



Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.



Matthew H. Mead, Governor



Todd Parfitt, Director

June 8, 2016

Ms. Pamela J. Henderson, Deputy Director
U.S. Nuclear Regulatory Commission
Division of Material Safety, State, Tribunal, and Rulemaking Programs
Office of Nuclear Material Safety and Safeguards

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Rockville, Maryland 20852-2738

Dear Ms. Henderson:

This letter is in response to the U.S. Nuclear Regulatory Commission's ("Commission") concerns regarding Wyoming's data trespass laws, Wyoming Statutes §§ 6-3-414 (2016) and 40-27-101 (2016), attached hereto as *Exhibit A*. Specifically, this letter is a follow up to the responses provided to the Commission by the Wyoming Office of Attorney General on behalf of the Wyoming Department of Environmental Quality's Uranium Recovery Program ("Wyoming's Uranium Recovery Program") on November 19, 2015, attached hereto as *Exhibit B*. In summary, Wyoming's data trespass laws do not interfere with the compatibility and adequacy requirements for Wyoming's Agreement State Program.

On December 8, 2015, the Commission sent a letter to Wyoming's Uranium Recovery Program containing a number of comments, attached hereto as *Exhibit C*. Please find responses to the Commission's comments in sequential order below. For your convenience, we restated the Commission's comments in bold. For your reference, attached are Wyoming's Nuclear Regulatory Agreement Statutes hereto as *Exhibit D*.¹ These statutes are current as of the date of this letter.

- The State's authorizations should include:**
Section 4.1.1.1d - Authorizes representatives of the program to enter premises and conduct inspections.

¹ During the 2016 Wyoming Legislative Session, the Wyoming legislature enacted all of the "Proposed Wyoming Statutes" as referenced in our November 19, 2015 letter. Therefore, references to Proposed Wyoming Statutes in our November 19, 2015 letter are now references to enacted statutes.

Section 4.1.1.1e - Authorizes the program to require compliance with regulatory requirements by both licensees and unlicensed individuals.

Section 4.1.1.1f - Authorizes the program to impose sanctions for violations of regulations, orders, or license conditions.

The statutes governing Wyoming's Uranium Recovery Program satisfy the requirements of Sections 4.1.1.1d, 4.1.1.1e, and 4.1.1.1f of SA-700, Handbook for Processing an Agreement. These authorizations were previously addressed in Wyoming's November 19, 2015 letter which provided:

Proposed Wyoming Statute § 35-11-2003(d) authorizes WYDEQ to conduct inspections of licensee operations to ensure compliance with regulatory requirements.

Proposed Wyoming Statute § 35-11-2002(a) authorizes WYDEQ to regulate and penalize unlicensed activities. Additionally, WYDEQ can issue emergency orders pursuant to Wyoming Statute § 35-11-115. WYDEQ can also obtain an administrative warrant for inspections of unlicensed facilities when there is a threat to public health and safety.

Wyoming Statute § 35-11-901 of the Environmental Quality Act authorizes WYDEQ to impose penalties for violations.

Proposed Wyoming Statute § 35-11-2003(f) authorizes WYDEQ to immediately suspend a license. WYDEQ can take other enforcement actions as dictated by Article 4, including permit revocation and license revocation and suspension. See Wyo. Stat. §§ 35-11-409 through -412. Additionally, the director has the authority to issue emergency orders pursuant to Wyoming Statute § 35-11-115.

See Exhibit B, p. 5. For your reference, Wyoming Statute § 35-11-115 is attached hereto as **Exhibit E**.

2. **SA-700 Section 4.1.1.2 provides evaluation criteria for the State law which includes: Section 4.1.1.2g – “The law must authorize inspections of licensee operations to ensure compliance with regulatory requirements. It should authorize inspections of**

unlicensed facilities to assess the risk resulting from accidents or environmental releases of materials. The law should permit access at all reasonable times.”

