



NONWAIVER OF PRIVILEGE CONFIDENTIALITY AGREEMENT

(Authority: PA 451 of 1994, as amended; completion is voluntary)

This Confidentiality Agreement (“Agreement”) between the Michigan Department of Environment, Great Lakes, and Energy (hereafter “Department”) and _____ (hereafter “the Submitter”) is entered into pursuant to Part 148 of the Natural Resources and Environmental Protection Act (hereafter “NREPA”), P.A. 451 of 1994; MCL 324.14801 et seq. (“Part 148”).

In accordance with Section 14803(3)(b) of Part 148, the purpose of this Agreement is to provide that certain documents or parts of documents (hereafter “Report”) designated and labeled by the Submitter as “**ENVIRONMENTAL AUDIT REPORT: PRIVILEGED DOCUMENT**” in accordance with subsection 14801(b) of Part 148, can be disclosed to the Department without waiving any privilege those documents may be accorded pursuant to Part 148 except as described herein. A Report disclosed to the Department under this Agreement will be held confidential by the Department subject to the terms and conditions of this Agreement. By executing this Agreement and submitting it to the Department, the Submitter accepts and agrees to be bound by the terms and conditions set forth herein.

1. **Preservation of Privilege:** A Report submitted to the Department pursuant to this Agreement for which the Submitter requests confidentiality shall be specifically designated and labeled by the Submitter as an “**ENVIRONMENTAL AUDIT REPORT: PRIVILEGED DOCUMENT/PRIVILEGE NOT WAIVED.**”
2. **Extent of Privilege:** Only a Report that is afforded a privilege from disclosure by Part 148 will be held confidential and withheld from disclosure by the Department pursuant to this Agreement. The privilege does not extend to, and the Department will not hold confidential, the following:
 - a) Any information which is not an “environmental audit report” as defined by Section 14801(b).
 - b) Any information, regardless of whether or not it is contained in an environmental audit report, which is excluded from the privilege by Section 14802(3). Without limiting the effect of other exclusions described in that section, it is the Department’s position that pursuant to Section 14802(3)(a) information is not privileged, and the Department will not hold it confidential, if it is required to be provided to the Department pursuant to a duly authorized information request including, but not limited to, a request pursuant to Section 20117 of NREPA, MCL 324.20117.
 - c) Any information that is required to be disclosed by a court pursuant to Section 14804.
3. **Waiver of Privilege:** The Department does not agree to withhold from disclosure any information described in this section whether or not it is contained in a Report. The Department will consider the submission, to the Department, of any of the information described below as a waiver of any privilege that may be provided by Part 148, thereby rendering the information subject to disclosure.
 - a) Information that is part of a “baseline environmental assessment” as defined by Subsection 20101(d) of NREPA; MCL 324.20101(d) and is submitted to the Department for the purpose of receiving liability protection under Section 20126(l)(c) of NREPA; MCL 324.201126(l)(c).
 - b) Information submitted to the Department for the purpose of obtaining an administrative

determination or approval from the Department pursuant to law, regulation, order, or administrative agreement (e.g., submission of a remedial action plan and components thereof, or information regarding due care or liability).

- c) Information submitted to the Department for the purpose of receiving public financial assistance such as a grant or loan.
- d) Information in a voluntary disclosure made pursuant to Section 14809(l) of Part 148 that is necessary to make a showing that the conditions described in Section 14809(l)(a)-(d) are met, supporting a claim that the disclosure is voluntary.
- e) Information in a notice to the Department, submitted in accordance with Section 14809(7), from a facility planning to commence an environmental audit.

4. **Release of Privileged Information in Formal Proceeding:** The Department may release any information contained in a Report received under this Agreement in the following circumstances:

- a) The information becomes part of the administrative record for a Department determination that is the subject of a formal judicial or administrative proceeding.
- b) The Department is ordered to release the information by a subpoena or court order.
- c) The information is presented by the Department to rebut the presumption of a voluntary disclosure as described in Section 14809(2).

5. **Internal Use of Information:** The Department may use any information in a Report being held confidential and share the Report with the Department of Attorney General in conducting its normal business, provided the Department does not disclose the Report to any other parties outside the Department.

6. **Notice of Intent to Release:** The Department may not necessarily review a Report at the time of submission to determine whether it is privileged under Part 148 or otherwise falls within an enumerated paragraph of this Agreement. The Department will make such determination when necessary to consider a request pursuant to the Freedom of Information Act, MCL 15.231 et seq., or otherwise conduct authorized activities of the Department. Subsequent to such determination, the Department will notify the Submitter of its intent to release a Report no less than five (5) business days prior to a release of the Report.

7. **Limitation on Appeal from Department Determination:** There shall be no formal administrative appeal for any decision, determination, or finding of the Department made pursuant to this Agreement.

8. **Prohibition Against Alteration of Agreement:** This Agreement may not be altered in any way. Alteration includes, but is not limited to, adding or eliminating any language, striking terms or parts of terms, retyping in whole or in part, and use of a different format. The Agreement may be submitted on a photocopy of an original Agreement or on an electronically transferred copy of the Agreement provided that the copy is not altered and includes the Department letterhead. The Department will consider the submission of a Report under cover of an altered Agreement as a waiver of any privilege that may be afforded to the Report by Part 148, thereby rendering the Report subject to disclosure.

9. **Execution of Agreement:** This Agreement is effective upon receipt by the Department provided it is fully executed by a duly authorized representative of the Submitter and **is received by December 31, 2018.**

By the signature below, the person executing this Agreement certifies and affirms that:

The Report arose from an “environmental audit” as defined by Part 148.

He/She is the person for whom the Report was prepared or a duly authorized representative of that person.

The Report qualifies in whole or in part for the privilege provided by Part 148.

That this Agreement has not been altered from its original form.

He/She will be bound by the terms and conditions of this Agreement.

SIGNATURE

TITLE

DATE

WHERE TO SUBMIT CONFIDENTIALITY AGREEMENTS

Please submit completed Confidentiality Agreement to the below email:

ELGE-NREPA-Part148@michigan.gov

For information or assistance on this publication, please contact the EGLE Environmental Assistance Center at 800-662-9278. This publication is available in alternative formats upon request.

EGLE does not discriminate on the basis of race, sex, religion, age, national origin, color, marital status, disability, political beliefs, height, weight, genetic information, or sexual orientation in the administration of any of its program or activities, and prohibits intimidation and retaliation, as required by applicable laws and regulations. Questions or concerns should be directed to the Nondiscrimination Compliance Coordinator at EGLE-NondiscriminationCC@Michigan.gov or 517-249-0906.

This form and its contents are subject to the Freedom of Information Act and may be released to the public.