreational vessels have been doing since 1960. A registration showing the vessel is documented and registered by the state would accompany the vessel and expiration decals would be displayed on the top forward half of the bow. This also becomes an aid in the identification of these vessels for homeland security issues, as currently the state does not know an exact number of these vessels utilizing Kansas waters, nor do we know who the owners are or where they are located. **STATISTIC: It is estimated that there are over 500 documented boats in Kansas. 27 States require documented boats to register; 6 are unknown; 12 do not. Missouri and Oklahoma require registration, Nebraska does not, Colorado is unknown. These vessels are large vessels requiring a minimum of 5 net tons (approximately 25 feet in length) before they are eligible by the U.S. Coast Guard to be documented. Once these vessels are placed and moored on a body of water, they usually stay on the same body of water throughout the course of the summer.**



Documented vessels moored at sailboat cove-El Dorado reservoir

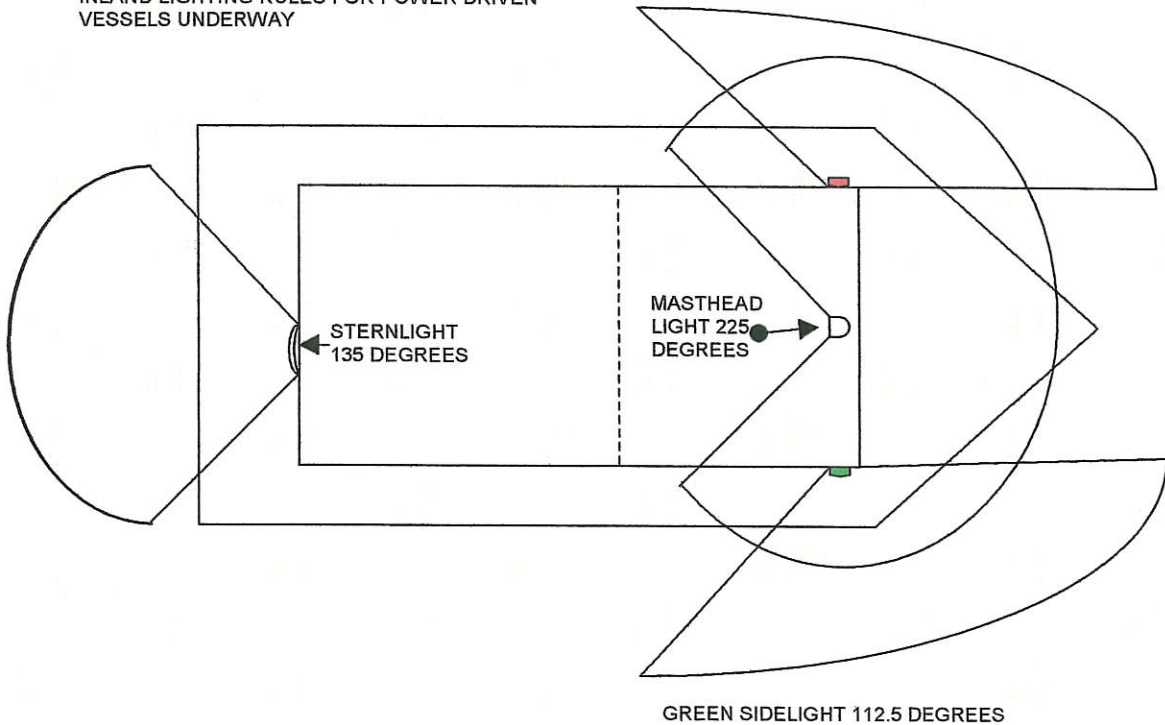
Sec. 4 K.S.A. 32-1119 – (b) Light requirement and sound.

These amendments mirror the language of the definitions for lights provided by the Code of Federal Regulations regulating inland waters. These amendments should simplify the language previously used for the purpose of clarification for the boating public, courts, and officers defining what types of lights are required. The federal act of September 24, 1963 for preventing collisions at sea, had been amended in 1972, and the inland navigation portion was amended in 1980 and became effective on December 24, 1981, thus making the section of the current law under K.S.A. 32-1119 (c) obsolete.

The current law on lighting is confusing and uses minutes on a compass. This law come from the old maritime law, which most, if not all, states had abandoned years ago, as many people would not be able to follow the language used trying to decipher how many points are on a compass. The new language presented uses degrees. It defines the four lighting variations and then explains what lights an individual would need for their vessels. **STATISTIC: LIGHTING VIOLATIONS: 2003=34, 2004=36, 2005=29**

RULE 23 OF 72 COLREGS – INTERNATIONAL AND INLAND LIGHTING RULES FOR POWER DRIVEN VESSELS UNDERWAY

RED SIDELIGHT 112.5 DEGREES



(d) The whistle amendment requiring all motorboats to provide an efficient sound producing device is from the Federal Code requiring all motorized vessels to have an

efficient sound-producing device while operating on navigable waters and is a safety issue in case the vessel is in need of assistance, navigating congested area, operating in foul weather, and entering and leaving port areas. A whistle will carry much further than a voice. Other states such as Missouri require all motorized vessels to carry a sound producing device and personal watercraft operators accomplish this by having a whistle on the vessel or attached to the operators life jacket.

(e) Removes class 2 vessels (26-40 feet) from needing a bell. This change will require only class 3 vessels to be equipped with a bell. The bell is for large ships in bad visibility to sound when entering and leaving a harbor. This change was asked for by the owners of vessels between 26 and 40 feet.

Sec. 5 K.S.A. 32-1125 – (e) “Direct and audible supervision”.

This definition is needed to clarify to the boating public that an adult needs to be on the same vessel so they can assume control over the vessel if needed.

Sec. 6 K.S.A. 32-1128 (a) – Skiing from sunrise to sunset. Presently the statute allows skiing up to one hour after sunset and an hour before sunrise. Boats are required to use lights for navigational purposes after sunset and before sunrise. Personal watercraft cannot be operated between the hours of sunset to sunrise. Current law requires boat to display lights for navigational purposes and safety, yet allows them to tow an object which may not be visible, 75 or more feet from the back of the vessel. It is very unsafe as the light fades quickly after sunset for the downed skier to be detected by other passing vessels. **STATISTIC: PROHIBITED OPERATIONS VIOLATIONS: 2003=93, 2004=88, 2005=85**

Cheney Reservoir – East Boat Ramp – Photos taken to the west during sunset.
October 21, 2004 – Partly Cloudy – ½ moon at sunset located at 11:00 position behind the photographer.

Boat Ramp was equipped with lighting located approximately 100 feet behind the photographer, illuminating the boat ramp.

Camera used was Sony Mavica Digital with 2.0 mega pixels – No Flash.

Length of average ski or tow rope is 75 feet.

Sunset was at 6:46 p.m.



Photo taken at 5:50 p.m. from East Boat Ramp – Buoy's are approximately 200 feet from photographer.



Photo taken at 6:35 p.m. from East Boat Ramp – same position as above.



Photo taken at 6:46 p.m. (official sunset hours) sun is setting on horizon.



Photo taken at 6:58 p.m. approximately 15 minutes after sunset. Residual lighting illuminates boat going into the marina at approximately 250 feet from photographer.

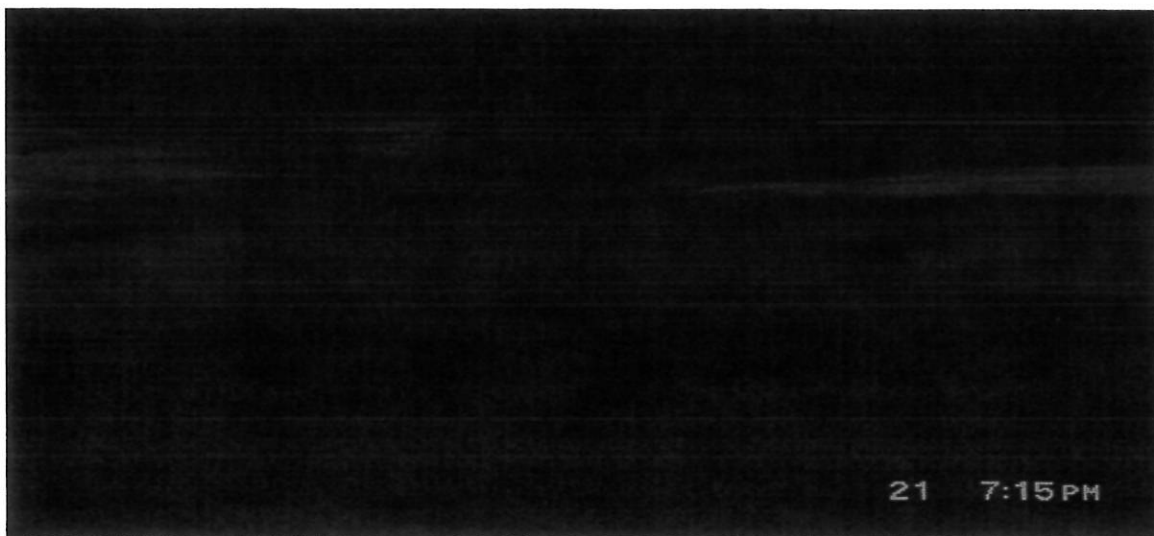


Photo taken at 7:15 p.m., 30 minutes after sunset. Residual lighting illuminates clouds in the west, but not enough to recognize any buoy features or structures on the water.

