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Guidance on the Texas Environmental, Health, and Safety Audit Privilege Act

Guidance on the Texas Environmental, Health, and Safety Audit Privilege Act

Prepared by
Litigation Division

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Contents

Introduction	1
Purpose.....	1
Historical Background	1
Significant Changes Made by HB 3459, 75th Legislature (1997).....	2
Rulemaking Authority.....	3
Guidance	4
Submissions Required under the Audit Act.....	4
Notice of Audit (NOA).....	4
Disclosure of Violations (DOV)	5
Request for Extension	6
Privilege and the Audit Act	6
Evidentiary Privilege	6
Waiver of Privilege	7
Questions and Answers	11
General.....	11
Confidentiality under the Audit Act	12
The Texas Audit Act and the EPA	12
What Does the Audit Act Cover?	13
Audits and Enforcement.....	14
Privileged Information and Inspections.....	15
Appendix A	17
Environmental, Health, and Safety Audit Privilege Act.....	17
§1. Short Title.....	17
§2. Purpose.	17
§3. Definitions.....	17
§4. Audit Report.....	18
§5. Privilege.	18
§6. Exception: Waiver.....	19
§7. Exception: Disclosure Required by Court or Administrative Hearings Official.....	20
§8. Nonprivileged Materials.	20
§9. Review of Privileged Documents by Governmental Authority.	21
§10. Voluntary Disclosure; Immunity.	21
§11. Circumvention by Rule Prohibited.	23
§12. Applicability.....	23
§13. Relationship to Other Recognized Privileges.....	23
Appendix B	24
Government Code Chapter 552. Open Records.....	24
§552.021. Availability of Public Information.....	24
§552.124. Exception: Certain Audits.	24
§552.352. Distribution of Confidential Information.....	24

Appendix C	25
Model Notice of Audit Letter	25
Appendix D	26
Model Disclosure of Violations Letter	26
Appendix E	27
Model Addendum to Disclosure of Violations	27

Introduction

This guidance document is intended to assist those who plan to use the provisions of the Texas Environmental, Health, and Safety Audit Privilege Act (Audit Act). Under the Audit Act, certain documents and information gathered as part of an environmental self-audit are privileged from disclosure. The Audit Act also grants certain immunities from administrative or civil penalties for violations voluntarily disclosed and corrected within a reasonable amount of time. Key processes covered in this document include the submission to the Texas Commission on Environmental Quality (TCEQ) of a letter indicating a person's intent to initiate a self-audit and the submission to TCEQ of a letter disclosing violations discovered.

Please note that this guidance is not regulation and should not be relied upon as such. (The text of the Audit Act appears in Appendix A.) Additionally, please note that although the Audit Act is applicable to issues within the jurisdiction of other state agencies, or even litigation between private parties, this guidance focuses exclusively on the Audit Act as it relates to the TCEQ's jurisdiction.

Purpose

The purpose of this June 2009 document is to make revisions, updates, and clarifications to the previous version of this document published in September 1997. No statutory changes have been made to the Audit Act since passage of HB 3459, 75th Legislature, 1997.

Historical Background

In 1995, the 74th Texas Legislature approved House Bill 2473, the Texas Environmental, Health, and Safety Audit Privilege Act, *Tex. Rev. Civ. Stat. Ann.* art. 4447cc (Vernon's). The Audit Act was subsequently amended by House Bill 3459 in 1997 by the 75th Legislature.

The Audit Act gives incentives for persons to conduct voluntary audits, at regulated facilities or operations, of their compliance with environmental, health, and safety regulations and to implement prompt corrective action. Note that this guidance document uses the term *person* as it is defined in the Audit Act to mean an "individual, corporation, partnership, or other legal entity."

The two primary incentives are a limited evidentiary privilege (see Section 5, Privilege, page 18) for certain information gathered in a voluntary self-audit and an immunity from administrative and civil penalties for certain violations voluntarily disclosed as a result of such an audit. Neither the privilege nor the immunity applies if an audit was conducted in bad faith, or if the person fails to take timely, appropriate action to achieve compliance, among other conditions.

Many violations disclosed under the Audit Act would not have been discovered in an ordinary inspection, since they could be discovered only through expensive sampling and testing protocols, or time-consuming data reviews. Nonetheless, the U.S. Environmental Protection Agency (EPA) cited its opposition to the 1995 Audit Act as partial explanation for its reluctance to grant delegation of federal environmental programs to Texas.¹ However, the EPA conceded before the 75th Legislative Session that an amended Audit Act would not be an obstacle to delegation of those federal programs if several changes were included. The Texas Legislature responded with House Bill 3459, which enacted the changes agreed upon after negotiation between the TCEQ and the EPA.

The amended Audit Act took effect September 1, 1997. Its provisions apply only to audits prepared on or after that date.

Significant Changes Made by HB 3459, 75th Legislature (1997).

Although HB 3459 made a number of changes to the Audit Act, the changes did not significantly affect the way the TCEQ had been implementing the Audit Act since 1995. The scope of the audit privilege and immunity was modified with the removal of references to criminal proceedings and penalties, and the application of the Audit Act was more explicitly limited to state law. Many of the changes were purely explanatory in nature, providing explicit statements of the relationship between the Audit Act and other state and federal laws. The definitions of relevant terms remained the same, as did the description of what information may be incorporated in an audit report.

The following points highlight the main changes to the Audit Act:

- The reference to the applicability of the audit privilege in criminal proceedings was removed. [Audit Act Section (§) 5(b)]
- The reference to immunity from criminal penalties was removed. [Audit Act §10(a)]

¹ Texas has not been alone as a focus of EPA criticism regarding self-audit privilege and immunity legislation. Texas is one of many states that have enacted legislation offering some form of evidentiary privilege or penalty immunity.

