

40 CFR 145.22(a)(3) – Attorney General’s Statement

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ENVIRONMENTAL ENFORCEMENT SECTION

September 25, 2023

Ms. Martha Guzman
Regional Administrator, Region 9
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, California 94105

Re: Attorney General's Statement to Accompany Arizona's Underground
Injection Control ("UIC") Program Primacy Application

Dear Ms. Guzman:

The Arizona Attorney General's Office has reviewed the statutory authority of the Arizona Department of Environmental Quality ("ADEQ") to administer the State Underground Injection Control ("UIC") Program. I hereby certify, pursuant to the provisions of Part C of the Safe Drinking Water Act (42 U.S.C. 300f *et seq.*, as amended) and 40 C.F.R. § 145.24(a) that, in my opinion, the laws of the State of Arizona provide adequate authority to apply for, assume, and carry out the program set forth in the Program Description submitted by ADEQ.

The following specific authorities are contained in lawfully enacted statutes or promulgated regulations that will be in full force and effect on the date of approval of this program.

- I. The Arizona UIC Permit Program is authorized by Arizona Revised Statutes ("A.R.S."): Title 49, Chapter 2, Article 3.3 entitled "Underground Injection Control Permit Program" (as enacted by Arizona Laws 2018, Chapter 170, Section 4, effective August 3, 2018 and amended by Arizona Laws 2021, effective September 29, 2021); Title 49, Chapter 2, Article 7 "Water Quality Appeals"; Title 38, Chapter 3 "Conduct of Office"; and Title 41 Chapter 6 "Administrative Procedures."
- II. The Arizona UIC administrative rules are located in the Arizona Administrative Code ("A.A.C.") Title 18, Chapter 9, Article 6 entitled "Underground Injection Control." As stated in the Notice of Final Rulemaking publication in the Arizona Administrative Register (Volume

28, Issue 30, page 1801) the effective date for Article 6 was September 6, 2022. A.A.C. R18-9-A602(A) further stipulates that Article 6 becomes effective upon the date of the Environmental Protection Agency's ("EPA") approval of the Arizona UIC Program.

I have reviewed the requirements for State UIC Programs in 40 C.F.R. § 145.11 entitled "Requirements for permitting" and have listed the requirements in 40 C.F.R. § 145.11(a)(1) through (a)(33) along with the corresponding State A.R.S. or A.A.C. rule, noting any variation in state law from the federal requirement.

40 CFR § 145.11(a)(1) through (a)(33) - Requirements for Permitting

1. Section 144.5(b) - Confidential information.
A.R.S. § 49-205 - Availability of information to the public.
A.A.C. R18-9-A603 - Confidentiality of Information.
2. Section 144.6 - Classification of injection wells.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-A604 - Classification of Wells.
3. Section 144.7 - Identification of underground sources of drinking water and exempted aquifers.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-A605 - Identification of Underground Sources of Drinking Water and Exempt Aquifers.
4. Section 144.8 - Noncompliance reporting.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
The Memorandum of Agreement between ADEQ and EPA and ADEQ's Program Description contain the noncompliance reporting requirements of 40 CFR § 144.8.
5. Section 144.11 - Prohibition of unauthorized injection.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-B607 - Prohibition of Unauthorized Injection.
6. Section 144.12 - Prohibition of movement of fluids into underground sources of drinking water.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-B608 - Prohibition of Movement of Fluid into Underground Sources of Drinking Water.
7. Section 144.13 - Elimination of Class IV wells.
A.R.S. § 49-257.01 - Underground Injection Control permit program;

permits; prohibitions; rules.

A.A.C. R18-9-B609 - Prohibition of Hazardous Waste Injection and Class IV Wells.

Note: The Arizona administrative rule does not grandfather or allow Class IV wells in operation prior to July 18, 1980 as described in 40 C.F.R. § 144.13(a)(2) and (a)(3).

8. Section 144.14 - Requirements for wells managing hazardous waste.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.

Note: The Arizona program prohibits hazardous waste injection in accordance with A.A.C. R18-9-B609 entitled "Prohibition of Hazardous Waste Injection."

9. Sections 144.21 through 144.26 - Authorization by rule.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-I650 through R18-9-I655 - Class V Injection Well Requirements.

