2017 HOUSE ENERGY AND NATURAL RESOURCES

HB 1336

2017 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau –A Room, State Capitol

HB 1336
2/2/2017
27804

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature	Kathleen Davis

Explanation or reason for introduction of bill/resolution:

Relating to environmental or health safety audits; and to provide a penalty

Minutes: Attachments #1-#2-2B

Chairman Porter: Called the committee to order on HB 1336.

Rep. Keiser: This bill is creating a new section of code dealing with what we normally call an internal audit. Whether environmental or health and safety, or a combination. In conducting audits they find deficiencies or problems within, and they would like to get those things corrected. There's a kind of a conflict that exists when you are a regulated industry. If you do an internal audit and find something serious, to what degree do you have to communicate that to the appropriate regulatory authorities and pretend it never happened and if they ever did an audit, you'd be fine. I believe transparency is an excellent outcome. This an attempt to put in play the process companies can do these audits, share information, when that information can be confidential or not, addresses required remedies and penalties for misbehavior. Companies will be more open to doing the internal kinds of analysis that you on the one hand can say you should be doing that, it's good for business, on the other hand there's some risk. If OSHA comes in, you either go to court, or you go in and try to negotiate the best deal you can but there's not a lot of opportunity for correcting, there's not really a fair opportunity to remedy a problem without a citation.

Zach Weis, manager of public and government relations with Marathon Oil, Houston, TX, Chairman of Regulatory Committee for the ND Petroleum Council: presented Attachment #1.

Chairman Porter: Questions? Testimony in support? Opposition?

David Glatt, co-director of ND Dept. of Health and Environment Health Section Chief, presented Attachment #2 and #2B, in opposition to HB 1336.

17:37

Lately I've been an advocate of please no more laws meant more towards EPA. They've dumped laws on us the last couple months. Self-audits I look at compliance plus. If done right

it can give us earlier compliance, information we previously didn't have and share with other industries, for example a valve that wasn't functioning properly. We would encourage that and have done some of that in some global agreements in the oil industry. If used incorrectly, it can be looked up as a shield to enforcement and holding back information from the public. We encourage self-audits but we want to be careful how we use that information. We don't know how this will impact enforcement. In TX when they went ahead with this law, they had to change some of the state laws pursuant to what EPA wanted, and gets into the premise agreement. We don't want to go crossways with EPA. We want to make sure a self-audit law provides us benefits but not the negative impacts from EPA. Multiple interpretations. I admit this has to do with the uncertainty. The law in TX has a guidance document that comes with it that's 20-30 pages. My personal opinion is, if I need 20-30 pages to explain to you what the law means, I don't know how clear that law is. As our staff read it, we got 2-3 different interpretations. That concerns me. You want to make sure it doesn't interfere or supersede existing law, such as spill reporting. Those are important to the state and knowing when those happen. As a light recommendation, I would encourage the state moving forward, looking at self-audits. I don't know if this is law is the right vehicle, or can be amended sufficiently, but I do think moving forward a direction from this committee, new rules, new policies, more concrete is appropriate. I applaud the concept. Our cooperation with industry has been excellent. The come to us and notify us of violations that have occurred and didn't know anything about. Does the environment improve from that, yes it does?

21:30

Chairman Porter: I know you've heard the term hog house. We can amend this to tell you the color white is now blue.

Rep. Keiser: You've pointed out areas that would be relatively easy amendments. I wish you would have brought them in and said if you do this it would work. In lots of industries that are regulatory, corporate information in a self-audit or a market conduct exam, is held absolutely confidential unless they're sited. It's the time they're sited that you have all the authority to make it public. If there was a way for self-audits through amendment be protected as they're asking for some degree of protection for minor things, but if you're going to have a major citation, then it should become public. Your job is to protect the public. The problem is you're not going to get companies to participate in self-audits. I wish you would have had the amendments to correct it.

Glatt: We can amend this. It doesn't matter what's in the law, it comes down to trust. It's the trust we have of industry, that they'll be up front with us on what they report, and visa versa. No matter what the law says, if the trust isn't there it isn't going to happen. We have industry coming to us and saying we have this problem; we didn't know it was there before. It's incumbent upon us to say what's more important, fixing the problem, improving the environment or the punitive end? I want them to come back the next time and say we got this other issue. I like the idea to keep to minor violations. The big ones that are creating problems it's a little tougher to get into.

Rep. Keiser: I do think industry in ND operates pretty morally and ethically and they are coming forward when they recognize a problem. An audit is different. That's a systematic

review and they may have problems they don't know until they have a self-audit, identify those in advance and may come to you.

Chairman Porter: The industry is working very hard on compliance. They don't want spills, they don't leak because it's a black eye, expensive to them. When they can be proactive and fix these things on an ongoing process. I appreciate when they talk to me and have nothing but kudos to the agency you lead, on how you do work and not looking at the punitive side. My problem is, you're not going to be there forever. We want to codify your good work so that the next person that's in charge isn't a punitive person. I understand where you're coming from but I hope you see these bills as the Dave Glatt legacy as the fixing component, not the punitive component, so as we move forward it stays with that kind of look.

Glatt: I appreciate that. This bill is the unknown for us. I appreciate the need to codify that. I'm willing to sit down and work on that.

Chairman Porter: Questions? Further testimony in opposition to HB 1336? Closed the hearing.

2017 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau –A Room, State Capitol

HB 1336
2/9/2017
28173
☒ Subcommittee
☐ Conference Committee

Committee Clerk Signature	Kathleen Davis

Explanation or reason for introduction of bill/resolution:

Relating to environmental or health safety audits; and to provide a penalty

Minutes: Attachment #1

Meeting location: Coteau Room

Date and Time: 2/2/2017 3:30 pm

Members present: Chairman Keiser, Rep. Marschall, Rep. Anderson

Others present: Kari Cutting, Zach Weis, Dave Glatt, Maggie Olson, Lynn Helms, Dean Moos, Illona Jeffcoat Sacco

Topics of discussion:

- Dave Glatt presented a proposed amendment, Attachment #1
- Sub D #1 agree with 5:00
- We don't want it to be a blank check
- Expand this to DMR
- Might hire or send our own employees
- Would like the opportunity to share information?
- **11:40** In 2 we define as an environmental audit, do we need clarification
- Companies are doing it now, saying we have this problem and 9 out of 10 times we say ok
- Policy A if environmental audit is a voluntary audit, do we need A
- Can't go with the TX bill
- Where can we blend, find language if I provide you a scope of audit, specifically that protection is granted
- Can we give them partial protection from civil liabilities, we'll give you a window to operate on your audit- this may be a step in the wrong direction?
- trying to create a new subcategory for a self audit. What benefit is there to it or is there no benefit
- B is a judgement call- reference- imminent (significant) or substantial harm

- Sec 7 of current bill, your privilege nature doesn't come with documents, communication, data, reports
- 4 says you must report within 24 hours, some other things you're given discretion
- You get it unless one of these happens. Unless is broader and provides for the unpredictable
- A will stay in, redundant with current law
- B the violation cause, imminent substantial damage, shorter version
- C time table – 60 days ok, but not the 180? The resources of the health dept can't act in 60 days, the responding and seeing if it was corrected. We don't want things to go on and on.
- **31:15** The regulated entity negotiate it, reasonable, and not to exceed 180 days. There are sometimes things are frozen up for 7 months out of the year in the oil and gas industry
- Can we take it to 360 days, but get it in written and agree to it? 60 is an automatic. If you can't fix it in 2 mths you need to come to us.
- 1 fix in 60 days
- 2 health dept comes in and says we need to reach an agreement? Can you then impose and order if they say they're not going to do it? Leave this all the same but not to exceed 360. If you can't do it in 60, when can you get it done. There's a difference it you find in the fall versus spring.
- D – no problem
    - willfully almost gets into criminal
    - the language in the bill is stronger than what's in here.
    - Reckless combine some, move them around
    - like the with knowledge in there.
- E – do we need to reference 12.01.02 define, sets a 2 yr time period for repeat violator, statute of limitations same or similar violation – after notification , multiple times, pattern,
- G ok federal law
- **42:00** that language is really good
- 2 is ok Zach will add more language
- 3 is ok, identify a scope and plan, notification should include, well done in the original bill, well defined what a notice was #8 page 10
- 4 is ok
- 5 if someone is misusing the self audit process. Willfully -If you lie during the audit to avoid
- Take B out
- Overall intent is to not 54:50 give an out to the bad companies

2017 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau –A Room, State Capitol

HB 1336
2/10/2017
28238
☒ Subcommittee
☐ Conference Committee

Committee Clerk Signature	Kathleen Davies

Explanation or reason for introduction of bill/resolution:

Relating to environmental or health safety audits; and to provide a penalty

Minutes: Attachments #1-#5

Meeting location: Coteau Room

Date and Time: 2/10/2017 11:00 AM

Members present: Chairman Keiser, Rep. Marschall, Rep. Anderson

Others present: Kari Cutting, Zach Weis, Dave Glatt, Maggie Olson, Lynn Helms, Illona Jeffcoat Saccio, Dean Moos

Topics of discussion:

- Switch B to A
- Switch A to B. B is all other violations
- Report within 45 days
- Correct within 60 days of discovery or agree upon time not to exceed 365 days
- Ability to file multiple audits (separate audits)
- May have extension over that 180 day period
- Start day - once initiated – once the department has been notified – start date in their scope of when they're projected to start
- Privilege and confidentiality unless I waive that privilege – protecting my audit from being used against them, privileged so they're not under the normal discovery rules
- If it's a health safety issue, we will be taking action
- Only the exception are listed, why not ALL? should read relating to the violations listed in Subdivision 1 everything in subdivision 1 should be privileged, not just 2 A-G?
- Confidential and privilege is different.
- Page 1 Sub 3, strike with knowledge (statute defining terms) willfully includes with knowledge and recklessness
- Willfully is tough to prove in the courts.

2017 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau –A Room, State Capitol

HB 1336
2/13/2017
28250
☒ Subcommittee
☐ Conference Committee

Committee Clerk Signature	Kathleen Davis

Explanation or reason for introduction of bill/resolution:

Relating to environmental or health safety audits; and to provide a penalty

Minutes: Attachments #1-#2

Meeting location: PSC Hearing Room

Date and Time: 2/13/2017 9:00 AM – 9:34 AM

Members present: Chairman Keiser, Rep. Marschall, Rep. Anderson

Others present: Kari Cutting, Zach Weis, Dave Glatt, Maggie Olson, Lynn Helms, Illona Jeffcoat Saccio, Dean Moos

Topics of discussion:
Maggie Olson presented **Attachment #1**

- 30 days to 45 days
- From date of audit to when found
- Sub 3 to clarify language – extension
- 6 – place holder for Zac
- Helms prefers 45 days so they're not a conflict;
- Glatt, if not notified and the Dept finds, then there's a violation if found during an inspection
- Weis, restricting to a day count on the front end might be tight to work with. WY is 60 days after completion of report (not acceptable).
- Olson, different type of audits. 6 months plus 45 days might be a problem
- Cutting, clause up to director's discretion, report initial violation and discuss a plan?
- Rep. Keiser, do you want each individual report
- Glatt, we want them to report. Without notification we don't have that discretion
- Helms, 2B says if they haven't reported and the regulatory agency finds it before it's reported, they don't get the protection
- Weis, verbal notification, then a follow up, if this gets written into law, we have a lot of learning to do.
- Rep. Anderson what takes precedence? Written or verbal?

- Glatt, verbal goes a long way. Precedent is written
- **We're comfortable with language as is written.**

Zac's proposed amendment put in as #6, **Attachment #2**

- The full report is privileged, can't be introduced into proceedings. The summary or disclosure would not be privileged. We need to say the final full report for privileged. Do we need to say the disclosures and notifications provided are not? It's assumed you have the privilege unless it's the final full report.
- **21:18** Weis, amendment is talking if A-G, willful, fraudulent
- Cutting, attempting to say privileged, but if we're asserting privilege is not appropriate, then you don't have that privilege. Accept or apply? Reckless, willful, this is a critical piece to doing a self-audit.
- Rep. Keiser we have to declare privilege. We have to state it.
- **24:30** Wies, the privilege does not apply for information relating to the types of violations listed in Subsection A-G of Subsection 2? If it's a violation that resulted in gross negligence, I'd go to regulators and see if they're coming after background information regarding that gross negligent find, they'd want to. Hard for me to argue to keep that but I don't think I can.
- **26:00** Rep. Keiser, does this sound okay, "An environmental audit report is privileged and shall not be admissible as evidence in civil actions or proceedings. The privilege does not apply to information related to violations" and Maggie can improve that. That's what we want right? That's what we're asking for, the openness and working with the violations and public.
- Cutting, is that too broad? Does that allow the agency to go in and find all the information, or is there a more succinct way?
- When trying to condense, it's hard to make it all work.
- Page 4 the original bill has the privilege section on it. Problems there?
- **32:20** Weis, 05 is the waiver, 06 the disclosures, 07 is non privileged
- Helms, this encourages the company to put everything in the report, and the report is what's privileged so now they're going to put everything in there, unless it triggers some of this willful, reckless business. **If they're smart, they put it in the report, and it's privileged which is what I think we're trying to get to.** Everything that happened under the audit in it and now you're providing that if you put it in the report unless it triggers 2A-G
- Specific: Except A-G. if you don't specify, it leaves you open.
- We're trying to incentivize the self-audit.

Meeting to reconvene in the Coteau Room at 12 Noon today, February 13, 2017. Meeting adjourned at 9:34 am.