- Federal agencies were deleted from the list of persons to whom certain audit disclosures can be made under a confidentiality agreement without waiving the audit privilege. [Audit Act §6(b)(2)(D)]
- Federal and state protections for individuals who disclose information to law-enforcement authorities (“whistleblower laws”) were explicitly preserved. [Audit Act §6(e)]
- The administrative or civil evidentiary privilege was not waived when an audit report is obtained, reviewed, or used in a criminal proceeding. [Audit Act §9(a)]
- A state regulatory agency may now review certain information included in an audit report without resulting in a waiver of the privilege if that information is required to be available under a specific state or federal law. Although in some cases the information could become available to the public by operation of state or federal law, it cannot be used in civil or administrative proceedings, and evidence that derives from the use of such information will be suppressed. [Audit Act §9]
- Immunity was further limited such that violations that result in imminent and substantial risk of injury—in addition to actual injury—are ineligible for immunity. [Audit Act §10(b)(7)]
- A new provision denied immunity for violations that result in “substantial economic benefit that gives the violator a clear advantage over its business competitors.” [Audit Act §10(d)(5)]
- The penalty for fraudulent assertion of the privilege for unprotected information was amended to allow for a maximum fine of \$10,000 as an alternative to sanctions under Rule 215, Texas Rules of Civil Procedure. [Audit Act §7(d)]
- The penalty for the disclosure of confidential information was amended to refer to the Open Records Act, Chapter 552, Government Code. [Audit Act §6(d)]

Rulemaking Authority

The Audit Act does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution. No rulemaking is necessary or anticipated to implement the Audit Act.

Guidance

Submissions Required under the Audit Act

Three types of notices are anticipated under the Audit Act: a Notice of Audit, a Disclosure of Violation, and a Request for Extension. In order to take advantage of the immunity offered by the Audit Act, a “person” (defined in the Audit Act as an individual, corporation, partnership, or any other legal entity) must give notice to the TCEQ prior to the initiation of an environmental audit and must disclose to the agency any violations for which immunity is being sought. However, if an auditing person does not intend to take advantage of potential immunity, no notice of intent to initiate an audit is necessary; in such cases the audit report will still be privileged, but no immunity can attach to any violations discovered. A person must request the written approval of the TCEQ if it seeks to extend the audit more than six months beyond the date it was begun.

Guidance. The Notice of Audit and Disclosure of Violation are not privileged documents and are available to the public.

Notice of Audit (NOA)

A *Notice of Audit* is the letter a person submits to the TCEQ before the person begins an environmental audit. Although the person is not required to give this notice to the TCEQ, the person cannot take advantage of the immunity provision of the Audit Act if it fails to give proper notice to the TCEQ that it is *planning to commence* an environmental audit [Audit Act §10(g)].

An NOA should be submitted in writing by certified mail. Certified mail is not required, but using certified mail is in the person’s best interest, in part because it provides a positive identification of the time the NOA was mailed.

An NOA should include the following information to facilitate the TCEQ’s processing and to fulfill the requirements of the Audit Act:

- the legal name of the person (the Audit Act defines “person” as an individual, corporation, partnership, or any other legal entity) to be audited, including its TCEQ Customer Number (CN)
- the location of the facility (regulated facility or operation) to be audited (address including city/town, county)
- a description of the facility or portion of the facility to be audited, including the applicable TCEQ permit number, registration number, regulated-entity number (RN), and any other identifier used by TCEQ for such a facility or portion of a facility

- specific date and time the audit will commence (time, day, month, and year)
- a general scope of the audit, with sufficient detail to enable a determination of whether subsequently discovered violations are included

When drafting an NOA for submission, review the TCEQ's Central Registry database to ensure that you have identified the appropriate CN and RN for your audit. If a CN or RN is not present for the location you are auditing or the information in Central Registry is incorrect, you should complete a Core Data Form and submit it with your NOA. You may view the Central Registry and download the Core Data Form online at www.tceq.state.tx.us/goto/core_data.

(See Appendix C, Model Notice of Audit Letter)

Disclosure of Violations (DOV)

A *Disclosure of Violations* is the notice or disclosure made by a person to the TCEQ promptly upon discovery of a violation as a result of an environmental audit. A person wishing to take advantage of the immunity from penalty must make a proper voluntary disclosure of the violation.

An adequate disclosure letter must be sent *in writing by certified mail* [Audit Act §10(b)(2)].

A DOV should include all of the following information to fulfill the requirements of the Audit Act and to facilitate processing by the TCEQ:

- the legal name of the person audited (the Audit Act defines "person" as an individual, corporation, partnership, or any other legal entity)
- a reference to the date of the relevant NOA
- certified mail reference number
- the time of initiation and completion (if applicable) of the audit
- an affirmative assertion that a violation has been discovered
- a description of the violation discovered, including references to relevant statutory, regulatory, and permit provisions, where appropriate
- the date the violation was discovered
- the duration of the violation (start date of violation to completion date of corrective actions)
- the status and schedule of corrective actions

It is important to include the duration of the violations in the DOV. The duration identifies the specific window of time for which the immunity will be effective.

If your audit identifies a violation for failure to comply with one or more specific permit requirements, include with the disclosure a copy of all permit requirements violated.

(See Appendix D, Model Disclosure of Violations Letter, and Appendix E, Model Addendum to Disclosure of Violations)

Request for Extension

The person may submit a letter requesting an extension of the deadline for the completion of the audit investigation. The Audit Act explicitly limits the audit period to “a reasonable time not to exceed six months” unless an extension is approved “based on reasonable grounds” [Audit Act §4(e)].

The evidentiary privilege and the immunity from penalties pertain only to information compiled and violations discovered and voluntarily disclosed during an authorized audit period. *Caution:* the continuation of an audit after the initial six-month period without prior written approval from the TCEQ may limit the availability of privilege and immunity.

A request for extension must be timely and must provide sufficient information for the TCEQ to determine whether reasonable grounds exist to grant an extension. Failure to supply sufficient information could result in delay which could jeopardize the privilege and immunity.

Mailing Address. All correspondence regarding the Audit Act should be sent to:

Deputy Director, MC 172
TCEQ, Office of Compliance and Enforcement
PO Box 13087
Austin TX 78711-3087

The Deputy Director’s Office will route these notices to all program areas, the Field Operations Division, and Central Records.

Privilege and the Audit Act

Evidentiary Privilege

Section 5 of the Audit Act grants a limited evidentiary privilege for audit reports developed according to the statute. The audit privilege applies to the admissibility and discovery of audit reports in civil and administrative proceedings. The privilege does not apply to documents, reports, and data required to be collected, developed, maintained, or reported under state or federal law or to information obtained independent of the audit process [Audit Act §8(a)]. The privilege also does not apply to criminal proceedings.

