

# Okla.'s New Facility Audit Law Offers Limited Protections

By **Ashlyn Smith and Jake Krattiger**

The Oklahoma Environmental, Health and Safety Audit Privilege Act, effective Nov. 1, is designed to encourage voluntary compliance with environmental and occupational health and safety, or EHS, laws.[1]

The Audit Act applies to all persons who own or operate any facility regulated under any state or federal EHS law, rule or regulation.[2] Oklahoma businesses regulated under EHS laws include oil and gas operators, pipeline operators, gas or chemical plants, public utilities and food processors, to name a few.

The Audit Act is in keeping with a national trend toward incentivizing voluntary EHS audits by regulated businesses.[3] Modeled after a Texas law,[4] the Audit Act offers two primary incentives: (1) immunity from certain civil and administrative penalties,[5] and (2) a limited evidentiary privilege for audit reports generated during the course of an audit.[6]

According to Oklahoma state Rep. Mark McBride, the Audit Act represents a pro-business approach to regulatory compliance that will lead to noticeable environmental improvements.[7] But for businesses that wish to leverage the benefits of this new law, the devil is in the details.

Businesses should first understand the limited scope of the immunity and privilege offered by the Audit Act. The immunity applies only to civil and administrative proceedings and penalties.[8] In other words, the Audit Act cannot be invoked against criminal liability. Furthermore, even though the Audit Act purports to encompass facilities and operations regulated under state and federal EHS laws, federal agencies are not bound by the Audit Act.

The immunity and privilege are, therefore, most likely limited to state civil and administrative penalties and proceedings, respectively. Still, it is worth noting that the U.S. Environmental Protection Agency has long maintained a policy whereby it "will not routinely request copies of audit reports to trigger enforcement investigations."[9] For businesses that are most heavily regulated under federal law, this is an important point that should be considered when determining the value of a voluntary EHS audit program.

With respect to the Audit Act privilege, additional limitations apply. Most notably, the privilege applies only to evidence related to the audit report, which the Audit Act defines as "the final report in a written document which contains the comments and recommendations of the auditor."[10]

The Audit Act privilege does not apply to testimony related to the underlying violation. Therefore, "[a] person ... who has actually observed physical events of violation may testify



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about those events but may not be compelled to testify about [the audit report].”[11]

That such a person may be compelled to testify about observed physical events is not explicitly stated in the Audit Act, though this may be implied. Businesses should therefore presume, out of an abundance of caution, that such persons may be compelled to testify at any legal proceeding, which limits the benefits of the Audit Act.

Businesses should also understand the many requirements that must be satisfied in order to claim Audit Act immunity or privilege. To claim immunity under the Audit Act, there must be a voluntary disclosure of an EHS violation.[12] For a disclosure to be voluntary under the Audit Act:

- The business must have disclosed the violation promptly after discovery;[13]
- The business must have given written notice of the violation by certified mail to the appropriate regulatory agency;[14]
- The appropriate regulatory agency must not have independently detected the violation prior to receiving notice of the violation;[15]
- The business must have disclosed the violation pursuant to a voluntary EHS audit;[16]
- The business must have taken appropriate steps to achieve compliance after discovering the violation and the violation must have been corrected within a reasonable time;[17]
- The business must have cooperated with any further regulatory investigation of the violation;[18]
- The violation must not have resulted in injury or imminent and substantial risk of serious injury to persons, property or the environment;[19] and
- The disclosure must not have been required by order or decree or otherwise required by law.[20]

Moreover, for a voluntary disclosure to qualify a business for immunity:

- The business must not have willfully or knowingly caused the violation;[21]
- The business must not have incurred a substantial economic benefit and advantage over its competitors as a result of the violation;[22] and
- The business must have given prior notice to the appropriate regulatory agency of its plans to conduct a voluntary audit.[23]

Certain other requirements also apply — namely for businesses involved in the acquisition of a regulated facility or operation that is already undergoing a voluntary EHS audit.[24]

Collectively, these requirements for immunity contain several gray areas, as well as opportunities for potentially costly oversight. For example, the Audit Act does not define the term “promptly” as it relates notice. Addressing this point, the Oklahoma Department of Environmental Quality has opined that it “is in a person’s best interests to disclose violations as soon as they are discovered.”[25]

The Audit Act immunity requirements that touch on reasonableness, state of mind and the extent of harm similarly present questions of fact that are not easily reduced to a binary answer. Whether the Audit Act affords immunity for a given disclosure is, therefore, highly dependent on the particular facts and circumstances surrounding the disclosure.