Note: 40 C.F.R. §§ 144.21 - 144.26 address several classes of wells that are authorized by rule. The Arizona program only authorizes Class V wells by rule. Therefore, only Section 144.24 - Class V wells is relevant to the Arizona program and corresponding State requirements are found in A.A.C. R18-9-I650 through R18-9-I655.

10. Section 144.31 - Application for a permit.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-C616 - Individual Permits: Application for Individual Permits.
A.A.C. R18-1-503 - Administrative Completeness Review.

11. Section 144.32 - Signatories.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-C617 - Signatories.

12. Section 144.33 - Area Permits.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-C624. Area Permits.

13. Section 144.34 - Emergency permits.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-C625 - Emergency Permits.

14. Section 144.35 - Effect of permit.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-C626 - Effect of a Permit.
15. Section 144.36 - Duration.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. 18-9-C628 - Duration.
16. Section 144.38 - Permit transfer.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-C630 - Permit Transfer.
17. Section 144.39 - Permit modification.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-C632 - Modification; Revocation and Reissuance of Permits.
A.A.C. R18-9-C631 - Modification; Revocation and Reissuance; or Termination of Permits.
A.A.C. R18-9-C633 - Minor Modification of Permits.
18. Section 144.40 - Permit termination.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-C634 - Termination of Permits.
Note: The Arizona administrative rule adds a fourth cause for termination in paragraph (A)(4), "The permittee has requested termination of their permit due to the completion of the terms and conditions therein, including proper abandonment or plugging pursuant to R18-9-B614."
19. Section 144.51 - Applicable permit conditions.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-D635 - Conditions Applicable to All Permits.
20. Section 144.52 - Establishing permit conditions.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-D636 - Establishing Permit Conditions.

Note: The Arizona administrative rule does not address 40 C.F.R. § 144.52(a)(4) which lists "Requirements for wells managing hazardous waste, as set forth in § 144.14" because the Arizona program in A.A.C. R18-9-B609 prohibits the construction and operations of wells for the purpose of hazardous waste injection.

Note: The Arizona administrative rule contains an additional requirement in paragraph E, "Permits shall provide language on duration, expiration and termination."

21. Section 144.53(a) - Schedule of Compliance.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-D637 - Compliance Schedule.
22. Section 144.54 - Monitoring requirements.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-D638 - Requirements for Recording and Reporting Monitoring Results.
23. Section 144.55 - Corrective Action.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-D639 - Corrective Action.

Note: The Arizona administrative rule contains an additional paragraph, F:

In determining the adequacy of corrective action proposed by the applicant under this Section and in determining the additional steps needed to prevent fluid movement into USDWs, the following criteria and factors shall be considered by the Director:

1. Nature and volume of injected fluid;
 2. Nature of native fluids or by-products of injection;
 3. Potentially affected population;
 4. Geology;
 5. Hydrology;
 6. History of the injection operation;
 7. Completion and plugging records;
 8. Abandonment procedures in effect at the time the well was abandoned; and
 9. Hydraulic connections with USDWs.
24. Section 124.3(a) - Application for a permit.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.R.S. Title 41, Chapter 6, Article 7.1 - Licensing Time Frames.
A.A.C. R18-9-C6 16 - Individual Permits: Application for Individual Permits.
A.A.C. R18-9-C6 17 - Signatories.
A.A.C. R18-1-503 - Administrative Completeness Review.
 25. Section 124.5 (a), (c), (d), and (f) - Modification of permits.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.R.S. Title 41, Chapter 6, Article 7.1 - Licensing Time Frames.

A.A.C. R18-9-C631 - Modification; Revocation and Reissuance; or Termination of Permits.

Note: The language in A.A.C. R18-9-C631 is more detailed than the federal regulation.

26. Section 124.6 (a), (c), (d), and (e) - Draft Permit.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.R.S. Title 41, Chapter 6, Article 7.1 - Licensing Time Frames.
A.A.C. R18-9-C618 - Draft Permits.
27. Section 124.8 - Fact sheets.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-C619 - Fact Sheet.
28. Section 124.10 (a)(1)(ii), (a)(1)(iii), (a)(1)(v), (b), (c), (d), and (e) - Public notice.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-C620 - Public Notice of Permit Actions and Public Comment Period.
29. Section 124.11 - Public comments and requests for hearings.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-C621 - Public Comments and Requests for Hearings.
30. Section 124.12(a) - Public hearings.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-C622 - Public Hearings.
31. Section 124.17(a) and (c) - Response to comments.
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
A.A.C. R18-9-C623 - Response to Comments.
32. Section 144.88 - What are the additional requirements?
A.R.S. § 49-257.01 - Underground Injection Control permit program; permits; prohibitions; rules.
R18-9-1654 - Class V; Prohibition of Class V Cesspools and Motor Vehicle Waste Disposal Wells.

