

ENVIRONMENTAL AUDIT PRIVILEGE AND IMMUNITY

FACT SHEET

BACKGROUND

Part 148 of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), encourages organizations to voluntarily conduct and disclose the results of environmental audits. An owner or operator of a regulated entity may perform a self-evaluation (audit) to identify, disclose, and promptly correct noncompliance with environmental regulations and receive immunity from violation, fines, and penalties.

ENVIRONMENTAL AUDITS

An Environmental Audit is a voluntary, internal evaluation of a facility that is regulated by environmental laws. The purpose of the Audit is to:

- Identify historical or current noncompliance.
- Prevent noncompliance or improve compliance.
- Identify an existing or potential environmental hazard, contamination, or adverse environmental condition.
- Improve an environmental management system or process.

ENVIRONMENTAL AUDIT REPORTS

An Environmental Audit will result in an Environmental Audit Report that includes all relevant information about the audit. Only the information prepared for and included in the audit report is eligible for confidentiality and immunity. The audit report may also include an implementation plan that corrects past noncompliance, improves existing compliance management systems, or prevents future noncompliance.

ENVIRONMENTAL AUDIT PRIVILEGE AND VOLUNTARY DISCLOSURE IMMUNITY

Part 148 contains two major provisions:

1. 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.
2. 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, provided they are voluntarily and promptly corrected and disclosed to the appropriate agencies.

An organization 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.
- 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.
- 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.
- 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.

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.

For more information on what cannot be considered privileged, please refer to [Part 148 of NREPA](#). To make a voluntary disclosure, use the [Voluntary Disclosure form](#).

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 Michigan Department of Environment, Great Lakes, and Energy (EGLE) of the intent to do an environmental audit.
- 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 324.3108 and 324.3115a of Part 31, Water Resources Protection, 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 and administered by EGLE:

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

To be considered voluntary, the disclosure must show 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.
- 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.

The immunity does not eliminate or affect a person's legal responsibilities to correct the violation, conduct necessary remediation, or pay damages.

Part 148 does not provide any immunity from federal or local laws or regulations; however, the U.S. Environmental Protection Agency (EPA) has delegated many federal environmental programs to EGLE 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, the EPA does provide some relief from federal penalties for companies that take self-initiated corrective actions. Questions regarding the federal policy should be directed to the Region 5 Enforcement Coordinator at 312-886-7935.

CONFIDENTIALITY AGREEMENT WITH EGLE

Disclosure of environmental audit information to EGLE 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, EGLE 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 EGLE 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 EGLE.

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.

EGLE NOTIFICATION AND VOLUNTARY DISCLOSURE PROCEDURES

All notices and voluntary disclosures to EGLE must be in writing. Notices and disclosures should be sent to:

Michigan Department of Environment, Great Lakes, and Energy
Environmental Support Division
Environmental Audit
P.O. Box 30457
Lansing, Michigan 48909-7957

VOLUNTARY DISCLOSURE FORM

The disclosure should be made using the “[Voluntary Disclosure](#)” form, available at [Michigan.gov/EnvAudit](https://www.michigan.gov/EnvAudit). Although use of this form is not mandatory, information supporting the voluntary disclosure is required, and the use of the form will facilitate proper documentation.

NOTICE OF INTENT

For convenience, a form for giving [notice of intent to perform an environmental audit](#) is available at [Michigan.gov/EnvAudit](https://www.michigan.gov/EnvAudit). 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.
- 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 EGLE 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.

This publication is intended for guidance and information only; it is not an official legal opinion of the state of Michigan. This document may be impacted by changes in legislation, rules, policies, and procedures adopted after the date of publication. This publication does not constitute the rendering of legal advice and any questions relating to the application of this law to any specific business, municipality, or other entity should be addressed to appropriate legal counsel.

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