

Texas Environmental, Health, and Safety Audit Privilege Act

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Outline

- Guide to the Texas Environmental, Health, and Safety Audit Privilege Act
- Immunity
- Notice of Audit
 - Statistics
 - Common NOA Deficiencies
- Request for Extension
- Disclosure of Violations
 - Statistics
 - Common DOV Deficiencies



Guide to Audit Privilege Act

- Guide to the Texas Environmental, Health, and Safety Audit Privilege Act (Audit Privilege Act)
 - Regulatory Guidance – 173
 - Revised November 2013



Guide to Audit Privilege Act

- Historical Background
- Guidance
 - Notice of Audit
 - Disclosure of Violation
 - Request for Extension
 - Privilege and the Audit Privilege Act
 - Immunity and the Audit Privilege Act
 - Questions and Answers
- Appendix A: Environmental, Health, and Safety Audit Privilege Act
- Appendices C-F: Model correspondence



Guide to Audit Privilege Act

- Historical Background

- In 1995, 74th Texas Legislature passed House Bill 2473
 - Incentives for persons to conduct voluntary audits to determine compliance with environmental, health, and safety regulations and to implement prompt corrective action
 - Provided limited evidentiary privilege for certain information gathered in a voluntary self-audit
 - Provided immunity from administrative and civil penalties for certain violations voluntarily disclosed



Guide to Audit Privilege Act

- Historical Background
 - In 1997, 75th Texas Legislature passed House Bill 3459
 - Changes did not significantly affect the way the Audit Privilege Act was implemented
 - Modified scope of audit privilege and immunity to remove references to criminal proceedings
 - Application of the Audit Privilege Act was more explicitly limited to State law



Guide to Audit Privilege Act

- Historical Background

- In 2013, 83rd Texas Legislature passed Senate Bill 1300
 - Changes did not significantly affect the way the Audit Privilege Act was implemented
 - Allowed prospective buyers of a regulated entity to be eligible for the incentives under the Audit Privilege Act



Guide to Audit Privilege Act

- Historical Background
 - In 2017, 85th Texas Legislature passed Senate Bill 1488
 - Codified the Audit Privilege Act in TEXAS HEALTH AND SAFETY CODE ch. 1101



Guide to Audit Privilege Act

- Guidance for Submissions under Audit Privilege Act
 - Notice of Audit
 - Request for Extension
 - Disclosure of Violations



Guide to Audit Privilege Act

- Guidance for Privilege and Audit Privilege Act
 - Limited evidentiary privilege for certain information gathered in a voluntary self-audit
 - Audit privilege applies to admissibility and discovery of audit reports in civil and administrative proceedings
 - Audit privilege does not apply to documents, reports, and data required to be collected, developed, maintained, or reported under state or federal law
 - Audit privilege also does not apply to criminal proceedings



Guide to Audit Privilege Act

- Guidance for Immunity and Audit Privilege Act
 - Audit Privilege Act conditionally grants immunity from administrative and civil penalties for certain violations voluntarily disclosed



Guide to Audit Privilege Act

- Questions and Answers
- Appendix A: Audit Privilege Act
- Appendix B: Government Code ch. 552 (Open Records)
- Appendices C-G: Examples of Model Letters



Immunity

- TEX. HEALTH & SAFETY CODE § 1101.151
 - Immunity from administrative or civil penalties
- Disclosed violations may be granted immunity from administrative or civil penalties
 - Proper notice of intent to conduct an audit
 - Prompt, voluntary disclosure of violations
 - Violations corrected in a reasonable amount of time



Notice of Audit (NOA)

- TEX. HEALTH & SAFETY CODE § 1101.154
- Notice must be provided of the intent to conduct an audit
- Notice must specify
 - Facility or portion of the facility to be audited
 - Anticipated time the audit will begin
 - General scope of the audit



Notice of Audit (NOA)