The effects of the audit privilege extend beyond admissibility and discovery in legal proceedings. The TCEQ will not routinely receive or review privileged audit report information, and such information should not be requested, reviewed, or otherwise used during an inspection. If the review of privileged information is necessary to determine compliance status, that information and information derived from its use will remain privileged and inadmissible in administrative or civil proceedings. Such review will occur under the terms of a confidentiality agreement between the TCEQ and the auditing person, where appropriate.

Note that information required for a Disclosure of Violations (violation, citation, violation start and end dates, corrective-action plan, and corrective-action target completion date) is considered basic information required to be voluntarily disclosed in order for a person to claim immunity pursuant to Audit Act §10. The Disclosure of Violations is not considered to be a privileged audit report pursuant to Audit Act §4.

Guidance. All privileged information contained in an audit report should be clearly labeled COMPLIANCE REPORT: PRIVILEGED DOCUMENT. The TCEQ accepts Disclosures of Violations and considers them to be non-privileged; it does not accept audit reports submitted under *claims of confidentiality* unless there is also a confidentiality agreement already in place.

Waiver of Privilege

The Audit Act privilege is waivable and will be lost if privileged information is communicated to others except in limited situations described in the legislation. This section discusses the potential consequences of disclosure in some foreseeable circumstances.

Disclosure to Government Officials

- **No waiver** for disclosure of an audit report to TCEQ personnel pursuant to a confidentiality agreement or under a claim of confidentiality

Disclosure of an audit report to applicable TCEQ personnel (“government official of a state”) does *not* waive the privilege if disclosure is made under the terms of a confidentiality agreement between the owner or operator of the audited facility (or the person for whom the report was prepared) and the TCEQ. [Audit Act §6(b)(2)(D)].

However, the TCEQ does not accept audit reports submitted under *claims of confidentiality*; instead, the TCEQ will attempt to return any such audit to the sender. The TCEQ recognizes that, under Audit Act §6(b)(3), privilege is not automatically waived. However, because it is difficult to segregate confidential information in an environment subject to public information requests, and because there are penalties against public entities or officials

for disclosure, the TCEQ maintains a policy of not accepting, and discouraging submission of, audit reports under claims of confidentiality.

A party that violates the terms of a confidentiality agreement will be liable for damages caused as a result of the disclosure. Information provided under a claim of confidentiality is not subject to disclosure under the Texas Open Records Act. Any agency employee who knowingly discloses such confidential information is subject to potential criminal prosecution which can result in a fine of up to \$1,000 and a term of up to six months in jail.

Guidance. TCEQ personnel will not accept any information offered under a claim of confidentiality. Any TCEQ employee who receives a document offered under such a claim should return it immediately, without review. Also, no employee should request, review, accept, or use an audit report during an inspection without first consulting the Litigation Division.

- **No waiver** for disclosure to a state regulatory agency of information required to be made available under state or federal law

The disclosure for agency review of information required “to be made available” [Audit Act §9(b)] as opposed to information required “to be collected, developed, maintained, or reported” under a federal or state environmental or health and safety law [Audit Act §8(a)(1)] does *not* result in waiver of any applicable privilege.

If the TCEQ requests the review of such material, it accepts the responsibility to maintain confidentiality. The use of any such information obtained is strictly limited. Evidence that arises or is derived from review, disclosure, or use of such information can be suppressed in a civil or administrative proceeding [Audit Act §9(d)]. If such a request for review could result in public disclosure as the result of any specific state or federal law requiring public access to information in the TCEQ’s possession, TCEQ personnel must affirmatively notify the person claiming the privilege before the agency obtains the material for review [Audit Act §9(c)].

- **Waiver** for disclosure of privileged information to the EPA or other federal agencies

Information privileged under the Audit Act cannot be disclosed to the EPA or other federal agencies without resulting in waiver of the privilege. Federal agencies are *not* included among entities to which privileged information can be disclosed under Audit Act §6(b).

Likewise, disclosure to the EPA or other federal agencies of information “required to be made available” under state or federal law will result in waiver of any applicable Audit Act privilege even though the disclosure of such information exclusively for TCEQ review would not waive the privilege under Audit Act §9(b).

Disclosure to Private Parties

- **No waiver** for disclosure to certain nongovernmental parties in order to address an issue identified through an audit

The Audit Act authorizes the disclosure of privileged information to the following nongovernmental parties for addressing or correcting a matter raised by the audit:

- a person employed by the owner or operator, including a temporary or contract employee;
- a legal representative of the owner or operator;
- an officer or director of the regulated facility or a partner of the owner or operator; or
- an independent contractor retained by the owner or operator.

[Audit Act §6(b)(1)]

- **No waiver** for disclosure to certain nongovernmental parties pursuant to the terms of a confidentiality agreement

If the disclosure is made under the terms of a confidentiality agreement, the Audit Act authorizes disclosure of privileged information to the following nongovernmental parties:

- a partner or potential partner of the owner or operator;
- a transferee or potential transferee of the facility or operation;
- a lender or potential lender for the facility or operation; or
- a person who insures, underwrites, or indemnifies the facility or operation.

[Audit Act §6(b)(2)]

Criminal Proceedings

- **No waiver** relative to civil or administrative proceedings where an audit report is obtained, reviewed, or used in a criminal proceeding. [Audit Act §9(a)]

Immunity and the Audit Act

Immunity under Audit Act §10 is from administrative and civil penalties relating to certain self-disclosed violations. This limited immunity does not affect the TCEQ's authority to seek injunctive relief, make technical recommendations, or otherwise enforce compliance. In order to receive immunity, the disclosure must be both voluntary *and* preceded by a proper

Notice of Audit that notified the TCEQ of the intent to initiate the environmental audit (see Notice of Audit, page 4).

A disclosure will be deemed voluntary under Audit Act §10 only if the following conditions apply. (“PINNACLE” can serve as a mnemonic device.)

