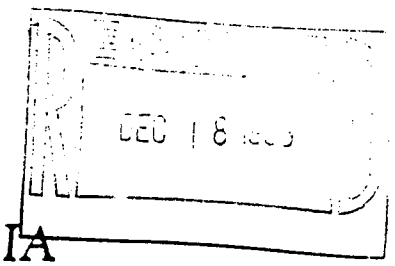
Attachment Number 1

Letter Dated January 12, 1998
Re: Environmental Assessment Privilege and Immunity Law

From: Richard Cullen
Attorney General of Virginia

To: The Honorable Michael McCabe
Regional Administrator, Region III
United States Environmental Protection Agency



COMMONWEALTH of VIRGINIA

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January 12, 1998

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The Honorable Michael McCabe
Regional Administrator, Region III
U.S. Environmental Protection Agency
841 Chestnut Building
Philadelphia, Pennsylvania 19107

General Responses Regarding Virginia's
Environmental Assessment Privilege and Immunity Law

Dear Mr. McCabe:

We have received EPA's September 4, 1997 letter requesting information regarding whether Virginia's Environmental Assessment Privilege and Immunity Law (§§ 10.1-1198 and 10.1-1199 of the Code of Virginia ("Code")) ("Environmental Privilege/Immunity Law") deprives the Commonwealth of adequate authority to enforce various requirements of our environmental programs that have been authorized, delegated, or approved by EPA or whose authorization, delegation, or approval by EPA is pending (collectively, "Virginia's federally authorized environmental programs"). With this letter, I respond to the questions presented in the Cross-Programmatic Enclosure to that letter. As explained fully below, none of Virginia's federally authorized environmental programs are subject to the Environmental Privilege/Immunity Law.

1. Virginia's Environmental Privilege/Immunity Law

Virginia's Environmental Privilege/Immunity Law was enacted in 1995 and is found at §§ 10.1-1198 and 10.1-1199 of the Code. Section 10.1-1198 provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. Not protected by the privilege are documents or information (1) that are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent, and substantial danger to the public health or environment; or (4) that are required by law. "Document" is defined to include "field notes, records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, videotape, computer-generated or electronically recorded information, maps, charts, graphs and surveys." Any document submitted to the Commonwealth pursuant to its federally authorized environmental programs would fall within this definition. See Cross-Programmatic Enclosure, No. 3. As discussed below, however, documents (and information about the content of those documents) that are needed for civil and criminal enforcement of Virginia's federally authorized environmental programs would not be privileged.

Section 10.1-1199 provides that immunity from administrative or civil penalty, "[t]o the extent consistent with requirements imposed by federal law," may be accorded to persons making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order. As explained below, this immunity is not available in civil and criminal enforcement of Virginia's federally authorized environmental programs.

2. **Non-Applicability of Environmental Privilege/Immunity Law**

In general, the Environmental Privilege/Immunity Law does not limit the Commonwealth's civil and criminal enforcement authority for Virginia's federally authorized environmental programs because § 10.1-1198 precludes granting a privilege to documents required by law and any immunity accorded under § 10.1-1199 is conditioned on its being consistent with federal law.[1] As you know, in order to obtain full authorization, delegation, or approval from EPA for any of these programs, the Commonwealth is required by federal law to have full authority to enforce those programs, both civilly and criminally. As such, all aspects of Virginia's environmental laws and regulations that are necessary to implement and enforce Virginia's federally authorized environmental programs in a manner that is no less stringent than their federal counterparts are necessarily "required by law."[2]

Regarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in the manner required by federal law to maintain program delegation, authorization, or approval. As to § 10.1-1199, no immunity could be afforded from administrative, civil, or criminal penalties because granting such an immunity would not be consistent with federal law, which is one of the criteria for the immunity. Granting immunity would be inconsistent with the federal requirement to have full civil and criminal enforcement authority, which is necessary for the Commonwealth's programs to remain at least as stringent as the federal counterparts.

3. **Definition of "Environmental Law"**

In the definition of "environmental assessment," Code § 10.1-1198 refers to "environmental laws and regulations." As noted in the September 4 letter, "environmental laws" is not defined in § 10.1-1198. See Cross-Programmatic Enclosure, No. 1. "Environmental laws" would include statutes adopted by the Virginia General Assembly to protect Virginia's environment and the

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[1]Accordingly, I will not respond to the questions set forth in Number 15 of the Cross-Programmatic Enclosure.