- Submit to Office of Compliance and Enforcement (OCE) Director
- NOA should include
 - Customer/legal name of the entity conducting the audit
 - Regulated entity name
 - Physical/geographical location of the entity being audited
 - Description of the entity or portion of the entity being audited
 - Time and date of the initiation of the audit
 - General scope of the audit



Notice of Audit (NOA)

- Notice may provide notification of more than one scheduled audit at a time
- Notice for a pre-acquisition audit is not required



Notice of Pre-Acquisition Audit

- Prospective buyers are not required to submit a NOA prior to the initiation of a pre-acquisition audit
 - TEX. HEALTH & SAFETY CODE § 1101.154(a)
- If new owner wishes to continue the audit, must provide notice per TEX. HEALTH & SAFETY CODE § 1101.155
 - Within 45 days after the acquisition closing date
 - Proper NOA must be submitted to OCE Deputy Director
 - New owner must provide a certification statement

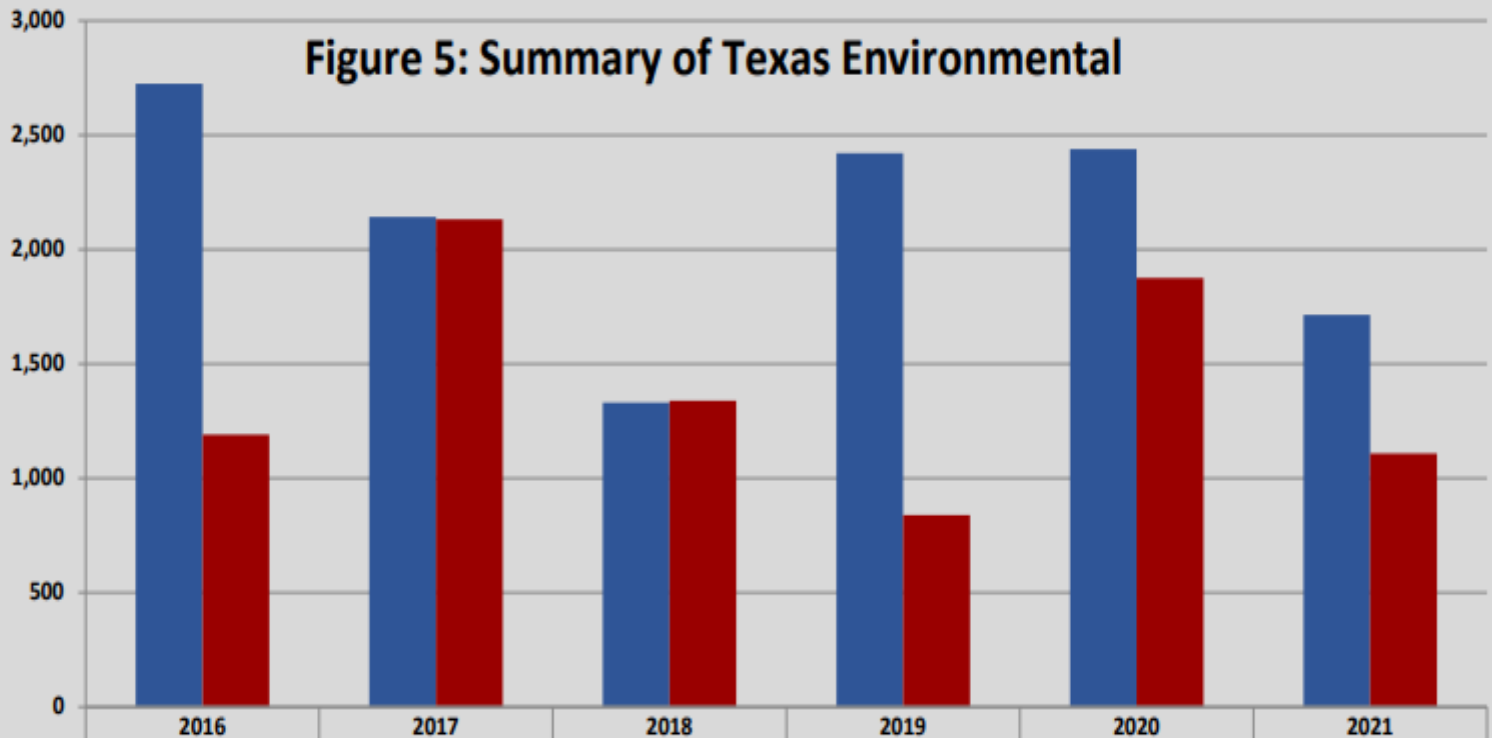


Notice of Pre-Acquisition Audit

- New owner must certify that before the acquisition closing date
 - New owner was not responsible for the scope of the environmental, health, or safety compliance being audited at the regulated entity or operation
 - New owner did not have the largest ownership share of the previous owner
 - Previous owner did not have the largest ownership share of the new owner
 - New owner and the previous owner did not have a common corporate parent or a common majority interest owner



Number of NOAs Received



■ Notice of Intent to Audit	2,724	2,142	1,330	2,421	2,439	1,714
■ Disclosure of Violation	1,191	2,131	1,339	839	1,875	1,108



Common NOA Deficiencies

- Postmark
 - NOA postmarked after environmental audit commenced
- Scope of audit outside TCEQ's delegated enforcement authority



Common NOA Deficiencies

- Specific site names/locations not provided
- Claim of Privilege or Confidentiality
 - NOAs are not privilege or confidential because it required to be submitted under the Under Act
 - NOAs are filed as public documents



Audit Period

- TEX. HEALTH & SAFETY CODE § 1101.052
- Unless an extension is approved based on reasonable grounds, an audit must be completed within a reasonable time not to exceed six months after the date the audit is initiated or the acquisition closing date



Request for Extension

