

ENVIRONMENTAL AUDIT PRIVILEGE AND IMMUNITY

AMY J. KOHLHEPP

Environmental Assistance Program
Environmental Science & Services Division

Kohlheppa@michigan.gov

517-241-7965



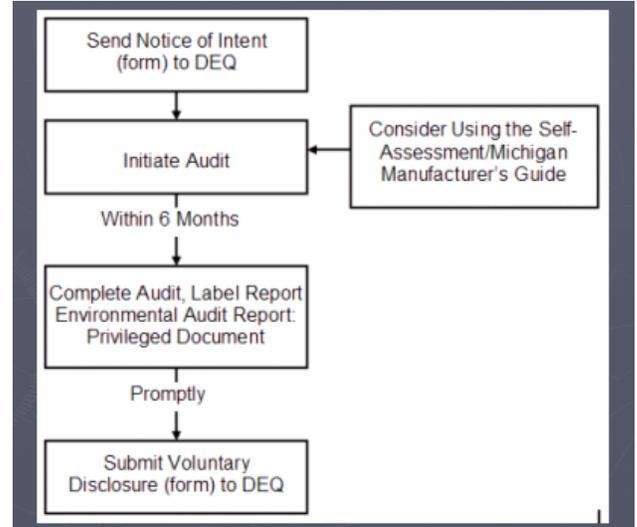
I. Self Assessments and Environmental Audits

II. Why was the Law Passed?

- To encourage use of audits in identifying and correcting environmental problems and conditions
- By helping alleviate fear associated with disclosure of violations facilities may be encouraged to perform environmental self-audits.
- Program requires prompt disclosure and correction of violations found.

III. Benefits of Michigan's Environmental Audit Privilege and Immunity Law

- Part 148 of NREPA, Natural Resources Environmental Protection Act, as amended
- Enacted March 18, 1997
- Amended November 13, 1997
- Environmental Audit Report: Privileged Document (MCL 324.14802 – 324.14808)
- Self Disclosure, Immunity (MCL 324.14809)



IV. Privilege (Special Treatment, Protection from Disclosure)

- Not subject to discovery in civil or administrative legal proceedings
- Not admissible evidence in civil or administrative legal proceedings
- Privilege also provides protection to persons from testifying about the report
- Exceptions to Privilege
 - Information and data required by statute, rule or permit
 - Information obtained by regulatory agency via observation, sampling, or monitoring
 - Industrial Pretreatment Program monitoring results
 - Information from a person not associated with the audit
 - Machinery and equipment records

Reminder: The Act identifies an audit under this part in very broad terms and defines that the report be labeled -- Environmental Audit Report: Privileged Document

Please do NOT send us a copy of your actual Audit Report – even if you voluntarily disclose violations for immunity purposes.

V. Immunity

- Freedom from duty or penalty
- For identified NREPA civil and administrative fines and penalties, some criminal fines and penalties (not for gross negligence nor various criminal parts of NREPA – many LWMD)
- Immunity does not apply to the responsibility to correct the violation, remediate or to pay damages.

ENVIRONMENTAL AUDIT PRIVILEGE AND IMMUNITY

VI. Steps to Pursue Immunity

1. File Notice of Intent (must be before the audit)
2. Conduct the Audit/Self Assessment (within a reasonable time – not more than 6 months)
3. Make a Good Faith Effort (Try Hard) to Achieve Compliance and promptly correct Noncompliance
4. Develop a “Return to Compliance” Plan
5. Promptly File a Voluntarily Disclosure (‘promptly’ starts when you learn of the violations)

Step 1: Send Notice First

- Sending in a Notice before conducting the Audit is a Condition that must be met to receive Immunity
- Part 148 Only Applies to Certain Sections of NREPA (Not Federal)
- For Federal Violations: US EPA Policy
- Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations

Contact: Jodi Swanson-Wilson
swanson-wilson.jodi@epa.gov
Phone: (312) 886-0879

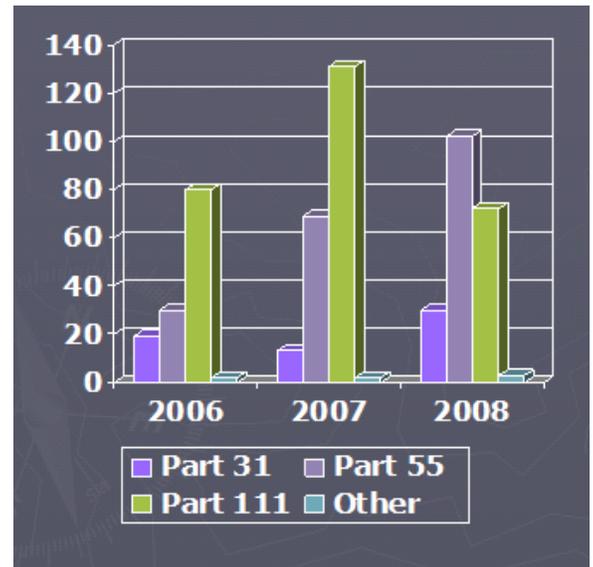
U.S. EPA Region 5 - Mail Code E-19J
77 West Jackson Blvd., Room R1918
Chicago, IL 60604-3507

