

# **Texas Environmental, Health, and Safety Audit Privilege Act**

Michael De La Cruz  
Enforcement Division

Office of Compliance and Enforcement  
Texas Commission on Environmental Quality



# Outline

- Guide to the Texas Environmental, Health, and Safety Audit Privilege Act
- Immunity
- Notice of Audit
  - Statistics
  - Common NOA Deficiencies
- Request for Extension
- Disclosure of Violations
  - Statistics
  - Common DOV Deficiencies



# Guide to Texas Environmental, Health, and Safety Audit Privilege Act

- Guide to the Texas Environmental, Health, and Safety Audit Privilege Act (Audit Privilege Act)
  - Regulatory Guidance – 173
  - Revised November 2013



# Guide to Audit Privilege Act

- Historical Background
- Guidance
  - Notice of Audit
  - Disclosure of Violation
  - Request for Extension
  - Privilege and the Audit Privilege Act
  - Immunity and the Audit Privilege Act
  - Questions and Answers
- Appendix A: Environmental, Health, and Safety Audit Privilege Act
- Appendices C-F: Model correspondence



# Guide to Audit Privilege Act

- Historical Background

- In 1995, 74<sup>th</sup> Texas Legislature passed House Bill 2473
  - Incentives for persons to conduct voluntary audits to determine compliance with environmental, health, and safety regulations and to implement prompt corrective action
  - Provided limited evidentiary privilege for certain information gathered in a voluntary self-audit
  - Provided immunity from administrative and civil penalties for certain violations voluntarily disclosed



# Guide to Audit Privilege Act

- Historical Background

- In 1997, 75<sup>th</sup> Texas Legislature passed House Bill 3459
  - Changes did not significantly affect the way the Audit Privilege Act was implemented
  - Modified scope of audit privilege and immunity to remove references to criminal proceedings
  - Application of the Audit Privilege Act was more explicitly limited to State law



# Guide to Audit Privilege Act

- Historical Background

- In 2013, 83<sup>rd</sup> Texas Legislature passed Senate Bill 1300
  - Changes did not significantly affect the way the Audit Privilege Act was implemented
  - Allowed prospective buyers of a regulated entity to be eligible for the incentives under the Audit Privilege Act



# Guide to Audit Privilege Act

- Historical Background
  - In 2017, 85<sup>th</sup> Texas Legislature passed Senate Bill 1488
    - Codified the Audit Privilege Act in TEXAS HEALTH AND SAFETY CODE ch. 1101





# Guide to Audit Privilege Act

- Guidance for submissions required under the Audit Privilege Act
  - Notice of Audit
  - Request for Extension
  - Disclosure of Violations



# Guide to Audit Privilege Act

- **Guidance for Privilege and Audit Privilege Act**
  - Limited evidentiary privilege for certain information gathered in a voluntary self-audit
  - Audit privilege applies to admissibility and discovery of audit reports in civil and administrative proceedings
  - Audit privilege does not apply to documents, reports, and data required to be collected, developed, maintained, or reported under state or federal law
  - Audit privilege also does not apply to criminal proceedings



# Guide to Audit Privilege Act

- Guidance for Immunity and Audit Privilege Act
  - Audit Privilege Act conditionally grants immunity from administrative and civil penalties for certain violations voluntarily disclosed



# Guide to Audit Privilege Act

- Questions and Answers
- Appendix A: Audit Privilege Act
- Appendix B: Government Code ch. 552 (Open Records)
- Appendices C-G: Examples of Model Letters



# Immunity

- TEX. HEALTH & SAFETY CODE § 1101.151
  - Immunity from administrative or civil penalties
- Disclosed violations may be granted immunity from administrative or civil penalties
  - Proper notice of intent to conduct an audit
  - Prompt, voluntary disclosure of violations
  - Violations corrected in a reasonable amount of time



# Notice of Audit (NOA)

- TEX. HEALTH & SAFETY CODE § 1101.154
- Notice must be provided of the intent to conduct an audit
- Notice shall specify
  - Facility or portion of the facility to be audited
  - Anticipated time the audit will begin
  - General scope of the audit



# Notice of Audit (NOA)

- Submit to Office of Compliance and Enforcement (OCE) Deputy Director
- NOA should include
  - Customer/legal name of the entity conducting the audit
  - Regulated entity name
  - Physical/geographical location of the entity being audited
  - Description of the entity or portion of the entity being audited
  - Time and date of the initiation of the audit
  - General scope of the audit



