CHAPTER 30

SENATE BILL No. 453

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

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

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

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

(2) the public record is necessary for the effective and efficient administration of a governmental program; or

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

(b) Subject to the provisions of subsection (h), all exceptions to disclosure in existence on July 1, 2000, shall expire on July 1, 2005, and any new exception to disclosure or substantial amendment of an existing exception shall expire on July 1 of the fifth year after enactment of the new exception or substantial amendment, unless the legislature acts to continue the exception. A law that enacts a new exception or substantially amends an existing exception shall state that the exception expires at the end of five years and that the exception shall be reviewed by the legislature before the scheduled date.

(c) For purposes of this section, an exception is substantially amended if the amendment expands the scope of the exception to include more records or information. An exception is not substantially amended if the amendment narrows the scope of the exception.

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

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

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

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

(1) Is required by federal law;

(2) applies solely to the legislature or to the state court system.

(h) (1) The legislature shall review the exception before its scheduled

expiration and consider as part of the review process the following:

(A) What specific records are affected by the exception;

(B) whom does the exception uniquely affect, as opposed to the general public;

(C) what is the identifiable public purpose or goal of the exception;

(D) whether the information contained in the records may be obtained readily by alternative means and how it may be obtained;

(2) An exception may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exception and if the exception:

(A) Allows the effective and efficient administration of a governmental program, which administration would be significantly impaired without the exception;

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

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

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

(i) Exceptions contained in the following statutes as certified by the revisor of statutes to the president of the senate and the speaker of the house of representatives pursuant to subsection (e) of this section on June 1, 2004, are hereby continued in existence until July 1, 2010, at which time such exceptions shall expire: 1-401, 2-1202, 5-512, 9-1137, 9-1712, 9-2217, 10-630, 11-306, 12-189, 12-1,108, 12-1694, 12-1698, 12-2819, 12-4516, 16-715, 16a-2-304, 17-1312e, 17-2227, 17-5832, 17-7503, 17-7505, 17-7511, 17-7514, 17-76,139, 19-4321, 21-2511, 22-3711, 22-4707, 22-4909, 22a-243, 22a-244, 23-605, 23-9,312, 25-4161, 25-4165, 31-405, 34-251, 38-1508, 38-1520, 38-1565, 38-1609, 38-1610, 38-1618, 38-1664, 39-709b, 39-719e, 39-934, 39-1434, 39-1704, 40-222, 40-2,156, 40-2c20, 40-2c21, 40-2d20, 40-2d21, 40-409, 40-956, 40-1128, 40-2807, 40-3012, 40-3304, 40-3308, 40-3403b, 40-3421, 40-3613, 40-3805, 40-4205, 44-510j, 44-550b, 44-594, 44-635, 44-714, 44-817, 44-1005, 44-1019, 45-221, 46-256, 46-259, 46-2201, 47-839, 47-844, 47-849, 47-1709, 48-1614, 49-406, 49-427, 55-1,102, 56-1a606, 56-1a607, 56a-1201, 56a-1202, 58-4114, 59-2135, 59-2802, 59-2979, 59-29b79, 60-3333, ~~60-3335,~~ 60-3336, 65-102b, 65-118, 65-119, 65-153f, 65-170g, 65-177, 65-1,106, 65-1,113, 65-1,116, 65-1,157a, 65-1,163, 65-1,165, 65-1,168, 65-1,169, 65-1,171, 65-1,172, 65-436, 65-445, 65-507, 65-525, 65-531, 65-657, 65-1135, 65-1467, 65-1627, 65-1831, 65-2422d, 65-2438, 65-2836, 65-2839a, 65-2898a, 65-3015, 65-3447, 65-34,108, 65-34,126, 65-4019, 65-4608, 65-4922, 65-4925, 65-5602, 65-5603, 65-6002, 65-6003, 65-6004, 65-6010, 65-67a05, 65-6803, 65-6804, 66-101c, 66-117, 66-151, 66-1,190, 66-1,203, 66-1220a, 66-2010, 72-996, 72-4311, 72-4452, 72-5214, 72-53,106, 72-5427, 72-8903, 73-1228, 74-2424, 74-2433f, 74-4905, 74-4909, 74-50,131, 74-5515, 74-7308, 74-7338, 74-7405a, 74-8104, 74-8307, 74-8705, 74-8804, 74-9805, 75-104, 75-712, 75-7b15, 75-1267, 75-2943, 75-4332, 75-4362, 75-5133, 75-5266, 75-5665, 75-5666, 75-7310, 76-355, 76-359, 76-493, 76-12b11, 76-3305, 79-1119, 79-1437f, 79-15,118, 79-3234, 79-3395, 79-3420, 79-3499, 79-34,113, 79-3614, 79-3657, 79-4301 and 79-5206.

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

(a) "*Environmental* audit" means a voluntary, internal assessment, evaluation or review~~, not otherwise required by environmental law,~~ *of a facility or operation, of an activity at a facility or operation or of an*

environmental management system at a facility or operation when the facility, operation or activity is regulated by state or federal environmental laws that is performed by the owner or operator, the owner's or operator's employees, or a qualified auditor ~~and initiated~~ *retained* by the owner or operator of ~~a~~ *the* facility *or operation* for the express and specific purpose of ~~determining whether a facility, operation within a facility or facility management system complies~~ *identifying historical or current noncompliance* with environmental laws*, discovering environmental contamination or hazards, remedying noncompliance or improving compliance with environmental laws or improving an environmental management system*. Once initiated, an audit shall be completed within a reasonable period of time *not to exceed six months, unless an extension is approved by the agency that regulates the facility or operation*. Nothing in this section shall be construed to authorize uninterrupted or continuous auditing.

