

LEGISLATIVE BILL 395

Approved by the Governor April 9, 1998

Introduced by Kristensen, 37; Bromm, 23; Jones, 43

AN ACT relating to public health and welfare; to amend sections 48-721 and 48-741, Reissue Revised Statutes of Nebraska, sections 48-724, 48-730, and 48-731, Revised Statutes Supplement, 1996, and sections 48-722 and 48-726, Revised Statutes Supplement, 1997; to provide for environmental audits; to state intent; to define terms; to provide penalties; to change provisions of the Boiler Inspection Act; to harmonize provisions; to provide operative dates; to repeal the original sections; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. The Legislature finds and declares that protection of the environment is enhanced by the public's voluntary compliance with environmental requirements and the local counterpart or extension of such requirements and that the public will benefit from incentives to identify and remedy environmental compliance issues. The Legislature further declares that it is in the public interest to encourage such activities by assuring limited protection of environmental audit findings and of providing fair treatment of those who report environmental audit findings to regulatory authorities.

Sec. 2. For the purposes of sections 1 to 11 of this act:

(1) Environmental audit means any document dated and labeled as a confidential environmental audit and prepared pursuant to a specific written directive to review compliance with an environmental requirement or requirements, including any report, finding, communication, or opinion or any draft of a report, finding, communication, or opinion, related to and prepared as a result of a voluntary self-evaluation that is done in good faith;

(2) Environmental requirement means an environmental protection requirement contained in (a) the Environmental Protection Act, the Integrated Solid Waste Management Act, the Nebraska Chemigation Act, the Pesticide Act, the Petroleum Products and Hazardous Substances Storage and Handling Act, sections 81-1575 to 81-1577, or federal law, a rule or regulation adopted and promulgated pursuant to such acts, sections, or laws, a permit or order issued pursuant to such acts, sections, or laws, or an agreement entered into or court order issued pursuant to any of the foregoing or (b) an ordinance or other legally binding requirement of a local governmental unit under authority granted by state or federal law relating to environmental protection;

(3) Person means any individual, partnership, limited liability company, association, public or private corporation, trustee, receiver, assignee, agent, municipality, other governmental subdivision, public agency, other legal entity, or any officer or governing or managing body of any public or private corporation, municipality, governmental subdivision, public agency, or other legal entity; and

(4) Voluntary self-evaluation means a self-initiated assessment, audit, or review, not otherwise expressly required by environmental requirements, that is performed by any person for himself, herself, or itself, either by an employee of such person assigned the responsibility of performing such assessment, audit, or review or by a consultant engaged by such person specifically for the purpose of performing such assessment, audit, or review to determine whether such person is in compliance with environmental requirements.

Sec. 3. (1) An environmental audit prepared under sections 1 to 11 of this act is not admissible as evidence in any civil or administrative proceeding or enforcement proceedings under local ordinances, except (a) as provided in sections 4, 5, and 6 of this act, (b) an agency having regulatory authority may obtain and review such audit for the limited purposes of determining if the audit exists and if any exceptions to the liability provisions of sections 1 to 11 of this act exist with respect to the audit, (c) with respect to the generation, storage, transport, or disposal of radioactive material, low-level radioactive waste, and high-level radioactive waste as defined in section 71-3503, and (d) no protections are given under this section with respect to violations which would likely result or have resulted in a significant adverse impact on the public health or the environment.

(2) Neither any person who conducted the audit nor any person to whom the audit results are disclosed can be compelled to testify regarding any matter which was the subject of the audit and which is addressed in the

environmental audit.

Sec. 4. Except as provided in section 5 of this act, the person for whom the environmental audit was prepared, whether the audit was prepared by the person, by an employee of the person, or by a consultant hired by the person, may waive the protection provided in section 3 of this act only by an express waiver.

Sec. 5. (1) An environmental audit is admissible as evidence in any civil or administrative proceeding or enforcement proceedings under local ordinances if a court of record determines that:

(a)(i) The environmental audit shows evidence that the person for which the environmental audit was prepared is not or was not in compliance with an environmental requirement; and

(ii) The person did not initiate, after the audit, appropriate efforts to achieve compliance with the environmental requirement or complete in good faith any necessary permit application promptly after the noncompliance with the environmental requirement was discovered and, as a result, the person did not or will not achieve compliance with the environmental requirement or complete the necessary permit application within a reasonable amount of time; or

(b) The protection provided in section 3 of this act is being asserted for a fraudulent purpose or the environmental audit was prepared in order to avoid disclosure of information in an investigative, administrative, or judicial proceeding that was underway, that was imminent, or for which the person had been provided written notification that an investigation into a specific violation had been initiated; or

(c) The information contained in the environmental audit shows (i) violations which would likely result in or have resulted in a significant adverse impact on the public health or the environment or (ii) water contamination.