# Model Notice of Audit Letter

[Month Day, Year]

Via Certified Mail, Return Receipt Requested, No. P12 345 6789

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

Re: **ABC Corporation; CN123456789; ABC Plant—Unit No. 123; RN123456789**  
Facility ID No. 12345; Permit Nos. 123 and 456  
Scheduled Environmental, Health, and Safety Audit

Dear OCE Deputy Director:

Please be advised that in accordance with the Environmental, Health and Safety Audit Privilege Act (Audit Act), the ABC Corporation's Corporate Audit Group intends to conduct an Environmental, Health and Safety compliance audit at its ABC Plant located at **[Plant's Physical Address]**. Pursuant to TEX. HEALTH & SAFETY CODE § 1101.151 of the Audit Act, which provides immunity for violations voluntarily disclosed as a result of a compliance audit, ABC Corporation is hereby notifying you that the planned audit will commence on **[Month Day, Year]**, at approximately **[Start Time]** and will cover Unit No. 123. **The scope of the audit will be to evaluate compliance with all applicable Environmental, Health and Safety regulations, as well as Permit Nos. 123 and 456.** Pursuant to TEX. HEALTH & SAFETY CODE § 1101.052(a) of the Audit Act, the audit will be completed no later than six months after the date of its commencement, unless, pursuant to a written request for extension, we receive your written approval of an extension before the end of the six-month period.

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

Sincerely,

Printed Name  
Title

cc: Regional Director, [TCEQ Regional Office Address]  
Audit Act Coordinator, TCEQ Litigation Division





# Notice of Audit (NOA)

- Notice may provide notification of more than one scheduled audit at a time
- Notice for a pre-acquisition audit is not required



# Notice of Pre-Acquisition Audit

- Prospective buyers are not required to submit a NOA prior to the initiation of a pre-acquisition audit
  - TEX. HEALTH & SAFETY CODE § 1101.154(a)
- If new owner wishes to continue the audit, must provide notice per TEX. HEALTH & SAFETY CODE § 1101.155
  - Within 45 days after the acquisition closing date
  - Proper NOA must be submitted to OCE Deputy Director
  - New owner must provide a certification statement

