

February 11, 2016

TEXAS EHS AUDIT PRIVILEGE ACT EPA SELF-DISCLOSURE POLICIES

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TEXAS ENVIRONMENTAL, HEALTH, AND SAFETY AUDIT PRIVILEGE ACT ("EHS AUDIT LAW")

- ORIGINALLY ENACTED IN 1995.
- AMENDED IN 1997 AND 2013.

WHAT DOES IT DO?

- PROVIDES INCENTIVES TO OWNERS AND OPERATORS OF REGULATED FACILITIES TO:
 - PERFORM REGULATORY COMPLIANCE AUDITS RELATING TO ENVIRONMENTAL OR OCCUPATIONAL HEALTH AND SAFETY LAWS ("EHS AUDITS"); AND
 - TO VOLUNTARILY COMPLY WITH THE LAW WITHOUT THE NEED FOR GOVERNMENT ENFORCEMENT.

WHAT IS AN EHS AUDIT?

“Environmental or health and safety audit” or “audit” means **a systematic voluntary evaluation, review, or assessment** of compliance with environmental or health and safety laws or with any permit issued under an environmental or health and safety law **conducted by:**

- **an owner or operator;**
- an employee of an owner or operator;
- **a person**, including an employee or independent contractor of the person, that is **considering the acquisition of a regulated facility or operation;** or
- an independent contractor of:
 - (A) A regulated facility or operation; or
 - (B) An activity at a regulated facility or operation.

WHAT IS AN EHS LAW?

“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.

EHS LAWS PRESUMABLY INCLUDE:

- TEXAS WATER CODE;
- TEXAS HEALTH AND SAFETY CODE;
- TEXAS NATURAL RESOURCES CODE;
- TEXAS AGRICULTURE CODE; AND
- TEXAS OCCUPATIONS CODE.

EHS AGENCIES INCLUDE:

- TEXAS COMMISSION ON ENVIRONMENTAL QUALITY;
- TEXAS RAILROAD COMMISSION;
- TEXAS STATE DEPARTMENT OF HEALTH SERVICES;
AND
- TEXAS DEPARTMENT OF PUBLIC SAFETY.

TCEQ HAS ISSUED GUIDANCE ON USE OF EHS AUDIT LAW

- See: A Guide to the Texas Environmental, Health, and Safety Audit Privilege Act TCEQ Publication RG-173, Revised November 2013
- Web Page Citation:
<https://www.tceq.texas.gov/publications/rg/rg-173.html>
- TCEQ GUIDANCE SHOULD BE USEFUL RELATIVE TO USE OF EHS LAW WITH OTHER STATE OF TEXAS AGENCIES

WHAT ARE THE SPECIFIC INCENTIVES OF THE EHS AUDIT LAW?

- **THE PRODUCT OF THE AUDIT, THE AUDIT REPORT IS LEGALLY PRIVILEGED AND, THEREFORE, NOT SUBJECT TO DISCLOSURE TO OUTSIDE PARTIES, WITH EXCEPTIONS; and**
- **IMMUNITY FROM ADMINISTRATIVE OR CIVIL PENALTIES FOR NON-COMPLIANCES PROPERLY DISCLOSED TO THE AGENCY, WITH EXCEPTIONS.**

CONTENTS OF AUDIT REPORT AND AUDIT TIMING CONSTRAINTS

- MAIN ELEMENTS
 - *SCOPE*
 - *FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS*
 - *EXHIBITS, APPENDICES, SUPPORTING DOCUMENTS*
 - *IMPLEMENTATION PLAN TO CORRECT PAST NON-COMPLIANCE, IMPROVE CURRENT COMPLIANCE, AND PREVENT FUTURE NON-COMPLIANCE*
- AUDIT MUST BE COMPLETED WITHIN 6 MONTHS OF THE DATE OF AUDIT INITIATION; EXTENSIONS CAN BE GRANTED
- SPECIAL TIMING RULES IN FACILITY ACQUISITION CONTEXT

HOW IS THE AUDIT REPORT PRIVILEGED?