2017 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau –A Room, State Capitol

HB 1336
2/13/2017
28279
☒ Subcommittee
☐ Conference Committee

Committee Clerk Signature	Kathleen Davis

Explanation or reason for introduction of bill/resolution:

Relating to environmental or health safety audits; and to provide a penalty

Minutes: Attachments #1-#1A

Meeting location: Coteau Room

Date and Time: 2/13/2017 12 Noon – 12:06 pm

Members present: Chairman Keiser, Rep. Marschall, Rep. Anderson

Others present: Kari Cutting, Zach Weis, Dave Glatt, Maggie Olson, Lynn Helms, Dean Moos

Topics of discussion:
This is a hoghouse amendment

- Maggie: **Amendment #**1 marked up version going off this morning's meeting. The second version **Amendment #1a** is a clean version.
- Added 1B a definition of environmental audit report.
- Zak: Language pulled together from couple different sources. Purpose to define the audit (later in Section 6,) added I, 2I and 3I. Helps the agencies tell the person making the audit that you should have (1) scope, (2) findings, conclusions and recommendations, and (3) info that brought you to those. So we have guidelines what will be accomplished at the end of the day. Even though in #6 the info will be kept privileged to the company, we still have some parameters.
- Other change in 2 was 45 days. If we did find a violation, a notice/notification, we have this violation, we're still looking in to it, we'll provide you with the official notice under the report at the end of the audit. May want to have a form in writing you may want to create a form and have them sign it. At this point they can send a statement informing a violation.

- Subsection 6 – the report itself is privileged (and not admissible) unless the regulated entity waives that. The entity has the burden to prove the privilege. The privilege does not apply to:
  a. The information relating to the types of violations, Subsection 2 A-G
  b. Information relating to a violation that's subject to a finding under 5, the findings where the agency finds the entities acted fraudulently, the bad actor type stuff.
  c. Exposures, notifications and other information provided by the entity to the agency under this action.

  The idea is the entity doesn't provide the environmental report itself, they're providing the disclosures, notifications, summaries, documents.

Chairman Keiser: **This does what we were talking about.**

Motion: Rep. Anderson moved to accept the amendments. Marschall, second. Voice vote, motion approved.

2017 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau –A Room, State Capitol

HB 1336
2/17/2017
28506

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature	Kathleen Davis

Explanation or reason for introduction of bill/resolution:

Relating to the definition of sovereign lands

Minutes: Attachment #1

Chairman Porter: Called the committee to order on HB 1336. Clerk took the roll.

Rep. Keiser: Presented Attachment 1. This is a hoghouse amendment. You can throw away the other part. I'd like to recognize Kari Cutting, Maggie Olson, Dave Glatt, Lynn Helms, Zak Weis. This was a real collaborative effort between industry and the regulatory agency to address their concerns and develop a satisfactory model. This is a new section of code. We have a new definition for environmental audit. The key element is voluntary internal and comprehensive evaluation of the facility or activity which a company is engaged in. Then we defined environment audit report very specifically. That means a set of documents, environmental audit report privileged document. What they're seeking with this legislation is some degree of privilege relative to the information generated within the audit. If you think of the audit, they're going to do one or more. They could have 3 different audits going on they contract for or perform internally within their organization and every one of them would like, anything that should be disclosed was addressed in the bill. Has to be disclosed, and then the process of what happens after disclosure. But what they were really concerned about, this would be a very proprietary document. It would have all sorts of interviews, reports, graphs, everything else for their company, and they wanted that information to be privileged and you'll where that comes up. We had to define regulatory agency. It's important for the committee to understand this is not just an oil and gas issue. This is a garbage dump issue, anything that's regulated. This kind of internal audit would be available to the organizations that have those and that's why we had to identify that as a general term. #2, a regulatory agency may not pursue civil penalties for a violation found during an environmental audit which the regulated entity discloses to the agency, in writing within 45 days after the violation is found. The 45 days had as much debate almost as any issue in here. I will show you why that is really is critical. They find something, they have to report it within 45 days. The report is still required. There's no change except for the days. And now the "unless". These are the exclusions that apply. The violation caused imminent or substantial harm to human health or the environment. If that happens it's an immediate report, you have no 45 days.

On Page 2, Subsection B, the violation is found by the regulatory agency before the regulated entity discloses the violation in writing to the regulatory agency. This is where the 45-day debate came in. Initially we wanted 90, then 60, then 30, then 45. This is a situation where if you identify as a company, and report it within 45 days, unless it meets one of these exemptions, they're ok. They have to fix it, but they're ok. They can report it and not be charged with anything else. The 45 days is critical. Let's say they identify something. They start the audit. On day 10 they identify something, and it could be day 11, or day 30. If it's not been reported, and the regulatory agency comes in and finds it, then it's reportable public record, there's no privilege. You don't want that period to be too long and yet it has to be long enough to give them some degree of flexibility.

Item C the regulated entity does not correct the violation within 60 days. These are all the exceptions to the privilege. The regulated entity established a pattern of repeated violations, then they lose privilege on D.

E if the regulated entity willfully violate, and we defined willfully on Page 1 as referencing it to the definition in another section of code.

F the violation is a result of gross negligence as defined under Section 101.17

G deals with the federal government. If the Federal government and the state law are inconsistent, it gives direction there.

#3 to qualify for a penalty exemption, under the previous section, the regulated entity shall notify the regulatory agency in writing before beginning the environmental audit, and goes on to detail what must be provided in that information.

4 reporting the violation is mandatory if it's required under those other chapters.

5 notwithstanding Subsection 2, the regulatory agency MAY pursue civil penalties against a regulated entity for a violation disclosed under this section if the regulatory agency finds the regulated entity (a) intentionally misrepresenting materials facts, (b) initiated self-audit to avoid liability for a violation. We think we've covered that kind of loop hole.

6. Starting on the bottom of Page 2. This is the heart of the polity. Unless the privilege is expressly waived by the regulated entity that prepared the report and an environmental audit report is privileged and not admissible evidence in a civil action or proceeding. The regulated entity asserting this privilege has the burden of proving the privilege. The privilege does not apply to, and goes on to list information relating to violations in Subsection 2, information relating to violation subject to a regulatory agency under Subsection 5, and C, disclosure notifications and other information provided by the regulated entity to the regulatory agency under this section.

7. Failure to label a document does not automatically give you privilege. You have to label it. It's in the requirements.

What we're trying to do is create an environment where the companies can initiate an internal audit and if they find something that is not that significant, they can report it and remedy it

within 60 days (8:18) work, and I have to tell you the Dept. of Health does a great job in working with the companies to try and fix the problems. If it's one of those major ones, that we have as an exception, that goes through the normal process of reporting public record, everything else. The big report that is generated has privilege; all the interviews with people and everything else from civil liability. That is the bill now. Questions?

Rep. Lefor: On Page 2 #6, where it's going on to Page 3, where it says that's it's not admissible evidence in a civil action or proceeding. What's the thought process behind that?

Rep. Keiser: To do an audit, the report could be 10 pages, generally speaking you going to have hundreds and hundreds of pages of interviews, measurements, documentations, everything else. If somebody comes along and does that, correct any problems with the regulatory agency, we're in good shape. But they don't want that report to be available if someone wants to sue them. They want to protect that report otherwise they won't do self-audits. The bottom line you have to look at the risk of doing a self-audit, the exposure you create, and the protection you might have.

Rep. Roers Jones: This is a great idea and a great program. We've been doing something through our construction company like this with OSHA for a number of years where they come out and do an inspection, we request it, and there's an opportunity to fix the things without being fined. It's a much more proactive approach to safety issues and also has a positive impact on insurance premiums. I'm happy to see the work that you did.

Rep. Anderson: we went through the process and had a lot of help from other people and everybody was satisfied with the results of the amendments.

Rep. Keiser: I move the amendment 01002 on HB 1336.

Rep. Anderson: second

Chairman Porter: I have a motion from Rep. Keiser, second from Rep. Anderson to adopt the amendment 01002 on HB 1336. Discussion?

Rep. Devlin: I was just curious, at the end of the game is there anything NOT public information that would have been public before? Is there anything that the public would not be aware of under these rules that previously would have been a public disclosure?

Rep. Keiser: It is my understanding that there would not be any difference between the two.

Chairman Porter: Further discussion? Seeing none, all those in favor say Aye, opposed. Voice vote, motion carries.

Rep. Keiser: Move a Do Pass as Amended

Rep. Anderson: second

Chairman Porter: I have a motion from Rep. Keiser, second from Rep. Anderson for a Do Pass as Amended to HB 1336. Discussion? None, the clerk will call the roll on a Do Pass as Amended.
Yes 11 No 0 Absent 3 Motion carried. Rep. Keiser is carrier.

Proposed Amendment

1. For purposes of this section:

   a. "Environmental audit" means a voluntary, internal, and comprehens. evaluation of facilities or activities that is designed to prevent noncompliance with environmental laws, rules, or permits enforced by a regulatory agency under chapters 23-25, 23-20.3, 23-29, 38-08, or 61-28. An environmental audit may be conducted by an owner, operator, prospective owner or operator. An employee or independent contractor may conduct the environmental audit on behalf of the owner, operator, or prospective owner or operator.

   b. "Environmental audit report" means a set of documents labeled "Environmental Audit Report: Privileged Document" prepared as a result of an environmental audit and shall include:

      i. A description of the scope of the audit;

      ii. The information gained in the audit and findings, conclusions, and recommendations; and

      iii. Exhibits and appendices.

      Exhibits and appendices to the environmental audit report may include interviews with current or former employees, field notes and records of observations, findings, opinions, suggestions, conclusions, guidance, notes, drafts, memoranda, legal analyses, drawings, photographs, laboratory analyses and other analytical data, computer-generated or electronically recorded information, maps, charts, graphs, and surveys and other communications associated with an environmental audit. 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.

   c. "Regulatory agency" means the agency with regulatory authority over the facilities or activities that are the subject of the environmental audit.

2. The regulatory agency may not pursue civil penalties for violations found during an environmental audit that are disclosed to the regulatory agency in writing within 45 days after the violation is found, unless:

   a. The violation caused imminent or substantial harm to human health or the environment;

   b. The violation is found by the regulatory agency before a regulated entity discloses the violation in writing to the regulatory agency;

c. The regulated entity does not correct the violation within 60 days of discovery or, if correction within 60 days is not possible, within a reasonable period as agreed to in writing by the regulatory agency but not to exceed 365 days;

d. The regulated entity has established a pattern of repeated violations of environmental law, rule, permit, or order by committing the same or similar violation that resulted in the imposition of a penalty by a regulatory agency more than once within two years prior to the date of the disclosure;

e. The regulated entity willfully, as defined by section 12.1-02-02, violated a state or federal environmental law, rule, or permit;

f. The violation is a result of gross negligence, as defined by section 1-01-17; or

g. The regulatory agency has assumed primacy over a federally-delegated environmental program and a waiver of penalty authority for the violations would result in a state program less stringent than the federal program or the waiver would violate any federal rule required to maintain primacy. If a federally-delegated program requires the imposition of a penalty for a violation, the voluntary disclosure of the violation shall, to the extent allowed under federal law or rule, be considered a mitigating factor in determining the penalty amount.

3. To qualify for subsection 2's penalty exemption, the regulated entity must notify the regulatory agency in writing before beginning the environmental audit. The notice must specify the facility or portion of the facility to be audited, the audit's anticipated start date, and the general scope of the audit. The environmental audit must be completed within 180 days of the start date, unless the regulatory agency agrees in writing to an extension. Nothing in this section shall be construed to authorize uninterrupted or continuous environmental audits.

4. Reporting a violation is mandatory and is therefore not voluntary under this section if the reporting is required by chapter 23-25, 23-20.3, 23-29, 38-08, or 61-28, any rule or permit implementing those chapters, any federal law or rule, or any administrative or court order.

5. Notwithstanding subsection 2, the regulatory agency may pursue civil penalties against a regulated entity for violations disclosed under this section if the regulatory agency finds the regulated entity:

   a. Intentionally misrepresented material facts concerning the violations disclosed or the nature of extent of any damage to human health or the environment; or

   b. Initiated a self-audit to avoid liability for violations after the regulated entity's knowledge or imminent discovery.

6. An environmental audit report is privileged and not admissible evidence in civil actions or proceedings, unless the privilege is expressly waived by the regulated entity that prepared the report. The regulated entity asserting the privilege has the burden of proving the privilege. The privilege does not apply to:

    a. Information relating to the types of violations listed in subdivisions a through g of subsection 2.

    b. Information relating to a violation that is subject to a regulatory agency's finding under subsection 5.

    c. Disclosures, notifications, and other information provided by the regulated entity to the regulatory agency under this section.

2/17/17 DF
1 of 3

17.0787.01002
Title.02000

Prepared by the Legislative Council staff for
Representative Keiser
February 17, 2017

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1336

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for limitations of penalties for environmental audits.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1.

Environmental audits - Violations.

1. As used in this section:

   a. "Environmental audit" means a voluntary, internal, and comprehensive evaluation of a facility or activity which is intended to prevent noncompliance with environmental laws, rules, or permits enforced by a regulatory agency under chapter 23-25, 23-20.3, 23-29, 38-08, or 61-28. An environmental audit may be conducted by an owner, operator, or prospective owner or operator. An employee or independent contractor may conduct an environmental audit on behalf of the owner, operator, or prospective owner or operator.

   b. "Environmental audit report" means a set of documents labeled "Environmental Audit Report: Privileged Document" prepared as a result of an environmental audit which must include a description of the scope of the audit; the information gained in the audit and findings, conclusions, and recommendations; and exhibits and appendices. The exhibits and appendices to the environmental audit report may include interviews with current or former employees, field notes and records of observations, findings, opinions, suggestions, conclusions, guidance, notes, drafts, memoranda, legal analyses, drawings, photographs, laboratory analyses and other analytical data, computer-generated or electronically recorded information, maps, charts, graphs, and surveys and other communications associated with an environmental audit.

   c. "Regulatory agency" means the agency with regulatory authority over the facility or activity.

   d. "Willfully" has the same meaning as provided under section 12.1-02-02.

