

Environmental Audit Privilege and Immunity



Fact Sheet

Update With 1997 Amendments



It is important to the success of Michigan's environmental protection efforts that businesses, municipalities, and public agencies take self-initiated actions to assess or audit their compliance with environmental laws and correct any violations found. For example, it is estimated that thousands of small businesses in Michigan have never applied for or obtained necessary environmental permits, fearing the disclosure of information to state agencies would lead to enforcement and penalties.

The Environmental Audit Privilege and Immunity Law removes this fear and provides incentives for businesses to perform environmental audits and promptly report and correct violations. This will lead to increased compliance with environmental requirements and further protection of Michigan's outstanding natural resources.

PART 148 OF THE NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT

On November 13, 1997 Governor Engler signed into law Acts 133 and 134 which amend Michigan's Natural Resources and Environmental Protection Act (NREPA), Part 148, the Environmental Audit Privilege and Immunity Law. 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. A further goal of Part 148 is to encourage the development and use of environmental management systems such as ISO 14001.

DEFINITIONS

Environmental Audit: An environmental audit is a voluntary, internal evaluation of a facility (or activity) regulated by

environmental laws, conducted after March 18, 1996. The environmental audit must be conducted in a reasonable amount of time, but must not exceed six months, and be designed to:

- ✓ identify past or current noncompliance;

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MICHIGAN DEPARTMENT OF
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1-800-662-9278

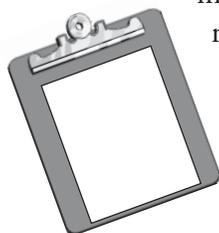
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- ✓ prevent noncompliance or improve compliance;
- ✓ identify an existing or potential hazard, contamination, or adverse environmental condition, or
- ✓ improve an environmental management system or process.

Environmental Audit Report: The environmental audit report is a document or set of documents created as a result of the environmental audit. Documents included in the audit report (except those that are not privileged) must be labeled “**Environmental Audit Report: Privileged Document**” when created. The audit report shall include supporting information, which may include a full range of information (notes, records, charts, etc.) provided such information or documents are **created or prepared** as result of the environmental audit.



The audit report may also include an implementation plan that corrects past noncompliance, improves existing compliance or management systems, or prevents future noncompliance.

ENVIRONMENTAL AUDIT PRIVILEGE AND VOLUNTARY DISCLOSURE IMMUNITY

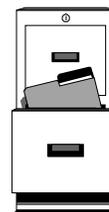
Part 148 contains two major provisions:

- ✓ establishes limited privilege status for an environmental audit. This means that certain information contained in the environmental audit report can be held confidential (privileged) and is not accessible to a state or local government agency or the public; and
- ✓ provides immunity from state administrative or civil fines and penalties and certain criminal

penalties and fines for negligent acts or omissions (except in the case of gross negligence) for violations that are discovered through an environmental audit and are voluntarily and promptly corrected and disclosed to the appropriate state and/or local regulatory agency. Any disclosures sent to a local regulatory agency should also be sent to the Michigan Department of Environmental Quality (DEQ), as discussed later.

Environmental Audit Privilege

The owner, operator, or his/her representative can conduct a voluntary environmental audit and develop an environmental audit report at any time. Certain information contained in an environmental audit report is considered privileged and is, therefore, protected from disclosure.



The following information cannot be considered privileged (even though it may appear in an environmental audit report):

- ✓ Documents, communication, data, reports, or other information required to be made available or reported to a regulatory agency or any other person by statute, rule, ordinance, permit, order, consent agreement, or as otherwise provided by law;

For example, if a company has a water discharge permit that requires reporting the discharge quality to the DEQ, those reports are not privileged and cannot be held confidential under this statute. Likewise, if a company has a gasoline spill on site, existing regulations require the spill to be reported to the DEQ, and that information cannot be considered privileged.

- ✓ information obtained by observation, sampling, or monitoring by any regulatory agency;
- ✓ pretreatment monitoring results that a publicly owned treatment or control authority requires to be reported for facilities that discharge wastewater to a municipal sewer system;
- ✓ information from a person or source not associated with the environmental audit;

For example, if an employee not engaged in the environmental audit activity advises the regulatory agency of a violation, that information is not considered privileged.

