

Act No. 233
Public Acts of 1993
Approved by the Governor
November 13, 1993
Filed with the Secretary of State
November 13, 1993

**STATE OF MICHIGAN
87TH LEGISLATURE
REGULAR SESSION OF 1993**

Introduced by Reps. Gnodtke, Brown, Alley, Middaugh, Freeman and Sikkema
Rep. Rocca named co-sponsor

ENROLLED HOUSE BILL No. 4865

AN ACT to amend sections 8, 11, and 14 of Act No. 348 of the Public Acts of 1965, entitled as amended "An act to control air pollution in this state; to create an air pollution control commission within the state health department; to prescribe its powers and duties; to prescribe the powers and duties of certain county agencies; to provide for the establishment of fees; and to provide penalties," being sections 336.18, 336.21, and 336.24 of the Michigan Compiled Laws; and to add sections 4a, 16a, 16b, 16c, 16d, 16e, 16f, 16g, and 16h.

The People of the State of Michigan enact:

Section 1. Sections 8, 11, and 14 of Act No. 348 of the Public Acts of 1965, being sections 336.18, 336.21, and 336.24 of the Michigan Compiled Laws, are amended and sections 4a, 16a, 16b, 16c, 16d, 16e, 16f, 16g, and 16h are added to read as follows:

Sec. 4a. (1) Except as provided in subsection (2), the department shall not issue a permit to install or an operating permit to a municipal solid waste incinerator unless the municipal solid waste incinerator is located at least 1,000 feet from all of the following:

- (a) Any residential dwelling.
- (b) A public or private elementary or secondary school.
- (c) A preschool facility for infants or children.
- (d) A hospital.
- (e) A nursing home.

(2) Subsection (1) does not apply to a municipal solid waste incinerator that existed prior to June 15, 1993, or to the modification; alteration; expansion, including but not limited to, the addition of 1 or more combustion units and any accompanying features or fixtures; or retrofit of such a municipal solid waste incinerator after June 15, 1993, regardless of whether the activity requires a permit.

(3) For the purposes of this section, a municipal solid waste incinerator existed prior to June 15, 1993 if it was issued a permit to operate or a permit to install for installation, construction, modification, alteration, or retrofit prior to June 15, 1993, unless it was denied a permit to operate prior to June 15, 1993.

(4) Within 21 months of the effective date of this section, the department shall promulgate rules pertaining to municipal solid waste siting setbacks from structures listed in subsection (1). Subsections (1), (2), and (3) apply only for the 21 months following the effective date of this section.

Sec. 8. (1) If the department believes that a person is violating this act, a rule promulgated under this act, a permit issued under this act, or a determination other than an order issued under this act, the department shall make a prompt investigation. If after this investigation the department finds that a violation of this act, a rule promulgated under this act, a permit issued under this act, or a determination other than an order issued under this act exists, the department shall attempt to enter into a voluntary agreement with the person.

(2) If the department believes that a person is violating an order issued under this act, the department shall make a prompt investigation. If after this investigation the department finds that a person has failed to comply with the terms of an order issued under this act, the department may attempt to enter into a voluntary agreement with the person.

(3) If a voluntary agreement is not entered into under subsection (1), the department may issue an order requiring a person to comply with this act, a rule promulgated under this act, a determination made under this act, or a permit issued under this act. If the department issues an order it shall be accompanied by a statement of the facts upon which the order is based.

(4) A person aggrieved by an order issued under subsection (3) may file a petition for a contested case hearing pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws. A petition shall be submitted to the department within 30 days of the effective date of the order. The department shall schedule the matter for hearing within 30 days of receipt of the petition for a contested case hearing. A final order or determination of the department upon the matter following the hearing is conclusive, unless reviewed in accordance with Act No. 306 of the Public Acts of 1969, as amended, in the circuit court for the county of Ingham or for the county in which the person resides.

Sec. 11. (1) A public hearing with reference to pollution control may be held before the department. Persons designated to conduct the hearing shall be described as presiding officers and shall be disinterested and technically qualified persons.

