

CORRECTED
SESSION OF 2006

SUPPLEMENTAL NOTE ON SENATE BILL NO. 453

As Amended by Senate Committee on
Natural Resources

Brief*

SB 453 would amend various provisions of the Kansas Environmental Audit Privilege Law which was first enacted in 1995.

The bill would update definitions of "environmental audit" and "environmental audit report," and add and define the terms "owner or operator" and "person."

In addition, the bill would:

- Clarify that failure to label each document within the environmental audit report as a privileged document does not constitute a waiver of the privilege;
- Clarify that a person who conducts or participates in the preparation of an audit report and who has observed physical events of an violation may testify but is not compelled to testify or produce documents;
- Prohibit an employee of a regulatory agency from requesting, reviewing or otherwise using an audit report during an agency inspection;
- Provide that a party asserting the privilege under the law has the burden of establishing the applicability of the privilege;
- Provide that a court or hearing officer could require disclosure of the audit report if:
 - 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

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

facility has been provided written notification that an investigation into specific violations had been initiated;

- The audit report shows evidence of substantial actual personal injury; or
- The report shows an imminent and substantial endangerment of the public health or the environment;
- Provide that a person seeking disclosure of an audit report may review the report, but the review does not waive or make the administrative or civil evidentiary privilege inapplicable to the report;
- Add to the conditions under which the privilege would not extend to include:
 - Information that existed before the initiation and independent of the audit;
 - Information prepared after the completion and independent of the audit;
 - Information, not otherwise privileged, that is developed or maintained in the course of regularly conducted business activity or regular practice;
- Clarify that in most instances there is still the authority of the regulatory agency to require technical or remedial action or to seek injunctive relief;
- Specify that the immunity provided by the law from administrative or civil penalties does not apply where:
 - Cases of continuous or repeated violations of environmental law have occurred;
 - Violations result in a substantial economic benefit to the violator; and
 - Conditions of a voluntary disclosure are not met but a good faith effort was made to voluntarily disclose and resolve a violation, in which case regulatory authorities may consider the nature and extent of the effort made in deciding the appropriate enforcement response and consider reduction

of penalties;

- Clarify that the immunity does not abrogate the responsibility of a person to report or correct violations, conduct remediation, or respond to third-party actions; and
- Repeal a section of the law dealing with the procurement of reports in criminal investigations.

Finally, the bill would stipulate that nothing in this law would prohibit the Division of Post Audit from having access during an audit approved by the Legislative Post Audit Committee to all environmental audit report document in the custody of a governmental agency. Further, the bill would require that environmental audit reports be returned to the custody of the facility's owner or operator upon completion of any review.

Background

This bill was requested by a spokesperson from the Kansas Department of Health and Environment (KDHE). At the hearing on the bill a spokesperson from the agency explained that the bill was prompted by concerns that the Kansas law and similar laws in other states were too permissive and allowed businesses guilty of criminal violation to escape accountability. These concerns were raised by official with the U.S. Environmental Protection Agency (EPA). Testimony indicated that all states had addressed the concerns raised by EPA except Illinois and Kansas. Testimony indicated that Illinois had repealed its law in August of 2005 and Kansas is in the process of amending its law to meet EPA's concerns. Testimony indicated that KDHE was not aware of any Kansas businesses that had escaped criminal prosecution for environmental violations through the use of the law. The Committee also heard from a representative of Region VII of EPA. This conferee stated the existing Kansas environmental privilege law does not meet the minimum requirements necessary for EPA delegation of federal programs to the state or for EPA to approve state environmental programs. The conferee indicated that the bill remedies this problem. He also stated that with the existing law, EPA is unable to delegate or approve new environmental programs in the State of Kansas. There were no opponents to the bill. The Legislative Post Auditor appeared before the Committee to request an amendment to the bill so that the agency could have access to certain reports during an audit.

The Senate Committee on Natural Resources amended the bill to clarify that the Division of Legislative Post audit would have access to environmental reports during an audit and to ensure that environmental audit reports are returned to the facility's owner or operator upon review completion.

The fiscal note on the bill indicates that passage is not expected to have any fiscal impact.