Note: The Arizona administrative rule prohibits the construction and operation of cesspools and motor vehicle waste disposal wells.

33. For states that wish to receive electronic documents, 40 C.F.R. Part 3 - Electronic reporting.

Arizona does wish to receive electronic reporting, which will be described in the Memorandum of Agreement between ADEQ and EPA and ADEQ's Program Description. ADEQ has authority to receive electronic submittals and electronic signatures (electronic documents) pursuant to A.R.S. Title 44, Chapter 26, "The Arizona Electronic Transactions Act."

40 C.F.R. § 145.12 – Requirements for Compliance Authority & 40 C.F.R. § 145.13 Requirements for Enforcement Authority

The compliance and enforcement statutes for the ADEQ Water Quality Programs, including the UIC Program, are located in A.R.S. Title 49, Chapter 2, Article 4 entitled "Enforcement." These statutes provide authority for ADEQ to enforce the UIC program requirements:

- A.R.S. § 49-261 – Compliance orders; appeal; enforcement.
- A.R.S. § 49-262 – Injunctive relief; civil penalties.
- A.R.S. § 49-263 – Criminal violations; classification; definition.
- A.R.S. § 49-264 – Private right of action; citizen suits; right to intervene.

Additional Requests from EPA

In addition to addressing the 40 C.F.R. § 145.11 program components above, and on behalf of ADEQ, I am addressing below additional items raised by EPA to ADEQ:

1. 40 C.F.R. § 124.10(c)(3). Public notice of permit actions and public comment period.

40 C.F.R. § 124.10(c)(3) requires Arizona to provide notice "...in a manner constituting legal notice to the public under State law..." Public Notice procedures for the UIC program are prescribed by state statute and administrative rule.

A.R.S. § 49-208 states:

[t]he director, by rule, shall prescribe procedures to assure adequate public participation in proceedings of the department under this chapter [A.R.S. Title 49, Chapter 2 includes the state statutory authority for adoption of the UIC program; see Article 3.3]. The public participation procedures shall meet the requirements of the clean water act and safe drinking water act for permits issued under those acts.

As of September 2022, ADEQ has adopted rules (A.A.C. Title 18, Chapter 9, Article 6) which prescribe procedures assuring adequate public participation in proceedings as follows:

A.A.C. R18-9-C620 - Public Notice of Permit Actions and Public Comment Period.

A.A.C. R18-9-C621 - Public Comments and Requests for Public Hearing.

A.A.C. R18-9-C622 - Public Hearings.

A.A.C. R18-9-C627 - Final Permit Decision and Notification requires notification of a final permit decision to the applicant and each person who has submitted written comments or requested notice of the final permit decision.

2. 40 C.F.R § 144.3. Definitions. - Hazardous Waste

The federal UIC program definitions in 40 C.F.R § 144.3 states, "Hazardous waste means a hazardous waste as defined in 40 CFR 261.3." The ADEQ UIC program defines hazardous waste in A.A.C. R18-9-A601(37) as "a hazardous waste as defined in A.R.S. § 49-921." The

hazardous waste definition in A.R.S. § 49-921(5) incorporates A.R.S. § 49-922 which, in Subpart (A), requires ADEQ to adopt a hazardous waste program consistent with the federal hazardous waste regulations, including the hazardous waste definition in 40 C.F.R. § 261.3. This is how A.R.S. § 49-921 incorporates the hazardous waste definition at 40 C.F.R. § 261.3.

3. 40 C.F.R § 144.31(d). Application for a permit; authorization by permit - Completeness

40 C.F.R § 144.31(d) entitled “Completeness” requires a complete application for a permit before issuing a permit. The ADEQ Licensing Time Frame administrative rules are located in A.A.C. Title 18, Chapter 1, Article 5. A.A.C. R18-1-503(A)(7) states the administrative completeness review licensing time-frame does not begin for ADEQ until the applicant provides all application components required by statute or rule.

4. 40 C.F.R. § 146.22(e). Construction requirements.