(2) For the purposes of subdivision (1)(a) of this section, if the evidence shows noncompliance with more than one environmental requirement by a person, the person may demonstrate to the court that appropriate efforts to achieve compliance were or are being taken by instituting a comprehensive program that establishes a phased schedule of actions to be taken to bring the person into compliance with all of such environmental requirements.

Sec. 6. The protection created by section 3 of this act does not apply to:

(1) Documents or information required to be developed, maintained, or reported pursuant to any environmental requirements;

(2) Documents or other information required to be available or furnished to a regulatory agency pursuant to any environmental requirements or any other law;

(3) Documents or information maintained or developed relating to grants or other financial assistance sponsored by the state or federal government;

(4) Information obtained by a regulatory agency through observation, inspection, sampling, or monitoring pursuant to an environmental requirement; or

(5) Information obtained through any source independent of the environmental audit.

Sec. 7. A person performing a voluntary self-evaluation may disclose in writing a possible violation of an environmental requirement to an agency having regulatory authority showing:

(1) A description of the possible violation;

(2) The date of discovery of the possible violation and, if known, the date the possible violation occurred; and

(3) Actions taken to correct the possible violation and, if applicable, a schedule to achieve compliance.

Sec. 8. (1) If disclosure is made pursuant to section 7 of this act and the agency having regulatory authority has approved the action taken or the schedule to achieve compliance, as appropriate, which approval shall not be unreasonably withheld, the person is not liable for civil penalties unless

(a) the disclosure was not made within sixty days after knowledge of the information disclosed was obtained by the person and was not disclosed to the agency having regulatory authority prior to the agency having knowledge of the violation contained in the disclosure, (b) the disclosure did not arise out of a voluntary self-evaluation, (c) the person making the disclosure did not initiate the appropriate efforts to achieve compliance, did not pursue compliance with due diligence, and did not correct the noncompliance as soon as reasonably practicable after discovery of the violation during the course of the environmental audit, (d) the person making the disclosure did not cooperate with the agency having regulatory authority with regard to the

violation disclosed regarding investigation of the issues identified in the disclosure, (e) the violation was due to a lack of good faith efforts to understand or comply with environmental requirements, (f) the violation was knowing and willful, or (g) the violation would likely result or has resulted in significant adverse impact on the public health or the environment. If the noncompliance under subdivision (c) of this subsection is the failure to obtain a permit, appropriate efforts to correct the noncompliance may be demonstrated by the submission of a complete permit application within a reasonable time and a permit for such activities is subsequently issued by the agency.

(2) This section does not apply to violations of the terms of any agreement entered into or court order or administrative order issued pursuant to an environmental requirement, including, but not limited to, consent decrees or plea agreements.

(3) This section does not preclude the agency having regulatory authority from seeking the recovery of any economic benefit resulting from noncompliance with an environmental requirement.

(4) For purposes of this section, (a) if a person is required, under an environmental requirement, under a specific permit condition, or under an order issued by the agency, to make a disclosure to an agency having regulatory authority with regard to the violation disclosed, the disclosure is not voluntary with respect to that agency, and (b) repeat violations or closely related additional violations within five years after a previous violation shall be prima facie evidence of a lack of good faith efforts to comply with environmental requirements.

Sec. 9. Except as specifically provided in sections 1 to 8 of this act, such sections do not affect the regulatory authority that any department or agency has to require any action associated with the information disclosed.

Sec. 10. Sections 1 to 9 of this act do not limit, waive, or abrogate the scope or nature of any statutory or common law privileges, including the work-product doctrine and the attorney-client privilege.

Sec. 11. The district court of the county in which the facility is located or, if all parties agree, the district court of Lancaster County shall have jurisdiction of actions brought under section 5 of this act.

