

1 **As Amended by House Committee**

2 *Session of 2002*

3  
4 **HOUSE BILL No. 2830**

5  
6 By Committee on Environment

7  
8 2-11

9  
10 AN ACT concerning environmental contamination of real property; pro-  
11 viding for prohibition or restriction of activities on and use of such  
12 property for certain purposes.

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

15 Section 1. As used in this act:

16 (a) "Department" means the Kansas department of health and  
17 environment.

18 (b) "Environmental use control" means a restriction, prohibition or  
19 control of one or more uses of, or activities on, a specific property to  
20 ensure future protection of public health and the environment when en-  
21 vironmental contamination remains on the property following the appro-  
22 priate remedial activities as directed by the department. Any environ-  
23 mental use control created pursuant to this act runs with the property  
24 and is binding on the owner and subsequent owners, lessees and other  
25 users of the land.

26 (c) "Owner" means any owner of record of property, and any person  
27 or entity authorized to make decisions regarding the transfer of the sub-  
28 ject property or placement of encumbrances on the subject property,  
29 other than by the exercise of eminent domain.

30 (d) "Person" means: Any individual, trust, firm, joint stock company,  
31 public or private corporation, limited liability company or partnership;  
32 the federal government or any agency or instrumentality thereof; any  
33 state, or any agency, instrumentality or political or taxing subdivision  
34 thereof; or any interstate body.

35 (e) "Protective structure" means an engineered structure imple-  
36 mented as part of the remedial action to control or respond to a release  
37 or threat of release of environmental contamination. Protective structure  
38 includes capping, fencing, berming, diking, drainage structures and other  
39 structures that may control erosion, migration or other releases of envi-  
40 ronmental contamination.

41 (f) "Property" means real property.

42 (g) "Remedial activity" means any site cleanup, soil or groundwater  
43 monitoring, remedial action, corrective action, emergency action, removal

1 action or other action necessary or appropriate to respond to a release or  
2 threat of release of environmental contamination.

3 (h) “Secretary” means the secretary of health and environment.

4 Sec. 2. (a) An owner of property may, with departmental approval,  
5 restrict the use of the owner’s property to mitigate the risk posed to  
6 human health and the environment by imposing on the property an ap-  
7 propriate environmental use control.

8 (b) (1) The owner or an authorized representative of the owner of  
9 the property shall make application to the department for approval of an  
10 environmental use control. Such application shall be made on forms pro-  
11 vided by the department and shall be completed and submitted to the  
12 department by the owner or an authorized representative of the owner  
13 of the property.

14 (2) The application shall be accompanied by a nonrefundable fee of  
15 \$1,000. Additional fees may be required as a condition of application  
16 approval for properties where the term of the environmental use control  
17 is projected to require oversight which will exceed the \$1,000 fee. A  
18 reimbursement agreement may be entered into by the department and  
19 the applicant if future oversight costs are difficult to determine. The sec-  
20 retary shall remit to the state treasurer, in accordance with K.S.A. 75-  
21 4215, and amendments thereto, all moneys received from fees pursuant  
22 to this subsection. Upon receipt of the remittance, the state treasurer  
23 shall deposit the entire amount in the state treasury and credit it to the  
24 environmental use control fund.

25 (3) The department may require the applicant to provide financial  
26 assurance based on the potential for longterm maintenance cost of pro-  
27 tective structures and the potential for release or migration of environ-  
28 mental contamination from the property. The applicant shall provide the  
29 financial assurance by one or more methods satisfactory to the depart-  
30 ment, including, but not limited to, insurance; guarantee; performance  
31 or other surety bond; letter of credit; qualification as a self-insurer; or  
32 other demonstration of financial capability. The demonstration of finan-  
33 cial capability must be adequate to provide remedies which are protective  
34 of human health and the environment should the proposed remedial ac-  
35 tivity fail.

36 (4) The application shall include an accurate legal description or sur-  
37 vey of the property.

