



AUDITS: OPTIONS, BENEFITS, AND RISKS!

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WHAT'S AN ENVIRONMENTAL COMPLIANCE AUDIT?

A systematic, documented, and objective review of an entity's operations, practices, and procedures in order to evaluate its compliance status.

BENEFITS OF AUDITS

Improve compliance.

Reduce risk of liability.

Pre-empt enforcement and reduce penalties or even eliminate.

Beneficial effect on your compliance history.

Save money in the long run.

BENEFITS OF AUDITS

Potential for privilege to prevent negative findings from discovery and admission into evidence.

Potential for immunity from penalties.

BUT: It is important to have lawyer involved in the decisions as to whether to audit and what type of audit.

PRIMARY OPTIONS

ISO

EPA Audit Policy

- Oil and Natural Gas New Owner Audit Program
- eDisclosure

Texas Environmental Health and Safety
Audit Privilege Act

Attorney-Client Privileged Audit

EPA AUDIT POLICY

Audit Policy confers benefits to regulated entities IF nine (9) conditions are satisfied.

Incentives

- If all nine (9) conditions are satisfied, EPA will not impose gravity-based penalties.
- If disclosure to agency is made but not as a result of an audit or EMS, EPA will waive only 75% of the gravity-based penalties.

EPA AUDIT POLICY

Incentive

- EPA's Policy does not provide relief from the “economic benefit” gained by entity.
- Possible determination by EPA not to refer you for criminal prosecution.

eDisclosure

Web-based portal to receive and process self-disclosed civil violations.

Must follow several steps to set up online.

Not clear when EPA will tell you “Congratulations, no penalty!”

- Still waiting after 18 months. . .

EPCRA failure to report is the most frequent disclosure.

EPA'S NEW OWNER AUDIT PROGRAM FOR OIL AND NATURAL GAS EXPLORATION AND PRODUCTION FACILITIES

New program – finalized late March 2019.

Provides incentives for new owners willing to address noncompliance that began before acquisition.

Well sites and associated storage tanks and pollution control equipment (vapor control).

Right now only available to upstream owners.

Must sign agreement with EPA and assess battery vapor control system design.

TEXAS ENVIRONMENTAL, HEALTH, AND SAFETY AUDIT PRIVILEGE ACT

“Environmental or health and safety 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...”

TEXAS ACT

Regulatory authority involved is usually TCEQ, TRRC, TDSHS, or Texas Water Development Board.

Primary incentives for identifying noncompliance and taking prompt corrective action are:

1. Limited privilege.
2. Immunity from civil or administrative penalties.

WHAT'S A "PRIVILEGE" AND WHY DO YOU NEED ONE?

Audit report and related materials cannot be discovered or admitted into evidence in civil or administrative proceedings in Texas.

- For example, employee notes, draft findings, and communications are protected.
- In its Policy, the EPA reserves the right to request your audit report.
- **BUT**: facts are not privileged. There is no privilege from criminal proceedings.

WHAT'S “IMMUNITY” AND HOW DO YOU GET IT?

Immunity: No civil or administrative penalties for violations disclosed and corrected.

Disclosure must be voluntary.

Agreed Order still possible.

Follow the Act scrupulously.

WHAT'S “IMMUNITY” AND HOW DO YOU GET IT?

Written notice to agencies in writing by certified mail beforehand if you want immunity from penalties: “Notice of Audit”.

But when? How about the day before?

- Must describe scope.
- Must give start date.

WHAT'S “IMMUNITY” AND HOW DO YOU GET IT?

Write it carefully.

- What is the scope? One unit? Entire facility?
Which law(s)?

Finish audit in six months or get an extension in writing, based on reasonable grounds.

- EPA has shorter deadlines.

WHAT'S “IMMUNITY” AND HOW DO YOU GET IT?

Statute is in the Texas Health & Safety Code, Title 13, Ch. 1101.

Audit must be “systematic”, but that’s not defined.

- Could audit just one unit or one process, not the entire plant or company.
- Perhaps “systematic” means according to a schedule; organized; documented.

You may create an audit report, but not mandatory. Label it, e.g., “Privileged Document/Audit Report.”

WHAT'S “IMMUNITY” AND HOW DO YOU GET IT?

Not immune from administrative and civil penalties UNLESS your disclosure of a violation is VOLUNTARY.

What Does Voluntary Mean?