(2) A copy of each permit, permit application, order, compliance plan and schedule of compliance, emissions or compliance monitoring report, sample analysis, compliance certification, or other report or information required under this act, rules promulgated under this act, or permits or orders issued under this act, shall be available to the public to the extent provided by the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

(3) A person whose activities are regulated under this act may designate a record or other information, or a portion of a record, permit application, or other information furnished to or obtained by the department or its agents, as being only for the confidential use of the department. The department shall notify the person asserting confidentiality of a request for public records under section 5 of the freedom of information act, Act No. 442 of the Public Acts of 1976, being section 15.235 of the Michigan Compiled Laws, the scope of which includes information that has been designated by the regulated person as being confidential. The person asserting confidentiality has 25 days after the receipt of the notice to demonstrate to the department that the information designated as confidential should not be disclosed because the information is a trade secret or secret process, or is production, commercial, or financial information the disclosure of which would jeopardize the competitive position of the person from whom the information was obtained, and make available information not otherwise publicly available. The department shall grant the request for the information unless the person regulated under this act demonstrates to the satisfaction of the department that the information should not be disclosed. If there is a dispute between the person asserting confidentiality and the person requesting information under Act No. 442 of the Public Acts of 1976, the department shall make the decision to grant or deny the request. After the department makes a decision to grant a request, the information requested shall not be released until 8 business days after the regulated person's receipt of notice of the department's decision. This does not prevent the use of the information by the department in compiling or publishing analyses or summaries relating to ambient air quality if the analyses or summaries do not identify the person or reveal information which is otherwise confidential under this section. This section does not render data on the quantity, composition, or quality of emissions from any source confidential. Data on the amount and nature of air contaminants emitted from a source shall be available to the public.

Sec. 14. (1) If the department finds that a person is discharging or causing to be discharged into the atmosphere, directly or indirectly, an air contaminant and the discharge constitutes an imminent and substantial endangerment to the public health, safety, or welfare, or to the environment and it appears to be prejudicial to the interests of the people of the state to delay action, the department shall notify the person by written notice that he or she must immediately discontinue the air pollution or take such other action as may be necessary to contain the imminent and substantial endangerment, or both. The written notice shall specify the facts that are the basis of the allegation. Within 7 days, the

department shall provide the person the opportunity to be heard and to present any proof that the discharge does not constitute an imminent and substantial endangerment to the public health, safety, or welfare, or to the environment.

(2) Notwithstanding any other provision of this act, upon receipt of evidence that a person is discharging or causing to be discharged into the atmosphere, directly or indirectly, an air contaminant and the discharge constitutes an imminent and substantial endangerment to the public health, safety, or welfare, or to the environment, and it appears to be prejudicial to the interests of the people of the state to delay action, the attorney general may bring suit on behalf of the state in the appropriate circuit court to immediately discontinue the air pollution or take such other action as may be necessary to contain the imminent and substantial endangerment, or both.

(3) An order issued by the department under subsection (1) is effective upon issuance and shall remain in effect for a period of not more than 7 days, unless the attorney general brings a civil action to restrain the alleged endangerment pursuant to subsection (2) or section 16e before the expiration of that period. If the attorney general brings such an action within the 7-day period, the order issued by the department shall remain in effect for an additional 7 days or such other period as is authorized by the court in which the action is brought.

(4) Prior to taking an action under subsection (1), the department shall attempt to notify the emergency management coordinator for the county in which the source is located who is appointed pursuant to the emergency management act, Act No. 390 of the Public Acts of 1976, being sections 30.401 to 30.420 of the Michigan Compiled Laws.

Sec. 16a. (1) The department may, upon the presentation of credentials and other documents as may be required by law, and upon stating the authority and purpose of the investigation enter and inspect any property at reasonable times for the purpose of investigating either an actual or suspected source of air pollution or ascertaining compliance or noncompliance with this act, rules promulgated under this act, the clean air act, a permit issued under this act, or any determination or order issued under this act. If in connection with an investigation or inspection, samples of air contaminants are taken for analysis, a duplicate of the analytical report shall be furnished promptly to the person who is suspected of causing the air pollution. In implementing this subsection, the department or its authorized representative may do any of the following:

(a) Have access to and copy, at reasonable times, any records that are required to be maintained pursuant to this act, rules promulgated under this act, the clean air act, a permit issued under this act, or any determination or order issued under this act.

(b) Inspect at reasonable times any facility, equipment, including monitoring and air pollution control equipment, practices, or operations regulated or required under this act, rules promulgated under this act, the clean air act, a permit issued under this act, or any determination or order issued under this act.