2. A regulatory agency may not pursue civil penalties for a violation found during an environmental audit which the regulated entity discloses to the regulatory agency in writing within forty-five days after the violation is found, unless:

   a. The violation caused imminent or substantial harm to human health or the environment;

b. The violation is found by the regulatory agency before the regulated entity discloses the violation in writing to the regulatory agency;

c. The regulated entity does not correct the violation within sixty days of discovery or, if correction within sixty days is not possible, within a reasonable period as agreed upon in writing by the regulatory agency, but not to exceed three hundred sixty-five days;

d. The regulated entity established a pattern of repeated violations of environmental law, rule, permit, or order by committing the same or similar violation that resulted in the imposition of a penalty by a regulatory agency more than once within two years before the date of the disclosure;

e. The regulated entity willfully violated a state or federal environmental law, rule, or permit;

f. The violation is a result of gross negligence, as defined under section 1-01-17; or

g. The regulatory agency assumed primacy over a federally delegated environmental program and a waiver of penalty authority for the violation would result in a state program less stringent than the federal program or the waiver would violate any federal rule required to maintain primacy. If a federally delegated program requires the imposition of a penalty for a violation, to the extent allowed under federal law or rule, the voluntary disclosure must be considered a mitigating factor in determining the penalty amount.

3. To qualify for a penalty exemption under subsection 2, the regulated entity shall notify the regulatory agency in writing before beginning the environmental audit. The notice must specify the facility or portion of the facility to be audited, the audit's anticipated start date, and the general scope of the audit. Unless the regulatory agency agrees in writing to an extension, the environmental audit must be completed within one hundred eighty days of the start date. This section may not be construed to authorize uninterrupted or continuous environmental audits.

4. Reporting a violation is mandatory if the reporting is required under chapter 23-25, 23-20.3, 23-29, 38-08, or 61-28, any rule or permit implementing those chapters, any federal law or rule, or any administrative or court order.

5. Notwithstanding subsection 2, the regulatory agency may pursue civil penalties against a regulated entity for a violation disclosed under this section if the regulatory agency finds the regulated entity:

   a. Intentionally misrepresented material facts concerning the violation disclosed or the nature of extent of any damage to human health or the environment; or

   b. Initiated a self-audit to avoid liability for a violation after the regulated entity's knowledge or imminent discovery.

6. Unless the privilege is expressly waived by the regulated entity that prepared the report, an environmental audit report is privileged and not

2/17/17 DA
3 of 3

admissible evidence in a civil action or proceeding. The regulated entity asserting this privilege has the burden of proving the privilege. The privilege does not apply to:

a. Information relating to the types of violations listed in subsection 2.

b. Information relating to a violation subject to a regulatory agency's finding under subsection 5.

c. Disclosures, notifications, and other information provided by the regulated entity to the regulatory agency under this section.

7. Failure to label a document in an exhibit or appendix to an environmental audit report does not constitute a waiver of the audit privilege under this section or create a presumption the privilege does not apply."

Renumber accordingly

Date: 2-13-17

Roll Call Vote #: 1

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1336

House Energy & Natural Resources Committee

☒ Subcommittee

Amendment LC# or Description:

Recommendation
☒ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions ☐ Reconsider ☐

Motion Made By Rep Anderson Seconded By Rep Marschall

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter			Rep. Lefor		
Vice Chairman Damschen			Rep. Marschall		
Rep. Anderson			Rep. Roers Jones		
Rep. Bosch			Rep. Ruby		
Rep. Devlin			Rep. Seibel		
Rep. Heinert					
Rep. Keiser			Rep. Mitskog		
			Rep. Mock		

Total (Yes) No

Absent

Floor Assignment

voice vote Motion carried

If the vote is on an amendment, briefly indicate intent:

Date: 2-17-17

Roll Call Vote #: 1

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1336

House Energy & Natural Resources **Committee**

☐ **Subcommittee**

Amendment LC# or Description: 17 0787 01002 02000

Recommendation

☒ Adopt Amendment 01002

☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation

☐ As Amended ☐ Rerefer to Appropriations

☐ Place on Consent Calendar

Other Actions ☐ Reconsider ☐ _____

Motion Made By Rep. Keiser **Seconded By** Rep. Anderson

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter			Rep. Lefor		
Vice Chairman Damschen			Rep. Marschall		
Rep. Anderson			Rep. Roers Jones		
Rep. Bosch			Rep. Ruby		
Rep. Devlin			Rep. Seibel		
Rep. Heinert					
Rep. Keiser			Rep. Mitskog		
			Rep. Mock		

Voice vote carries

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

01002

Date: 2-17-17

Roll Call Vote #: 2

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1336

House Energy & Natural Resources **Committee**

☐ **Subcommittee**

Amendment LC# or Description: 17 0787 01002 02000

Recommendation

☐ Adopt Amendment
☑ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☒ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions ☐ Reconsider ☐ _____

Motion Made By Rep. Keiser **Seconded By** Rep. Anderson

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep. Lefor	✓	
Vice Chairman Damschen	✓		Rep. Marschall	✓	
Rep. Anderson	✓		Rep. Roers Jones	✓	
Rep. Bosch	✓		Rep. Ruby	AB	
Rep. Devlin	✓		Rep. Seibel	AB	
Rep. Heinert	✓				
Rep. Keiser	✓		Rep. Mitskog	✓	
			Rep. Mock	AB	

Total (Yes) 11 No 0

Absent 3

Floor Assignment Rep. Keiser

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1336: Energy and Natural Resources Committee (Rep. Porter, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING). HB 1336 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for limitations of penalties for environmental audits.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1.

Environmental audits - Violations.

1. As used in this section:

   a. "Environmental audit" means a voluntary, internal, and comprehensive evaluation of a facility or activity which is intended to prevent noncompliance with environmental laws, rules, or permits enforced by a regulatory agency under chapter 23-25, 23-20.3, 23-29, 38-08, or 61-28. An environmental audit may be conducted by an owner, operator, or prospective owner or operator. An employee or independent contractor may conduct an environmental audit on behalf of the owner, operator, or prospective owner or operator.

   b. "Environmental audit report" means a set of documents labeled "Environmental Audit Report: Privileged Document" prepared as a result of an environmental audit which must include a description of the scope of the audit; the information gained in the audit and findings, conclusions, and recommendations; and exhibits and appendices. The exhibits and appendices to the environmental audit report may include interviews with current or former employees, field notes and records of observations, findings, opinions, suggestions, conclusions, guidance, notes, drafts, memoranda, legal analyses, drawings, photographs, laboratory analyses and other analytical data, computer-generated or electronically recorded information, maps, charts, graphs, and surveys and other communications associated with an environmental audit.

   c. "Regulatory agency" means the agency with regulatory authority over the facility or activity.

   d. "Willfully" has the same meaning as provided under section 12.1-02-02.

2. A regulatory agency may not pursue civil penalties for a violation found during an environmental audit which the regulated entity discloses to the regulatory agency in writing within forty-five days after the violation is found, unless:

   a. The violation caused imminent or substantial harm to human health or the environment;

   b. The violation is found by the regulatory agency before the regulated entity discloses the violation in writing to the regulatory agency;

   c. The regulated entity does not correct the violation within sixty days of discovery or, if correction within sixty days is not possible, within a reasonable period as agreed upon in writing by the regulatory agency, but not to exceed three hundred sixty-five days;

d. The regulated entity established a pattern of repeated violations of environmental law, rule, permit, or order by committing the same or similar violation that resulted in the imposition of a penalty by a regulatory agency more than once within two years before the date of the disclosure;

e. The regulated entity willfully violated a state or federal environmental law, rule, or permit;

f. The violation is a result of gross negligence, as defined under section 1-01-17; or

g. The regulatory agency assumed primacy over a federally delegated environmental program and a waiver of penalty authority for the violation would result in a state program less stringent than the federal program or the waiver would violate any federal rule required to maintain primacy. If a federally delegated program requires the imposition of a penalty for a violation, to the extent allowed under federal law or rule, the voluntary disclosure must be considered a mitigating factor in determining the penalty amount.

3. To qualify for a penalty exemption under subsection 2, the regulated entity shall notify the regulatory agency in writing before beginning the environmental audit. The notice must specify the facility or portion of the facility to be audited, the audit's anticipated start date, and the general scope of the audit. Unless the regulatory agency agrees in writing to an extension, the environmental audit must be completed within one hundred eighty days of the start date. This section may not be construed to authorize uninterrupted or continuous environmental audits.

4. Reporting a violation is mandatory if the reporting is required under chapter 23-25, 23-20.3, 23-29, 38-08, or 61-28, any rule or permit implementing those chapters, any federal law or rule, or any administrative or court order.

5. Notwithstanding subsection 2, the regulatory agency may pursue civil penalties against a regulated entity for a violation disclosed under this section if the regulatory agency finds the regulated entity:

   a. Intentionally misrepresented material facts concerning the violation disclosed or the nature of extent of any damage to human health or the environment; or

   b. Initiated a self-audit to avoid liability for a violation after the regulated entity's knowledge or imminent discovery.

6. Unless the privilege is expressly waived by the regulated entity that prepared the report, an environmental audit report is privileged and not admissible evidence in a civil action or proceeding. The regulated entity asserting this privilege has the burden of proving the privilege. The privilege does not apply to:

   a. Information relating to the types of violations listed in subsection 2.

   b. Information relating to a violation subject to a regulatory agency's finding under subsection 5.

   c. Disclosures, notifications, and other information provided by the regulated entity to the regulatory agency under this section.

7. Failure to label a document in an exhibit or appendix to an environmental audit report does not constitute a waiver of the audit privilege under this section or create a presumption the privilege does not apply."

Renumber accordingly

2017 SENATE ENERGY AND NATURAL RESOURCES

HB 1336

2017 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

HB1336
3/9/2017
Job #28939

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature	Pam Dever

Explanation or reason for introduction of bill/resolution: To provide for limitations of penalties for environmental audits.

Minutes:

Atch#1=Zachary Weis; Attch#2=David Glatt;

Called the committee to order. All committee members present.
Chairwoman Unruh: Let's open HB 1336.

Rep. George Keiser, Dist. 47, Bismarck, ND: (4.00-9.18) When you have companies they need to be inspected to see if there are any violations. This bills deals with doing a self-audit. It is a catch 22 right now. You do a self-audit that shows violations and the other entity. There is a disincentive to do a sell-audit. It costs a lot of money. This bill was to encourage self-audit and to look for problems. This is a hog house amendment. Many agencies had concerns and the industries involved. Through a sub-committee, we worked with all affected parties and reached the bill you see before you. If there is a major violation, it will be reported and will be in public record. Violations will not change. Within the 60 days of reporting violations, and they can fix it, and not be engaged in a lot of litigation and other. If it is major problem, they can still do what they have been doing. When you create this giant report. You will have a lot of proprietary information in it. The bill sets up a system where if the reporting is done in a timely basis, we can work it out. The 60-day limit had lots of discussion. Companies cannot subpoena these reports. We are trying to protect on the civil side. Any questions?

Zachary Weis, Marathon Oil; Chair of ND Regulatory Committee of NDPC: (see Attch#1) Here in support of HB 1336. Will increase transparency and shows good faith violations without fear of ramifications in our industry. Similar programs are in place in other states. Texas, Oklahoma, SD and Wyoming have similar programs. This version represents a compromise of sorts by all to establish a program that progresses compliance with in ND. We did sample from other states to come up with this hog house version. 45 days was agreed upon to disclose a violation; I believe Rep. Keiser said 60 days.
Sen. Oban: What internal audits do companies already do? Does Marathon do any now?
Zachary: We do routine audits in operations. We use third party. We do this in Texas. If we buy a company, we audit before the closing.
Sen. Oban: Are the time lines similar in other states where Marathon, the 45 days or 60 days? Are they forced in other states?

Zachary: The time lines are similar. The notification is different in different state. Other states, it is a voluntary program.

Dave Glatt, ND Dept. of Health, Environmental Health Section: (see Attch #2) We support this bill. We believe this will help improve compliance rates.
Vice Chair Kreun: In other industries that you work with, is this common scenario? What other industries would volunteer to do this?
Dave: The initial bill looked at all industries, food, etc. We thought that was too broad. We kept it contained to environmental area. I do not know if there are other industries that do this. We have followed this policy for years. (20.15)
Sen. Roers: Does OSHA do this?
Dave: I am familiar with OSHA. We don't do anything with OSHA.
Sen. Roers: They have a similar program that sounds like this. It works well in the construction industry.
Dave: This is not a gotcha thing. It is about compliance.
Sen. Cook: Do you send a notice out and say the health dept. is coming?
Dave: We do inspections. Some we let them know ahead of time, some we do not.
Sen. Cook: Is there any chance that you tell them you are coming and then they instantly do a sell-audit to avoid penalties?
Dave: No.
Sen. Oban: What rises to level of imminent and substantial harm and who determines that?
Dave: If they violated a standard. Or if people are in harm's way, directly.

Chairwoman Unruh: Further testimony in support? Any opposed? Any agencies? Seeing none, the hearing is closed.

2017 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

HB 1336
3/16/2017
Job# 29341

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Pam Dever

Explanation or reason for introduction of bill/resolution:

Minutes: Committee work

Chairwoman Unruh: Please look at engrossed HB 1336. This deals with environmental internal audits.

Sen. Oban: I move a Do Pass. **Sen. Armstrong**: I second.

Chairwoman Unruh: Any discussion? I like this bill and this is what I do in my daily life at my job.

Sen. Armstrong: This self-reporting. When a company decided to do this on their own, are they just a lot more forthcoming? I am small oil, and we do not have to audit ourselves.

Chairwoman Unruh: It provides some protections for smaller violations, but also allows for the department to issue a violation with a larger violation is found during an audit.

Vice Chair Kreun: Isn't it an insurance that the company hires to do the audit. Correct?

Chairwoman Unruh: Not sure about that question. I don't know it is because insurance demands this.

Vice Chair Kreun: They do it so that they are in compliance so that the insurance company wants to or they will not insure them, as I see it. They need to comply with all the rules. (4.30)

Chairwoman Unruh: Any more discussion? Seeing none, clerk call the roll on engrossed HB 1336 as Do Pass.

YES 7 NO 0 -0- absent **Chairwoman Unruh** will carry the bill.