[2]Any other interpretation would conflict with a variety of general and specific grants of authority to state agencies to obtain federal authorizations, delegations, and approvals for implementation of environmental programs.

public, mainly in terms of air, water, and waste pollution. "Regulations" would include any and all regulations adopted pursuant to these environmental laws. In addition, "environmental laws and regulations" includes permits, consent agreements, and orders by virtue of the fact that they are issued pursuant to these statutes and regulations.

4. Criminal Violations

The Environmental Privilege/Immunity Law applies by its terms only to administrative and civil enforcement actions. Thus, it does not provide a privilege from disclosure of documents and does not authorize immunity to be accorded from prosecution from criminal violations of environmental laws, regulations, permits, or orders pertaining to any of Virginia's federally authorized environmental programs. The Commonwealth retains full enforcement authority to prosecute criminal conduct. As such, the Environmental Privilege/Immunity Law has no effect on the activities listed in Number 2 of the Cross-Programmatic Enclosure. A privilege cannot be asserted under § 10.1-1198 in any criminal investigation arising under any federally authorized, delegated, or approved environmental program for any document (and information about the content of such document) that is the product of a voluntary environmental assessment.

Moreover, as noted above, the Commonwealth retains full authority for criminal enforcement because it is a requirement of federal law that Virginia have such authority in order to obtain and maintain full authorization, delegation, or approval from EPA for any of these programs. For this additional reason, the Environmental Privilege/Immunity Law does not apply to criminal prosecutions or investigations.

5. Documents Required by Law

As noted in Number 8 of the Programmatic Enclosure to the September 4 letter, Virginia's federally authorized environmental programs contain comprehensive monitoring, recordkeeping, compliance certification, and reporting requirements. For this very reason, the phrase "documents required by law" in Code § 10.1-1198 renders the privilege provision in that statute inapplicable to these programs. Likewise, the phrase "to the extent consistent with requirements imposed by federal law" in Code § 10.1-1199 renders the immunity provisions of the statutes inapplicable to these programs.

Similarly, in response to Number 4 of the Cross-Programmatic Enclosure, Code § 10.1-1198 does not provide a privilege for documents and information required to be collected, maintained, reported, or otherwise made available to the Commonwealth by statute, regulation, ordinance, permit, order, consent agreement, settlement agreement, or otherwise as provided by law. Accordingly, the privilege in § 10.1-1198 would not apply to any documents or information relevant to noncompliance with Virginia's federally authorized environmental programs.

6. Investigations by DEQ

In response to the inquiry in Number 5 of the Cross-Programmatic Enclosure, I note that the Environmental Privilege/Immunity Law does not impede or adversely affect the Commonwealth's authority to investigate possible violations of any program requirement (including any requirement of statute, regulation, ordinance, permit, order, consent agreement, settlement agreement, or as otherwise provided by law), as well as the Commonwealth's authority to verify adequate correction of any such violations and to inspect and copy any records pertaining to compliance with program requirements for the reasons set forth in the introductory paragraphs.

7. Access of Public to Documents

The Environmental Privilege/Immunity Law does not impede the public's access to documents that are required to be collected, maintained, reported, or otherwise made available to the Commonwealth or made available directly to the public under Virginia's federally authorized environmental programs. Cross-Programmatic Enclosure, No. 6.

The Law also does not impede public access to documents and information in the Commonwealth's files, whether those documents and information are voluntarily submitted or are collected pursuant to Virginia's information gathering authorities.[3] Cross-Programmatic Enclosure, No. 7. This is true because the Environmental Privilege/Immunity Law does not alter the right of Virginia's citizens to acquire any such documents pursuant to the Virginia Freedom of Information Act ("FOIA"), Code §§ 2.1-340 *et seq.* FOIA ensures that the public has ready access to records in the custody of public officials and agencies, which would include the types of documents and information addressed here. Public access is withheld only if one of the narrowly construed FOIA exceptions or exemptions apply. There is no exception or exemption in FOIA, however, for documents and information claimed as privileged under the Environmental Privilege/Immunity Law. The public, therefore, would not be precluded access to documents and information in the possession of Virginia's information gathering authorities based upon a claim of privilege under § 10.1-1198. Further, because the Environmental Privilege/Immunity Law does not expressly retain the privilege for voluntarily disclosed documents or information, any claim of privilege for such documents or information would be waived by such voluntary disclosure.

