

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

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Introduction

This is a guide for those who plan to use the provisions of the Oklahoma Environmental, Health, and Safety Audit Privilege Act, 27A O.S. § 1-4-110 et seq (Audit Act). Under the Audit Act, certain documents and information gathered as part of an environmental 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. This guidance will cover the process of submitting documents to the Oklahoma Department of Environmental Quality (DEQ), including a submission indicating intent to initiate an environmental audit and submissions disclosing violations discovered.

Please note that this guidance is intended to provide a basic insight to the Audit Act and should not be relied upon as regulation. (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 Audit Act as it relates to the DEQ's jurisdiction.

Background

On February 4, 2019, Senate Bill 1003, the Oklahoma Environmental, Health, and Safety Audit Privilege Act, was introduced by the legislature. The Audit Act is modeled after the Texas Environmental, Health, and Safety Audit Privilege Act, which was enacted in 1995, and amended in 1997. On April 29, 2019, the Audit Act was signed into law by the governor, with an effective date of November 1, 2019.

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 implementing corrective actions to address any issues of noncompliance. While the Audit Act does not explicitly define the term “person”, DEQ interprets the term person broadly, consistent with the definition of “person” at 27A O.S. § 2-1-102.

The two primary incentives offered by the Act are a limited evidentiary privilege for certain information gathered during a voluntary audit and an immunity from administrative and civil penalties for certain violations voluntarily disclosed as a result of such 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 of the 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.

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.

Submissions Required under the Audit Act

Three types of submissions are anticipated under the Audit Act: a Notice of Audit, a Disclosure of Violation, and a Request for Extension. In order to take advantage of the immunity offered by the Act, a facility must give notice to the DEQ before the beginning of an environmental audit. 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 DEQ if it seeks to extend the environmental audit more than six months beyond the date it was begun.

All submissions should be sent to the appropriate division that the environmental audit will affect. If a person is conducting an environmental audit that will affect more than one division at DEQ, then separate notices must be submitted to each affected division.

Note. 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 (NOA) is the form a submitted on behalf of a regulated facility or operation to the DEQ before beginning an environmental audit. The Audit Act does not require that a NOA be given to DEQ, however in order to receive immunity a facility must give notice to DEQ that it is planning to commence an environmental audit [Audit Act §10(H)]. If a person fails to submit a NOA, the privilege offered by the Audit Act is still available. 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 should be submitted in writing by certified mail. Though not required, certified mail is in the person's best interest, in part because it documents the time the NOA was mailed.

An NOA should include the following information to facilitate the DEQ's processing and to fulfill the requirements of the Audit Act:

- the legal name of the person submitting the notice and relationship of that person to the facility or facilities to be audited
- the physical location of the regulated facility (or facilities) to be audited. This includes the address, city, county and legal description

- a description of the facility, portion of the facility, and/or operations to be audited, including the applicable DEQ permit numbers
- specific date and time the audit will commence (day, month, and year)
- a general scope of the audit, with sufficient detail to enable a determination of whether subsequently discovered violations are included
- whether the audit is being conducted in connection with a potential purchase/sale transaction

Note. 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.

What about potential purchasers?

For a potential purchaser that acquires a facility that is undergoing an environmental audit prior to the acquisition closing date, the purchaser may continue the audit after the acquisition closing date, and receive the immunity offered under the Audit Act, if an NOA is provided to DEQ no later than forty-five (45) days after the acquisition closing date. The NOA must include the following:

- a statement that the potential purchaser intends to continue the audit
- the legal name of the potential purchaser
- the physical location of the regulated facility (or facilities) to be audited. This includes the address, city, county and legal description
- a description of the facility, portion of the facility, and/or operations to be audited, including the applicable DEQ permit number
- specific date and time the audit will commence (day, month, and year)
- a general scope of the audit, with sufficient detail to enable a determination of whether subsequently discovered violations are included

Additionally, the potential purchaser must certify that before the acquisition closing date:

- the potential purchaser was not responsible for the scope of the environmental, health, or safety compliance being audited at the facility
- the potential purchaser did not have the largest ownership share of the seller
- the seller did not have the largest ownership share of the potential purchaser
- the potential purchaser and seller did not have a common corporate parent or common majority interest.