Date: 3/16/17
Roll Call Vote #: 1

2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1334 engrossed

Senate Energy and Natural Resources Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☑ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Sen. Oban Seconded By Sen. Armstrong

Senators	Yes	No	Senators	Yes	No
Chairman Jessica Unruh	✓		Sen. Erin Oban	✓	
Vice Chair Curt Kreun	✓				
Sen. Kelly Armstrong	✓				
Sen. Dwight Cook	✓				
Sen. Jim Roers	✓				
Sen. Don Schaible	✓				

Total (Yes) 7 No 0

Absent -0-

Floor Assignment Sen. Unruh

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1336, as engrossed: Energy and Natural Resources Committee (Sen. Unruh, Chairman) recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1336 was placed on the Fourteenth order on the calendar.

2017 TESTIMONY

HB 1336

#1
HB 1336
2-2-17

Marathon Oil

House Bill 1336
Testimony of Zachary Weis
Manager, Public & Government Relations
Marathon Oil Company
North Dakota House Energy & Natural Resource Committee
February 2, 2017

Good Morning Chairman Porter and members of the House Energy and Natural Resource Committee. For the record, my name is Zachary Weis and I represent Marathon Oil Company, a global exploration and production company based in Houston, Texas. I also serve as the Chairman of the Regulatory Committee for the North Dakota Petroleum Council.

I am here in support of House Bill 1336. The audit program introduced through this bill creates a useful tool for industry to use for compliance with state environmental, health and safety laws and regulations. The voluntary nature of the audit program lends to increased transparency between industry and state regulators and provides the opportunity for industry to show in good faith violations without the threat of ramifications.

This concept of an audit privilege act is not new to the environmental, health and safety world. Similar programs are in place in many of the other industrialized states like Wyoming, Oklahoma and Texas. This bill is a version that we recommend from the state of Texas. Marathon's expertise on this program comes with working with the Texas Commission on Environmental Quality (TCEQ).

I find is the best way to describe the audit program is to use an example. I can step you through how we would typically use this in our operations.

The audit of one or more locations or facilities is initiated when a company notifies the agency. The Health Department in our case is notified of the upcoming audit through a notice of audit. That notice will include a scope of work, a list of locations/facilities to be audited, a description of what is to be audited within that location and specific date and time the audit will commence. The Company will then have a prescribed amount of time to conduct the audit and to report the completion of that audit.

If a violation is identified while the party is conducting the audit, the party will promptly give notice to the agency. The disclosure of violation will include a description of the violation discovered, where and how long the violation occurred and the status and schedule of corrective actions taken to address the violation. If the violation disclosed under this Act is corrected within a reasonable amount of time, immunity from any fines or penalties is granted for those identified violations.

This limited immunity does not affect the agency's authority to seek injunctive relief, make technical recommendations, or otherwise enforce compliance. The voluntary audit program itself does not impede, restrict or limit an agency from doing their routine and required inspections. In fact, if an agency identifies a violation before it is disclosed through an audit on an identified location/facility, that agency still has that authority to act on the violation.

Both the notice of audit and disclosure of violation provided to the agency are not confidential or privileged documents and are available to the public. The audit report and individuals who prepared and preformed that audit are allowed the confidentiality privilege by this bill.

We recognized that Heath Department and possibly other state agencies have questions or concerns regarding this bill. I would like the Chairman to know that this bill is not the response to a lack of trust or disapproval in the current philosophies of the Health Department. In fact, we appreciate their continued willingness to work with industry to achieve compliance the right way. We believe this program will assist in that effort.

We are happy to answer any they may have and I am happy to work with the Chairman or agencies on any modifications they seem fit to support the bill.

#2
HB1336
2-2-17

Testimony
House Bill 1336
House Energy and Natural Resources Committee
February 2, 2017, 9:00 a.m.
North Dakota Department of Health

Good morning Chairman Porter and members of the House Energy and Natural Resources Committee. My name is David Glatt, and I am the Interim Co-Director for the North Dakota Department of Health and Environmental Health Section Chief. The North Dakota Department of Health (Department) implements a variety of programs with a mission to safeguard public and environmental health.

I am here today to express our opposition to HB 1336. We are concerned about:

- the potential scope of HB 1336
- the need for congruity between state and federal enforcement agencies
- possible conflicts with open records laws

The Environmental Health Section acknowledges certain types of self-audits have potential environmental benefits. Self audits can expedite compliance by finding violations previously unknown to either a facility or state regulatory agency.

However, we question the need for such audits as the philosophy of the Environmental Health Section has been to work with industry when evaluating environmental violations. This philosophy helps clarify if enforcement actions are warranted and when they should be initiated. The end result has been a regulatory environment of accountability, problem solving and trust among the involved parties. We can show examples of self-reported code violations where the first order of business was finding a solution by working in cooperation with the municipality, industry, public and state. Our slogan for the regulated community has been "find it, fix it."

Although we acknowledge the benefits of a self audit, we question if HB 1336 is the appropriate vehicle for its implementation for the following reasons:

1. It is unclear which other agencies may be impacted by this law, unintentionally placing barriers to cooperative, effective and common-sense public health and safety practices among agencies. I direct you to page 2, line 15, which states:

   "4. To fully implement the privilege established by this chapter, the term "environmental or health and safety law" must be construed broadly."

In addition to environmental laws, is it the intent of HB 1336 to include health and safety laws as administered by agencies other than the Environmental Health Section?

2. As noted on page 3, lines 16-20, audit reports must be labeled "Compliance Report: Privileged Document," and the information may not be disclosed or used in enforcement actions by the regulator. We are unsure how this will impact existing open records laws and our ability to inform the general public. This law may limit transparency of state, public and industry actions. Existing state law and legal process allow certain data submitted or collected during enforcement negotiations to remain confidential until all negotiations have been completed, at which time the information is considered public record. How long is an audit considered to be privileged and not available for disclosure? We understand that states that have implemented self-audit laws have, on multiple occasions, been required to provide Attorney General opinions on their impact and applicability to open records laws.

3. As noted on page 3, lines 25-26, "... an audit must be completed within a reasonable time not to exceed six months..." We question how violations occurring during this six-month audit completion period would be handled. Would the regulated community be allowed to identify a problem in the first month but, under protection of the audit, not have to address the concern and not be held liable for repairs until after the audit is completed – up to five months later?

4. Through open public dialogue and by following appropriate science, acceptable thresholds for environmental impacts have been established in state law (e.g., air and water quality standards). We are concerned about the reference on page 9, lines 3 to 5, which states:

   "g. The violation did not result in injury or imminent and substantial risk of serious injury to one or more persons at the site or offsite substantial actual harm or imminent and substantial risk of harm to persons, property, or the environment."

   This reference has the potential to result in litigation relating to the definition and application of "imminent and substantial risk." Could a court's decision be contrary to established law, rule and standards?

5. The Environmental Health Section acknowledges the severity and duration of a pollution event in its enforcement process. HB 1336 caps enforcement penalties at $10,000. We are concerned that such limits would open the door to increased U.S. EPA enforcement action and preclude the state from taking appropriate action on its own due to arbitrarily assigned low penalties. Currently, the calculation of enforcement penalties considers the severity and duration of the event, willfulness of the violator and cooperation of the facility owner in determination of an appropriate penalty. As proposed, HB 1336 would arbitrarily cap the enforcement action without proper vetting of all pertinent facts.

The Department does not object to a self-audit policy and finds merit in its application in specific instances. As noted earlier, however, we already consider many site-specific issues (e.g., willfulness and impact on the environment). We believe the bill, as proposed and if interpreted too broadly, could result in increased frequency of federal enforcement actions, state litigation, damage to current state/industry/public relationships, and limited transparency in the disclosure of information.

This concludes my testimony. I am happy to answer any questions.

2B
HB1336
2-2-17

RG-173
Revised November 2013

A Guide to the Texas Environmental, Health, and Safety Audit Privilege Act

printed on
recycled paper

Litigation Division

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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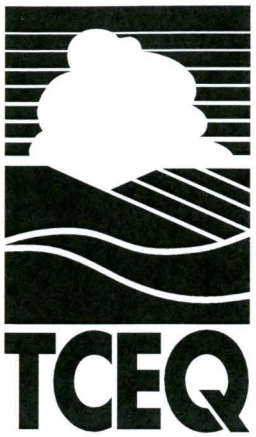

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Contents

Introduction

This is a guide for 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 provides 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 of a letter indicating intent to initiate a self-audit and 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 guide focuses exclusively on the Act as it relates to the TCEQ's jurisdiction.

Purpose

This November 2013 revision updates the previous versions of this document, which was published in September 1997 and revised in February 2009. The updates were necessitated by statutory changes made to the Audit Act with the passage of SB 1300, 83rd Legislature, 2013. Additionally, minor revisions and clarifications have been made.

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 provides 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 guide 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 21) 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 are discoverable 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 a number of changes were made to the Audit Act by HB 3459, the changes did not significantly affect the way TCEQ had been implementing the 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 Act was more explicitly limited to state law. Many of the changes were purely explanatory, explicitly stating the relationship between the 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. [§10(a)]
- 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. [§6(b)(2)(D)]
- Federal and state protections for individuals who disclose information to law enforcement authorities ("whistleblower laws") were explicitly preserved. [§6(e)]
- The administrative or civil evidentiary privilege is no longer waived when an audit report is obtained, reviewed, or used in a criminal proceeding. [§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

[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 immunity from penalty.

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. [§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. [§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." [§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. [§7(d)]
- The penalty for the disclosure of confidential information was amended to refer to the Open Records Act, Chapter 552, Government Code. [§6(d)]

Significant Changes Made by SB 1300, 83rd Legislature (2013)

Although SB 1300 made a number of changes to the Audit Act, they do not significantly affect the way the TCEQ has been implementing the Audit Act since 1995. SB 1300 added verbiage to the statute concerning audits that take place before the purchase of a facility.

The following are the main changes to the Audit Act under SB 1300:

- Defined [*a*]*cquisition closing date*. [§3(a)(1)]
- Expanded the definition of [*e*]*nvironmental or health and safety audit* to include an audit conducted by a person, including an employee or an independent contractor of the person, considering the acquisition of a facility. [§3(a)(4)]
- Applied the six-month time frame in which an audit must be completed to certain pre-acquisition audits. Pre-acquisition audits which have been continued must be completed within six months of the acquisition closing date. [§§4(d-1), (e), 10(g-1)]
- Exempted audits conducted before the acquisition closing date from the six-month limitation to complete the self-audit investigation. [§4(f)]
- Extended the provisions related to disclosure of audit reports and information acquired during an audit to a person considering the acquisition of a facility or operation and also extended the provisions to that person's employees or representatives. Such disclosure does not waive the privilege provided by Section 5 of the Audit Act. [§6(b)(1)(E) and (F)]
- Revised the requirements of a voluntary disclosure to require the submission of the Disclosure of Violation discovered during a

pre-acquisition audit within 45 days after the acquisition closing date. [§10(b)(1)(A) and (B)]

- Added a requirement that a person disclosing violations discovered during a pre-acquisition audit must make certain certifications relating to the business relationship between the seller and the person relating to the control of the facility in the disclosure. The same certifications must be included with a notice to continue an audit beyond the acquisition closing date. [§10(b-1) and 10(g-1)]
- Added an additional mitigating factor to be considered if a penalty is assessed under Subsection 10(d) of the Audit Act. [§10(e)(5)]
- Exempted a person considering the acquisition of a facility or operation from having to give the agency notice of an audit that the person initiated prior the acquisition closing date. [§10(g)]

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 most circumstances, in order to take advantage of the immunity offered by the Act, a "person" (defined in the Audit Act as an individual, corporation, partnership, or any other legal entity) must give notice to the TCEQ before the beginning of an environmental audit. A person who is considering the acquisition of a facility is not required to give notice to the TCEQ before initiating an environmental audit before the acquisition closing date. To qualify for immunity, a person must disclose to the agency any violations for which immunity is being sought and correct the violations within a reasonable amount of time. 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 or beyond the acquisition closing date where the person chooses to continue an environmental audit initiated before the closing date.

Guidance. The Notice of Audit and Disclosure of Violation, including responses to requests for additional information, are not confidential or 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 beginning 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)]. However, if an auditing person does not intend to take advantage of potential immunity, no notice of intent to initiate an environmental audit is necessary; in such cases the audit report will still be privileged, but no immunity can attach to any violations discovered during the environmental audit.

An NOA is not required from a person who initiates an environmental audit before the acquisition closing date. However, in order to take advantage of the immunity conferred by the Audit Act, a person who elects to continue an environmental audit beyond the closing date must notify the TCEQ that the audit is continuing [Audit Act §10(g-1)].

An NOA should be submitted in writing by certified mail. Though not required, certified mail is in the person's best interest, in part because it positively identifies 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 to be audited, including its TCEQ customer reference number (CN)

- the physical location of the regulated facility or operation to be audited (address including city or town and county)
- a description of the facility or portion of the facility to be audited, including the applicable TCEQ permit number, registration number, regulated-entity reference 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. While a person is not required to obtain a RN for a site, the person cannot receive compliance history benefits for conducting an environmental audit without a CN and RN; however, the person may be eligible for immunity. 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.texas.gov/goto/coredata> .

(See Appendix C, Model Notice of Audit)

Guidance. Even though an NOA is not required for environmental audits conducted prior to the acquisition closing date, a new owner may include a letter to the agency that contains the information traditionally included in an NOA with a Disclosure of Violation to facilitate the agency's processing of the disclosure. The NOA should include a site name and geographic location (physical address or description of the physical location or latitude and longitude). If an NOA is submitted for multiple sites, it should include the required information for each site where an environmental audit is being conducted in order to be eligible for immunity under the Audit Act.

Disclosure of Violation (DOV)

A *Disclosure of Violation* 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. In the context of a pre-acquisition audit, a disclosure must be made within 45 days after the acquisition closing date. 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 the TCEQ's processing of the DOV:

- the legal name of the person audited
- a reference to the date of the relevant NOA (if applicable)
- the 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 (from the date the violation began to the date corrective action was completed)
- the status and schedule of corrective action

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 a violation of a permit is disclosed, then a person should identify the specific permit condition that was violated and include a copy of the condition of the permit that was effective during the time of the violation. .

