

US EPA ARCHIVE DOCUMENT



DIVISION OF ENVIRONMENTAL PROTECTION

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LAIDLEY ELI MCCOY, PH.D.
DIRECTOR

March 27, 1997

Maria Vickers, Associate Division Director (3HW03)
Office of RCRA Programs
U.S. Environmental Protection Agency, Region III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

Dear Ms. Vickers:

Re: Underground Storage Tank and Hazardous
Waste Program Authorizations -- Attorney
General's Statements

I enjoyed talking with you by telephone on February 28, 1997, regarding West Virginia's application to obtain program authorization for the underground storage tank program and the hazardous waste program. I was encouraged to hear that the U.S. Environmental Protection Agency (EPA) is anxious to resolve the outstanding issue relating to the appropriate signatory on the Attorney General's statements for these program authorizations.

As we discussed in our phone conversation, EPA's concerns seem to be centered around three (3) issues which were stated in paragraph #5 of Mr. Lawrence Bass' memorandum to Mr. John Humphreys and Ms. Sharon McCauley dated May 31, 1996. These issues are as follows:

1. The Attorney General's statements should be executed by the chief legal representative for the State Division of Environmental Protection (DEP) who can independently represent the state in court or otherwise carry out the authorized programs.
2. The representations of the attorney signing the Attorney General's statements must be binding on all legal officials who may represent the State in carrying out the authorized programs.
3. If there are other State officials, such as the Attorney General, who may represent the State in legal matters pertaining to the authorized programs, but are not bound by the representations made in the statements, they must also sign the Attorney General's statements.

Office of Legal Services
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Taking each of these issues in order, the first deals with which attorney in the State has full authority to represent the DEP in court or otherwise carry out the authorized programs. As I explained in our conversation, W.Va. Code §22-1-6(d)(7) provides clear authority to the DEP to employ in-house counsel and further authorizes that in-house counsel to perform all legal services for the agency, including representing the agency in any administrative proceeding or state or federal court. That section states:

(d) In addition to other powers, duties and responsibilities granted and assigned to the director by this chapter, the director is hereby authorized and empowered to:

(7) Notwithstanding any provisions of this code to the contrary, employ in-house counsel to perform all legal services for the director and the division, including, but not limited to, representing the director, any chief, the division or any office thereof in any administrative proceeding or in any proceeding in any state or federal court. Additionally, the director may call upon the attorney general for legal assistance and representation as provided by law. W.Va. Code §22-1-6(d)(7). (Emphasis added.)

The above-quoted language makes it clear that the agency's in-house counsel have full authority to independently represent the State agency in court on all matters pertaining to the State programs and therefore possess the requisite authority to sign the Attorney General's statements. (See 40 CFR §271.7.)

Regarding the second issue that the statements must be binding on all legal officials who represent the State in carrying out the authorized programs, the DEP's Office of Legal Services was established as a result of the enactment of W.Va. Code §22-1-6(d)(7). This office consists of approximately fourteen (14) attorneys, two (2) paralegals, and several support staff. As Chief of this office, having been appointed by the Director to serve in this capacity, I am responsible for and direct all the employees in their work activities, including representing the agency in program authorization matters. Any statements signed by me would be binding upon all the employees in the office.

Finally, with respect to the third issue, although the statute does permit the Director to request legal assistance from the State Attorney General's Office, it is only upon the Director's specific request that the Attorney General's Office has any authority to represent the agency. This is certainly not the "full authority" contemplated by 40 CFR §271.7. Furthermore, the agency has no intention of requesting such assistance in any matters pertaining to either the underground storage tank or the hazardous waste management programs.

Ms. Maria Vickers

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The agency's practice since the creation of the Office of Legal Services has been to request the Attorney General's assistance only on non-programmatic matters, such as grievances and other personnel matters. It is the agency's intention to continue this practice. Therefore, there will be no occasion upon which the Attorney General will represent the State in matters related to the underground storage tank or the hazardous waste programs and it is unnecessary to include the Attorney General's Office as a signatory to the Attorney General's statements.

As stated above, the DEP is confident its attorneys have full authority to represent it with regard to each of the authorized programs and any challenge to that authority could successfully be defended. The West Virginia Supreme Court of Appeals has on several occasions held the Attorney General's powers and duties, including the power to represent State agencies, may be limited by the State Legislature. See Fahlgren Martin, Inc. v. McGraw, 190 W.Va. 306, 438 S.E.2d 338 (1993); State ex rel. Caryl v. MacQueen, 385 S.E.2d 646 (W.Va. 1989); Manchin v. Browning, 170 W.Va. 779, 296 S.E.2d 909 (1982).¹

I hope the above has satisfied the Regional Counsel's concerns and any concerns you may have had with respect to the appropriate signatory for the Attorney General's statements associated with West Virginia's applications for these two program authorizations. The DEP is hopeful that with the transmission of this letter, we can complete the necessary steps towards obtaining these respective program authorizations.

Please let me know if you have any questions regarding the contents of this letter or if you desire any additional information in support of the above.

Sincerely,



Karen G. Watson, Chief
Office of Legal Services

KGW/gb

cc: L. Eli McCoy, Director
B. F. Smith, Chief, OWM

¹There presently exist numerous State agencies in West Virginia with the authority to employ legal counsel other than the Attorney General's Office. See e.g., W.Va. Code § 12-6-5(6) (West Virginia State Board of Investments); § 17-2A-7 (West Virginia Commissioner of Highways); § 21A-2-18 (Commissioner of Employment Security); § 22B-1-3(a)(9) (Environmental Quality Boards); § 22C-1-6(12) (Water Development Authority); § 22C-3-6(12) (Solid Waste Management Board); § 23-1-1(e) (Commissioner of the Bureau of Employment Programs); § 24-1-8 (Public Service Commission); § 33-2-3(b) (Insurance Commissioner).