



Office of the Attorney General

Governor
Matthew H. Mead

Attorney General
Peter K. Michael

Water and Natural Resources
Division
Kendrick Building
2320 Capitol Avenue
Cheyenne, Wyoming 82002
307-777-6946 Telephone
307-777-3542 Fax

Chief Deputy Attorney General
John G. Knepper

Division Deputy
James Kaste

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Daniel S. Collins, Director
U.S. Nuclear Regulatory Commission
Division of Material Safety, State, Tribal and Rulemaking Programs
Office of Nuclear Material Safety and Safeguards

Two White Flint North
11545 Rockville Pike
Rockville, Maryland 20852-2738

Dear Mr. Collins,

Our office represents the Wyoming Department of Environmental Quality ("WYDEQ"). This letter is in response to your letter dated October 17, 2016 and an email from your attorney, Joan Olmstead, dated December 21, 2016. You and Ms. Olmstead requested that the Wyoming Attorney General's Office answer a number of questions and respond to five scenarios related to the data trespass laws. Please find responses to the questions and scenarios in sequential order below. For your convenience, we restated the questions and scenarios in bold and paraphrased as appropriate. Our responses below should be considered in conjunction with our previous correspondence where we addressed similar NRC questions.

1(a). Please confirm that the State will provide procedures in its Agreement application that address follow-up and closeout of any allegations that the State of Wyoming receives related to the regulation of Agreement material.

The Uranium Recovery Program's draft agreement application was submitted on October 26, 2016. The Uranium Recovery Program's procedures for follow-up and closeout of allegations can be found in Section 4.7, Event Allegation Response Program Elements, of the draft agreement application. As indicated during WYDEQ's meeting with NRC staff on November 29 and December 14 and 15, 2016, WYDEQ will provide additional procedures regarding how those allegations are tracked and maintained as part of its final agreement.

1(b). Please confirm that a member of the public will not be prosecuted for collecting, developing or reporting information of potential safety concerns involving radioactive material.

As stated in WYDEQ's June 8, 2016 letter, the data trespass laws impose civil and criminal penalties for trespass to unlawfully collect resource data. The data trespass laws do not prevent individuals from reporting suspected violations of law based on personal observations. Additionally, the data trespass laws do not punish individuals who have developed and reported information in accordance with the law. As such, members of the public will not be prosecuted for collecting, developing, or reporting information of potential safety concerns involving radioactive material so long as they did not trespass or violate other state or federal laws during the collection, development, and reporting. Enforcement of the data trespass laws will be left to the respective county attorneys, and absent unusual circumstances, our office will not be responsible for the enforcement of the data trespass laws.

2. In your June 8, 2016 response to item 6 of our December 8, 2015 letter and during subsequent discussions with your staff, you indicated that information collected that relates to Agreement State activities can be used by the State regardless if the individual is prosecuted or convicted under the Data Collection Trespass Law. Please confirm that if a member of the public is prosecuted or convicted under the Data Collection Trespass Law, the information collected that relates to Agreement State activities can still be used by the State to investigate allegations, violations, and take action to protect public health and safety. Please also clarify whether the Wyoming Agreement Program's response will change if the individual had knowingly trespassed on the private property. Will the Attorney General's Office support DEQ in taking action to protect public health and safety or an enforcement action if the information is provided by a potential violator of the Data Collection Trespass Law? Will DEQ forward relevant information to the NRC?

First, WYDEQ has not stated that information collected that relates to Agreement State activities can be used by the State regardless if the individual is prosecuted or convicted under the Data Collection Trespass Law. Instead, in WYDEQ's June 8, 2016 letter, WYDEQ stated:

[The data trespass laws do] 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.

Under the data trespass laws, “[r]esource data collected on private land in violation of [the data trespass laws] in the possession of any governmental entity as defined by W.S. 1-39-103(a)(i) shall be expunged by the entity from all files and data bases, and it shall not be considered in determining any agency action.”Accordingly, WYDEQ will abide by the data trespass laws upon a conviction and a court order ordering that the resource data be expunged.