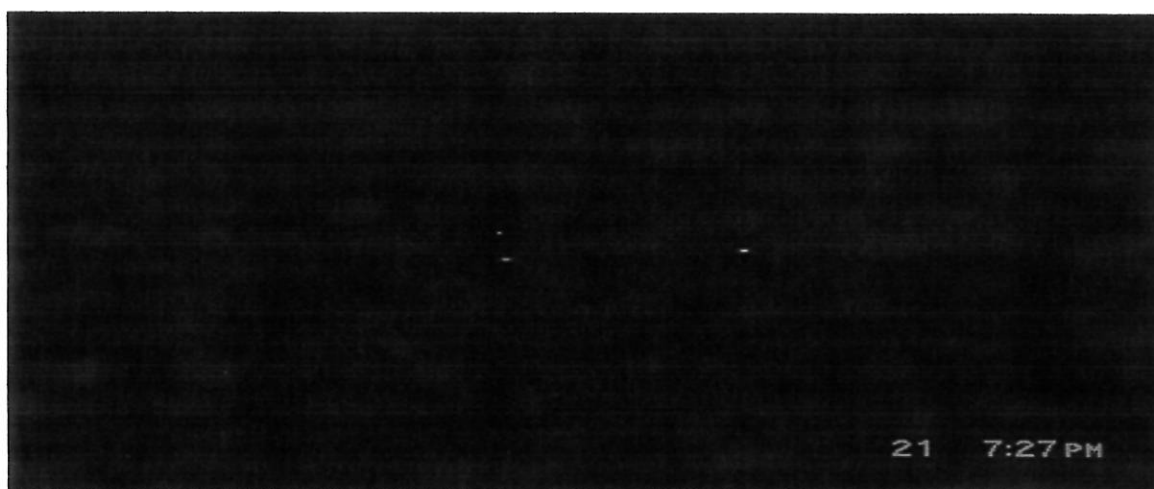
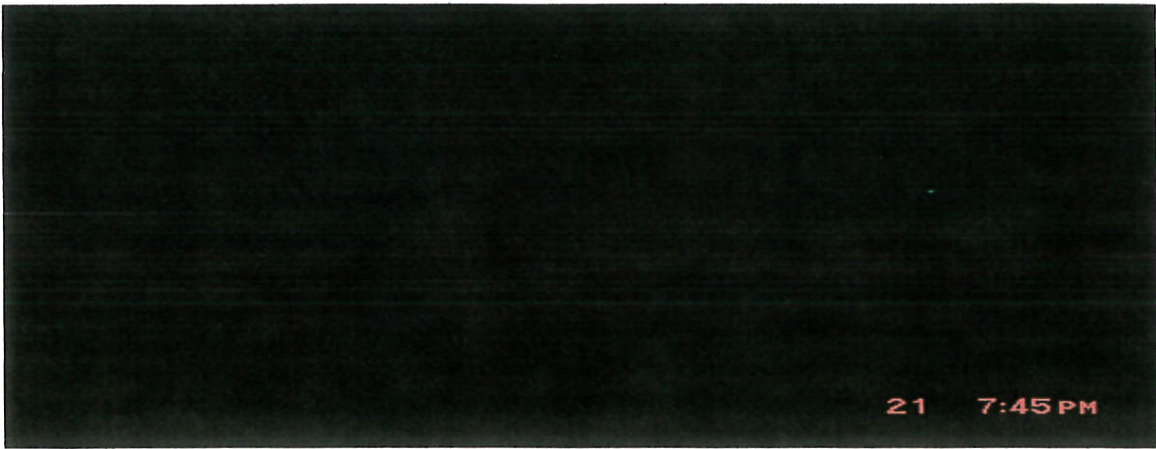


Photo taken at 7:27 p.m. approximately 45 minutes after sunset. Notice the boat lights heading to the left in this picture. Boat was approximately 150 feet in front of photographer. White all round light is to the right of photograph. The vessel itself cannot be detected.



Same vessel as above taken at 7:31 p.m. Vessel is approximately 75 feet from the photographer. Notice the illumination of the port side light and the all round white light. At this distance it is not enough to illuminate the vessel.



Photograph of same area at 7:45 p.m., one hour after sunset. Vessel is coming in approximately 200 feet from the photographer and you can barely make out the starboard side light, which is green in color located in the middle of the photograph above the number one. These photos represent the peril of operating a vessel during the night hours and clearly demonstrate that an individual being towed behind a vessel would have to be illuminated by a light shining directly on them to be seen by other vessels.

STATISTICS: 30 OF 50 STATES PROHIBIT SKIING FROM SUNSET TO SUNRISE: COLORADO, MISSOURI, & OKLAHOMA PROHIBIT SKIING FROM SUNSET TO SUNRISE. NEBRASKA PROHIBITS FROM ½ HOUR AFTER SUNSET TO ½ HOUR BEFORE SUNRISE.

(e) – Skier down flag.

The flag requirement is a safety issue, which many states have adopted, to alert other recreational vessels that there is a person in the water near the area of a vessel displaying the flag. Officer Heskett personally worked an accident where a young female had her leg nearly severed in two after falling into the water from skiing and being hit by another boater who did not see her. After undergoing seven major surgeries, she can still walk but with a limp.

STAT: 13 states require a skier down flag in 2001. Colorado, Nebraska, Missouri require a skier down flag. Oklahoma did not in 2001.



New Sec. 7. Motorboat muffling requirements.

A muffler requirement had previously existed under K.S.A. 82a-809 in 1982 and K.S.A. 32-1119, after recodification in 1989, until it was removed from the law in the mid 90's. Many complaints come from campers, fishermen, and other boaters from the overbearing noise that some of these racing designed vessels produce as they traverse our waters. This request is modeled off of the National Association of Boating Law Administrators, "Model Act for Motorboat Noise Control" and other states boating law requirements. **STATISTIC: 2001 information shows 39 states require some type of**

muffling law. 31 States have a maximum noise level for motor boats. Missouri, Oklahoma, Colorado have requirements; Nebraska does not.



Several vessels of this type frequently visit Kansas reservoirs and generate the most complaints for noise.

New Section 8-New section 14

These statutes are proposed to address the increasing occurrences of marine theft within the state of Kansas. With vessels being produced that rival the cost of any automobile as well as their mobility, vessels have become an increasing target for thieves. Insurance companies are paying an alarming rate of claims due to marine theft, while law enforcement struggles in the detection and apprehension of the criminal element. There are many flaws with current statutes and regulations which lead to a weakness in the prosecution of the cases.

STATISTICS: NUMBER OF REPORTED MARINE RELATED THEFTS FROM KBI RECORDS-2002: 101 VESSELS STOLEN WORTH \$245,236; 2003: 70 VESSELS STOLEN WORTH \$191,334.

DURING THE YEAR OF 2005 THE KANSAS WILDLIFE & PARKS RECOVERED OR ASSISTED IN THE RECOVERY OF 14 STOLEN VESSELS FOR A VALUE OF \$91,650 AND HANDLED 36 THEFT INCIDENTS.

THE KDWP ASSIGNS APPROXIMATELY 10 HIN NUMBERS TO HOMEMADE VESSELS PER YEAR.

KANSAS RANKS IN THE MIDDLE OF ALL STATES WHEN IT COMES TO MARINE THEFT WITH FLORIDA, TEXAS, N. CAROLINA, AND CALIFORNIA LEADING IN THE NUMBER OF THEFTS.

New Sec. 8. Hull Identification Number and New Sec 9. Vessel Identification Number

The Hull Identification Number (HIN) is currently a 12 digit number that a boat manufacturer assigns to each individual boat that is built. This number is a unique identifier that recognizes the boat manufacturer, a serial number, and the date the vessel was manufactured. Its purpose similar to an automobile's VIN, however they are different in format and placement requirements. The laws concerning vehicle identification numbers are very concise and informative for business owners, individuals, and law enforcement officers to follow in the course of dealing with automotive vehicles that have had their numbers altered or removed. These two new sections would bring this same philosophy to vessels.

STATISTIC: 35 OF 50 STATES REQUIRE INSPECTION WHEN DISCREPANCIES ARE APPARENT IN HIN'S, BILL OF SALE OR TITLE

INSPECTION. COLORADO, OKLAHOMA, AND MISSOURI REQUIRE IT. NEBRASKA DOES NOT.

New Sec. 10. Hull Identification Numbers-Handmade vessels.

