

Act No. 132
Public Acts of 1996
Approved by the Governor
March 15, 1996
Filed with the Secretary of State
March 18, 1996

**STATE OF MICHIGAN
88TH LEGISLATURE
REGULAR SESSION OF 1996**

Introduced by Senators Bennett, Steil, Gougeon, Schwarz, Gast, Dunaskiss, Shugars, Emmons, McManus, Carl and Hoffman

ENROLLED SENATE BILL No. 728

AN ACT to amend Act No. 451 of the Public Acts of 1994, entitled "An act to protect the environment and natural resources of the state; to codify, revise, consolidate, and classify laws relating to the environment and natural resources of the state; to regulate the discharge of certain substances into the environment; to regulate the use of certain lands, waters, and other natural resources of the state; to prescribe the powers and duties of certain state and local agencies and officials; to provide for certain charges, fees, and assessments; to prescribe penalties and provide remedies; to repeal certain parts of this act on a specific date; and to repeal certain acts and parts of acts," as amended, being sections 324.101 to 324.90106 of the Michigan Compiled Laws, by adding part 148.

The People of the State of Michigan enact:

Section 1. Act No. 451 of the Public Acts of 1994, as amended, being sections 324.101 to 324.90106 of the Michigan Compiled Laws, is amended by adding part 148 to read as follows:

PART 148 ENVIRONMENTAL AUDIT PRIVILEGE AND IMMUNITY

Sec. 14801. As used in this part:

(a) "Environmental audit" means a voluntary and internal evaluation conducted on or after the effective date of this part of 1 or more facilities or an activity at 1 or more facilities regulated under state, federal, regional, or local laws or ordinances, or of environmental management systems or processes related to the facilities or activity or of a previously corrected specific instance of noncompliance, that is designed to identify historical or current noncompliance and prevent noncompliance or improve compliance with 1 or more of those laws, or to identify an environmental hazard, contamination, or other adverse environmental condition, or to improve an environmental management system or process.

(b) "Environmental audit report" means a document or a set of documents, each labeled at the time it is created "environmental audit report: privileged document" and created as a result of an environmental audit. An environmental audit report shall include supporting information. Supporting information may include field notes, records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, follow-up reports, drawings, photographs, computer generated or electronically recorded information, maps, charts, graphs, and surveys, if the supporting information or documents are created or prepared for the primary purpose and in the course of or as a result of an environmental audit. An environmental audit report may also include an implementation plan that addresses correcting past noncompliance, improving current compliance, improving an environmental management system, and preventing future noncompliance, as appropriate.

(c) "Privilege" means the privilege provided to an environmental audit report as provided in this part.

Sec. 14802. (1) The owner or operator of a facility, or an employee or agent of the owner or operator on behalf of the owner or operator, at any time may conduct an environmental audit and may create an environmental audit report.

(2) Except as provided in subsection (3), an environmental audit report created pursuant to this part is privileged and protected from disclosure under this part.

(3) The privilege described in subsection (2) does not extend to any of the following regardless of whether or not they are included within an environmental audit report:

(a) 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.

(b) Information obtained by observation, sampling, or monitoring by any regulatory agency.

(c) Pretreatment monitoring results which a publicly owned treatment works or control authority requires any industrial user to report to a publicly owned treatment works or control authority, including, but not limited to, results establishing a violation of the industrial user's discharge permit or applicable local ordinance.

(d) Information legally obtained from a source independent of the environmental audit or from a person who did not obtain the information from the environmental audit.

(e) Machinery and equipment maintenance records.

(4) Except as otherwise provided in this part, a person who conducts an environmental audit and a person to whom the environmental audit results are disclosed shall not be compelled to testify regarding any information obtained solely through the environmental audit which is a privileged portion of the environmental audit report. Except as otherwise provided in this part, the privileged portions of an environmental audit report are not subject to discovery and are not admissible as evidence in any civil, criminal, or administrative proceeding.

Sec. 14803. (1) The privilege provided for in this part may be expressly waived by the person for whom the environmental audit report was prepared. The waiver applies only to the portion or portions of the environmental audit report that are specifically waived.

(2) Disclosure of an environmental audit report and information generated by the environmental audit by the person for whom the environmental audit report was prepared or by the person's employee or agent to any of the following does not waive the privilege provided for in this part:

(a) An employee of the person.

(b) A legal representative of the person.

(c) An agent of the person retained to address an issue or issues raised by the environmental audit.

(3) Disclosure of the environmental audit report or any information generated by the environmental audit under the following circumstances does not waive the privilege provided for in this part:

(a) A disclosure made under the terms of a confidentiality agreement between the person for whom the environmental audit report was prepared and a partner or potential partner, or a transferee or potential transferee of, or a lender or potential lender for, or a trustee of, the business or facility audited, or a disclosure made between a subsidiary and a parent corporation or between members of a partnership, joint venture, or other similarly related entities.

(b) A disclosure made under the terms of a confidentiality agreement between governmental officials and the person for whom the environmental audit report was prepared.