- Requests must be submitted to OCE Director
 - At least two weeks before six months of commencing the audit
- Requests for extensions submitted/postmarked after six months of commencing the self-audit investigation will be denied
 - Violations discovered after the end of the self-audit investigation are not subject to immunity under the Audit Privilege Act



Disclosure of Violations (DOV)

- TEX. HEALTH & SAFETY CODE § 1101.151
- Person who makes a voluntary disclosure of a violation of an environmental law is immune from an administrative or civil penalty for the violation disclosed



Disclosure of Violations (DOV)

- TEX. HEALTH & SAFETY CODE § 1101.152
 - Nature of voluntary disclosure
- Disclosure is voluntary, only if
 - Disclosure made promptly after knowledge of the information disclosed is obtained or not later than the 45th day after the acquisition closing date
 - Disclosure was made in writing via certified mail to OCE Deputy Director



Disclosure of Violations (DOV)

- Disclosure is voluntary, only if
 - Investigation of the violation was not initiated or the violation was not independently detected by the regulatory agency before disclosure was made via certified mail
 - Disclosure arises out of a voluntary environmental or health and safety audit



Disclosure of Violations (DOV)

- Disclosure is voluntary, only if
 - Person making the disclosure initiates an appropriate effort to achieve compliance, pursues that effort with due diligence, and corrects the noncompliance within a reasonable time
 - Person making the disclosure cooperates with the regulatory agency of the issues identified in the disclosure



Disclosure of Violations (DOV)

- Disclosure is voluntary, only if
 - Violation did not result in injury or imminent and substantial risk of serious injury to one or more persons at the site or off-site substantial actual harm or imminent and substantial risk of harm to persons, property, or the environment



Disclosure of Violations (DOV)

- Voluntary DOV should include
 - Legal name of the entity that was audited
 - Reference the date of the relevant NOA
 - Date of initiation and completion of the audit
 - Affirmative assertion that a violation was discovered
 - Brief description of the violation
 - Date the violation was discovered
 - Duration of the violation
 - The status and schedule of proposed corrective measures



