

**HB5092, As Passed House, October 21, 1997**

Environmental protection; code; modifications to environmental  
audit privilege; provide for.

ENVIRONMENTAL PROTECTION: Code; ENVIRONMENTAL PROTECTION: Other

A bill to amend 1994 PA 451, entitled  
"Natural resources and environmental protection act,"  
by amending sections 14801, 14802, 14804, 14805, and 14808 (MCL  
324.14801, 324.14802, 324.14804, 324.14805, and 324.14808), as  
added by 1996 PA 132.

**THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**

1       Sec. 14801. As used in this part:  
2       (a) "Environmental audit" means a voluntary and internal  
3 evaluation conducted on or after the effective date of this part  
4 of 1 or more facilities or an activity at 1 or more facilities  
5 regulated under state, federal, regional, or local laws or ordi-  
6 nances, or of environmental management systems or processes  
7 related to the facilities or activity, or of a previously  
8 corrected specific instance of noncompliance, that is designed to  
9 identify historical or current noncompliance and prevent

1 noncompliance or improve compliance with 1 or more of those laws,  
2 or to identify an environmental hazard, contamination, or other  
3 adverse environmental condition, or to improve an environmental  
4 management system or process. ONCE INITIATED, AN AUDIT SHALL BE  
5 COMPLETED WITHIN A REASONABLE TIME, NOT TO EXCEED 6 MONTHS,  
6 UNLESS A WRITTEN REQUEST FOR AN EXTENSION IS APPROVED BY THE  
7 DIRECTOR ON REASONABLE GROUNDS.

8 (b) "Environmental audit report" means a document or a set  
9 of documents, each labeled at the time it is created  
10 "environmental audit report: privileged document" and created as  
11 a result of an environmental audit. An environmental audit  
12 report shall include supporting information. Supporting informa-  
13 tion may include field notes, records of observations, findings,  
14 opinions, suggestions, conclusions, drafts, memoranda, follow-up  
15 reports, drawings, photographs, computer generated or electroni-  
16 cally recorded information, maps, charts, graphs, and surveys, if  
17 the supporting information or documents are created or prepared  
18 for the primary purpose and in the course of or as a result of an  
19 environmental audit. An environmental audit report may also  
20 include an implementation plan that addresses correcting past  
21 noncompliance, improving current compliance, improving an envi-  
22 ronmental management system, and preventing future noncompliance,  
23 as appropriate.

24 (c) "Privilege" means the privilege provided to an environ-  
25 mental audit report as provided in this part.

26 Sec. 14802. (1) The owner or operator of a facility, or an  
27 employee or agent of the owner or operator on behalf of the owner

1 or operator, at any time may conduct an environmental audit and  
2 may create an environmental audit report.

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

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

9 (a) Documents, communication, data, reports, or other infor-  
10 mation required to be COLLECTED, MAINTAINED, OR made available or  
11 reported to a regulatory agency or any other person by statute,  
12 rule, ordinance, permit, order, consent agreement, or as other-  
13 wise provided by law.

14 (b) Information obtained by observation, sampling, or moni-  
15 toring by any regulatory agency.

16 (c) Pretreatment monitoring results which a publicly owned  
17 treatment works or control authority requires any industrial user  
18 to report to a publicly owned treatment works or control authori-  
19 ty, including, but not limited to, results establishing a viola-  
20 tion of the industrial user's discharge permit or applicable  
21 local ordinance.

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

25 (e) Machinery and equipment maintenance records.

26 (F) INFORMATION IN INSTANCES WHERE THE PRIVILEGE IS ASSERTED  
27 FOR A FRAUDULENT PURPOSE.

