April 5, 1996

MEMORANDUM

SUBJECT: Effect of Audit Immunity/Privilege Laws on States' Ability to Enforce Title V Requirements

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I. INTRODUCTION

A. Title V Requires States to Have Adequate Enforcement Authority

This memorandum responds to your request for guidance as to whether certain provisions of state audit immunity and privilege laws deprive the state of adequate authority to enforce the requirements of Title V of the Clean Air Act. The Clean Air Act (CAA), in Section 502(d), authorizes States to implement operating permit programs pursuant to Title V of that law. Before a State's program can be approved, however, the Environmental Protection Agency (EPA) must determine that the state's permit program meets the minimum standards established under the law. In particular, Section 502(b)(5) of the CAA requires states to have authority to enforce the terms and conditions of Title V permits. These requirements protect citizens from criminal conduct and violations that threaten public health and the environment. They also ensure citizens of the fair application of federal laws, regardless of whether they are administered by EPA or State agencies.

This memorandum offers guidelines to assist the Region in determining whether specific provisions of State audit privilege or immunity laws would in fact deprive the State of federally required authority to enforce Title V permits. Because State laws differ in important details, Regions should review laws or pending bills closely in applying these guidelines, and consult with both States and headquarters before making a determination. Where a State privilege or immunity law deprives the state of adequate enforcement authority, as explained in these

guidelines, it must be amended before final Title V approval can be granted. These guidelines are limited to enforcement authorities required for Title V approval, and do not address other substantive program requirements.

Recently, State legislators, state officials, and various environmental groups have questioned whether proposed immunity and privilege bills would jeopardize a State's ability to enforce federally delegated programs, including those administered under the Clean Water and Resource Conservation and Recovery Acts. While these statutes include requirements similar to those of the Clean Air Act concerning adequate authority, they may also impose additional requirements not contemplated under Title V of the Clean Air Act. For that reason, these guidelines are limited to Title V, and the Office of Enforcement and Compliance Assurance (OECA) will work with the Regions to prepare supplementary guidance to address enforcement requirements of other statutes.

B. EPA Support for Auditing

EPA supports incentives which encourage responsible companies to audit to prevent noncompliance, and to disclose and correct any violations that do occur. Through its own policy issued on December 18, 1995,[1] EPA has agreed to reduce civil penalties and not recommend criminal prosecution for certain types of violations discovered and corrected through voluntary self-policing. That policy was developed through an open process that included extensive consultation with States, leading 16 State attorneys general to conclude:

> The consultative process used in developing the policy provides an excellent example of how EPA and the states work in harmony to encourage both voluntary compliance and effective law enforcement.[2]

At the same time, EPA has consistently opposed blanket amnesties which excuse repeated noncompliance, criminal conduct, or violations that result in serious harm or risk, as well as audit privileges that shield evidence of violations from regulators and jeopardize the public's right-to-know about noncompliance.

C. Consultation with States

This document offers general guidelines to assist in the review of State audit privilege and immunity legislation. It should be noted that these State laws differ in important details: while some will affect a State's ability to enforce provisions of Title V permits, others will

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"Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" 60 *Federal Register* 246 (December 22, 1995), pages 66706-66712.

Letter to EPA Administrator Carol M. Browner dated January 26, 1996. In total, the signatories included 19 state officials.

not. Using the guidelines laid out in this memorandum, the Agency will need to evaluate the impact of individual State statutes on Title V enforcement on a case-by-case basis. EPA believes that minimum statutory enforcement standards for federal programs will not discourage innovation or jeopardize the strong working partnership the Agency is developing with States. The Agency will make every effort to work cooperatively with States to resolve any problems that may arise due to conflict between federal and State law.

D. Principles

The following principles should guide EPA's analysis of State audit privilege and/or immunity legislation with respect to Clean Air Act Title V program approval:

- EPA's review should be focused upon those few provisions that conflict with specific federal requirements for adequate enforcement authority.

- Some provisions in State laws may be ambiguous. EPA may accept reasonable opinions from the State Attorney General which interpret the statute as providing the State with the required authority.

- EPA will consult closely with States, and provide them with ample opportunity to correct specific problems. Pursuant to Clean Air Act Section 502(g), EPA has and will generally continue to grant interim approval to States with audit legislation, but will identify whether specific provisions must be changed before final approval can be granted.

II. SPECIFIC ENFORCEMENT AUTHORITIES REQUIRED FOR TITLE V DELEGATION

A. Emergency Orders/Injunctive Relief

Emergency Orders: The State must have authority to bring suit to restrain responsible persons where a pollution source or sources is presenting an "imminent and substantial endangerment" to public health or welfare or the environment. The Clean Air Act, at Section 110(a)(2)(G), requires such authority for state implementation plans, the provisions of which must be incorporated into Title V permits. The Title V regulations, at 40 C.F.R. 70.11(a)(1), also expressly require States to have the authority to seek emergency orders. This authority should be clear, and not constrained by express or implied limitations in State immunity laws.

Injunctive Relief: The State must have clear authority to seek injunctive relief where needed to stop a violation, correct noncompliance, and prevent its recurrence. Injunctive authority is essential to the State's ability to assure compliance and enforce permits under Section 502 of the Clean Air Act. The Title V regulations, at 40 C.F.R. Section 70.11(a)(2),

explicitly require States to have such authority, which should be clear and unfettered by either express or implied limitations in State immunity laws.

