

International Erosion Control Association

Texas Stormwater Conference

September 25, 2018

Environmental Audits

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Agenda

- Introduction – Why Audit?
- About Environmental Audits
- Options and Legal Issues
- Summary

Introduction

Why Conduct an Audit?

Overwhelming World of Environmental Law

1. Environmental regulations are all encompassing
2. Daunting volume of environmental law
3. Many different regulators
4. Vigilant investigation and enforcement

1. Environmental regulations are all encompassing

What is regulated?

- Waste
- Water
- Air

Texas Commission on Environmental Quality
Air Permits Division
De Minimis Facilities or Sources
Version – December 2015

The following list contains facilities or sources that are de minimis for air emissions, which means that registration or authorization prior to construction is not required per Title 30, Texas Administrative Code, Section 116.119 (a)(1). Even though New Source Review preconstruction authorizations are not required for the following facilities or sources, other TCEQ environmental authorizations may be applicable.

Unconditional Facilities/Sources

- Music and Film Studios
- Farm and Ranch Refueling Operations
- Office Equipment
- Modular, Self-contained Abrasive Blasting Cabinets (Parts Cleaning)
- Deer Block Manufacturing
- Laundromats (Excluding Dry Cleaning)
- Warehouses (Storage of Closed Containers Only)
- Educational Laboratories/Training
- Equipment used for hydraulic or hydrostatic testing.
- Platen presses used for laminating.
- Vacuum-producing devices used in laboratory operations.

Facilities/Sources for Personal Use

- Repair of Personal Recreational Equipment
- Ammunition Reloading (Bullet Making)
- Still Photo Film Processing
- Gardening, Composting, and Mulching
- Hot Tub Cleaning and Maintenance
- Water Treatment System Maintenance
- Heating and Cooling Equipment
- Fireplaces and Barbecues
- Water Heaters
- Water Softeners
- Dish and Clothes Washers and Dryers
- Water Treatment Equipment (Well Water)
- Food Preparation
- Non-industrial and noncommercial ovens, mixers, blenders, barbecue pits, and cookers if the products are edible and intended for human consumption.
- Vacuum cleaning systems used exclusively for non-industrial, noncommercial, or residential housekeeping purposes.

Retail/Service Facilities/Sources

- Beauty Shops
- Barber Shops
- Massage Parlors
- Pet Shops
- Pet Groomers

2. Daunting volume of environmental law

Where are the regulations?

EPA Administered Statutes

1. Atomic Energy Act (AEA)
2. Beaches Environmental Assessment and Coastal Health (BEACH) Act
3. Chemical Safety Information, Site Security and Fuels Regulatory Relief Act
4. Clean Air Act (CAA)
5. Clean Water Act (CWA)
6. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or Superfund)
7. Emergency Planning and Community Right-to-Know Act (EPCRA)
8. Endangered Species Act (ESA)
9. Energy Independence and Security Act (EISA)
10. Energy Policy Act
11. Federal Food, Drug, and Cosmetic Act (FFDCA)
12. Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)
13. Food Quality Protection Act (FQPA)
14. Marine Protection, Research, and Sanctuaries Act (MPRSA, also known as the Ocean Dumping Act)
15. National Environmental Policy Act (NEPA)
16. National Technology Transfer and Advancement Act (NTTAA)
17. Noise Control Act
18. Nuclear Waste Policy Act (NWPA)
19. Occupational Safety and Health (OSHA)
20. Oil Pollution Act (OPA)
21. Pollution Prevention Act (PPA)
22. Resource Conservation and Recovery Act (RCRA)
23. Safe Drinking Water Act (SDWA)
24. Shore Protection Act (SPA)
25. Compensation, and Liability Act
26. Toxic Substances Control Act (TSCA)

Texas Environmental Laws

- Texas implementation of Federal Statutes & Regulations
- Texas Statutes & Regulations
- Local Ordinances

3. Many different regulators

Who regulates and enforces it all?

Many Governmental Environmental Regulators

Federal:

Environmental Protection Agency (EPA)
Department of Agriculture
Department of Energy
Corps of Engineers
Coast Guard
OSHA
Etc.

Texas:

Texas Commission on Environmental Quality (TCEQ)
Railroad Commission of Texas
Texas Parks & Wildlife
Public Utility Commission
Texas Department of State Health Services
Counties
Municipalities
Etc.

4. Vigilant investigation and enforcement

Are the regulations enforced?