(c) Sample or monitor at reasonable times substances or parameters for the purpose of determining compliance with this act, rules promulgated under this act, the clean air act, a permit issued under this act, or any determination or order issued under this act. The department may enter into a contract with a person to sample and monitor as authorized under this subdivision.

(2) If the department, or an authorized representative of the department, is refused entry or access to records and samples under subsection (1) for the purposes of utilizing this section, the attorney general, on behalf of the state, may do either of the following:

(a) Petition the court of appropriate jurisdiction for a warrant authorizing entry or access to records and samples pursuant to this section.

(b) Commence a civil action to compel compliance with a request for entry and access to records and samples pursuant to this section, to authorize entry and access to records and samples provided for in this section, and to enjoin interference with the utilization of this section.

(3) As used in this section, "authorized representative" means any of the following:

(a) A full- or part-time employee of the department of natural resources or other state department or agency to which the department delegates certain duties under this section.

(b) A county to which authority is delegated under section 14f.

(c) For the purpose of utilizing the powers conferred in subsection (1)(c), a contractor retained by the state or a county to which authority is delegated under section 14f.

Sec. 16b. (1) As used in this section, "emergency" means a situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, war, strike, riot, catastrophe, or other condition as to which negligence on the part of the person was not the proximate cause, which requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation contained in an operating permit issued pursuant to section 5c, due to unavoidable increases in emissions attributable to the emergency. An emergency does not include acts of noncompliance caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

(2) An emergency constitutes an affirmative defense to an action brought for noncompliance with a technology-based emission limitation contained in an operating permit issued pursuant to section 5c if the affirmative defense of emergency is demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that establish all of the following:

- (a) An emergency occurred and that the permit holder can identify the cause or causes of the emergency.
 - (b) The permitted source was properly operated at the time of the emergency.
 - (c) During the emergency the permit holder took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit.
 - (d) The permit holder submitted notice of the emergency to the department within 2 working days of the time when an emission limitation was exceeded due to the emergency. This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.
- (3) In any enforcement proceeding, the permit holder seeking to establish the occurrence of an emergency has the burden of proof.

Sec. 16c. (1) If the department believes that a violation of this act or a rule promulgated under this act exists, or a violation of the terms of a permit issued under this act exists, the department shall provide the person responsible for the alleged violation with the opportunity to enter into an agreement with the department to correct the alleged violation. The agreement may provide for monetary or other relief as agreed upon by the parties. The agreement shall be in the form of a consent order and shall provide for compliance with this act and rules promulgated under this act and compliance with any applicable permit issued under this act. In addition, each consent order shall contain a compliance schedule that provides for reasonable progress toward full compliance by a designated date.

(2) If the department believes that a violation of an order issued under this act exists, the department may provide the person responsible for the alleged violation with the opportunity to enter into an agreement with the department to correct the alleged violation. The agreement may provide for monetary or other relief as agreed upon by the parties. The agreement shall be in the form of a consent order and shall provide for compliance with this act and rules promulgated under this act and compliance with any applicable permit or order issued under this act. In addition, each consent order shall contain a compliance schedule that provides for reasonable progress toward full compliance by a designated date.

(3) The department shall provide public notice and an opportunity for public comment on the terms and conditions of a consent order. Upon the request of any person the department shall provide a copy of the proposed consent order.

Sec. 16d. (1) The department may assess an administrative fine of up to \$10,000.00 for each instance of violation and, if the violation continues, for each day of continued noncompliance, if the department, on the basis of available information, finds that the person has violated or is in violation of this act or a rule promulgated under this act, has failed to obtain a permit required under this act, violates an order under this act, or has failed to comply with the terms of a permit issued under this act. If a single event constitutes an instance of violation of any combination of this act, a rule promulgated under this act, or a permit issued or order entered under this act, the amount of the administrative fine for that single event shall not exceed \$10,000.00 for that violation. The assessment of an administrative fine may be either a part of a compliance order or a separate order issued by the department.

(2) The authority of the department under this section is limited to matters where the total administrative fine sought does not exceed \$100,000.00 and the first alleged date of violation occurred within 12 months prior to initiation of the administrative action. Except as may otherwise be provided by applicable law, the department shall not condition the issuance of a permit on the payment of an administrative fine assessed pursuant to this section.

