

**Policy Regarding Implementation of
The Colorado Environmental Audit Privilege and Immunity Law
Sections 13-25-126.5, 13-90-107, 25-1-114.5, and 25-1-114.6, C.R.S.**

This document supercedes and replaces the "Policy Regarding the Implementation of the Colorado Environmental Auditing and Immunity Law" adopted November 13, 1996.

The Colorado Environmental Audit Privilege and Immunity Law ("Audit Law"), enacted in 1994, provides that all State civil and administrative penalties and penalties for criminally negligent violations of State environmental laws may be waived if such violations are voluntarily disclosed as the result of an audit conducted by or for the entity. The Audit Law is codified at section 13-25-126.5, C.R.S. (audit privilege); section 13-90-107, C.R.S. (testimonial privilege); and section 25-1-114.5, C.R.S. (penalty immunity). Certain aspects of the Audit Law are clarified by the Colorado Attorney General's formal opinion of April 14, 2000. In 2000, the Colorado General Assembly enacted legislation (codified at section 25-1-114.6, C.R.S.) creating a "Pilot Project" to work in conjunction with the original Audit Law. A Memorandum of Agreement between the State of Colorado and the United States Environmental Protection Agency dated May 30, 2000, further explains implementation of the Pilot Project. The purpose of this Policy is to articulate the procedures to be utilized by the Colorado Department of Public Health and Environment (the "Department") to manage and track implementation of the Audit Law under the Pilot Project.

In order to ensure that disclosures are treated consistently and in accordance with State law, it is the Department's policy that:

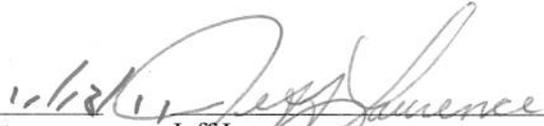
1. Each Division of the Department will maintain complete records of all communications and documentation provided pursuant to disclosures associated with immunity requests in accord with each Division's record retention policy. The Division of Environmental Health and Sustainability (DEHS), Sustainability Unit will maintain a centralized file that includes a copy of each disclosure and documentation indicating how the Department responded to the disclosure. The Department will make this information accessible to the public in accordance with the Colorado Open Records Act, sections 24-72-101 to 402, C.R.S.
2. The Sustainability Unit will acknowledge in writing every disclosure. Additionally, the appropriate Division(s) will be requested to evaluate the claim of immunity, collect additional information, if necessary, and identify the need for further action. Any disclosures received directly by department staff shall be forwarded to the Sustainability Unit.
3. The Sustainability Unit will notify the federal Environmental Protection Agency (EPA) and act in accordance with the "Protocols for Implementation of the Colorado Audit Privilege and Immunity Law, Memorandum of Agreement (MOA) and the EPA Self-Audit Policy".
4. Written requests for additional information and/or for meetings with the disclosing entity to discuss the audit disclosures and the potential for penalty immunity will be made by designated Division enforcement staff. Disclosures that the Division(s) determines do not meet the requirements of a voluntary disclosure as defined in § 25-1-114.5, C.R.S., or that fall into the categories of activities specified in § 25-1-114.6(2) and (3), C.R.S., may be considered for potential enforcement action by the appropriate Division(s). The Division(s)

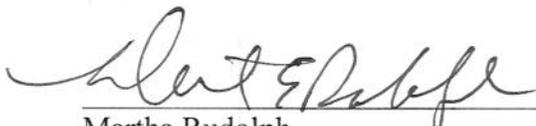
and the disclosing entity may agree to resolve some or all of the matters raised in the disclosures through a settlement agreement, such as a compliance order on consent. Any such settlement agreements shall contain an express waiver by the disclosing entity of further claims of penalty immunity through appeals to the appropriate board or commission or through any other legal action filed in any other venue. Before a determination to grant or deny a request for immunity is made, the Division staff will consult with the relevant Division Director, who will consult with the Director of Environmental Programs if the request for immunity impacts more than one division.