Section 4.1.1.2h – “The law must provide authority to take prompt enforcement action, and should provide a variety of legal sanctions. The law should provide authority to suspend licenses and to impound materials. In cases of an imminent threat to public health and safety, the law should authorize immediate suspension without prior hearing.”

Section 4.1.1.2i – “The law should authorize suspension or revocation of a license for repeated or continued noncompliance. The authority to suspend or revoke a license may be conditioned on a prior administrative or judicial hearing. The program should also have authority to seek injunctive relief, and refer licensees for criminal prosecution. The program should also consider authority to impose civil or administrative monetary penalties.”

The statutes governing Wyoming’s Uranium Recovery Program satisfy the requirements of Sections 4.1.1.2g and 4.1.1.2h of SA-700, Handbook for Processing an Agreement as discussed in the response to comment number 1, above. Additionally, the statutes governing Wyoming’s Uranium Recovery Program satisfy the requirements of Section 4.1.1.2i of SA-700, Handbook for Processing an Agreement. This was previously addressed in Wyoming’s November 19, 2015 letter which provided:

Wyoming Statute § 35-11-901 of the Environmental Quality Act authorizes WYDEQ to impose penalties for violations.

Proposed Wyoming Statute § 35-11-2003(f) also authorizes suspension and revocation of a license for repeated or continued noncompliance and injunctive relief.

Rules and regulations will authorize the program to refer licensees for criminal prosecution.

See Exhibit B, pp. 5-6; see also Wyoming Statute § 35-11-904.

- 3. SA-700 Section 4.7 also describes the evaluation criteria for reviewing written procedures for event and allegation response program elements.**

Section 4.7.1.2e – Allegation procedures should address response, follow-up and closeout. The procedures should provide for protection of the identity of a person making an allegation when requested and provide for the protection of other sensitive information.

Wyoming’s Uranium Recovery Program is developing guidelines and policy and procedure documents that fulfill the requirements of Section 4.7.1.2 of SA-700, Handbook for Processing an Agreement. Currently, Wyoming Department of Environmental Quality (“WYDEQ”) maintains a confidential reporting procedure for the protection of sensitive information.

4. Our response letter dated, September 28, 2015, contained two comments regarding the new trespassing law:

16. On page 1 line 17, it states, “authorizing the department to implement and administer the program.” The Enrolled Act No. 61 in Wyoming that restricts inspection activities creates an incompatible obstacle to assuming regulatory responsibility over the NRC responsibility for source and byproduct material. See, ENROLLED ACT NO. 61, SENATE SIXTY-THIRD LEGISLATURE OF THE STATE OF WYOMING 2015 GENERAL SESSION

Trespassing to unlawfully collect resource data and unlawful collection of resource data.

21. On page 4 line 86, it states “To facilitate inspections, licensees and proposed licensees shall obtain and grant access to the Department at all reasonable times.” There should be an explicit (rather than implied) repeal of the sampling trespass law.

Wyoming previously addressed these comments in its November 19, 2015 letter, as follows:

Enrolled Act No. 61, SF0012, codified as Wyoming Statute § 6-3-414, will not restrict inspections of licensed operations. Wyoming Statute § 6-3-414 allows the collection of resource data if there is “other legal authorization to enter or access the land.” Proposed Wyoming Statute § 35-11-2003 clearly authorizes inspections and requires that licensees both obtain and grant WYDEQ access to

inspect their operations. Further, licensing conditions will require that licensees obtain and grant WYDEQ access to inspect their operations. The failure to satisfy licensing conditions will result in enforcement actions, including the suspension and revocation of licenses. Unannounced inspections of unauthorized facilities must be conducted through the use of an administrative warrant. This is true regardless of Wyoming Statute § 6-3-414. Accordingly, future WYDEQ inspectors will not be restricted from conducting inspections of licensed operations and Wyoming Statute § 6-3-414 does not create an incompatible obstacle.

Like other states, Wyoming has never condoned illegal trespass onto private property. Wyoming Statute § 6-3-414 merely establishes criminal remedies for trespass onto private property in the context of data collection. The Commission does not require that Wyoming's Agreement State Program authorize illegal trespass onto private property and there is no such compatibility requirement in SA-700, Handbook for Processing an Agreement. We are happy to address any additional questions regarding Wyoming Statute § 6-3-414.