(3) Within 28 days of being assessed an administrative fine from the department, a person may file a petition with the department for review of this fine. Review of the fine shall be conducted pursuant to the contested case procedures of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.271 to 24.287 of the Michigan Compiled Laws. If issued as part of a consent order issued pursuant to section 16c, only the amount of the administrative fine and the alleged violation on which the fine is based are subject to the contested case procedures of Act No. 306 of the Public Acts of 1969.

Sec. 16e. (1) The attorney general may commence a civil action against a person for appropriate relief, including injunctive relief, and a civil fine as provided in subsection (2) for any of the following:

- (a) Violating this act or a rule promulgated under this act.
- (b) Failure to obtain a permit under this act.
- (c) Failure to comply with the terms of a permit or an order issued under this act.
- (d) Failure to pay an air quality fee or comply with a filing requirement under this act.
- (e) Failure to comply with the inspection, entry, and monitoring requirements of this act.

(f) A violation described in section 14(2).

(2) In addition to any other relief authorized under this section, the court may impose a civil fine of not more than \$10,000.00 for each instance of violation and, if the violation continues, for each day of continued violation.

(3) In addition to other relief authorized under this section, the attorney general may, at the request of the department, file an action in a court of competent jurisdiction to recover the full value of the injuries done to the natural resources of the state.

(4) In issuing a final order in an action brought pursuant to this section, the court may award costs of litigation, including, but not limited to, reasonable attorney and expert witness fees, to the prevailing or substantially prevailing party if the court determines that such an award is appropriate.

(5) A civil action brought under this section may be brought in the county in which the defendant is located, resides, or is doing business, or in the circuit court for the county of Ingham, or in the county in which the registered office of a defendant corporation is located, or in the county where the violation occurred.

(6) General defenses and affirmative defenses, that may otherwise apply under state law may apply in an action brought under this section as determined to be appropriate by a court of competent jurisdiction.

(7) Fines imposed under this section shall be assessed for each instance of violation and, if the violation is continuous, shall be assessable up to the maximum amount for each day of violation.

Sec. 16f. (1) A person who knowingly violates any requirement or prohibition of an applicable requirement of this act, a rule promulgated under this act, who fails to obtain or comply with a permit, or comply with a final order or order of determination issued under this act is guilty of a misdemeanor punishable by a fine of not more than \$10,000.00 per day, for each violation.

(2) A person who knowingly makes a false material statement, representation or certification in, or omits material information from, or knowingly alters, conceals, or fails to file any notice, application, record, report, plan, or other document required to be submitted pursuant to this act or a rule promulgated under this act, or who knowingly fails to notify or report information required to be submitted under this act or a rule promulgated under this act, or who knowingly falsifies, tampers with, renders inaccurate, or knowingly fails to install any monitoring device or method required under this act or a rule promulgated under this act, is guilty of a misdemeanor punishable by imprisonment for not more than 1 year and a fine of not more than \$10,000.00 per day, for each violation.

(3) A person who knowingly fails to pay any air quality fee owed under this act is guilty of a misdemeanor punishable by a fine of not more than \$10,000.00.

(4) A person who knowingly releases into the ambient air any specific chemical or any hazardous air pollutant listed in 40 C.F.R. part 68, section 68.130 (January 19, 1993) pursuant to the authority of section 112(r) of part A of title I of the clean air act, 84 Stat. 1685, 42 U.S.C. 7412, or both, contrary to applicable federal, state, or local requirements, or contrary to a permit issued under this act, and because of the quantities or concentrations of the substance released knows or should have known at the time that the release places another person in imminent danger of death or serious bodily injury is guilty of a felony punishable by imprisonment for not more than 2 years, or a fine of not more than \$10,000.00, or both.

(5) A person who knowingly releases or causes the release into the ambient air any specific chemical or any hazardous air pollutant listed in 40 C.F.R. part 68, section 68.130 (January 19, 1993) pursuant to the authority of section 112(r) of part A of title I of the clean air act, 84 Stat. 1685, 42 U.S.C. 7412, or both, contrary to applicable federal, state, or local requirements, or contrary to a permit issued under this act, and who knows or should have known at the time that the release places another person in imminent danger of death or serious bodily injury, and the release results in death or serious bodily injury to any person is guilty of a felony punishable by imprisonment for not more than 6 years, or a fine of not more than \$25,000.00, or both.