TCEQ 2017 Enforcement Statistics

- 104,000 routine investigations conducted
- 4,963 complaint investigations
- Over 17,000 Notices of Violation (NOVs) issued
- 1,496 Administrative Orders
- \$10.9 million in penalties + \$4.9 millions SEPs
- \$1.3 million Attorney General civil judicial orders
- 21 Criminal conviction cases
- \$3,440,674 criminal fines

2015 EPA Settlement with Noble Energy, Inc.

- Oil and natural gas exploration and production company
- 3,400 condensate storage tank batteries in the Denver area (ozone nonattainment area)
- Allegation: inadequate vapor control systems leading to uncontrolled emissions
- Penalties:
 - \$60.0 million on corrective actions
 - \$4.95 million civil penalty
 - \$4.5 million on environmental mitigation projects
 - \$4.0 million on supplemental environmental projects

Environmental Audits

What is an Environmental Audit?

“Environmental or health and safety audit” or “audit” means a systematic voluntary evaluation, review, or assessment of compliance with environmental or health and safety laws or with any permit issued under an environmental or health and safety law conducted by an owner or operator, an employee of an owner or operator, a person, including an employee or independent contractor of the person, that is considering the acquisition of a regulated facility or operation, or an independent contractor of: (A) a regulated facility or operation; or (B) an activity at a regulated facility or operation.

The Texas Environmental, Health, and Safety Audit Privilege Act (Tex. Rev. Civ. Stat. Ann. art. 4447cc)

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Costs, Risks, and Benefits of an Audit

Costs:

- Dollars for staff, consultants, lawyers
- Time investment
- Cost of corrective actions

Risks:

- Discovery of a significant noncompliance
- Generation of discoverable compliance information (“road map” for regulatory agencies or plaintiffs)

Costs, Risks, and Benefits of an Audit

Benefits:

- Avoid penalties and fines
- Avoid business interruptions
- Avoid bad publicity
- Cost savings due to elimination of needless compliance activities
- Privileges available for audit information
- Possible avoidance of regulatory inspection
- Peace of mind

When to Conduct an Audit?

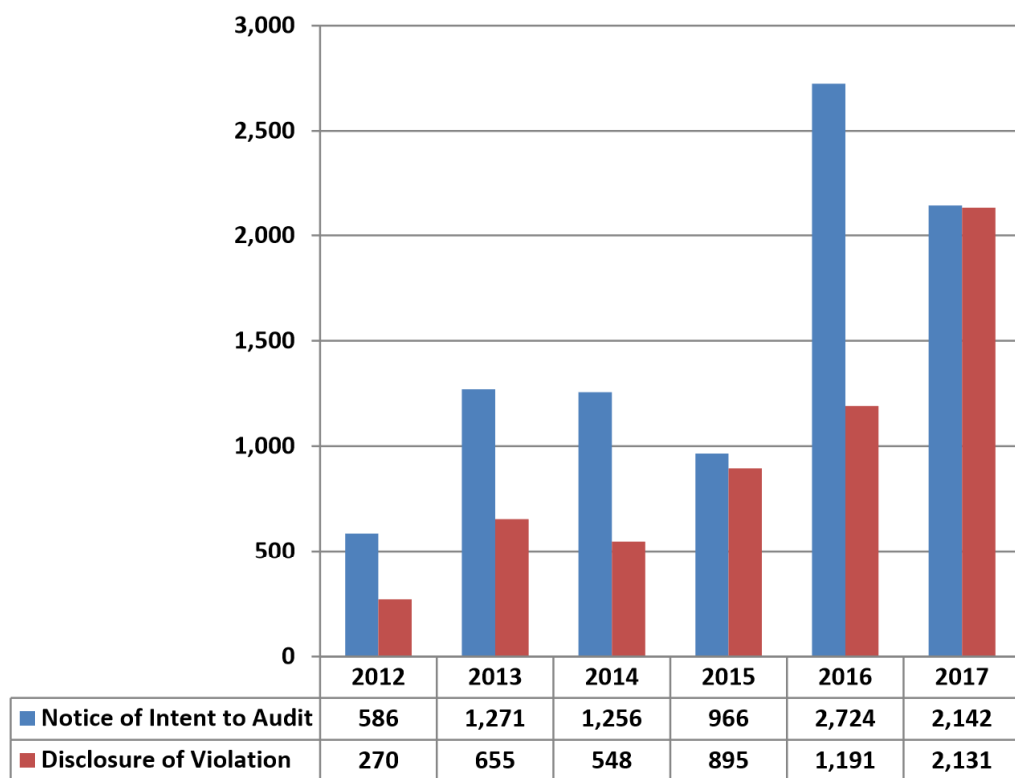
Anytime, but audits are often prompted by:

- Purchase of a facility
- New management or new environmental staff
- Concerns about compliance status
- Routine compliance self-evaluation

How common are environmental audits?