See Exhibit B, p. 8. Although Enrolled Act No. 61 has been superseded during Wyoming's 2016 legislative session, the November 19, 2015 response still applies. Revised Wyoming Statute § 6-3-414 (2016) will not restrict inspections of licensed operations. Revised Wyoming Statute § 6-3-414 (2016) allows the collection of resource data if there is "other legal authorization to enter the private land to collect the specified resource data."

Similarly, with respect to the Commission's comment number 21, we responded as follows:

As previously discussed in response to Comment No. 16, Wyoming Statute § 6-3-414 does not render the program incompatible with the Commission's requirements as set forth in SA-700, Handbook for Processing an Agreement. Pursuant to proposed Wyoming Statute § 35-11-2003(d) and through licensing conditions, WYDEQ maintains authority to conduct inspections of licensed facilities. Therefore, it is unnecessary to explicitly repeal Wyoming Statute § 6-3-414.

See Exhibit B, p. 10.

5. **On page 3, lines 5 through 18 state that trespassing to unlawfully collect resource data and unlawfully collecting resource data is punishable by imprisonment, fine or**

both. These provisions potentially punish people for developing and reporting information concerning allegations or performance concerns regarding Atomic Energy Act radioactive material and prevents the development of an adequate and compatible Agreement State program.

Wyoming Statute § 6-3-414 (2016) imposes criminal penalties for trespass to unlawfully collect resource data. Therefore, Wyoming Statute § 6-3-414 (2016) does not “potentially punish people for developing and reporting information.” It potentially punishes people for trespassing. It does not punish individuals who have developed and reported information in accordance with the law. As previously discussed, and like other states, Wyoming has never condoned illegal trespass onto private property. Additionally, the Commission does not require that Wyoming’s Uranium Recovery Program authorize illegal trespass onto private property and there is no such compatibility or adequacy requirement in SA-700, Handbook for Processing an Agreement.

- 6. On page 5, Paragraph (e) lines 7 through 13 state “No resource data collected in violation of this section is admissible in evidence in any civil, criminal or administrative proceeding, other than a prosecution for violation of this section or a civil action against the violator.” This section applies whether or not the violation was prosecuted or resulted in conviction of this law. These provisions are problematic because they discourage people from developing and reporting information concerning allegations or performance concerns, prevent the appropriate use of information in enforcement or other actions, and prevent the development of an adequate and compatible Agreement State program.**

Wyoming Statutes §§ 6-3-414 (2016) and 40-27-101 (2016), as amended, are attached hereto as Exhibit A. Wyoming Statute § 6-3-414(f) (2016) states, “No resource data collected on private land *in violation of this section* is admissible in evidence” (Emphasis added). Although no court has interpreted Wyoming Statute § 6-3-414(f) (2016), and no individual has been prosecuted under this statute, the plain language shows that the referenced section would not apply unless a violation is proven.

Moreover, Wyoming Statute § 6-3-414 (2016) does not discourage people from developing and reporting information, it discourages illegal trespass. It does not prevent the appropriate use of legally obtained and reliable information in enforcement or other actions and does not prevent the development of an adequate and compatible Agreement State Program. Enforcement and other actions should utilize reliable and admissible information and evidence. WYDEQ does not encourage the use of unreliable and inadmissible information and evidence,

including information and evidence that has been illegally obtained, stolen, or otherwise violates the law. Additionally, there is no compatibility or adequacy requirement in SA-700, Handbook for Processing an Agreement that mandates the use of illegally obtained information in enforcement or other actions.