Disclosure of Violation (DOV)

A Disclosure of Violation (DOV) is the notice or disclosure made by a person to DEQ *promptly* upon discovery of a violation as a result of a voluntary environmental audit. In the context of a pre-acquisition audit, a DOV must be made within 45 days after the acquisition closing date.

[Audit Act §10(B)(1)(b)]. A person wishing to take advantage of the immunity from penalty must make a proper voluntary disclosure of the violation.

An adequate DOV must be sent in writing by certified mail to the appropriate division of DEQ [Audit Act §10(B)(2)]. To comply with the requirements of the Audit Act and receive the full benefits of immunity, a person must promptly send a DOV upon discovery of a violation. This means that during the course of an audit, multiple DOVs may be submitted.

A DOV should include all of the following information to fulfill the requirements of the Audit Act and to facilitate the DEQ's processing of the DOV:

- the legal name of the person audited
- a reference to the date of the relevant NOA
- the certified-mail reference number of the NOA
- the time of initiation and completion 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
- a corrective action plan
- the status and schedule of corrective action
- the duration of the violation (from the date the violation began to the date corrective action was completed or is expected to be completed)

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 the specific permit condition that was violated should be stated. A copy of the condition of the permit that was in effect during the time of the violation must be included in the DOV.

To qualify for immunity, a person must correct the violation within a reasonable time. When submitting a DOV, a person should describe the corrective action that will be taken to achieve compliance and the projected date of compliance. If the DEQ 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 DEQ that compliance was achieved and provide the date of compliance for each violation.

Note. The violation disclosed must be discovered as a result of a voluntary environmental audit. Violations discovered during routine environmental compliance inspections will not be considered part of a voluntary environmental audit for the purposes of the Audit Act.

What about new owners?

In the context of a pre-acquisition audit, if the violation was discovered during an audit conducted before the acquisition closing date by the potential purchaser of the facility, then the DOV must be submitted no later than forty-five (45) days after the acquisition closing date.

The potential purchaser must also certify in the DOV that:

- the potential purchaser was not responsible for the scope of the environmental, health, or safety compliance being audited at the facility
- the potential purchaser did not have the largest ownership share of the seller
- the seller did not have the largest ownership share of the potential purchaser
- the potential purchaser and seller did not have a common corporate parent or common majority interest

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 after the date the audit is initiated; or the acquisition closing date, if the person continues the audit” 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 period along with sufficient information for DEQ 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, 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(I)(1)]. This notice of a continued audit must contain specific certifications relating to the business relationship between the seller and the person regarding the control of the facility before the closing date [Audit Act §10(I)(2)-(3)].

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 DEQ may limit the availability of privilege and immunity.

Conclusion of an Audit

At the conclusion of an audit, a final submission should be sent to DEQ which states that the audit has been completed. The final submission should include the reference date of the NOA and the facilities that were audited.

Mailing Address

All notices and communications related to an environmental audit should be sent to the appropriate division of DEQ via certified mail.

Air Quality Division:

Air Quality Division
Oklahoma Department of Environmental Quality
P.O. Box 1677
Oklahoma City, OK 73101-1677

ATTN: Air Quality Audit Coordinator

Land Protection Division:

Land Protection Division
Oklahoma Department of Environmental Quality
P.O. Box 1677
Oklahoma City, OK 73101-1677

ATTN: Land Protection Audit Coordinator

Water Quality Division:

Water Quality Division
Oklahoma Department of Environmental Quality
P.O. Box 1677
Oklahoma City, OK 73101-1677

ATTN: Water Quality Audit Coordinator

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. DEQ 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, 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 DEQ 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.