5. C.R.S. § 25-1-114.5 states that a voluntary disclosure of an environmental violation to the Department creates a rebuttable presumption that the person or entity is immune from any administrative or civil penalties associated with the issues disclosed, and is immune from any criminal penalties for the negligent acts associated with the issues disclosed. If the Division determines that immunity for any portion of a disclosure is not justified and there is no agreed resolution of enforcement matters with the disclosing entity as described in paragraph 4 above, C.R.S. § 25-1-114.5(5) requires that the Division show to the satisfaction of the respective commission or the state Board of Health that the disclosure was not voluntary based upon the factors set forth in the statute.
 - a. The Division shall provide written notification to the disclosing entity of the denial of penalty immunity that includes the following information:
 1. The right to seek an adjudicatory hearing if the disclosing entity files a request seeking such a hearing within thirty days of notification of the denial;
 2. The board or commission to whom a request for hearing should be sent; and
 3. Notification that the failure to timely request a hearing constitutes a waiver of the right to pursue self-audit immunity pursuant to C.R.S. § 25-1-114.5.
 - b. If the disclosing entity timely requests a hearing, such request shall be sent to the board or commission with subject matter jurisdiction over the requirements at issue. No penalty action shall be taken during the administrative appeal.
 - c. For the hearing, the Division has the burden of rebutting the presumption of the voluntariness of the disclosure. The decision by the appropriate board or commission is a final agency action. If the final agency action upholds the Division's denial of penalty immunity, absent a stay issued by a court with jurisdiction, the Division may take penalty action at that time.
6. All matters disclosed will be reviewed and resolved in a timely manner by the appropriate Division. In doing so, the issues disclosed will be resolved either informally or formally through the normal enforcement procedures of the reviewing Division following this Policy.

7. A checklist will be completed as the appropriate Division(s) evaluates claims for penalty immunity. An example checklist is provided in Attachment 1. This checklist may be modified from time to time. A hard copy of the completed checklist will be retained in the Division's file, and a copy will be forwarded to the Sustainability Unit.
8. Questions regarding the interpretation or implementation of this Policy should be referred to the office of the Director of Environmental Programs.

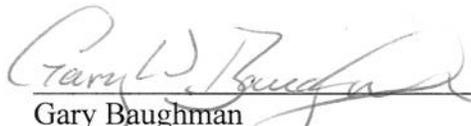
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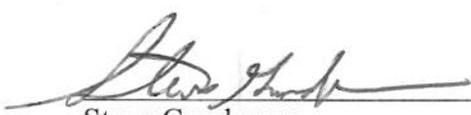
 _____ Chris Urbina Executive Director	Date	 _____ Jeff Lawrence Director, Division of Environmental Health and Sustainability	Date
			11/18/11

 _____ Martha Rudolph Director of Environmental Programs	Date
	11/17/11

Acknowledged:

 _____ Will Allison Director, Air Pollution Control Division	Date

 _____ Gary Baughman Director, Hazardous Materials and Waste Management Division	Date
	11/17/11

 _____ Steve Gunderson Director, Water Quality Control Division	Date
	11/17/11

Attachment 1
Colorado Environmental Audit Privilege and Immunity Law
Checklist for Voluntary Disclosures

The Colorado Environmental Audit Privilege and Immunity Law (“Audit Law”) provides that civil and administrative penalties and penalties for criminally negligent violations of State environmental laws may be waived if such violations are voluntarily disclosed. The following is a checklist to be utilized by the Department in determining whether a disclosure by a person or entity constitutes a “voluntary disclosure” pursuant to the Audit Law.

Entity Name: <i>(Insert Entity Name Here)</i>	
Entity Location: <i>(Insert Entity Location Here)</i>	
Date Disclosure Received: <i>(Insert Disclosure Date Here)</i>	
1.	Was penalty immunity approved? <i>(Insert Yes or No)</i>
1.2	If no, why? Division Response: <i>(Insert Response Here)</i>
2.	Disclosure must be made promptly after knowledge of the noncompliance.
2.1	When was the self-evaluation initiated? Division Response: <i>(Insert Response Here)</i>
2.2	When was the self-evaluation completed? <i>(It must be completed within a reasonable period of time.)</i> Division Response: <i>(Insert Response Here)</i>
2.3	When did the person claiming the voluntary disclosure first learn of the alleged noncompliance? <i>(The person must have disclosed it promptly to the Department.)</i> Division Response: <i>(Insert Response Here)</i>
2.4	How did the person claiming the voluntary disclosure first learn of the alleged noncompliance? <i>(The discovery must be the direct result of the self-evaluation audit and not a chance discovery.)</i> Division Response: <i>(Insert Response Here)</i>
3.	Disclosure must arise out of a voluntary self-evaluation, as defined in the privilege portion of the self-audit law.
3.1	What was the scope and purpose of the voluntary self-evaluation? Division Response: <i>(Insert Response Here)</i>
3.2	Who performed the self-evaluation? Employees or a consultant? <i>(Employees or consultants must be assigned or hired expressly for the purpose of conducting the self-evaluation.)</i> Division Response: <i>(Insert Response Here)</i>

