

BILL ANALYSIS

Senate Research Center

S.B. 1300
By: Eltife; Hegar
Natural Resources
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Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The Texas Environmental, Health, and Safety Audit Privilege Act (Act) provides certain benefits, such as immunity from civil and administrative penalties and the creation of a confidentiality privilege for audit reports, for the purpose of encouraging voluntary compliance with environmental and occupational health and safety laws. Facility owners or operators must meet certain requirements to be eligible for the immunity from civil and administrative penalties that the Act affords. Prior notice to appropriate regulatory agencies of the audit and prompt, voluntary disclosure of violations discovered during the audit are two of these requirements.

Prospective buyers in transactions involving facilities subject to environmental, health, and safety regulation often perform due diligence reviews of those facilities. These reviews are systematic compliance evaluations of a facility and its operations, comparable to a compliance audit, and often reveal issues of non-compliance. If the transaction closes and the prospective buyer becomes the owner of the facility, the new owner inherits these compliance issues. However, despite the new owner's efforts to evaluate compliance at the facility during due diligence and expeditiously correct issues identified following the closing on the transaction, the new owner is not eligible for the benefits afforded under the Act. Further, the Act as currently written creates an incentive for prospective buyers to delay in-depth compliance evaluations until they take over ownership of the facility, and become eligible to give the required notice and conduct an audit pursuant to the Act. This can delay discovery and correction of compliance issues.

In contrast, the United States Environmental Protection Agency (EPA) currently has a new owner audit policy. This policy recognizes the unique situations of a prospective purchaser and a new owner and encourages prospective purchasers and new owners to evaluate compliance at subject facilities, with the goal of improving compliance, correcting violations, and upgrading deficient compliance management practices. S.B. 1300 creates an opportunity for voluntary disclosure of violations discovered during due diligence for new owners under the Act similar to that which now only exists under the EPA policy.

S.B. 1300 amends current law relating to environmental or health and safety audits under the Texas Environmental, Health, and Safety Audit Privilege Act.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 3(a), Texas Environmental, Health, and Safety Audit Privilege Act (Article 4447cc, V.T.C.S.), to define "acquisition closing date" in this Act, to redefine "environmental or health and safety audit" or "audit" in this Act, and to make nonsubstantive changes.

SECTION 2. Amends Section 4, Texas Environmental, Health, and Safety Audit Privilege Act (Article 4447cc, V.T.C.S.), by adding Subsections (d-1) and (f) and amending Subsection (e), as follows:

(d-1) Authorizes a person that begins an audit before becoming the owner of a regulated facility or operation to continue the audit after the acquisition closing date if the person gives notice under Section 10(g-1).

(e) Requires that an audit, unless an extension is approved by the governmental entity with regulatory authority over the regulated facility or operation based on reasonable grounds, be completed within 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 under Subsection (d-1). Deletes existing text requiring that an audit, once initiated, be completed within a reasonable time, not to exceed six months after a certain date, unless an extension is approved by the governmental entity with regulatory authority over the regulated facility or operation based on reasonable grounds.

(f) Provides that Subsection (e)(1) (relating to the date the audit is initiated) does not apply to an audit conducted before the acquisition closing date by a person that is considering the acquisition of the regulated facility or operation.

SECTION 3. Amends Section 6(b), Texas Environmental, Health, and Safety Audit Privilege Act (Article 4447cc, V.T.C.S.), as follows:

(b) Provides that 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)-(C) Makes no changes to these paragraphs;

(D) an independent contractor of the owner or operator, rather than 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 or a person described by Paragraph (E) of this subdivision;

(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 certain individual or entity; 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.

SECTION 4. Amends Section 10, Texas Environmental, Health, and Safety Audit Privilege Act (Article 4447cc, V.T.C.S.), by amending Subsections (b), (e), and (g) and adding Subsection (b-1) and (g-1), as follows:

(b) Provides that a disclosure is voluntary only if certain conditions are met, including that the disclosure was made promptly after knowledge of the information disclosed is obtained by the person or, not more than the 45th day after the acquisition closing date, if the violation was discovered during an audit conducted before the acquisition closing date by a person considering the acquisition of the regulated facility or operation.

(b-1) Requires the person making the disclosure, for a disclosure described by Subsection (b)(1)(B) (relating to providing that a disclosure is voluntary if the disclosure was made promptly after knowledge of the information disclosed is obtained by that person), to 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.

(e) Provides that a penalty that is imposed under Subsection (d) (relating to providing that the immunity established by Subsection (a) of this section does not apply and an administrative or civil penalty is authorized to be imposed under certain applicable law) of this section should, to the extent appropriate, be mitigated by certain factors, such as the period of ownership of the regulated facility or operation.

(g) Requires a facility conducting an environmental or health and safety audit under this Act to provide, rather than give, notice to an appropriate regulatory agency of the fact that that it is planning to commence the audit. Provides that this subsection (relating to requiring a facility conducting an environmental or health and safety audit under this Act to give notice to an appropriate regulatory agency) does not apply to an audit conducted before the acquisition closing date by a person considering the acquisition of the regulated facility or operation that is the subject of the audit.

(g-1) Authorizes a person that begins an audit before becoming the owner of the regulated facility or operation to continue the audit after the acquisition closing date if, not more than the 45th day after the acquisition closing date, the person provides notice to an appropriate regulatory agency of the fact the person intends to continue an ongoing audit. Requires that the notice specify the facility or portion of the facility being audited, the date the audit began, and the general scope of the audit. Requires the person to certify in the notice that before the acquisition closing date:

- (1) the person was not responsible for the scope of the environmental, health, or safety compliance being audited at the regulated facility or operation;
- (2) the person did not have the largest ownership share of the seller;
- (3) the seller did not have the largest ownership share of the person; and
- (4) the person and the seller did not have a common corporate parent or a common majority interest owner.

SECTION 5. Makes application of a change in law made by this Act prospective.

SECTION 6. Effective date: September 1, 2013.