Note. All privileged information contained in an audit report should be clearly labeled: COMPLIANCE REPORT: PRIVILEGED DOCUMENT. DEQ will *not* accept audit reports submitted under claims of confidentiality unless there is a confidentiality agreement already in place. Any audit report submitted without an existing Confidentiality Agreement in place will be returned.

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 Audit Act. 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 DEQ personnel pursuant to a **confidentiality agreement** or under a claim of confidentiality.

Disclosure of an audit report to DEQ personnel (“government official of a state”) does not waive the privilege if the 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 DEQ. [Audit Act §6(B)(2)(d)].

However, DEQ does not accept audit reports submitted to DEQ under claims of confidentiality; instead, DEQ will return any such audit to the sender. DEQ 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, DEQ maintains a policy of not accepting audit reports submitted under claims of confidentiality.

Guidance. DEQ personnel will not accept any information offered under a claim of confidentiality. Any DEQ employee who receives a document offered under such a claim should return it immediately, without review. Also, no DEQ employee should request, review, accept, or use an audit report during an inspection without first consulting the DEQ Office of General Counsel.

- **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)] does not result in waiver of any applicable privilege. Disclosure of required “to be collected, developed, maintained, or reported” under a federal or state environmental or health and safety law is not privileged information. [Audit Act §8(A)(1)]

If DEQ 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 DEQ’s possession, DEQ 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 that is disclosed to the EPA or other federal agencies will result in the 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 DEQ 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.
- **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 DEQ's authority to conduct inspections, 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.

A disclosure will be deemed voluntary under Audit Act §10 only under the following conditions:

1. the disclosure was made promptly after the violation was discovered;

2. the disclosure was made in writing by certified mail to the DEQ;
3. 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;
4. the violation was noted and disclosed as the result of a voluntary environmental audit;
5. appropriate efforts to correct the noncompliance are initiated, pursued, and completed within a reasonable amount of time;
6. the disclosing person cooperates in the investigation of the issues identified in the disclosure;
7. the violation did not result in injury or substantial risk of injury to one or more persons at the site or off site substantial harm or imminent and substantial risk of harm to persons, property or the environment; and
8. 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(I)]

Audit Act §10(E) 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 willfully 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(J)].

Note. DEQ 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 DEQ’s enforcement authority remains unaltered by the Audit Act, except for the exclusion of penalties.

Frequently Asked Questions

General

1. Will Disclosures of Violation be accepted by any means of delivery other than certified mail (for example: telephone, fax, e-mail)?

No. According to the Audit Act, Disclosures of Violation must be sent by Certified Mail.

2. What is considered a “prompt” disclosure? Should I wait until the audit is complete to send in a Disclosure of Violation?

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.

Disclosure of Violations should be submitted promptly upon discovery of a violation. Waiting to submit a Disclosure of Violation may result in the violation not qualifying for the immunity offered by the Audit Act.

3. What documents should I submit to DEQ at the conclusion of an audit? Should I send in the final audit report?

Do not send DEQ a copy of the audit report. DEQ will not open the audit report and will attempt to return the audit report to the sender. At the conclusion of the audit, a letter should be sent to the respective Division Audit Coordinator informing him/her that the audit is complete. Any final violations discovered through the audit should be disclosed in a final Disclosure of Violation.

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 DEQ 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 promptly made 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. Violations should be disclosed with reference to specific operating units or equipment (or both) affected by relevant regulations or other applicable law and any specific condition of a DEQ issued permit, state rule, state, or federal rule.

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 a “continuous audit” such that it can receive immunity from all violation 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.

Confidentiality

1. Will the DEQ receive and review audit reports?

DEQ will not routinely receive or review privileged audit reports. Notices of Audit and Disclosures of Violation will be reviewed for sufficiency by the Audit Coordinator of the respective Division of DEQ that is affected by the audit. If the review of privileged audit report information is necessary to determine compliance, 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 DEQ and the auditing person, where appropriate.

