

**CHAPTER 44****(HB 143)**

AN ACT relating to environmental audits.

*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

Section 1. KRS 224.01-040 is amended to read as follows:

(1) As used in this section:

- (a) "Environmental audit" means a voluntary, internal, and comprehensive evaluation of one (1) or more facilities or an activity at one (1) or more facilities regulated under this chapter, or federal, regional, or local counterparts or extensions thereof, or of management systems related to that facility or activity, that is designed to identify and prevent noncompliance and to improve compliance with statutory or regulatory requirements. An environmental audit may be conducted by the owner or operator, by the owner's or operator's employees, or by independent contractors.
- (b) "Environmental audit report" means a set of documents, each labeled "environmental audit report: privileged document" and prepared as a result of an environmental audit. An environmental audit report may include field notes and records of observations, findings, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs, and surveys, provided the supporting information is collected or developed for the primary purpose and in the course of an environmental audit. An environmental audit report, when completed, shall have three (3) components:
  - 1. An audit report prepared by an auditor, which shall include the scope and date of the audit and the information gained in the audit together with exhibits and appendices, and may include conclusions and recommendations;
  - 2. Memoranda and documents analyzing part or all of the audit report and discussing implementation issues; and
  - 3. An audit implementation plan that addresses correcting past noncompliance, improving current compliance, and preventing future noncompliance.
- (c) "Voluntary disclosure" means the prompt reporting to the cabinet by the owner or operator of a facility of the voluntary discovery of a violation of this chapter or the administrative regulations promulgated pursuant thereto prior to:
  - 1. The commencement of a federal, state, or local agency inspection or investigation, or the issuance by that agency of an information request to the owner or operator of the facility;
  - 2. The filing of a notice of a citizen suit filed under federal or state law;
  - 3. The filing of a complaint by a third party;
  - 4. The reporting to a federal, state, or local agency of the violation by an employee who is not authorized to speak on behalf of the facility; or
  - 5. The imminent discovery of the violation by a regulatory agency.

- (d) "Voluntary discovery" means the discovery of a violation of this chapter or the administrative regulations promulgated pursuant thereto by the owner or operator of a facility if:
1. The violation was discovered by an environmental audit; and
  2. The violation was not identified through a legally mandated monitoring or sampling requirement prescribed by statute, administrative regulation, permit, judicial or administrative order, agreed order, consent decree, or plea bargain.
- (2) In order to encourage owners and operators of facilities and persons conducting other activities regulated under this chapter, or its federal, regional, or local counterparts or extensions, both to conduct voluntary internal environmental audits of their compliance programs and management systems and to assess and improve compliance with statutory and regulatory requirements, an environmental audit privilege is created to protect the confidentiality of communications relating to voluntary internal environmental audits.
- (3) An environmental audit report shall be privileged and shall not be admissible as evidence in ~~any legal action in~~ any civil, ~~criminal,~~ or administrative proceeding, except as provided in **subsection** ~~subsections~~ (4) ~~and (5)~~ of this section.
- (4) The privilege described in subsection (3) of this section does not apply to the extent that:
- (a) It is waived expressly or waived by implication by the owner or operator of a facility or persons conducting an activity that prepared or caused to be prepared the environmental audit report;
  - (b) The owner or operator of a facility or person conducting an activity seeks to introduce an environmental audit report as evidence. Seeking to introduce any part of the report shall constitute waiver of the privilege described in subsection (3) of this section for the entire report;
  - (c) In a civil or administrative proceeding, a court of record, after a private review consistent with the Kentucky Rules of Civil Procedure, shall require disclosure of material for which the privilege described in subsection (3) of this section is asserted, if the court determines that:
    1. The privilege is asserted for a fraudulent purpose;
    2. The material is not subject to the privilege; or
    3. Even if subject to the privilege, the material shows evidence of noncompliance with this chapter, or with the federal, regional, or local counterparts or extensions thereof, and appropriate efforts to achieve compliance were not promptly initiated and pursued with reasonable diligence.
  - (d) ~~In a criminal proceeding, a court of record, after a private review as described in subsection (5) of this section, shall require disclosure of material for which the privilege described in subsection (3) of this section is asserted, if the court determines that:~~
    - ~~1. The privilege is asserted for a fraudulent purpose;~~
    - ~~2. The material is not subject to the privilege;~~
    - ~~3. Even if subject to the privilege, the material shows evidence of noncompliance with this chapter, or with the federal, regional, or local counterparts or~~

~~extensions thereof, and appropriate efforts to achieve compliance were not promptly initiated and pursued with reasonable diligence; or~~

~~4. The material contains evidence relevant to commission of an offense under subsection (3), (4), (6), (10), or (11) of KRS 224.99-010, and the prosecuting authority has a need for the information.~~

~~(e)} A party asserting the environmental audit privilege in subsection (3) of this section has the burden of proving the privilege, including, if there is evidence of noncompliance with this chapter, or the federal, regional, or local counterparts or extensions thereof, proof that appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence. A party seeking disclosure under subsection (4)(c)1. of this section has the burden of proving that the privilege is asserted for a fraudulent purpose. [The prosecuting authority seeking disclosure under subsection (4)(d)4. of this section has the burden of proving the conditions for disclosure set forth in subsection (4)(d)4. of this section. The party seeking disclosure under subsection (4)(d)1. of this section has the burden of proving that the privilege is asserted for a fraudulent purpose.~~