38 (c) The department shall review the application. If the application is  
39 disapproved by the department, the applicant may modify the application  
40 in a manner necessary to obtain department approval and resubmit the  
41 application for the department’s approval. If the application is approved  
42 by the department, the department shall provide the applicant a written  
43 approval.

1 (d) An environmental use control pursuant to this act shall be ap-  
2 proved by the department only for the protection of human health and  
3 environment from a remediated or contaminated property within the  
4 state.

5 Sec. 3. (a) An environmental use control may be granted either in  
6 perpetuity or for a term of years, as determined by the department. An  
7 environmental use control may not be approved for a term of years unless  
8 provisions are included that ensures the protection of human health and  
9 the environment beyond the expiration of the environmental use control.

10 (b) An environmental use control that restricts property runs with the  
11 land and is binding on all successors in interest to property until the  
12 environmental use control is removed upon the department's approval.

13 (c) An environmental use control shall be removed if the requesting  
14 party demonstrates to the department's satisfaction that the original risk  
15 to human health or the environment which created the need for the  
16 control is no longer present. An owner must submit a request to the  
17 department for approval to remove all or a portion of the environmental  
18 use controls from the property. The department shall review the request  
19 and provide the owner with the department's decision to approve or deny  
20 the request within 120 days after the department's receipt of the request.  
21 If the department denies the request, justification shall be provided the  
22 owner with a written explanation of the denial, which may include the  
23 applicant has not provided the documentation to demonstrate that the  
24 request is protective of human health and the environment, as deter-  
25 mined by the department;

26 (d) If the department approves an owner's request to remove all or  
27 a portion of environmental use controls, the owner shall file the approval  
28 with the ~~county clerk~~ **register of deeds** in the county where the property  
29 is located.

30 (e) An environmental use control may not be extinguished, limited  
31 or impaired through adverse possession, abandonment, waiver, lack of  
32 enforcement or other common law principles relating to covenants or by  
33 the exercise of eminent domain.

34 (f) Notwithstanding any other provision of law, including any com-  
35 mon law requirement for privity of estate, an environmental use control  
36 shall run with the land and shall bind the owners of the property, the  
37 owners successors and assigns and any person using the property.

38 (g) The department shall not acquire any liability by virtue of ap-  
39 proving an environmental use control or by approving removal of all or a  
40 portion of environmental use controls.

41 Sec. 4. (a) An environmental use control pursuant to this act may  
42 restrict or prohibit the following activities at or uses of property:

43 (1) Disturbing soil caps, soil covers, soil surfaces, berms, drainage

1 structures or other structures that may cause erosion or migration of en-  
2 vironmental contamination at or from the property;

3 (2) excavating, dredging or digging into soil caps, soil covers, soil sur-  
4 faces, berms, drainage structures or other structures that may cause a  
5 release or migration of environmental contamination at or from the  
6 property;

7 (3) drilling or using water wells for domestic or other purposes;

8 (4) residential, commercial, agricultural or industrial uses of the prop-  
9 erty or access to the property or to protective structures to protect the  
10 public from exposures to environmental contamination;

11 (5) storage of equipment or materials, pasturing of animals, con-  
12 structing or placing structures such as buildings on or above soil caps, soil  
13 covers, soil surfaces, berms, drainage structures or other structures;

14 (6) planting or allowing growth of specific types of vegetation, such  
15 as crops for human or animal consumption, or undesirable vegetation  
16 which may be detrimental to the environmental use controls; or

17 (7) any other activity or use detrimental to or interfering with the  
18 remediation or cleanup of the property or detrimental to the preservation  
19 of remedial or protective structures measures, or technologies employed  
20 at the property.