P—the disclosure was made *promptly* after the violation was discovered;

I—the disclosure was made *in writing by certified mail* to the TCEQ;

N—the violation was *not independently detected*, or an investigation of the violation was not initiated, before the disclosure was made in writing by certified mail;

N—the violation was *noted and disclosed as the result* of a voluntary environmental audit;

A—*appropriate efforts to correct* the noncompliance are initiated, pursued, and completed within a reasonable amount of time;

C—the disclosing person *cooperates in the investigation* of the issues identified in the disclosure;

L—the violation *lacks injury or imminent and substantial risk of injury*; and

E—the disclosure is not required by an *enforcement order or decree*.

Audit Act §10(d) further limits the availability of the immunity for certain violations. Immunity does not apply, and a civil or administrative penalty may be imposed, if the violation was intentionally or knowingly committed; was recklessly committed; or resulted in a “substantial economic benefit which gives the violator a clear advantage over its business competitors.” Furthermore, the immunity does not apply if a court or administrative law judge finds that the person claiming immunity has repeatedly or continuously committed significant violations and has not attempted to bring the facility into compliance, resulting in a pattern of disregard of environmental or health and safety laws. A three-year period will be used to determine whether a pattern exists [Audit Act §10(h)].

Guidance. TCEQ enforcement programs should take appropriate steps in coordination with the Environmental Audit Coordinators when a violation is disclosed as a result of an environmental audit. *The TCEQ’s enforcement authority remains unaltered by the Audit Act, except for the exclusion of penalties.*

Questions and Answers

General

1. Will Disclosures of Violation be accepted by any means of delivery other than certified mail (for example, telephone, fax, personal communication)?

No. According to the Audit Act, Disclosures of Violation *must* be sent by certified mail. They should be addressed to the deputy director of the Office of Compliance and Enforcement.

2. What is considered a “prompt” disclosure?

Whether a disclosure is prompt depends upon the circumstances surrounding the audit and the particular violation; the determination will be made case by case basis. It is in a person’s best interests to disclose violations as soon as they are discovered.

3. How certain must a person be that a violation has occurred before that person needs to give notice in order to receive immunity?

A person must notify the TCEQ of a violation promptly once the person has a reasonable factual basis that a violation has occurred. A person runs the risk of forfeiting potential immunity either if the disclosure is not prompt or if the violation is independently detected before the person has submitted a sufficient disclosure. A vague disclosure is inadequate and *does not qualify* as a voluntary “disclosure of violation.” Specific violations should be disclosed with reference to specific operating units or equipment (or both) affected by relevant regulations or other applicable law.

4. Can a person be in “continuous audit” such that the person can receive immunity from all violations discovered and disclosed?

That is unlikely. The Audit Act limits the audit period to six months. It is doubtful that a person could justify such consecutive audits without raising the suspicion that those audits are being conducted in bad faith. However, it is clear that a person may conduct several audits of *different* facilities during the year and take advantage of the Audit Act’s incentives.

5. Will all voluntarily disclosed violations be required to be listed on a regulated entity’s compliance history?

All voluntarily disclosed violations must be identified in a facility’s compliance-history report as being voluntarily disclosed [Audit Act §10(i)]. The TCEQ views a voluntary disclosure as a positive action that leads to the correction of violations that might otherwise not be detected through traditional enforcement approaches.

Confidentiality under the Audit Act

1. Will the TCEQ receive and review audit reports?

The TCEQ will *not* routinely receive or review *privileged* audit reports. Notices of Audit and Disclosures of Violation will be reviewed for sufficiency by the Office of Compliance and Enforcement and the Litigation Division. If the review of privileged audit report information is necessary to determine compliance status, that information and information derived from its use will remain privileged and inadmissible in administrative or civil proceedings. The review will occur under the terms of a confidentiality agreement between the TCEQ and the auditing person, where appropriate.

2. How will the confidentiality of audit-report information be maintained inside the TCEQ?

If TCEQ and a person have agreed to a confidentiality agreement, any audit-report information submitted will be flagged or segregated in some manner to assist TCEQ personnel in maintaining confidentiality. However, the TCEQ emphasizes that privileged audit report information should not be submitted under *a claim of confidentiality* to the agency or accepted by its personnel when a confidentiality agreement is not already in place.

3. How will the TCEQ address a claim of confidentiality accompanying a Disclosure of Violations or Notice of Audit letter?

A Disclosure of Violations or Notice of Audit letter will not be considered privileged or confidential under the Audit Act. Such letters that are labeled confidential will nonetheless be treated as public documents. Information required for a Disclosure of Violations (violation, citation, violation start and end dates, corrective-action plan, and corrective-action target completion date, etc.) is considered basic information required to be voluntarily disclosed in order for a person to claim immunity pursuant to Audit Act §10. The Disclosure of Violations is not considered to be a privileged audit report pursuant to Audit Act §4.

The Texas Audit Act and the EPA

1. How does the Audit Act apply to EPA inspectors operating in Texas?

The Audit Act does not apply to federal agencies, including the EPA. The EPA has its own audit policy,² and EPA inspectors operate within that policy.

2. If an EPA inspector requests a copy of an audit during a joint inspection, should the TCEQ inspector continue to participate?

² "Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations—Final Policy Statement," 60 *Fed. Reg.* 66706 (Dec. 22, 1995) (Recommended Update to 19618 Volume 65, Number 70, April 11, 2000).

The EPA has explicitly stated that it “will not request an environmental audit report in routine inspections.”³ However, if an EPA inspector does request and obtain a copy of an audit report privileged under the Texas Audit Act, the TCEQ inspector should continue to participate, but should not receive, review, or otherwise use such information. The inspector should refer the issue to the Litigation Division as soon as possible.

What Does the Audit Act Cover?

1. Does the definition of “audit report” include such routine reports as stack tests, CEM data reviews, and so forth? In other words, could a person review the information in such reports, disclose all violations before submitting the reports to the agency, and gain immunity in this way?

Stack tests, data reviews, and so forth may be privileged under the Audit Act, but only if they are included in the scope of the environmental audit and are not required to be collected, maintained, or reported under laws, regulations, permit conditions, or enforcement orders (that is, only if they are “voluntary”). Violations discovered as the result of a voluntary audit may also be immune from penalties if voluntarily disclosed.

