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Re: Wyoming Environmental Audit Law/Federal Program Approval

Dear Mr. Clough and Mr. Speicher:

The purpose of this letter is to respond to the U.S. Environmental Protection Agency (EPA), Region VIII letter dated May 19, 1997, questioning whether Wyoming's environmental audit privilege and immunity law, Wyo. Stat. §§ 35-11-1105-1106, affects Wyoming's ability to meet the enforcement requirements for EPA program approval. Since, as noted in your letter, many of your questions cover similar topics, I have not addressed each question individually, but have responded more generally to the concerns raised. The responses are tailored to the specific enforcement requirements identified in your letter, including 40 C.F.R. Part 123 (for the Clean Water Act NPDES program), 40 C.F.R. Part 145 (for the Safe Drinking Water Act UIC program), 40 C.F.R. Part 70 (for the Clean Air Act operating permit program), and 40 C.F.R. Part 271 (for RCRA programs) and to the general requirements of EPA's February 14, 1997 Statement of Principles, which accompanied your letter. The scope of this letter is limited to the impact of the audit privilege and immunity law on federal programs and does not address specific points of the law that will only affect state programs.

Ability to Obtain Complete Injunctive Relief and Civil Penalties:
Questions 1,2,3,6,7 & General Questions

Section 1106 of the Wyoming Environmental Quality Act (WEQA) provides limited immunity from injunctive relief and civil penalties for violators that voluntarily report to the Wyoming Department of Environmental Quality (WDEQ) violations that they have discovered and corrected as the result of conducting an environmental audit. To qualify for the immunity, the audit must meet the requirements of Section 1105. Wyo. Stat. § 35-11-1106(a). However, Section 1106(a)(iv) creates a broad exception to the immunity for federal programs that have been delegated to Wyoming. The intent of this provision was to prevent the audit law from interfering with Wyoming's ability to maintain federal program approval. Under Section 1106:

> [T]he [WDEQ] shall not seek civil penalties or injunctive relief for the violation reported unless:
>
> . . .
>
> (iv) [A] waiver of penalty authority would result in a state program less stringent than the federal program or the waiver would violate any federal rule or regulation required to maintain state primacy.
> Wyo. Stat. § 35-11-1106(a)(iv)

Section 1106(a)(iv) preserves both Wyoming's penalty authority and its authority to obtain injunctive relief for violations of federally-delegated programs. Since Section 1106(a) generally waives both penalty authority and injunctive relief, the second reference to "the waiver" in Section 1106(a)(iv) refers not only to penalties, but to injunctive relief as well. This interpretation is consistent with the structure of Section 1106(a) and fulfills the intent of Section 1106(a)(iv) to preserve Wyoming's ability to maintain federal program approval. This interpretation is also consistent with the general policy and purpose of the WEQA to "retain for the state the control over its air, land and water," and to "secure cooperation between agencies of the state . . . and the federal government . . . ." Wyo. Stat. § 35-11-102.

Section 1106(a) provides no limits on the WDEQ's ability to recover civil penalties for violations of any permit, order, regulation, consent decree, judicial or administrative orders covered under a federally-delegated program. Accordingly, the WDEQ retains all the authority it had prior to the passage of the audit privilege and immunity law to recover civil penalties for violations that result in significant economic benefit or those that result in serious harm or present an imminent and substantial endangerment to public health or the environment under federally-delegated programs. The statute only requires that the WDEQ consider the voluntary disclosure of the violation as a mitigating factor "to the extent allowed under federal law or regulation." Wyo. Stat. § 35-11-1106(a)(iv). If the federal law does not allow a penalty reduction for a voluntary disclosure, the law does not authorize the WDEQ to take the disclosure into account in its penalty assessment.

In short, where a federal program requires Wyoming to have authority to assess penalties, immunity is unavailable under Section 1106. In implementing Section 1106, the WDEQ will

review its responsibilities to take enforcement action, not only under the relevant federal laws and regulations, but also will review its commitments under the State-EPA enforcement agreements governing federally-delegated programs. If the appropriate agreement or federal program requires the WDEQ to seek a penalty, the source will not be entitled to immunity for its voluntary disclosure. Finally, Section 1106 applies to all federal programs currently delegated to Wyoming and to all programs that may be delegated to Wyoming in the future.

Whether Privileges and Immunity Are Available for Audits Conducted As Part of a Settlement of an Administrative or Judicial Action: Question 4

Audits conducted as the result of a settlement of an administrative or judicial action would not meet the definition of an audit found in Section 1105(a)(i). To qualify for either the privilege or the immunity, environmental audits must be "voluntary" under Section 1105(a)(i). An audit conducted to comply with an enforcement settlement is not "voluntary," within the meaning of Section 1105(a)(i).