(b) "*Environmental* audit report" means a set of documents, each labeled "Audit Report: Privileged Document" ~~and prepared~~ *that is generated and developed for the primary purpose and in the course of or* as a result of an *environmental* audit *that is conducted in good faith*. An *environmental* audit report may include the following supporting information, if collected or developed for the primary purpose and in the course of an audit: Field notes and records of observations, *samples, analytical results, exhibits, findings,* opinions, suggestions, *recommendations,* conclusions, drafts, memoranda, *implementation plans, interviews, correspondence,* drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs and surveys. An *environmental* audit report, when completed, may ~~have three~~ *include any of the following* components:

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

(2) memoranda and documents analyzing all or part of the audit report and discussing potential implementation issues; ~~and~~

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

(4) periodic updates documenting progress in completing the implementation plan.

(c) "Facility" means all contiguous land, structures and other appurtenances and improvements on the land.

(d) "Qualified auditor" means a person or organization with education, training and experience in preparing *environmental* studies and assessments.

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

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

(g) "Person" means any individual, association, partnership, joint venture, company, firm, corporation, institution, governmental subdivision, state or federal department or agency or other legal entity.

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

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

subject of the audit and which is addressed in a privileged part of the audit report.

(c) A person who conducts or participates in the preparation of an environmental audit report and who has observed physical events of an environmental violation may testify about those events but shall not be compelled to testify or produce documents related to the preparation of or any privileged part of an environmental audit or any component listed in subsection (b) of K.S.A. 60-3332, and amendments thereto.

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

(e) A party asserting the privilege under this section has the burden of establishing the applicability of the privilege. If there is evidence of noncompliance with environmental laws, such party must prove that appropriate efforts to achieve compliance were initiated promptly upon discovery and pursued with reasonable diligence.

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

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

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

(1) Disclosure under the terms of an agreement which expressly provides that the information provided be kept confidential between the owner or operator of the facility audited and a potential purchaser of the operation or facility; or

(2) disclosure under the terms of a confidentiality agreement between governmental officials and the owner or operator of the facility audited, which expressly provides that the information provided be kept confidential. *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.*

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

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

(2) the party asserting the privilege has not implemented a management system to assure compliance with environmental laws. Depending on the nature of the ~~entity~~ *facility* including its size, its financial resources and assets and the environmental risks posed by its operations, and based on a qualitative assessment of the totality of circumstances, a management system shall be deemed to satisfy the requirements of this act if it contains the following primary characteristics:

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

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

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

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

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

(F) specific individuals within both high-level and plant- or operation-level management are assigned responsibility to oversee compliance with

such standards and procedures;

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

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

(I) the ~~entity's~~ *facility's* standards and procedures to ensure compliance are enforced through appropriate employee performance, evaluation and disciplinary mechanisms;

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

(4) even if subject to the privilege, the material shows evidence of noncompliance with the environmental laws, and appropriate efforts to achieve compliance with such laws were not promptly initiated and pursued with reasonable diligence upon discovery of noncompliance*;*

(5) the environmental audit 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 facility owner or operator had been provided written notification that an investigation into a specific violation had been initiated;

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

(7) all or part of the environmental audit report shows an imminent and substantial endangerment to the public health or the environment.

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

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

(f) A person seeking disclosure of an environmental audit report may review the report, but such review does not waive or make the administrative or civil evidentiary privilege inapplicable to the report.

(g) Environmental audit reports shall be returned to the facility's owner or operator upon completion of the review of the report.

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

~~(a)~~ *(1)* Documents, communications, data, reports or other information required to be collected, developed, maintained or reported to a regulatory agency pursuant to federal, state or local statute, ordinance, resolution, rule and regulation, permit*, approval* or order;

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

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

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

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

(6) any information, not otherwise privileged, that is developed or maintained in the course of regularly conducted business activity or regular practice.

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

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

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

(2) made to an agency having regulatory authority with regard to the violation disclosed *before there is notice of a citizen suit or a legal complaint by a third party*;

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

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

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

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

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

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

(2) the violation was committed intentionally and willfully by the ~~person or entity~~ *facility owner or operator* making the disclosure;

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

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

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

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

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

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

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

(1) If a facility owner or operator has been found in a civil, criminal or administrative proceeding to have committed violations in this state that constitute a pattern of continuous or repeated violations of environmental law that were due to separate and distinct events giving rise to the violations within the three-year period prior to the date of disclosure.

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

(g) In cases where the conditions of a voluntary disclosure are not met, but a good faith effort was made to voluntarily disclose and resolve a violation detected in an environmental audit, the state regulatory authorities shall consider the nature and extent of any good faith effort in deciding the appropriate enforcement response and shall consider reducing any administrative or civil penalties based on mitigating factors showing that one or more of the conditions for voluntary disclosure have been met.

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

Sec. 7. K.S.A. 60-3339 is hereby amended to read as follows: 60-3339. If a ~~person or entity~~ *facility owner or operator* has implemented an environmental management system, consistent with the primary characteristics prescribed by subsection (d)(2) of K.S.A. 60-3334, *and amendments thereto,* a court or administrative tribunal which finds a violation of such laws, or extension of such laws, shall give consideration to that

fact in determining whether to impose administrative~~,~~ *or* civil ~~or criminal~~ penalties and in determining the severity of any penalties imposed.

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

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

Approved March 22, 2006.