3.3	<p>Was the self-evaluation conducted as a permit or other regulatory requirement? <i>(Any requirement contained in any regulations promulgated under the Colorado Air Pollution Prevention and Control Act, the Colorado Water Quality Control Act, the Radiation Control Act, the Colorado Hazardous Waste Act and the Solid Waste Disposal Sites and Facilities Act or in any orders, permits, licenses, or closure plans under the above laws.)</i></p> <p>Division Response: <i>(Insert Response Here)</i></p>
4.	<p>The disclosing entity must pursue compliance with due diligence and correct the noncompliance within two years.</p>
4.1	<p>Has the person making the disclosure indicated what measures have been or will be taken to come into compliance?</p> <p>Division Response: <i>(Insert Response Here)</i></p>
4.2	<p>Has the disclosing entity pursued compliance with due diligence? <i>(If a permit is required to achieve compliance, submittal of a complete permit application within a reasonable period of time and continued cooperation with the permitting agency will be considered appropriate effort. Additionally, the development of a compliance schedule may be appropriate.)</i></p> <p>Division Response: <i>(Insert Response Here)</i></p>
4.3	<p>Will compliance be achieved within two years? When was or will compliance be achieved? <i>(Persons may not automatically have two years to achieve compliance, as they must demonstrate due diligence.)</i></p> <p>Division Response: <i>(Insert Response Here)</i></p>
4.4	<p>Is a time extension necessary and warranted for the disclosing entity to achieve compliance? <i>(The two-year time period within which the noncompliance is required to be corrected may be extended if it is not practicable to correct the noncompliance within the two-year period.)</i></p> <p>Division Response: <i>(Insert Response Here)</i></p>
5.	<p>The disclosing entity must cooperate with the Department.</p>
5.1	<p>Has the disclosing entity cooperated with the Department regarding the investigation of the issues identified in the disclosure?</p> <p>Division Response: <i>(Insert Response Here)</i></p>
6.	<p>The disclosing entity must not already be required to disclose the compliance issue under an environmental permit or an agency order.</p>
6.1	<p>Was the disclosing entity required to make the disclosure under a specific permit condition or an order? <i>(If so, then the disclosure is not "voluntary".)</i></p> <p>Division Response: <i>(Insert Response Here)</i></p>
7.	<p>The Department will use its discretion and will review any information and/or data provided by the disclosing entity in assessing whether the non-compliance created an imminent and substantial endangerment or resulted in serious harm to public health or the environment.</p>
7.1	<p>Did the activity disclosed create an imminent and substantial endangerment, or result in serious harm to public health or the environment?</p> <p>Division Response: <i>(Insert Response Here)</i></p>
8.	<p>The Department will use its discretion and will review any information and/or data provided by the disclosing entity in assessing whether the identified non-compliance conferred an unfair or excessive economic benefit.</p>

8.1	<p>Did the activity disclosed confer an unfair or excessive economic benefit on the disclosing entity?</p> <p>Division Response: <i>(Insert Response Here)</i></p>
9.	<p>The Department will use its discretion and will review the facts of the disclosure in determining whether it is appropriate to allow immunity from penalties for criminal negligence on a case-by-case basis.</p>
9.1	<p>Is the violation considered to be a criminally negligent violation? <i>(Discretion only applies to criminally negligent violations for discharges to surface water under the Colorado Discharge Permit System; voluntary disclosures of other criminally negligent violations remain immune from penalties.)</i> Find out why just water</p> <p>Division Response: <i>(Insert Response Here)</i></p>
10.	<p>Immunity from penalties does not apply if the entity is found to be a “bad actor” by a court or by an administrative law judge.</p>
10.1	<p>Has the disclosing entity committed serious violations that constitute a pattern of continuous or repeated violations of environmental laws, rules, regulations, permit conditions, settlement agreements, or orders on consent, and that were due to separate and distinct events giving rise to the violations?</p> <p>Division Response: <i>(Insert Response Here)</i></p>
10.2	<p>What is the disclosing entity’s compliance history within the three-year period prior to the date of the disclosure?</p> <p>Division Response: <i>(Insert Response Here)</i></p>
11.	<p>The law does not limit the Department from issuing orders or requiring activities to achieve compliance.</p>
11.1	<p>How will you resolve the issues identified by the disclosing entity?</p> <p>Division Response: <i>(Insert Response Here)</i></p>
11.2	<p>Is the action to be taken to resolve the issues identified by the disclosing entity consistent with the Division’s enforcement response policy and procedures?</p> <p>Division Response: <i>(Insert Response Here)</i></p>
11.3	<p>Are additional actions needed to protect public health and the environment? <i>(The Department can still obtain injunctions, or issue a cease and desist order if necessary.)</i></p> <p>Division Response: <i>(Insert Response Here)</i></p>
<p>Additional Comments: <i>(Insert Comments Here)</i></p>	