2. How will the confidentiality of audit-report information be maintained inside the DEQ?

If DEQ and a person have entered into a confidentiality agreement, any audit-report information submitted will be flagged or segregated to assist DEQ personnel in maintaining confidentiality. However, DEQ emphasizes that privileged audit-report information should not be submitted under a claim of confidentiality to the agency or accepted by DEQ personnel when a confidentiality agreement is not already in place.

3. How will DEQ 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 submissions 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 Audit Act and the EPA

1. How does the Audit Act apply to the EPA?

The Audit Act does not apply to federal agencies, including the EPA. The EPA has its own audit policy and EPA operates within that policy.

2. If an EPA inspector requests a copy of an audit during a joint inspection, should the DEQ inspector continue to participate?

The EPA has explicitly stated that it “will not request an environmental audit report in routine inspections.”¹ However, if an EPA inspector does request and obtain a copy of an audit report privileged under the Oklahoma Audit Act, the DEQ inspector should continue to participate, but should not receive, review, or otherwise use such information. The inspector should refer the issue to the Office of the General Counsel as soon as possible.

What does the Audit 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 are “voluntary”). Violations discovered as the result of a voluntary audit may also be immune from penalties if voluntarily disclosed.

DEQ will not consider violations discovered as a result of routine reporting eligible for immunity under the Audit Act, unless preceded by a written notice of audit covering the activity giving rise to the violation. Such violations, however, may be eligible for reduced penalties if promptly self-reported to DEQ (OAC 252:4-9-5).

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

¹ “Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations – Final Policy Statement,” 60 *Fed. Reg.* 66706 at 66711 (Dec. 22, 1995).

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 C.F.R. § 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 defined scope, 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 DEQ continue to inspect facilities that have submitted NOAs?

Yes. However, DEQ 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 DEQ 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. DEQ may still require technical and remedial provisions, such as collecting any outstanding operational or permit fees.

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 DEQ still enter into orders with technical requirements and compliance schedules based on the violations disclosed?

The Audit Act immunity applies only to administrative and civil penalties; DEQ will still bring enforcement actions and enter orders with technical requirements where appropriate.

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

Inspectors will review all violations identified pursuant to an inspection prior to finalizing a report. This review will include review of any Disclosures of Violations.

Privilege Information and Inspection

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 Office of the General Counsel 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 an environmental audit.

3. Is it the responsibility of DEQ inspectors to instruct companies to refrain from discussing information that is related to an environmental audit during inspections?

Although it may not be the DEQ 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 Office of the General Counsel.

5. When an inspector independently discovers a violation, how will DEQ 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.

The Audit Act and DEQ Self-Disclosure Policy

1. How does the Audit Act and DEQ’s current Self-Disclosure Policy coexist?

The immunity granted by the Audit Act applies to violations discovered within the scope of an audit. If a violation is discovered that falls outside the scope of an audit, or if a violation arises during the period of an audit, these violations would not qualify for the immunities offered by the Audit Act. However, a person may submit to a Self-Disclosure of Noncompliance pursuant to OAC 252:4-9-5. If the conditions of OAC:252-4-9-5 are met, DEQ will not seek administrative or civil penalties.

Appendix A Model Notice of Audit



OKLAHOMA ENVIRONMENTAL, HEALTH, AND SAFETY AUDIT PRIVILEGE ACT

Notice of Audit

Please submit via certified mail to:

**[Insert Division]
Oklahoma Department of Environmental Quality
P.O. Box 1677
Oklahoma City, OK 73101-1677**

ATTN: [Insert Division] Audit Coordinator

NOTICE OF AUDIT

NOTE: The following information is hereby voluntarily disclosed pursuant to and in accordance with the Oklahoma Environmental, Health, and Safety Audit Privilege Act 27A O.S. § 1-4-110 – 121. In order to receive immunity from administrative and civil penalties, a facility must provide notice to DEQ that it is planning to commence an environmental audit. If an environmental audit is being conducted over multiple facilities, please provide the facility name, address, legal description, latitude/longitude, and any current DEQ permits for each facility via an attachment to this Notice of Audit.