Appendix G

Model Addendum to Disclosure of Violation

Disclosure of Violation: Addendum

ABC Company
ABC Plant
RN123456789

<i>Violation</i>	<i>Citation and Permit Provisions</i>	<i>Violation Discovery Date</i>	<i>Violation Start Date</i>	<i>Corrective Action Plan</i>	<i>Schedule or Target Completion Date</i>	<i>Violation Status Completion or Actual Completion Date</i>
1. Failure to register for permit by rule to authorize surface-coating operations.	30 TAC § 106.433(9)	9/15/2013	4/23/2006	Submit Form PI-7 and obtain confirmation from the TCEQ that surface-coating operations are registered under permit by rule.	12/1/2013	Early completion: confirmation received 9/30/2013
2. Failure to properly label used-oil containers. Employees were not trained in labeling procedures.	30 TAC § 328.26(d)	9/15/2013	6/15/2007	All used-oil containers are now properly labeled and employee training regarding labeling procedures was conducted.	Complete	Used-oil containers labeled as of 9/20/2013
3. Failure to update Stormwater Pollution Protection Plan (SWPPP). The SWPPP needs to be updated to reflect current owner.	Stormwater General Permit TXR05000, Part III, Section A	9/15/2013	7/5/2007	Update SWPPP to accurately reflect current owner.	12/1/2013	Status update: SWPPP submission has been delayed; plan expected to be submitted by 11/1/2013

This is an example addendum to a Disclosure of Violation. Please add columns or rows as needed.



Disclosure of Pre-Acquisition Violations

- New owner must submit a proper, voluntary DOV for all violations discovered during the pre-acquisition audit
 - Within 45 days of the acquisition closing date
 - Must provide a certification statement
- If the audit is continued, the violations must be disclosed promptly upon discovery