Additionally, WYDEQ only uses reliable and legally-obtained information for regulatory and enforcement matters. WYDEQ has explained to NRC staff that, practically speaking, any data received from the public must generally be substantiated prior to any regulatory or enforcement action. For example, if WYDEQ received an anonymous allegation regarding a violation, WYDEQ will not rely on that allegation alone for an enforcement matter. Rather, WYDEQ must substantiate the allegation, either through an inspection or administrative warrant, prior to initiating the enforcement matter. This ensures the allegation is legitimate and that admissible, reliable, and legally-obtained evidence exists to support the enforcement matter. As such, expungement under the data trespass laws would not affect WYDEQ’s ability to bring a regulatory or enforcement matter.

WYDEQ and the Attorney General’s Office do not condone illegal activity. Unreliable or illegally-obtained information is generally not admissible evidence in an enforcement action and does not meet the legal requirements necessary to satisfy the burden of proof required in those actions. Further, Rule 11 of the Wyoming and Federal Rules of Civil Procedure prevent an attorney from bringing an action that is not warranted, unsubstantiated, or not supported by evidence. Thus, WYDEQ and the Attorney General’s Office will not bring an enforcement action based solely upon unreliable or illegally obtained information.

However, WYDEQ will utilize evidence it has independently collected and substantiated to support regulatory or enforcement matters. This includes complaints, allegations, or testimony from individuals who have witnessed violations. Finally, WYDEQ will provide the NRC with relevant information as required by the NRC’s event reporting criteria and in accordance with state and federal laws.

3. Based on the Data Collection Trespass Law, the state will not be able to: 1) investigate or act on an allegation; 2) send information to the NRC if it involves NRC regulated materials or common defense and security concerns; or 3) have a record for NRC to evaluate during an Integrated Materials Performance Evaluation Program review. Please provide additional information describing how the State will not be impeded in implementing the aforementioned actions. This response should explain how the State can use the information and when the State has to expunge this information. For example, will the State be able to use the information before the person that reported the information is convicted under the Data Collection Trespass Law to support a warrant or investigation? What will happen if the person is convicted? Does the Court have to order the information to be expunged from all files and databases after a conviction or is the information automatically expunged? Can the State expunge information before a conviction?

The data trespass laws do not prevent WYDEQ from investigating or acting on allegations, sending information to the NRC, or, absent a conviction and court order, maintaining records for NRC to evaluate during an Integrated Materials Performance Evaluation Program review.

With regard to the expungement of data, we will address each of your sub-questions identified above as follows:

- ***This response should explain how the State can use the information and when the State has to expunge this information.***
 - The WYDEQ cannot use information that has been expunged according to a court order. However, WYDEQ will work to substantiate and develop independent information that is not subject to expungement and can be used for enforcement or other regulatory matters.
- ***Will the State be able to use the information before the person that reported the information is convicted under the Data Collection Trespass Law to support a warrant or investigation?***
 - As stated in WYDEQ's June 8, 2016 letter, although no court has interpreted the data trespass laws and no individual has been prosecuted under the data trespass laws, the plain language of the statutes shows that expungement would not apply unless a violation is proven. Thus, WYDEQ may use information until the statutory requirements are met. However, WYDEQ will expunge information if it is ordered by a court to do so.

- *What will happen if the person is convicted? Does the Court have to order the information to be expunged from all files and databases after a conviction or is the information automatically expunged? Can the State expunge information before a conviction?*
 - It is unclear what would happen in the case of a conviction, because there has never been a conviction under the data trespass laws. However, if a person is convicted under the data trespass laws and a court orders the expungement of data, WYDEQ will follow court orders. As discussed above, WYDEQ does not rely on illegally-obtained or unreliable information in enforcement or regulatory matters. Regardless, any information that has been independently-obtained and substantiated by WYDEQ is not subject to expungement. Similar to other states, absent a court order, WYDEQ retains information and records in accordance with its policies and records retention policy.