40 C.F.R. § 146.22(e) does not apply to Arizona because there are no existing Class II wells in Arizona. There are Class II wells on sovereign tribal land, specifically in Navajo Nation, which is not subject to State of Arizona jurisdiction. A.A.C. R18-9-F643 entitled “Class II: Construction Requirements” contains the necessary casing and cementing requirements for any future Class II wells in Arizona in accordance with the requirements of 40 C.F.R. § 146.22(e):

[w]here a State did not have regulatory controls for casing and cementing prior to the time of the submission of the State program to the Administrator, the Director need not apply the casing and cementing requirements in paragraph (b) of this section if he submits as a part of his application for primacy, an appropriate plan for casing and cementing of existing, newly converted, and newly drilled wells in existing fields, and the Administrator approves the plan.

5. A.R.S. § 49-1403 - Audit Privilege

I certify that the environmental audit privilege of the State of Arizona does not affect the ability of the State to meet enforcement and information gathering requirements under the Safe Drinking Water Act because the State has issued a clarifying Attorney General Statement (January 28, 2019), attached as Exhibit 1 to this letter, to satisfy the requirements of federally authorized, delegated, or approved environmental programs. The Statement details that the State’s environmental audit privilege neither negates a Public Water System’s obligation under the Safe Drinking Water Act nor does it negate the State of Arizona’s authority to conduct compliance inspections, determine compliance, or impose penalties under A.R.S. Title 49, Chapter 2, Article 4. I certify here that the statement applies to UIC-regulated facilities as well. The environmental audit privilege also does not prevent the public from obtaining information about noncompliance or prevent the public from bringing citizen suits under the Safe Drinking Water Act. Arizona’s environmental audit privilege law has not changed since the date of the letter referenced above.

6. A.A.C. R18-9-A601(44) - Major Facility

A.A.C. R18-9-A601(44) defines “major facility” as “any UIC facility or activity classified as such by the Administrator in conjunction with the Director.” As described in ADEQ’s Program Description, “major facility” under the administrative rule means all facilities requiring a permit under the UIC program and does not include UIC Class V wells authorized by rule under A.A.C. R18-9-I650 *et seq.*

If there are questions about this Statement, please contact me at (602) 542-8535 or my supervisor, Curtis Cox, Section Chief, Environmental Enforcement Section, Arizona Attorney General's Office at (602) 542-7781.

Sincerely,



Adam Stafford
Assistant Attorney General
Counsel to Arizona Department of
Environmental Quality

Document No. 10525116v2

Exhibit 1



MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ARIZONA ATTORNEY GENERAL
STATE GOVERNMENT DIVISION
Environmental Enforcement Section

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January 28, 2019

Tomás Torres, Director
Water Division
U.S. EPA, Pacific Southwest, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Re: Arizona Attorney General Certification – Safe Drinking Water Act PWSS
Program Revisions and Responses to EPA's Follow-up Questions

Dear Mr. Torres:

The Environmental Protection Agency (EPA) is requiring certification from the Arizona Attorney General's Office that Arizona's Environmental Audit Privilege does not affect the State's ability to meet enforcement and information gathering requirements under the Safe Drinking Water Act. Pursuant to the EPA's request, the Arizona Attorney General's Office offers the following analysis to demonstrate that the State of Arizona is able to satisfy the requirements for federally authorized, delegated, or approved environmental programs.

I. The Environment Audit Privilege

An environmental audit report is a formal opinion created by either an internal or external auditor at the request of a particular entity. The report's purpose is to inform that particular entity whether various environmental laws have been violated. Accompanying the report is an environmental privilege. This privilege protects the confidentiality of opinions and analyses related to the environmental audit report but not the underlying data itself.

Generally, a state agency employee cannot view an audit report. Rather, the environmental audit report process is a parallel and independent process to the state's enforcement and programmatic authorities and processes. While an item of non-privileged material may be attached to an audit report, that does not make the item privileged. Specifically, the agency maintains the authority to separately collect any necessary information to operate its environmental program. Moreover, the agency maintains the authority to request any information that a regulated entity is required to develop, maintain, or report under an environmental law. *See* A.R.S. § 49-1406(A)(1).

The motivation behind the environmental audit privilege is to encourage entities to perform environmental audits to identify, report, and correct potential violations, resulting in increased compliance with environmental requirements and to provide further protection of the state's natural resources. As mentioned, the environmental audit privilege is a tool to increase compliance with environmental requirements and further protect the State's outstanding natural resources. It is not a tool for potential bad actors to hide behind. In fact, bad actors cannot hide behind it even if they so desired because, while an audit report's opinions and analyses are protected, the underlying data, which in many instances they are required to report, is not.