- DISCLOSURE CANNOT BE REQUIRED IN A CIVIL, JUDICIAL, OR ADMINISTRATIVE ACTION
- CERTAIN PERSONS CAN SEE AUDIT REPORT WITHOUT WAIVER, INCLUDING:
 - *TCEQ UNDER A CLAIM OF PRIVILEGE OR PURSUANT TO A CONFIDENTIALITY AGREEMENT;*
 - *ATTORNEYS OF ENTITY DOING AUDIT;*
 - *CONSULTANTS HIRED FOR AUDIT;*
 - *EMPLOYEES OF ENTITY;*
 - *PERSONS CONSIDERING ACQUISITION OF FACILITY; AND*
 - *CERTAIN PERSONS COVERED BY A CONFIDENTIALITY AGREEMENT (e.g. facility transferees, lenders, and insurers).*
- BUT ACTUAL DISCLOSURE LETTER IS NOT PRIVILEGED

BUT PRIVILEGE MUST NOT BE WAIVED

- PRIVILEGE CAN BE LOST UNDER CERTAIN CIRCUMSTANCES, E.G. FRAUD OR LACK OF DILIGENCE
- PRIVILEGE ALSO CAN BE LOST IF REPORT GIVEN TO EPA!
- NO WAIVER RELATIVE TO CIVIL OR ADMINISTRATIVE PROCEEDINGS WHERE AN AUDIT REPORT IS OBTAINED, REVIEWED, OR USED IN A CRIMINAL PROCEEDING.

HOW DOES THE EHS AUDIT LAW PROVIDE FOR IMMUNITY FROM ADMINISTRATIVE OR CIVIL PENALTIES?

- IMMUNITY FROM ADMINISTRATIVE OR CIVIL PENALTIES RELATING TO SELF-DISCLOSED VIOLATIONS.
- DOES NOT AFFECT AGENCY'S AUTHORITY TO SEEK:
 - *INJUNCTIVE RELIEF;*
 - *MAKE TECHNICAL RECOMMENDATIONS; OR*
 - *OTHERWISE ENFORCE COMPLIANCE.*

HOW DOES THE EHS AUDIT LAW PROVIDE FOR IMMUNITY FROM ADMINISTRATIVE OR CIVIL PENALTIES? (continued)

- TO RECEIVE IMMUNITY THE DISCLOSURE MUST BE BOTH:
 - *VOLUNTARY; AND*
 - *PRECEDED BY A PROPER “NOTICE OF AUDIT,” WHERE APPLICABLE, THAT NOTIFIED AGENCY OF INTENT TO INITIATE AN ENVIRONMENTAL AUDIT.*
 - *SPECIAL PRE-REQUISITES FOR PRE-ACQUISITION AUDITS.*
- PERSON MUST DEMONSTRATE:
 - *INITIATION OF APPROPRIATE EFFORT TO ACHIEVE COMPLIANCE*
 - *PURSUE COMPLIANCE EFFORT WITH DUE DILIGENCE; AND*
 - *CORRECT OR CORRECTED NON-COMPLIANCE WITHIN A REASONABLE TIME.*

OTHER WAYS TO LOSE IMMUNITY UNDER THE EHS AUDIT LAW:

- if the violation was **intentionally or knowingly committed**;
- was recklessly committed;
- resulted in a “**substantial economic benefit** which gives the violator a clear advantage over its business competitors”;
- 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 reviewed to determine whether a pattern exists.

WHAT SUBMISSIONS ARE REQUIRED TO IMPLEMENT AN EHS AUDIT LAW AUDIT?

- NOTICE OF AUDIT
 - *(IF SEEKING IMMUNITY; NOT NEEDED FOR PRIVILEGE)*
 - *NEEDED IN ACQUISITION CONTEXT FOR IMMUNITY, IF AUDIT WILL CONTINUE BEYOND CLOSING DATE*
- DISCLOSURE OF VIOLATION
 - *IN WRITING BY CERTIFIED MAIL*
 - *CERTAIN NECESSARY ELEMENTS*
- REQUEST FOR EXTENSION (WHERE NECESSARY). BUT ASK BEFORE INITIAL AUDIT PERIOD EXPIRES
- *See Forms at “A Guide to the Texas Environmental, Health and Safety Audit Privilege Act” TCEQ Publication RG-173, Revised November 2013*