- ✓ information in instances where the privilege is asserted for a fraudulent purpose;
- ✓ information in instances where the material shows evidence of noncompliance and the owner or operator failed to either take prompt corrective action or eliminate any violation within a reasonable period of time, but not to exceed three years after discovery of the violation; or
- ✓ machinery and equipment maintenance records.

These exemptions to the audit privilege do not limit already existing protections granted under other common law privileges, such as the attorney-client privilege.

Under Part 148, a person (individual, business, municipality, or other entity) who conducts an environmental audit and a person to whom the audit results are disclosed do not have to testify about any privileged information in the audit report. In addition, the privileged information contained in

the report is not subject to discovery or admissible as evidence in any civil or administrative proceedings. Information from an audit cannot be privileged unless it is contained in an environmental audit report.

Disclosure of environmental audit information by a person normally waives the privilege, except as provided in Part 148. The privilege is not waived, however, if the information is disclosed to a governmental official under the terms of a confidentiality agreement, as discussed later.

Part 148 establishes a procedure by which the state or local law enforcement agency can seek disclosure of privileged material. The agency must prove to a Circuit Court Judge that the privilege was asserted for a fraudulent purpose, the material was not subject to the privilege or even if subject to the privilege, the facility failed to take corrective action or eliminate a violation found by the environmental audit within a reasonable period of time.

State and local agencies retain their authority to review information required to be made available or reported to the agency under current permits, environmental laws and regulations, or other legal documents or agreements.

Voluntary Disclosure/Immunity

Under Part 148, a person who conducts an environmental audit can receive immunity from administrative, civil, and certain criminal fines and penalties when he or she:

- ✓ gives prior notice to the DEQ of the intent to do an environmental audit; and
- ✓ makes a *voluntary disclosure* of the violations discovered as a result of the audit to the appropriate state and/or local agency.

Immunity from criminal fines and penalties is only available for negligent acts or omissions and not acts of gross negligence. There also is no immunity for any criminal fines and penalties for violations of wetland protection laws (Parts 301, 303, 315, 325, and Sections 3108 and 3115a of Part 31 of the NREPA).

The immunity in Part 148 applies only to violation(s) of the following parts of the state's environmental laws (NREPA) and any rules promulgated thereunder:

- ✓ **Article II. Pollution Control**
All Chapters
- ✓ **Article III. Natural Resources Management**
Chapter 1:Habitat Protection
Chapter 3:Management of Nonrenewable Resources

These are the state's environmental protection laws administered by the DEQ.

To be considered voluntary, the disclosure must make a showing that all of the following conditions are met:

- ✓ the disclosure of the information arises out of an environmental audit;
- ✓ the audit occurs before the person is made aware that he or she is under investigation by a regulatory agency;
- ✓ the disclosure is made promptly after knowledge of the environmental violation is obtained by the person; and
- ✓ the person initiates an appropriate and good-faith effort to achieve compliance, pursues compliance with due diligence, and promptly corrects the violation after its discovery.

There is a "rebuttable presumption" that a disclosure made in full compliance with Part 148 is "voluntary." This means that it is assumed to be true but the state or local agency may rebut or challenge that presumption. The agency bears the burden of rebutting or challenging the presumption that the disclosure was voluntary.

People who have a history of violating the law cannot use the immunity provision in Part 148. The penalty immunity does not apply when:

- ✓ a person has been found guilty of knowingly committing a criminal act;
- ✓ a person has committed a series of violations that constitute a pattern of violations within a three-year period prior to the date of the voluntary disclosure;
- ✓ the violation results in a substantial economic benefit and gives a clear advantage over business competitors;
- ✓ the violations have resulted in serious harm or imminent and substantial endangerment to human health or the environment; or
- ✓ there is a violation of an administrative or judicial order.

The immunity does not eliminate or affect a person's legal responsibilities to correct the violation, conduct necessary remediation, or pay damages. This means, for example, that if a company determines through an environmental audit that it had a spill of gasoline on the ground, the company must take responsibility for addressing the situation in accordance with NREPA. This could include investigations, remedial plans, and remediation activities.

