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COOPERATIVE FEDERALISM: STATE PERSPECTIVES ON EPA REGULATORY ACTIONS AND THE ROLE OF STATES AS CO-REGULATORS

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

MARCH 9, 2016

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ONE HUNDRED FOURTEENTH CONGRESS
SECOND SESSION

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C O N T E N T S

COOPERATIVE FEDERALISM: STATE PERSPECTIVES ON EPA REGULATORY ACTIONS AND THE ROLE OF STATES AS CO-REGULATORS

WEDNESDAY, MARCH 9, 2016

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 9:34 a.m. in room 406, Dirksen Senate Office Building, Hon. James Inhofe (chairman of the committee) presiding.

Present: Senators Inhofe, Boxer, Capito, Boozman, Wicker, Fischer, Rounds, Sullivan, Carper, Cardin, Whitehouse, Gillibrand, and Markey.

Senator INHOFE. The meeting will come to order.

First of all, I am very happy to have the five witnesses that are here today. We always like to hear from the States, at least some of us do, and I would like to, at this point, have any of our members who want to introduce those from their State. Senator Capito, do you?

Senator CAPITO. Yes. Thank you, Mr. Chairman. I would like to welcome Randy Huffman, who is our Cabinet Secretary, and has been for many years, in West Virginia at the Department of Environmental Protection. Randy was 3 years as the deputy, but he has worked in all variety of areas, including abandoned mine lands program. He is a graduate of West Virginia Tech. We see him, or I see him, around town all the time, so welcome, Randy. Thank you for your testimony and for your service to our State and to our Nation.

Senator INHOFE. And Senator Rounds.

Senator ROUNDS. Thank you, Mr. Chairman. Yes, I would.

First, I would also like to thank all of our witnesses for coming here today to testify in front of this Committee on State perspectives. I would particularly like to welcome to our Committee today the Secretary of the South Dakota Department of Environment and Natural Resources, or, as we used to call them, Dirt and Water. Secretary Pirner has served as the DENR Secretary for three South Dakota Governors, but he has also been in various positions at DENR since 1979. Secretary Pirner has more than three decades of experience with EPA regulations and is truly an expert in the field.

Secretary Pirner has an impressive breadth of experience in every type of environmental regulation. He has extensive experi-

ence in EPA rules regulating water, air, and toxic substances. Secretary Pirner leads an agency with approximately 180 full-time employees, and this small group of employees is responsible for administering nearly all of the Federal environmental laws from the EPA such as Clean Water Act, Clean Air Act, and Safe Drinking Water Act. They are also responsible for administering various State environmental laws in the State with over 77,000 square miles of land.

Secretary Pirner knows all too well the demands of a small State agency with limited budgets that they face while attempting to administer the increasing multitude of EPA regulations forced upon the States. Every day he is confronted with the challenge of managing his agency's resources in a way that will allow them to fulfill all of their State and Federal duties as the environmental regulatory agency in South Dakota.

It should also be noted that over 30 percent of DENR's operating budget is relied upon Federal funds. Every day Secretary Pirner's goal is to make sure that South Dakotans enjoy the cleanest air and water possible. In South Dakota, our environmental record is a source of pride for all of us.

I can tell you that during the time that I worked as Governor in South Dakota for 8 years, Steve was the secretary of this department. He comes with a wealth of knowledge and an interest in seeing that things get done and get done correctly, and I am very, very happy that he has been able to make the trek out here for this very special meeting. Thank you.

Senator INHOFE. It is very nice to have you here.

Senator Carper, did you want to introduce?

Senator CARPER. Before I introduce Ali, I just want to say to Randy welcome. I was born in Beckley and spent a lot of my years growing up as a kid going back and visiting my grandparents and my aunts and uncles and my cousins all over the State. So it is great to have you here. I think you have somebody with you today who is from Beckley. Nice to see you. Welcome. Good to see you.

Ali, you have a name that is going to be most pronounced of any of our witnesses today. Just to make it easy for my folks, it would be easier to call him Ali. But his last name is Mirzakhalili. Nice sound to it. When I was Governor, he has been serving for the people of Delaware for close to 30 years. He has been a key leader in the Department of Natural Resources and Environmental Control. He used to work for the guy sitting right behind me, Christoph Tulou, who is our Secretary of the Department of Natural Resources and Environmental Control. So this is like getting the band back together, and we welcome the opportunity.