II. Memorandum of Responses to EPA Specific Questions

During the review process, the EPA sought clarification on a number of issues. Part II addresses EPA's questions.

1. What does the "government authority" mean for the environmental audit privilege law?

"Governmental authority" as referenced in the audit privilege law refers only to State governmental authority. The audit privilege law does not restrict: (1) the EPA's authority or responsibility for overseeing delegated federal environmental programs or (2) its federal enforcement or information-gathering authority. Such an analysis is consistent with the term "governmental authority," which is found in A.R.S. § 49-1407(C). "Governmental authority," as referenced in the self-audit law, refers only to the governmental authority of the State of Arizona.

2. How are whistle blowers protected by the environmental audit privilege?

a. What does "privilege," as referenced in the audit privilege, mean?

Privileged information refers to a specific type of information. In particular, for purposes of the audit privilege law, privileged information is any conclusory or interpretative material in the audit report that was created for an environmental audit. *See* A.R.S. §§ 49-1402 to 49-1406. Pursuant to A.R.S. § 49-1403(C), a person who conducts or participates in the preparation of the environmental audit and who observed physical events of the violation may testify to the physical facts witnessed. The person may not be compelled to disclose conclusory or interpretative material relating to the audit. Again, "any part of an audit report is privileged and is not admissible as evidence or subject to discovery" except as provided for in A.R.S. §§ 49-1404 to 49-1406. *See* A.R.S. § 49-1403(A).

While the audit report is privileged that does not mean the state is precluded from obtaining the same data that the report is based on. Entities that seek an environmental report must still comply with requirements to collect, develop, maintain or report under an environmental law.

It is also important to note that an “agency employee may not request, review or otherwise use an audit report during an agency inspection of a regulated facility or operation or an activity of a regulated facility or operation.” See A.R.S. § 49-1403(D). In other words, the agency cannot take an audit report and disclose privileged material.

b. Can the audit privilege be construed to circumvent protections for whistleblowers by the State and federal law?

No, the audit privilege shall not be construed to circumvent protections for “whistleblowers” by both State and federal law. A.R.S. § 49-1404(E) of the audit privilege addresses protection for whistleblowers who disclose information to law enforcement authorities, and provides that the audit privilege “shall not be construed to circumvent protections provided by federal or state law for individuals who disclose information to law enforcement authorities.”

i. What are the whistleblower protections generally?

A.R.S. § 23-1501(A)(3)(c)(ii) outlines protections for employees who allege their employment was terminated in retaliation for the disclosure.

A.R.S. § 38-532 outlines protections for a public employee who has disclosed information that is a matter of public concern to a public body. A person who discloses such information is protected from any reprisal taken against them.

Both A.R.S. § 23-1501(A)(3)(C)(ii) and A.R.S. § 38-532 are consistent with the general intent and nature of the whistleblower protections afforded by the Safe Drinking Water Act (42 U.S.C. § 300j-9(i)).

ii. Are there any other environmental whistleblower protections?

A.R.S. § 49-207(A) outlines protections for any person who files a complaint, institutes a proceeding, or testifies about a violation of the Water Quality Control statutes, A.R.S. Title 49, Chapter 2. This section prohibits any form of intimidation, threats, or general discrimination against such persons.

3. May the requesting party review documents as part of an in camera review?

No, the requesting party may not review documents as part of an *in camera* review.

a. Definition of privilege in Arizona.

The State of Arizona has not adopted a probable cause standard when determining if privileged information can be disclosed to the requesting party. For information

to be privileged under state common law, a communication must meet four criteria: (1) it originates in a confidence that it will not be disclosed, (2) confidentiality is essential to the full maintenance of the relationship between the parties, (3) the relationship is one that the community believes should be fostered, and (4) the injury to the relationship that would occur from disclosure would be greater than the benefit gained by the aid given to the litigation. *City of Tucson v. Superior Court in and for County of Pima*, 809 P.2d 428, 432 (Ariz. 1991) (citing *Humana Hosp. Desert Valley v. Superior Court*, 742 P.2d 1382, 1387 (Ariz. Ct. App. 1987)).

i. (1) Originates in a confidence that it will not be disclosed.