7. **On page 5 (f) lines 15 through 19 state “that resource data collected in violation of this section in possession of any governmental entity shall be expunged by the entity from all files and databases, and it shall not be considered in determining agency action. These provisions are problematic because they appear to prevent the use of information in State regulatory actions. This provision could even interfere with the NRC obtaining information regarding inspections, enforcement, allegations, or evaluating Agreement State performance.**

As discussed above, Wyoming Statute § 6-3-414 applies to information that has been illegally obtained and discourages illegal trespass. However, Wyoming Statute § 6-3-414 does not prevent the use of legally obtained and reliable information in regulatory actions.

Moreover, Wyoming Statute § 6-3-414(f) applies to a “governmental entity” as defined in Wyoming Statute § 1-39-103(a)(i). Wyoming Statute § 1-39-103(a)(i) defines a “governmental entity” as *“the state, University of Wyoming or any local government.”* (Emphasis added). Accordingly, it does not apply to the Commission.

8. **We also request clarification on the following mean [sic] in the legislation:**
 - **“Resource Data” (E.g. Does this include information on radioactive materials or related operations?)**
 - **“Peace Officer” (E.g. Department employees, other State, federal, local or tribal officials? Applicability for government contractors?)**
 - **“Engaged in the lawful performance of his official duties”**
 - **“Government entity” (E.g. State, Federal, Tribal or local governments?)**
 - **“Expunged from databases”**
 - **“Agency actions”**

Most of the requested information can be found in the text of Wyoming Statutes §§ 6-3-414 (2016) and 40-27-101 (2016).

As used in Wyoming Statutes §§ 6-3-414 (2016) and 40-27-101 (2016), “Resource data” means: “data relating to land or land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil, conservation, habitat, vegetation, or animal species. ‘Resource data’ does not include data: (A) for surveying to

determine property boundaries or the location of survey monuments; (B) Used by a state or local governmental entity to assess property values; (C) Collected or intended to be collected by a peace officer while engaged in the lawful performance of his official duties.”

The definition for “Peace Officer” as used in Wyoming Statutes §§ 6-3-414 (2016) and 40-27-101 (2016) is attached hereto as Exhibit E.

“Engaged in the lawful performance of his official duties” seems clear. Under these statutes, “Resource data” appears to exclude data obtained by a peace officer, in accordance with the law, during the course and scope of the officer’s duties.

“Government entity” was previously defined above in response to comment number 7.

“Expunged from databases” is not defined in Wyoming Statutes §§ 6-3-414 (2016) and 40-27-101 (2016). However, Black’s Law Dictionary defines “expunge” as “to erase or destroy.”

“Agency actions” is not defined in Wyoming Statutes §§ 6-3-414 (2016) and 40-27-101 (2016). However, the definition of “agency actions” can be derived from the plain definition of the terms “agency” and “action.” An agency is generally defined as “any authority, bureau, board, commission, department, division, officer or employee of the state, a county, city or town or other political subdivision of the state, except the governing body of a city or town, the state legislature, the University of Wyoming and the judiciary.” See Wyoming Statute § 16-3-101. Black’s Law Dictionary defines “action” as “the process of doing something; conduct or behavior.”

On April 29, 2016, the Commission sent an email to Wyoming’s Uranium Recovery Program containing a number of questions, attached hereto as *Exhibit F*. Please find responses to the Commission’s questions in sequential order below. For your convenience, the Commission’s questions are restated in bold.

- 1. One Scenario of interest would be if a concerned individual (CI) from a public road were to witness a truck with markings indicating that it belonged to a Wyoming uranium recovery licensee dumping waste material on private property.**

The plain language of Wyoming Statutes §§ 6-3-414 (2016) and 40-27-101 (2016) indicate that the data trespass laws do not apply to an individual who is not trespassing or has not trespassed. Specifically, the trespass statutes require that an individual “enter” onto private land. Therefore, if someone is on a public road, and has not trespassed to be on the public road, then that individual is not subject to criminal prosecution or civil liability under those statutes.

2. Can Wyoming DEQ use the information obtained by the CI? Would the CI be liable for criminal prosecution?

In the Commission's scenario above, the concerned individual would not be subject to criminal prosecution if that individual did not trespass as defined by the statute. WYDEQ may use legally obtained and reliable information.