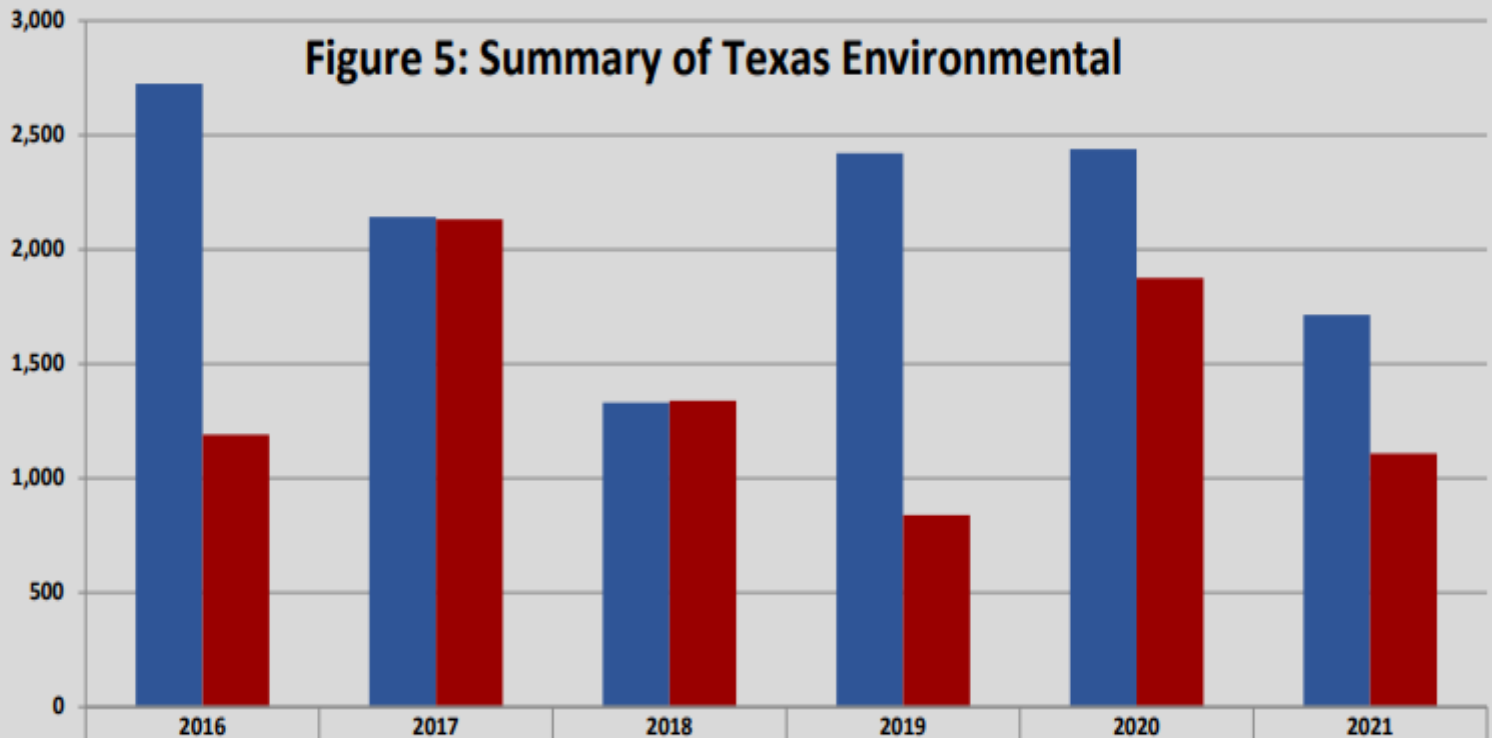


Disclosure of Pre-Acquisition Violations

- New owner must certify in the disclosure that before the acquisition closing date:
 - New owner was not responsible for the environmental, health, or safety compliance at the regulated entity or operation that is subject to the disclosure
 - New owner did not have the largest ownership share of the previous owner
 - Previous owner did not have the largest ownership share of the new owner
 - New owner and the previous owner did not have a common corporate parent or a common majority interest owner



Number of DOVs Received



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Common DOV Deficiencies

- No affirmative assertion that violations were discovered
 - Issues, Potential Violations, Findings, etc.
- Violation not clearly described
- No specific/accurate regulatory citation (cannot cite 40 CFR § 60, Subpart B, or MACT HH, or JJJJ)



Common DOV Deficiencies

- No violation start dates or corrective action completion dates
- Sites were not included in the NOA
- Violation not independently detected
- Claim of privilege or confidentiality



Common DOV Deficiencies

- No explanation how the audit investigation exceeded a reasonable inquiry, for Title V permit holders
- When permit violations disclosed, no permit included
- Disclosed a violation of a rule where TCEQ does not have delegated enforcement authority



TCEQ Does Not Have Delegated Enforcement Authority

- General Land Office jurisdiction (Certain costal/offshore)
- Polychlorinated Biphenyl (PCBs)
- Asbestos
- Surface Impoundment Variance



TCEQ Does Not Have Delegated Enforcement Authority

- Department of Public Safety Jurisdiction (lab glass, etc.)
- Stratospheric Ozone
- City permits
- Railroad Commission jurisdiction (Certain oil and gas)



TCEQ Does Not Have Delegated Enforcement Authority

- EPA Programs
 - Spill Prevention Control and Countermeasure (SPCC)
 - Reformulated Gas (RFG)
 - Risk Management Plan (RMP)
 - Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
 - Emergency Planning and Community Right-to-Know Act (EPCRA)



TCEQ Does Not Have Delegated Enforcement Authority

- EPA Programs
 - Toxic Substance Control Act (TSCA)
 - Toxic Release Inventory (TRI)
 - Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)
 - Clean Water Act 404



Summary

- NOAs, DOVs, and any other Audit Privilege Act correspondence are not privileged or confidential
- Immunity from administrative or civil penalties is conditionally granted only if:
 - Proper NOA submitted
 - Prompt, voluntary DOV submitted
 - Violations corrected within a reasonable amount of time
- Conducting audits under the Audit Privilege Act avails an owner to compliance history benefits



Points of Contact

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Questions



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