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February 5, 2019

Doug Benevento
Regional Administrator
Environmental Protection Agency
1595 Wynkoop Street
Denver, CO 80202-1129

Re: Opinion on the Effect of North Dakota's Environmental Audit Law

Dear Mr. Benevento:

This letter addresses the effect of North Dakota Century Code Section 32-40.2-01 on the State of North Dakota's ability to enforce federally delegated, authorized, and approved programs. Section 32-40.2-01 was passed in the 2017 Legislative Session and went into effect on August 1, 2017. This law encourages regulated entities to conduct environmental audits by granting them immunity from civil penalties under certain circumstances. The law also provides a limited privilege for environmental audit reports.

It is my opinion that Section 32-40.2-01 does not affect the ability of the State of North Dakota to meet enforcement requirements under federal programs. First, Section 32-40.2-01 grants immunity only for civil penalties and does not restrict North Dakota's ability to obtain injunctive relief. N.D.C.C. § 32-40.2-01(2) (limiting agency's ability to "pursue civil penalties"). Second, Section 32-40.2-01 does not grant immunity for criminal penalties, and expressly cites one example where there are willful violations or violations that result from gross negligence. N.D.C.C. § 32-40.2-01(2)(e)-(f). Third, the immunity provision does not apply where there is "imminent or substantial harm to human health or the environment" (which we interpret to include situations where activities "may present an imminent and substantial endangerment"), the regulatory agency discovers the violation before it's disclosed or imminent discovery by the state, the regulated entity fails to correct the violation within the time period allowed, or the regulated entity engaged in "a pattern of repeated violations." N.D.C.C. § 32-40.2-01(2)(a)-(d) and (5). Moreover, Section 32-40.2-01(2)(g) explicitly makes the immunity provision inapplicable where it would "result in a state program less stringent than the federal program or . . . would violate any federal rule required to maintain primacy." As a result, we interpret the law to retain the state's ability to recover civil penalties for significant economic benefit.

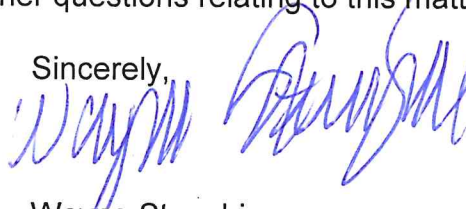
It is my further opinion that Section 32-40.2-01 does not affect the ability of the State of North Dakota to meet information-gathering requirements under federally delegated programs. An "environmental audit" is defined as a "voluntary" activity. N.D.C.C. § 32-40.2-01(1)(a). Under Section 32-40.2-01(4), reporting a violation is not voluntary but "mandatory" if it is required by applicable state environmental laws "or any rule or permit

Doug Benevento
February 5, 2019
Page 2

implementing those chapters, any federal law or rule, or any administrative or court order." Thus, violations required to be reported by federally delegated programs are not subject to the privilege or immunity provisions. Regulated entities must continue to submit information in the same manner as prior to the law's adoption. In addition, the privilege does not apply to "information" (e.g., data and facts) relating to violations exempt from the immunity provision under Section 32-40.2-01(2) or subject to a finding under Section 32-40.2-01(5), or "[d]isclosures, notifications, and other information provided by the regulated entity to the regulatory agency under this section." N.D.C.C. § 32-40.2-01(6). This excludes from privilege any factual information and data (but not opinions or conclusions) underlying the audit findings. Notably, the privilege also does not affect the application of the State's open records laws to documents in an agency's possession.

Please contact me if you have any further questions relating to this matter.

Sincerely,



Wayne Stenehjem
Attorney General

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