Ali is the Director of the Division of Air Quality with the Department of Natural Resources and Environmental Control. He is responsible for implementing all aspects of the Clean Air Act requirements. He has 30 years of experience in all aspects of air quality management, including program and regulatory development, planning, compliance, and enforcement and permitting. He is a professional engineer and holds a B.S. in Engineering from the University of Delaware, an M.S. in Environmental Planning and Management from Johns Hopkins University.

He has been a great servant and friend. Welcome, Ali. We are happy that you are here. Thank you.

Senator INHOFE. Thank you, Senator Carper.

Becky, we are going to hold you until Senator Boozman comes here. I had breakfast with him, a prayer breakfast this morning and I told him I would do that, so we will postpone yours.

Deborah, it is very nice to have you here. We welcome you along with the rest of the witnesses.

Barbara and I will give opening statements, then we will hear from you. Since there are five of you, I would like to have you comply with the same time that we do up here.

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. Today's hearing is critical to our understanding of the success and the lack of success of the environmental groups across the Country. Indeed, in appreciation of our unique system of federalism, Congress and, in particular, this Committee must check in with States to ensure this system is fully functioning when it comes to actions initiated by the United States Environmental Protection Agency, the EPA. For this reason, I want to thank our State regulators for being here today to share your feedback on whether the current regulatory framework between States and the EPA is working in upholding the principles of cooperative federalism.

Cooperative federalism is a core principle of environmental statutes, including the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, RCRA, and several others. Unfortunately, under the Obama administration we have observed a flood of new regulations breaking down this system in what seems to be uncooperative federalism. The Obama EPA has embarked on an unprecedented regulatory agenda that simply runs over States by imposing an increasing number of Federal regulatory actions on States while requesting even less funds to help States carry out these actions. As some State regulators have explained, EPA is requiring them to do more with less.

Many of these actions are driven from the EPA headquarters to fulfill a political agenda that often results in years of litigation and inefficiencies that cost citizens more taxpayer dollars and reap little to no environmental benefits.

Today we have a diverse panel of witnesses from States across the Country working with different EPA regions and experiencing unique environmental issues who will expand on this breakdown. While State feedback varies, there are several troubling themes that have consistently emerged. EPA has neglected the responsibility to consult with States at the beginning stages of regulatory actions; the EPA gives States little time to digest complex regulations and provide meaningful analysis during short comment periods; EPA has allowed environmental activists to set regulatory deadlines imposed on States through sue-and-settle agreements without State input; EPA has increasingly used regulatory guidance to circumvent the regulatory process; EPA has a severe backlog of approving State implementation plans, yet has issued an unprecedented number of Federal implementation plans over State

air programs; EPA budget requests have called for decreased levels of State funding while requesting increased funds for EPA bureaucrats; and EPA is deviating from its core functions and duty to uphold cooperative federalism as we have defined it.

These concerns are not limited to our witnesses today. Last month I sent letters to all Committee members' State environmental agencies asking for feedback on EPA actions and the level of cooperative federalism. I appreciate the many responses I got to this Committee and, without objection, will make them part of the record.

[The referenced information follows:]

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DIRECTOR

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February 8, 2016

The Honorable James M. Inhofe, Chairman
Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, DC 20510-6175

Dear Chairman Inhofe:

As Director of the Alabama Department of Environmental Management (ADEM), I am honored to respond on behalf of the State of Alabama to your request to submit information on the onerous burden placed upon the States by the unprecedented volume of Federal regulation promulgated by EPA under the current Administration. As expressed in your letter and contrary to the established principles of cooperative federalism, this deluge of unfunded mandates has been imposed upon the States with precious little State input and has come at a time when all States, and particularly Alabama, are struggling with reduced budgets and diminished workforces. The following detailed example is one of many that could be provided.

I draw your Committee's attention to the NPDES Electronic Reporting Rule (80 FR 64064) promulgated by EPA on October 22, 2015. This rule affects both NPDES regulated entities and their oversight by NPDES regulatory authorities (i.e. states, tribes, territories, and, in some cases, EPA). The eReporting Rule is 132 pages long and is one of an estimated 3,281 new rules proposed/implemented by EPA since 2008. EPA developed the proposed rule with little input from the states impacted by the rule.