FACILITY INFORMATION

COMPANY NAME					
MAILING ADDRESS					
CITY		STATE		ZIP	
FACILITY NAME					
FACILITY STREET ADDRESS					
LEGAL DESCRIPTION					
LATITUDE/LONGITUDE					
COUNTY					
CITY		STATE		ZIP	
CURRENT DEQ PERMITS (IF APPLICABLE)					

CONTACT INFORMATION

CONTACT					
TITLE					
PHONE NUMBER		FAX NUMBER			
EMAIL					

AUDIT INFORMATION

DATE THE AUDIT WILL COMMENCE			
NAME OF ENTITY PERFORMING THE AUDIT			
GENERAL SCOPE OF THE AUDIT, INCLUDING A DESCRIPTION OF THE FACILITY, PORTION OF THE FACILITY, AND/OR OPERATIONS TO BE AUDITED			
WHICH DIVISION(S) OF THE DEQ WILL THE AUDIT AFFECT? (AQD, WQD, LPD)			
IS THIS A VOLUNTARY ENVIRONMENTAL OR HEALTH AND SAFETY AUDIT AS DEFINED IN 27A O.S. § 1-4-112(A)	<input type="checkbox"/> Yes	<input type="checkbox"/> No	
IS THE ENVIRONMENTAL AUDIT CONNECTED TO A POTENTIAL PURCHASE/SALE TRANSACTION?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	

NEW OWNER INFORMATION

Note: Complete the following section if the facility was undergoing an environmental audit prior to the acquisition closing date. For new owners that acquire a facility that is undergoing an environmental audit prior to the acquisition closing date, a Notice of Audit must be provided to DEQ no later than forty-five (45) days after the acquisition closing date.

ACQUISITION CLOSING DATE		
NAME OF THE SELLER (PREVIOUS OWNER OF THE FACILITY)		
DO YOU PLAN ON CONTINUING THE ENVIRONMENTAL AUDIT?	<input type="checkbox"/> Yes	<input type="checkbox"/> No

WAS YOUR COMPANY RESPONSIBLE FOR THE SCOPE OF THE ENVIRONMENTAL, HEALTH, OR SAFETY COMPLIANCE BEING AUDITED AT THE FACILITY?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
DOES YOUR COMPANY HAVE THE LARGEST OWNERSHIP SHARE OF THE SELLER	<input type="checkbox"/> Yes	<input type="checkbox"/> No
DOES THE SELLER HAVE THE LARGEST OWNERSHIP SHARE OF YOUR COMPANY	<input type="checkbox"/> Yes	<input type="checkbox"/> No
DOES YOUR COMPANY AND THE SELLER SHARE A COMMON CORPORATE PARENT OR COMMON MAJORITY INTEREST OWNER	<input type="checkbox"/> Yes	<input type="checkbox"/> No

CERTIFICATION OF VOLUNTARY ENVIRONMENTAL AUDIT			
I certify that the statements and information contained in this notification are true, accurate, and complete.			
Responsible Official or Designee Signature			
Responsible Official or Designee Name (typed or printed)		Date	
Responsible Official or Designee Title (typed or printed)		Phone	

Appendix B Disclosure of Violation



OKLAHOMA ENVIRONMENTAL, HEALTH, AND SAFETY AUDIT PRIVILEGE ACT

Disclosure of Violation

Please submit via certified mail to:

**[Insert Division]
Oklahoma Department of Environmental Quality
P.O. Box 1677
Oklahoma City, OK 73101-1677**

ATTN: [Insert Division] Audit Coordinator

DISCLOSURE OF VIOLATION				
NOTE: The following information is hereby voluntarily disclosed pursuant to and in accordance with the Environmental, Health, and Safety Audit Privilege Act 27A O.S. § 1-4-110 – 121. In order to receive immunity from administrative and civil penalties, a facility must promptly disclose, via certified mail, violations discovered via an environmental audit.				
FACILITY INFORMATION				
COMPANY NAME				
MAILING ADDRESS				
CITY		STATE		ZIP
FACILITY NAME				
FACILITY STREET ADDRESS				
LEGAL DESCRIPTION				
LATITUDE/LONGITUDE				
COUNTY				
CITY		STATE		ZIP
CURRENT DEQ PERMITS (IF APPLICABLE)				
CONTACT INFORMATION				
CONTACT				
TITLE				
PHONE NUMBER		FAX NUMBER		
EMAIL				
AUDIT INFORMATION				
DATE THE NOTICE OF AUDIT WAS SUBMITTED				
CERTIFIED MAIL REFERENCE NUMBER OF THE NOTICE OF AUDIT				
DATE THE AUDIT COMMENCED				
WHICH DIVISION(S) OF THE DEQ IS THE VIOLATION AFFECTING? (AQD, WQD, LPD)				

DISCLOSURE OF VIOLATION FOR RECENTLY ACQUIRED AUDITED FACILITY		
NOTE: Complete the following if you are the new owner of the audited facility and began the audit prior to the acquisition closing date. A Disclosure of Violation must be provided to DEQ no later than forty-five (45) days after that acquisition closing date.		
ACQUISITION CLOSING DATE		
NAME OF THE SELLER (PREVIOUS OWNER OF THE FACILITY)		
WAS YOUR COMPANY RESPONSIBLE FOR THE SCOPE OF THE ENVIRONMENTAL, HEALTH, OR SAFETY COMPLIANCE BEING AUDITED AT THE FACILITY?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
DOES YOUR COMPANY HAVE THE LARGEST OWNERSHIP SHARE OF THE SELLER	<input type="checkbox"/> Yes	<input type="checkbox"/> No
DOES THE SELLER HAVE THE LARGEST OWNERSHIP SHARE OF YOUR COMPANY	<input type="checkbox"/> Yes	<input type="checkbox"/> No
DO YOUR COMPANY AND THE SELLER SHARE A COMMON CORPORATE PARENT OR COMMON MAJORITY INTEREST OWNER	<input type="checkbox"/> Yes	<input type="checkbox"/> No

Please attach to this form a list of violations discovered via an environmental audit for which you are seeking immunity from administrative and civil penalties. Include the following information:

- **Description of Violation**
- **Permit Condition and/or Rule of Violation (Be Specific)**
- **Violation Discovery Date**
- **Violation Start Date**
- **Corrective Action Plan**
- **Duration of Violation**
- **Date of Compliance (or Expected Date)**

CERTIFICATION OF VOLUNTARY ENVIRONMENTAL AUDIT

I certify that the statements and information contained in this notification are true, accurate, and complete.

Responsible Official or Designee Signature			
Responsible Official or Designee Name (typed or printed)		Date	
Responsible Official or Designee Title (typed or printed)		Phone	

Appendix C Model Addendum to Disclosure of Violation

Disclosure of Violation: Addendum

ABC Company
ABC Plant

Violation	Citation and Permit Condition	Violation Discovery Date	Violation Start Date	Corrective Action Plan	Schedule date of Completion