This section outlines the requirements in assigning Hull Identification Numbers to individuals who build homemade vessels. These guidelines track the U.S. Coast Guard guidelines for states to assign HIN numbers for this particular reason. This section also gives guidelines for the issuance of a HIN decal and placement of this decal. The U.S. Coast Guard is working toward mandating this in the future.

New Sec. 11 and New Sec. 12. Abandonment of Vessels.

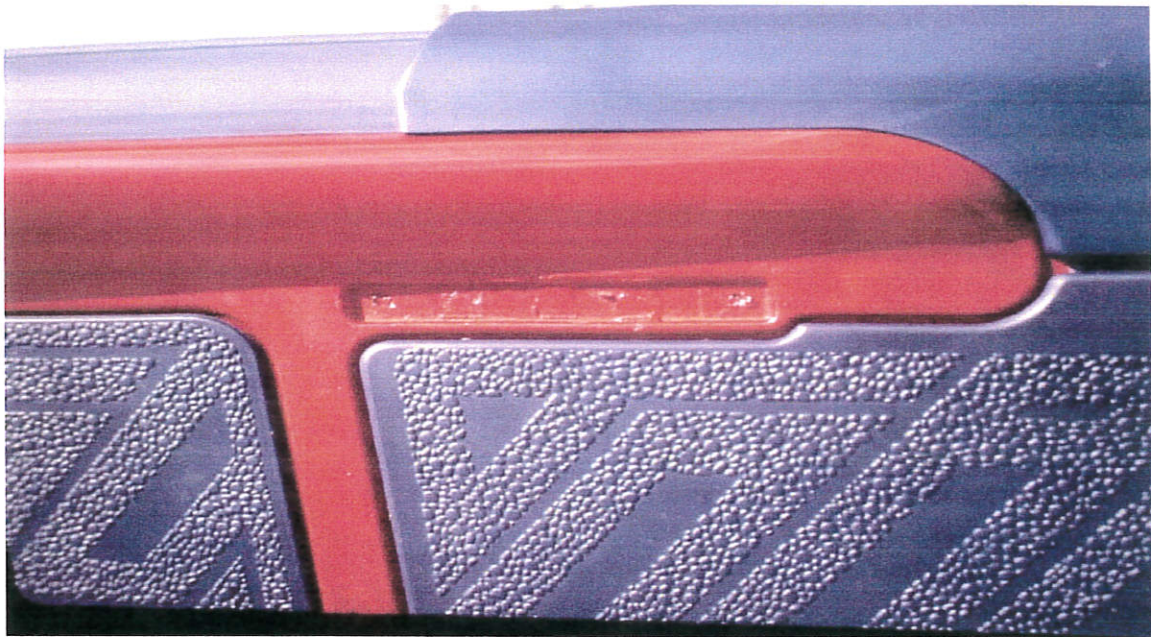
Current statutory authority provides for dealing with the abandonment of automobiles on public highways, the towing of such vehicles and how to dispose of them. This same concept should be applied to abandoned vessels.

New Sec 13. formulates the guidelines for the Department's boating registration system. The section outlines the course of action for the registered owner of a boat to take when the boat is abandoned or salvaged and what the boater registration system is required to complete if an abandoned vessel is ever to be registered after it has been abandoned.

Sections 11-13 shall also provide guidance to a person who claims salvage to a vessel and to the department on handling the registration of such a vessel.

New Sec. 14. Vessel seizure.

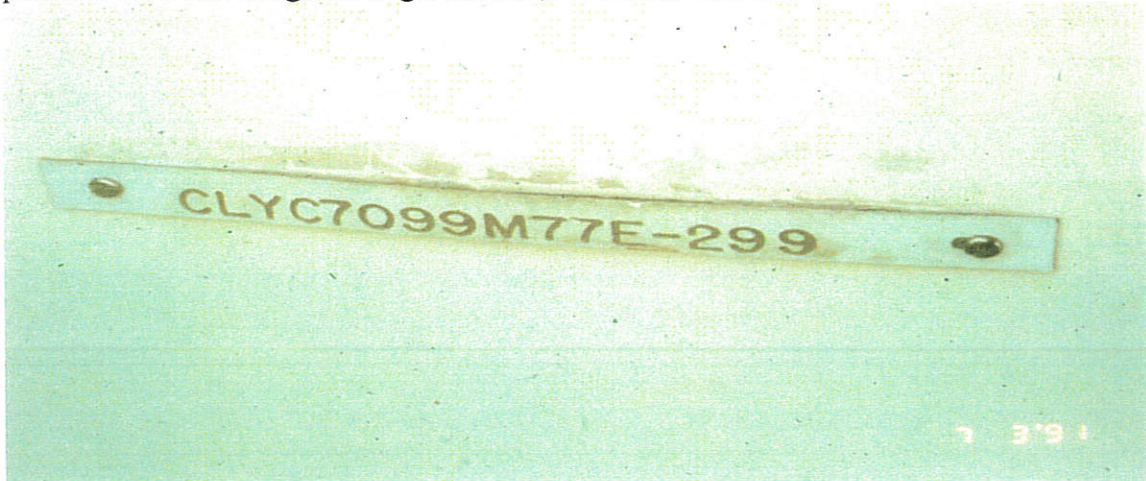
This new section provides for seizure and holding a vessel for criminal investigative purposes when there is reason to believe a criminal act may have taken place involving such vessel. It also provides guidance as to responsibility for storage fees when a vessel has been impounded.



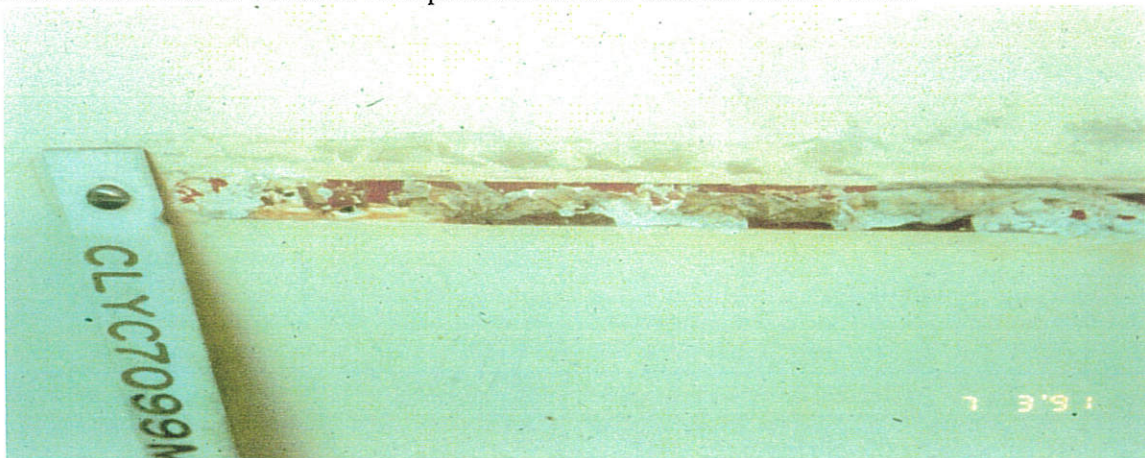
Hull Identification Number removed from Personal Watercraft during theft of vessel. Vessel taken from storage facility in Wichita.



Same vessel. Vessel was recovered at Cheney Reservoir while in operation. The owner pictured here was delighted to get his \$13,000 investment back.



Hull Identification Number on a plate screwed to the hull of the vessel.



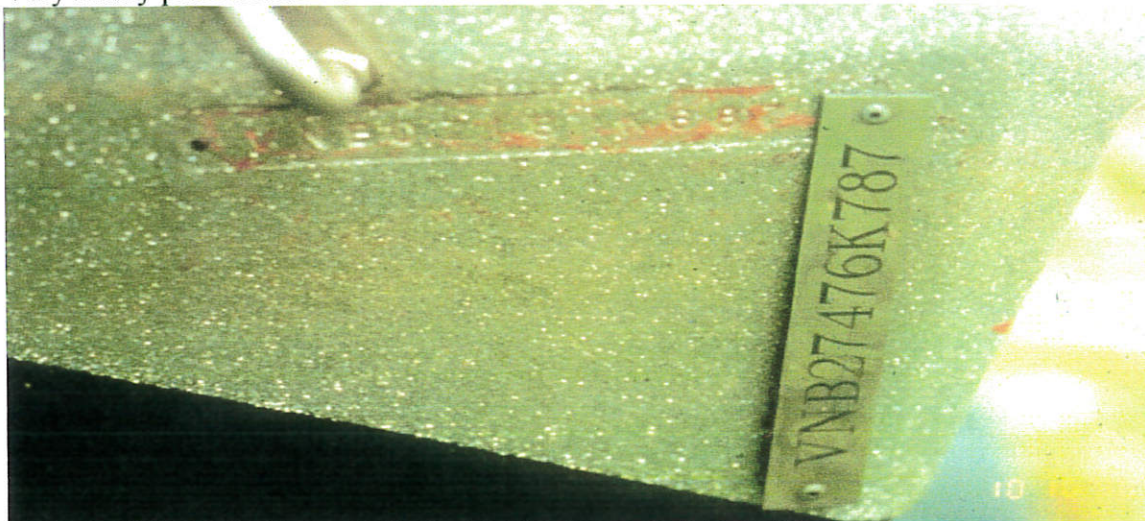
Same plate removed reveals the location of the original hull identification number before it was chiseled away.