4. In your June 8, 2016 response to item 8 of our December 8, 2015 letter, your response to item 8 clarified the meaning of specific terms, however, the response only provided definitions in accordance with the Webster's Dictionary and in particular did not explain what was considered data that will be covered under the law. The Wyoming Attorney General's Office, in providing definitions of these terms should also clarify the scope of the information covered by the term "resource data" (e.g. does the term resource data cover photographs or observations from private or public lands on to private property.) What other types of information does it cover, or not cover? Please also provide additional information to the definition to the terms we identified in our letter dated December 8, 2015, to help us evaluate the potential effect of the Data Collection Trespass Law will have on Wyoming's Agreement State program application.

In WYDEQ's June 8, 2016 letter, WYDEQ defined the terms identified by the NRC. As the definitions were previously provided, it is unclear what additional information the NRC is seeking. Definitions for the terms identified by the NRC are mostly found in Wyoming statutes. For the terms not found in statute, WYDEQ utilized Black's Law Dictionary, to provide insight on the plain legal meaning of those terms. As such, please refer to WYDEQ's June 8, 2016 letter for the provided definitions. Additionally, you have requested that we provide further explanation as to the scope of information covered by the terms. Generally, this information can be ascertained from the plain meaning of the term. However, in an effort to facilitate your understanding of the data trespass laws, please see the following responses to the questions identified above.

- ***Does the term resource data cover photographs or observations from private or public lands onto private property?***
 - Under the data trespass laws' definition of "resource data," certain photographs may be considered to be resource data. For example, photographs taken in the course of trespass are considered resource data. Whereas, photographs taken when no trespass occurred are not considered to be resource data. Additionally, personal observations and memories are not considered to be resource data.
 - The data trespass laws only apply to trespass onto private land. If a person is on public land, and did not trespass to get onto the public land, then the data trespass laws do not apply.
- ***What other types of information does the data trespass laws cover, or not cover?***
 - The definition of resource data is broad. Resource data includes all "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: for surveying to determine property boundaries or the locations of survey monuments, used by state or local government entities to assess property values, and collected or intended to be collected by a peace officer while engaged in the lawful performance of his official duties.
 - Examples of what can constitute resource data include, but are not limited to, samples and photographs. Additionally, personal observations, telephone calls, WYDEQ call logs, or notes do not constitute resource data.
- ***Does the definition of "peace officer" include department employees, other state, federal, local, tribal officials, or government contractors?***
 - WYDEQ previously provided the statutory definition of "peace officer." This definition includes a list of individuals who constitute peace officers. Under this definition, WYDEQ employees and federal officials are not peace officers.
- ***What constitutes a "government entity"?***
 - As previously stated, a "governmental entity" is defined as "the state, University of Wyoming, or any local government." Accordingly, a governmental entity for purposes of the data trespass laws does not include the NRC.

5. Can information be used as evidence if an individual is not convicted under the data trespass laws? Can the State act on the information prior to a conviction?

As previously stated, the plain language of the data trespass laws shows that the expungement of data does not apply unless a violation is proven. Therefore, WYDEQ will use reliable and legally-obtained information until it is proven to be unreliable or illegally-obtained. Moreover, WYDEQ will always attempt to independently substantiate information received.

6(a). Will the State consider information obtained by a person knowingly or unknowingly trespassing to be a legitimate allegation?

WYDEQ will take all allegations seriously, and will attempt to independently substantiate allegations and obtain reliable and legal evidence to pursue enforcement or regulatory actions.

6(b). Can information from a person knowingly or unknowingly trespassing on private property be used to obtain a warrant for an investigation or support issuance of an emergency order involving Agreement material?

State and federal laws dictate what is necessary to obtain an administrative warrant. The type of information adequate to support an administrative warrant will likely be dependent on the facts and circumstances of each situation. The information necessary to support an administrative warrant will be determined on a case-by-case basis.