B. CRIMINAL ENFORCEMENT AUTHORITY

Knowing Criminal Conduct: Section 502 of the Clean Air Act requires states to have authority to recover "appropriate" penalties for criminal conduct, which in the Title V regulations (40 C.F.R. Section 70.11(a)(3)(ii)) includes "knowing" criminal conduct. Any legislation that immunizes willful, intentional, or knowing criminal conduct conflicts with this requirement, and must be amended before final Title V approval may be granted.[3]

Burden of Proof: The Title V regulations, at 40 C.F.R. Section 70.11(b), prohibit the burden of proof and degree of knowledge or intent required under State law for establishing civil or criminal liability to be greater than is required under federal law. State immunity laws that, for example, require a showing of specific intent or harm to the environment to establish criminal liability, are inconsistent with this requirement and must be amended before final Title V approval can be granted.

C. CIVIL PENALTY AUTHORITY

Section 502 of the Clean Air Act requires States to have authority to recover civil penalties of at least $10,000 per day for violations of Title V permit conditions (see also 40 C.F.R. 70.11). States must exercise that authority by collecting penalties appropriate to the violation.

Section 113(e) of the Clean Air Act, which addresses “Penalty assessment criteria,” mandates that the Administrator or the court “shall take into consideration’ certain factors in assessing penalties. To the extent that state laws provide an immunity from civil penalties that does not permit any consideration of these factors, appropriate civil penalties cannot be assessed, and a State’s Title V permit program should not be approved. Factors that must be considered in determining an appropriate penalty pursuant to Section 113(e) of the Clean Air Act include: “the violator’s full compliance history and good faith efforts to comply, the duration of the violation …, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.”

Thus, a State Title V program should not be approved if State law provides immunity from civil penalties for repeat violations, violations of previous court or administrative orders, violations resulting in serious harm or risk of harm, or violations resulting in substantial

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[3] The Clean Water Act regulations require states also to have the authority to seek penalties for "gross negligence".

economic benefit to the violator.[4] These considerations are also reflected in EPA's policy on Incentives for Self-Policing. EPA should approve state programs which include conditions substantially equivalent to those reflected in the Clean Air Act and regulations, and adopted in EPA's policies.[5]

D. PRIVILEGE

The regulations governing program approval do not specifically address the scope of privileges available in State enforcement actions. Minor variations among States with regard to generally available privileges (*e.g.*, attorney-client communication) would not affect program approval. However, where a State adopts a very broad privilege law, specifically directed at evidence related to environmental violations, that privilege could go so far as to render the overall State enforcement program inadequate even if other authorities (*e.g.*, injunctive relief and penalties) were nominally available. An excessively broad privilege could so interfere with the exercise of these authorities as to render them largely meaningless by depriving the State of the ability to gather evidence needed to establish a violation.

The point at which a privilege law goes too far is difficult to define in general terms, and such laws will have to be evaluated on a case-by-case basis. However, certain types of provisions are particularly likely to raise this concern and will generally lead to a finding that the enforcement program is inadequate.

Information Required by Law, Regulation, or Permit: In order to assure compliance effectively, as required by Section 502(b)(5)(A) of the Clean Air Act, the State must have access to evidence to determine whether violations have, in fact, been corrected. At a minimum, State law must not limit an Agency's access to information that federal or state laws or regulations require to be collected, maintained, reported, or otherwise made available. These include, for example, compliance plans, emissions or monitoring reports, and compliance certification under Title V, which are also required to be publicly available.

State Access Needed to Verify Compliance: Where an audit produces evidence of noncompliance, but State law prevents the enforcing agency from reviewing that evidence to determine whether the violation will be corrected, the State is unable to assure compliance. Such provisions must be addressed prior to any final Title V approval.

The Agency recognizes that there may be different ways to calculate any economic gain that may have occurred from a violation, and that the use of any specific model or assumptions is not required.

EPA's policies include the afore-mentioned policy on Incentives for Self-Policing, the interim policy on Compliance Incentives for Small Businesses, and the policy on Flexible State Enforcement Responses to Small Community Violations.

Audit Presents Evidence of Criminal Conduct: Similarly, where an audit reveals evidence of prior criminal conduct on the part of managers or employees, but the State is barred from using such information, the State lacks the ability to obtain appropriate criminal penalties as required by Section 502(b)(5)((E) of the Clean Air Act.

Sanctions for Disclosure of Privileged Information: Another area of concern is laws that impose special sanctions upon persons who disclose privileged information. Courts have effectively exercised control over such disclosures in other areas protected by privileges (such as the attorney-client and doctor-patient privileges) through inherent powers to exclude evidence and other general sanctions. Special sanctions in this area are unwarranted and, especially where the potential for liability is broad and the privilege is not clearly defined, would have a chilling effect upon disclosures well beyond the intended reach of the privilege. Confidential informants are a critical source of leads for EPA's criminal enforcement program, as they are for enforcement programs throughout federal and State governments. Indeed, the Clean Air Act specifically protects "whistle blowers" from retaliation (Section 322) and also provides awards for persons who furnish information that leads to a criminal conviction or a civil penalty (Section 113(f)). Therefore, provisions that penalize those who disclose information related to a possible violation of the Clean Air Act may be inconsistent with an adequate enforcement program.

This list is not intended to be exhaustive, and other factors may also cause a privilege law to be excessively broad. For example, laws that define the term "audit" loosely may shield so much information as to significantly impede enforcement efforts, or may lead to very broad assertions of privilege that consume inordinate time and resources to resolve.

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