Appendix D

Oklahoma Environmental, Health, and Safety Audit Privilege Act

An Act

ENROLLED SENATE
BILL NO. 1003

By: Allen and Daniels of the
Senate

and

McBride and Caldwell (Chad)
of the House

An Act relating to environment and natural resources; creating the Oklahoma Environmental, Health and Safety Audit Privilege Act; stating purpose of act; applying act to certain agencies; defining terms; specifying general and supporting information to be contained in complete audit reports; requiring audit documents to be labeled in certain manner; specifying failure to label documents does not constitute waiver of certain privilege; establishing timeline for completed audit with certain exception; establishing audit report as privileged in certain circumstances; prohibiting certain persons from compelled testimony or production of audit documents in certain circumstances; authorizing certain persons to voluntarily testify or produce audit documents; prohibiting certain persons from requesting or reviewing audit documents for certain purpose; establishing burden of proof; providing exception to privilege if expressly waived by certain persons; establishing certain disclosures of audit information as non-waiver disclosures; classifying certain information as confidential; establishing affirmative defense for disclosure; providing construing clause; authorizing court or administrative hearing to require disclosure of certain audit information in certain circumstances; establishing decision of administrative hearing as appealable without certain disclosure; establishing sanctions for persons violating Oklahoma Rules of Civil Procedure in claiming certain privilege; establishing

determination of district court as subject to certain appeal; establishing exceptions to certain privilege for audit documents; providing exception to waiver in certain circumstances; authorizing agency to review certain information; requiring notification for certain privileged information; requiring court to suppress privileged information in certain circumstances; authorizing court to find certain persons in contempt of court; providing immunity for certain persons; establishing provisions of voluntary disclosure of audit information or report; requiring certain certification for voluntary disclosure; requiring certain notice to potential purchaser; providing exceptions to immunity; establishing mitigating factors for certain penalty; establishing circumstances required for developing a pattern; requiring certain notification to regulatory agency; establishing required information in notification; establishing applicability of act; providing for codification; and providing an effective date.

SUBJECT: Oklahoma Environmental, Health and Safety Audit Privilege Act

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-110 of Title 27A, unless there is created a duplication in numbering, reads as follows:

This act shall be known and may be cited as the "Oklahoma Environmental, Health and Safety Audit Privilege Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-111 of Title 27A, unless there is created a duplication in numbering, reads as follows:

A. The purpose of this act is to encourage voluntary compliance with environmental and occupational health and safety laws.

B. A regulatory agency in this state shall not adopt a rule or impose a condition that circumvents the purpose of this act.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-112 of Title 27A, unless there is created a duplication in numbering, reads as follows:

A. As used 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 the final report in a written document which contains the comments and recommendations of the auditor;

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 subparagraph a of this paragraph;

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; and

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 willfully for purposes of this act if the person acts willfully within the meaning of Section 92 of Title 21 of the Oklahoma Statutes.

C. A person acts knowingly for purposes of this act if the person acts knowingly within the meaning of Section 96 of Title 21 of the Oklahoma Statutes.

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

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-113 of Title 27A, unless there is created a duplication in numbering, reads as follows:

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 paragraph 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.

E. 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.

F. Paragraph 1 of subsection E of this section does not apply to an environmental or health and safety audit conducted before the acquisition closing date by a potential purchaser that is considering the acquisition of the regulated facility or operation.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-114 of Title 27A, unless there is created a duplication in numbering, reads as follows:

A. An audit report is privileged as provided in this section.

B. Except as provided in Sections 6 through 9 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, 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 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. 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 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.

G. No audit report or any associated information or records shall be subject to Section 24A.1 et seq. of Title 51 of the Oklahoma Statutes. All records collected pursuant to this act shall be deemed confidential.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-115 of Title 27A, unless there is created a duplication in numbering, reads as follows:

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,
- 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 in subparagraph e of this paragraph;

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 agency, 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 in paragraph 2 of subsection B 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 paragraph 3 of subsection B of this section is confidential and is not subject to disclosure under Section 24A.1 et seq. of Title 51 of the Oklahoma Statutes. A public entity, public employee or public official who discloses information in violation of this subsection is subject to penalty. 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. 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.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-116 of Title 27A, unless there is created a duplication in numbering, reads as follows:

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 paragraph 1, 2 or 3 of subsection A of this section applies.