21 (b) An environmental use control pursuant to this act may include or  
22 require the following:

23 (1) Prompt notification to the department of transfers of the property  
24 or any proposed changes in land use for the property;

25 (2) maintenance of remedial structures or systems at the property,  
26 such as soil caps, soil covers, soil surfaces, berms, drainage structures,  
27 vegetation, monitoring wells or other structures or systems;

28 (3) department access to the property as necessary to inspect and  
29 monitor remediation activities, monitoring wells, surface streams and pro-  
30 tective structures or systems and to ensure implementation and enforce-  
31 ment of the requirements, restrictions and other limitations of the envi-  
32 ronmental use controls; or

33 (4) any other obligations necessary to reduce or eliminate risks or  
34 threats to human health and the environment from the property.

35 (c) All interests not transferred or conveyed by environmental use  
36 controls shall remain in with the owner, including the right to engage in  
37 all uses of the property that are not inconsistent with the environmental  
38 use control and not expressly prohibited by the environmental use control  
39 or by law.

40 Sec. 5. (a) An environmental use control must be recorded by the  
41 ~~county clerk~~ **register of deeds** in the county in which the property is  
42 located and shall include:

43 (1) The notarized original environmental use control agreement; and

1 (2) an adequate legal description or legal survey of the property.

2 (b) The applicant must provide to the department a notarized copy  
3 of the approved environmental use control agreement for the property.

4 (c) Environmental use controls recorded by the owner of property  
5 that restrict or require certain uses or activities relating to such property  
6 pursuant to this act shall be considered valid and enforceable by the terms  
7 of the agreement.

8 Sec. 6. (a) Upon receipt of information that approved environmental  
9 use controls are not being implemented in accordance with an approved  
10 environmental use control agreement or present a hazard to human  
11 health or the environment, the secretary may take such actions as may be  
12 necessary to protect human health or the environment. The action the  
13 secretary may take shall include, but not be limited to:

14 (1) Issuing an order directing the owner of the property subject to  
15 the environmental use controls to take such steps as are necessary to  
16 correct any deficiencies and fully implement the approved environmental  
17 use controls.

18 (2) Retracting the approval of the remedial action for the subject  
19 property, which included the environmental use control as part of the  
20 remedy and require that the owner implement remediation of the prop-  
21 erty to a cleanup standard which will allow for unrestricted use of the  
22 property.

23 (3) Commencing an action to enjoining acts or practices set forth in  
24 the approved environmental use controls or requesting that the attorney  
25 general or appropriate district or county attorney commence an action to  
26 enjoin such actions which result in approved environmental use controls  
27 not being implemented or not being fully or properly implemented or  
28 present a hazard to human health or the environment. Upon demonstra-  
29 tion by the secretary that approved environmental use controls are not  
30 being implemented in accordance with approved environmental use con-  
31 trol agreement or present a hazard to human health or the environment,  
32 a permanent or temporary injunction, restraining order or other order  
33 may be granted by any court of competent jurisdiction. ~~An action for  
34 injunction under this subsection shall have precedence over other cases  
35 in respect to order of trial.~~

36 (4) Applying to the district court in the county in which an order of  
37 the secretary under subsection (a)(1) will take effect, in whole or in part,  
38 for an order of the court directing compliance with the order of the sec-  
39 retary. Failure to obey the court order shall be punishable as contempt  
40 of the court issuing the order. ~~The application under this subsection for  
41 a court order shall have precedence over other cases in respect to order  
42 of trial.~~

43 (b) Any order of the secretary pursuant to subsection (a)(1) is subject

1 to hearing and review in accordance with K.S.A. 65-3440, and amend-  
2 ments thereto.

3 (c) Notwithstanding subsections (a)(1) and (a)(2), the county or dis-  
4 trict attorney of every county ~~is hereby authorized and directed to~~ **may**  
5 file appropriate actions for enforcement of environmental use controls.  
6 The county or district attorney filing the action shall notify the secretary  
7 before filing the action.