(See Appendix D, Model Disclosure of Violations; Appendix E, Model Notice of Audit for Continuing Audit and Disclosure of Violations Letter for a Newly Acquired Entity; Appendix F, Model Notice of Audit for a Completed Audit and Disclosure of Violation for a Newly Acquired Entity; and Appendix G, Model Addendum to Disclosure of Violations)

Guidance. To qualify for immunity, a person must demonstrate, among other things, that the person:

- has initiated an appropriate effort to achieve compliance,
- has pursued that effort with due diligence, and
- has corrected or will correct the noncompliance within a reasonable time.

[Audit Act §10(b)(5)].

To qualify for immunity, a person must correct the violation within a reasonable time. When submitting a voluntary disclosure of a violation, a person should describe the corrective action that will be taken to achieve compliance and the projected date of compliance. If the TCEQ determines that the corrective action will not be completed within a reasonable amount of time, it may request additional information before approving an alternative compliance schedule. Upon completion of the corrective actions, a person should inform the TCEQ that compliance was achieved and provide the date of compliance for each violation.

Request for Extension

A person may submit a letter requesting an extension of the time period allowed 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)].

A request for extension must be submitted before the end of the audit investigation along with sufficient information for the TCEQ to determine whether reasonable grounds exist to grant an extension. Failure to submit a sufficient request could delay or prevent the approval of the extension before the expiration of the audit investigation, jeopardizing the availability of any immunity.

The six-month limitation does not apply to an environmental audit conducted by a person that is considering the acquisition of a facility before the acquisition closing date [Audit Act §4(f)]. A person may continue an audit that began before the closing date only if the person notifies the agency that the person intends to continue the audit [Audit Act §§10(e)(2) and 10(g-1)]. This notice of a continued audit must contain specific certifications relating to the business relationship between the seller and the person and the control of the facility before the closing date [Audit Act §10(g-1)].

The evidentiary privilege and the immunity from penalties pertain only to information compiled, violations discovered, and voluntarily disclosed during an audit period. Persons are cautioned that 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.

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

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

The Deputy Director's Office will route these notices to all program areas.

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 Violation (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 Violation 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 will accept a Disclosure of Violation and will not consider it 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 can be waived 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 to TCEQ under *claims of confidentiality*; instead, 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 audit reports submitted 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 submitted 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 specific state or federal laws 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 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 for the purpose of addressing an issue identified through an audit.

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

- a person employed by the owner or operator, including temporary and contract employees;
- a legal representative of the owner or operator;
- an officer or director of the regulated facility or a partner of the owner or operator;
- an independent contractor of the owner or operator; or
- a person considering the acquisition of the regulated facility or operation that is the subject of the audit or that person's employee (including a temporary or contract employee), legal representative, officer, director, partner, or independent contractor.

[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; and
  - a person or entity engaged in the business of insuring, underwriting, or indemnifying 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, where applicable, that notified the TCEQ of the intent to initiate the environmental audit (see "Notice of Audit," page 5).

A disclosure will be deemed voluntary under Audit Act §10 only if the following conditions apply (mnemonic: PINNACLE).

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.*

For a disclosure of violation discovered during an environmental audit conducted before an acquisition closing date, the person making the disclosure must certify that, before the closing date:

- the person was not responsible for compliance at the regulated entity;
- the person did not have the largest ownership share of the seller;
- the seller did not have the largest ownership share of the person; and
- the person and the seller did not have a common corporate parent or a common majority interest owner. [Audit Act §10(b-1)]

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 reviewed 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 a Notice of Audit be considered adequate if only the county is given for the specific location of the facility that is being audited?

   No. A site name and geographic location (physical address or description of physical location or latitude and longitude) must be included in the Notice of Audit. Failure to give proper notice may result in denial of immunity for disclosed violations. For an NOA being conducted at multiple sites, the required information for each site must be submitted.

2. 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.

3. 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. It is in a person's best interests to disclose violations as soon as they are discovered. In the pre-acquisition audit context, disclosures must be made no later than the 45th day after the acquisition closing date.

4. How certain must a person be that a violation has occurred before giving notice in order to receive immunity?

   A person must notify the TCEQ of a violation promptly once it 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. Furthermore, since a person should make an affirmative assertion that a violation has been discovered, a Disclosure of Violation should not be reported as an apparent or potential violation or potential area of noncompliance.

5. Can a person be in "continuous audit" such that it can receive immunity from all violations discovered and disclosed?

   That is unlikely. The Audit Act generally limits the audit period to six months. It is doubtful that a person could justify such consecutive audits without raising the suspicion that it is conducting its audits 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.

6. Can a person receive immunity for violations disclosed for facilities that were not identified in the NOA after an audit has begun?

   No. For traditional audits, disclosed violations will only be granted immunity if a proper notice of intent to conduct an environmental audit for the facility was submitted, and the violations were properly disclosed and corrected with a reasonable amount of time. A Notice of Audit is not required for an audit initiated before the closing date by a person who is considering the acquisition of a facility.

7. 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. As detailed in the compliance-history rules, found in Title 30, Texas Administrative Code, Chapter 60, compliance-history points are awarded for both NOAs and voluntarily disclosed violations.

   A person that properly discloses a violation that was discovered during a pre-acquisition audit will receive compliance-history benefits for the disclosure. Although an NOA is not required for pre-acquisition audits, the benefits associated with an NOA will appear in the compliance history of a person disclosing a violation discovered during a pre-acquisition audit. To facilitate the TCEQ's processing of the DOV, a person making a disclosure in this context is encouraged to submit the information traditionally included in an NOA prior to or with its DOV.

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 the TCEQ and a person have entered into a confidentiality agreement, any audit-report information submitted will be flagged or segregated 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 TCEQ personnel when a confidentiality agreement is not already in place.

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

   A Disclosure of Violation or Notice of Audit will not be considered privileged or confidential under the Audit Act. Any 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?

   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, continuous emissions monitoring 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

[2] "Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations—Final Policy Statement," 60 *Fed. Reg.* 66706 (Dec. 22, 1995).

[3] Ibid., p. 66711.

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?

   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.

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 that are 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 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. Under a traditional audit, only when a person intends to qualify for the immunity provisions of the Audit Act is the person required to give notice of intent to commence an audit. A person who is considering the acquisition of a facility is not required to file a Notice of Audit prior to commencing an audit before the acquisition closing date in order to qualify for immunity. Even where no Notice of Audit has been filed, audit reports remain privileged.

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

   The Office of Compliance and Enforcement will furnish copies of correspondence regarding Disclosures of Violations to the regional offices.

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, if required, the sufficiency of the 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 information from an audit. 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 determine the timing.

Appendix A
Environmental, Health, and Safety Audit Privilege Act

as amended by SB 1300, 83rd Legislature

Article 4447cc. 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) "Acquisition closing date" means the date on which ownership of, or a direct or indirect majority interest in the ownership of, a regulated facility or operation is acquired in an asset purchase, equity purchase, merger, or similar transaction.

(2) "Audit report" means an audit report described by Section 4 of this Act.

(3) "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.

(4) "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.

(5) "Owner or operator" means a person who owns or operates a regulated facility or operation.

(6) "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.

(7) "Person" means an individual, corporation, business trust, partnership, association, and any other legal entity.

(8) "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.

(d-1) A person that begins an audit before becoming the owner of a regulated facility or operation may continue the audit after the acquisition closing date if the person gives notice under Section 10(g-1).

(e) Unless an extension is approved by the governmental entity with regulatory authority over the regulated facility or operation based on reasonable grounds, an audit must be completed within a reasonable time not to exceed six months after:

(1) the date the audit is initiated; or

(2) the acquisition closing date, if the person continues the audit under Subsection (d-1).

(f) Subsection (e)(1) does not apply to an audit conducted before the acquisition closing date by a person that is considering the acquisition of the regulated facility or operation.

§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;

(E) a person considering the acquisition of the regulated facility or operation that is the subject of the audit; or

(F) an employee, temporary employee, contract employee, legal representative, officer, director, partner, or independent contractor of a person described by Paragraph (E) of this subdivision.

(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:

(A) promptly after knowledge of the information disclosed is obtained by the person; or

(B) not more than the 45th day after the acquisition closing date, if the violation was discovered during an audit conducted before the acquisition closing date by a person considering the acquisition of the regulated facility or operation;

(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.

(b-1) For a disclosure described by Subsection (b)(1)(B), the person making the disclosure must certify in the disclosure that before the acquisition closing date:

(1) the person was not responsible for the environmental, health, or safety compliance at the regulated facility or operation that is subject to the disclosure;

(2) the person did not have the largest ownership share of the seller;

(3) the seller did not have the largest ownership share of the person; and

(4) the person and the seller did not have a common corporate parent or a common majority interest owner.

(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;

(5) the period of ownership of the regulated facility or operation; or

(6) 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 provide 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. This subsection does not apply to an audit conducted before the acquisition closing date by a person considering the acquisition of the regulated facility or operation that is the subject of the audit.

(g-1) A person that begins an audit before becoming the owner of the regulated facility or operation may continue the audit after the acquisition closing date if, not more than the 45th day after the acquisition closing date, the person provides notice to an appropriate regulatory agency of the fact that the person intends to continue an ongoing audit. The notice shall specify the facility or portion of the facility being audited, the date the audit began, and the general scope of the audit. The person must certify in the notice that before the acquisition closing date:

(1) the person was not responsible for the scope of the environmental, health, or safety compliance being audited at the regulated facility or operation;

(2) the person did not have the largest ownership share of the seller;

(3) the seller did not have the largest ownership share of the person; and

(4) the person and the seller did not have a common corporate parent or a common majority interest owner.

(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

[*month day, year*]

Via certified Mail, return receipt requested, no. P12 345 6789

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

Re: ABC Corporation; CN123456789; ABC Plant—Unit No. 123; RN123456789
Facility ID No. 12345; Permit Nos. 123 and 456
Scheduled environmental, health, and safety audit

Dear OCE Deputy Director:

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 ABC Plant located at [*plant's physical 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 [*start time*] and will cover Unit No. 123. The scope of the audit will be to evaluate compliance with all applicable environmental, health, and safety regulations, as well as Permit Nos. 123 and 456. 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, we receive your written approval of an extension before the end of the six-month period.

Please do not hesitate to contact me at 512-123-4567, [*e-mail address*], if you have any questions or require further information regarding this matter.

Sincerely,

[*printed name*]
[*title*]

cc: Regional Director, [*TCEQ regional-office address*]
Audit Act Coordinator, TCEQ Litigation Division

Appendix D
Model Disclosure of Violation

[*month day, year*]

Via certified mail, return receipt requested, no. P12 345 6789

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

Re: ABC Corporation; CN123456789; ABC Plant—Unit No. 123; RN123456789
Facility ID No. 12345; Permit Nos. 123 and 456
Voluntary disclosure of violations discovered pursuant to a scheduled environmental, health, and safety audit; NOA dated [*month day, year*]

Dear OCE Deputy Director:

ABC Corporation has conducted an environmental audit of its ABC Plant, located at [*plant's physical address*]. Advance notice of the audit was given to you by letter dated [*month day, year*]. The audit covered Unit No. 123; 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 512- 123-4567, [*e-mail address*], if you have any questions or require further information regarding this matter.

Sincerely,

[*printed name*]
[*title*]

Enclosure

cc: Regional Director, [*TCEQ regional-office address*]
Audit Act Coordinator, TCEQ Litigation Division

Appendix E
Model Notice of Audit for Continuing Audit and Disclosure of Violation for a Newly Acquired Company

[*month day, year*]

Via certified mail, return receipt requested, no. P12 345 6789

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

Re: XYZ Corporation; CN123456789; ABC Plant; RN123456789;
Facility ID No. 12345; Permit Nos. 123 and 456
Notice of audit and voluntary disclosure of violations discovered before acquisition and pursuant to a scheduled environmental, health, and safety audit

Dear OCE Deputy Director:

XYZ Corporation acquired the ABC Plant from the ABC Corporation on [*month day, year*]. In accordance with Section 10(g-1) of the Environmental, Health, and Safety Audit Privilege Act (Audit Act), the XYZ Corporation's Corporate Audit Group began an environmental, health, and safety compliance audit prior to the acquisition of the ABC Plant located at [*plant's physical address*] on [*month day, year*]. The scope of the audit was to evaluate compliance with all applicable environmental, health, and safety regulations, as well as Permit Nos. 123 and 456. Pursuant to Section 4(d-1) of the Audit Act, XYZ Corporation intends to continue the ongoing audit after the acquisition closing date and the audit will be completed no later than six months after the acquisition closing date, unless, pursuant to a written request for extension, we receive written approval of an extension before the end of the six-month period.

This letter is also to notify you of several violations discovered during the environmental audit conducted before the acquisition closing date. Accordingly, XYZ 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.

In accordance with Sections 10(g-1) and 10(b-1) of the Audit Act, XYZ Corporation certifies that before the acquisition closing date:

- XYZ Corporation was not responsible for the scope of the environmental, health, or safety compliance being audited at the ABC Plant;
- XYZ Corporation was not responsible for the environmental, health, or safety compliance at the ABC Plant that is subject to the disclosure;
- XYZ Corporation did not have the largest ownership share of the ABC Corporation;
- ABC Corporation did not have the largest ownership share of the XYZ Corporation; and
- XYZ Corporation and ABC Corporation did not have a common corporate parent or a common majority-interest owner.

Please do not hesitate to contact me at 512-123-4567, [e-mail address], if you have any questions or require further information regarding this matter.

