

ENVIRONMENTAL AUDIT PRIVILEGE AND IMMUNITY

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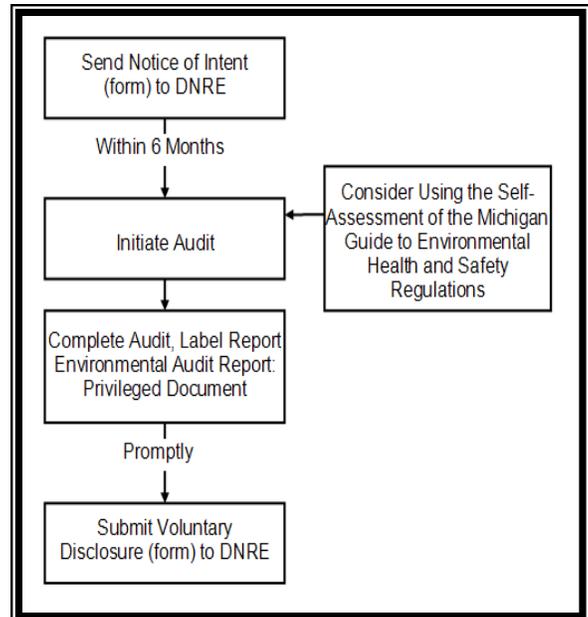
I. Self Assessments and Environmental Audits

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

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.

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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

Audit only applies to NREPA Violations

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

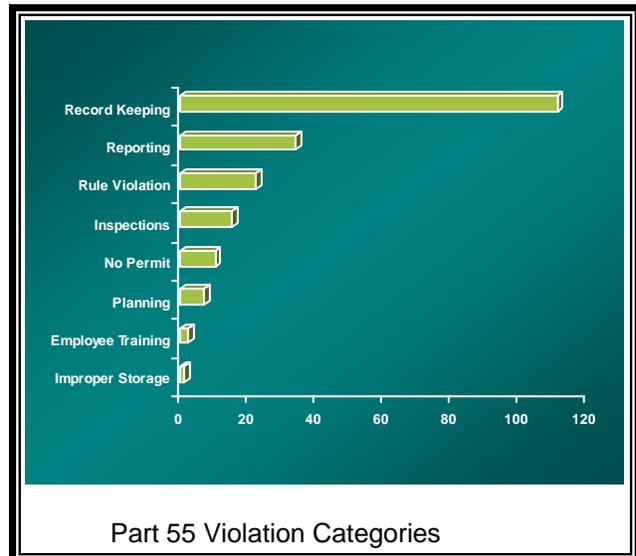
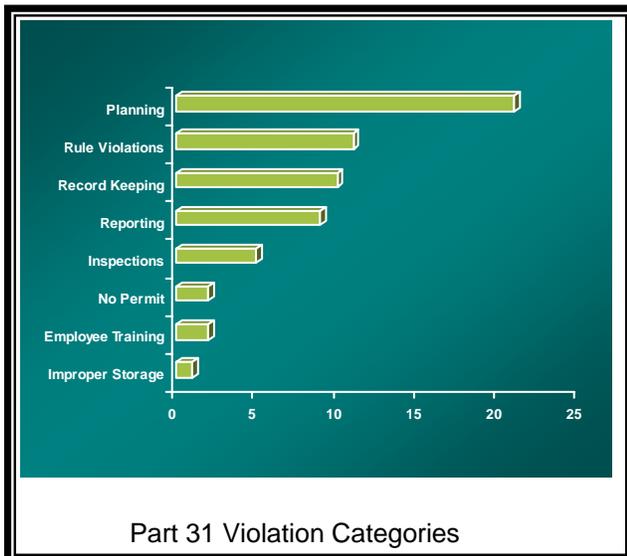
U.S. EPA Region 5 - Mail Code E-19J
77 West Jackson Blvd., Room R1918
Chicago, IL 60604-3507

Step 2: Conduct the Audit

- Audit must take place within a reasonable time not to exceed 6 months from initiating the Audit (anticipated date should 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 – Three Year Period

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



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Part 55 Violation Categories – Three Year Period

- Record Keeping & Reporting
 - Calculations Required by Permits
 - Call the Environmental Assistance Program
1-800-662-9278

Part 111 Violation Categories – Three Year Period

- 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



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



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VII. Conditions to Receive Immunity

- Gave prior "Notice of Intent" to DNRE
- Violations must be disclosed to DNRE
- Disclosure must be voluntary
- Conditions of Voluntary Disclosure
 - Violations disclosed arose out of the audit
 - Audit occurred prior to being aware of an investigation by DNRE
 - 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

X. Sample language:

Description of Audit: Compliance Audit with a focus on Part 31, Water Resources Protection.

Environmental Assistance Center 1-800-662-9278

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