

HEALTH AND SAFETY CODE

TITLE 13. ENVIRONMENTAL, HEALTH, AND SAFETY AUDIT PRIVILEGE ACT
CHAPTER 1101. ENVIRONMENTAL, HEALTH, AND SAFETY AUDIT PRIVILEGE
ACT

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 1101.001. SHORT TITLE. This chapter may be cited as the Texas Environmental, Health, and Safety Audit Privilege Act. Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

Sec. 1101.002. PURPOSE; CIRCUMVENTION BY RULE PROHIBITED. (a) The purpose of this chapter is to encourage voluntary compliance with environmental and occupational health and safety laws.

(b) A regulatory agency may not adopt a rule or impose a condition that circumvents the purpose of this chapter. Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

Sec. 1101.003. DEFINITIONS. (a) In this chapter:

(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 1101.051.

(3) "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.

(4) "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).

(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) "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 chapter if the person acts intentionally within the meaning of Section [6.03](#), Penal Code.

(c) For purposes of this chapter, 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 chapter 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 chapter, the term "environmental or health and safety law" shall be construed broadly.

Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. [1488](#)), Sec. 20.002(a), eff. September 1, 2017.

Sec. 1101.004. APPLICABILITY. The privilege established by this chapter applies to environmental or health and safety audits that are conducted on or after May 23, 1995.

Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

Sec. 1101.005. RELATIONSHIP TO OTHER RECOGNIZED PRIVILEGES. This chapter 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.

Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

SUBCHAPTER B. GENERAL AUDIT PROVISIONS

Sec. 1101.051. AUDIT REPORT. (a) An audit report is a report that includes each document and communication, other than those described by Section 1101.102, 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) 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 privilege established by this chapter or create a presumption that the privilege does or does not apply.

Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

Sec. 1101.052. PERIOD FOR COMPLETION OF AUDIT. (a) Unless an extension is approved by the governmental entity with regulatory authority over the regulated facility or operation based on reasonable grounds, an environmental or health and safety 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 Section 1101.053.

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

Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

Sec. 1101.053. CONTINUATION OF AUDIT BEGUN BEFORE ACQUISITION CLOSING DATE. A person that begins an environmental or

health and safety 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 [1101.155](#).
Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. [1488](#)), Sec. 20.002(a), eff. September 1, 2017.

SUBCHAPTER C. PRIVILEGE

Sec. 1101.101. SCOPE OF PRIVILEGE. (a) An audit report is privileged as provided by this section.

(b) Except as provided by Sections [1101.102](#), [1101.103](#), and [1101.104](#), 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, may not 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 [1101.051](#) that was made as part of the preparation of an audit report and that is addressed in a privileged part of an audit report; and

(2) 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 [1101.103](#)(b); 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 [1101.051](#).

(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 created by this section has the burden of establishing the applicability of the privilege. Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

Sec. 1101.102. NONPRIVILEGED MATERIALS. (a) The privilege established by Section 1101.101 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 audit report.

(b) This section does not limit the right of a person to agree to conduct and disclose an audit report.

Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

Sec. 1101.103. EXCEPTION: WAIVER. (a) The privilege established by Section 1101.101 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 1101.101 if the disclosure:

(1) is made to address or correct a matter raised by the audit and is made only to:

(A) a person employed by the owner or operator, including a temporary or contract employee;

(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;

(D) an independent contractor of 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);

(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 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 by Subsection (b)(2) 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) 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 by 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 labeled with 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) This section may not be construed to circumvent the protections provided by federal or state law for individuals who disclose information to law enforcement authorities.

Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

Sec. 1101.104. 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 by application of Section 1101.102; 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) 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 information that, by application of Section 1101.102, is not subject to the privilege.

(e) A determination of a court under this section is subject

to interlocutory appeal to an appropriate appellate court.

Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

Sec. 1101.105. REVIEW OF PRIVILEGED DOCUMENTS BY GOVERNMENTAL AUTHORITY. (a) If an audit report is obtained, reviewed, or used in a criminal proceeding, the administrative or civil evidentiary privilege established by Section 1101.101 is not waived or eliminated for any other purpose.