EPA has asked about the access of moving parties to documents as contemplated in § 10.1-1198(C). As provided in that statute, in an administrative or judicial proceeding a moving party would be given limited access to documents and information claimed as privileged for the purpose of proving an exception to the privilege. That limited access is available is consistent with the last sentence of § 10.1-1198(C), which provides for restrictions on that party's use of those documents and information. Furthermore, as to § 10.1-1198, if the fact-finder in the administrative or judicial proceeding concludes that the privilege does not apply, the documents or information would be

[3]"Virginia's information gathering authorities" means any agency responsible for the administration and enforcement of Virginia's federally authorized environmental programs.

subject to production through the normal discovery process. In the administrative context, this would mean the documents and information would be subject to the provisions of Code § 9-6.14:13 of the Virginia Administrative Process Act which authorizes the fact-finder to issue subpoenas requiring testimony or the production of books, papers, and physical and other evidence.

8. Protection for Whistle Blowers

In Number 9 of the Cross-Programmatic Enclosure, EPA asks whether Code § 10.1-1198 conflicts with various federal statutory protections for employee disclosure or "whistle blowers" provided for public and private employees. The Environmental Privilege/Immunity Law has no effect on any such protections. The Law serves only to prevent the Commonwealth from compelling a person to produce a document covered by the privilege. It would not sanction an employee or other person for disclosing such a document.

9. Injunctive Relief, Civil Penalties, and Emergency Orders Regarding Harmful Activities

As noted above, documents and information that demonstrate a clear, imminent, and substantial danger to the public health or environment are not protected under the Environmental Privilege/Immunity Law. Accordingly, Virginia's ability to obtain injunctive relief, civil penalties, and emergency orders to restrain activities that are endangering or causing damage to public health or the environment would not be affected. See Cross-Programmatic Enclosure, No. 10 and No. 12. The Commonwealth would not be obstructed in the collection of evidence in such situations because the evidence, pursuant to Code § 10.1-1189, would not be protected under the Environmental Privilege/Immunity Law.

EPA has asked whether voluntary testing that indicated levels greater than regulatory limits, but not so high as to be a "clear, imminent, and substantial danger to public health or environment," would be privileged. The answer is no. As noted in the introductory section above, documents and other information – which would include results of such testing – needed for civil or criminal enforcement of one of Virginia's federal environmental programs would not be privileged because they are required by law in order for the Commonwealth to meet the federal requirement to have full civil and criminal enforcement authority at least as stringent as the federal counterparts.

10. "Federal Law" as Used in Code § 10.1-1199

The term "federal law" in Code § 10.1-1199 includes federal statutes, federal common law (as decided by federal courts and administrative tribunals), federal regulations, and the Federal Rules of Evidence, Civil Procedure, and Appellate Procedure. See Cross-Programmatic Enclosure, No. 11.

11. Citizen Suits

In Number 13 of the Cross-Programmatic Enclosure, EPA inquires whether Code § 10.1-1199 would bar civil penalty recovery by citizens pursuant to § 304 of the CAA and § 7002 of RCRA. Section 10.1-1199 would not bar citizen suits and civil penalty recovery by citizens bringing those suits because the immunity could not be used to defend against an action in federal court. That defense is available only in suits brought in Virginia state court. In addition, the immunity would not be available because § 10.1-1199 conditions the use of that immunity on it being consistent with requirements imposed by federal law. Use of the immunity to preclude the imposition of civil penalties in federal citizen suits would not be consistent with requirements of federal law.[4]

It is the Commonwealth's intention to append this letter to and incorporate it by reference in all Attorney General's statements or certifications included in applications for any program that is to be delegated, approved, or authorized by EPA. Further, we will apprise you if any changes in Virginia state law alter the conclusions of this letter. Please let me know if you have any questions about the above.

Sincerely yours,

Richard Cullen
Attorney General of Virginia

MJL\air\auditgeneral
cc: The Honorable Becky Norton Dunlop
The Honorable Robert C. Metcalf
Randolph L. Gordon
Thomas L. Hopkins

[4]Virginia law does not provide for citizen suits, so your inquiry does not apply in that context.