The audit privilege is designed to protect privileged information at the onset of the audit. The protection of the audit privilege incentivizes private actors to conduct environmental audits because it provides fewer potential repercussions.

ii. (2) Confidentiality is essential to the full maintenance of the relationship between the parties.

For the audit privilege to successfully incentivize corporate environmental responsibility, the communication between the auditor and the auditee must be kept confidential. This will foster a thorough and accurate audit of the corporation that will lead to the highest level of environmental compliance.

iii. (3) The relationship is one that the community believes should be fostered.

The audit privilege law encourages corporations to be proactive when investigating and remedying environmental noncompliance. This serves as a benefit to not only the business community, as it aids in keeping compliance up and cleanup costs down, but also benefits the State of Arizona in general, as it increases the likelihood and effectiveness of discovery and cleanup of environmental violations.

The audit privilege does not shield corporations from violations. The audit privilege still requires that corporations report information that is required under other environmental law. A.R.S. § 49-1406(A)(1). The fact that a violation occurred is not privileged.

b. Definition of privileged materials under this statute.

The materials listed under Parts B and C of A.R.S. § 49-1402 are permissible, but the crux of the determination of privilege is not that a certain *type* of material is privileged, but rather whether the materials were created for the purpose of the audit. Old materials such as interviews, field notes, memoranda, photographs and the like that were created before the audit are not to be privileged, even if they are of the same type of document as is listed in Parts B or C.

c. In camera inspection in Arizona.

Arizona trial courts are vested with “wide discretion concerning discovery, and absent an abuse of discretion, its rulings will not be disturbed.” *State ex rel. Babbitt v. Arnold*, 548 P.2d 426, 427 (Ariz. Ct. App. 1976). *In camera* inspections have been utilized in an effort to insure that non-discoverable, privileged material is not disclosed. *Id.* at 428. Disclosing material to the requesting party before the trial judge has reviewed the material to determine its privilege status would frustrate the process of *in camera* review altogether. The trial judge conducts an *in camera* review of the material to determine what information is privileged and what is not. *Catrone v. Miles*, 160 P.3d 1204, 1210 (Ariz. Ct. App. 2007). The requesting party shall not be permitted to view the privileged material until a court or administrative law judge determines, *in camera*, that the information is not in fact privileged.

d. The in camera inspection process.

A judge can determine in a civil or administrative hearing, after doing an *in camera* review, whether 1) the privilege is asserted for a fraudulent purpose, 2) the privilege does not apply to every piece of information the party claims is privileged or to the portion requested, or 3) the portion of the report shows evidence of noncompliance with an environmental law and appropriate efforts to achieve compliance with the law were not promptly initiated and pursued with reasonable diligence after the discovery of the noncompliance. A.R.S. § 49-1405(A). Regarding prong (2), an item does not become privileged just because the item is attached to an audit report. Also, if an item is “privileged,” it is still discoverable if prongs (1) or (3) are met, regardless of whether a privilege is asserted or not.

If the judge determines after the review that the materials meet one of the three prongs, then the material will become available for use in a criminal, administrative, or civil case.

e. Overboard assertions of privilege.

It would be very difficult for someone to make an overbroad assertion of privilege because of the *in camera* review process and because the only privileged information is that which is created for the audit. A.R.S. § 49-1403. Under the statute, the party could claim the information created for the audit is privileged, but would still have to disclose any information required to be disclosed to the government or the public under state or federal law. A.R.S. § 49-1407(C). Section 49-1407(C) also states that the regulatory agency may review the information within the audit report required to be available under a specific state or federal law, although the review does not waive or eliminate the administrative or civil evidentiary privilege for the material, except for materials prescribed in A.R.S. § 49-1406. A.R.S. § 49-1407(B).

4. Does the audit privilege affect the public's right to access non-privileged information?

No, the audit privilege does not affect the public's right to access non-privileged information.

a. Arizona public records law.

A.R.S. § 39-121 states that "public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours." Public records law creates a strong presumption in favor of disclosure. *Griffis v. Pinal County*, 156 P.3d 418, 422 (Ariz. 2007). If a document falls within the scope of the public records statute, then the presumption favoring disclosure applies, and when necessary, the court can perform a balancing test to determine whether privacy, confidentiality, or the best interests of the state outweigh the policy in favor of disclosure. *Carlson v. Pima County*, 687 P.2d 1242, 1245-46 (Ariz. 1984). A court can perform an *in camera* review to determine if documents should be subject to public disclosure. *Griffis v. Pinal County*, 156 P.3d 418, 420.

b. Public right to access environmental violation information.