Sec. 14804. (1) A request by state or local law enforcement authorities for disclosure of an environmental audit report shall be made by a written request delivered by certified mail or a demand by lawful subpoena. Within 30 business days after receipt of a request for disclosure or subpoena, the person asserting the privilege may make a written objection to the disclosure of the environmental audit report on the basis that the environmental audit report is privileged. Upon receipt of such an objection, the state or local law enforcement authorities may file with the circuit court, and serve upon the person, a petition requesting an in camera hearing on whether the environmental audit report or portions of the environmental audit report are privileged or subject to disclosure. The motion shall be brought in camera and under seal. The circuit court has jurisdiction over a petition filed under this subsection requesting a hearing. Failure of the person asserting the privilege to make an objection to disclosure waives the privilege as to that person.

(2) Upon the filing of a petition for an in camera hearing under subsection (1), the person asserting the privilege in response to a request for disclosure or subpoena under this section shall provide a copy of the environmental audit report to the court and shall demonstrate in the in camera hearing all of the following:

(a) The year the environmental audit report was prepared.

(b) The identity of the person conducting the audit.

(c) The name of the audited facility or facilities.

(d) A brief description of the portion or portions of the environmental audit report for which privilege is claimed.

(3) Upon the filing of a petition for an in camera hearing under subsection (1), the court shall issue an order under seal scheduling, within 45 days after the filing of the petition, an in camera hearing to determine whether the environmental audit report or portions of the environmental audit report are privileged or subject to disclosure. The counsel for the state or local law enforcement agency seeking disclosure of the information contained in the environmental audit report and the counsel for the person asserting the privilege shall participate in the in camera hearing but shall not disclose the contents of the environmental audit report for which privilege is claimed unless the court so orders.

(4) The court, after in camera review, shall require disclosure of material for which privilege is asserted, if the court determines that either of the following exists:

(a) The privilege is asserted for a fraudulent purpose.

(b) Even if subject to the privilege, the material shows evidence of noncompliance with state, federal, regional, or local environmental laws, permits, consent agreements, regulations, ordinances, or orders and the owner or operator failed to take corrective action or eliminate any violation of law identified during the environmental audit within a reasonable time, but not exceeding 3 years after discovery of the noncompliance or violation unless a longer period of time is set forth in a schedule of compliance in an order issued by the department of environmental quality, after notice in the department's calendar, and following the department's determination that acceptable progress is being made.

(5) The court, after in camera review, may require disclosure of material for which privilege is asserted if the court determines that the material is not subject to the privilege.

(6) If the court determines under this section that the material is not privileged, but the party asserting the privilege files an application for leave to appeal of this finding, the material, motions, and pleadings shall be disclosed unless the court specifically determines that all or a portion of such information shall be kept under seal during the pendency of the appeal.

Sec. 14805. (1) To the extent authorized by the code of criminal procedure, Act No. 175 of the Public Acts of 1927, being sections 760.1 to 760.21 of the Michigan Compiled Laws, state or local law enforcement authorities may seize an environmental audit report for which privilege is asserted, pursuant to a lawful search warrant. Upon seizure, the law enforcement authorities shall immediately place the environmental audit report under seal and shall immediately file it with the court that authorized the search warrant. The law enforcement authorities or the court shall also provide notice of the filing to any person who is eligible under this part to assert the privilege. Unless and until the court orders disclosure under section 14804, or the privilege has been waived pursuant to section 14803, the law enforcement authorities shall not inspect, review, or disclose the contents of the environmental audit report. Within 30 business days after the notice of the filing has been provided, the person asserting the privilege may make a written objection to the disclosure of the environmental audit report on the basis that the environmental audit report is privileged. Upon receipt of such an objection, the state or local law enforcement authorities may file with the circuit court, and serve upon the person, a petition requesting an in camera hearing on whether the environmental audit report or portions of the report are privileged or subject to disclosure. Failure of the person asserting the privilege to make an objection to disclosure waives the privilege as to that person.

(2) Upon the filing of a petition requesting an in camera hearing under subsection (1), the person asserting the privilege shall demonstrate in the in camera hearing all of the following:

(a) The year the environmental audit report was prepared.

(b) The identity of the person conducting the audit.

(c) The name of the audited facility or facilities.

(d) A brief description of the portion or portions of the environmental audit report for which privilege is claimed.

(3) Upon the filing of a petition for an in camera hearing under subsection (1), the court shall issue an order under seal scheduling, within 45 days after the filing of the petition, an in camera hearing to determine whether the environmental audit report or portions of the environmental audit report are privileged or subject to disclosure. The counsel for the state or local law enforcement agency seeking disclosure of the information contained in the environmental audit report and the counsel for the person asserting the privilege shall participate in the in camera hearing but shall not disclose the contents of the environmental audit report for which privilege is claimed unless the court so orders.

(4) The court, after in camera review, shall require disclosure of material for which privilege is asserted, if the court determines that either of the following exists:

(a) The privilege is asserted for a fraudulent purpose.