Stolen boat. Hull Identification Number that used body putty to change the last number.



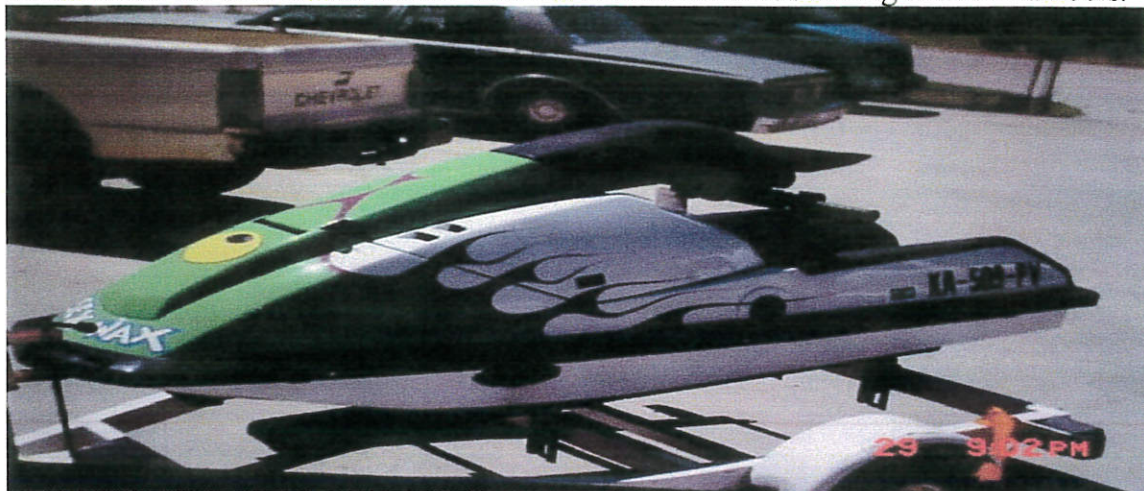
Very neatly placed Hull Identification Plate riveted to the vessel.



Same plate removed reveals original HIN stamped into the hull of the vessel.



Vessels such as this burned vessel, which may only be identified by the HIN that remained on the back of the vessel. Heat from the fire melted the registration numbers.



Personal Watercraft left abandoned on rental property grounds. Property owner called to determine what to do with it. Vessel was found to be stolen from dealership in Eldorado.



Vessel found abandoned on Eldorado Wildlife area. All identifiers of the vessel were removed. After two year investigation, subject was arrested, charged and convicted of insurance fraud.



Stolen watercraft sitting under carport and chained to supports of private residence in Wichita Ks. Watercraft were seized during an investigation which led to their recovery. Estimated value at \$21,000.

Sec. 17. This amendment cleans up the preceding requirement in sections 15 and 16 that fines from boating violations be credited to the boating fee fund. As there is no way to track the individual fine money from violations through the clerk of the district courts when it is deposited with state treasurer, an estimate was made of the annual penalties assessed and a percentage assigned to that estimate.

U.S. Department of
Homeland Security

United States
Coast Guard



Commander, Eighth Coast Guard
District
Hale Boggs Federal Building

500 Poydras Street
New Orleans LA 70130
Staff Symbol: dpl-2
Phone: (504) 589-6770
FAX: (504) 589-4999

16753
January 31, 2006

Department of Wildlife and Parks
Attn: Dan Heskett
Law Enforcement Division
512 SE 25th Street
Pratt, KS 67124


Dear Mr. Heskett,

Having reviewed Kansas State Senate Bill #417 I have found the language pertaining to navigation lights in Section 4 parts (b)(1)(A) through (e) mirror the federal regulations as found in the International and Inland Navigation Rules.

The Coast Guard and every state have been partners in the stewardship of recreational boating safety for over forty years. Through our close working relationship we have ensured that the intent of all state Legislature's is to promote uniformity and reciprocity of boating laws among the states. This function is monitored closely to ensure it is given priority and that collectively safety and the protection of lives continues to be our primary goals.

The Coast Guard is proud of its recreational boating safety partnership with the State of Kansas and, in particular, the Department of Wildlife and Parks, as well as state and local law enforcement and marine safety organizations throughout Kansas. Please continue to work to ensure safe and enjoyable boating for all of Kansas.

Sincerely,


Kevin M. Kelly
Recreational Boating Safety Specialist
By direction

Senate Natural Resources
2-10-06
ATTACHMENT 2

Greetings, Honorable Senators

My name is Travis Whitt, and I am recovering from surgery and will make this brief. I want to show my support of this Bill. I have 4 boats registered here in the State of Kansas. I am a member of the United States Coast Guard Auxiliary and a boating instructor and area coordinator for the Kansas Boater Education thru the Kansas Department of Wildlife and Parks. I am not here to represent them or speak for them. I am here as a citizen of Kansas. I want my boating knowledge to be known and as to why I feel this needs to be done.

My reasons of why I agree with these necessary changes to Senate Bill 417 are as follows:

1. These changes make the law easier to understand so there is no confusion to the boating public as to what is right and what is wrong. I am sure that many of the new boaters cannot give you the points of the compass which is in the law as it is being stricken out of this bill. I wholeheartedly support the definitions to be added in direct and audible supervision on page 11. line 3 thru 6.

2. The flag rule for a person in the water has been adopted in our surrounding states and it works. The orange flag makes people aware of their surrounds when the flag is displayed. I have witnessed this at Lake Perry over the past 3 summers and have seen it used and the way boaters react when it has been used.

This bill makes sense and I hope that this will pass favorable to benefit the Kansas boating public.

Thank you for your time.

Travis Whitt
410 NW 35th
Topeka, KS 66617
(785) 221-7388

Registered voter since 1987.

Senate Natural Resources
2-10-06

ATTACHMENT 3



K A N S A S

RODERICK L. BREMBY, SECRETARY

DEPARTMENT OF HEALTH AND ENVIRONMENT

KATHLEEN SEBELIUS, GOVERNOR

**Testimony before
Senate Natural Resources Committee**

Kansas Environmental Audit Privilege and Immunity Law

**Presented by
John W. Mitchell
Director, Bureau of Environmental Field Services
Kansas Department of Health and Environment**

February 10, 2006

Good morning Chairperson McGinn and members of the Senate Natural Resources Committee. I am pleased to be here this morning to provide background and testimony on proposed changes to the existing Kansas environmental audit privilege and immunity law.

Audit privilege laws have been used by many states to provide immunity from prosecution or penalty mitigation for voluntarily disclosed environmental violations that were discovered either as a result of conducting an environmental audit or as part of an environmental management system. The spirit of such laws, both nationally and in Kansas, is to benefit environmental protection efforts by encouraging business and industry to take self-initiated actions to assess or audit their compliance with environmental laws and correct any violations found. Such laws should be attractive to businesses and industry regardless of size, but especially to small businesses who have never applied for or obtained necessary environmental permits, fearing the disclosure of information to state agencies would lead to enforcement and penalties.

The Kansas audit privilege law, K.S.A. 60-3332, et seq., was enacted in 1995. KDHE implemented a policy on environmental audits in 1997. Beginning in 2000, KDHE has maintained a log of audit submittals received. A review of that log reveals that very small numbers of Kansas businesses have taken advantage of the audit provision in the past six years (3 in 2000, 8 in 2001, 6 in 2002, 5 in 2003, 3 in 2004, and 8 in 2005) with the majority of the submittals coming from large corporations.

DIVISION OF ENVIRONMENT
Bureau of Environmental Field Services
CURTIS STATE OFFICE BUILDING, 1000 SW JACKSON ST., STE.430, TOPEKA, KS 66612-1376
Voice 785-296-5572 Fax 785-291-3266 <http://www.kdhe.state.ks.us/befs>

*Senate Natural Resources
2-10-06*

ATTACHMENT 4

Since 1993, a total of 27 states have enacted audit privilege laws. Concerns that the initial laws were too permissive and allowed businesses guilty of even criminal violations to escape accountability have been raised on nearly all of those by the U.S. Environmental Protection Agency. All states, with the exception of Illinois and Kansas had addressed EPA's concerns prior to 2005. Illinois repealed its law in August 2005 and Kansas is attempting to make changes acceptable to EPA through this proposed legislation. While KDHE is not aware of Kansas businesses that have escaped criminal prosecution for environmental violations we are concerned that in some cases Kansas businesses have adopted the practice of making annual audit privilege claims rather than seeking to implement effective environmental management systems.

In order to encourage Kansas to make changes in the existing audit law EPA has blocked federal authorization for newer state regulatory provisions. This in turn has resulted in Kansas businesses being subject to inspection and possible enforcement action for regulatory violations by both the state and federal governments. The proposed statutory changes would bring the Kansas law into line with other states and KDHE believes, the changes would be acceptable to EPA.

