



Texas Environmental, Health & Safety Audits

PERSPECTIVES AND EXPERIENCE

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Outline

Types of Audits

Drivers

How To

Legal Issues

Key Issues

Typical Timelines

What to Expect

- Common Findings
- Common Challenges

Lessons Learned

Types of “Audits”

Internal Team – with or without disclosure to agency

External Team – with or without disclosure to agency

Due Diligence – Prior to ownership

Media Focused – Air, Water, Waste, Health & Safety

EPA Programs only

State only

Common Drivers

- Management of Change
 - Recent Acquisition
 - Potential Divestiture
 - New Upper Management / Environmental Director
 - Change in Emission Factors / Environmental Consultant
- Violation Discovered: digging deeper at same or other sites
- Good Citizen / Corporate Policy
- Insurance Carrier/Customer Requirement
- Preparing for Permit Application/Governmental Inspection
- Potential Emissions or Other Testing
- Complaint: Employee or Neighbor; Whistleblower
- Concern Regarding Employee Performance, especially if Termination
- Lawsuit

How do I Start?

- Texas Environmental, Health, and Safety Audit Privilege Act (TX Audit Act) requires notification to the relevant agency **prior** to the start of an audit to obtain immunity from penalty benefit.
- EPA provides a 21 day window **following** discovery of a violation for self-reporting. May provide penalty relief for some or all of “gravity” penalty but not “economic benefit”.
- Many states have no notification or timeline requirements and audit privilege is available as long as the violation is disclosed to the agency prior to their independent discovery and is made according to typical “good faith” provisions.

Note on Confidentiality & Privilege

- Only the Texas Audit Act provides for confidentiality of the Audit Report and a privilege from disclosing the report.
- EPA's Audit Policy does not provide this protection; however, EPA states that it will not routinely ask. Does not protect the document from third parties, for example, in litigation.
- Audit Under the Direction of Counsel – Confidentiality of Attorney/Client Communications. Purpose of the “communication” (audit inquiry) is to seek legal advice.

Texas Law

Audit Act is a statute passed by the Texas Legislature*

- Initial Law – 1995
- Amendment – Address EPA concerns concerning criminal violations (1997)
- Amendment – Recognize pre-purchase due diligence as a “voluntary audit” (2013)
- <http://www.statutes.legis.state.tx.us/Docs/CV/htm/CV.71.1.htm>

Guidance Documents:

- **Texas Commission on Environmental Quality (TCEQ)**
- [Title V Deviation Reporting and Permit Compliance Certification \(RG-173\)](https://www.tceq.texas.gov/publications/rg/rg-173.html)
 - <https://www.tceq.texas.gov/publications/rg/rg-173.html>
- [Title V Deviation Reporting and Permit Compliance Certification](https://www.tceq.texas.gov/assets/public/compliance/field_ops/guidance/Title_V_Guidance_2012_November.pdf)
 - [https://www.tceq.texas.gov/assets/public/compliance/field_ops/guidance/Title V Guidance 2012 November.pdf](https://www.tceq.texas.gov/assets/public/compliance/field_ops/guidance/Title_V_Guidance_2012_November.pdf)
- **Railroad Commission of Texas (RCT)**
- [Guidance for Submissions](http://www.rrc.state.tx.us/media/34830/rrc-guide-for-submissions-audit-privelege-act-august-2016.pdf)
 - <http://www.rrc.state.tx.us/media/34830/rrc-guide-for-submissions-audit-privelege-act-august-2016.pdf>

In fiscal years 2015 and 2016, the TCEQ received 3,690 notices of audit and 2,724 disclosures of violation. The TCEQ ensures that all violations disclosed under this program are corrected.

*There are no agency “regulations”.

EPA Audit Policy Documents

- Website: <https://www.epa.gov/compliance/epas-audit-policy>
- Report within 21 days
- Register with EPA's electronic exchange "CDX"
- Use web portal to disclose (except new owners)
- Small Businesses (<100 employees) more lenient policy
- Correct and file notice of same within 60 days of discovery (not disclosure)

The Act Does Two Things

1. Confidentiality of the Report

An “Audit Report” is privileged from disclosure under Texas law. That is, it is confidential (in most cases) and the agency cannot review it (in most cases). *Notice of Audit is NOT required.*

2. Grants Immunity from Penalties

Normal Case: If you first file a notification with a Texas regulatory agency prior to commencing an Audit, then the Act provides immunity from penalties that are promptly disclosed in writing and are promptly corrected (in most cases). *Notice of Audit is required.*

Pre Purchase Due Diligence: If you conduct pre-purchase due diligence and decide to buy the assets or a company, then violations that you identified in your due diligence can be disclosed to TCEQ and you will have immunity from penalties if the violations are promptly corrected (in most cases). *Notice of Audit is NOT required.*

What Is Not Covered

- Violations of EPA requirements. *
- Criminal violations.
- Violations where there is actual or a risk of imminent and substantial injury to persons, property, or the environment.
- Repeat violations showing a pattern of disregard (3 year window).
- Intentional, knowing, or reckless disregard.
- Substantial economic benefit.