8 (1) In any action initiated by a county or district attorney, upon a  
9 showing by a county or district attorney that approved environmental use  
10 controls are not being implemented or present a hazard to human health  
11 or the environment, a permanent or temporary injunction, restraining  
12 order or other order may be granted by any court of competent jurisdic-  
13 tion. ~~An action for injunction under this subsection shall have precedence~~  
14 ~~over other cases in respect to order of trial.~~

15 (2) In any action brought by a county or district attorney in which a  
16 temporary restraining order, preliminary injunction or permanent in-  
17 junction is sought, it shall not be necessary to allege or prove at any stage  
18 of the proceeding that irreparable damage will occur should the tempo-  
19 rary restraining order, preliminary injunction or permanent injunction not  
20 be issued or that the remedy at law is inadequate, and the temporary  
21 restraining order, preliminary injunction or permanent injunction shall  
22 issue without such allegations and without such proof.

23 (d) An environmental use control may not be separated from the  
24 property and survives foreclosure of a mortgage, lien or other encum-  
25 brance, as well as tax sales and the issuance of a tax deed.

26 Sec. 7. (a) The department shall provide oversight of the environ-  
27 mental use control for property to ensure that the environmentally con-  
28 trolled property is being used only for the purposes permitted by the  
29 terms of the environmental use control agreement and is not being used  
30 in a manner that is prohibited or restricted by the terms of the agreement.

31 (b) The department shall develop and maintain an environmental use  
32 control tracking system on all approved environmental use control agree-  
33 ments. The tracking system data shall be made available to the public **in**  
34 **a manner which allows review by either city or county** and shall  
35 include the following:

- 36 (1) Name of the property;  
37 (2) address of the property, including the city and county;  
38 (3) legal description of the property;  
39 (4) **cause and type of the environmental contamination;**  
40 (5) description of the environmental use control; and  
41 ~~(5)~~ (6) duration of the environmental use control.

42 Sec. 8. (a) There is established in the state treasury the environmen-  
43 tal use control fund. Moneys from the following sources shall be deposited

1 in the state treasury and credited to the fund:

2 (1) Moneys collected from the environmental use control application  
3 fee;

4 (2) moneys received by the secretary in the form of gifts, grants, re-  
5 imbursements or appropriations from any source intended to be used for  
6 purposes of the fund; and

7 (3) interest attributable to the investment of moneys in the fund.

8 (b) Moneys in the environmental use control fund shall be expended  
9 only for costs of:

10 (1) Review of environmental use control applications;

11 (2) oversight of remedial projects which include an environmental  
12 use control as an element of their remedy;

13 (3) activities performed by the department to address immediate or  
14 emergency threats to human health or the environment related to prop-  
15 erties subject to environmental use controls;

16 (4) development and operation of the environmental use control  
17 tracking system; and

18 (5) administration and enforcement of the provisions of this act.

19 (c) On or before the 10th of each month, the director of accounts  
20 and reports shall transfer from the state general fund to the environmen-  
21 tal use control fund interest earnings based on:

22 (1) The average daily balance of moneys in the environmental use  
23 control fund for the preceding month; and

24 (2) the net earnings rate of the pooled money investment portfolio  
25 for the preceding month.

26 (d) All expenditures from the environmental use control fund shall  
27 be made in accordance with appropriation acts upon warrants of the di-  
28 rector of accounts and reports issued pursuant to vouchers approved by  
29 the secretary or the secretary's designee for purposes set forth in this  
30 section.

31 Sec. 9. The secretary may adopt rules and regulations to implement  
32 the provisions of this act.

33 Sec. 10. The department shall publish annually in the Kansas register  
34 a summary of the number of approved environmental use control agree-  
35 ments pursuant to this act.

36 Sec. 11. If any provision of this act or its application to any person  
37 or circumstance is held invalid, the invalidity does not affect other pro-  
38 visions or applications of this act which can be given effect without the  
39 invalid provision or application. To this end the provisions of this act are  
40 severable.

41 Sec. 12. This act shall take effect and be in force from and after its  
42 publication in the statute book.

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