

Attachment 3 –

Arizona A.G. Analysis for Environmental Audit Privilege Laws



Primacy Application Revision
Arizona Department of Environmental Quality
July 26, 2019



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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. Babbit 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



Ryan Regula

Assistant Attorney General

Environmental Enforcement Section

cc: Curtis Cox, Section Chief, Environmental Enforcement

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