~~(5) (a) The prosecuting authority, having probable cause to believe an offense has been committed under subsection (3), (4), (6), (10), or (11) of KRS 224.99-010, based upon information obtained from a source independent of an environmental audit report, may obtain an environmental audit report for which a privilege is asserted under subsection (3) of this section pursuant to a search warrant, criminal subpoena, or discovery as allowed by the Kentucky Rules of Criminal Procedure or any applicable statute. The prosecuting authority shall immediately place the report under seal and shall not review or disclose its contents.~~

~~(b) Within twenty (20) days of the prosecuting authority obtaining an environmental audit report, the owner or operator who prepared or caused to be prepared the report, or the prosecuting authority, may file with the appropriate court a petition requesting a private hearing on whether the environmental audit report or portions thereof are privileged under this section or subject to disclosure. Failure by the owner or operator to file such a petition shall waive the privilege.~~

~~(c) Upon filing a petition, the court shall issue an order scheduling a private hearing, within thirty (30) days of the filing of the petition, to determine whether the environmental audit report or parts of the report are privileged under this section or subject to disclosure. The order shall also allow the prosecuting authority immediately to remove the seal from the report and to review the entire report and shall place appropriate limitations on distribution and review of the report to protect against unnecessary disclosure. The prosecuting authority may consult with enforcement agencies regarding the contents of the report as necessary to prepare for the private hearing. However, the information used in preparation for the private hearing shall not be used in any investigation or in any proceeding against the defendant, and shall otherwise be kept confidential, unless and until the information is found by the court to be subject to disclosure.~~

~~(d) The parties may at any time stipulate to the entry of an order directing that specific information contained in an environmental audit report is or is not subject to the privilege provided under subsection (3) of this section.~~

~~(e) Upon making a determination under subsection (4)(c) of this section, the court may compel the disclosure only of those portions of an environmental audit report relevant to issues in dispute in the proceeding.]~~

~~(5)(6)~~ The privilege described in subsection (3) of this section shall not extend to:

- (a) Documents, communications, data, reports, or other information required to be collected, developed, maintained, reported, or made available to *the public* or a regulatory agency pursuant to this chapter, or administrative regulations promulgated pursuant thereto, or other federal, state, or local law, ordinance, regulation, permit, or order, and any information developed relating to any release subject to KRS 224.01-400(19);
- (b) Information obtained by observation, sampling, or monitoring by any regulatory agency;~~or~~
- (c) Information obtained from a source independent of the environmental audit; **or**
- (d) **Any criminal proceeding.**

~~(6)(7)~~ Nothing in this section shall limit, waive, or abrogate the scope or nature of any statutory or common-law privilege, including the work-product doctrine and the attorney-client privilege.

~~(7)(8)~~ Nothing in this section shall limit, waive, or abrogate any reporting requirement in accordance with this chapter or permit conditions.

~~(9) An environmental audit report found subject to disclosure under subsection (4)(c) of this section shall not be deemed privileged in any criminal proceeding.]~~

~~(8)(10)~~ The cabinet shall not seek a civil penalty against a facility for a violation of this chapter or the administrative regulations promulgated pursuant thereto if:

- (a) The owner or operator has made voluntary disclosure to the cabinet of the voluntary discovery of the violation;
- (b) The owner or operator has corrected the violation within sixty (60) days of voluntary discovery, unless a shorter period of time is necessary to protect human health, safety, or the environment, or the cabinet determines that a longer period of time is necessary to correct the violation and approves a longer period of time and the owner or operator is taking the steps necessary to correct the violation as soon as possible;
- (c) The owner or operator has agreed in writing to take steps to prevent a recurrence of the violation;
- (d) The specific violation, or closely related violation;
  1. Has not occurred within the past three (3) years at the facility;
  2. Is not part of a pattern of violations of federal, state, or local law occurring within the past five (5) years identified in a judicial or administrative order, consent agreement, or agreed order, complaint, notice of violation, conviction, or plea agreement; and
  3. Is not an act or omission for which the facility has received penalty mitigation from a federal, state, or local agency;

- (e) The violation is not one which resulted in serious actual harm, or presented an imminent and substantial endangerment to human health or the environment, or violated the terms of a judicial or administrative order, consent decree or agreed order, or plea agreement;~~and~~
  - (f) ***The violation is not one which resulted in significant economic benefit which gives to the violator a clear advantage over its business competitors; and***
  - (g) The owner or operator of the facility cooperates as requested by the cabinet and provides information as necessary to determine the applicability of this section.
- (9) ***The condition contained in subsection (8)(f) of this section shall not apply to voluntary disclosures made prior to the effective date of this Act.***
- (10)~~(11)~~ Nothing in this section shall be construed to abridge the right of any person to recover actual damages resulting from any violation.

**Approved March 15, 2001**