THE NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT

(Act 451 of 1994, As Amended)

Part 148
ENVIRONMENTAL AUDIT PRIVILEGE AND IMMUNITY

FIVE-YEAR REPORT

1996 – 2001

Prepared by:
Environmental Assistance Division
Department of Environmental Quality
March 31, 2001
I. INTRODUCTION

This report is being submitted to the Senate Natural Resources and Environmental Affairs Committee and the House Conservation and Outdoor Recreation Committee of the Michigan Legislature in accordance with Part 148, Environmental Audit Privilege and Immunity, of the Natural Resources and Environmental Protection Act 1994 PA 451, as amended, (NREPA), which states in part:

Section 14810

(2) Within 5 years after the effective date of this part, the department of environmental quality shall prepare and submit to the standing committees of the legislature with jurisdiction over issues pertaining to natural resources and the environment a report evaluating the effectiveness of this part and specifically detailing whether this part has been effective in encouraging the use of environmental audits and in identifying and correcting environmental problems and conditions.

II. LEGISLATIVE HISTORY


On November 13, 1997, Governor John Engler signed into law 1997 PA 133 and 1997 PA 134, which amended Part 148 of the NREPA. These amendments further limited the scope of immunity coverage, established a pre-audit notice requirement, and clarified various aspects of the law.

III. OVERVIEW

The purpose of Part 148 is to encourage businesses, municipalities, and other entities to conduct environmental audits and to promptly disclose and correct any violations found by the audits. Part 148 defines “environmental audit” as a voluntary, internal evaluation of a facility (or activity) regulated by the environmental requirements in the NREPA, conducted after March 18, 1996, that is designed to:

- Identify past or current noncompliance;
- Prevent noncompliance or improve compliance;
- Identify an existing or potential hazard, contamination, or adverse environmental condition; or
- Improve an environmental management system or process.
Part 148 provides two important incentives to conduct environmental audits and correct violations:

- Limited privilege for an environmental audit report, by which certain information contained in the environmental audit report can be held confidential (privileged) and is not directly accessible to a state or local government agency or the public; and

- Limited immunity from state administrative or civil fines and penalties and certain criminal fines for negligent acts or omissions (except in the case of gross negligence) for violations that are discovered through an environmental audit, provided that the audit is voluntary, prior notice is provided to the Department of Environmental Quality (DEQ) of the intent to do an audit, and the discovered violations are promptly corrected and disclosed to the appropriate state and/or local regulatory agencies.

State and local agencies retain authority to access and review any information that is required to be made available or reported under environmental laws and regulations, permits, or other legal documents or agreements. Also, Part 148 establishes a procedure by which the state or local law enforcement agency can seek disclosure of privileged material through the circuit court.

In order to receive immunity under Part 148, a facility must notify the DEQ of its intent to do an environmental audit, specifying the facility or portion of the facility to be audited, the anticipated time the audit will begin, the general scope of the audit, and make a voluntary disclosure of the violations discovered, and promptly correct the violations. The state may rebut the presumption of immunity in a situation where the state believes that the disclosure was not made in full compliance with Part 148.

For additional information see the attached – *Fact Sheet – Environmental Audit Privilege & Immunity Update with 1997 Amendments*.

### IV. RESULTS

As of March 31, 2001, the DEQ has received 1,648 notices of intent to perform an environmental audit. These notices have been filed by various business and industry types, both large and small, as well as several local units of government.

<table>
<thead>
<tr>
<th>DATES</th>
<th>NUMBER OF NOTICES OF INTENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>March 1996 - October 1997</td>
<td>Requirement not in effect</td>
</tr>
<tr>
<td>November 1997 - March 1998</td>
<td>35</td>
</tr>
<tr>
<td>April 1998 - March 1999</td>
<td>554</td>
</tr>
<tr>
<td>April 1999 - March 2000</td>
<td>538</td>
</tr>
<tr>
<td>April 2000 - March 2001</td>
<td>521</td>
</tr>
<tr>
<td>Total to Date</td>
<td>1648</td>
</tr>
</tbody>
</table>
As of March 31, 2001, 80 voluntary disclosures have been submitted. To qualify for immunity, facilities are required to pursue compliance with due diligence, and promptly correct the noncompliance or conditions after their discovery. Ninety percent of the violations reported were targeted for correction within six months of the date of the voluntary disclosure.

<table>
<thead>
<tr>
<th>DATES</th>
<th>NUMBER OF VOLUNTARY DISCLOSURES</th>
</tr>
</thead>
<tbody>
<tr>
<td>March 1996 - April 1997</td>
<td>12</td>
</tr>
<tr>
<td>April 1997 - March 1998</td>
<td>10</td>
</tr>
<tr>
<td>April 1998 - March 1999</td>
<td>12</td>
</tr>
<tr>
<td>April 1999 - March 2000</td>
<td>15</td>
</tr>
<tr>
<td>April 2000 - March 2001</td>
<td>31</td>
</tr>
<tr>
<td>Total to Date</td>
<td>80</td>
</tr>
</tbody>
</table>

Additional information for the five-year period, including geographic distribution of notices and disclosures, types of violations disclosed, and the estimated time required to achieve compliance is presented in Appendix A attached.

V. EVALUATION OF EFFECTIVENESS

The recorded results indicate that Part 148 is serving its purpose in providing an incentive and reducing barriers to regulated entities to perform self-audits. Most importantly, the significant number of notices of intent filed (1,648) shows that audits are being performed.

