



House Resolution 231 Regular Session of the Legislature 2019

Stakeholders Session

Wednesday September 4, 2019

LOUISIANA DEPARTMENT OF **ENVIRONMENTAL QUALITY**

:LAW DIVISION



Immunity

- “[E]xemption from penalties, payments or legal requirements, granted by authorities or statutes.”
- There are many types of legal immunity. Currently, Blacks Law Dictionary lists 21 types of immunity, but does not list an immunity for environmental violations specifically.
- For purposes of this presentation, two types of immunity are defined: absolute immunity and qualified immunity.
- Neither immunity is recognized under EPA’s current Voluntary Audit policy.



Immunity (cont.)

- At this time, Louisiana does not have a statute granting immunity from penalties, payments, or other legal requirements in the environmental setting. It does, however, have enforcement authority to choose not to impose a penalty, require a payment, and to allow for a compliance schedule that grants time to come into compliance.



Immunity (cont.)

LAC 33:I.701.B says the following:

- B. After considering the nine factors in R.S. 30:2025(E)(3)(a), the department realizes there may be circumstances where violations have occurred that do not warrant a penalty action.
- This provision recognizes that in considering the factors required, the department can decide not to issue a penalty.



Immunity (cont.)

- *Absolute immunity*- “A complete exemption from civil liability, usually afforded to officials while performing particularly important functions, such as a representative enacting legislation and a judge presiding over a lawsuit.” (Blacks)
- *Qualified Immunity*- “Immunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights.” (Blacks)

Both types of immunities can be applied in the environmental self audit privilege setting.



EPA Policy

- Currently, EPA does not recognize immunity for anything other than the new purchasers in the oil and gas production field.
- EPA policy does provide for a partial immunity in that the fines/penalties are subject to either a 75% or 100% reduction in the gravity portion of a penalty.



Immunity vs Privilege

- Immunities are generally afforded to persons.
- Privileges are afforded to evidence.
- Immunities generally prevent actions being brought against designated persons under certain circumstances.
- Privileges generally prevent information from being used in actions brought against certain persons.

Both immunities and privileges can effect the ability of an environmental agency from carrying out prosecutions.



EPA Region VI

- Arkansas
- Louisiana
- New Mexico
- Oklahoma
- Texas



Arkansas

- Arkansas' statute, Arkansas Code Annotated Section 8-1-301 through 312, does not contain an immunity provision, only extensive privilege provisions.
- Arkansas' statute would not ban a prosecution against a violator after an adversary hearing on the release of the audit report conducted by a qualified judge of administrative tribunal.
- Arkansas' rule is one of evidence, not one directly protecting a person.



New Mexico

- Does not have an immunity statute.
- Does have a Voluntary Environmental Self Evaluation Policy.
- Substantially the same as EPA's current policy
- Does not completely protect persons guilty of violations, but does partially protect them from all or a portion of the gravity portion of the penalty calculation.
- Is not a rule of evidence or a ban on prosecution but would foreclose referral for criminal prosecution.
- Report would become public.



Oklahoma

- New statute recognizes a qualified immunity. Contained in Oklahoma Code 27A O.S. §1-4-111-121; effective November 1, 2019 (specifically Section 1-4-119).
- Creates extensive conditions under which the immunity can and cannot be applied.
- Applies to both a seller and buyer of a facility under certain conditions.
- Contains many exceptions to the immunity including willful and knowing; the person committing the violation was also the person responsible for the violation; recklessness; and/or the violation resulted in significant economic benefit over competitors.



Oklahoma

- The person claiming the immunity has the initial burden of establishing a prima facie case that the disclosure was voluntary.
- The enforcement authority will then have a chance to rebut the assertion of voluntary disclosure.
- The provision requires notice to the regulatory agency and be specific to where, what, and time duration of the audit.
- Potential purchasers can gain the immunity if within 45 days of acquisition, it notifies the agency it intends to complete an environmental audit.



Texas

- Statute found in Texas Environmental, Health, and Safety Audit Privilege Act. Title 13, Chapter 1101.
- Does recognize an immunity under Section 1101.151.
- The immunity applies only if the disclosure is “voluntary” as defined in the statute.
- The immunity is available to both the seller and a purchaser under certain conditions.
- The immunity is disclosed under a voluntary audit and made in writing by certified mail.
- Appropriate actions were taken after discovery.
- The person cooperates with the agency.



Texas

- The violation did not result in injury or imminent and substantial risk of serious injury to one or more persons, property, or the environment.
- The violation did not result in off-site substantial harm or imminent and substantial risk of harm to persons, property, or the environment.
- The provision also contains a burden of proof provision. The person asserting immunity has to make a prima facie case, where the burden would shift to the agency.



Other Information

- Currently EPA lists four states as having only an Immunity provision and not a privilege provision.
- 20 states have both a privilege and an immunity provision. See: <https://www.epa.gov/compliance/state-audit-privilege-and-immunity-laws-self-disclosure-laws-and-policies>
- EPA has also published an article on the effect on State Delegated programs, see; <https://www.epa.gov/sites/production/files/2016-03/documents/audit.pdf>