(b) Notwithstanding the privilege established by Section 1101.101, a regulatory agency may review information that is required to be available under a specific state or federal law, but that review does not waive or eliminate the administrative or civil evidentiary privilege if 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 before obtaining the 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 unless the review, disclosure, or use is authorized under Section 1101.102. 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.

Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

SUBCHAPTER D. VOLUNTARY DISCLOSURE; IMMUNITY

Sec. 1101.151. IMMUNITY FOR VIOLATION VOLUNTARILY DISCLOSED. Except as otherwise provided by this subchapter, 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.

Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

Sec. 1101.152. NATURE OF VOLUNTARY DISCLOSURE. (a) A disclosure is voluntary for purposes of this subchapter only if:

(1) the disclosure was made:

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

(B) not later 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 making 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:

(A) injury or imminent and substantial risk of serious injury to one or more persons at the site; or

(B) off-site substantial actual harm or imminent and substantial risk of harm to persons, property, or the environment.

(b) For a disclosure described by Subsection (a)(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 subchapter if the disclosure is a report to a regulatory agency required solely by a specific condition of an enforcement order or decree.

Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

Sec. 1101.153. BURDEN OF PROOF WITH RESPECT TO VOLUNTARY DISCLOSURE. (a) 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 created by this subchapter has the burden of establishing a prima facie case that the disclosure was voluntary.

(b) After the person claiming the immunity establishes a prima facie case of voluntary disclosure, other than a case in which immunity does not apply under Section 1101.157, the enforcement authority has the burden of rebutting the presumption by a preponderance of the evidence.

Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

Sec. 1101.154. NOTICE REQUIREMENT. (a) This section does not apply to an environmental or health and safety 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.

(b) To receive immunity under this subchapter, a facility conducting an environmental or health and safety audit under this chapter must provide notice to an appropriate regulatory agency of the fact that it is planning to begin the audit.

(c) The notice must specify:

(1) the facility or portion of the facility to be audited;

(2) the anticipated time the audit will begin; and

(3) the general scope of the audit.

(d) The notice may provide notification of more than one scheduled environmental or health and safety audit at a time.

Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

Sec. 1101.155. NOTICE REQUIREMENT FOR CERTAIN AUDITS BEGUN BEFORE ACQUISITION CLOSING DATE. (a) A person that begins an environmental or health and safety audit before becoming the owner of the regulated facility or operation that is the subject of the audit may continue the audit after the acquisition closing date if, not later 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.

(b) The notice must specify:

(1) the facility or portion of the facility being audited;

(2) the date the audit began; and

(3) the general scope of the audit.

(c) 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.

Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

Sec. 1101.156. IDENTIFICATION OF VIOLATION IN COMPLIANCE HISTORY REPORT. A violation that has been voluntarily disclosed and to which immunity applies under this subchapter must be identified in a compliance history report as being voluntarily disclosed.

Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

Sec. 1101.157. EXCEPTION TO IMMUNITY: CERTAIN VIOLATIONS AND OFFENSES; IMPOSITION OF PENALTY; MITIGATING FACTORS. (a) The immunity established by this subchapter 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 that gives the violator a clear advantage over its business competitors.

(b) A penalty that is imposed under Subsection (a) 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.

Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.

Sec. 1101.158. EXCEPTION TO IMMUNITY: VIOLATIONS THAT CONSTITUTE PATTERN OF DISREGARD OF ENVIRONMENTAL OR HEALTH AND SAFETY LAWS. (a) The immunity established by this subchapter does not apply if a court or administrative law judge finds that the person claiming the immunity has, after May 23, 1995, repeatedly or continuously committed significant violations and 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.

(b) For violations committed by a person to be considered a "pattern" under Subsection (a), the person must have committed a series of violations that were due to separate and distinct events occurring within a three-year period at the same facility or operation.

Added by Acts 2017, 85th Leg., R.S., Ch. 324 (S.B. 1488), Sec. 20.002(a), eff. September 1, 2017.