There have been no known instances where Part 148 has prevented the DEQ from performing its regulatory responsibilities or taking necessary enforcement actions. None of the 80 voluntary disclosures have identified violations of the type and extent that warranted further action by the DEQ, nor did the privilege provided under Part 148 prevent the DEQ from accessing necessary site information.

In conclusion, Part 148 has been and continues to be effective in encouraging increased self-auditing by regulated entities in Michigan, with no adverse effect on the DEQ’s regulatory programs. No changes in the statute appear to be necessary or appropriate at this time.
March 1996 – March 2001

Notices of Intent to Commence Environmental Audits

Number of Notices Received ................................................................. 1648

Types Of Facilities Providing Notice
- Industrial/Business ......................................................... 1645
- Municipal ............................................................................. 3

Geographic Distribution Of Notices
- Number of Counties With Notices ........................................... 41
- Number of Notices Per County
  - Wayne ................................................................. 907
  - Washtenaw ......................................................... 200
  - Macomb ............................................................ 144
  - Oakland ............................................................... 106
  - Monroe ................................................................. 47
  - Genesee ............................................................... 36
  - Kent ................................................................. 32
  - Saginaw ............................................................... 31
  - Muskegon ........................................................... 23
  - Ottawa ................................................................. 17
  - Bay ....................................................................... 12
  - Ingham ............................................................... 12
  - Oceana ................................................................. 8
  - Kalamazoo ............................................................ 6
  - Lenawee ............................................................... 6
  - Shiawassee .......................................................... 6
  - Eaton ................................................................. 5
  - Kalkaska, Montcalm, Newaygo, St. Clair ......................... 4
  - Jackson, Manistee, Mecosta, Midland .............................. 3
  - Allegan, Calhoun, Clare, Lapeer, Livingston, Osceola, Sanilac ......................................................... 2
  - Alpena, Gratiot, Huron, Ionia, Lake, Livingston, Mason, Schoolcraft, VanBuren, Wexford ...................... 1

Appendix A
Five-Year Summary of Notifications and Disclosures Made Pursuant to Part 148, Environmental Audit Privilege and Immunity of Act 451 of 1994, as Amended, the Natural Resources and Environmental Protection Act

Total Through 3/31/01
Voluntary Disclosures

Number of Disclosures Received.............................................................. 80

Types of Facilities Submitting Disclosures
- Industry/Business ................................................................. 79
- Municipal .............................................................. 1

Geographic Distribution Of Disclosures
- Number of Counties With Disclosures .............................................. 27
- Number of Disclosures Per County
  - Wayne ............................................................... 15
  - Oakland ............................................................. 10
  - Ottawa ................................................................. 8
  - Genesee, Ingham ............................................................. 5
  - Kent, Muskegon ............................................................ 4
  - Macomb, Saginaw ............................................................ 3
  - Jackson, Lapeer, Schoolcraft, Shiawassee, Washtenaw .................. 2
  - Allegan, Bay, Branch, Clare, Huron, Kalamazoo, Kalkaska, Livingston, Manistee, Oceana, Sanilac, St. Clair, VanBuren ........................................ 1

Table 1. Tabulation of number of violations disclosed by category and the reported time needed to gain compliance.

<table>
<thead>
<tr>
<th>VIOLATION TYPE</th>
<th>NREPA Part</th>
<th>Failure to Have A Permit</th>
<th>Contamination</th>
<th>Failure to Have A Required Plan</th>
<th>Violation of A Permit Condition/Rule</th>
<th>Failure to Report</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>31 Water</td>
<td>8</td>
<td>0</td>
<td>15</td>
<td>22</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>55 Air</td>
<td>22</td>
<td>0</td>
<td>4</td>
<td>36</td>
<td>18</td>
</tr>
<tr>
<td></td>
<td>111 Hazardous Waste</td>
<td>0</td>
<td>0</td>
<td>26</td>
<td>35</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>115 Waste Disposal</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>201 Environmental Remediation</td>
<td>0</td>
<td>6</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>211 Underground Storage Tank</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>311/312 Title III (EPCRA)</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>30</td>
<td>9</td>
<td>45</td>
<td>98</td>
<td>39</td>
</tr>
</tbody>
</table>
Table 2. Tabulation of time needed to gain compliance by violation type. Table covers report period March, 1996 through March, 2001.

<table>
<thead>
<tr>
<th>NREPA Part</th>
<th>Failure to Have A Permit</th>
<th>Contamination</th>
<th>Failure to Have A Required Plan</th>
<th>Violation of A Permit Condition/Rule</th>
<th>Failure to Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reported Compliant at Time of Disclosure</td>
<td>5</td>
<td>0</td>
<td>11</td>
<td>36</td>
<td>19</td>
</tr>
<tr>
<td>1 to 2 Months</td>
<td>14</td>
<td>0</td>
<td>13</td>
<td>41</td>
<td>9</td>
</tr>
<tr>
<td>3 to 6 Months</td>
<td>5</td>
<td>5</td>
<td>18</td>
<td>18</td>
<td>5</td>
</tr>
<tr>
<td>7 to 9 Months</td>
<td>4</td>
<td>4</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Greater Than 9 Months</td>
<td>2</td>
<td>0</td>
<td>3</td>
<td>2</td>
<td>6</td>
</tr>
</tbody>
</table>