To the best of our knowledge, WYDEQ has never needed to obtain an administrative warrant. Generally, information is gathered and inspections are conducted pursuant to a permit or license. However, in an extreme situation where WYDEQ requires an administrative warrant, it will abide by the constitutional and legal requirements necessary to obtain that warrant. WYDEQ will rely on information that can legally support the administrative warrant and prevent future legal challenges to the administrative warrant and any evidence obtained under the administrative warrant.

6(c). Will information relating to an NRC licensee or common defense and security matter be passed onto the NRC?

WYDEQ will pass onto the NRC information relating to a NRC, common defense, security matter as required by the NRC's reporting criteria and in accordance with state and federal laws.

7. Explain how Wyoming's data trespass laws "will not impact the State's ability to implement an adequate program to protect health and safety and compatibility with the NRC's regulatory program for allegations, investigations, enforcement, transmission of

information to the NRC of relevant information impacting NRC's areas of regulatory authority or retention records for the NRC's period review."

Although the data trespass laws impose new criminal and civil penalties for the act of illegal trespass, a cause of action for illegal trespass under Wyoming law is not new. Almost all states have trespass laws, including a majority of the agreement states. Like these states, Wyoming does not condone illegal trespass onto private property. Regardless of the data trespass laws, the Uranium Recovery Program satisfies the NRC's compatibility requirements and is adequate to protect public health and safety and the environment.

Moreover, the data trespass laws do not prohibit or punish the use of legally obtained reliable information. Currently, all of WYDEQ's regulatory programs are functioning and protect public health, safety, and the environment in harmony with the data trespass laws by using reliable and legally-obtained information for regulatory and enforcement matters. The data trespass laws have had no effect on WYDEQ's ability to protect public health and safety and the environment. Therefore, the data trespass laws do not change the Uranium Recovery Program's ability to adequately protect public health and safety and the environment.

8. What is the State's authority to enter a licensee's or non-licensee's property in response to information gathered by a trespasser.

A licensee is required to obtain and provide WYDEQ with access to its property and any private property WYDEQ must cross to access the licensee's property. This is required by Wyoming statute, rules, and license conditions.

WYDEQ's authority to enter a non-licensee's property is the same as the NRC's ability to enter a non-licensee's property. As previously stated, WYDEQ can seek an administrative warrant to access a non-licensee's property.

9. Describe how Wyoming's data trespass laws apply to different types of information.

As previously discussed, Wyoming's data trespass laws only apply to "resource data" as defined under those laws. It has been determined that resource data does not include observations, memories, or telephone calls made to WYDEQ and resulting call logs or notes.

Resource data can include things such as photographs or samples. However, WYDEQ will handle all allegations the same. WYDEQ will attempt to independently substantiate all allegations. Until the statutory requirements are met and WYDEQ receives a court order ordering that the resource data be expunged, WYDEQ will maintain resource data consistent with its practices and procedures.

10. Can information obtained by a trespasser be used to obtain a warrant in subsequent enforcement actions or other administrative proceedings.

WYDEQ's mission is to protect public health, safety, and the environment. WYDEQ does not independently investigate or determine whether a person who has made an allegation has trespassed or has been convicted under Wyoming's data trespass laws. Thus, WYDEQ will operate consistent with its ordinary course of business. WYDEQ will utilize information received from allegations to independently substantiate any claims, obtain an administrative warrant, in enforcement actions, or other administrative proceedings until it receives a court order prohibiting the utilization of the information. WYDEQ anticipates it will ordinarily be able to independently gather evidence and substantiate any allegations prior to receiving a court order to expunge data or information.

11. Will information provided by a trespasser be handled differently than other allegation information (e.g. would it be stored for the same amount of time? How long will information be stored)? When will the state be required to expunge information from its files?

All information obtained from allegations will be handled similarly and in accordance with WYDEQ's practices and procedures. However, as previously discussed, WYDEQ will expunge information pursuant to an order from a court.

Furthermore, Ms. Olmstead requested that we respond to the five hypothetical scenarios below. Although we have attempted to respond to these hypothetical scenarios, our responses are merely intended to assist with your understanding of how WYDEQ might respond to an allegation, generally. It is significant to note that allegations vary vastly. How WYDEQ responds to an allegation is determined on a case-by-case basis and will vary depending on the facts and circumstances of the allegation.