SB 453, as proposed, would modify the existing law to:

- update definitions
- eliminate the privilege for criminal violations
- clarify that the party asserting the privilege has the burden of establishing the applicability of the privilege
- include additional reasons where a court or hearing officer shall require disclosure of the report. Such reasons would include instances where:
 1. the report was prepared to avoid disclosure of information in an investigative, administrative, criminal or civil proceeding that was underway or imminent or for which the owner of the facility had been provided written notification that an investigation into specific violations had been initiated;
 2. the audit report shows evidence of substantial actual personal injury;
 3. the report shows an imminent and substantial endangerment to the public health or the environment
- clarify that the privilege shall not extend to:
 1. information that existed before the initiation and independent of the audit;
 2. information prepared after the completion and independent of the environmental audit; and
 3. information, not otherwise privileged, that is developed or maintained in the course of regularly conducted business activity or regular practice
- clarify that immunity provided from administrative or civil penalties does not apply in cases:
 1. of continuous or repeated violations of environmental law;
 2. where violation results in a substantial economic benefit to the violator
 3. where conditions of a voluntary disclosure are not met but a good faith effort was made to voluntarily disclose and resolve a violation. In such cases regulatory authorities may consider the nature and extent of the effort made in deciding the appropriate enforcement response and may

consider reduction of penalties

- clarify that immunity does not abrogate responsibility of a person to report or correct violations, conduct remediation, or respond to third-party actions.

Passage of SB 453 as proposed will remove the barriers to which EPA objects while continuing the Kansas audit privilege program.

Thank you for your time and attention and I would be happy to respond to any questions.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

OFFICE OF
REGIONAL ADMINISTRATOR

February 10, 2006

Testimony before
Kansas State Senate Natural Resources Committee

SB 453: Amendments to Environmental Audit Privilege/Immunity Statute

Presented by William W. Rice
Deputy Regional Administrator, Region VII
United States Environmental Protection Agency

Good morning, Chairperson McGinn and Members of the Senate Natural Resources Committee. I am pleased to be here this morning on behalf the United States Environmental Protection Agency to offer EPA's views as to Senate Bill 453, which would amend Kansas' existing environmental audit privilege/immunity law.

Kansas' existing statute, enacted in 1995, creates a statutory privilege for environmental audit reports and information and provides broad immunity from enforcement for environmental violations. Kansas was one of a number of states across the country to enact such a statute.

EPA believes that audit privilege/immunity statutes run counter to our mutual interests in encouraging the kind of openness that builds trust among the regulators, the regulated community and the public we both serve.

The current Kansas law:

- allows a violator to invoke privilege even in instances of criminal misconduct, seriously hampering State's/EPA's ability to investigate criminal wrongdoing;
- gives a violator immunity from penalties for criminal negligence;
- gives a violator immunity from penalties even when the violator has gained a significant economic benefit as a result of not complying with the law, which also may have given the violator an advantage over its competitors; and



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- gives a violator immunity from penalties even when the violation has created an imminent and substantial endangerment to human health or the environment.

Federal environmental statutes establish minimum standards that states must meet for delegation of federal programs to the state and for federal approval of state environmental programs. These include standards for adequate enforcement, public participation and access to information. These requirements reflect the high value federal laws place on public openness in the administration and enforcement of environmental requirements.

With the existing Kansas audit law, the State of Kansas does not meet the minimum requirements necessary for EPA delegation of federal programs to the state or for EPA to approve state environmental programs. SB 453 remedies this problem.

With the existing Kansas audit law, EPA is unable to delegate or approve new environmental programs in the State of Kansas. For example, EPA has been unable to approve a series of applications submitted by KDHE in 2004 seeking State primacy for implementation of nine rules under the Safe Drinking Water Act. The applications submitted by KDHE have been reviewed by EPA and the only impediment to approving state primacy of these rules is the existing state audit law.

In addition to impeding EPA's ability to delegate or approve state programs, the existence of the current audit law in Kansas exposes the State to citizens' suits.

Since 1993, twenty six states across the country, in addition to Kansas, have enacted some type of audit legislation. All 26 of those states have addressed any issues EPA had with their state statutes, so that the existence of a state audit law does not present an impediment to the delegation or approval of environmental programs in those states. Kansas is now the only state in the country in which the specific provisions of its state audit law fail to meet the minimum requirements necessary for EPA delegation and approval of environmental programs.

The revisions proposed in SB 453, as drafted, would resolve the issues that EPA has identified with the existing state law. With the passage of SB 453, the Kansas audit statute would no longer be an impediment for the continued implementation by Kansas of federal environmental programs in the State or for the delegation or approval of new environmental programs in Kansas.

Again, I appreciate the opportunity to testify here today. Thank you for your time and attention. If you have any questions, I would be glad to try to address them.

Att.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

OFFICE OF
REGIONAL ADMINISTRATOR

February 10, 2006

SB 453: Amendments to Environmental Audit Privilege/Immunity Statute

Current statute:

- Enacted in 1995 – part of a national model legislation initiative
- Statute has several provisions which create a significant impediment to the State's ability to ensure compliance with environmental laws and regulations
- Examples of issues with existing law:
 - statute allows privilege to be invoked even in instances of criminal misconduct, seriously hampering State's/EPA's ability to investigate criminal wrongdoing
 - statute gives immunity from penalties for criminal negligence
 - statute gives immunity from penalties even when the violator has gained a significant economic benefit as a result of not complying with the law
 - statute gives immunity from penalties even when the violator has created an imminent and substantial endangerment to human health or the environment

Effect of current Kansas statute:

- All states must meet minimum standards when assuming responsibility for implementing federal environmental programs, including standards for adequate enforcement, public participation and access to information
- These requirements reflect the high value federal laws place on public openness in the implementation and enforcement of environmental regulations

- **State of Kansas does not meet the minimum requirements needed for EPA approval of State programs**
- **As a result, EPA can no longer authorize Kansas to implement new environmental laws in the State**
- **Specifically, EPA has been unable to approve a series of primacy applications under the SDWA submitted by Kansas in 2004 because of the existing state audit law; if KDHE were to request authority to implement the RCRA corrective action regulations in Kansas or seek new authority for other programs, EPA would be unable to approve such requests with the with the existing state audit law**
- **In addition, the State is vulnerable to citizen suits seeking the withdrawal of existing authorized state programs and seeking that these programs be implemented by EPA in the State of Kansas**

National picture:

- **27 states have enacted some type of environmental audit privilege and/or immunity law since 1993**
- **Kansas is the only state in the country in which the specific provisions of the state law fail to meet the minimum requirements necessary for EPA approval of state programs; in the other 26 states, the issues have been resolved through statutory amendments, AG's opinions, MOUs with the state, or sunset of the law**
- **At federal level, EPA has a published Agency policy, last amended in 2000, which allows for penalty mitigation for environmental violations voluntarily and promptly disclosed and expeditiously remedied (separate policy for small business, with 100 or fewer employees, giving essentially the same relief)**
- **Last year alone (FY2005), EPA received over 600 self-disclosures from companies disclosing potential violations at nearly 1500 facilities across the country**

- **Region 7 resolved voluntary disclosures with 23 different companies last year, addressing violations at 54 facilities across the Region and mitigating penalties of more than \$2.4 million (\$2,442,000)**
- **Over the last 5 years, 22 companies have self-disclosed violations at 26 Kansas facilities to Region 7 using the EPA audit policy**

Effect of revisions:

- **With the revisions as proposed in SB 453, the impediments to implementing federal environmental programs in the state would be resolved**
- **In that event, the Kansas environmental audit statute would no longer be an impediment to the state for meeting minimum federal authorization/delegation requirements, such as currently exists with the pending SDWA primacy applications**

Conclusion:

- **SB 453, as drafted, resolves the concerns that EPA has with current Kansas law**



LEGISLATURE OF KANSAS
LEGISLATIVE DIVISION OF POST AUDIT

800 SOUTHWEST JACKSON STREET, SUITE 1200
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E-MAIL: lpa@lpa.state.ks.us
www.kslegislature.org/postaudit

**Testimony for the Senate Natural Resources Committee
on SB 453**

Barb Hinton, Legislative Post Auditor
February 10, 2006

Madame Chairman and members of the Committee, thank you for allowing me to appear before you regarding SB 453. As written, we think this bill could be interpreted to preclude our access to confidential records in the possession of a governmental agency as part of an audit authorized by the Legislative Post Audit Committee.

Section 4(c)(2) on page 6 specifies that an environmental audit report remains privileged if it is "disclosed under the terms of a confidentiality agreement between governmental officials and the owner or operator of the facility...which expressly provides that the information provided be kept confidential."

