60-3334. Same; waiver of privilege; exceptions; burden of proof; review; return of report. (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 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 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 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 facility owner or operator implements a system that has policies, standards and procedures that highlight the importance of assuring compliance with all environmental laws;

(E) the facility owner or operator's policies, standards and procedures are communicated effectively to all in the 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 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 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 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;

(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) A person seeking disclosure of an environmental audit report has the burden of proving that the privilege 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.

History: L. 1995, ch. 204, § 3; L. 2006, ch. 30, § 4; July 1.