Sec. 12. Section 48-721, Reissue Revised Statutes of Nebraska, is amended to read:

48-721. The commissioner shall appoint a state boiler inspector who shall work under the direct supervision of the commissioner or his or her designee and devote his or her full time to the duties of the office. The commissioner may appoint deputy inspectors possessing the same qualifications as the state boiler inspector whenever the same may be necessary to carry out the Boiler Inspection Act. Such deputy inspectors shall be subject to and governed by the same rules and regulations applicable to and governing the acts and conduct of the state boiler inspector. The person so appointed shall (1) be a practical boilermaker, technical engineer, operating engineer, or boiler inspector and hold a commission from the National Board of Boiler and Pressure Vessel Inspectors with an "A" or "B" endorsement or acquire the commission within twelve months of appointment and an "A" or "B" endorsement within eighteen months of appointment, (2) be qualified by not less than ten years' experience in the construction, installation, repair, inspection, or operation of boilers, steam generators, and superheaters, (3) have a knowledge of their operation and use for the generating of steam for power, heating, or other purposes, and (4) neither directly nor indirectly be interested in the manufacture, ownership, or agency of the same. Before entering upon his or her duties under the Boiler Inspection Act, the state boiler inspector and each deputy inspector shall be bonded under the blanket surety bond required by section 11-201.

Sec. 13. Section 48-722, Revised Statutes Supplement, 1997, is amended to read:

48-722. ~~The~~ (1) Except as provided in subsection (2) of this section, the state boiler inspector shall inspect or cause to be inspected at least once every twelve months all boilers required to be inspected by the Boiler Inspection Act to determine whether the boilers are in a safe and satisfactory condition and properly constructed and maintained for the purpose for which the boiler is used, except that (a) hobby boilers, steam farm traction engines, portable and stationary show engines, and portable and stationary show boilers, which are not otherwise exempted from the act pursuant to section 48-726, shall be subject to inspection at least once every twenty-four months and (b) the commissioner may, by rule and regulation, establish inspection periods for pressure vessels of more than twelve months, but not to exceed the inspection period recommended in the Boiler and Pressure Vessel Code of the American Society of Mechanical Engineers or the American

Petroleum Institute Pressure Vessel Inspection Code API-510 for pressure vessels being used for similar purposes. No boilers required to be inspected by the act shall be operated without valid and current certification pursuant to rules and regulations adopted and promulgated by the commissioner in accordance with the requirements of the Administrative Procedure Act. The owner of any boiler installed after September 2, 1973, shall file a manufacturer's data report covering the construction of such boiler with the state boiler inspector. Such reports shall be used to assist the state boiler inspector in the certification of boilers. No boiler required to be inspected by the Boiler Inspection Act shall be operated at any type of public gathering or show without first being inspected and certified as to its safety by the state boiler inspector. Antique engines with boilers may be brought into the state from other states without inspection, but inspection as provided in this section shall be made and the boiler certified as safe before being operated.

(2) The commissioner may, by rule and regulation, waive the inspection of unfired pressure vessels registered with the State of Nebraska if the commissioner finds that the owner or user of the unfired pressure vessel follows a safety inspection and repair program that is based upon nationally recognized standards.

Sec. 14. Section 48-724, Revised Statutes Supplement, 1996, is amended to read:

48-724. (1) Upon making an inspection of any boilers required to be inspected by the Boiler Inspection Act and upon receipt of the inspection fee and certificate fee or registration fee, the boiler inspector shall give to the owner or user of the boilers a certificate of inspection or certificate of registration upon forms prescribed by the commissioner. The certificate shall be posted in a place near the location of such boiler.

(2) The commissioner shall establish the amount of the inspection fee, and certificate fee, and registration fee by rule or regulation at the level necessary to meet the costs of administering the act.

Sec. 15. Section 48-726, Revised Statutes Supplement, 1997, is amended to read:

48-726. The Boiler Inspection Act shall not apply to (1) boilers of railway locomotives subject to federal inspection, (2) boilers operated and regularly inspected by railway companies operating in interstate commerce, (3) boilers under the jurisdiction and subject to inspection by the United States Government, (4) boilers used exclusively for agricultural purposes, (5) steam heating boilers in single-family residences and apartment houses with four or less units using a pressure of less than fifteen pounds per square inch and having a safety valve set at not higher than fifteen pounds pressure per square inch, (6) heating boilers using water in single-family residences and apartment houses with four or less units using a pressure of less than thirty pounds per square inch and having a safety valve set at not higher than thirty pounds pressure per square inch, (7) fire engine boilers brought into the state for temporary use in times of emergency, (8) boilers of a miniature model locomotive or boat or tractor or stationary engine constructed and maintained as a hobby and not for commercial use and having a diameter of less than ten inches inside diameter and a grate area not in excess of one and one-half square feet and that are properly equipped with a safety valve, (9) hot water supply boilers not having more than if none of the following limitations is exceeded: (a) One one hundred fifty thousand British thermal units of input; (b) one hundred twenty gallons of nominal capacity; (c) two hundred ten degrees Fahrenheit output, (10) unfired pressure vessels not exceeding (a) five cubic feet in volume and or (b) a pressure of two hundred fifty pounds per square inch, or (b) one and one-half cubic feet in volume regardless of the amount of pressure used, and (11) unfired pressure vessels owned and maintained by a district or corporation organized under the provisions of Chapter 70, article 6.