You didn't know of the violation before the audit, and neither did the agency.

WHAT'S “IMMUNITY” AND HOW DO YOU GET IT?

No injury or imminent and substantial risk to people on site.

No off-site substantial actual harm or imminent and substantial harm to people, property, or the environment.

Disclosure not already required by any permit, consent order, enforcement order, or judicial order.

WHAT'S “IMMUNITY” AND HOW DO YOU GET IT?

Disclose violations “promptly” upon discovery in writing by certified mail.

Follow “Notice of Disclosure” in RG-173.

Not a benefit: Your N.O.D. is not privileged.

DISCLOSURE OF VIOLATION

RG-173 lists multiple elements that should be included in your Notice of Disclosure (letter). A few examples:

the time of initiation of the audit, and IF applicable, the time of completion of the audit;

citation of statutory, regulatory, or permit provision violated;

status and schedule of corrective action planned to address each violation;

the duration of the violation, which defines the period of time for which the immunity will be effective.

TO QUALIFY FOR IMMUNITY

You must:

- Initiate an appropriate effort to achieve compliance;
- Pursue that effort with due diligence;
- Correct the noncompliance within a “reasonable time”.



TEXAS ACT: WHAT IF YOU ACQUIRE A NONCOMPLIANT FACILITY?

Rules are different for these audits.

2013 Texas Act amended: Now your pre-purchase diligence constitutes an audit.

Notice to agency of audit is not required for immunity: you can discover violation during due diligence prior to acquisition, and address it after closing.

Can obtain immunity if you (the new owner) disclose violation to agency within 45 days after closing.

DON'T BLOW IT

You can waive (destroy) the privilege by disclosing the audit report or the information in it, beyond limited circumstances listed in statute.

If you waive the privilege, anyone can get your audit report.

DISADVANTAGES TO TEXAS EHS ACT

No protection from criminal enforcement actions.

No privilege or immunity if serious threat to HHE or where you obtained a substantial economic benefit over competitors.

Little time to develop internal strategy.

You must disclose violations as violations, not “compliance issues”.

- Can't whitewash.

DISADVANTAGES TO TEXAS EHS ACT

Your notices and disclosures of violations are subject to disclosure to third parties pursuant to the Public Information Act.

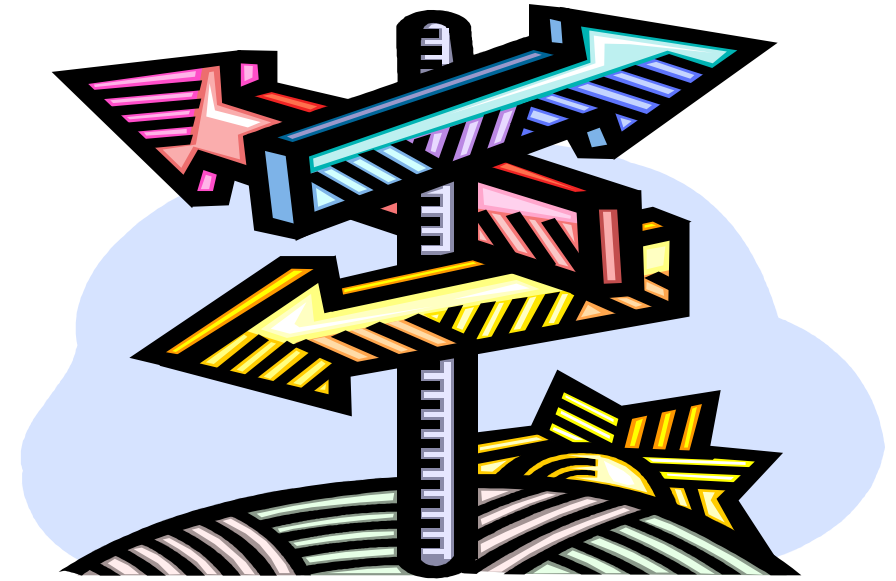
Violations count against your compliance history.