In addition to requiring NPDES regulated entities to convert their current method of submittal for various reports and notifications from paper to electronic, this rule also requires that state NPDES program data elements in the areas of permitting, compliance, and enforcement (beyond simply the reports and notifications) must also now be electronically submitted to EPA. The rule has the noble purpose of ensuring that accurate, complete, and consistent data is submitted by NPDES regulatory authorities to EPA's national database (ICIS-NPDES). There is no dispute that this is a goal worth pursuing. However, significant resources must be expended by the states and regulated entities to comply with the mandate on a compressed schedule with no additional funding being provided by EPA.

This rule places numerous resource burdens on ADEM. To remain the primary recipient of the reports and notifications covered under this rule, ADEM must modify its existing data systems (1) to be able to receive the electronic reports and notifications from NPDES regulated entities as prescribed in the rule and (2) to be able to submit the data to EPA's database. Despite being a leader among all the states in electronic applications, this will require significant additional investment by ADEM. The alternative to making these modifications would be to instruct our regulated universe to submit their required reports directly to EPA, bypassing the state regulator entirely. EPA has, therefore, forced upon the States the dilemma of either compromising its primacy in implementing the NPDES program to comply with the rule or allocating a significant portion of its scarce resources to satisfy yet another unfunded federal mandate.

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Not only must the methodology of submitting data to EPA be changed, the rule also increases the amount of data ADEM must electronically submit to EPA in the areas of permitting, compliance, and enforcement. As a result, ADEM must expend significant additional resources to modify our systems to accommodate the additional data elements. Significant personnel resources must also be expended to start up compliance with the new requirement in the rule to populate all permit-related data elements for all currently outstanding facility-specific individual permits. Since tailored facility-specific individual permit applications must continue to be submitted in paper form due to their variability, the population of these data elements from paper to electronic format will be a continuous personnel resource burden.

Finally, the rule establishes an unrealistically short timeframe for accomplishing Phase I of the rule. In Phase I, EPA only allows one year from the effective date of the rule for ADEM to have a system ready for receipt of Discharge Monitoring Reports (DMRs) and to register all NPDES regulated entities for participation in the system. Unlike many states, ADEM fortunately already has an electronic DMR system in place, but we are still working toward increasing our participation rates. In addition, Phase I's schedule only allows nine months for ADEM to modify its data system to accommodate the new permit-related data elements, to populate all permit-related data elements for all current individual permits, and to begin electronically submitting the data to EPA. Phase I's schedule also only allows one year from the effective date of the rule for ADEM to modify its data system to accommodate the new compliance and enforcement data elements and to begin electronically submitting the data to EPA. These are three independent deadlines for which EPA gave no consideration for the limited existing resources that NPDES regulatory authorities have available.

Similar accounts of unreasonable burdens placed on states by EPA could be provided in the areas of Clean Power Plan (CPP), the SIP call on Start-up, Shutdown and Malfunction, the SO_2 settlement, and Coal Combustion Residual (CCR) to name just a few. EPA with its 15,000 employees is asking the 50 states, each with a mere fraction of its employees (in Alabama's case $1/25^{th}$), to not only study and understand the hundreds of thousands of pages of rules but to actually implement them without any additional funding.

In the absence of direct funding from EPA, ADEM must divert scarce resources from the implementation of the core environmental programs in order to bear the burdens of these and other unfunded federal mandates. The imposition of such burdens by the clearly dominant regulatory partner belies all principles of cooperative federalism and fundamentally calls into question the viability of this process.

In closing, I thank the Committee for the opportunity to comment on these matters and stand ready to provide any additional information you may need.

Sincerely,

Lance R. LeFleur
Director

cc: Barbara Boxer, Ranking Member

THE STATE of ALASKA
GOVERNOR BILL WALKER

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February 9, 2016

The Honorable James M. Inhofe
United States Senate
Committee on Environment and Public Works
Washington, DC 20510-6175

Dear Senator Inhofe:

In response to your January 12, 2016 letter, the Alaska Department of Environmental Conservation (ADEC) provides the following information related to state resources and efforts necessary to comply with EPA regulatory actions and whether the current regulatory framework between EPA and the states upholds the principle of cooperative federalism. We appreciate your interest in this issue and Alaska's experience in working as co-regulators with the U.S. Environmental Protection Agency (EPA).

