



State of Ohio Environmental Protection Agency

Audit Disclosure Response Protocol

Background: Ohio's amended audit privilege and immunity law became effective on September 30, 1998. The purpose of this law is to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, promptly disclose and expeditiously correct violations of environmental laws. Under the law, the owner or operator of a facility may perform a voluntary self-evaluation ("audit") designed to improve compliance or identify, correct, or prevent noncompliance with environmental laws. In return for performing a proper audit, the owner or operator can qualify for immunity from the gravity portion of any civil penalty for the violations disclosed. Also, the audit and documents used to conduct the audit are privileged.

Ohio EPA has developed prior audit disclosure response protocols to assist the Agency in complying with Ohio's audit privilege and immunity law in 1998 and 2002. The revisions to the protocol contained herein primarily speak to two areas. First, the revisions seek to better clarify obligations within Ohio EPA to communicate with the entity submitting the audit disclosure regarding results and conclusions of our investigation. Second, because a company ultimately has the burden of proving in court that they are entitled to immunity, it is not Ohio EPA's role or even ability to "grant or deny" immunity. Rather, it is ultimately a question for a court to answer. Accordingly, in our communication, we will only be issuing an opinion as to whether the submittal meets the requirements for immunity.

Content of Disclosures: R.C. §3745.72(C) requires that all disclosures must be in writing, dated, and hand delivered or sent by certified mail to the Director. The disclosure must contain all of the following information:

- (i) the name, address, and telephone number of the owner or operator making the disclosure;
- (ii) the name, title, address, and telephone number of one or more persons associated with the owner or operator who may be contacted regarding the disclosure;
- (iii) a brief summary of the alleged violation of environmental laws, including, without limitation, the nature, date, and location of the alleged violation to the extent that the information is known by the owner or operator; and (iv) a statement that the information is part of an environmental audit report and is being disclosed

under R.C. §3745.72 in order to obtain the immunity provided by that section.

Procedure for Processing Disclosures:

- Step 1 The Director's Office will promptly log receipt of the disclosure into its Audit Disclosure Tracking Log. The Director's Office will assign a tracking number (Disclosure Number) to all audit disclosures received. The number will consist of the last two digits of the year the disclosure was received, followed by the number of disclosures received since the law was passed.
- Step 2 The Director's Office will promptly determine whether the disclosure meets the statutory requirements regarding content set forth above. The Director's Office will also determine whether Ohio EPA has jurisdiction over the alleged violation(s).
- a. If Ohio EPA does not have jurisdiction over the disclosed violations the Director's Office will ensure that a copy of the disclosure has been delivered to the appropriate state agency. No further action will be taken by Ohio EPA.
 - b. If Ohio EPA has jurisdiction but the disclosure fails to contain all the necessary information, the Director's Office will notify the disclosing party and request any missing information.
 - c. If the disclosure contains violations for which Ohio EPA has jurisdiction as well as violations under the jurisdiction of another state agency, Ohio EPA will process the disclosure independently as well as comply with step 2a.
- Step 3 If the disclosure has the requisite information, or upon receipt of all necessary information, the Director's Office, within seven days of receipt of the disclosure, shall send a copy of the notice and the disclosure to the Assistant Chief of the District Office in which the facility or property is located and to the Enforcement Coordinator for each affected Division.
- a. If the disclosure identifies a violation of chapter 3704 of the Revised Code and concerns a facility or property located within the jurisdiction of a local air agency, DAPC's Enforcement Coordinator will provide a copy of the disclosure to such local air agency.
 - b. If the disclosure identifies a violation of chapter 3714 or a violation of the solid or infectious waste provisions of chapter 3734, and concerns a facility or property within and subject to the jurisdiction of

a local health department approved by the Director, then the Assistant District Chief will provide a copy of the disclosure to such approved local health department.

- Step 4 After receiving a copy of the disclosure, the Assistant District Chief shall identify someone in the District as having the lead role in responding to the disclosure, the Lead Investigator. If the disclosure identifies violations in more than one agency program (i.e. a multi-media disclosure), the Assistant District Chief should assign a Lead Investigator for each affected division. However, in situations where the facility or property is located within the jurisdiction of a local air agency, the local air agency shall identify someone in the agency to have the lead role in responding to the disclosure and notify the Assistant District Chief. In the event the disclosure contains more than just air violations, the District Office should still designate someone as having the lead role and that person shall coordinate with the local air agency.
- Step 5 Within fourteen days of receipt of the disclosure, the Lead Investigator [or local air agency, if applicable] shall deliver, by certified mail, notice of Ohio EPA's jurisdiction over the violations contained in the disclosure to the owner or operator who made the disclosure. The notice shall identify the Lead Investigator [name, title, address and telephone number] who will be responding to the disclosure. For multi-media disclosures, the Assistant District Chief should prepare the letter and indicate each Lead Investigator that has been designated.
- Step 6 The Lead Investigator shall promptly schedule an inspection of the facility or site, unless the Lead Investigator, in consultation with the Division Enforcement Coordinator(s) determines that an inspection is not necessary. If a determination is made that an inspection is not necessary, move to Step 9. The Lead Investigator may involve other district personnel in investigating the disclosure as appropriate. If there is a multi-media disclosure involved, the District should attempt to coordinate a multi-media inspection of the facility.
- a. The Lead Investigator should be aware that the individual or entity that performed the environmental audit enjoys a privilege over the following:
 - i. The contents of an environmental audit report.
 - ii. The contents of communications between the owner or operator and employees or contractors of the owner or operator, or among employees or contractors of the owner or

operator, that are necessary to the audit and are made in good faith as part of the audit.