Web Page Citation: <https://www.tceq.texas.gov/publications/rg/rg-173.html>

NOTE ON RELATED (BUT DIFFERENT) SELF-DISCLOSURE AND PRIVILEGE VEHICLES

1. EPA AUDIT/SELF-DISCLOSURE POLICY

- EPA AUDIT POLICY: “INCENTIVES FOR SELF-POLICING: DISCOVERY, DISCLOSURE, CORRECTION AND PREVENTION OF VIOLATIONS.” 65 FED. REG. 19,618 (APRIL 11, 2001).
- 9 CONDITIONS TO QUALIFY FOR 100% MITIGATION OF GRAVITY-BASED PENALTY:
 - SYSTEMATIC DISCOVERY;
 - VOLUNTARY DISCOVERY;
 - PROMPT DISCLOSURE WITHIN 21 DAYS;
 - INDEPENDENT DISCLOSURE (BEFORE DISCOVERED BY OTHERS);
 - PROMPT CORRECTION;
 - RECURRENCE PREVENTION;
 - REPEAT VIOLATIONS INELIGIBLE;
 - NO ACTUAL HARM OR IMMINENT AND SUBSTANTIAL ENDANGERMENT; AND
 - COOPERATION WITH EPA.
- EPA “INTERIM APPROACH TO APPLYING THE AUDIT POLICY TO NEW OWNERS,” 73 FED. REG. 44,991 (AUGUST 1, 2008).
- EPA “Small Business Compliance Policy” 65 Fed. Reg. 19630 (April 11, 2000)

EPA's NEW eDISCLOSURE PORTAL

80 Fed. Reg. 76476 (December 9, 2015)

- **NEW eDISCLOSURE PROCESS INVOLVES THREE STEPS:**
 - ELECTRONIC REGISTRATION FOR FILING DISCLOSURES WITH THE CENTRALIZED WEB BASED PORTAL.
 - “PROMPT” ON-LINE SUBMISSION OF AN ELECTRONIC DISCLOSURE WITHIN 21 DAYS OF DISCOVERY OF A POTENTIAL VIOLATION.
 - ONLINE CERTIFICATION OF COMPLIANCE WITHIN 60 DAYS OF SUBMITTING AN AUDIT POLICY eDISCLOSURE OR WITHIN 90 DAYS OF SUBMITTING A SMALL BUSINESS POLICY DISCLOSURE (EXTENSIONS ARE AVAILABLE).

NOTE ON RELATED (BUT DIFFERENT) SELF-DISCLOSURE AND PRIVILEGE VEHICLES (cont.)

2. ATTORNEY-CLIENT PRIVILEGE/ATTORNEY WORK PRODUCT PROTECTION

- DERIVED FROM RULES OF EVIDENCE AS INTERPRETED BY COURTS;
- AUDIT CAN BE PRIVILEGED AND OTHERWISE PROTECTED FROM DISCLOSURE TO THIRD PARTIES AND IN LITIGATION;
- CONSULTANTS CAN BE INCLUDED WITH PROPER PROCEDURES;
- SIMILAR PROTECTIONS TO THOSE UNDER EHS AUDIT LAW, BUT THERE ARE DIFFERENCES THAT NEED TO BE CONSIDERED WITH HELP FROM COMPETENT LEGAL COUNSEL;
- BUT NO PENALTY IMMUNITY.

SOME PRACTICAL TIPS FOR EHS AUDITS

- **DON'T START ONE UNLESS YOU ARE PREPARED TO ADDRESS WHAT YOU FIND.**
- **THINK CAREFULLY ABOUT WHETHER “THE HORSE IS ALREADY OUT OF THE BARN” BEFORE INITIATING AUDIT.**
- **BE PREPARED TO TELL THE AGENCY WHEN THE VIOLATION COMMENCED.**
- **BE PREPARED TO FIND CONDITIONS THAT PRESENT HEALTH AND SAFETY CONCERNS TO WORKERS AND/OR THE SURROUNDING COMMUNITY.**
- **UNION CONTRACTS AND OTHER CONTRACTUAL OBLIGATIONS MAY REQUIRE DISCLOSURE OF VIOLATIONS OR OTHER CONDITIONS DISCOVERED IN AN EHS AUDIT.**
- **DEFINE THE AUDIT SCOPE CAREFULLY.**
- **REPORT PROMPTLY.**
- **IF A COMPANY HAS MULTIPLE PLANTS WITH SIMILAR OPERATIONS, VIOLATIONS AT ONE PLANT MAY WELL EXIST AT THE OTHERS.**
- **BE AWARE OF SPECIAL CONSIDERATIONS FOR CLEAN AIR ACT TITLE V PROGRAM.**