TCEQ Statistics

Figure 1-5: Summary of Texas Environmental Health and Safety Audit Privilege Act Statistics



Options and Legal Issues

Environmental Audit Options

1. Just do it
2. Directed by an attorney
3. EPA Environmental Audit Policy
4. Texas Environmental, Health, and Safety Audit Privilege Act

Environmental Audit Options

1. Just do it

- Identify & fix violations
- Texas privileges for audit report
- No immunity for violations
- On-going exposure for past violations (records)

Environmental Audit Options

2. Directed by an attorney

- State and federal attorney-client, attorney work product privileges
- Purpose of the audit must be to obtain legal advice
- No immunity from penalties
- Attorney actively involved with audit and any unanticipated audit issues

Environmental Audit Options

3. EPA Environmental Audit Policy

- Waive gravity-based (punitive) portion of penalties
- No prior notice required
- No affirmative statement of violation is required
- No privileges (“EPA won’t routinely request info”)
- Policy applied at EPA’s discretion
- Recently revised to encourage audits of upstream oil and gas industry (new owners of storage tank battery vapor control systems)
- Nine criteria to qualify for policy

EPA Audit Eligibility Criteria

1. Systematic discovery, *e.g.*, discovery during an environmental audit.
2. Voluntary discovery, meaning discovery was not otherwise legally required.
3. Prompt disclosure to EPA, within 21 days of discovery.
4. Independent discovery and disclosure (*i.e.*, before EPA finds out).
5. Correct the violations within 60 calendar days (an extension may be requested).
6. Prevent recurrence.
7. Repeat violations are ineligible (*i.e.*, no pattern of violations).
8. Certain types of violations are ineligible (*e.g.*, serious actual harm, imminent and substantial endangerment, and violations of terms of an administrative order).
9. Cooperation with EPA.

Environmental Audit Options

4. Texas Environmental Health and Safety Audit Act

- Highly successful program
- Privileges for Audit Report
- A state agency is prohibited from requesting or reviewing an Audit Report
- Immunity from penalties
- Procedures and other requirements apply, e.g., prior notice of audit, prompt disclosure, etc.
- Improves a facility's TCEQ compliance history score
- No privilege or immunity for federal-only violations
- TCEQ's "PINNACLE" audit criteria

TCEQ Criteria for Penalty Immunity under Texas Audit Act

- P — disclosure made *promptly*
- I — disclosure made *in writing* by certified mail
- N — violation was *not independently detected*, or an investigation of the violation was not initiated before disclosure
- N — the violation was *noted and disclosed* under a voluntary environmental audit
- A — *appropriate efforts* to correct the noncompliance within a reasonable amount of time;
- C — the disclosing person *cooperates* in the investigation
- L — violation *lacks injury or imminent and substantial risk of injury*
- E — disclosure not required by an *enforcement order or decree*.

Arkansas

- Arkansas Code Annotated (AR Code Ann.) 8-1-301 to 8-1-312
 - Privilege for voluntary audit report
- Arkansas Department of Environmental Quality (“ADEQ”)
 - Environmental Self-Disclosure Incentive Policy
 - “May” waive gravity portion of penalty if eight criteria are satisfied

Lousiana

- No audit law or policy?

Oklahoma

- Title 252. Department of Environmental Quality, Chapter 4. Rules of Practice and Procedure
 - Section 252:4-9-5: Considerations for self-reporting of non-compliance
 - “Will not seek penalties” when eight criteria are satisfied
- Privilege?

Summary

Summary: Environmental Audits

- Controlled approach for evaluating compliance with environmental, health & safety laws
- Often prompted by a change at a facility (acquisition, new environmental staff)
- Texas Audit Act provides privileges for information and immunity for violations
- EPA Audit Policy can waive or reduce penalties for federal-only violations
- An attorney directed audit provides privileges for federal-only and/or criminal violations, and involves counsel with unforeseen issues

Thanks for your attention!

Environmental Audits

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