The volume of EPA regulatory actions is challenging for Alaska. ADEC has limited resources to track and comment on EPA regulatory proposals. Often the EPA's rule proposals are developed in a centralized, national manner that are not well-suited to Alaska's unique situation. ADEC staff spend significant time analyzing proposals and providing comments to the EPA, typically raising concerns or requesting flexibility to address specific Alaska circumstances. The EPA in focusing on the national perspective does not always provide the flexibility that a state like Alaska desires and needs to more practically implement environmental requirements.

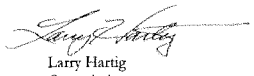
Alaska has been successful at times in gaining some flexibilities that allow the state to implement EPA rules in a manner that better fits our unique circumstances, but this is not generally the case. An example of a success was when the EPA tailored diesel engine rules to address concerns about impacts to rural Alaska fuel distribution and power generation. This success came only as a result of significant state effort over a number of years to raise our unique concerns and provide data to the EPA in support of a more practical and less burdensome approach.

The high number of EPA regulatory actions that must be implemented by states, or adopted into state regulation, can also act to crowd out other state environmental priorities and initiatives that may better address local concerns. As noted in your letter, many federal rules require significant time to implement and this means that ADEC must often divert attention and initiate work well in advance of compliance dates. The sheer volume of EPA rulemakings makes it difficult to proactively initiate actions early on all requirements; ADEC must prioritize its efforts and may ultimately not be able to meet all the new requirements in a timely manner.

ADEC notes that the principle of cooperative federalism recognizes the shared authorities between states and federal agencies. ADEC has taken primacy for a number of federal environmental programs, including wastewater permitting and air quality planning and permitting. The implementation of these programs at the state and our partnership with the EPA in implementing environmental laws requires continual interaction and open communications. In recent years, the EPA's focus on litigation response has driven their efforts toward policies and priorities that may or may not produce the most important environmental benefits. States are then put under pressure from the EPA to also take steps to advance those priorities within their programs sometimes at the expense of other higher priority efforts.

ADEC has enclosed a list of examples of some recent EPA regulatory actions that impact Alaska's water and air quality programs. There are times when the EPA does appear to engage the states in the spirit of cooperative federalism, but the process surrounding many of these actions speaks to the need for continued improvement to allow for better upfront collaboration between the EPA and the states. Even if the EPA provides ample opportunity for input on regulatory actions and guidance, a state with unique issues, like Alaska, can find that its concerns are overwhelmed by a broader national perspective. In addition, better alignment and clarity on the respective roles of the EPA and the ADEC in implementing environmental programs could be helpful in ensuring the efficient and effective use of limited state and federal resources.

Sincerely,



Larry Hartig
Commissioner

Enclosure

cc: Nathan Butzlaff, Office of the Governor, Washington DC

February 9, 2016

ENCLOSURE

Alaska Department of Environmental Conservation
Observations on the Cooperative Federalism Framework
and the
Impacts of EPA Rules on State Resources

The Alaska Department of Environmental Conservation (ADEC) provides the following specific examples depicting impacts of EPA rulemakings on state resources and providing observations on the implementation of cooperative federalism between the EPA and ADEC.

The following rulemakings highlight some water program actions where the EPA has not fully engaged with the state as a partner or addressed significant state concerns prior to rule finalization. In these cases, there are also resource implications to the state in implementing the final rules.

- Clean Water Act (CWA) Electronic Reporting Rule: In September 2015, the EPA mandated new data submittal requirements with tight implementation schedules and no additional resources to states to assist with compliance. Alaska provided comments about the challenges of remote, rural internet access, difficulties in retaining qualified operators, and the costs of new technology management and maintenance. These issues were not addressed in the EPA's final action.
- Water Quality Standards Rule: In August 2015, the EPA finalized a rule updating the national water quality standards. The EPA developed the initial rule without the benefit of state dialogue and then scheduled state workgroup meetings after the comment period that only resulted in minor changes to address state concerns.
- Waters of the U.S. (Clean Water) Rule: The EPA finalized the Clean Water Rule in June 2015, which is currently under litigation by a number of states including Alaska. The EPA hosted calls with states on the rule proposal under the auspices of cooperative federalism, but they did not engage in meaningful dialogue. Alaska commented on the rule and identified specific, unique conditions for the EPA to consider, such as permafrost conditions, but the EPA did not address Alaska's concerns in the final rule.
- Alaska Seafood Effluent Limitation Guidelines (ELG): The EPA published a notice of data availability and possible revisions to the ELG without any upfront discussion with the state. While the ELG only applies to Alaska, the state was relegated to participating through the formal public notices process; the EPA has never engaged with ADEC regarding the evaluation and decision making process to modify the ELG.

