

1 AN ACT relating to environmental audits.

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

3 ➔SECTION 1. A NEW SECTION OF KRS CHAPTER 77 IS CREATED TO
4 READ AS FOLLOWS:

5 (1) As used in this section, "environmental audit" has the same meaning as in
6 Section 2 of this Act.

7 (2) Any person or facility subject to the requirements of this chapter or the rules,
8 orders, or administrative regulations promulgated hereunder that performs or
9 causes the performance of an environmental audit that complies with the
10 requirements of Section 2 of this Act shall be entitled to all of the benefits,
11 privileges, and protections afforded by that section.

12 ➔Section 2. KRS 224.1-040 is amended to read as follows:

13 (1) As used in this section:

14 (a) "Environmental audit" means a voluntary, internal, and comprehensive
15 evaluation of one (1) or more facilities or an activity at one (1) or more
16 facilities regulated under KRS Chapter 77 or this chapter, or federal, regional,
17 or local counterparts or extensions thereof, or of management systems related
18 to that facility or activity, that is designed to identify and prevent
19 noncompliance and to improve compliance with statutory or regulatory
20 requirements. An environmental audit may be conducted by the owner or
21 operator, by the owner's or operator's employees, or by independent
22 contractors.

23 (b) "Environmental audit report" means a set of documents, each labeled
24 "environmental audit report: privileged document" and prepared as a result of
25 an environmental audit. An environmental audit report may include field
26 notes and records of observations, findings, suggestions, conclusions, drafts,
27 memoranda, drawings, photographs, computer-generated or electronically

1 recorded information, maps, charts, graphs, and surveys, provided the
2 supporting information is collected or developed for the primary purpose and
3 in the course of an environmental audit. An environmental audit report, when
4 completed, shall have three (3) components:

- 5 1. An audit report prepared by an auditor, which shall include the scope
6 and date of the audit and the information gained in the audit together
7 with exhibits and appendices, and may include conclusions and
8 recommendations;
- 9 2. Memoranda and documents analyzing part or all of the audit report and
10 discussing implementation issues; and
- 11 3. An audit implementation plan that addresses correcting past
12 noncompliance, improving current compliance, and preventing future
13 noncompliance.

14 (c) "Voluntary disclosure" means the prompt reporting to *the air pollution*
15 *control district established under KRS Chapter 77 by the owner or operator*
16 *of a facility of the voluntary discovery of a violation of KRS Chapter 77 or*
17 *any rules, orders, or administrative regulations promulgated pursuant*
18 *thereto, or to* the cabinet by the owner or operator of a facility of the
19 voluntary discovery of a violation of this chapter or the administrative
20 regulations promulgated pursuant thereto prior to:

- 21 1. The commencement of a federal, state, or local agency inspection or
22 investigation, or the issuance by that agency of an information request to
23 the owner or operator of the facility;
- 24 2. The filing of a notice of a citizen suit filed under federal or state law;
- 25 3. The filing of a complaint by a third party;
- 26 4. The reporting to a federal, state, or local agency of the violation by an
27 employee who is not authorized to speak on behalf of the facility; or

- 1 5. The imminent discovery of the violation by a regulatory agency.
- 2 (d) "Voluntary discovery" means the discovery of a violation of *KRS Chapter 77*
- 3 *or* this chapter or the administrative regulations promulgated pursuant thereto
- 4 by the owner or operator of a facility if:
- 5 1. The violation was discovered by an environmental audit; and
- 6 2. The violation was not identified through a legally mandated monitoring
- 7 or sampling requirement prescribed by statute, administrative regulation,
- 8 permit, judicial or administrative order, agreed order, consent decree, or
- 9 plea bargain.
- 10 (2) In order to encourage owners and operators of facilities and persons conducting
- 11 other activities regulated under *KRS Chapter 77 or* this chapter, or its federal,
- 12 regional, or local counterparts or extensions, both to conduct voluntary internal
- 13 environmental audits of their compliance programs and management systems and to
- 14 assess and improve compliance with statutory and regulatory requirements, an
- 15 environmental audit privilege is created to protect the confidentiality of
- 16 communications relating to voluntary internal environmental audits.
- 17 (3) An environmental audit report shall be privileged and shall not be admissible as
- 18 evidence in any civil or administrative proceeding, except as provided in subsection
- 19 (4) of this section.
- 20 (4) The privilege described in subsection (3) of this section does not apply to the extent
- 21 that:
- 22 (a) It is waived expressly or waived by implication by the owner or operator of a
- 23 facility or persons conducting an activity that prepared or caused to be
- 24 prepared the environmental audit report;
- 25 (b) The owner or operator of a facility or person conducting an activity seeks to
- 26 introduce an environmental audit report as evidence. Seeking to introduce any
- 27 part of the report shall constitute waiver of the privilege described in