Under the Legislative Post Audit Act (46-1106(g)), we have access to all records—confidential or otherwise—in the custody of any person or state agency subject to the Post Audit Act when we are conducting an audit approved by the Committee. So we would have access to an environmental audit report that was in the custody of KDHE or another government agency, regardless of any confidentiality agreement between the agency or the facility / operator. But agency officials could interpret the language in SB 453 to mean we don't have access and deny our request. When that happens, we ask for an Attorney General Opinion to confirm our legal access to confidential records. Our access has always been upheld, but the process is very time-consuming and can delay our audits—sometimes by weeks or even months.

A similar situation arose last year when the Legislature considered HB 2357, which addressed self audits conducted by insurance companies. Under Section 1(d) of that bill, industry officials and members of the Senate Financial Institutions and Insurance Committee agreed to add the following language: "Nothing in this act shall prohibit the division of post audit from having access to all insurance compliance self-evaluative audit documents in the custody of the commissioner."

To avoid any potential misunderstanding regarding our access to confidential records, I would respectfully ask the Committee to consider adding similar language to SB 453.

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Attachment 6*

SENATE BILL No. 453

By Committee on Judiciary

1-26

9 AN ACT concerning environmental laws; relating to compliance audit
10 privilege; immunity; lesser penalties for violations; amending K.S.A.
11 60-3332, 60-3333, 60-3334, 60-3336, 60-3338 and 60-3339 and K.S.A.
12 2005 Supp. 45-229 and repealing the existing sections; also repealing
13 K.S.A. 60-3335.

14

15 *Be it enacted by the Legislature of the State of Kansas:*

16 Section 1. K.S.A. 2005 Supp. 45-229 is hereby amended to read as
17 follows: 45-229. (a) It is the intent of the legislature that exceptions to
18 disclosure under the open records act shall be created or maintained only
19 if:

20 (1) The public record is of a sensitive or personal nature concerning
21 individuals;

22 (2) the public record is necessary for the effective and efficient ad-
23 ministration of a governmental program; or

24 (3) the public record affects confidential information. The mainte-
25 nance or creation of an exception to disclosure must be compelled as
26 measured by these criteria. Further, the legislature finds that the public
27 has a right to have access to public records unless the criteria in this
28 section for restricting such access to a public record are met and the
29 criteria are considered during legislative review in connection with the
30 particular exception to disclosure to be significant enough to override the
31 strong public policy of open government. To strengthen the policy of open
32 government, the legislature shall consider the criteria in this section be-
33 fore enacting an exception to disclosure.

34 (b) Subject to the provisions of subsection (h), all exceptions to dis-
35 closure in existence on July 1, 2000, shall expire on July 1, 2005, and any
36 new exception to disclosure or substantial amendment of an existing ex-
37 ception shall expire on July 1 of the fifth year after enactment of the new
38 exception or substantial amendment, unless the legislature acts to con-
39 tinue the exception. A law that enacts a new exception or substantially
40 amends an existing exception shall state that the exception expires at the
41 end of five years and that the exception shall be reviewed by the legis-
42 lature before the scheduled date.

43 (c) For purposes of this section, an exception is substantially amended

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1 if the amendment expands the scope of the exception to include more
2 records or information. An exception is not substantially amended if the
3 amendment narrows the scope of the exception.

4 (d) This section is not intended to repeal an exception that has been
5 amended following legislative review before the scheduled repeal of the
6 exception if the exception is not substantially amended as a result of the
7 review.

8 (e) In the year before the expiration of an exception, the revisor of
9 statutes shall certify to the president of the senate and the speaker of the
10 house of representatives, by July 15, the language and statutory citation
11 of each exception which will expire in the following year which meets the
12 criteria of an exception as defined in this section. Any exception that is
13 not identified and certified to the president of the senate and the speaker
14 of the house of representatives is not subject to legislative review and
15 shall not expire. If the revisor of statutes fails to certify an exception that
16 the revisor subsequently determines should have been certified, the re-
17 visor shall include the exception in the following year's certification after
18 that determination.

19 (f) "Exception" means any provision of law which creates an excep-
20 tion to disclosure or limits disclosure under the open records act pursuant
21 to K.S.A. 45-221, and amendments thereto, or pursuant to any other
22 provision of law.

23 (g) A provision of law which creates or amends an exception to dis-
24 closure under the open records law shall not be subject to review and
25 expiration under this act if such provision:

- 26 (1) Is required by federal law;
27 (2) applies solely to the legislature or to the state court system.

28 (h) (1) The legislature shall review the exception before its scheduled
29 expiration and consider as part of the review process the following:

- 30 (A) What specific records are affected by the exception;
31 (B) whom does the exception uniquely affect, as opposed to the gen-
32 eral public;
33 (C) what is the identifiable public purpose or goal of the exception;
34 (D) whether the information contained in the records may be ob-
35 tained readily by alternative means and how it may be obtained;

36 (2) An exception may be created or maintained only if it serves an
37 identifiable public purpose and may be no broader than is necessary to
38 meet the public purpose it serves. An identifiable public purpose is served
39 if the legislature finds that the purpose is sufficiently compelling to over-
40 ride the strong public policy of open government and cannot be accom-
41 plished without the exception and if the exception:

- 42 (A) Allows the effective and efficient administration of a govern-
43 mental program, which administration would be significantly impaired

1 without the exception;

2 (B) protects information of a sensitive personal nature concerning
3 individuals, the release of which information would be defamatory to such
4 individuals or cause unwarranted damage to the good name or reputation
5 of such individuals or would jeopardize the safety of such individuals.
6 Only information that would identify the individuals may be excepted
7 under this paragraph; or

8 (C) protects information of a confidential nature concerning entities,
9 including, but not limited to, a formula, pattern, device, combination of
10 devices, or compilation of information which is used to protect or further
11 a business advantage over those who do not know or use it, the disclosure
12 of which information would injure the affected entity in the marketplace.

13 (3) Records made before the date of the expiration of an exception
14 shall be subject to disclosure as otherwise provided by law. In deciding
15 whether the records shall be made public, the legislature shall consider
16 whether the damage or loss to persons or entities uniquely affected by
17 the exception of the type specified in paragraph (2)(B) or (2)(C) of this
18 subsection (h) would occur if the records were made public.

19 (i) Exceptions contained in the following statutes as certified by the
20 revisor of statutes to the president of the senate and the speaker of the
21 house of representatives pursuant to subsection (e) of this section on June
22 1, 2004, are hereby continued in existence until July 1, 2010, at which
23 time such exceptions shall expire: 1-401, 2-1202, 5-512, 9-1137, 9-1712,
24 9-2217, 10-630, 11-306, 12-189, 12-1,108, 12-1694, 12-1698, 12-2819, 12-
25 4516, 16-715, 16a-2-304, 17-1312e, 17-2227, 17-5832, 17-7503, 17-7505,
26 17-7511, 17-7514, 17-76,139, 19-4321, 21-2511, 22-3711, 22-4707, 22-
27 4909, 22a-243, 22a-244, 23-605, 23-9,312, 25-4161, 25-4165, 31-405, 34-
28 251, 38-1508, 38-1520, 38-1565, 38-1609, 38-1610, 38-1618, 38-1664, 39-
29 709b, 39-719e, 39-934, 39-1434, 39-1704, 40-222, 40-2,156, 40-2c20,
30 40-2c21, 40-2d20, 40-2d21, 40-409, 40-956, 40-1128, 40-2807, 40-3012,
31 40-3304, 40-3308, 40-3403b, 40-3421, 40-3613, 40-3805, 40-4205, 44-
32 510j, 44-550b, 44-594, 44-635, 44-714, 44-817, 44-1005, 44-1019, 45-221,
33 46-256, 46-259, 46-2201, 47-839, 47-844, 47-849, 47-1709, 48-1614, 49-
34 406, 49-427, 55-1,102, 56-1a606, 56-1a607, 56a-1201, 56a-1202, 58-4114,
35 59-2135, 59-2802, 59-2979, 59-29b79, 60-3333, ~~60-3335~~, 60-3336, 65-
36 102b, 65-118, 65-119, 65-153f, 65-170g, 65-177, 65-1,106, 65-1,113, 65-
37 1,116, 65-1,157a, 65-1,163, 65-1,165, 65-1,168, 65-1,169, 65-1,171, 65-
38 1,172, 65-436, 65-445, 65-507, 65-525, 65-531, 65-657, 65-1135, 65-1467,
39 65-1627, 65-1831, 65-2422d, 65-2438, 65-2836, 65-2839a, 65-2898a, 65-
40 3015, 65-3447, 65-34,108, 65-34,126, 65-4019, 65-4608, 65-4922, 65-
41 4925, 65-5602, 65-5603, 65-6002, 65-6003, 65-6004, 65-6010, 65-67a05,
42 65-6803, 65-6804, 66-101c, 66-117, 66-151, 66-1,190, 66-1,203, 66-1220a,
43 66-2010, 72-996, 72-4311, 72-4452, 72-5214, 72-53,106, 72-5427, 72-

1 8903, 73-1228, 74-2424, 74-2433f, 74-4905, 74-4909, 74-50,131, 74-5515,
2 74-7308, 74-7338, 74-7405a, 74-8104, 74-8307, 74-8705, 74-8804, 74-
3 9805, 75-104, 75-712, 75-7b15, 75-1267, 75-2943, 75-4332, 75-4362, 75-
4 5133, 75-5266, 75-5665, 75-5666, 75-7310, 76-355, 76-359, 76-493, 76-
5 12b11, 76-3305, 79-1119, 79-1437f, 79-15,118, 79-3234, 79-3395,
6 79-3420, 79-3499, 79-34,113, 79-3614, 79-3657, 79-4301 and 79-5206.