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December 2015

CLIENT ALERT: On December 9, 2015 EPA Publishes Notice of eDisclosure Portal Launch for the Electronic Self-Disclosure of Certain Environmental Regulatory Violations

BACKGROUND

On December 9, 2015 EPA announced in the *Federal Register* (80 FR 76479) the immediate implementation of the eDisclosure Portal (the “Portal”), which is a centralized web-based portal by which EPA shall receive and automatically process self-disclosed environmental violations. EPA explains that the Portal “streamlines and modernizes EPA’s approach to handling disclosures” under the existing “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations” (“Audit Policy”), and under its companion, the “Small Business Compliance Policy” (“Small Business Policy”). EPA published both of those policies on April 11, 2000 (65 *Federal Register* 19618 and 19630, respectively).

Please note that for preexisting and unresolved disclosures made under either the Audit or Small Business Policies prior to December 9, 2015, EPA states that such disclosing parties are to resubmit those disclosures within 120 days of December 9, 2015. However, EPA also states that pre-existing disclosures made prior to December 9, 2015 that are subject to audit agreements will be resolved outside the eDisclosure system through a Notice of Determination (“NOD”), a Consent Agreement and Final Order (“CAFO”), or a Consent Decree (“CD”).

In addition, although the eDisclosure Portal encompasses disclosures under the Audit Policy and the Small Business Policy, disclosures made pursuant to the New Owner Policy (73 *Federal Register* 44991, August 1, 2008) will not be resolved through the eDisclosure process, irrespective of whether they were made prior or subsequent to December 9, 2015. However, in the December 9, 2015 announcement, EPA states that it will continue to accept New Owner Policy disclosures, but will handle them “manually,” outside of the eDisclosure system. Thus, the means to accomplish New Owner Policy submittals remains: a new owner auditing party will enter into audit agreements with EPA, as is appropriate.

DETAILS

Process: The eDisclosure process involves three steps: 1) Electronic registration for filing disclosures with the centralized web-based portal; 2) the “prompt” on-line submission of an electronic disclosure within twenty-one days of the discovery of the occurrence of a “potential,” which is not necessarily a “confirmed,” violation; and 3), the on-line certification of compliance within 60 days of submitting an Audit Policy disclosure, or within 90 days of submitting a Small Business Policy disclosure. Please note that under certain circumstances EPA may exercise its discretion to extend those deadlines.

Disclosing Party Categories: The eDisclosure program establishes two categories of disclosures and procedures by which a party makes an eDisclosure: Category 1 and Category 2.

• Category 1 disclosures include Toxic Release Inventory (“TRI”) reporting and emergency planning violations under the Emergency Planning & Community Right-to-Know Act (“EPCRA”) that meet all Audit Policy conditions, and violations under those EPCRA provisions that meet all Small Business Compliance Policy conditions. Category 1 violations do *not* include: 1) violations of the requirements for the notification of releases of hazardous substances under Section 103 of the Environmental Response, Compensation and Liability Act (“CERCLA”); 2) violations of requirements for the notification of releases of extremely hazardous substances under Section 304 of EPCRA; or 3), EPCRA violations with significant economic benefit to the violator, as may be defined by EPA.

The reason EPA has circumscribed *at this time* Category 1 disclosures to include only TRI reporting and emergency planning violations is because it has extensive experience in resolving those types of violations, it is easy to determine compliance with those requirements, and the regulated community has persuaded EPA that such violations are appropriate for streamlined disposition under the Audit Policy.

The goal of a Category 1 disclosure party is for EPA to issue an electronic Notice of Determination (“eNOD”) confirming that the violations are resolved with no assessment of civil penalties, conditioned on the accuracy and completeness of the submitter’s certified eDisclosure. Thus, a Category 1 disclosure party, whether under the Audit Policy or the Small Business Policy, must disclose within 21 days of discovery of a violation. In the case of an Audit Policy disclosure, the party must correct within 60 days of discovery, while in the case of a Small Business Policy disclosure, the party must correct within 90 days of disclosure.

EPA interprets these deadlines to mean, in the case of an Audit Policy disclosure, that a party must submit a Category 1 Audit Policy Compliance Certification no later than 81 days after violation discovery, and in the case of a Small Business Policy disclosure the party must submit a Category 1 Small Business Compliance Policy Compliance Certification no later than 111 days after violation discovery.

