

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WSG 126

Date Signed: February 9, 1999

MEMORANDUM

Subject: Updated Procedures Concerning State Audit Privilege/Immunity Laws and Legislation

From: Nancy K. Stoner  
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To: Regional Administrators  
Deputy Regional Administrators  
Regional Counsel  
Regional Enforcement Division Directors  
Regional Enforcement Coordinators  
OECA Office Directors  
Audit Task Force

I have updated the procedures EPA should follow concerning states with pending or enacted audit privilege/immunity laws to reflect the lead role EPA's Regional offices are assuming in this area. Section II.4 of these updated procedures establishes that EPA's Regional offices will serve as Agency lead for all communications and negotiations with states (except Colorado). As Agency lead, Regional offices should continue to initiate contact with states regarding privilege/immunity laws and legislation and ensure that states retain the minimum enforcement and information-gathering authorities required by federal law for program approval, authorization or the grant of primacy.

As a result of this shift of additional responsibility to the Regions, it is especially important that the Regions continue to keep OPPA informed of all pending state audit bills and communications the Region is planning to have with a state concerning audit privilege/immunity legislation or an enacted statute. In particular OPPA, and in some circumstances OECA upper management, still needs to review in advanced all proposed written communications with a state relating to audit legislation or an enacted statute.

If you have any questions or comments concerning the attached material, please contact me at (202) 564-6577.

Attachment

## **Procedures for Addressing State Audit Laws and Bills**

### **I. Criteria for Reviewing Adequacy**

1. All EPA communications with the States relating to audit privilege/immunity legislation and statutes need to make a distinction between OECA's position as a policy and a legal matter. On the policy level, EPA opposes all state audit privilege/immunity laws in any form. Audit privileges make it more difficult to enforce the nation's environmental laws by making it easier to shield evidence of wrongdoing. EPA also opposes blanket immunities because, among other things, they can eliminate the important deterrent effect of penalties and result in disparate treatment of companies in states with different immunity laws. If a state legislature has passed a bill, however, certain legal points could be made clear with regard to the possible impact of the legislation on the state's ability to satisfy federal delegations criteria.

2. EPA will apply the criteria outlined in its "Statement of Principles" memo issued on 2/14/97 in determining whether states with audit laws have retained adequate enforcement authority for any authorized or delegated federal programs. The principles articulated in the guidance are based on the requirements of federal law, specifically the enforcement and compliance provisions of environmental statutes and the delegation regulations, e.g., 40 CFR 271.16 (RCRA), 40 CFR 70.11 (CAA), and 40 CFR 123.27 (CWA).

3. The Principles provide that if provision of the state law are ambiguous, it will be important to obtain opinions from the State Attorneys General or independent legal counsel, as defined in federal regulations, e.g. 40 CFR 271.7(a), 40 CFR 70.4(b)(3), and 40 CFR 123.23, interpreting the law as meeting specific federal requirements. These opinions, however, must be reasonably consistent with the wording of the state audit laws and must demonstrate how the delegations criteria are satisfied. Where there is no such ambiguity, changes to state laws may be necessary to obtain federal program approval.

### **II. Process**

1. **Case-by-Case Evaluation** - State audit privilege/immunity bills vary significantly in their provisions, and some may present few or no obstacles to approval of federal programs. As agreed to at the 3/5/97 meeting that the Administrator held with various state environmental commissioners, EPA will need to evaluate these laws on a state-by-state basis to take these variations into account.

2. **Pending State Audit Bills** - Concerning pending State Audit bills, EPA should get on the record to articulate EPA's position on a pending state bill. Depending upon the individual circumstances, a letter to the state's department of environmental protection and to relevant legislators in the state's legislature should suffice in most situations. Where appropriate, EPA

should also seek opportunities to provide testimony on these bills. EPA's statements should clearly articulate policy objections to privilege and immunity provisions, but will also, upon request, identify specific revisions needed to meet minimum federal requirements for approval. Many states are already contacting EPA for technical advice as bills are presented in their legislatures.

**3. States with Enacted Audit Laws** - In States with enacted audit privilege/immunity laws. Regional Administrators or Deputy Regional Administrators should promptly contact each of the states within their Regions that have enacted such laws.

1) The RA or DRA should initiate contacts, on a state-by-state basis, with State Environmental Commissioners and State Attorneys General. The Agency may request an interpretation from the state's Attorney General regarding how specific provisions of the audit law meet federal requirements for enforcement authority. The region may also simultaneously contact the state and offer to begin negotiations, on a state-by-state basis, to attempt to reach agreement on specific amendments to state laws needed to satisfy delegation or authorization requirements. Amendments may vary based on individual state laws, but must be consistent with federal requirements as articulated in the 2/14 Statement of Principles. Once the State agrees to negotiate, representatives from the environmental community and from industry generally should be identified and contacted for their input. If the state is one where a petition to withdraw the state's program has been filed by an environmental group, it should be the representative.

2) EPA will commit to accelerated review of any technical amendments at the highest level of management, and OECA will obtain any necessary review from the Office of General Counsel and other program offices.

3) EPA will not move to formal proceedings on program modification, approval or withdrawal while EPA is satisfied that good faith negotiations are proceeding with appropriate state officials in a manner that may quickly resolve EPA legal concerns with the state audit law. EPA will consider progress of such negotiations in responding to petitions seeking program withdrawals, while meeting legal requirements applicable to responding to such petitions.

4) If the individual state and EPA reach agreement on amendments to the state's audit privilege/immunity statute, EPA will issue a letter memorializing the agreement and asserting EPA's opposition to the state's audit privilege/immunity law, but stating that the state's audit law would no longer present a barrier to program approval if amendments were to be enacted in accordance with the agreement. If such changes are made, EPA would expect to deny any petitions asserting lack of enforcement authority, but states should be aware that EPA's decision may be subject to judicial review.

5) If the issue cannot be resolved informally, EPA will consider formal action regarding

program approvals , modifications, or withdrawals.

4. **Regional Lead / OPPA Involvement** - Regional offices will serve as Agency lead for communications and negotiations with a state concerning audit privilege/immunity legislation or an enacted statute. Regional offices are responsible for initiating appropriate communications with states and ensuring that any conflicts with federal delegations requirements are successfully resolved. Regional offices should inform OPPA of all pending state audit bills and meetings the Region in planning to have with a state concerning audit privilege/immunity legislation or an enacted statute. Depending upon the specific circumstances, OPPA may actively participate in negotiations led by the Region. OPPA will consult with the Regions as to appropriate staffing for a particular negotiation. OPPA, and in some circumstances OECA upper management, also needs to review in advance all proposed written communications with the state relating to audit legislation or an enacted statute.