Scenario 1: A person trespasses on a licensee's land and contacts WYDEQ to make allegations based on information they collected while trespassing.

Generally speaking, in this hypothetical scenario, WYDEQ would conduct an inspection of the licensee's facility. During that inspection, WYDEQ would attempt to independently substantiate the allegations and collect information or evidence of any existing violations. If WYDEQ is able to substantiate the allegations, it would proceed with the appropriate enforcement or regulatory action. As previously discussed, licensees are required to obtain and provide WYDEQ reasonable access to their facilities.

Scenario 2: A person trespasses on property that is not a licensee's land, collects information related to a licensee and contacts WYDEQ to make allegations based on information they collected while trespassing.

Generally speaking, in this hypothetical scenario, WYDEQ would conduct an inspection of the licensee's facility. WYDEQ would also contact the non-licensee to request access to the private property where the information was collected for an inspection. If the non-licensee refuses, WYDEQ would attempt to obtain an administrative warrant based on the allegation and any information collected during the inspection of the licensee's facility. If WYDEQ is able to substantiate the allegations, it would proceed with the appropriate enforcement or regulatory action.

Scenario 3: A person trespasses on property that is not a licensee's land and contacts WYDEQ to make allegations concerning a non-licensee based on information they collected while trespassing.

Generally speaking, in this hypothetical scenario, WYDEQ would proceed with an investigation in a similar manner to an investigation of a licensee. WYDEQ would contact the non-licensee to request access to the private property for an inspection. If the non-licensee refuses, WYDEQ would attempt to obtain an administrative warrant based on the allegation. If WYDEQ is able to substantiate the allegations, it would proceed with the appropriate enforcement or regulatory action.

Scenario 4: A licensee's employee goes to a section of the facility where they are not authorized to go and contacts the State to make allegations concerning the license based on information they collected while they were in the unauthorized area.

Generally speaking, in this hypothetical scenario, WYDEQ would conduct an inspection of the licensee's facility. During that inspection, WYDEQ would attempt to independently substantiate the allegations and collect information or evidence of any existing violations. If WYDEQ is able to substantiate the allegations, it would proceed with the appropriate enforcement or regulatory action. Licensees will be subject to applicable federal or state employment laws, including Wyoming's Occupational Health and Safety Act (*see* Wyo. Stat. 27-11-101 *et seq.*).

Scenario 5: An employee of a licensed facility trespasses on property that is not part of the licensee's land and contacts WYDEQ to make allegations concerning the licensee based on information they collected while trespassing.

Generally speaking, in this hypothetical scenario, WYDEQ would contact the non-licensee to request access to the private property for an inspection. If the non-licensee refuses, WYDEQ would attempt to obtain an administrative warrant based on the allegation. If WYDEQ is able to substantiate the allegations, it would proceed with the appropriate enforcement or regulatory action. Licensees will be subject to applicable federal or state employment laws, including Wyoming's Occupational Health and Safety Act (*see* Wyo. Stat. 27-11-101 *et seq.*).

Mr. Daniel S. Collins
Page 11 of 11

We hope that this response, in addition to our previous correspondence, provides you with a better understanding of the data trespass laws. We appreciate the opportunity to address your questions. Please do not hesitate to contact me by telephone at (307-777-7376) or email at (eva.la@wyo.gov).

Sincerely,



Eva La
Assistant Attorney General
Uranium Recovery Program

CC: WYDEQ
File
Todd Parfitt (todd.parfitt@wyo.gov)
Kyle Wendtland (kyle.wendtland@wyo.gov)
Agreement State Program (via email: AgreementstateRegs.Resource@nrc.gov)
Duncan White (via email: Duncan.White@nrc.gov)
Stephen Poy (via email: Stephen.Poy@nrc.gov)
Joan Olmstead (via email: Joan.Olmstead@nrc.gov)