(b) Even if subject to the privilege, the material shows evidence of noncompliance with state, federal, regional, or local environmental laws, permits, consent agreements, regulations, ordinances, or orders and the owner or operator failed to take corrective action or eliminate any violation of law identified during the environmental audit within a

reasonable time, but not exceeding 3 years after discovery of the noncompliance or violation unless a longer period of time is set forth in a schedule of compliance in an order issued by the department of environmental quality, after notice in the department's calendar, and following the department's determination that acceptable progress is being made.

(5) The court, after in camera review, may require disclosure of material for which privilege is asserted if the court determines that the material is not subject to the privilege.

(6) If the court determines under this section that the material is not privileged, but the party asserting the privilege files an application for leave to appeal of this finding, the material, motions, and pleadings shall be disclosed unless the court specifically determines that all or a portion of such information shall be kept under seal during the pendency of the appeal.

Sec. 14806. (1) A person asserting the privilege under this part has the burden of proving a prima facie case as to the privilege. A person seeking disclosure of an environmental audit report has the burden of proving by a preponderance of the evidence that privilege does not exist under this part.

(2) The parties disputing the existence of the privilege may at any time stipulate to entry of an order directing that specific information contained in an environmental audit report is or is not subject to the privilege.

(3) Upon making a disclosure determination under section 14804 or 14805, the court may compel the disclosure only of those portions of an environmental audit report relevant to issues in dispute in the proceeding.

Sec. 14807. A person who uses this part to commit fraud is guilty of a misdemeanor punishable by a fine of not more than \$25,000.00.

Sec. 14808. This part does not limit, waive, or abrogate the scope or nature of any statutory or common law privilege, including the work product doctrine and the attorney-client privilege.

Sec. 14809. (1) A person is immune from any administrative or civil penalties and fines under this act and from criminal penalties and fines for negligent acts or omissions under this act related to a violation of article II and chapters 1 and 3 of article III and the rules promulgated under those articles if the person makes a voluntary disclosure to the appropriate state or local agency. However, the immunity provided for in this section does not apply to any criminal penalties and fines for gross negligence. The person making the voluntary disclosure under this section shall provide information supporting his or her claim that the disclosure is voluntary at the time that the disclosure is made to the state or local agency. For the purposes of this section, a disclosure of information by a person under this section is voluntary if all of the following occur:

(a) The disclosure is made promptly after knowledge of the information disclosed is obtained by the person.

(b) The person making the disclosure initiates an appropriate and good-faith effort to achieve compliance, pursues compliance with due diligence, and promptly corrects the noncompliance or condition after discovery of the violation. If evidence shows the noncompliance is the failure to obtain a permit, appropriate and good-faith efforts to correct the noncompliance may be demonstrated by the submittal of a complete permit application within a reasonable time.

(c) The disclosure of the information arises out of an environmental audit.

(d) The environmental audit occurs before the person is made aware that he or she is under investigation by a regulatory agency for potential violations of this act.

(2) There is a rebuttable presumption that a disclosure made pursuant to this section is voluntary. The presumption of voluntary disclosure under this section may be rebutted by presentation of an adequate showing to the administrative hearing officer or appropriate trier of fact that the disclosure did not satisfy the requirements for a voluntary disclosure under subsection (1). The state or local agency shall bear the burden of rebutting the presumption of voluntariness. Agency action determining that disclosure was not voluntary shall be considered final agency action subject to judicial review.

(3) Unless a final determination shows that a voluntary disclosure has not occurred, a notice of violation or cease and desist order shall not include any administrative or civil penalty or fine or any criminal penalty or fine for negligent acts or omissions by the person making the voluntary disclosure.

(4) The elimination of administrative or civil penalties or fines or criminal penalties or fines under this section does not apply if a person has been found by a court or administrative law judge to have knowingly committed a criminal act or committed serious violations that constitute a pattern of continuous or repeated violations of environmental laws, rules, regulations, permit conditions, settlement agreements, or orders on consent or judicial orders and that were due to separate and distinct events giving rise to the violations, within the 3-year period prior to the date of the disclosure. For purposes of this subsection, a pattern of continuous or repeated violations may also be demonstrated by multiple settlement agreements related to substantially the same alleged violations concerning serious instances of noncompliance with environmental laws that occurred within the 3-year period immediately prior to the date of the voluntary disclosure. In determining whether a person has a pattern of continuous or repeated violations under this

subsection, the court or administrative law judge shall base the decision on the compliance history of the specific facility at issue.

(5) In those cases where the conditions of a 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.

(6) The immunity provided by this section does not abrogate a person's responsibilities as provided by applicable law to correct the violation, conduct necessary remediation, or pay damages.

Sec. 14809a. Except for the immunity provided in section 14809, this part does not limit or affect the authority of any other provision of this act or any other provision of law.

Sec. 14810. (1) The department of environmental quality shall establish and maintain a data base of the voluntary disclosures made under this part. The data base shall include the number of voluntary disclosures made on an annual basis and shall summarize in general categories the types of violations and the time needed to achieve compliance. The department of environmental quality shall annually publish a report containing the information in this data base.

(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.

This act is ordered to take immediate effect.

Secretary of the Senate.

Clerk of the House of Representatives.

Approved -----

Governor.