A.R.S. § 49-205 outlines the types of environmental information that are required to be available to the public. The public has a right to access the name of any permittees, information about chemicals that have been discharged, and the amount of pollutant in the drinking water or the environment.

The audit privilege does not exempt entities from disclosing data and other reporting information required by statute or ADEQ regulation. A.R.S. § 49-1406(A)(1).

5. Does the state maintain the authority to issue emergency environmental orders?

Yes, the State maintains the authority to issue emergency environmental orders.

A.R.S. § 49-282.02(B) outlines the steps the director of ADEQ may take in response to a release of a hazardous substance that presents an imminent and substantial endangerment to the public health or the environment. A.R.S. § 49-282.02 (WQARF) allows the director to take any reasonable, necessary, and cost-effective remedial action when such a situation arises.

A.R.S. § 49-354 also gives the director the power to immediately issue an order requiring compliance from a person who is in violation, giving the director the ability to address emergency situations immediately if necessary.

6. Does the audit privilege preempt other State law requiring disclosure of information to the State?

No, the audit privilege law does not preempt other State law requiring disclosure of information to the State, nor does it preempt State officials' right to review information.

The privilege protecting information created for the audit report does not protect the underlying factual data and information that is otherwise required by law to be available to the State. Pursuant to A.R.S. § 49-1406, the privilege does not apply to any information required to be collected, developed, maintained or reported under an environmental law. Section 49-1406 also states in relevant part that information obtained by observation, sampling, or monitoring by a regulatory agency and information obtained from a source not involved in the audit report is not protected as part of the privilege. Additionally, the fact a violation has occurred is not protected as privilege as well.

The audit privilege does protect conclusory, interpretive, and analytical statements in the audit report. Also, if factual data is contained in the audit report that is not otherwise required to be collected, developed, maintained or reported under an environmental law, that data may be protected under the audit privilege.

An audit report can also be used in criminal investigations, grand jury proceedings, and prosecutions. However, if an audit report is used for criminal purposes, the party will not waive their audit privilege in a later civil proceeding.

State officials can freely review information in an audit report if it is required to be available under a specific state or federal law, but it does not waive or eliminate the administrative or civil evidentiary privilege except for materials prescribed in section 49-1406 (which are non-privileged materials). A.R.S. § 49-1407(B).

Once an *in camera* review is conducted, if the judge finds the information may be disclosed, then the state official may do so. See Section 3 for the process behind this hearing. Then, the party claiming the privilege may be subject to sanctions, but not the party seeking to have the information revealed. See A.R.S. § 49-1405(A) and (D).

Additionally, any materials listed under A.R.S. § 49-1406 and created by an agency are not privileged, even if the same kind of materials are found in the audit report (i.e. raw data may be collected by both an agency and a private auditor). State employees can freely disclose this information not covered under audit privilege law without fear of repercussion.

7. *Does the audit privilege interfere with the State's ability to respond to citizen complaints?*

No, the audit privilege law does not interfere with the State's ability to respond to citizen complaints. The State is permitted to respond to citizen complaints concerning a regulated entity that has voluntarily participated in the audit privilege program. The State has access to all non-privileged parts of the audit, including underlying data and information.

A.R.S. § 49-1406 of the audit privilege permits the State to release non-privileged information that is required to be provided pursuant to public records law. The fact that a violation has occurred is not privileged information.

8. *Does the State maintain the authority to enter sites to ensure compliance?*

Yes, the State maintains the authority to enter sites to ensure compliance. A.R.S. § 49-353(A)(2) outlines the rules the director of ADEQ shall prescribe regarding the production, treatment, distribution and testing of potable water. The director shall provide for inspection and certification of drinking water supplies, and provide for appropriate actions to be taken if a water supply does not meet the required standards. The audit privilege does not interfere with this authority.

A.A.C. R18-4-207 states that the director of ADEQ may, at any time, enter a site to ensure that the site is in compliance with SDWA. ADEQ may inspect records, files, papers, processes, controls and facilities, or test any feature of a public water system, including the raw water source. If the director determines that a person is in violation of the SDWA, then the director may issue an order requiring compliance immediately. A.R.S. § 49-354(B).