DISADVANTAGES TO TEXAS EHS ACT

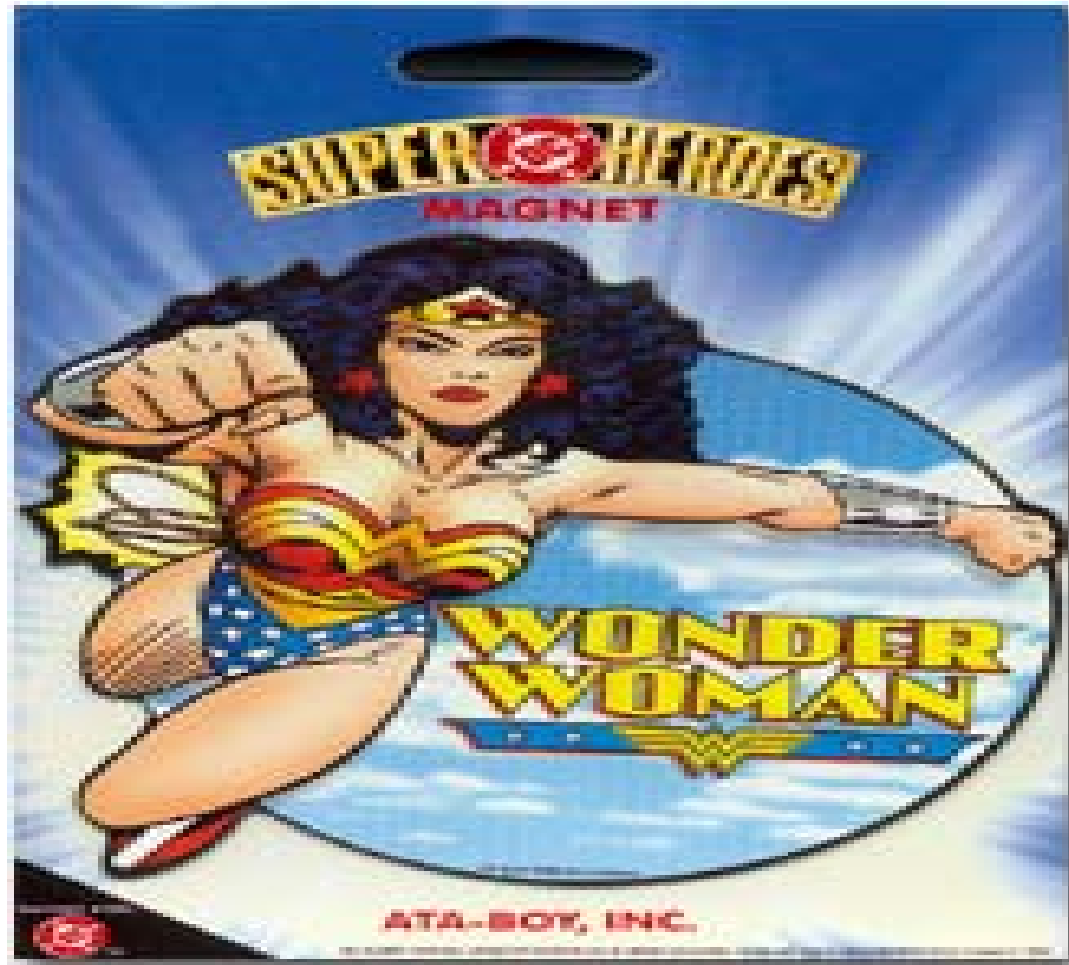
Limited ability to prioritize projects:

- Before committing to an audit under the Texas Act, your management must be ready to come into compliance → \$.
- You better fix it.
- Audit establishes “knowledge” → criminal.

EPA can override, or at least pester you.



IS THERE A BETTER WAY?



USE THE ATTORNEY-CLIENT PRIVILEGE !!!

REQUIREMENTS FOR THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege generally protects confidential attorney-client communications from discovery in legal proceedings or introduction into evidence.

Ask your environmental attorney, but the audit must be for the purpose of obtaining legal advice.

REQUIREMENTS FOR THE ATTORNEY-CLIENT PRIVILEGE

1. a communication;
2. made between privileged persons;
3. in confidence (without previous disclosure or other third persons present); and
4. for the purpose of seeking, obtaining, or providing legal advice.

BENEFITS OF ATTORNEY-CLIENT PRIVILEGE

- Don't have to disclose – just fix it.
- Can disclose after legal discussion with management.
- Strong evidentiary privilege, even in criminal proceedings.

RECOMMENDATION:

Conduct at least your first comprehensive audit pursuant to the attorney-client privilege.

FOOTNOTE

The content of this PowerPoint was current as of December 2, 2019, but there may have been subsequent developments.

Q & A?

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