1 (G) INFORMATION IN INSTANCES WHERE THE MATERIAL SHOWS  
2 EVIDENCE OF NONCOMPLIANCE WITH STATE, FEDERAL, REGIONAL, OR LOCAL  
3 ENVIRONMENTAL LAWS, PERMITS, CONSENT AGREEMENTS, REGULATIONS,  
4 ORDINANCES, OR ORDERS AND THE OWNER OR OPERATOR FAILED TO EITHER  
5 TAKE PROMPT CORRECTIVE ACTION OR ELIMINATE ANY VIOLATION OF LAW  
6 IDENTIFIED DURING THE ENVIRONMENTAL AUDIT WITHIN A REASONABLE  
7 TIME, BUT NOT EXCEEDING 3 YEARS AFTER DISCOVERY OF THE NONCOMPLI-  
8 ANCE OR VIOLATION UNLESS A LONGER PERIOD OF TIME IS SET FORTH IN  
9 A SCHEDULE OF COMPLIANCE IN AN ORDER ISSUED BY THE DEPARTMENT OF  
10 ENVIRONMENTAL QUALITY, AFTER NOTICE IN THE DEPARTMENT'S CALENDAR,  
11 AND FOLLOWING THE DEPARTMENT'S DETERMINATION THAT ACCEPTABLE  
12 PROGRESS IS BEING MADE.

13 (4) Except as otherwise provided in this part, a person who  
14 conducts an environmental audit and a person to whom the environ-  
15 mental audit results are disclosed shall not be compelled to tes-  
16 tify regarding any information obtained solely through the envi-  
17 ronmental audit which is a privileged portion of the environmen-  
18 tal audit report. Except as otherwise provided in this part, the  
19 privileged portions of an environmental audit report are not  
20 subject to discovery and are not admissible as evidence in any  
21 civil ~~—, criminal,~~ or administrative proceeding.

22 Sec. 14804. (1) A request by state or local law enforcement  
23 authorities for disclosure of an environmental audit report shall  
24 be made by a written request delivered by certified mail or a  
25 demand by lawful subpoena. Within 30 business days after receipt  
26 of a request for disclosure or subpoena, the person asserting the  
27 privilege may make a written objection to the disclosure of the

1 environmental audit report on the basis that the environmental  
2 audit report is privileged. Upon receipt of such an objection,  
3 the state or local law enforcement authorities may file with the  
4 circuit court, and serve upon the person, a petition requesting  
5 an in camera hearing on whether the environmental audit report or  
6 portions of the environmental audit report are privileged or  
7 subject to disclosure. The motion shall be brought in camera and  
8 under seal. The circuit court has jurisdiction over a petition  
9 filed under this subsection requesting a hearing. Failure of the  
10 person asserting the privilege to make an objection to disclosure  
11 waives the privilege as to that person.

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

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

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

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

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

23 (3) Upon the filing of a petition for an in camera hearing  
24 under subsection (1), the court shall issue an order under seal  
25 scheduling, within 45 days after the filing of the petition, an  
26 in camera hearing to determine whether the environmental audit  
27 report or portions of the environmental audit report are

1 privileged or subject to disclosure. The counsel for the state  
2 or local law enforcement agency seeking disclosure of the infor-  
3 mation contained in the environmental audit report and the coun-  
4 sel for the person asserting the privilege shall participate in  
5 the in camera hearing but shall not disclose the contents of the  
6 environmental audit report for which privilege is claimed unless  
7 the court so orders.

8 (4) The court, after in camera review, shall require disclo-  
9 sure of material for which privilege is asserted, if the court  
10 determines that either of the following exists:

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

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

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

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

8           Sec. 14805. THE PRIVILEGE CREATED BY THIS PART DOES NOT  
9 APPLY TO CRIMINAL INVESTIGATIONS OR PROCEEDINGS. WHERE AN AUDIT  
10 REPORT IS OBTAINED, REVIEWED, OR USED IN A CRIMINAL PROCEEDING,  
11 THE PRIVILEGE CREATED BY THIS PART APPLICABLE TO ADMINISTRATIVE  
12 OR CIVIL PROCEEDINGS IS NOT WAIVED OR ELIMINATED. ~~-(1) To the~~  
13 ~~extent authorized by the code of criminal procedure, Act No. 175~~  
14 ~~of the Public Acts of 1927, being sections 760.1 to 760.21 of the~~  
15 ~~Michigan Compiled Laws, state or local law enforcement authori-~~  
16 ~~ties may seize an environmental audit report for which privilege~~  
17 ~~is asserted, pursuant to a lawful search warrant. Upon seizure,~~  
18 ~~the law enforcement authorities shall immediately place the envi-~~  
19 ~~ronmental audit report under seal and shall immediately file it~~  
20 ~~with the court that authorized the search warrant. The law~~  
21 ~~enforcement authorities or the court shall also provide notice of~~  
22 ~~the filing to any person who is eligible under this part to~~  
23 ~~assert the privilege. Unless and until the court orders disclo-~~  
24 ~~sure under section 14804, or the privilege has been waived pursu-~~  
25 ~~ant to section 14803, the law enforcement authorities shall not~~  
26 ~~inspect, review, or disclose the contents of the environmental~~  
27 ~~audit report. Within 30 business days after the notice of the~~

~~1 filing has been provided, the person asserting the privilege may  
2 make a written objection to the disclosure of the environmental  
3 audit report on the basis that the environmental audit report is  
4 privileged. Upon receipt of such an objection, the state or  
5 local law enforcement authorities may file with the circuit  
6 court, and serve upon the person, a petition requesting an in  
7 camera hearing on whether the environmental audit report or por-  
8 tions of the report are privileged or subject to disclosure.  
9 Failure of the person asserting the privilege to make an objec-  
10 tion to disclosure waives the privilege as to that person.~~

~~11 (2) Upon the filing of a petition requesting an in camera  
12 hearing under subsection (1), the person asserting the privilege  
13 shall demonstrate in the in camera hearing all of the following:~~

~~14 (a) The year the environmental audit report was prepared.~~

~~15 (b) The identity of the person conducting the audit.~~

~~16 (c) The name of the audited facility or facilities.~~

~~17 (d) A brief description of the portion or portions of the  
18 environmental audit report for which privilege is claimed.~~

~~19 (3) Upon the filing of a petition for an in camera hearing  
20 under subsection (1), the court shall issue an order under seal  
21 scheduling, within 45 days after the filing of the petition, an  
22 in camera hearing to determine whether the environmental audit  
23 report or portions of the environmental audit report are privi-  
24 leged or subject to disclosure. The counsel for the state or  
25 local law enforcement agency seeking disclosure of the informa-  
26 tion contained in the environmental audit report and the counsel  
27 for the person asserting the privilege shall participate in the~~

1 ~~in camera hearing but shall not disclose the contents of the~~  
2 ~~environmental audit report for which privilege is claimed unless~~  
3 ~~the court so orders.~~

4 ~~(4) The court, after in camera review, shall require disclo-~~  
5 ~~sure of material for which privilege is asserted, if the court~~  
6 ~~determines that either of the following exists:~~

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

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

20 ~~(5) The court, after in camera review, may require disclo-~~  
21 ~~sure of material for which privilege is asserted if the court~~  
22 ~~determines that the material is not subject to the privilege.~~

23 ~~(6) If the court determines under this section that the~~  
24 ~~material is not privileged, but the party asserting the privilege~~  
25 ~~files an application for leave to appeal of this finding, the~~  
26 ~~material, motions, and pleadings shall be disclosed unless the~~  
27 ~~court specifically determines that all or a portion of such~~

1 ~~information shall be kept under seal during the pendency of the~~  
2 ~~appeal.~~

3       Sec. 14808. This part does not limit, waive, or abrogate  
4 ~~the~~ EITHER OF THE FOLLOWING:

5       (A) THE scope or nature of any statutory or common law priv-  
6 ilege, including the work product doctrine and the  
7 attorney-client privilege.

8       (B) ANY EXISTING ABILITY OR AUTHORITY TO CHALLENGE PRIVILEGE  
9 UNDER MICHIGAN LAW.

10       Enacting section 1. This amendatory act does not take  
11 effect unless Senate Bill No. \_\_\_\_\_ or House Bill  
12 No. \_\_\_\_\_ (request no. 04122'97) of the 89th Legislature is  
13 enacted into law.