2. If a person chooses to conduct an environmental audit in order to collect information necessary for an operating permit application and to complete the application’s compliance certification (or in preparing to submit an annual compliance certification), is this audit considered voluntary under the Audit Act?

Reports, data, communications, and other records required to be reported under state or federal law must be reported notwithstanding the environmental audit and are therefore *not* privileged. An audit report will only be eligible for the Audit Act privilege if a voluntary audit is conducted according to the terms of the legislation. If an audit is conducted pursuant to a federal or state mandate, none of the information collected within the mandated scope of audit will qualify for the Audit Act privilege. With regard to the Clean Air Act Title V operating-permit program, a case-by-case determination will be necessary to determine whether an environmental audit exceeded the “reasonable inquiry” required by EPA regulations [40 CFR Part 70.5(d)] such that privileged information could have been generated in accordance with the Audit Act.

3. Will a person be able to place all documents, correspondence, and records that are not specifically required by regulation under the protection of the audit privilege, limiting the field inspector to looking only at records that are mandated by rule?

³ Ibid., p. 66711.

No. Only the documents, communications, and other data produced from an environmental audit are privileged. The audit contemplated under this legislation is a systematic event with a start date and a completion date.

4. If a nuisance violation results from an upset condition, can the responsible party disclose the violation as part of an environmental audit and thereby gain immunity from the associated penalty?

No. Immunity is available only for voluntarily disclosed violations whose disclosure arises out of a voluntary environmental audit. The discovery and subsequent disclosure of a nuisance violation might coincidentally occur during an audit period, but the discovery and disclosure cannot be attributed solely to the audit process.

Audits and Enforcement

1. Will the TCEQ continue to inspect facilities that have submitted NOAs?

Yes. However, the TCEQ will not target a facility for inspection based upon the submission of an NOA. Enforcement authority is unaffected by the submission of an NOA, and the TCEQ will continue to inspect independently at its discretion.

2. Is any violation reported by a person during the audit period automatically immune from enforcement?

No. Only violations that are discovered in a voluntary environmental audit and are voluntarily disclosed can be immune from penalties. Companies receive no immunity for violations unrelated to the scope of the audit and violations identified through information otherwise required to be collected. Furthermore, the Audit Act does not provide immunity from enforcement—only from certain penalties.

3. Does the Audit Act allow participating companies the authority to set their own compliance plans and schedules without approval from the agency, or will the TCEQ still enter “no penalty” orders with technical requirements and compliance schedules based on the violations disclosed?

Audit Act immunity applies only to the penalty; the TCEQ will still bring enforcement actions and enter “no penalty” orders with technical recommendations where appropriate.

4. Will the TCEQ regional office be aware that an audit is ongoing or has been conducted at a facility under review?

In most cases, the regional office staff will be aware. Notices of Audit will be forwarded to the regions by the Office of Compliance and Enforcement. However, the TCEQ is not necessarily notified of all environmental audits to be conducted; only when a person intends to qualify for the immunity provisions of the Audit Act is it required to provide notice of intent to

commence an audit. Even where no Notice of Audit has been filed, audit reports remain privileged information.

5. How will an inspector know whether a person has received immunity from penalties related to certain violations?

Correspondence regarding disclosures of violations will be CCed to the regional offices by the Office of Compliance and Enforcement.

Privileged Information and Inspections

1. If there is a dispute during an inspection regarding which information is privileged and which should be available to the inspector, where and when will it be resolved?

If a dispute arises during an inspection, a person should not make audit reports available to the inspector, and the inspector should not insist upon access to the information. The inspector should note, as specifically as possible, the types of documents that have been withheld and promptly refer the issue to the Litigation Division for resolution.

2. If, in the course of an inspection, the inspector identifies an apparent violation and the person's representative says, "Yes, we found that during our audit," how should the inspector proceed?

The inspection should proceed as normal. The potential immunity would affect only the penalty, not the investigation. Whether immunity is applicable will be determined later, based on the sufficiency of the NOA and DOV and the voluntariness of the disclosure. The person should cooperate with the inspector's investigation of all issues, including any which the person feels are covered by a self-audit.

3. Is it the responsibility of TCEQ inspectors to instruct companies to refrain from discussing information that is related to an environmental audit during inspections?

Although it may not be the TCEQ inspectors' responsibility, they should inform companies not to provide or discuss privileged audit-report information during inspections.

4. How should an inspector document a verbal disclosure of audit information during the inspection?

An inspector should be careful to avoid receiving privileged audit information. If such information is nonetheless communicated, the inspector should document the information and the circumstances under which it was received, including whether a claim of confidentiality accompanied the disclosure; label the notes "Privileged and Confidential Information"; and promptly refer the matter directly to the Litigation Division.

5. When an inspector independently discovers a violation, how will the TCEQ resolve disputes regarding the timing of the Disclosure of Violation relative to the inspector's discovery?

Disclosures of Violation must be sent by certified mail. The mailing date of a sufficient DOV will be used to resolve the timing issue.

Appendix A

Environmental, Health, and Safety Audit Privilege Act

as Amended by HB 3459, 75th Legislature

Tex. Rev. Civ. Stat. Ann. Article 4447cc (Vernon's). Environmental, Health, and Safety Audit Privilege Act.

§1. Short Title.

This Act may be cited as the Texas Environmental, Health, and Safety Audit Privilege Act.

§2. Purpose.

The purpose of this Act is to encourage voluntary compliance with environmental and occupational health and safety laws.

§3. Definitions.

(a) In this Act:

- (1) "Audit report" means an audit report described by Section 4 of this Act.
 - (2) "Environmental or health and safety law" means:
 - (A) a federal or state environmental or occupational health and safety law; or
 - (B) a rule, regulation, or regional or local law adopted in conjunction with a law described by Paragraph (A) of this subdivision.
 - (3) "Environmental or health and safety audit" means a systematic voluntary evaluation, review, or assessment of compliance with environmental or health and safety laws or any permit issued under those laws conducted by an owner or operator, an employee of the owner or operator, or an independent contractor of:
 - (A) a regulated facility or operation; or
 - (B) an activity at a regulated facility or operation.
 - (4) "Owner or operator" means a person who owns or operates a regulated facility or operation.
 - (5) "Penalty" means an administrative, civil, or criminal sanction imposed by the state to punish a person for a violation of a statute or rule. The term does not include a technical or remedial provision ordered by a regulatory authority.
 - (6) "Person" means an individual, corporation, business trust, partnership, association, and any other legal entity.
 - (7) "Regulated facility or operation" means a facility or operation that is regulated under an environmental or health and safety law.
- (b) A person acts intentionally for purposes of this Act if the person acts intentionally within the meaning of Section 6.03, Penal Code.
- (c) For purposes of this Act, a person acts knowingly, or with knowledge, with respect to the nature of the person's conduct when the person is aware of the person's physical acts. A person acts knowingly, or with knowledge, with respect to the result of the person's conduct when the person is aware that the conduct will cause the result.