3. What if the CI unknowingly followed the truck down a private road? Can the Wyoming DEQ use the information obtained by the CI? Would the CI be liable for criminal prosecution?

Under the plain language of Wyoming Statute § 6-3-414 (2016), if the concerned individual is on private property or a private road without permission of the landowner then the individual is trespassing and is subject to prosecution. As previously discussed, the resource data is not admissible evidence in any civil, criminal, or administrative proceeding, other than the trespass action, only if the concerned individual is convicted under Wyoming Statute § 6-3-414 (2016).

4. What steps would Wyoming DEQ take in order to look into the allegation?

The WYDEQ investigates legitimate allegations of violations and will take action against actual violations. Wyoming's Uranium Recovery Program satisfies all of Commission's compatibility and adequacy requirements with respect to investigation and inspection. Specifically, the relevant statutes and rules mandate that all operators obtain and provide access of the licensed facilities to the WYDEQ. Failure to obtain and provide access to the WYDEQ results in a possible enforcement action, including license revocation. Moreover, additional statutory authority for WYDEQ to investigate complaints is provided in Wyoming Statute § 35-11-701, attached hereto as Exhibit E.

For other private property, the WYDEQ may utilize the administrative warrant process to obtain access to private property where there is a threat to public health and safety. *See V-1 Oil Co. v. State of Wyo., Dept. of Environmental Quality*, 902 F.2d 1482, 1487 (10th Cir. 1990) (Requiring WYDEQ to obtain a search warrant for inspections of private property in accordance with the Fourth Amendment of the United States Constitution). The Director of WYDEQ may also issue an emergency order pursuant to Wyoming Statute § 35-11-115.

5. Does Wyoming DEQ have unfettered access to information with regard to ensuring public health and safety relating to regulation of the radioactive material within its jurisdiction?

The meaning of “unfettered access” is unclear in this context. Clearly, every governmental agency, including the Commission, is fettered in its access by the United States Constitution. *See, e.g., V-1 Oil Co.*, 902 F.2d at 1487 (“Administrative searches conducted pursuant to statutes of general applicability require search warrants”). Similarly, it is unclear what “information” entails in this context. Please clarify what the Commission means by these terms.

In addition to the information provided herein, Wyoming’s Uranium Recovery Program is developing rules that adopt or incorporate by reference all of the applicable Code of Federal Regulations with the Commission’s Compatibility Category “A” through “C” pursuant to SA-700, Handbook for Processing an Agreement. Those rules are being provided to the Commission for review throughout the ongoing rulemaking process.

As always, we appreciate the opportunity to address the Commission’s comments and concerns. As discussed during our April 29, 2016 phone conference, we request that the Commission: 1) identify any new or detailed questions, with specificity, in writing and 2) provide us with the Commission’s understanding or its legal interpretation of the data trespass law that effects the establishment of Wyoming’s Agreement State Program, in writing, for our consideration within thirty (30) days of this letter.

Please feel free to contact Ryan Schierman, Program Manager, by telephone (307-777-7757) or email (Ryan.Schierman@wyo.gov).

Sincerely,



Kyle Wendtland
Administrator
Land Quality Division

cc: Todd Parfitt
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TABLE OF EXHIBITS

- Exhibit A:** Wyoming Statutes §§ 6-3-414 (2016) and 40-27-101 (2016) (*Session Laws*)
- Exhibit B:** Office of Attorney General's letter to NRC (November 19, 2015)
- Exhibit C:** NRC's letter to Wyoming Uranium Recovery Program (December 8, 2015)
- Exhibit D:** Wyoming's Nuclear Regulatory Agreement Statutes (2016) (*Session Laws*)
- Exhibit E:** Wyoming Statute §§ 35-11-115 (*Emergency Order*), 7-2-101 (*Definition of "Peace Officer"*); 35-11-701 (*Complaint; investigations; conference; cease and desist order; hearing referee*)
- Exhibit F:** Email from Stephen Poy, NRC (April 29, 2016)