Whether Statute Limits Requirements to Report Information to the Agency: Questions 5, 11 & 13

Both Sections 1105 and 1106 are inapplicable to information that must be reported to the WDEQ and again, it bears repeating that Section 1106 is generally inapplicable to violations of federally-delegated programs.[1]

Under Section 1105, the audit privilege does not apply to:

> Documents, communications, data, reports or other information required to be collected, developed, maintained, reported or otherwise made available to a regulatory agency pursuant to any regulatory requirement of [the WEQA] or any other federal or state law or regulation.
> Wyo. Stat. § 35-11-1105(d)(i).

This exception preserves the WDEQ's authority to require ongoing reporting as mandated by the various federal programs regardless of whether the reporting requirement is in a permit. Sources of pollution cannot circumvent Section 1105(d)(i) by failing to obtain the permit that would describe the details of the reporting requirement. The reporting requirement is in the underlying law or regulation and thus, outside the scope of the audit privilege and immunity law.

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[1] If Section 1106 applied to federal program violations, it would not provide immunity for violations that must be reported to the WDEQ. Reporting a violation is "mandatory," not "voluntary," within the meaning of Section 1106, if reporting the violation is required by the WEQA, federal, state or local regulations. Wyo. Stat. § 35-11-1106(b).

Likewise, the privilege does not affect the ability of the WDEQ to collect information that must be available to the state or the public. Wyoming retains its information gathering ability, including the broad powers of the WDEQ administrators in Section 110(a)(vii) of the WEQA, to require sources of pollution to test, gather information and report their findings to the WDEQ. Wyo. Stat. § 35-11-110(a)(vii). Consequently, while Section 1105 may prohibit the WDEQ from obtaining the audit report, it would not prevent collection of the underlying data.

Whether Wyoming Law will Interfere with
Criminal Investigations and Prosecutions: Question 8

Section 1106, even if it applied to violations of federally-approved programs, only establishes immunity from civil penalties. Wyo. Stat. § 35-11-1106(a). The privilege in Section 1105, although it provides limited protection for environmental audit reports in criminal investigations, should not interfere with the ability of the State of Wyoming to conduct criminal investigations.

Under Wyoming's law, the District Attorney or the Attorney General may obtain the environmental audit through a search warrant, criminal subpoena or discovery if there is probable cause of a violation. Wyo. Stat. § 35-11-1105(c)(v). The facility owner or operator then has twenty (20) days to request an *in camera* hearing with the court to review the confidentiality of the report or the privilege is waived. Wyo. Stat. § 35-11-1105(c)(vi).

If the court conducts a review, the burden is on the facility owner or operator to establish the privilege. The state official can overcome any finding of privilege and obtain the audit report if :

> [T]he material contains evidence relevant to the commission of a criminal offense under [the WEQA] or any federal environmental law, the district attorney or the attorney general has a need for the information, the information is not otherwise available and the district attorney or attorney general is unable to obtain the substantial equivalent of the information by any means without incurring unreasonable cost and delay.
> Wyo. Stat. § 35-11-1105(c)(iii)

In short, prosecutors have the ability to obtain the audit report, regardless of the privilege, if it is necessary to the development of the case.

In addition, the facility owner and operator will not be able bear its burden of establishing the privilege if the report shows evidence of noncompliance and efforts to achieve compliance were not pursued with reasonable diligence or if the report demonstrates that there is a substantial threat to public health or the environment or damage to property outside the facility boundary. Wyo. Stat. § 35-11-1105(c)(ii). It seems unlikely that in a criminal action, the facility owner or operator is going to be able to meet its burden on these two points. However, if the facility owner or operator is successful, the prosecutors still have the ability to obtain the audit under Section 1105(c)(iii).

Whether Wyoming Audit Law Heightens the Burden of Proof for Proving Violations of the WEQA: Question 9

You have questioned whether the burden of proof imposed on the state enforcement authority under Section 1105(c)(iv) impermissibly shifts the burden of proof in violation of delegation authorities. Federal delegation requirements generally specify that the burden of proof required to establish a violation under state law cannot be any greater than that required for a federal enforcement action. *See, e.g.*, 40 C.F.R. § 123.27(b)(2) (NPDES). Section 1105 has no effect on the burden of proof necessary to prove violations of Wyoming's environmental laws.

Under Section 1105(c)(iv), the owner or operator of the facility has the burden of establishing that the document in question qualifies for the privilege. Wyo. Stat. § 35-11-1105(c)(iv). Unless the owner or operator can prove all of the elements of the privilege as set out in Section 1105, the party must disclose the material. The state has no burden at all if the facility owner and operator cannot prove the elements of the privilege. If the owner or operator establishes the privilege, then the burden is on the state to show the privilege is claimed for a fraudulent purpose. Wyo. Stat. § 35-11-1105(c)(iv).