- (d) A person acts recklessly or is reckless for purposes of this Act if the person acts recklessly or is reckless within the meaning of Section 6.03, Penal Code.
- (e) To fully implement the privilege established by this Act, the term “environmental or health and safety law” shall be construed broadly.

§4. Audit Report.

- (a) An audit report is a report that includes each document and communication, other than those set forth in Section 8 of this Act, produced from an environmental or health and safety audit.
- (b) General components that may be contained in a completed audit report include:
 - (1) a report prepared by an auditor, monitor, or similar person, which may include:
 - (A) a description of the scope of the audit;
 - (B) the information gained in the audit and findings, conclusions, and recommendations; and
 - (C) exhibits and appendices;
 - (2) memoranda and documents analyzing all or a portion of the materials described by Subdivision (1) of this subsection or discussing implementation issues; and
 - (3) an implementation plan or tracking system to correct past noncompliance, improve current compliance, or prevent future noncompliance.
- (c) The types of exhibits and appendices that may be contained in an audit report include supporting information that is collected or developed for the primary purpose of and in the course of an environmental or health and safety audit, including:
 - (1) interviews with current or former employees;
 - (2) field notes and records of observations;
 - (3) findings, opinions, suggestions, conclusions, guidance, notes, drafts, and memoranda;
 - (4) legal analyses;
 - (5) drawings;
 - (6) photographs;
 - (7) laboratory analyses and other analytical data;
 - (8) computer-generated or electronically recorded information;
 - (9) maps, charts, graphs, and surveys; and
 - (10) other communications associated with an environmental or health and safety audit.
- (d) To facilitate identification, each document in an audit report should be labeled “COMPLIANCE REPORT: PRIVILEGED DOCUMENT,” or labeled with words of similar import. Failure to label a document under this section does not constitute a waiver of the audit privilege or create a presumption that the privilege does or does not apply.
- (e) Once initiated, an audit shall be completed within a reasonable time not to exceed six months unless an extension is approved by the governmental entity with regulatory authority over the regulated facility or operation based on reasonable grounds.

§5. Privilege.

- (a) An audit report is privileged as provided in this section.
- (b) Except as provided in Sections 6, 7, and 8 of this Act, any part of an audit report is privileged and is not admissible as evidence or subject to discovery in:
 - (1) a civil action, whether legal or equitable; or

- (2) an administrative proceeding.
- (c) A person, when called or subpoenaed as a witness, cannot be compelled to testify or produce a document related to an environmental or health and safety audit if:
 - (1) the testimony or document discloses any item listed in Section 4 of this Act that was made as part of the preparation of an environmental or health and safety audit report and that is addressed in a privileged part of an audit report; and
 - (2) for purposes of this subsection only, the person is:
 - (A) a person who conducted any portion of the audit but did not personally observe the physical events;
 - (B) a person to whom the audit results are disclosed under Section 6(b) of this Act; or
 - (C) a custodian of the audit results.
- (d) A person who conducts or participates in the preparation of an environmental or health and safety audit and who has actually observed physical events of violation, may testify about those events but may not be compelled to testify about or produce documents related to the preparation of or any privileged part of an environmental or health and safety audit or any item listed in Section 4 of this Act.
- (e) An employee of a state agency may not request, review, or otherwise use an audit report during an agency inspection of a regulated facility or operation, or an activity of a regulated facility or operation.
- (f) A party asserting the privilege described in this section has the burden of establishing the applicability of the privilege.

§6. Exception: Waiver.

- (a) The privilege described by Section 5 of this Act does not apply to the extent the privilege is expressly waived by the owner or operator who prepared the audit report or caused the report to be prepared.
- (b) Disclosure of an audit report or any information generated by an environmental or health and safety audit does not waive the privilege established by Section 5 of this Act if the disclosure:
 - (1) is made to address or correct a matter raised by the environmental or health and safety audit and is made only to:
 - (A) a person employed by the owner or operator, including temporary and contract employees;
 - (B) a legal representative of the owner or operator;
 - (C) an officer or director of the regulated facility or operation or a partner of the owner or operator; or
 - (D) an independent contractor retained by the owner or operator;
 - (2) is made under the terms of a confidentiality agreement between the person for whom the audit report was prepared or the owner or operator of the audited facility or operation and:
 - (A) a partner or potential partner of the owner or operator of the facility or operation;
 - (B) a transferee or potential transferee of the facility or operation;
 - (C) a lender or potential lender for the facility or operation;
 - (D) a governmental official of a state; or
 - (E) a person or entity engaged in the business of insuring, underwriting, or indemnifying the facility or operation; or

- (3) is made under a claim of confidentiality to a governmental official or agency by the person for whom the audit report was prepared or by the owner or operator.
- (c) A party to a confidentiality agreement described in Subsection (b)(2) of this section who violates that agreement is liable for damages caused by the disclosure and for any other penalties stipulated in the confidentiality agreement.
- (d) Information that is disclosed under Subsection (b)(3) of this section is confidential and is not subject to disclosure under Chapter 552, Government Code. A public entity, public employee, or public official who discloses information in violation of this subsection is subject to any penalty provided in Chapter 552, Government Code. It is an affirmative defense to the clerical dissemination of a privileged audit report that the report was not clearly labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT" or words of similar import. The lack of labeling may not be raised as a defense if the entity, employee, or official knew or had reason to know that the document was a privileged audit report.
- (e) Nothing in this section shall be construed to circumvent the protections provided by federal or state law for individuals that disclose information to law enforcement authorities.