Sincerely,

[*printed name*]
[*title*]

Enclosure

cc: Regional Director, [*TCEQ regional-office address*]
Audit Act Coordinator, TCEQ Litigation Division

Appendix F
Model Notice of Audit for a Completed Audit and Disclosure of Violation for a Newly Acquired Company

[*month day, year*]

Via certified mail, return receipt requested, no. P12 345 6789

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

Re: XYZ Corporation; CN123456789; ABC Plant; RN123456789;
Facility ID No. 12345; Permit Nos. 123 and 456
Notice of audit and voluntary disclosure of violations discovered before acquisition and pursuant to a scheduled environmental, health, and safety audit

Dear OCE Deputy Director:

XYZ Corporation acquired the ABC Plant from the ABC Corporation on [*month day, year*]. In accordance with Section 10(g-1) of the Environmental, Health, and Safety Audit Privilege Act (Audit Act), the XYZ Corporation's Corporate Audit Group began an environmental, health, and safety compliance audit prior to the acquisition of the ABC Plant located at [*plant's physical address*] on [*month day, year*]. The scope of the audit was to evaluate compliance with all applicable environmental, health, and safety regulations, as well as Permit Nos. 123 and 456. XYZ Corporation completed the audit before the acquisition closing date on [*month day, year*].

This letter is also to notify you of several violations discovered during the environmental audit conducted before the acquisition closing date. Accordingly, XYZ 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.

In accordance with Sections 10(g-1) and 10(b-1) of the Audit Act, XYZ Corporation certifies that before the acquisition closing date:

- XYZ Corporation was not responsible for the scope of the environmental, health, or safety compliance being audited at the ABC Plant;
- XYZ Corporation was not responsible for the environmental, health, or safety compliance at the ABC Plant that is subject to the disclosure;
- XYZ Corporation did not have the largest ownership share of the ABC Corporation;
- ABC Corporation did not have the largest ownership share of the XYZ Corporation; and
- XYZ Corporation and ABC Corporation did not have a common corporate parent or a common majority-interest owner.

Please do not hesitate to contact me at 512-123-4567, [*e-mail address*], if you have any questions or require further information regarding this matter.

Sincerely,

[*printed name*]
[*title*]

Enclosure

cc: Regional Director, [*TCEQ regional-office address*]
Audit Act Coordinator, TCEQ Litigation Division

Appendix G
Model Addendum to Disclosure of Violation

Disclosure of Violation: Addendum

ABC Company
ABC Plant
RN123456789

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

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

Public Service Commission
State of North Dakota

600 East Boulevard, Dept. 408
Bismarck, North Dakota 58505-0480
Web: www.psc.nd.gov
E-mail: ndpsc@nd.gov
Phone: 701-328-2400
ND Toll Free: 1-877-245-6685
Fax: 701-328-2410
TDD: 800-366-6888 or 711

7 February 2017

Honorable Todd Porter, Chairman
Energy and Natural Resources Committee
North Dakota House of Representatives
600 East Boulevard Avenue
Bismarck, ND 58505

Re: House Bill 1336

Dear Chairman Porter:

The Public Service Commission did not provide testimony at the hearing on House Bill 1336 last week. However, a representative of the commission did attend the hearing. Following the hearing, the commission discussed the bill again in light of the testimony from the hearing and asked me to let you know that the commission shares the concerns brought up by the North Dakota Department of Health. The commission opposes the bill in its current form.

Our understanding of House Bill No. 1336 is that it provides for regulated entities to conduct internal environmental or safety/health audits and to share the information from the internal audit with the appropriate state regulatory agencies. We also understand that it provides for immunity for the voluntary disclosure of an environmental or safety/health violation.

As a regulatory agency, the Public Service Commission encourages the companies that it regulates to conduct internal environmental and safety audits. Those testifying in favor of House Bill No. 1336 on February 2 indicated that this bill is intended to be primarily applicable to the North Dakota Department of Health and the programs it administers. However, as originally proposed, the bill is very broad in scope and would apply to <u>any</u> environmental or safety and health law, presumably including the programs that the Public Service Commission administers. We are specifically thinking of our Coal Mining and Reclamation regulatory program (codified in N.D.C.C. Chapter 38-14.1), but there could be others.

Dave Glatt, Chief of the Environmental Health Section of the North Dakota Department of Health, testified in opposition to House Bill No. 1336, citing a variety of reasons. These include the broad scope of the bill, the fact that some of the provisions are in direct conflict with the federal programs that the state manages through state primacy, and the fact that many of the confidentiality provisions of the bill are in conflict with the state's public records laws. As pointed out by Mr. Glatt during his testimony, state agencies need the flexibility to determine when enforcement actions are needed and this bill would remove much of that flexibility.

The Honorable Todd Porter, Chairman
House Energy and Natural Resources Committee
House Bill 1336
7 February 2017

Our concerns with this bill are the same as those expressed by Mr. Glatt at the February 2, 2017 hearing. For this reason, we oppose the bill in its current form. We understand that the bill was referred to a subcommittee for further work and Mr. Glatt indicated he would be willing to work with the subcommittee to refine the bill. We are also willing to work with the subcommittee, if requested, but we have confidence that working with Mr. Glatt will address our concerns. We encourage the subcommittee to work with Mr. Glatt to produce a bill that is acceptable to the North Dakota Department of Health and the Public Service Commission, and that satisfactorily addresses the problems noted.

Please let us know if we can assist in any way, or if the committee or subcommittee needs any more information. We would appreciate an opportunity to review any amendments the subcommittee may propose so that we can comment on them before final consideration.

Thank you for your consideration.

Best regards,

Illona A. Jeffcoat-Sacco

Illona A. Jeffcoat-Sacco
General Counsel

c: Rep. Chuck Damschen
Rep. Bill Devlin
Rep. Mike Lefor
Rep. Corey Mock
Rep. Jay Seibel
Rep. Dick Anderson
Rep. Pat Heinert
Rep. Andrew Marschall
Rep. Shannon M. Roers Jones
Dave Glatt
Rep. Glenn Bosch
Rep. George Keiser
Rep. Alisa Mitskog
Rep. Matthew Ruby

HB 1336
Subcommittee
2-9-17

1. The department may not pursue civil penalties for violations found during an environmental audit that are disclosed to the department in writing within 30 days after the violation is found, unless:

    a. The violation is found by the department before a regulated entity discloses the violation in writing to the department;

    b. The violation caused or is likely to cause damage to human health or the environment;

    c. The regulated entity does not correct the violation within 60 days of discovery or, if correction within 60 days is not possible, within a reasonable period as agreed to in writing by the department but not to exceed 180 days;

    d. The regulated entity willfully or with knowledge violated a state or federal environmental law, rule, or permit;

    e. The regulated entity has established a pattern of repeated violations of environmental law, rule, permit, or order within two years prior to the date of the disclosure;

    f. The violation is a result of gross negligence or recklessness; or

    g. The department has assumed primacy over a federally-delegated environmental program and a waiver of penalty authority for the violations would result in a state program less stringent than the federal program or the waiver would violate any federal rule required to maintain primacy. If a federally-delegated program requires the imposition of a penalty for a violation, the voluntary disclosure of the violation shall to the extent allowed under federal law or rule, be considered a mitigating factor in determining the penalty amount.

2. For purposes of this section, an "environmental audit" is a voluntary, internal, and comprehensive evaluation of facilities or activities that is designed to prevent noncompliance with environmental laws, rules, or permits enforced by the department under chapters 23-25, 23-20.3, 23-29, or 61-28.

3. To qualify for subsection 1's penalty defense, the regulated entity must notify the department in writing before beginning the environmental audit. Once initiated, the environmental audit must be completed within 180 days. Nothing in this section shall be construed to authorize uninterrupted or continuous environmental audits.

4. Reporting a violation is mandatory and is therefore not voluntary under this section if the reporting is required by chapter 23-25, 23-20.3, 23-29, or 61-28, any department rule or permit implementing those chapters, any federal law or rule, or any administrative or court order.

5. Notwithstanding subsection 1, the department may pursue civil penalties against a regulated entity for violations disclosed under this section if the department finds the regulated entity:

    a. Intentionally misrepresented material facts concerning the violations disclosed or the nature of extent of any damage to human health or the environment;

    b. Engaged in multiple or continuous self-auditing to intentionally avoid liability for violations; or

    c. Initiated a self-audit to intentionally avoid liability for violations after the regulated entity's knowledge or imminent discovery.

6. An environmental audit report or summary of such a report submitted by a regulated entity to the department in compliance with this section is a confidential record under chapter 44-04, except for information relating to the types of violations listed in subdivisions a through g of subsection 1 or subject to a department finding under subsection 5.

2-10-17
HB 1336
Sub committee

1. The department may not pursue civil penalties for violations ~~found~~ discovered during an environmental audit that are disclosed to the ~~department~~ regulatory agency in writing within ~~30~~ 45 days ~~after the violation is found~~of the completion date of the audit, unless: now Sec 2

   a. The violation is found by the department before a regulated entity discloses the violation in writing to the ~~department~~regulatory agency;

   b. The violation caused or ~~is likely~~ has imminent or substantial rist to cause damage to human health or the environment;

   c. The regulated entity does not correct the violation within 60 days of discovery or, if correction within 60 days is not possible, within a reasonable period as agreed to in writing by the ~~department~~ regulatory agency but not to exceed ~~180~~365 days;

   d. The regulated entity willfully or with knowledge violated a state or federal environmental law, rule, or permit;

   e. The regulated entity has established a pattern of repeated violations of environmental law, rule, permit, or order within two years prior to the date of the disclosure;

   f. The violation is a result of gross negligence or recklessness; or

   g. The ~~department~~ regulatory agencyhas assumed primacy over a federally-delegated environmental program and a waiver of penalty authority for the violations would result in a state program less stringent than the federal program or the waiver would violate any federal rule required to maintain primacy. If a federally-delegated program requires the imposition of a penalty for a violation, the voluntary disclosure of the violation shall to the extent allowed under federal law or rule, be considered a mitigating factor in determining the penalty amount.

2. For purposes of this section, an "environmental audit" is a systematic voluntary evaluation, review, or assessment of compliance with environmental or health and safety laws, rules or permits enforced by a regulatory agency under chapters 23-25, 23-20.3, 23-29, 61-28 or 38-08. The environmental audit is conducted by a regulated entity, an employee of a regulated entity, an independent contractor of the regulated entity that is considering the acquisition of a regulated facility or operation, or an independent contractor of a regulated facility or operation; or an activity at a regulated facility or operation.~~For purposes of this section, an "environmental audit" is a voluntary, internal, and comprehensive evaluation of facilities or activities that is designed to prevent noncompliance with environmental laws, rules, or permits enforced by the department under chapters 23-25, 23-20.3, 23-29, or 61-28.~~

3. To qualify for subsection 1's penalty defense, the regulated entity must provide notice in writing to the regulatory agency before beginning an environmental or health and safety audit. The notice shall specify the facilities 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. From the date the audit is initiated, the regulated entity must complete the environmental audit within 180 days. The regulatory agency may approve an extension if requested by the regulated entity. Nothing in this section shall be construed to authorize uninterrupted or continuous environmental audits. ~~To qualify for subsection 1's penalty defense, the regulated entity must notify the department in writing before beginning the environmental audit. Once initiated, the environmental audit must be completed within 180 days. Nothing in this section shall be construed to authorize uninterrupted or continuous environmental audits.~~

4. Reporting a violation is mandatory and is therefore not voluntary under this section if the reporting is required by chapter 23-25, 23-20.3, 23-29, ~~or~~ 61-28, or 38-08 any department rule or permit implementing those chapters, any federal law or rule, or any administrative or court order.
5. Notwithstanding subsection 1, the ~~department~~ regulatory agency may pursue civil penalties against a regulated entity for violations disclosed under this section if the department finds the regulated entity:

    a. Intentionally misrepresented material facts concerning the violations disclosed or the nature of extent of any damage to human health or the environment;

    b. Engaged in ~~multiple or~~ continuous self-auditing to intentionally avoid liability for violations; or

    c. Initiated a self-audit to intentionally avoid liability for violations after the regulated entity's knowledge or imminent discovery.

6. An environmental audit report is privileged, except for information relating to the types of violations listed in subdivisions a through g of subsection 1 or subject to a department finding under subsection 5. The audit report is a report that includes each document and communication, produced from an environmental or health and safety audit.
    a. The environmental audit report should be labeled "Environmental Audit Report: Privileged Document". 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. The report may include interviews with current or former employees, field notes and records of observations, findings, opinions, suggestions, conclusions, guidance, notes, drafts, and memoranda, legal analyses, drawings, photographs, laboratory analyses and other analytical data, computer-generated or electronically recorded information, maps, charts, graphs, and surveys and other communications associated with an environmental or health and safety audit.

b. The privilege described by Section 3 does not apply to the extent the privilege is expressly waived by the regulated entity who prepared the audit report.

~~6. An environmental audit report or summary of such a report submitted by a regulated entity to the department in compliance with this section is a confidential record under chapter 44-04, except for information relating to the types of violations listed in subdivisions a through g of subsection 1 or subject to a department finding under subsection 5.~~

2
HB1336
Subcommittee
2-10-17

1. For purposes of this section:

   a. "Environmental audit" means a voluntary, internal, and comprehensive evaluation of facilities or activities that is designed to prevent noncompliance with environmental laws, rules, or permits enforced by a regulatory agency under chapters 23-25, 23-20.3, 23-29, 38-08, or 61-28. An environmental audit may be conducted by an owner, operator, prospective owner or operator. An employee or independent contractor may conduct the environmental audit on behalf of the owner, operator, or prospective owner or operator.

   b. "Regulatory agency" means the agency with regulatory authority over the facilities or activities that are the subject of the environmental audit.

2. The regulatory agency may not pursue civil penalties for violations found during an environmental audit that are disclosed to the regulatory agency in writing within 30 days after the violation is found, unless:

   a. The violation is found by the regulatory agency before a regulated entity discloses the violation in writing to the regulatory agency;

   b. The violation caused imminent or substantial harm to human health or the environment;

   c. The regulated entity does not correct the violation within 60 days of discovery or, if correction within 60 days is not possible, within a reasonable period as agreed to in writing by the regulatory agency but not to exceed 365 days;

   d. The regulated entity has established a pattern of repeated violations of environmental law, rule, permit, or order by committing the same or similar violation that resulted in the imposition of a penalty by a regulatory agency more than once within two years prior to the date of the disclosure;

   e. The regulated entity willfully, , as defined by section 12.1-02-02, violated a state or federal environmental law, rule, or permit;

   f.

   g. The violation is a result of gross negligence, as defined by section 1-01-17; or

   h. The regulatory agency has assumed primacy over a federally-delegated environmental program and a waiver of penalty authority for the violations would result in a state program less stringent than the federal program or the waiver would violate any federal rule required to maintain primacy. If a federally-delegated program requires the imposition of a penalty for a violation, the voluntary disclosure of the violation shall, to the extent allowed

under federal law or rule, be considered a mitigating factor in determining the penalty amount.