1 subsection (3) of this section for the entire report;

2 (c) In a civil or administrative proceeding, a court of record, after a private
3 review consistent with the Kentucky Rules of Civil Procedure, shall require
4 disclosure of material for which the privilege described in subsection (3) of
5 this section is asserted, if the court determines that:

- 6 1. The privilege is asserted for a fraudulent purpose;
- 7 2. The material is not subject to the privilege; or
- 8 3. Even if subject to the privilege, the material shows evidence of
9 noncompliance with *KRS Chapter 77 or* this chapter, or with the
10 federal, regional, or local counterparts or extensions thereof, and
11 appropriate efforts to achieve compliance were not promptly initiated
12 and pursued with reasonable diligence.

13 (d) A party asserting the environmental audit privilege in subsection (3) of this
14 section has the burden of proving the privilege, including, if there is evidence
15 of noncompliance with *KRS Chapter 77 or* this chapter, or the federal,
16 regional, or local counterparts or extensions thereof, proof that appropriate
17 efforts to achieve compliance were promptly initiated and pursued with
18 reasonable diligence. A party seeking disclosure under subsection (4)(c)1. of
19 this section has the burden of proving that the privilege is asserted for a
20 fraudulent purpose.

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

- 22 (a) Documents, communications, data, reports, or other information required to
23 be collected, developed, maintained, reported, or made available to the public
24 or a regulatory agency pursuant to *KRS Chapter 77 or* this chapter, or
25 administrative regulations promulgated pursuant thereto, or other federal,
26 state, or local law, ordinance, regulation, permit, or order, and any
27 information developed relating to any release subject to KRS 224.1-400(19);

- 1 (b) Information obtained by observation, sampling, or monitoring by any
2 regulatory agency;
- 3 (c) Information obtained from a source independent of the environmental audit;
4 or
- 5 (d) Any criminal proceeding.
- 6 (6) Nothing in this section shall limit, waive, or abrogate the scope or nature of any
7 statutory or common-law privilege, including the work-product doctrine and the
8 attorney-client privilege.
- 9 (7) Nothing in this section shall limit, waive, or abrogate any reporting requirement in
10 accordance with **KRS Chapter 77 or** this chapter or permit conditions.
- 11 (8) The cabinet shall not seek a civil penalty against a facility for a violation of this
12 chapter or the administrative regulations promulgated pursuant thereto **and an air**
13 **pollution control district shall not seek a civil penalty against a facility for a**
14 **violation of KRS Chapter 77 or the rules, orders, or administrative regulations**
15 **promulgated pursuant thereto** if:
- 16 (a) The owner or operator has made voluntary disclosure to the cabinet **or the air**
17 **pollution control district** of the voluntary discovery of the violation;
- 18 (b) The owner or operator has corrected the violation within sixty (60) days of
19 voluntary discovery, unless a shorter period of time is necessary to protect
20 human health, safety, or the environment, or the cabinet **or the air pollution**
21 **control district** determines that a longer period of time is necessary to correct
22 the violation and approves a longer period of time and the owner or operator
23 is taking the steps necessary to correct the violation as soon as possible;
- 24 (c) The owner or operator has agreed in writing to take steps to prevent a
25 recurrence of the violation;
- 26 (d) The specific violation, or closely related violation;
- 27 1. Has not occurred within the past three (3) years at the facility;

- 1 2. Is not part of a pattern of violations of federal, state, or local law
2 occurring within the past five (5) years identified in a judicial or
3 administrative order, consent agreement, or agreed order, complaint,
4 notice of violation, conviction, or plea agreement; and
- 5 3. Is not an act or omission for which the facility has received penalty
6 mitigation from a federal, state, or local agency;
- 7 (e) The violation is not one which resulted in serious actual harm, or presented an
8 imminent and substantial endangerment to human health or the environment,
9 or violated the terms of a judicial or administrative order, consent decree or
10 agreed order, or plea agreement;
- 11 (f) The violation is not one which resulted in significant economic benefit which
12 gives to the violator a clear advantage over its business competitors; and
- 13 (g) The owner or operator of the facility cooperates as requested by the cabinet *or*
14 *the air pollution control district* and provides information as necessary to
15 determine the applicability of this section.
- 16 (9) The condition contained in subsection (8)(f) of this section shall not apply to
17 voluntary disclosures made prior to June 21, 2001.
- 18 (10) Nothing in this section shall be construed to abridge the right of any person to
19 recover actual damages resulting from any violation.