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Important Legislation for Finishers:

Michigan's Environmental Audit Privilege & Immunity Law (Part 148)

Landmark legislation was recently passed in the State of Michigan concerning the discovery of unintentional environmental violations. An important feature of this law is the creation of immunity from certain fines and penalties. Mr. Smary discussed the law and its importance to finishers at the September 12 meeting of the Grand Rapids Branch. P&SF thanks Ken Gatchel for encouraging Mr. Smary to present the facts for publication.

Background

On March 15, 1996, Governor Engler signed into law Part 148 of Michigan's Natural Resources and Environmental Protection Act (NREPA), the Environmental Audit Privilege and Immunity Law (Part 148). Part 148 is found at M.C.L.A. § 324.14801 *et seq.* It was filed with the Secretary of State on March 18 and was given immediate effect.

Summary

The purpose of Part 148 is to encourage businesses, municipalities and other entities to investigate their facilities and environmental activities in order to discover, disclose and correct violations of environmental laws or regulations.

Part 148 contains two major provisions. The first provision creates a limited privilege for information contained in an environmental audit report (making such information confidential). The second major provision creates immunity from state and local administrative, civil and certain criminal fines and penalties for violations discovered through an environmental self-audit that are voluntarily reported and corrected. These provisions are discussed in more detail in the following.

Definitions

Environmental Audit

An environmental audit means a voluntary and internal evaluation conducted by or on behalf of an owner or operator after March 18, 1996, of one or more facilities, an activity regulated under law, an environmental management system, or of a previously corrected specific instance of noncompliance, that is designed to:

1. Identify historical or current noncompliance;
 2. Prevent noncompliance or improve compliance;
 3. Identify an environmental hazard or other adverse environmental condition; or
 4. Improve an environmental management system or process.
- M.C.L.A. § 324.14801(a).

Environmental Audit Report

An environmental audit report means a document that is created as a result of an environmental audit.

1. The environmental audit report must be labeled at the time it is created "Environmental Audit Report: Privileged Document."
2. The audit report must contain supporting information, such as field notes, findings, opinions, suggestions, drawings, photographs, maps or computer-generated information. This information must be created or prepared in the course of conducting the environmental audit. M.C.L.A. § 324.14801(b).

Privilege

An environmental audit report is privileged and protected from disclosure under Part 148. Therefore,

a person who conducts an environmental audit and a person to whom the environmental audit results are disclosed, cannot be compelled to testify regarding information obtained solely through the audit, which is a privileged portion of the audit report. In addition, information in the environmental audit report is not subject to discovery and is not admissible as evidence in any civil, criminal or administrative proceeding. M.C.L.A. § 324.14802.

Exceptions

The privilege does not extend to the following information or documents:

1. Documents or other information required to be made available or reported to a regulatory agency or other person by law. M.C.L.A. § 324.14802(3)(a). This exception places important limitations on the scope of the privilege. Under Michigan's Hazardous Waste Management law, for example, a generator must report any release of a hazardous waste that could threaten human health or that could reach surface or groundwater. M.A.C. R 299.9306. Under Michigan's new Part 201, Environmental Response, an owner or operator who knows that property is a facility and who is liable under Part 201 must report releases of reportable quantities of hazardous substances. M.C.L.A. § 324.20114(1)(d). Use of the attorney-client privilege may avoid some of these limitations, because reports prepared in accordance with the privilege would remain confidential.
2. Information obtained by a regulatory agency through

observation, sampling or monitoring.

3. Information legally obtained from a source independent of the environmental audit.
4. Machinery and equipment maintenance records.

Waiver

The person for whom the environmental audit report was prepared may expressly waive the privilege.

Disclosure by that person (or by that person's employee or agent), however, to another employee, a legal representative, or an agent of that person retained to address issues raised by the audit does not waive the privilege. Similarly, a disclosure made under the terms of a confidentiality agreement between the person for whom the audit report was prepared and an actual or potential partner, transferee, lender or trustee, or a disclosure made between a subsidiary and parent or between members of a partnership or joint venture do not waive the privilege. M.C.L.A. § 324.14803.

"In camera" review

A state or local law enforcement agency must make a written request for the disclosure of an environmental audit privilege. Failure of the person asserting the privilege to make written objection to disclosure within 30 business days of receipt of the request or subpoena waives the privilege for that person. Upon receipt of an objection to disclosure, a state or local law enforcement authority may file with the circuit court a petition requesting an *in camera* review on whether the environmental audit report is privileged. An *in camera* review is a private proceeding that generally occurs inside the judge's chambers.

1. The court must require disclosure of information in an environmental audit if the judge finds that the privilege is asserted for a "fraudulent purpose." M.C.L.A. § 324.14804(4)(a). A person who uses Part 148 to commit fraud is guilty of a misdemeanor punishable by a fine of not more than \$25,000. M.C.L.A. § 324.14807. "Fraudulent purpose" is not defined in the statute.
2. The court must also require disclosure if the court determines

that the audit report shows evidence of noncompliance with the law and the owner or operator failed to take corrective action or eliminate the violation within a reasonable time. A reasonable time shall not exceed three years after discovery of the noncompliance unless a longer period of time is set forth in a schedule of compliance issued by the Department of Environmental Quality after notice in the Department's public calendar, and after the Department has determined that acceptable progress is being made. M.C.L.A. § 324.14804(4)(b).

Immunity

A person is immune from administrative or civil fines and penalties and from criminal penalties and fines for negligent acts or omissions related to noncompliance with Michigan's environmental laws, provided that that person makes a voluntary disclosure to the appropriate agency, that the information arises out of the environmental audit, and that the noncompliance is corrected. M.C.L.A. § 324.14809(1).

Voluntary disclosure

A disclosure is voluntary if:

1. The disclosure is made promptly after the information disclosed is obtained;
2. The person making the disclosure initiates a good-faith effort to achieve compliance, pursues compliance with due diligence, and promptly corrects the noncompliance;
3. The information arises out of an environmental audit; and
4. The environmental audit was conducted before the person was aware that he or she was under investigation by a regulatory agency for potential violations of Michigan's environmental laws. M.C.L.A. § 324.14809(1)(a)-(d).

Immunity not available for "knowingly" violating environmental laws

Immunity does not apply to a person if a court finds that that person has "knowingly" committed a criminal act or serious violations that constitute a pattern of continuous or repeated violations of environmental laws. M.C.L.A. § 324.14809(4).

Next month: Federal incentives for self-policing and compliance incentives for small businesses. **P&SF**

About the Columnist

Eugene E. Smary is a partner with the law firm of Warner Norcross & Judd LLP, 900 Old Kent Bldg., 111 Lyon St., N.W., Grand Rapids, MI 49503. His practice focuses on hazardous waste site remediation and associated claims, environmental due diligence associated with real property and corporate transactions, lender environmental liability, and client counseling on compliance with environmental laws. He recently served as spokesperson for the Michigan Chamber of Commerce during the legislative process for the Michigan Environmental Audit Privilege and Immunity legislation. A 1975 graduate of the University of Notre Dame Law School, he serves on numerous state environmental committees and task forces, and is co-editor of Michigan Environmental Law Deskbook, published by Michigan's Institute of Continuing Legal Education. He has lectured extensively on various environmental topics to a wide variety of professional and civic organizations in the U.S. and Canada.

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