§7. Exception: Disclosure Required by Court or Administrative Hearings Official.

- (a) A court or administrative hearings official with competent jurisdiction may require disclosure of a portion of an audit report in a civil or administrative proceeding if the court or administrative hearings official determines, after an in camera review consistent with the appropriate rules of procedure, that:
 - (1) the privilege is asserted for a fraudulent purpose;
 - (2) the portion of the audit report is not subject to the privilege under Section 8 of this Act; or
 - (3) the portion of the audit report shows evidence of noncompliance with an environmental or health and safety law and appropriate efforts to achieve compliance with the law were not promptly initiated and pursued with reasonable diligence after discovery of noncompliance.
- (b) A party seeking disclosure under this section has the burden of proving that Subsection (a)(1), (2), or (3) of this section applies.
- (c) Notwithstanding Chapter 2001, Government Code, a decision of an administrative hearings official under Subsection (a)(1), (2), or (3) of this section is directly appealable to a court of competent jurisdiction without disclosure of the audit report to any person unless so ordered by the court.
- (d) A person claiming the privilege is subject to sanctions as provided by Rule 215 of the Texas Rules of Civil Procedure or to a fine not to exceed \$10,000 if the court finds, consistent with fundamental due process, that the person intentionally or knowingly claimed the privilege for unprotected information as provided in Section 8 of this Act.
- (e) A determination of a court under this section is subject to interlocutory appeal to an appropriate appellate court.

§8. Nonprivileged Materials.

- (a) The privilege described in this Act does not apply to:
 - (1) a document, communication, datum, or report or other information required by a regulatory agency to be collected, developed, maintained, or reported under a federal or state environmental or health and safety law;

- (2) information obtained by observation, sampling, or monitoring by a regulatory agency; or
- (3) information obtained from a source not involved in the preparation of the environmental or health and safety audit report.
- (b) This section does not limit the right of a person to agree to conduct and disclose an audit report.

§9. Review of Privileged Documents by Governmental Authority.

- (a) Where an audit report is obtained, reviewed, or used in a criminal proceeding, the administrative or civil evidentiary privilege created by this Act is not waived or eliminated for any other purpose.
- (b) Notwithstanding the privilege established under this Act, a regulatory agency may review information that is required to be available under a specific state or federal law, but such review does not waive or eliminate the administrative or civil evidentiary privilege where applicable.
- (c) If information is required to be available to the public by operation of a specific state or federal law, the governmental authority shall notify the person claiming the privilege of the potential for public disclosure prior to obtaining such information under Subsection (a) or (b).
- (d) If privileged information is disclosed under Subsection (b) or (c), on the motion of a party, a court or the appropriate administrative official shall suppress evidence offered in any civil or administrative proceeding that arises or is derived from review, disclosure, or use of information obtained under this section if the review, disclosure, or use is not authorized under Section 8. A party having received information under Subsection (b) or (c) has the burden of proving that the evidence offered did not arise and was not derived from the review of privileged information.

§10. Voluntary Disclosure; Immunity.

- (a) Except as provided by this section, a person who makes a voluntary disclosure of a violation of an environmental or health and safety law is immune from an administrative or civil penalty for the violation disclosed.
- (b) A disclosure is voluntary only if:
 - (1) the disclosure was made promptly after knowledge of the information disclosed is obtained by the person;
 - (2) the disclosure was made in writing by certified mail to an agency that has regulatory authority with regard to the violation disclosed;
 - (3) an investigation of the violation was not initiated or the violation was not independently detected by an agency with enforcement jurisdiction before the disclosure was made using certified mail;
 - (4) the disclosure arises out of a voluntary environmental or health and safety audit;
 - (5) the person who makes the disclosure initiates an appropriate effort to achieve compliance, pursues that effort with due diligence, and corrects the noncompliance within a reasonable time;
 - (6) the person making the disclosure cooperates with the appropriate agency in connection with an investigation of the issues identified in the disclosure; and
 - (7) the 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.

- (c) A disclosure is not voluntary for purposes of this section if it is a report to a regulatory agency required solely by a specific condition of an enforcement order or decree.
- (d) The immunity established by Subsection (a) of this section does not apply and an administrative or civil penalty may be imposed under applicable law if:
 - (1) the person who made the disclosure intentionally or knowingly committed or was responsible within the meaning of Section 7.02, Penal Code, for the commission of the disclosed violation;
 - (2) the person who made the disclosure recklessly committed or was responsible within the meaning of Section 7.02, Penal Code, for the commission of the disclosed violation and the violation resulted in substantial injury to one or more persons at the site or off-site harm to persons, property, or the environment;
 - (3) the offense was committed intentionally or knowingly by a member of the person's management or an agent of the person and the person's policies or lack of prevention systems contributed materially to the occurrence of the violation;
 - (4) the offense was committed recklessly by a member of the person's management or an agent of the person, the person's policies or lack of prevention systems contributed materially to the occurrence of the violation, and the violation resulted in substantial injury to one or more persons at the site or off-site harm to persons, property, or the environment; or
 - (5) the violation has resulted in a substantial economic benefit which gives the violator a clear advantage over its business competitors.
- (e) A penalty that is imposed under Subsection (d) of this section should, to the extent appropriate, be mitigated by factors such as:
 - (1) the voluntariness of the disclosure;
 - (2) efforts by the disclosing party to conduct environmental or health and safety audits;
 - (3) remediation;
 - (4) cooperation with government officials investigating the disclosed violation; or
 - (5) other relevant considerations.
- (f) In a civil or administrative enforcement action brought against a person for a violation for which the person claims to have made a voluntary disclosure, the person claiming the immunity has the burden of establishing a prima facie case that the disclosure was voluntary. After the person claiming the immunity establishes a prima facie case of voluntary disclosure, other than a case in which under Subsection (d) of this section immunity does not apply, the enforcement authority has the burden of rebutting the presumption by a preponderance of the evidence or, in a criminal case, by proof beyond a reasonable doubt.
- (g) In order to receive immunity under this section, a facility conducting an environmental or health and safety audit under this Act must give notice to an appropriate regulatory agency of the fact that it is planning to commence the audit. The notice shall specify the facility or portion of the facility to be audited, the anticipated time the audit will begin, and the general scope of the audit. The notice may provide notification of more than one scheduled environmental or health and safety audit at a time.
- (h) The immunity under this section does not apply if a court or administrative law judge finds that the person claiming the immunity has, after the effective date of this Act, (1) repeatedly or continuously committed significant violations, and (2)

not attempted to bring the facility or operation into compliance, so as to constitute a pattern of disregard of environmental or health and safety laws. In order to be considered a “pattern,” the person must have committed a series of violations that were due to separate and distinct events within a three-year period at the same facility or operation.