Section 1105(c)(iv) does nothing to alter Wyoming's burden to prove by a simple preponderance of the evidence that a violation has occurred and thus, has no impact on Wyoming's ability to comply with federal delegation requirements. As discussed above, because Section 1105 does not limit the WDEQ's ability to gather information needed to investigate compliance at a facility, it does not create any obstacles to Wyoming's ability to enforce violations of the WEQA.

Whether Audit Privilege Limits Emergency Order Authority: Question 10

Nothing in Section 1105 limits the WDEQ's authority to obtain emergency injunctive relief under Section 115 of the WEQA;[2] nor will it cause any delay in the WDEQ's ability to obtain emergency relief. When the WDEQ is aware of an immediate and substantial threat to public health or the environment--the standard for an emergency order--the WDEQ is not likely to need additional information from the company to obtain the injunction. If however, additional information is required, the WDEQ retains its authority to gather information and to require sources of

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[2] Under Section 115 of the WEQA, Wyo. Stat. § 35-11-115, there are two procedures available for obtaining emergency orders. The Director of the WDEQ can issue an administrative order which must be heard by the Environmental Quality Council within 48 hours. Wyo. Stat. § 35-11-115(a). The company could then appeal this decision to the court. Wyo. Stat. § 35-11-1001. Alternatively, the Director can request that the Attorney General seek a temporary restraining order from the court which would be followed by a hearing within three (3) days. Wyo. Stat. § 35-11-115(b).

sources of pollution to provide emission, discharge or other information to the agency under Section 110 of the WEQA, as discussed above.

It is also worth noting that the privilege would not apply to circumstances where an emergency order is appropriate. There is no privilege when the report shows evidence of noncompliance with environmental laws, Wyo. Stat. § 35-11-1105(c)(ii)(C), or shows evidence of a substantial threat to the public health or environment or damage to real property outside the facility property, Wyo. Stat. § 35-11-1105(c)(ii)(D). The burden would be on the source to show that there is no threat. If the report shows a threat to public health and safety, it would be foolhardy for the polluter to even attempt to claim the privilege during a proceeding for an emergency injunction. On the other hand, if the court finds that the audit report contains no evidence of a substantial threat to the public health or the environment, the WDEQ would not be able to establish the grounds for an emergency order using the audit report. Consequently, Section 1105 has no practical impact on the WDEQ's ability to obtain an emergency injunction.

Disclosure of Audit Report for Failure to Correct Violations: Question 12

You have asked when the state will seek disclosure of an audit report in the event a facility owner or operator has failed "to make appropriate efforts to achieve compliance" as stated in Section 1105(c)(ii)(C) and how the WDEQ will use that evidehce. Under Section 1105(c)(iv), the party asserting the privilege bears the burden of showing that it met the requirements of Section 1105(c)(ii)(C). If it cannot meet this burden, the audit report is not privileged.

Thus, whenever the WDEQ has evidence of ongoing noncompliance or a concern that a facility violated provisions of the WEQA and did not remedy the violations, it is entitled to discovery of the audit report and may seek the report. Once the WDEQ obtains the report, it will have full discretion to take an appropriate enforcement action consistent with its authority under the WEQA and its responsibilities under any delegation from or enforcement agreement with EPA.

Whether the Wyoming Law Prevents the Public From Obtaining Information about Violations, Reporting Violations or Bringing Federal Enforcement Actions: Question 14

Wyoming's audit privilege law makes the same information available to the public from the WDEQ that was available prior to its passage. There is no reduction in the flow of public information into WDEQ, as a result of the passage of Section 1105. As stated above in the answer to questions 5, 11 & 13, the privilege does not protect information that must be reported to the WDEQ, including information about violations. The law contains no "whistle blower" provisions that would penalize individuals who disclose violations described in an audit report. Finally, nothing in the law limits a citizen's right to bring federal enforcement actions.

Relationship Between Audit Privilege And Immunity: Question 15

Your question asks how a claim of privilege is affected by a voluntary report under Section 1106. Any time a facility owner or operator makes a voluntary report under Section 1106, the company waives its privilege under Section 1105 with respect to those sections of the audit report dealing with the media that is the subject of the voluntary disclosure. Wyo. Stat. § 35-11-1105(c)(i). If the voluntary disclosure is for an NPDES violation, for example, the disclosure waives those portions of the audit report related to water quality.

Conclusion

Wyoming's audit privilege and immunity law, Sections 1105 and 1106 of the WEQA, based on my understanding of the questions you have asked and interpretation of federal program requirements, does not interfere with the enforcement authority Wyoming must have to maintain federal program approval. Under the law, the WDEQ continues to have authority to gather information about environmental compliance and to pursue civil and criminal penalties and injunctive relief for violations of federally-approved programs. The public's right to access compliance information is also preserved under the law.

If you require additional information to complete your review of Wyoming's audit privilege and immunity law, do not hesitate to contact me or Mary Throne of my staff.

Sincerely,

William U. Hill

William U. Hill
Attorney General

cc: Dennis Hemmer, WDEQ Director