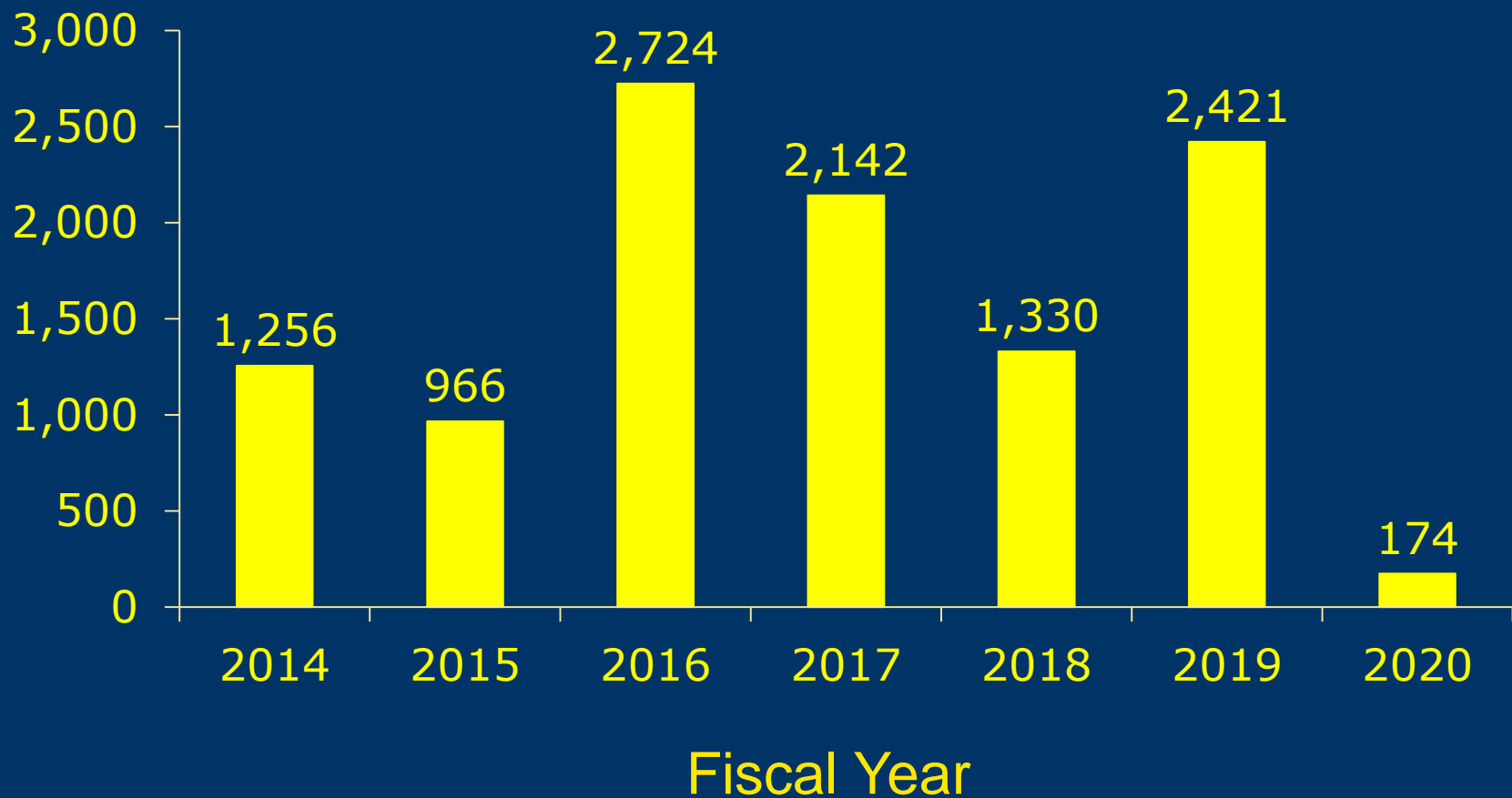


# Notice of Pre-Acquisition Audit

- New owner must certify that before the acquisition closing date
  - New owner was not responsible for the scope of the environmental, health, or safety compliance being audited at the regulated entity or operation
  - New owner did not have the largest ownership share of the previous owner
  - Previous owner did not have the largest ownership share of the new owner
  - New owner and the previous owner did not have a common corporate parent or a common majority interest owner



# Number of NOAs Received



# Common NOA Deficiencies

- Postmark
  - NOA postmarked after environmental audit commenced
- Scope of audit outside TCEQ's delegated enforcement authority
- Specific site names/locations not provided



# Common NOA Deficiencies

- Claim of Privilege or Confidentiality
  - NOAs are not privilege or confidential because it required to be submitted under the Under Act
  - NOAs are filed as public documents



# Request for Extension

- TEX. HEALTH & SAFETY CODE § 1101.052
- Unless an extension is approved based on reasonable grounds, an audit must be completed within a reasonable time not to exceed six months after the date the audit is initiated or the acquisition closing date



# Request for Extension

- Requests must be submitted to OCE Deputy Director
  - At least two weeks before six months of commencing the audit
- Requests for extensions submitted/postmarked after six months of commencing the self-audit investigation will be denied
  - Violations discovered after the end of the self-audit investigation are not subject to immunity under the Audit Privilege Act





# Disclosure of Violations (DOV)

- TEX. HEALTH & SAFETY CODE § 1101.151
- Person who makes a voluntary disclosure of a violation of an environmental law is immune from an administrative or civil penalty for the violation disclosed



# Disclosure of Violations (DOV)

- TEX. HEALTH & SAFETY CODE § 1101.152
  - Nature of voluntary disclosure
- Disclosure is voluntary, only if
  - Disclosure made promptly upon discovery
  - Disclosure made in writing via certified mail to OCE Deputy Director
  - Investigation of the violation was not initiated or the violation was not independently detected by the regulatory agency before disclosure was made via certified mail



# Disclosure of Violations (DOV)

- Disclosure is voluntary, only if
  - Disclosure arises out of a voluntary environmental audit
  - 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



# Disclosure of Violations (DOV)

- Disclosure is voluntary, only if
  - Person making the disclosure cooperates with the regulatory agency of the issues identified in the disclosure
  - Violation did not result in injury or imminent and substantial risk of serious injury to one or more persons at the site or off-site substantial actual harm or imminent and substantial risk of harm to persons, property, or the environment



# Disclosure of Violations (DOV)

- Voluntary DOV should include
  - Legal name of the entity that was audited
  - Reference the date of the relevant NOA
  - Date of initiation and completion of the audit
  - Affirmative assertion that a violation was discovered
  - Brief description of the violation
  - Date the violation was discovered
  - Duration of the violation
  - The status and schedule of proposed corrective measures