Sec. 16. Section 48-730, Revised Statutes Supplement, 1996, is amended to read:

48-730. Before any boiler required to be inspected by the Boiler Inspection Act is installed, a ten days' written notice of intention to install the boiler shall be given to the commissioner, except that the commissioner may, upon application and good cause shown, waive the ten-day prior notice requirement. The notice shall designate the proposed place of installation, the type and capacity of the boiler, the use to be made of the boiler, the name of the company which manufactured the boiler, and whether the boiler is new or used.

Sec. 17. Section 48-731, Revised Statutes Supplement, 1996, is amended to read:

48-731. (1)(a) The Division of Safety and Labor Standards of the Department of Labor may issue a special inspector commission to an inspector

in the employ of a company if the inspector has previously passed the examination prescribed by the National Board of Boiler and Pressure Vessel Inspectors and the company is an insurance company authorized to insure boilers in this state against loss from explosion.

(b) Each insurance company which has been issued a special inspector commission under this section shall submit to the state boiler inspector complete data of each boiler required to be inspected by the Boiler Inspection Act which is insured by such company on forms approved by the commissioner.

(2) (c) Insurance companies shall notify the Division of Safety and Labor Standards of the Department of Labor division of new, canceled, or suspended risks relating to insured boilers. Insurance companies shall notify the division of all boilers which the company insures, or any boiler for which insurance has been canceled, not renewed, or suspended within thirty days after such action.

(3) (d) Insurance companies shall notify the division of defective boilers. If a special inspector, upon the first inspection of new risk, finds that the boiler or any of the appurtenances are in such condition that the inspector's company refuses insurance, the company shall submit a report of the defects to the state boiler inspector.

(4) (2) The inspection required by the act shall not be made if (a) an annual inspection is made under a city ordinance which meets the standards set forth in the act, (b) and a certificate of inspection of the boiler is filed with the commissioner with a certificate fee, and (c) if the inspector for the city making such inspection is required by such ordinance to have qualifications equal to those required of the state boiler inspector as set forth in section 48-721. Upon such showing the commissioner shall waive inspection by the state boiler inspector for the period covered by the certificate issued by the city either hold a commission from the National Board of Boiler and Pressure Vessel Inspectors commensurate with the type of inspections performed by the inspector for the city or acquire the commission within twelve months after appointment.

(5) The division may issue a special inspector commission to an inspector in the employ of a company if the inspector has previously passed the examination prescribed by the National Board of Boiler and Pressure Vessel Inspectors and the company is an insurance company authorized to insure boilers in this state against loss from explosion.

(3) The commissioner may, by rule and regulation, provide for the issuance of a special inspector commission to an inspector in the employ of a company using or operating an unfired pressure vessel subject to the act for the limited purpose of inspecting unfired pressure vessels used or operated by such company.

(4) (6) All inspections made by a special inspector shall be performed in accordance with the act, and a complete report of such inspection shall be filed with the division in the time, manner, and form prescribed by the commissioner.

(7) (5) The state boiler inspector may, at his or her discretion, inspect any boiler to which a special inspector commission applies.

(8) (6) The commissioner may, for cause, suspend or revoke any special inspector commission.

Sec. 18. Section 48-741, Reissue Revised Statutes of Nebraska, is amended to read:

48-741. The members of the board shall meet in January of conduct an annual meeting in July of each year, or at such other time as the board determines, and shall elect a chairperson from their members at the annual meeting. Other meetings of the board shall be held when called with at least seven days' notice to all members by the chairperson of the board or pursuant to a call signed by four other members. Four members of the board shall constitute a quorum for the transaction of business.

Sec. 19. Sections 12 to 21 of this act become operative on their effective date. The other sections of this act become operative three calendar months after adjournment of this legislative session.

Sec. 20. Original sections 48-721 and 48-741, Reissue Revised Statutes of Nebraska, sections 48-724, 48-730, and 48-731, Revised Statutes Supplement, 1996, and sections 48-722 and 48-726, Revised Statutes Supplement, 1997, are repealed.

Sec. 21. Since an emergency exists, this act takes effect when passed and approved according to law.