- (i) A violation that has been voluntarily disclosed and to which immunity applies must be identified in a compliance history report as being voluntarily disclosed.

§11. Circumvention by Rule Prohibited.

A regulatory agency may not adopt a rule or impose a condition that circumvents the purpose of this Act.

§12. Applicability.

The privilege created by this Act applies to environmental or health and safety audits that are conducted on or after the effective date of this Act.

§13. Relationship to Other Recognized Privileges.

This Act does not 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.

Appendix B

Government Code Chapter 552. Open Records

§552.021. Availability of Public Information.

Public information is available to the public at a minimum during the normal business hours of the governmental body.

§552.124. Exception: Certain Audits.

Any documents or information privileged under the Texas Environmental, Health, and Safety Audit Privilege Act are excepted from the requirements of Section 552.021.

§552.352. Distribution of Confidential Information.

- (a) A person commits an offense if the person distributes information considered confidential under the terms of this chapter.
- (b) An offense under this section is a misdemeanor punishable by:
 - (1) a fine of not more than \$1,000;
 - (2) confinement in the county jail for not more than six months; or
 - (3) both the fine and confinement.
- (c) A violation under this section constitutes official misconduct.

Appendix C

Model Notice of Audit Letter

September 30, 2009

Via Certified Mail, Return Receipt Requested, No. P11 111 1111

Mr. John Sadlier, Deputy Director, MC 172
TCEQ, Office of Compliance and Enforcement
P.O. Box 13087
Austin, Texas 78711-3087

Re: [ABC] Corporation, CNxxxxxxxx; [City/Town] Plant—Unit No. [0];
RNxxxxxxxx; Facility ID No. [00000]; Registration No. [000000]; Permits No.
[00000, 00000, . . .] Scheduled Environmental, Health, and Safety Audit

Dear Mr. Sadlier:

Please be advised that in accordance with the Environmental, Health and Safety Audit Privilege Act (Audit Act), the ABC Corporation's Corporate Audit Group intends to conduct an Environmental, Health and Safety compliance audit at its [City/Town] Plant located at [Facility Address]. Pursuant to Section 10(g) of the Audit Act, which provides immunity for violations voluntarily disclosed as a result of a compliance audit, ABC Corporation is hereby notifying you that the planned audit will commence on [Month, Day, Year], at approximately 9 a.m. and will cover Unit No. 6. The scope of the audit will be to evaluate compliance with all applicable Environmental, Health and Safety regulations, as well as Permits No. 12345 and 678910. Pursuant to Section 4(e) of the Audit Act, the audit will be completed no later than six months after the date of its commencement, unless, pursuant to a written request for extension, we receive your written approval of an extension before the end of the six-month period.

Please do not hesitate to contact me at (000) 000-0000, [e-mail address], if you have any questions or require further information regarding this matter.

Sincerely,

[Person's title, e.g., Manager, Environmental, Health, and Safety Affairs]

cc: [Name], Regional Director, [TCEQ Regional Office Address]

Appendix D

Model Disclosure of Violations Letter

December 30, 2009

Via Certified Mail, Return Receipt Requested, No. P00 000 0000

Mr. John Sadlier, Deputy Director, MC 172
TCEQ, Office of Compliance and Enforcement
P.O. Box 13087
Austin, Texas 78711-3087

Re: [ABC] Corporation; CNxxxxxxxx; [City] Plant—Unit No. [0]; RNxxxxxxxx;
Facility ID No. [00000]; Registration No. [000000]; Permits No. [00000, 00000, ...];
Voluntary Disclosure of Violations Discovered Pursuant to a Scheduled
Environmental, Health, and Safety Audit; NOA Dated [Month/Day/Year]

Dear Mr. Sadlier:

ABC Corporation has conducted an environmental audit of our [City] Plant, located at [Facility Address]. Advance notice of the audit was given to you by letter dated [Month/Day/Year]. The audit covered Unit No. 6; it began on [Month/Day/Year], and was completed on [Month/Day/Year]. This letter is to notify you of several violations discovered in the environmental audit. Accordingly, ABC Corporation hereby invokes the immunity from civil and administrative penalties provided by Section 10 of the Audit Act.

The enclosed addendum summarizes the violations discovered, the time periods during which the violations occurred, the specific rule or permit provision violated, and the status and schedule of corrective actions.

Please do not hesitate to contact me at (000) 000-0000, [e-mail address], if you have any questions or require further information regarding this matter.

Sincerely,

[Person's title, e.g. Manager, Environmental, Health, and Safety Affairs]

Enclosure

cc: [Name], Regional Director, [TCEQ Regional Office Address]

Appendix E

Model Addendum to Disclosure of Violations

Disclosure of Violations: Addendum

Company Name

Facility Name

RN

Violation	Citation	Violation Start Date	Corrective Action Plan	Schedule or Target Completion Date	Violation Status Completion or Actual Completion Date
1. Failure to register for permit by rule to authorize surface-coating operations.	30 TAC § 106.433(9)	4/23/2006	Submit Form PI-7 and obtain confirmation from the TCEQ that surface-coating operations are registered under permit by rule.	8/1/2008	Early completion: confirmation received 7/12/2008
2. Failure to properly label used-oil containers. Employees were not trained in labeling procedures.	30 TAC § 328.26(d)	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 5/8/2008
3. Failure to update Stormwater Pollution Protection Plan. The SWPPP needs to be updated to reflect current owner.	Stormwater General Permit TXR05000, Part III, Section A	7/5/2007	Update SWPPP to accurately reflect current owner.	8/1/2008	Status update: SWPPP submission has been delayed; plan expected to be submitted by 9/30/2008

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