- b. The privilege described above does not apply to the following:
 - i. Information that is required by law to be collected, developed, maintained, reported, disclosed publicly, or otherwise made available to a government agency.
 - ii. The information is obtained from a source other than an environmental audit report, including, without limitation, observation, sampling, monitoring, a communication, a record, or a report that is not part of the audit on which the audit report is based.

It is the policy and practice of this Agency (and U.S. EPA) to not request an audit report. The Agency will, however, continue to request information necessary to investigate and respond to alleged violations of environmental laws, just as the Agency would have before enactment of the law. If the Lead Investigator's efforts to obtain necessary information are inhibited by claims of privilege by a disclosing party, the investigator should promptly seek the advice of an Agency attorney.

Step 7 Within five days after inspecting the facility, the Lead Investigator, using normal procedures, will determine whether any follow-up enforcement action is necessary. The Lead Investigator shall then submit to the Assistant District Chief and to the Enforcement Coordinator of each affected Ohio EPA Division a report that (A) summarizes the investigation of the disclosure, including steps taken to investigate the disclosure; and (B) gives a recommendation as to the course of action to be taken.

Step 8 The Enforcement Coordinator of each affected Division shall review the Recommendation of the Lead Investigator and, in consultation with the Assistant District Chief and the Lead Investigator, shall determine the course of further action.

Once a determination is made, and regardless of whether enforcement action is called for or not, the Enforcement Coordinator shall send a follow-up letter to the company informing the company of the results of the investigation and Ohio EPA's opinion of the degree of immunity, if any, that applies and what action, if any, Ohio EPA plans to take.

If follow-up enforcement is necessary, move to Step 9. If a determination has been made that no further enforcement is necessary, move to Step 11.

Step 9

Formal Enforcement Action Follow-up.

- a. If a determination is made that an EAR is appropriate, the Lead Investigator

shall prepare the EAR following normal procedures. If a multi-media disclosure is involved the Lead Investigators should coordinate with the Assistant District Chief and follow the Multi-Media Enforcement Protocol. The Lead Investigator will also include all relevant factual information pertaining to the following issues:

- i. Was the disclosure made promptly after the audit was performed?
- ii. Did the individual or entity make a reasonable, good faith effort to achieve compliance as quickly as practicable?
- iii. Did the individual or entity cooperate with Ohio EPA in investigating the cause, nature, extent, and effects of the noncompliance?
- iv. Was the disclosure required by law, prior litigation or an order by a court or government agency?
- v. Did the disclosing party know or have reason to know that a government agency had commenced an investigation or enforcement action that concerns violations disclosed?
- vi. Within the previous 3 year period, did the disclosing party commit significant violations that constitute a pattern of continuous or repeated violations of environmental laws, environmental related settlement agreements, or environmental related judicial orders and that arose from separate and distinct events?
- vii. Have any of the disclosed violations resulted in serious harm or in imminent and substantial endangerment to human health or the environment?
- viii. Did the disclosed violations arise from a specific requirement of an administrative or judicial order?
- ix. Was the audit completed within a reasonable amount of time,

not to exceed six months, unless an extension was granted by the Director?

- Step 10 Upon receipt of an EAR in Central Office that includes violations disclosed as part of an audit, the EAR should be processed using normal procedures. In addition, the Enforcement Committee shall request Legal assign an attorney to review the EAR to determine the impact, if any, on the enforcement case as a result of the audit privilege and immunity law. Any Director's Final Findings and Orders or referral to the Attorney General's Office shall be prepared taking into account the immunity granted under R.C. §3745.72 in full consultation with the Legal Office. After issuance of the Final Findings and Orders or referral, the normal procedures should govern resolution of the case. After resolution of the enforcement case, move to Step 9.
- Step 11 Once Steps 1 through 10, as applicable, have been completed, no further action should be necessary with respect to the disclosure or the violation(s) disclosed. The Enforcement Coordinator for each affected Ohio EPA division shall complete the information sheet, which is identified as Appendix A to this protocol and provide a copy to the Director's Office. Upon receipt, the Director's Office shall record in the Audit Disclosure Tracking Log that investigation and follow-up on the disclosure is complete.

Appendix A
Record of Disclosures

Company Name: _____

Location: _____

Disclosure Number: _____

District Office/Local Air Agency: _____

Lead Investigator: _____

Relevant Dates:

Date Forwarded to DO/DIV/LAA: _____

Date Acknowledgment Letter to Company: _____

Date of Inspection(s) (if any): _____

DATE OF FOLLOWUP LETTER TO OWNER _____

Date of Follow Enforcement Action(s) (if any): _____

OAC Rule(s)/ORC Section(s) Violation: _____

Brief Description As To How Violations Were Addressed: _____

Brief Description of Environmental Benefits Gained Through Compliance: _____

Immunity

_____ MEETS R.C. 3745.72 STANDARD

_____ DOES NOT MEET R.C. 3745.72 STANDARD

IF disclosure does not meet standard, explain why _____