7 Sec. 2. K.S.A. 60-3332 is hereby amended to read as follows: 60-
8 3332. As used in K.S.A. 60-3332 through 60-3339:

9 (a) "*Environmental audit*" means a voluntary, internal assessment,
10 evaluation or review, ~~not otherwise required by environmental law, of a~~
11 *facility or operation, of an activity at a facility or operation or of an*
12 *environmental management system at a facility or operation when the*
13 *facility, operation or activity is regulated by state or federal environmental*
14 *laws* that is performed by the owner or operator, the owner's or operator's
15 employees, or a qualified auditor ~~and initiated~~ *retained* by the owner or
16 operator of ~~a~~ *the facility or operation* for the express and specific purpose
17 of ~~determining whether a facility, operation within a facility or facility~~
18 ~~management system complies~~ *identifying historical or current noncom-*
19 *pliance with environmental laws, discovering environmental contamina-*
20 *tion or hazards, remedying noncompliance or improving compliance with*
21 *environmental laws or improving an environmental management system.*
22 Once initiated, an audit shall be completed within a reasonable period of
23 time *not to exceed six months, unless an extension is approved by the*
24 *agency that regulates the facility or operation.* Nothing in this section
25 shall be construed to authorize uninterrupted or continuous auditing.

26 (b) "*Environmental audit report*" means a set of documents, each
27 labeled "*Audit Report: Privileged Document*" ~~and prepared~~ *that is gen-*
28 *erated and developed for the primary purpose and in the course of or as*
29 *a result of an environmental audit that is conducted in good faith.* An
30 *environmental audit report* may include the following supporting infor-
31 mation, if collected or developed for the primary purpose and in the
32 course of an audit: Field notes and records of observations, *samples, an-*
33 *alytical results, exhibits, findings, opinions, suggestions, recommenda-*
34 *tions, conclusions, drafts, memoranda, implementation plans, interviews,*
35 *correspondence, drawings, photographs, computer-generated or electron-*
36 *ically recorded information, maps, charts, graphs and surveys.* An *envi-*
37 *ronmental audit report, when completed, may have three include any of*
38 *the following* components:

39 (1) An audit report prepared by the auditor, which may include the
40 scope of the *environmental* audit, the information gained in the *environ-*
41 *mental* audit, conclusions and recommendations, together with exhibits
42 and appendices;

43 (2) memoranda and documents analyzing all or part of the audit re-

1 port and discussing potential implementation issues; ~~and~~

2 (3) an implementation plan that addresses correcting past noncom-
3 pliance, improving current compliance *or an environmental management*
4 *system*, and preventing future noncompliance; *and*

5 (4) *periodic updates documenting progress in completing the imple-*
6 *mentation plan.*

7 (c) "Facility" means all contiguous land, structures and other appur-
8 tenances and improvements on the land.

9 (d) "Qualified auditor" means a person or organization with educa-
10 tion, training and experience in preparing *environmental* studies and
11 assessments.

12 (e) "Environmental law" means any requirement contained in state
13 environmental statutes and in rules and regulations promulgated under
14 such statutes, *or in any orders, permits, approvals, licenses or closure*
15 *plans issued or made under these provisions.*

16 (f) "Owner or operator" means any person who possesses an interest
17 in or who is in control of the daily operation of a facility and who caused
18 the environmental audit to be undertaken.

19 (g) "Person" means any individual, association, partnership, joint
20 venture, company, firm, corporation, institution, governmental subdivi-
21 sion, state or federal department or agency or other legal entity.

22 Sec. 3. K.S.A. 60-3333 is hereby amended to read as follows: 60-
23 3333. (a) ~~An audit report shall be subject to discovery procedures but~~
24 ~~shall be privileged and shall not be admissible as evidence in any legal~~
25 ~~action in any civil, criminal~~ *Material that is included in an environmental*
26 *audit report generated during an environmental audit conducted after*
27 *July 1, 1995, is privileged and confidential and is not discoverable or*
28 *admissible as evidence in any civil or administrative proceeding, except*
29 *as specifically provided by this act. Failure to label each document within*
30 *the environmental audit report as a privileged document does not consti-*
31 *tute a waiver of the environmental audit privilege or create a presumption*
32 *that the privilege does not apply.*

33 (b) If an *environmental* audit report, or any part thereof, is subject
34 to the privilege recognized in this section, neither any person who con-
35 ducted the audit nor anyone to whom the audit results are disclosed,
36 unless such disclosure constitutes a waiver of the privilege under K.S.A.
37 60-3334, can be compelled to testify regarding any matter which was the
38 subject of the audit and which is addressed in a privileged part of the
39 audit report.

40 (c) *A person who conducts or participates in the preparation of an*
41 *environmental audit report and who has observed physical events of an*
42 *environmental violation may testify about those events but shall not be*
43 *compelled to testify or produce documents related to the preparation of*

1 or any privileged part of an environmental audit or any component listed
2 in subsection (b) of K.S.A. 60-3332, and amendments thereto.

3 (d) An employee of a regulatory agency or other governmental em-
4 ployee shall not request, review or otherwise use an environmental audit
5 report during an agency inspection of a regulated facility or operation or
6 activity at a regulated facility or operation.

7 (e) A party asserting the privilege under this section has the burden
8 of establishing the applicability of the privilege. If there is evidence of
9 noncompliance with environmental laws, such party must prove that ap-
10 propriate efforts to achieve compliance were initiated promptly upon dis-
11 covery and pursued with reasonable diligence.

12 Sec. 4. K.S.A. 60-3334 is hereby amended to read as follows: 60-
13 3334. (a) The privilege recognized in K.S.A. 60-3333, and amendments
14 thereto, does not apply to the extent that the privilege is expressly waived
15 in writing by the person who owns or operates the facility at which the
16 environmental audit was conducted and who prepared or caused to be
17 prepared the environmental audit report.

18 (b) The environmental audit report and information generated by the
19 audit may be disclosed to any person employed by the owner or operator
20 of the audited facility, any legal representative of the owner or operator
21 or any independent contractor retained by the owner or operator to ad-
22 dress an issue or issues raised by the audit, without waiving the privilege
23 recognized in K.S.A. 60-3333, and amendments thereto.

24 (c) Disclosure of the environmental audit report or any information
25 generated by the audit under the following circumstances shall not waive
26 the privilege recognized in K.S.A. 60-3333, and amendments thereto:

27 (1) Disclosure under the terms of an agreement which expressly pro-
28 vides that the information provided be kept confidential between the
29 owner or operator of the facility audited and a potential purchaser of the
30 operation or facility; or

31 (2) disclosure under the terms of a confidentiality agreement be-
32 tween governmental officials and the owner or operator of the facility
33 audited, which expressly provides that the information provided be kept
34 confidential.]

35 (d) In a civil, ~~criminal~~ or administrative proceeding, a court or ad-
36 ministrative tribunal of record shall require disclosure of material for
37 which the privilege recognized in K.S.A. 60-3333, and amendments
38 thereto, is asserted, after in camera review consistent with the code of
39 civil procedure, if such court or administrative tribunal determines that:

40 (1) The privilege is asserted for a fraudulent purpose;

41 (2) the party asserting the privilege has not implemented a manage-
42 ment system to assure compliance with environmental laws. Depending
43 on the nature of the ~~entity~~ facility including its size, its financial resources

Nothing in this act shall prohibit the division of post audit from having access during an audit approved by the legislative post audit committee to all environmental audit report documents in the custody of a governmental agency.