Step 2: Conduct the Audit

- Audit must take place within a reasonable time not to exceed 6 months from initiating the Audit (this anticipated date be listed in the Notice of Intent).
- If more time is needed, then an extension can be requested (based upon reasonable grounds)

Part 31 Violation Categories - Last 3 years

- 3.2.3.d Industrial Storm Water
- Annual Wastewater Reporting
- 6.2.2 Part 5 Rules (Secondary Containment)
- 6.2.4 Storm Water Pollution Prevention Plans



Part 55 Violation Categories - Last 3 years

- Record Keeping
 - Calculations Required by Permits
- Compliance Assistance: Use the spreadsheet for tracking and calculating VOC and HAP emissions from surface coating operations

www.michigan.gov/deg, Select “Air” then “Clean Air Assistance”
Hotlink: http://www.michigan.gov/deg/0,1607,7-135-3310_4148-176172--,00.html

ENVIRONMENTAL AUDIT PRIVILEGE AND IMMUNITY

Part 111 Violation Categories - Last 3 years

- Record Keeping:
 - 2.4.7 Inspection Records
 - 2.4.5 Manifest & Shipping Records
- Labeling:
 - 2.4.8 Labeling Requirements & 2.4.9 Specific Waste Streams
- Improper Storage:
 - 2.4.7 Hazardous Waste and Universal Waste Accumulation On-Site
- Inspections:
 - 2.4.7.b Container and Tank Requirements
- Employee Training
 - 2.4.12 Employee Emergency Training
- Rule Violation – Often Exceeding Generator Status
- Reporting
 - 2.4.4 Identification Numbers (Notifications)
 - 6.2 Release Reporting
 - 2.4.6 Biennial Reporting
 - 6.2 Release Reporting –
- Planning
 - 6.2.1 Contingency Plan

REMEMBER: Audit only applies to NREPA Violations
--

Step 3: Make a Good Faith Effort (Try Hard) to Achieve Compliance and promptly correct Noncompliance

Condition – Good Faith Effort 324.14809(5)

“In those cases where the conditions of voluntary disclosure are not met but a good-faith effort was made to voluntarily disclose and resolve a violation detected in a voluntary environmental audit, the state and local environmental and law enforcement authorities shall consider the nature and extent of any good-faith effort in deciding the appropriate enforcement response and shall mitigate any civil penalties based on a showing that 1 or more of the conditions for voluntary disclosure have been met.”

Steps 4 & 5: Develop a Return to Compliance Plan

Voluntary Disclosure Form

- Facility Identification/Date of Audit
- Person(s) that conducted audit
- Identify Part of NREPA violated; describe violation
- Resources:
 - Beginning of Chapters in Manufacturer’s Guide
 - Appendix D (Laws and Rules)
- Describe the corrective action and associated schedule to achieve compliance
- If seeking immunity then submit the voluntary disclosure form

VII. Conditions to Receive Immunity

- Gave prior “Notice of Intent” to DEQ
- Violations must be disclosed to DEQ
- Disclosure must be voluntary

ENVIRONMENTAL AUDIT PRIVILEGE AND IMMUNITY

- Conditions of Voluntary Disclosure
 - Violations disclosed arose out of the audit
 - Audit occurred prior to being aware of an investigation by DEQ
 - Disclosure is made promptly after being made aware of the violation
 - Compliance/corrective actions initiated are appropriate and in good-faith to achieve compliance promptly
- Exclusions to Immunity Provisions
 - Knowingly committed a criminal act
 - Pattern of continuous or repeated significant violations within three year period
 - Violations resulted in substantial economic benefit
 - Violations resulted in serious harm or imminent and substantial endangerment
 - Violations were terms of administrative or judicial order

VIII. Web Site

- Audit Forms
- Annual Reports
- Audit Statute
- EPA Links

www.michigan.gov/deg, select "Key Topics" then "Environmental Assistance" then the link to the program, which is listed under "Information & Services"

IX. Why Should I Participate in the Environmental Audit Program (Part 148)?

- You're responsible for a new company
- You're a new Environmental Manager
- Part of an EMS
- Today you learned about lots of things you are going to consider when you get back to your facility

Environmental Assistance Center 1-800-662-9278

This document was produced by Environmental Sciences and Services Division for guidance and compliance assistance purposes. Reliance on information from this document is not usable as a defense in any enforcement action or litigation