(6) A person who knowingly releases into the ambient air any specific chemical or any hazardous air pollutant listed in 40 C.F.R. part 68, section 68.130 (January 19, 1993) pursuant to the authority of section 112(r) of part A of title I of the clean air act, 84 Stat. 1685, 42 U.S.C. 7412, or both, contrary to applicable federal, state, or local requirements, or contrary to a permit issued under this act, and who intended at that time to place another person in imminent danger of death or serious bodily injury, and whose actions do result in death or cause serious bodily injury to any person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than \$250,000.00, or both.

(7) In determining whether a defendant who is an individual knew that the violation placed another person in imminent danger of death or serious bodily injury as required under subsections (4), (5), and (6), the defendant is responsible only for actual awareness or actual belief possessed; and knowledge possessed by a person other than the defendant, but not by the defendant, may not be attributed to the defendant. However, in proving a defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to be shielded from relevant information.

(8) Fines imposed under this section shall be assessed for each instance of violation and, if the violation is continuous, shall be assessable up to the maximum amount for each day of violation.

(9) A defendant may establish an affirmative defense to a prosecution under this section by showing by a preponderance of the evidence that the conduct charged was freely consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of any of the following:

(a) An occupation, a business, or a profession.

(b) Medical treatment or medical or scientific experimentation conducted by professionally approved methods if the person had been made aware of the risks involved prior to giving consent.

(10) All general defenses, affirmative defenses, and bars to prosecution that may otherwise apply with respect to state criminal offenses may apply under this section and shall be determined by the courts of this state having jurisdiction according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed by the courts in the light of reason and experience.

(11) Fines shall not be imposed pursuant to this section for a violation that was caused by an act of God, war, strike, riot, catastrophe, or other condition to which negligence or willful misconduct on the part of the person was not the proximate cause.

(12) As used in this section:

(a) "Serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(b) "Specific chemical" means a hazardous air pollutant listed in section 112(b)(1) of part A of title I of the clean air act, 84 Stat. 1685, 42 U.S.C. 7412, except for the following compounds:

(i) Antimony compounds.

(ii) Arsenic compounds (inorganic including arsine).

(iii) Beryllium compounds.

(iv) Cadmium compounds.

(v) Chromium compounds.

(vi) Cobalt compounds.

(vii) Coke oven emissions.

(viii) Cyanide compounds.

(ix) Glycol ethers.

(x) Lead compounds.

(xi) Manganese compounds.

(xii) Mercury compounds.

(xiii) Fine mineral fibers.

(xiv) Nickel compounds.

(xv) Polycyclic organic matter.

(xvi) Radionuclides (including radon).

(xvii) Selenium compounds.

Sec. 16g. (1) A civil or criminal fine assessed, sought, or agreed upon under this act shall be appropriate to the violation.

(2) In determining the amount of any fine levied under this act, all of the following factors shall be considered:

(a) The size of the business.

(b) The economic impact of the penalty on the business.

(c) The violator's full compliance history and good faith efforts to comply.

(d) The duration of the violation as established by any credible evidence, including evidence other than the applicable test method.

(e) Payment by the violator of penalties previously assessed for the same violation.

(f) The economic benefit of noncompliance.

(g) The seriousness of the violation.

(h) Such other factors as justice may require.

Sec. 16h. The department may pay an award of up to \$10,000.00 to an individual who provides information resulting in the assessment of a civil fine by a court in an action brought by the attorney general pursuant to section 16e, or leading to the arrest and conviction of a person under section 16f. An officer or employee of the United States, state of Michigan, an authorized representative of the department as defined in section 16a(3), or any other state or local government who furnishes information described in this section in the performance of an official duty is ineligible for payment under this section. In addition, an employee of the department of natural resources, a designee of the department of natural resources, or a person employed by the department of attorney general is ineligible to receive an award under this section regardless of whether the reported information came to his or her attention while functioning in an official capacity or as a private citizen. A person may not receive an award under this section for a violation of this act made by that person alone or in conjunction with others. An award shall not be made under this section until rules are promulgated by the department prescribing the criteria for making awards.

Section 2. This amendatory act shall not take effect unless all of the following bills of the 87th Legislature are enacted into law:

- (a) Senate Bill No. 46.
- (b) Senate Bill No. 804.

Section 3. This amendatory act shall take effect March 15, 1994.

This act is ordered to take immediate effect.

Co-Clerk of the House of Representatives.

Secretary of the Senate.

Approved -----

Governor.