With this in mind, businesses that decide to implement voluntary EHS audit programs under the Audit Act should be sure to systematically capture evidence that these requirements are being met. After all, “the person claiming the immunity has the burden of establishing a prima facie case that the disclosure was voluntary.”[26]

Audit Act requirements for immunity do not apply to privilege. For example, a business that fails to give prior notice of a voluntary EHS audit may still claim Audit Act privilege even though immunity is not available. However, the privilege may be lost if it is waived. The Audit Act addresses the topic of waiver by listing certain persons, such as legal representatives and employees, to which disclosure of an audit report will not waive privilege.[27]

Noting that federal agencies are absent from that list, the Oklahoma Department of Environmental Quality has opined that disclosure of an audit report to the EPA will waive Audit Act privilege.[28] Notably, the Audit Act explicitly provides there is no waiver of privilege for civil or administrative proceedings where an audit report is obtained, reviewed or used in a criminal proceeding.[29] Since the Audit Act has only recently come into effect, Oklahoma courts have yet to clarify these points.

In sum, although strings are attached, the Audit Act can be a valuable option for certain businesses that wish to get in front of potential EHS issues, and thereby curb their potential civil and administrative liability. Whether a voluntary EHS audit program is right for a given business should be determined by examining the cost of implementation in light of the potential liability averted under applicable EHS laws and regulations, bearing in mind the limited reach of Audit Act immunity and privilege, as well as business and stakeholder values.

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[1] 27A O.S. § 1-4-111(A).

[2] 27A O.S. § 1-4-112(A).

[3] Environmental Protection Agency, State Audit Privilege and Immunity Laws & Self-Disclosure Laws and Policies, last visited Nov. 11, 2019, available

at <https://www.epa.gov/compliance/state-audit-privilege-and-immunity-laws-self-disclosure-laws-and-policies>.

[4] State Rep. Mark McBride, *Allowing voluntary audits on regulated industries*, May 3, 2019, available at <https://journalrecord.com/2019/05/03/mcbride-allowing-voluntary-audits-on-regulated-industries/>.

[5] 27A O.S. § 1-4-119(A).

[6] 27A O.S. § 1-4-114(A).

[7] State Rep. Mark McBride, *Allowing voluntary audits on regulated industries*, May 3, 2019, available at <https://journalrecord.com/2019/05/03/mcbride-allowing-voluntary-audits-on-regulated-industries/>.

[8] 27A O.S. § 1-4-119(A).

[9] *Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations — Final Policy Statement*, 60 Fed. Reg. 66706 at 66711 (May 11, 2000).

[10] 27A O.S. §§ 1-4-112(A), 1-4-114(A).

[11] 27A O.S. § 1-4-114(D).

[12] 27A O.S. § 1-4-119(A).

[13] 27A O.S. § 1-4-119(B)(1)(a).

[14] 27A O.S. § 1-4-119(B)(2).

[15] 27A O.S. § 1-4-119(B)(3).

[16] 27A O.S. § 1-4-119(B)(4).

[17] 27A O.S. § 1-4-119(B)(5).

[18] 27A O.S. § 1-4-119(B)(6).

[19] 27A O.S. § 1-4-119(B)(7).

[20] 27A O.S. § 1-4-119(D).

[21] 27A O.S. § 1-4-119(E)(1).

[22] 27A O.S. § 1-4-119(E)(5).

[23] 27A O.S. § 1-4-119(H).

[24] See, e.g., 27A O.S. § 1-4-119(B)(1)(b).

[25] Department of Environmental Quality, *A Guide to the Oklahoma Environmental, Health, and Safety Audit Privilege Act*, available at [https://www.deq.ok.gov/wp-content/uploads/air-division/Form\\_Audit\\_Act\\_guidance.pdf](https://www.deq.ok.gov/wp-content/uploads/air-division/Form_Audit_Act_guidance.pdf).

[26] 27A O.S. § 1-4-119(G).

[27] 27A O.S. § 1-4-115(B).

[28] Department of Environmental Quality, A Guide to the Oklahoma Environmental, Health, and Safety Audit Privilege Act, available at [https://www.deq.ok.gov/wp-content/uploads/air-division/Form\\_Audit\\_Act\\_guidance.pdf](https://www.deq.ok.gov/wp-content/uploads/air-division/Form_Audit_Act_guidance.pdf).

[29] 27A O.S. § 1-4-118(A).