## Appendix G Model Addendum to Disclosure of Violation

### *Disclosure of Violation: Addendum*

**ABC Company**  
**ABC Plant**  
**RN123456789**

<i>Violation</i>	<i>Citation and Permit Provisions</i>	<i>Violation Discovery Date</i>	<i>Violation Start Date</i>	<i>Corrective Action Plan</i>	<i>Schedule or Target Completion Date</i>	<i>Violation Status Completion or Actual Completion Date</i>
1. Failure to register for permit by rule to authorize surface-coating operations.	30 TAC § 106.433(9)	9/15/2013	4/23/2006	Submit Form PI-7 and obtain confirmation from the TCEQ that surface-coating operations are registered under permit by rule.	12/1/2013	Early completion: confirmation received 9/30/2013
2. Failure to properly label used-oil containers. Employees were not trained in labeling procedures.	30 TAC § 328.26(d)	9/15/2013	6/15/2007	All used-oil containers are now properly labeled and employee training regarding labeling procedures was conducted.	Complete	Used-oil containers labeled as of 9/20/2013
3. Failure to update Stormwater Pollution Protection Plan (SWPPP). The SWPPP needs to be updated to reflect current owner.	Stormwater General Permit TXR05000, Part III, Section A	9/15/2013	7/5/2007	Update SWPPP to accurately reflect current owner.	12/1/2013	Status update: SWPPP submission has been delayed; plan expected to be submitted by 11/1/2013

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



# Disclosure of Pre-Acquisition Violations

- New owner must submit a proper, voluntary DOV for all violations discovered during the pre-acquisition audit
  - Within 45 days of the acquisition closing date
  - Must provide a certification statement
- If the audit is continued, the violations must be disclosed promptly upon discovery



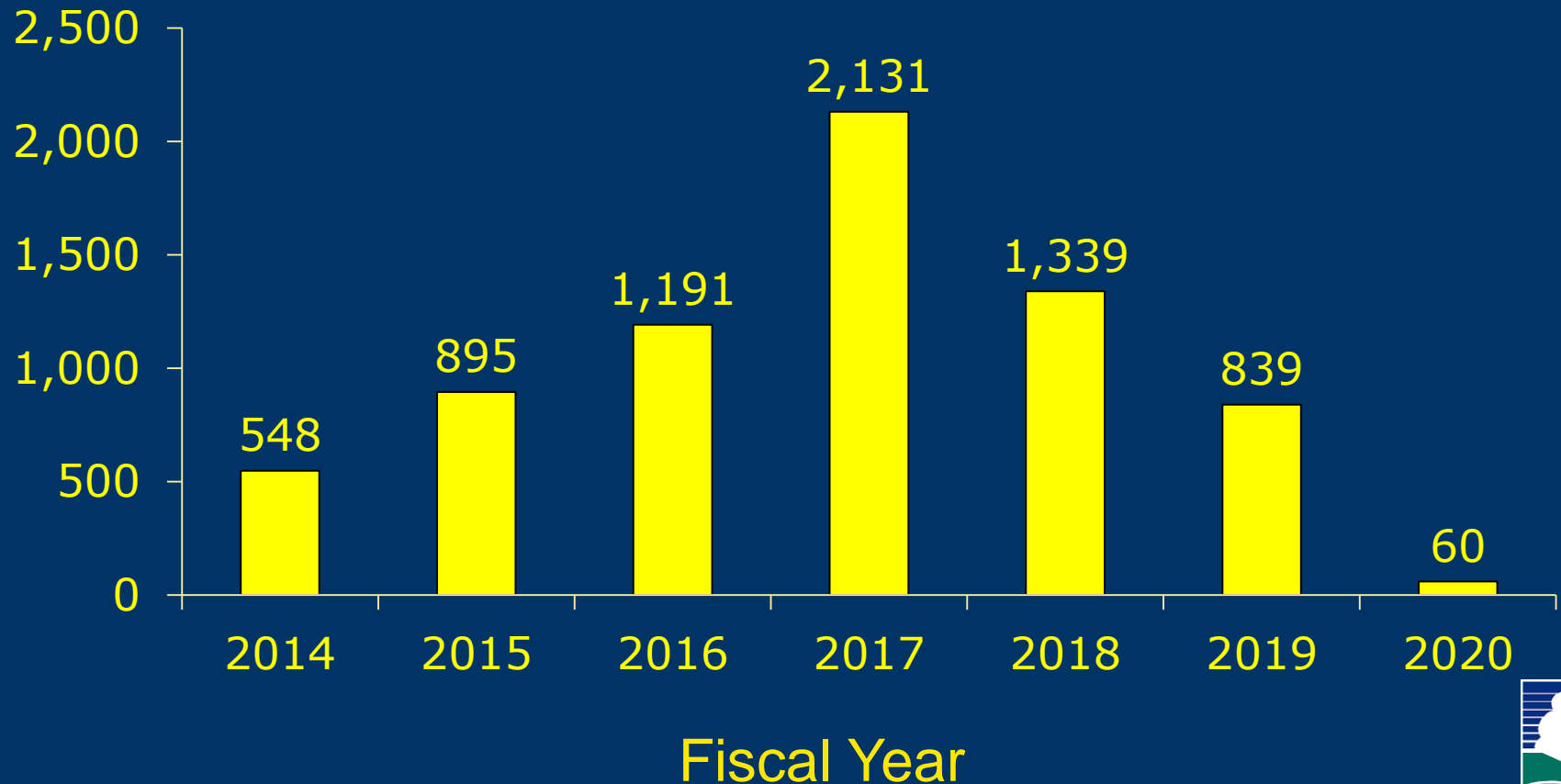
# Disclosure of Pre-Acquisition Violations

