

Act No. 133
Public Acts of 1997
Approved by the Governor
November 13, 1997
Filed with the Secretary of State
November 14, 1997
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STATE OF MICHIGAN
89TH LEGISLATURE
REGULAR SESSION OF 1997

Introduced by Reps. Alley, Kilpatrick, Wetters, Middaugh, Mans, Sikkema, Walberg, LaForge, Brown, Anthony, Bodem, Basham, Birkholz, Byl, DeVuyt, Rhead, McNutt, Brater and Callahan

ENROLLED HOUSE BILL No. 5092

AN ACT to amend 1994 PA 451, 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 provide certain appropriations; 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," 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:

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. Once initiated, an audit shall be completed within a reasonable time, not to exceed 6 months, unless a written request for an extension is approved by the director on reasonable grounds.

(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 collected, maintained, or 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.

(f) Information in instances where the privilege is asserted for a fraudulent purpose.

(g) Information in instances where 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 either take prompt 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.

(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 or administrative proceeding.

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 either take prompt 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, shall 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. The privilege created by this part does not apply to criminal investigations or proceedings. Where an audit report is obtained, reviewed, or used in a criminal proceeding, the privilege created by this part applicable to administrative or civil proceedings is not waived or eliminated.

Sec. 14808. This part does not limit, waive, or abrogate either of the following:

(a) The scope or nature of any statutory or common law privilege, including the work product doctrine and the attorney-client privilege.

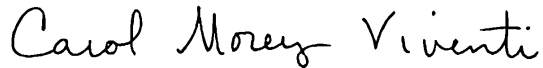
(b) Any existing ability or authority to challenge privilege under Michigan law.

Enacting section 1. This amendatory act does not take effect unless House Bill No. 5093 of the 89th Legislature is enacted into law.

This act is ordered to take immediate effect.



Clerk of the House of Representatives.



Secretary of the Senate.

Approved _____

Governor.