* EPA Audit policy may be available.

Key Issues

- The Audit must be voluntary.
 - Cannot use an Audit to cover violations that you are required to inquire and report on (DMRs or Title V Deviations)
- Only violations identified in the audit are eligible for penalty immunity.
 - A violation found outside an audit can't be pulled into an audit and be eligible for penalty immunity. These include violations identified before the audit commenced and violations that were identified outside of the audit process.
- Penalty immunity only attaches when a violation is disclosed and only if it is disclosed before the regulatory agency has not already commenced an investigation into the violation or not detected the violation independently.
- Texas Confidentiality Privilege always applies to an Audit Report, unless it is waived by releasing the information to a third party.

Key Issues Continued

- Whatever you disclose is public record.
- Whatever you disclose you must correct promptly.
- You do not have to disclose all violations.
 - “Fix and move on.”
- If you do not disclose an ongoing violation, **and** don’t correct, you may have a “knowing” violation which carries higher penalties, including the possibility of criminal enforcement.
- An Audit can only last for 6 months unless an extension is granted before the end of that period.
- Don’t forget – disclosures must be made in writing and by certified mail to be eligible for penalty immunity.

What to Expect

- You don't know what you don't know, be comfortable with uncertainty
 - Expect some surprises that will cost time and money
- Scope determines the investigations level of effort,
 - Records only audit or field audit?
 - Will the field team be the same as the records team?
 - How many facilities and how far back in time do you go?
- O&G sites are relatively simple when keeping a single site in compliance
- Compliance for dozens or hundreds of sites is much more difficult – expect some findings
- Going through an Audit requires commitment from senior management to address what is found
- Audits are about reducing existing and future risk

Timeline

- Notification of Audit Start via Certified Mail (recommended)
- Audit Investigation can last 6 months from start date (or longer with extension request)
- Disclosures via Certified Mail can occur anytime within the Audit investigation period and up to 6 months after
- Multiple rounds of disclosure are common and encouraged
- Each disclosure needs a compliance action to be completed promptly from the date disclosed – typically within 6 months
- TCEQ audits may run less than 6 months to greater than 18 months depending on number of facilities, disclosures and complexity of compliance actions required
- Audit closure occurs once each audit finding is brought into compliance and TCEQ Enforcement division signs an audit closure letter

Typical Findings/Corrective Actions

- Missing Air Authorization Documentation
 - Prepare PBR or SP documentation and submit to TCEQ as required
- Missing continuous documentation of compliance
 - Improve recordkeeping procedures – Implement EMS?
- Insufficient secondary tank containment
 - Repair or upgrade containment berms institute periodic inspections
- As found equipment does not match permit representations
 - Update permit documentation submit to TCEQ as needed
- Required stack testing was not performed
 - Schedule testing asap and implement testing management system
- Required stack testing results exceeded limits
 - Repair or tune system into compliance/replacement may be necessary

Observations

- Unanticipated changes in flows/compositions may require engineering changes or a new permitting mechanism
 - Higher sulfur concentrations at inlet cause a noncompliance issue with vent height requirements or change from unregistered to registered PBR
- “Easy” permit changes (i.e. like-for-like swaps) may not always be like-for-like and may trigger additional regulatory requirements
 - New, identical engine swap with a more recent manufacturing date that would trigger NSPS JJJJ requirements
- There are often Maintenance, Startup, or Shutdown activities that have not been included in the permit
- Ongoing compliance cost may increase after audit as gaps are identified and filled
- Overlapping jurisdictions complicates disclosures
 - RCT and EPA each have SPCC programs
 - Waste issues may be covered by either TCEQ or RCT

Lessons Learned

- Corporate EHS, operations & management must be on the same page about the purpose of and goals for the audit along with potential costs/risks.
 - If parties are not aligned, many problems can arise (unwillingness to disclose findings, failure to understand findings and implement changes, etc.)
- In order to avoid above, make sure that all parties are part of the “buy in” at the start of the audit project.
- Define the scope of the audit, how far back in time do you look and how deeply do you dive. Answer may differ depending on site complexity and applicable environmental programs.
- Coordination of disclosures is very important at Title V sites.

Definitions

Audit

Notice of Audit

Finding

Audit Report

Disclosure of Violation

Compliance Plan/Compliance Action

Closure

Questions

If we have a corporate audit team that does not use the Texas Audit Act, are the audit reports privileged?

Does privilege cover major sources with Title V reporting requirements?

If a state has EPA delegated authority for a federal program, do they need to disclose to EPA?

Company failed to prepare an SPCC plan under 40 CFR Part 112. Who to disclose to?

Well completion notice not filed with TCEQ. Is it eligible for immunity from penalty?

RRC signage was not present at well site. Should you report?

During due diligence for the purchase a well field, a significant leak from a slop oil tank entering a creek is found. Company goes through with transaction. Should they report? "