1 and assets and the environmental risks posed by its operations, and based
2 on a qualitative assessment of the totality of circumstances, a management
3 system shall be deemed to satisfy the requirements of this act if it contains
4 the following primary characteristics:

5 (A) A system that covers all parts of the ~~entity's~~ *facility's* operations
6 regulated under one or more environmental laws;

7 (B) a system that regularly takes steps to prevent and remedy
8 noncompliance;

9 (C) a system that has the support of senior management;

10 (D) the ~~entity~~ *facility owner or operator* implements a system that
11 has policies, ~~entity~~ standards and procedures that highlight the impor-
12 tance of assuring compliance with all environmental laws;

13 (E) the ~~entity's~~ *facility owner or operator's* policies, standards and
14 procedures are communicated effectively to all in the ~~entity~~ *facility* whose
15 activities could affect compliance achievement;

16 (F) specific individuals within both high-level and plant- or operation-
17 level management are assigned responsibility to oversee compliance with
18 such standards and procedures;

19 (G) the ~~entity~~ *facility owner or operator* undertakes regular review
20 of the status of compliance, including routine evaluation and periodic
21 auditing of day-to-day monitoring efforts, to evaluate, detect, prevent and
22 remedy noncompliance;

23 (H) the ~~entity~~ *facility owner or operator* has a reporting system which
24 employees can use to report unlawful conduct within the organization
25 without fear of retribution; and

26 (I) the ~~entity's~~ *facility's* standards and procedures to ensure compli-
27 ance are enforced through appropriate employee performance evaluation
28 and disciplinary mechanisms;

29 (3) the material is not subject to the privilege *as provided in K.S.A.*
30 *60-3336, and amendments thereto;* ~~or~~

31 (4) even if subject to the privilege, the material shows evidence of
32 noncompliance with the environmental laws, and appropriate efforts to
33 achieve compliance with such laws were not promptly initiated and pur-
34 sued with reasonable diligence upon discovery of noncompliance;

35 (5) *the environmental audit report was prepared to avoid disclosure*
36 *of information in an investigative, administrative, criminal or civil pro-*
37 *ceeding that was underway or imminent or for which the facility owner*
38 *or operator had been provided written notification that an investigation*
39 *into a specific violation had been initiated;*

40 (6) *all or part of the environmental audit report shows evidence of*
41 *substantial actual personal injury, which information is not otherwise*
42 *available; or*

43 (7) *all or part of the environmental audit report shows an imminent*

1 *and substantial endangerment to the public health or the environment.*

2 (e) ~~(1) Subject to the provisions of subsection (2), a party asserting~~
 3 ~~the audit privilege recognized in K.S.A. 60-3333, and amendments~~
 4 ~~thereto, has the burden of demonstrating the applicability of the privilege.~~
 5 ~~If there is evidence of noncompliance with environmental laws, such party~~
 6 ~~must prove that appropriate efforts to achieve compliance were promptly~~
 7 ~~initiated upon discovery and pursued with reasonable diligence.~~

8 (2) A ~~party~~ person seeking disclosure ~~under subsection (d)(1) of an~~
 9 ~~environmental audit report has the burden of proving that the privilege~~
 10 ~~is asserted for a fraudulent purpose or to prevent disclosure of past non-~~
 11 ~~compliance and, in a criminal proceeding, the state has the burden of~~
 12 ~~proving the conditions for disclosure under subsection (d)(3) does not~~
 13 ~~exist under this section.~~

14 (f) *A person seeking disclosure of an environmental audit report may*
 15 *review the report, but such review does not waive or make the adminis-*
 16 *trative or civil evidentiary privilege inapplicable to the report.*

17 Sec. 5. K.S.A. 60-3336 is hereby amended to read as follows: 60-
 18 3336. (a) The privilege recognized in K.S.A. 60-3333 shall not extend to:

19 ~~(a) (1) Documents, communications, data, reports or other informa-~~
 20 ~~tion required to be collected, developed, maintained or reported to a~~
 21 ~~regulatory agency pursuant to federal, state or local statute, ordinance,~~
 22 ~~resolution, rule and regulation, permit, approval or order;~~

23 ~~(b) (2) information obtained by observation, sampling or monitoring~~
 24 ~~by any regulatory agency or its authorized designee; or~~

25 ~~(c) (3) information obtained from a source independent not involved~~
 26 ~~in the preparation of the environmental audit report;~~

27 (4) *information that existed before the initiation and independent of*
 28 *the environmental audit;*

29 (5) *information prepared after the completion and independent of the*
 30 *environmental audit; or*

31 (6) *any information, not otherwise privileged, that is developed or*
 32 *maintained in the course of regularly conducted business activity or reg-*
 33 *ular practice.*

34 (b) *This section does not limit the right of a person to agree to conduct*
 35 *an environmental audit and disclose an environmental audit report.*

36 Sec. 6. K.S.A. 60-3338 is hereby amended to read as follows: 60-
 37 3338. (a) If any ~~person or entity~~ facility owner or operator makes a vol-
 38 untary disclosure of a violation of environmental laws, there shall be a
 39 rebuttable presumption that the ~~person or entity~~ facility owner or oper-
 40 ator is immune from any administrative, or civil or criminal penalties for
 41 the violation disclosed if the disclosure is one:

42 (1) *Made promptly after knowledge of the information disclosed is*
 43 *obtained by the ~~person or entity~~ facility owner or operator;*

1 (2) made to an agency having regulatory authority with regard to the
2 violation disclosed *before there is notice of a citizen suit or a legal com-*
3 *plaint by a third party.*

4 (3) arising out of an *environmental audit and is related to privileged*
5 *information as provided in K.S.A. 60-3334, and amendments thereto;*

6 (4) for which the ~~person or entity~~ *facility owner or operator* making
7 the disclosure initiates action in a *reasonable and diligent* manner to re-
8 solve the violations identified in the disclosure; and

9 (5) in which the ~~person or entity~~ *facility owner or operator* making
10 the disclosure cooperates with the appropriate agency in connection with
11 investigation of the issues identified in the disclosure.

12 (b) A disclosure is not voluntary for purposes of this section if it is
13 required by ~~state~~ *environmental* law to be reported to a regulatory
14 authority.

15 (c) The presumption recognized in subsection (a) may be rebutted
16 and penalties may be imposed under state law if it is established that:

17 (1) The disclosure was not voluntary within the meaning of this
18 section;

19 (2) the violation was committed intentionally and willfully by the ~~per-~~
20 ~~son or entity~~ *facility owner or operator* making the disclosure;

21 (3) the ~~violation was~~ *facility owner or operator did not fully corrected*
22 ~~in a diligent manner correct the violation in a reasonable time; or~~

23 (4) ~~significant environmental harm or a public health threat was~~
24 ~~caused by~~ the violation *caused serious actual harm or an imminent and*
25 *substantial endangerment to public health or the environment.*

26 (d) In any enforcement action brought against a ~~person or entity fa-~~
27 ~~ility owner or operator~~ regarding a violation for which the ~~person or~~
28 ~~entity~~ *facility owner or operator* claims to have made a voluntary disclo-
29 sure within the meaning of this section, the burden of proof concerning
30 voluntariness of the disclosure shall be allocated as follows:

31 (1) The ~~person or entity~~ *facility owner or operator* making the vol-
32 untary disclosure claim shall have the burden of establishing a prima facie
33 case that the disclosure was voluntary within the meaning of this section;
34 and

35 (2) once a prima facie case of voluntary disclosure is established, the
36 opposing party shall have the burden of rebutting the presumption rec-
37 ognized in subsection (a) by a preponderance of the evidence.

38 (e) *Except as provided in this section, this section does not impair the*
39 *authority of the appropriate regulatory agency to require technical or*
40 *remedial action or to seek injunctive relief.*

41 (f) *Immunity provided under this section from administrative or civil*
42 *penalties does not apply under any of the following circumstances:*

43 (1) *If a facility owner or operator has been found in a civil, criminal*

1 *or administrative proceeding to have committed violations in this state*
2 *that constitute a pattern of continuous or repeated violations of environ-*
3 *mental law that were due to separate and distinct events giving rise to*
4 *the violations within the three-year period prior to the date of disclosure.*

5 *(2) If a violation of an environmental law, administrative order or*
6 *judicial decree results in a substantial economic benefit to the violator.*

7 *(g) In cases where the conditions of a voluntary disclosure are not*
8 *met, but a good faith effort was made to voluntarily disclose and resolve*
9 *a violation detected in an environmental audit, the state regulatory au-*
10 *thorities shall consider the nature and extent of any good faith effort in*
11 *deciding the appropriate enforcement response and shall consider reduc-*
12 *ing any administrative or civil penalties based on mitigating factors show-*
13 *ing that one or more of the conditions for voluntary disclosure have been*
14 *met.*

15 *(h) The immunity provided by this section does not abrogate the re-*
16 *sponsibility of a person as provided by applicable law to report a violation,*
17 *to correct the violation, conduct necessary remediation or respond to*
18 *third-party actions.*

19 Sec. 7. K.S.A. 60-3339 is hereby amended to read as follows: 60-
20 3339. If a ~~person or entity~~ *facility owner or operator* has implemented
21 an environmental management system, consistent with the primary char-
22 acteristics prescribed by subsection (d)(2) of K.S.A. 60-3334, *and amend-*
23 *ments thereto*, a court or administrative tribunal which finds a violation
24 of such laws, or extension of such laws, shall give consideration to that
25 fact in determining whether to impose administrative, *or civil or criminal*
26 penalties and in determining the severity of any penalties imposed.

27 Sec. 8. K.S.A. 60-3332, 60-3333, 60-3334, 60-3335, 60-3336, 60-
28 3338 and 60-3339 and K.S.A. 2005 Supp. 45-229 are hereby repealed.

29 Sec. 9. This act shall take effect and be in force from and after its
30 publication in the statute book.