3. To qualify for subsection 2's penalty exemption, the regulated entity must notify the regulatory agency in writing before beginning the environmental audit. The notice must 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. Once initiated, the environmental audit must be completed within 180 days. Nothing in this section shall be construed to authorize uninterrupted or continuous environmental audits.

4. Reporting a violation is mandatory and is therefore not voluntary under this section if the reporting is required by chapter 23-25, 23-20.3, 23-29, 38-08, or 61-28, any rule or permit implementing those chapters, any federal law or rule, or any administrative or court order.

5. Notwithstanding subsection 2, the regulatory agency may pursue civil penalties against a regulated entity for violations disclosed under this section if the regulatory agency finds the regulated entity:

    a. Intentionally misrepresented material facts concerning the violations disclosed or the nature of extent of any damage to human health or the environment; or

    b. Initiated a self-audit to avoid liability for violations after the regulated entity's knowledge or imminent discovery.

6. An environmental audit report or summary of such a report submitted by a regulated entity to the regulatory agency in compliance with this section is a confidential record under chapter 44-04, except for information relating to the types of violations listed in subdivisions a through g of subsection 2 or subject to a regulatory agency finding under subsection 5.

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HB1336
2-10-17
Subcommittee

West's North Dakota Century Code Annotated
Title 12.1. Criminal Code
Chapter 12.1-02. Liability and Culpability

NDCC, 12.1-02-02

§ 12.1-02-02. Requirements of culpability

Currentness

1. For the purposes of this title, a person engages in conduct:

a. "Intentionally" if, when he engages in the conduct, it is his purpose to do so.

b. "Knowingly" if, when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so.

c. "Recklessly" if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct, except that, as provided in section 12.1-04-02, awareness of the risk is not required where its absence is due to self-induced intoxication.

d. "Negligently" if he engages in the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct.

e. "Willfully" if he engages in the conduct intentionally, knowingly, or recklessly.

2. If a statute or regulation thereunder defining a crime does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, the culpability that is required is willfully.

3. a. Except as otherwise expressly provided, where culpability is required, that kind of culpability is required with respect to every element of the conduct and to those attendant circumstances specified in the definition of the offense, except that where the required culpability is "intentionally", the culpability required as to an attendant circumstance is "knowingly".

b. Except as otherwise expressly provided, if conduct is an offense if it causes a particular result, the required degree of culpability is required with respect to the result.

1

c. Except as otherwise expressly provided, culpability is not required with respect to any fact which is solely a basis for grading.

d. Except as otherwise expressly provided, culpability is not required with respect to facts which establish that a defense does not exist, if the defense is defined in chapters 12.1-01 through 12.1-06; otherwise the least kind of culpability required for the offense is required with respect to such facts.

e. A factor as to which it is expressly stated that it must "in fact" exist is a factor for which culpability is not required.

4. Any lesser degree of required culpability is satisfied if the proven degree of culpability is higher.

5. Culpability is not required as to the fact that conduct is an offense, except as otherwise expressly provided in a provision outside this title.

Credits
S.L. 1973, ch. 116, § 2.

Notes of Decisions (80)

NDCC 12.1-02-02, ND ST 12.1-02-02

End of Document

4
HB 1336
Subcommittee
2-10-17

West's North Dakota Century Code Annotated
Title 1. General Provisions
Chapter 1-01. General Principles and Definitions (Refs & Annos)

NDCC, 1-01-17

§ 1-01-17. Degrees of negligence--Definition

Currentness

Slight negligence shall consist in the want of great care and diligence, ordinary negligence, in the want of ordinary care and diligence, and gross negligence, in the want of slight care and diligence.

Codifications: Civ. C. 1877, § 2102; R.C. 1895, § 5111; R.C. 1899, § 5111; R.C. 1905, § 6696; C.L. 1913, § 7283; R.C. 1943, § 1-0117.

Notes of Decisions (22)

NDCC 1-01-17, ND ST 1-01-17

End of Document

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5
HB1336
Subcommittee
2-10-17

1. For purposes of this section:

   a. "Environmental audit" means a voluntary, internal, and comprehensive evaluation of facilities or activities that is designed to prevent noncompliance with environmental laws, rules, or permits enforced by a regulatory agency under chapters 23-25, 23-20.3, 23-29, 38-08, or 61-28. An environmental audit may be conducted by an owner, operator, prospective owner or operator. An employee or independent contractor may conduct the environmental audit on behalf of the owner, operator, or prospective owner or operator.

   b. "Regulatory agency" means the agency with regulatory authority over the facilities or activities that are the subject of the environmental audit.

~~1.~~2. The ~~department~~ regulatory agency may not pursue civil penalties for violations found during an environmental audit that are disclosed to the ~~department~~ regulatory agency in writing within 30 days after the violation is found, unless:

   a. The violation is found by the ~~department~~regulatory agency before a regulated entity discloses the violation in writing to the ~~department~~regulatory agency;

   b. The violation caused ~~or is likely to cause damage~~imminent or substantial harm to human health or the environment;

   c. The regulated entity does not correct the violation within 60 days of discovery or, if correction within 60 days is not possible, within a reasonable period as agreed to in writing by the ~~department~~regulatory agency but not to exceed ~~180~~ 365 days;

   d. The regulated entity has established a pattern of repeated violations of environmental law, rule, permit, or order by committing the same or similar violation that resulted in the imposition of a penalty by a regulatory agency more than once within two years prior to the date of the disclosure;

~~d.~~

   e. The regulated entity willfully, ~~or with knowledge~~, as defined by section 12.1-02-02, violated a state or federal environmental law, rule, or permit;

   f. ~~The regulated entity has established a pattern of repeated violations of environmental law, rule, permit, or order within two years prior to the date of the disclosure;~~

   g. The violation is a result of gross negligence, as defined by section 1-01-17 ~~or recklessness~~; or

   ~~h.~~ The ~~department~~regulatory agency has assumed primacy over a federally-delegated environmental program and a waiver of penalty authority for the

violations would result in a state program less stringent than the federal program or the waiver would violate any federal rule required to maintain primacy. If a federally-delegated program requires the imposition of a penalty for a violation, the voluntary disclosure of the violation shall, to the extent allowed under federal law or rule, be considered a mitigating factor in determining the penalty amount.

h.

~~2. For purposes of this section, an "environmental audit" is a voluntary, internal, and comprehensive evaluation of facilities or activities that is designed to prevent noncompliance with environmental laws, rules, or permits enforced by the department under chapters 23-25, 23-20.3, 23-29, or 61-28.~~

3. To qualify for subsection ~~1's~~ 2's penalty ~~defense~~exemption, the regulated entity must notify the ~~department~~regulatory agency in writing before beginning the environmental audit. The notice must 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. Once initiated, the environmental audit must be completed within 180 days. Nothing in this section shall be construed to authorize uninterrupted or continuous environmental audits.

4. Reporting a violation is mandatory and is therefore not voluntary under this section if the reporting is required by chapter 23-25, 23-20.3, 23-29, 38-08, or 61-28, any ~~department~~ rule or permit implementing those chapters, any federal law or rule, or any administrative or court order.

~~4.~~

5. Notwithstanding subsection ~~1~~2, the ~~department~~regulatory agency may pursue civil penalties against a regulated entity for violations disclosed under this section if the ~~department~~regulatory agency finds the regulated entity:

   a. Intentionally misrepresented material facts concerning the violations disclosed or the nature of extent of any damage to human health or the environment; or

~~b. Engaged in multiple or continuous self-auditing to intentionally avoid liability for violations; or~~

   ~~c.~~b. Initiated a self-audit to ~~intentionally~~ avoid liability for violations after the regulated entity's knowledge or imminent discovery.

6. An environmental audit report or summary of such a report submitted by a regulated entity to the ~~department~~regulatory agency in compliance with this section is a confidential record under chapter 44-04, except for information relating to the types of violations listed in subdivisions a through g of subsection ~~1~~2 or subject to a ~~department~~regulatory agency finding under subsection 5.

1. For purposes of this section:

   a. "Environmental audit" means a voluntary, internal, and comprehensive evaluation of facilities or activities that is designed to prevent noncompliance with environmental laws, rules, or permits enforced by a regulatory agency under chapters 23-25, 23-20.3, 23-29, 38-08, or 61-28. An environmental audit may be conducted by an owner, operator, prospective owner or operator. An employee or independent contractor may conduct the environmental audit on behalf of the owner, operator, or prospective owner or operator.

   b. "Regulatory agency" means the agency with regulatory authority over the facilities or activities that are the subject of the environmental audit.

2. The regulatory agency may not pursue civil penalties for violations found during an environmental audit that are disclosed to the regulatory agency in writing within ~~30~~ 45 days after the violation is found, unless:

   a. The violation caused imminent or substantial harm to human health or the environment;
   ~~a.~~
   b. The violation is found by the regulatory agency before a regulated entity discloses the violation in writing to the regulatory agency;

   c. ~~The violation caused imminent or substantial harm to human health or the environment;~~

   d. The regulated entity does not correct the violation within 60 days of discovery or, if correction within 60 days is not possible, within a reasonable period as agreed to in writing by the regulatory agency but not to exceed 365 days;

   e. The regulated entity has established a pattern of repeated violations of environmental law, rule, permit, or order by committing the same or similar violation that resulted in the imposition of a penalty by a regulatory agency more than once within two years prior to the date of the disclosure;

   f. The regulated entity willfully, as defined by section 12.1-02-02, violated a state or federal environmental law, rule, or permit;

   g. The violation is a result of gross negligence, as defined by section 1-01-17; or

   h. The regulatory agency has assumed primacy over a federally-delegated environmental program and a waiver of penalty authority for the violations would result in a state program less stringent than the federal program or the waiver would violate any federal rule required to maintain primacy. If a federally-delegated program requires the imposition of a penalty for a

violation, the voluntary disclosure of the violation shall, to the extent allowed under federal law or rule, be considered a mitigating factor in determining the penalty amount.

3. To qualify for subsection 2's penalty exemption, the regulated entity must notify the regulatory agency in writing before beginning the environmental audit. The notice must specify the facility or portion of the facility to be audited, the audit's anticipated ~~time the audit will begin~~start date, and the general scope of the audit. ~~Once initiated, t~~The environmental audit must be completed within 180 days of the start date, unless the regulatory agency agrees in writing to an extension. Nothing in this section shall be construed to authorize uninterrupted or continuous environmental audits.

4. Reporting a violation is mandatory and is therefore not voluntary under this section if the reporting is required by chapter 23-25, 23-20.3, 23-29, 38-08, or 61-28, any rule or permit implementing those chapters, any federal law or rule, or any administrative or court order.

5. Notwithstanding subsection 2, the regulatory agency may pursue civil penalties against a regulated entity for violations disclosed under this section if the regulatory agency finds the regulated entity:

    a. Intentionally misrepresented material facts concerning the violations disclosed or the nature of extent of any damage to human health or the environment; or

    b. Initiated a self-audit to avoid liability for violations after the regulated entity's knowledge or imminent discovery.

6. ~~An environmental audit report or summary of such a report submitted by a regulated entity to the regulatory agency in compliance with this section is a confidential record under chapter 44-04, except for information relating to the types of violations listed in subdivisions a through g of subsection 2 or subject to a regulatory agency finding under subsection 5.~~ [Insert Environmental Audit Privilege language here or in a separate section.]

2
WEIS
2-13-17
HB 1336
Subcommittee

An environmental audit report is privileged and shall not be admissible as evidence in ~~and~~ civil action or proceeding, unless the privilege is asserted for information relating to the types of violations listed in subdivisions a through h of subsection 2 or the privilege is expressly waived by the regulated entity who prepared the audit report. The regulated entity asserting the privilege under this section has the burden of proving the privilege.

HB 1336
Noon 2-13-17
Subcommittee

1. For purposes of this section:

   a. "Environmental audit" means a voluntary, internal, and comprehensive evaluation of facilities or activities that is designed to prevent noncompliance with environmental laws, rules, or permits enforced by a regulatory agency under chapters 23-25, 23-20.3, 23-29, 38-08, or 61-28. An environmental audit may be conducted by an owner, operator, prospective owner or operator. An employee or independent contractor may conduct the environmental audit on behalf of the owner, operator, or prospective owner or operator.

   b. "Environmental audit report" means a set of documents labeled "Environmental Audit Report: Privileged Document" prepared as a result of an environmental audit and shall include:

      i. A description of the scope of the audit;

      ii. The information gained in the audit and findings, conclusions, and recommendations; and

      iii. Exhibits and appendices.

      Exhibits and appendices to the environmental audit report may include interviews with current or former employees, field notes and records of observations, findings, opinions, suggestions, conclusions, guidance, notes, drafts, memoranda, legal analyses, drawings, photographs, laboratory analyses and other analytical data, computer-generated or electronically recorded information, maps, charts, graphs, and surveys and other communications associated with an environmental audit. 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.

   ~~a.~~

   ~~b.~~ c. "Regulatory agency" means the agency with regulatory authority over the facilities or activities that are the subject of the environmental audit.