9. *Does the State maintain the authority to verify reported information submitted by permittees?*

Yes, the State maintains the authority to verify reported information submitted by permittees. A.R.S. § 41-1075 outlines the substantive review process that ADEQ takes to determine whether an application for a license meets all substantive criteria required by statute or rule. The agency has the authority to verify reported information submitted to them to ensure that it is in compliance with environmental statutes and rules. The audit privilege law does not interfere with ADEQ's ability to verify information that is reported by permittees.

10. *Will the requestor forfeit the privilege if they do not come into compliance within a reasonable period of time?*

Yes, the requester will forfeit the privilege if they do not come into compliance within a reasonable period of time. A.R.S. § 49-1402(B)(3) states that the audit report may include an implementation plan or tracking system to correct past

noncompliance, improve current compliance, or prevent future noncompliance.

A.R.S. § 49-1405(A)(3) states in relevant part that a court or administrative law judge may require disclosure of privileged material if appropriate efforts to achieve compliance with the law were not promptly taken and pursued with reasonable diligence after the noncompliance was discovered. Accordingly, parties would forfeit the audit privilege if they do not come into compliance within a reasonable period of time.

III. Conclusion

The environmental audit report privilege is a tool the State has made available to incentivize entities to identify, correct, and report potential violations. It does not affect the State's ability to meet enforcement and information gathering requirements under the Safe Drinking Water Act. The undersigned Assistant Attorney General has been delegated authority from the Arizona Attorney General to sign and issue the statements and analysis set forth herein.

Sincerely

A handwritten signature in cursive script, appearing to read "Ryan Regula".

Ryan Regula

Assistant Attorney General

Environmental Enforcement Section

cc: Curtis Cox, Section Chief, Environmental Enforcement

#7589583v1

KRIS MAYES
ATTORNEY GENERAL



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OFFICE OF THE ARIZONA ATTORNEY GENERAL
STATE GOVERNMENT DIVISION
ENVIRONMENTAL ENFORCEMENT SECTION

January 3, 2024

Ms. Martha Guzman
Regional Administrator, Region 9
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, California 94105

Re: Attorney General's Addendum to September 25, 2023 Statement to
Accompany Arizona's Underground Injection Control ("UIC") Program
Primacy Application

Dear Ms. Guzman:

The Environmental Protection Agency ("EPA") has requested addition clarification from the Arizona Attorney General's Office on the Arizona statutes that provide the authority for the Arizona Department of Environmental Quality ("ADEQ") to administer the State Underground Injection Control ("UIC") Program. The EPA has asked for the Attorney General's interpretation of A.R.S. § 49-257.01(B), which states:

An underground injection is prohibited unless the underground injection is into a well authorized by rule or unless it is authorized by a permit issued pursuant to this article or by a permit issued by the United States environmental protection agency, **which are not subject to section 49-224, subsection B**. A person may not construct any well that is required to have a permit until the person is issued the permit or is otherwise authorized under the permit program established pursuant to this article or federal law. (emphasis added).

Specifically, the EPA seeks interpretation of the phrase "which are not subject to section 49-224, subsection B."

A.R.S. § 49-224 provides requirements for aquifer identification, classification, and reclassification. Subsection B of the statute states:

All aquifers in this state identified and defined under subsection A of this section and any other aquifers subsequently discovered, identified and defined shall be classified for drinking water protected use unless the classification is changed in the manner

provided in subsection C of this section.

The purpose of the phrase “which are not subject to section 49-224, subsection B” in A.R.S. § 49-257.01(B) is to codify that injection wells that are authorized pursuant to the UIC program (either under state rules approved by the EPA or federal regulations), whether by rule or by permit, are not subject to the aquifer identification, classification, and reclassification requirements in A.R.S. 49-224, which apply to Arizona’s Aquifer Protection Permit program. The requirements for aquifer identification, classification, and exemption relevant to the UIC program are found in Arizona Administrative Code R18-9-A601 through R18-9-A606, which are at least as stringent as the federal UIC regulations.

If there are questions about this Statement, please contact me at (602) 542-8535 or my supervisor, Curtis Cox, Section Chief, Environmental Enforcement Section, Arizona Attorney General's Office at (602) 542-7781.

Sincerely,

A handwritten signature in blue ink, appearing to read 'A. Stafford', with a stylized flourish at the end.

Adam Stafford
Assistant Attorney General
Counsel to Arizona Department of
Environmental Quality

#11751403