C. Notwithstanding Section 250 et seq. of Title 75 of the Oklahoma Statutes, a decision of an administrative hearings official under paragraph 1, 2 or 3 of subsection A 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 Section 3226.1 of Title 12 of the Oklahoma Statutes if the court finds that the person willfully or knowingly claimed the privilege for 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.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-117 of Title 27A, unless there is created a duplication in numbering, reads as follows:

A. The privilege established by Section 5 of 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.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-118 of Title 27A, unless there is created a duplication in numbering, reads as follows:

A. If an audit report is obtained, reviewed or used in a criminal proceeding, the administrative or civil evidentiary privilege established by Section 5 of this act is not waived or eliminated for any other purpose.

B. Notwithstanding the privilege established by Section 5 of this act, 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 of this section.

D. If privileged information is disclosed under subsection B or C of this section 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 8 of this act. A party having received information under subsection B or C of this section has the burden of proving that the evidence offered did not arise and was not derived from the review of privileged information.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-119 of Title 27A, unless there is created a duplication in numbering, reads as follows:

A. Except as otherwise provided by this act, 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 making the disclosure, and
- b. no later than forty-five (45) days 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. Notice of 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:

- a. injury or imminent and substantial risk of serious injury to one or more persons at the site, or

- b. off-site substantial harm or imminent and substantial risk of harm to persons, property, or the environment.

C. For a disclosure described in subparagraph b of paragraph 1 of subsection B of this section, 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.

D. 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.

E. 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 willfully or knowingly committed or was responsible within the meaning of state laws for the commission of the disclosed violation;
- 2. The person who made the disclosure recklessly committed or was responsible within the meaning of state laws 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 willfully 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.

F. 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.

G. 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 subsections D and E of this section immunity does not apply, the enforcement authority has the burden of rebutting the presumption by a preponderance of the evidence.

H. In order to receive immunity under this section, a facility conducting an environmental or health and safety audit under this act must give 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.

I. In order to receive immunity under this section, a potential purchaser:

1. That acquires a regulated facility or operation that is the subject of an audit begun prior to acquisition may continue the audit after the acquisition closing date if, no later than forty-five (45) days after the acquisition closing date, the person provides notice to an appropriate regulatory agency of the fact that the potential purchaser intends to continue the ongoing audit;

2. The notice must specify:

- a. the facility or portion of the facility being audited,
- b. the date the audit began, and
- c. the general scope of the audit; and

3. The potential purchaser must certify that before the acquisition closing date:

- a. the potential purchaser was not responsible for the scope of the environmental, health, or safety compliance being audited at the regulated facility of operation,
- b. the potential purchaser did not have the largest ownership share of the seller,
- c. the seller did not have the largest ownership share of the potential purchaser, and

- d. the potential purchaser and the seller did not have a common corporate parent or a common majority interest owner.

J. 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.

For violations to be considered a pattern, the person shall 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.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-120 of Title 27A, unless there is created a duplication in numbering, reads as follows:

The privilege established by this act applies to environmental or health and safety audits that are conducted on or after the effective date of this act.

SECTION 12. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-4-121 of Title 27A, unless there is created a duplication in numbering, reads as follows:

This act shall 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.

SECTION 13. This act shall become effective November 1, 2019.

Passed the Senate the 14th day of March, 2019.

Presiding Officer of the Senate

Passed the House of Representatives the 23rd day of April, 2019.

Presiding Officer of the House
of Representatives

OFFICE OF THE GOVERNOR

Received by the Office of the Governor this _____

day of _____, 20_____, at _____ o'clock _____ M.

By: _____

Approved by the Governor of the State of Oklahoma this _____

day of _____, 20_____, at _____ o'clock _____ M.

Governor of the State of Oklahoma

OFFICE OF THE SECRETARY OF STATE

Received by the Office of the Secretary of State this _____

day of _____, 20_____, at _____ o'clock _____ M.

By: _____