Part 148 does not provide any immunity from federal or local laws or regulations. However, EPA has delegated many federal environmental programs to DEQ to administer under the authority of state law. Immunity from state penalties does apply to violations of these joint state/federal requirements where the violations are voluntarily disclosed pursuant to Part 148.

The EPA retains authority to take independent enforcement action for violation of these federal laws. In the event that EPA would pursue an independent action under federal law, Michigan's immunity law would not apply.

To encourage self audits and voluntary disclosures, EPA does provide some relief from federal penalties for companies that take self-initiated corrective actions. The federal policy on environmental audits and voluntary disclosure is contained in the January 22, 1996 EPA policy: "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," and the May 20, 1996 policy: "Policy on Compliance Incentives for Small Business." Questions regarding the federal policy should be directed to the Region 5 Enforcement Coordinator at (312) 886-9296.

CONFIDENTIALITY AGREEMENT WITH DEQ

Disclosure of environmental audit information to the DEQ waives the privilege unless the information is disclosed under the terms of a confidentiality agreement. To not waive the privilege, a signed confidentiality agreement must accompany the disclosed information.

For this purpose the DEQ has developed a self-initiating "Nonwaiver of Privilege Confidentiality Agreement." This confidentiality agreement does not create any additional privilege but only preserves any privilege this information may have under Part 148. The confidentiality

agreement sets out the types of information that will be held confidential and conditions under which DEQ will keep this information confidential.

An individual confidentiality agreement can also be developed for a specific submittal, in which case it must be signed by and dated by the person making the disclosure and an authorized representative of DEQ.

NOTE: Prior to disclosing information under Part 148, a person should read this confidentiality agreement carefully. Only privileged information that meets the terms and conditions of the confidentiality agreement will be held confidential.

DEQ NOTIFICATION AND VOLUNTARY DISCLOSURE PROCEDURES

All notices and voluntary disclosures to the DEQ must be in writing. Notices and disclosures should be made to the Environmental Science and Services Division at:

Environmental Audits
Pollution Prevention and Compliance Assistance Section
Environmental Science & Services Division
Michigan Department of Environmental Quality
Post Office Box 30457
Lansing, Michigan 48909-7957

The disclosure should be made using the "Voluntary Disclosure" form which is available at DEQ offices and on the DEQ Internet home page. Use of the "Voluntary Disclosure" form is not mandatory but highly recommended; however, information supporting the voluntary disclosure is required, and the use of the form will facilitate proper documentation. Remember that a disclosure must support the claim by making a showing that:

- ✓ the information arose from an environmental audit;
- ✓ the audit occurred before the person was made aware that he/she was under investigation by a regulatory agency;
- ✓ the disclosure was made promptly after the person became aware of the violation; and
- ✓ the person started an appropriate and good faith effort to comply, promptly correcting any violations.

For convenience, a form for giving notice of intent to perform an environmental audit has been developed (see page 8). The form is available at DEQ offices and on the DEQ Internet home page. Remember that notices must:

- ✓ announce that a facility is planning to commence an audit;
- ✓ specify the facility or portion of the facility to be audited;
- ✓ specify the anticipated time the audit will begin; and
- ✓ specify the general scope of the audit.

Notices may provide notifications of more than one scheduled environmental audit at a time.

Submission of the "Voluntary Disclosure" form waives any privilege the information submitted may have under Part 148 unless a "Nonwaiver of Privilege Confidentiality Agreement" is completed and submitted along with the voluntary disclosure form. Any privileged information that is not included in the voluntary disclosure retains its privilege. Receipt of a voluntary disclosure by DEQ is not an admission that the disclosure meets the requirements of Part 148 of NREPA to qualify for immunity from fines and penalties under state law or that the items disclosed, including the

violation resolution/response strategy, are appropriate or adequate.