2. The regulatory agency may not pursue civil penalties for violations found during an environmental audit that are disclosed to the regulatory agency in writing within 45 days after the violation is found, unless:

   a. The violation caused imminent or substantial harm to human health or the environment;

   b. The violation is found by the regulatory agency before a regulated entity discloses the violation in writing to the regulatory agency;

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c. The regulated entity does not correct the violation within 60 days of discovery or, if correction within 60 days is not possible, within a reasonable period as agreed to in writing by the regulatory agency but not to exceed 365 days;

d. The regulated entity has established a pattern of repeated violations of environmental law, rule, permit, or order by committing the same or similar violation that resulted in the imposition of a penalty by a regulatory agency more than once within two years prior to the date of the disclosure;

e. The regulated entity willfully, as defined by section 12.1-02-02, violated a state or federal environmental law, rule, or permit;

f. The violation is a result of gross negligence, as defined by section 1-01-17; or

g. The regulatory agency has assumed primacy over a federally-delegated environmental program and a waiver of penalty authority for the violations would result in a state program less stringent than the federal program or the waiver would violate any federal rule required to maintain primacy. If a federally-delegated program requires the imposition of a penalty for a violation, the voluntary disclosure of the violation shall, to the extent allowed under federal law or rule, be considered a mitigating factor in determining the penalty amount.

3. To qualify for subsection 2's penalty exemption, the regulated entity must notify the regulatory agency in writing before beginning the environmental audit. The notice must specify the facility or portion of the facility to be audited, the audit's anticipated start date, and the general scope of the audit. The environmental audit must be completed within 180 days of the start date, unless the regulatory agency agrees in writing to an extension. Nothing in this section shall be construed to authorize uninterrupted or continuous environmental audits.

4. Reporting a violation is mandatory and is therefore not voluntary under this section if the reporting is required by chapter 23-25, 23-20.3, 23-29, 38-08, or 61-28, any rule or permit implementing those chapters, any federal law or rule, or any administrative or court order.

5. Notwithstanding subsection 2, the regulatory agency may pursue civil penalties against a regulated entity for violations disclosed under this section if the regulatory agency finds the regulated entity:

   a. Intentionally misrepresented material facts concerning the violations disclosed or the nature of extent of any damage to human health or the environment; or

b. Initiated a self-audit to avoid liability for violations after the regulated entity's knowledge or imminent discovery.

6. An environmental audit report is privileged and not admissible evidence in civil actions or proceedings, unless the privilege is expressly waived by the regulated entity that prepared the report. The regulated entity asserting the privilege has the burden of proving the privilege. The privilege does not apply to:

a. Information relating to the types of violations listed in subdivisions a through g of subsection 2.

b. Information relating to a violation that is subject to a regulatory agency's finding under subsection 5.

b.c. Disclosures, notifications, and other information provided by the regulated entity to the regulatory agency under this section.

~~6. [Insert Environmental Audit Privilege language here or in a separate section.]~~

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HB 1336
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1. For purposes of this section:

   a. "Environmental audit" means a voluntary, internal, and comprehensive evaluation of facilities or activities that is designed to prevent noncompliance with environmental laws, rules, or permits enforced by a regulatory agency under chapters 23-25, 23-20.3, 23-29, 38-08, or 61-28. An environmental audit may be conducted by an owner, operator, prospective owner or operator. An employee or independent contractor may conduct the environmental audit on behalf of the owner, operator, or prospective owner or operator.

   b. "Environmental audit report" means a set of documents labeled "Environmental Audit Report: Privileged Document" prepared as a result of an environmental audit and shall include:

      i. A description of the scope of the audit;

      ii. The information gained in the audit and findings, conclusions, and recommendations; and

      iii. Exhibits and appendices.

      Exhibits and appendices to the environmental audit report may include interviews with current or former employees, field notes and records of observations, findings, opinions, suggestions, conclusions, guidance, notes, drafts, memoranda, legal analyses, drawings, photographs, laboratory analyses and other analytical data, computer-generated or electronically recorded information, maps, charts, graphs, and surveys and other communications associated with an environmental audit. 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.

   c. "Regulatory agency" means the agency with regulatory authority over the facilities or activities that are the subject of the environmental audit.

2. The regulatory agency may not pursue civil penalties for violations found during an environmental audit that are disclosed to the regulatory agency in writing within 45 days after the violation is found, unless:

   a. The violation caused imminent or substantial harm to human health or the environment;

   b. The violation is found by the regulatory agency before a regulated entity discloses the violation in writing to the regulatory agency;

c. The regulated entity does not correct the violation within 60 days of discovery or, if correction within 60 days is not possible, within a reasonable period as agreed to in writing by the regulatory agency but not to exceed 365 days;

d. The regulated entity has established a pattern of repeated violations of environmental law, rule, permit, or order by committing the same or similar violation that resulted in the imposition of a penalty by a regulatory agency more than once within two years prior to the date of the disclosure;

e. The regulated entity willfully, as defined by section 12.1-02-02, violated a state or federal environmental law, rule, or permit;

f. The violation is a result of gross negligence, as defined by section 1-01-17; or

g. The regulatory agency has assumed primacy over a federally-delegated environmental program and a waiver of penalty authority for the violations would result in a state program less stringent than the federal program or the waiver would violate any federal rule required to maintain primacy. If a federally-delegated program requires the imposition of a penalty for a violation, the voluntary disclosure of the violation shall, to the extent allowed under federal law or rule, be considered a mitigating factor in determining the penalty amount.

3. To qualify for subsection 2's penalty exemption, the regulated entity must notify the regulatory agency in writing before beginning the environmental audit. The notice must specify the facility or portion of the facility to be audited, the audit's anticipated start date, and the general scope of the audit. The environmental audit must be completed within 180 days of the start date, unless the regulatory agency agrees in writing to an extension. Nothing in this section shall be construed to authorize uninterrupted or continuous environmental audits.

4. Reporting a violation is mandatory and is therefore not voluntary under this section if the reporting is required by chapter 23-25, 23-20.3, 23-29, 38-08, or 61-28, any rule or permit implementing those chapters, any federal law or rule, or any administrative or court order.

5. Notwithstanding subsection 2, the regulatory agency may pursue civil penalties against a regulated entity for violations disclosed under this section if the regulatory agency finds the regulated entity:

   a. Intentionally misrepresented material facts concerning the violations disclosed or the nature of extent of any damage to human health or the environment; or

   b. Initiated a self-audit to avoid liability for violations after the regulated entity's knowledge or imminent discovery.

6. An environmental audit report is privileged and not admissible evidence in civil actions or proceedings, unless the privilege is expressly waived by the regulated entity that prepared the report. The regulated entity asserting the privilege has the burden of proving the privilege. The privilege does not apply to:

    a. Information relating to the types of violations listed in subdivisions a through g of subsection 2.

    b. Information relating to a violation that is subject to a regulatory agency's finding under subsection 5.

    c. Disclosures, notifications, and other information provided by the regulated entity to the regulatory agency under this section.

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Title.

Prepared by the Legislative Council staff for
Representative Keiser
February 16, 2017

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1336

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for limitations of penalties for environmental audits.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1.

Environmental audits - Violations.

1. As used in this section:

   a. "Environmental audit" means a voluntary, internal, and comprehensive evaluation of a facility or activity which is intended to prevent noncompliance with environmental laws, rules, or permits enforced by a regulatory agency under chapter 23-25, 23-20.3, 23-29, 38-08, or 61-28. An environmental audit may be conducted by an owner, operator, or prospective owner or operator. An employee or independent contractor may conduct an environmental audit on behalf of the owner, operator, or prospective owner or operator.

   b. "Environmental audit report" means a set of documents labeled "Environmental Audit Report: Privileged Document" prepared as a result of an environmental audit which must include a description of the scope of the audit; the information gained in the audit and findings, conclusions, and recommendations; and exhibits and appendices. The exhibits and appendices to the environmental audit report may include interviews with current or former employees, field notes and records of observations, findings, opinions, suggestions, conclusions, guidance, notes, drafts, memoranda, legal analyses, drawings, photographs, laboratory analyses and other analytical data, computer-generated or electronically recorded information, maps, charts, graphs, and surveys and other communications associated with an environmental audit.

   c. "Regulatory agency" means the agency with regulatory authority over the facility or activity.

   d. "Willfully" has the same meaning as provided under section 12.1-02-02.

2. A regulatory agency may not pursue civil penalties for a violation found during an environmental audit which the regulated entity discloses to the regulatory agency in writing within forty-five days after the violation is found, unless:

   a. The violation caused imminent or substantial harm to human health or the environment;

b. The violation is found by the regulatory agency before the regulated entity discloses the violation in writing to the regulatory agency;

c. The regulated entity does not correct the violation within sixty days of discovery or, if correction within sixty days is not possible, within a reasonable period as agreed upon in writing by the regulatory agency, but not to exceed three hundred sixty-five days;

d. The regulated entity established a pattern of repeated violations of environmental law, rule, permit, or order by committing the same or similar violation that resulted in the imposition of a penalty by a regulatory agency more than once within two years before the date of the disclosure;

e. The regulated entity willfully violated a state or federal environmental law, rule, or permit;

f. The violation is a result of gross negligence, as defined under section 1-01-17; or

g. The regulatory agency assumed primacy over a federally delegated environmental program and a waiver of penalty authority for the violation would result in a state program less stringent than the federal program or the waiver would violate any federal rule required to maintain primacy. If a federally delegated program requires the imposition of a penalty for a violation, to the extent allowed under federal law or rule, the voluntary disclosure must be considered a mitigating factor in determining the penalty amount.

3. To qualify for a penalty exemption under subsection 2, the regulated entity shall notify the regulatory agency in writing before beginning the environmental audit. The notice must specify the facility or portion of the facility to be audited, the audit's anticipated start date, and the general scope of the audit. Unless the regulatory agency agrees in writing to an extension, the environmental audit must be completed within one hundred eighty days of the start date. This section may not be construed to authorize uninterrupted or continuous environmental audits.

4. Reporting a violation is mandatory if the reporting is required under chapter 23-25, 23-20.3, 23-29, 38-08, or 61-28, any rule or permit implementing those chapters, any federal law or rule, or any administrative or court order.

5. Notwithstanding subsection 2, the regulatory agency may pursue civil penalties against a regulated entity for a violation disclosed under this section if the regulatory agency finds the regulated entity:

   a. Intentionally misrepresented material facts concerning the violation disclosed or the nature of extent of any damage to human health or the environment; or

   b. Initiated a self-audit to avoid liability for a violation after the regulated entity's knowledge or imminent discovery.

6. Unless the privilege is expressly waived by the regulated entity that prepared the report, an environmental audit report is privileged and not

admissible evidence in a civil action or proceeding. The regulated entity asserting this privilege has the burden of proving the privilege. The privilege does not apply to:

a. Information relating to the types of violations listed in subsection 2.

b. Information relating to a violation subject to a regulatory agency's finding under subsection 5.

c. Disclosures, notifications, and other information provided by the regulated entity to the regulatory agency under this section.

7. Failure to label a document in an exhibit or appendix to an environmental audit report does not constitute a waiver of the audit privilege under this section or create a presumption the privilege does not apply."

Renumber accordingly

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NORTH DAKOTA
PETROLEUM
COUNCIL

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701.223.6380 | ndpc@ndoil.org | www.NDOil.org

House Bill 1336
Testimony of Zachary Weis
NDPC Regulatory Committee Chairman
Marathon Oil Company
Senate Energy & Natural Resource Committee
March 9, 2017

Good Morning Madam Chair Unruh and members of the Senate Energy and Natural Resource Committee. For the record, my name is Zachary Weis and I represent Marathon Oil Company, a global exploration and production company based in Houston, Texas. I also serve as the Chairman of the regulatory committee for the North Dakota Petroleum Council.

I am here in support of House Bill 1336. The environmental audit program introduced through this bill creates a useful tool for industry to comply with state environmental laws and regulations. The voluntary nature of the audit program lends to increased transparency between industry and state regulators and provides the opportunity for industry to show in good faith violations without the threat of ramifications.

This concept of an audit privilege act is not new to the environmental, health and safety world. Similar programs are in place in many of the other states we operate in like Wyoming, Oklahoma and Texas. The bill in front of you is a collaborative effort between Representatives in the House, the industry and regulators. This version represents a compromise by all to establish a program that progresses compliance within the state.

To best describe this bill and the audit program, I will step you through the sections and how we would typically use this in our operations.

Subsection 3 allows for a notification to be made to the regulatory agency before the beginning of an environmental audit. The notice will include a list of locations/facilities to be audited, the audits anticipated start date and a scope of work. The regulated entity will have 180 day to complete the audit, unless an extension is granted.

If a violation is identified while conducting the audit, subsection 2 describes the process for disclosing that violation. The regulated entity will disclose the violation within 45 days after discovery of the violation. As long as the violation does not conflict with any of the circumstances listed in subsections 2 a through g, the regulatory agency will not pursue civil penalties for the identified violation.

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The voluntary audit program itself does not impede, restrict or limit an agency from doing their routine and required inspections. In fact, subsections 2 a through g identify situations when a violation would not receive immunity. Examples of this would be when a violation caused imminent or substantial harm to human health or the environment, if the violation is discovered by the agency before it is reported, if the violation is not corrected in the prescribed amount of time or if the regulated entity willfully violated a state or federal law.

Finally, it is important to know that both the notice of audit and disclosure of violation provided to the agency are not confidential or privileged documents and are available to the public. Subsection six provides the audit report prepared for the regulated entity be a privileged document and not admissible as evidence in a civil action or proceeding.

Thank you for the opportunity to speak on HB 1336 and I am happy to answer any they may have.

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Testimony
House Bill 1336
Senate Energy and Natural Resources Committee
March 9, 2017, 9:30 a.m.
North Dakota Department of Health

Good morning Chairman Unruh and members of the Senate Energy and Natural Resources Committee. My name is David Glatt, Environmental Health Section Chief for the North Dakota Department of Health. We are responsible for the implementation of the vast majority of environmental protection programs in the state, including programs delegated to the state through agreements with the U.S. Environmental Protection Agency. I am here today to provide testimony in support of HB 1336.

We support HB 1336 in the form recently approved by the House of Representatives. It allows companies to conduct and report findings of an environmental audit to the Department of Health or the Department of Mineral Resources and not receive civil penalties under specific circumstances. The Health Department believes HB 1336 can result in improved compliance rates, environmental quality and public safety.

This concludes my testimony. I am happy to answer any questions you may have.

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