Category 2 disclosures include: 1) all non-EPCRA violations; 2) EPCRA violations where the disclosing party can certify that it met Conditions 2 – 9 of the Audit Policy *except* Condition 1, whereby the discovery was not pursuant to an environmental audit or compliance management system; and 3), the CERCLA/EPCRA violations that are excluded from coverage under Category 1, which relate to violations of requirements to notify releases of reportable quantities of CERCLA hazardous substances or EPCRA extremely hazardous substances, and to instances of EPCRA violations with significant economic benefit to the violator.

For disclosures that qualify as Category 2, the eDisclosure system will automatically issue an electronic Acknowledgement Letter (“AL”) that confirms EPA’s receipt of the disclosure, and in which EPA “promises” to make a determination as to eligibility for penalty mitigation if and when it considers taking an enforcement action for environmental violations. For Category 2 disclosures, EPA does not issue eNODs.

Category 2 disclosers that seek penalty mitigation under the Audit Policy may, without providing an explanation, make an online request for up to 30 days in addition to the 60 days already afforded under the Audit Policy to correct their violations. In response to such a request, the eDisclosure system will automatically extend the Compliance Certification due date by the number of days requested for extension. Such disclosers may also make online requests for more than 30 additional days to correct their violations, provided the violation correction date does not extend beyond 180 days after the date of discovery. However, in the event the party requests an extension of more than 30 days, that party must include in the eDisclosure system a justification for such extension.

Although the eDisclosure system will automatically extend the Compliance Certification due date by an amount equal to the correction period extension request, the request is not considered granted or denied at the time of the request: EPA effectively reserves the right to scrutinize requests for extension beyond 30 additional days, and it ultimately may decide that correction was not prompt, if and when it considers taking an enforcement action for environmental violations.

Category 2 disclosers that seek penalty mitigation under the Small Business Policy may, without providing an explanation, make an online request for up to 90 additional days beyond the 90 days already allowed under the Small Business Policy to correct their violations. Such extensions are considered granted at the time of the request and the eDisclosure system automatically will extend the Compliance Certification due date by the number of days equal to the number of days requested for the extension.

Such Category 2 disclosers may also make an online request for more than 90 additional days to correct their violations, provided the violation correction date does not extend beyond 360 days after the date the party discovered the violations. To request an extension of more than 90 days, the discloser must include in the eDisclosure system a justification for such extension.

Requests for extensions of more than 180 days after discovery of the violation must be based on the time needed to correct the violations by putting into place pollution prevention measures. Although the eDisclosure system will automatically extend the Compliance Certification due date by an amount equal to the correction period extension request, the request is not considered granted or denied at the time of the request: EPA effectively reserves the right to scrutinize requests for extension beyond 90 additional days, and it ultimately may decide that correction was not prompt, if and when it considers taking an enforcement action for environmental violations.

CONCLUSION

The launch of the eDisclosure Portal signals that EPA continues to support its April 2000 policies and consequentially-formalized practice of rewarding parties who timely self-disclose. Over the past few years, some in the regulated community had concerns that EPA had lost interest in the voluntary self-disclosure process. In addition, earlier this year an EPA HQ source expressed, off-the-record, concern that EPA enforcement policy managers might determine to decentralize the eDisclosure program. Thus, were regional offices to take the lead on a program in which EPA “promises” to make determinations of eligibility for penalty mitigation, the possibility of inconsistent determinations among EPA’s ten regional offices was a concern. Therefore, the debut of the centralized eDisclosure Portal demonstrates that EPA remains committed to achieving reasoned, expedient, and predictable penalty reductions by simplifying the means to take advantage of the April 2000 Audit and Small Business policies and thereby, presumably, achieving consistent results.

CONTACT

Please do not hesitate to contact any of our attorneys for any additional information regarding the new eDisclosure Portal and its processes.

This is one in a series of occasional pieces discussing environmental issues of current interest to clients and friends of the firm. This material is not intended as legal advice. Readers should not act upon information discussed in this material without consulting an attorney.

Guida, Slavich & Flores, P.C. provides legal representation to businesses and individuals in the planning, strategy-setting and execution of their business objectives within the complex maze of environmental laws, including regulatory compliance counseling, structuring and negotiation of contaminated property transactions and litigation.

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