All DEQ district offices have both the **Voluntary Disclosure** and **Nonwaiver of Privilege Confidentiality Agreement** forms or you may contact the Environmental Assistance Center of the DEQ at 800-662-9278 for copies. These forms are also available on the DEQ's Internet home page at www.michigan.gov/deq; select "Key topics," "Environmental Incentives," then "Environmental Audit Privilege & Immunity."

SUMMARY

An environmental audit is a voluntary and internal evaluation conducted after March 18, 1996 (the effective date of Part 148). This law is designed to promote the use of audits to identify historical or current noncompliance and prevent noncompliance or improve compliance with environmental rules and statutes. An environmental audit can also be used to identify an environmental hazard, site contamination or other adverse environmental condition, or to improve an environmental management system.

An environmental audit, which is conducted by the company or its representative, systematically reviews processes and searches for problems that need attention; e.g., water discharges or air emissions that require permits or site contamination that requires cleanup. An environmental audit can cover all or part of a company's activities.

The environmental audit does not require written documentation or a report. It can be as simple as an evaluation by the company or its contractor to determine the need for additional action. However, only information included in an environmental audit report qualifies for being considered privileged; and only those violations discovered through the audit can qualify for immunity. If an environmental audit report

contains information required to be reported under any environmental regulation or existing permit, that information must be reported to the agency.

If an environmental audit report is produced and the report contains information that is privileged, to retain this privilege that information must be labeled: "ENVIRONMENTAL AUDIT REPORT - PRIVILEGED DOCUMENT."

To qualify for immunity a person must:

- ✓ give notice that they are planning to commence an audit; and
- ✓ make a voluntary disclosure in accordance with Part 148.

DEQ has developed a "Voluntary Disclosure" form to assist in making these disclosures. To preserve the confidentiality (the privilege) of disclosed information, DEQ has developed a "Nonwaiver of Privilege Confidentiality Agreement." Receipt of these forms does not mean that DEQ agrees that a facility qualifies for immunity or that disclosed information is privileged.



AN ENVIRONMENTAL AUDIT REPORT IS AN INTERNAL FACILITY DOCUMENT. IT IS NOT REQUIRED TO BE SENT TO THE REGULATORY AGENCY.

If you have additional questions, call the local DEQ district office or the Environmental Assistance Center toll-free: 800-662-9278 or write to:

Environmental Audit Program
Environmental Science & Services Division
Michigan Department of Environmental Quality
Post Office Box 30457
Lansing, Michigan 48909-7957

(517) 241-0673 (FAX)

Internet: Access the DEQ Environmental Audit home page for forms, annual report (including 5-Year Report), and additional information at www.michigan.gov/deq; click on "Key topics," "Environmental Incentives," then "Environmental Audit Privilege & Immunity."

NOTE: This document is for informational purposes only and is not an official legal opinion of the State of Michigan. Any questions relating to the application of this law to any specific business, municipality, or other entity should be addressed to appropriate legal counsel.





Environmental Science and Services Division
Michigan Department of Environmental Quality

NOTICE OF INTENT TO DO AN ENVIRONMENTAL AUDIT

(Authority: PA 451 of 1994, as amended; completion is voluntary)

In accordance with Section 14809(7) of Part 148 of the Natural Resources and Environmental Protection Act, PA 451 of 1994; MCL 324.14801 et seq., in order to receive immunity under Part 148, a facility conducting an environmental audit under Part 148 shall give notice to the Michigan Department of Environmental Quality (DEQ) of the fact that it is planning to commence the audit. This document is designed to assist a person in making that notification, and its use is voluntary.

NAME OF FACILITY TO BE AUDITED:			
STREET ADDRESS OF FACILITY TO BE AUDITED:			
CITY	COUNTY	STATE	ZIP CODE
GENERAL SCOPE OF THE AUDIT:			
ANTICIPATED DATE AUDIT WILL BEGIN (Month/Day/Year):			
SUBMITTED BY: (Print or Type Name)			
TITLE		PHONE NUMBER ()	
SIGNATURE		DATE	
SUBMIT TO: Michigan Department of Environmental Quality Environmental Sciences and Services Division Pollution Prevention Compliance Assistance Section P.O. Box 30457 Lansing, MI 48909-7957			