- New owner must certify in the disclosure that before the acquisition closing date:
  - New owner was not responsible for the environmental, health, or safety compliance at the regulated entity or operation that is subject to the disclosure
  - New owner did not have the largest ownership share of the previous owner
  - Previous owner did not have the largest ownership share of the new owner
  - New owner and the previous owner did not have a common corporate parent or a common majority interest owner





# Number of DOVs Received



# Common DOV Deficiencies

- No affirmative assertion that violations were discovered
  - Issues, Potential Violations, Findings, etc.
- Violation not clearly described
- No specific/accurate regulatory citation (cannot cite 40 CFR § 60, Subpart B, or MACT HH, or JJJJ)



# Common DOV Deficiencies

- No violation start dates or corrective action completion dates
- Sites were not included in the NOA
- Violation not independently detected
- Claim of privilege or confidentiality



# Common DOV Deficiencies

- No explanation how the audit investigation exceeded a reasonable inquiry, for Title V permit holders
- When permit violations disclosed, no permit included
- Disclosed a violation of a rule where TCEQ does not have delegated enforcement authority



# TCEQ Does Not Have Delegated Enforcement Authority

- General Land Office jurisdiction (Certain costal/offshore)
- Polychlorinated Biphenyl (PCBs)
- Asbestos
- Surface Impoundment Variance



# TCEQ Does Not Have Delegated Enforcement Authority

- Department of Public Safety Jurisdiction (lab glass, etc.)
- Stratospheric Ozone
- City permits
- Railroad Commission jurisdiction (Certain oil and gas)



# TCEQ Does Not Have Delegated Enforcement Authority

- EPA Programs
  - Spill Prevention Control and Countermeasure (SPCC)
  - Reformulated Gas (RFG)
  - Risk Management Plan (RMP)
  - Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
  - Emergency Planning and Community Right-to-Know Act (EPCRA)



# TCEQ Does Not Have Delegated Enforcement Authority

- EPA Programs
  - Toxic Substance Control Act (TSCA)
  - Toxic Release Inventory (TRI)
  - Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)
  - Clean Water Act 404





# Summary

- NOAs, DOVs, and any other Audit Privilege Act correspondence are not privileged or confidential
- Immunity from administrative or civil penalties is granted only if:
  - Proper NOA submitted
  - Prompt, voluntary DOV submitted via certified mail
  - Violations corrected within a reasonable amount of time
- Conducting audits under the Audit Privilege Act avails an owner to compliance history benefits



# Points of Contact

## Litigation Division Program Staff

- Elizabeth Lieberknecht
  - (512) 239-0620

## Audit Privilege Act Program Staff

- Robyn Babyak
  - (512) 239-1853
- Michaelle Garza
  - (210) 403-4076
- Rebecca Johnson
  - (361) 825-3423
- Suzanne Walrath
  - (512) 239-2134



# Questions



**Michael De La Cruz**  
**Texas Commission on Environmental Quality**  
**Enforcement Division**  
**(512) 239-0259**  
**Michael.DeLaCruz@tceq.texas.gov**