Despite the above examples, there are times when the EPA does appear to engage the state's water program in the spirit of cooperative federalism. In 2014, at the request of states and others, the EPA convened a Federal Advisory Committee Act subcommittee to study which waters and wetlands a state will have authority over if they assume the CWA Section 404 Program from the U.S. Army Corps of Engineers. Alaska is participating on this subcommittee and a meaningful dialogue is underway.

With respect to EPA rules that impact air quality, the EPA has recently engaged in dialogue with ADEC on some critical rulemakings and actions. The examples below reflect, to some extent, the challenges the agencies share in the co-regulation of air quality. They also identify recent efforts on air quality rulemaking and implementation that have resulted in the State spending considerable resources to engage in a shared dialogue and to provide sufficient documentation to satisfy the EPA in allowing for Alaska's specific concerns to be addressed:

- Clean Power Plan Rule: The State of Alaska expended significant resources from multiple agencies over many months to provide comments and data to the EPA on the Clean Power Plan proposal. In our comments, we requested that Alaska be exempted from the Clean Power Plan because of our unique circumstances. The EPA did not include Alaska in the final rule released in August 2015 and indicated that it had delayed action to gather additional information on Alaska's power system. While the EPA appears to have heard the State's concerns, significant concerns remain about the resources and potential impacts of any future efforts associated with the EPA's regulation of greenhouse gas emissions from the power sector in Alaska.
- Fine Particulate Matter (PM2.5) Planning: The State of Alaska has a PM2.5 air quality problem area within the Fairbanks North Star Borough. The EPA and ADEC have worked collaboratively with the local government to develop a Clean Air Act state implementation plan to address the pollution issue, which is primarily a result of wintertime wood smoke from home heating sources. EPA's PM2.5 planning regulations and guidance require the State to conduct numerous technical and policy-related analyses. The EPA guidance on PM2.5 had been developed in the context of large urban area PM2.5 pollution that occurs year round. As a result, ADEC has found that some of the requirements add little value to addressing specific pollution concerns. This includes some required technical analyses as well as the analyses of best available controls for sources having little direct impact on PM2.5 levels in this community.

  In addition, the EPA's interpretation and revision of PM2.5 air monitoring rules in recent years has resulted in a difficult situation within this nonattainment area. The PM2.5 air monitoring rules have made it more challenging for ADEC to characterize the extent of air pollution; the use of special purpose monitoring is leading to requirements for additional formal, long term compliance monitors that then stress state and local resources. This also impacts ADEC and local government as more resources are expended to alleviate more onerous planning requirements. In this case, disagreement over the representativeness and classification of a special purpose monitor led the state to take a number of additional actions, including a request to split the nonattainment area. As the EPA rules and Clean Air Act requirements escalate and force more planning and onerous control actions, the state and local government want the flexibility to address the different levels of pollution in this community (as monitored) in a manner that focuses on fair and appropriate controls rather than most stringent controls on all pollution sources throughout the broader area.

ADEQ
ARKANSAS
Department of Environmental Quality

March 3, 2016

The Honorable James M. Inhofe, Chairman
410 Dirksen Senate Office Building
Committee on Environment and Public Works
Washington, DC 20510-6175

Dear Chairman Inhofe:

As the Director of the Arkansas Department of Environmental Quality, I appreciated the opportunity to respond to your call from the several states for a local perspective on our relationship and level of cooperation with the United States Department of Environmental Protection Agency. As I prepared my remarks on behalf of the independent sovereign that I respect, the great state of Arkansas, I thought it only fair to begin with the constitutional and regulatory structure that defines Arkansas's relationship with the EPA, the notion of cooperative federalism. This notion is born of something uniquely American, our system of federalism whereby the nation and States function together as co-sovereigns.

In Arkansas at least, for decades, the relationship worked well. When it came to federal regulation, whether it be the Clean Air Act or the Clean Water Act, we would propose and the EPA would dispose. And, we learned the hard (and expensive) way; if you want local control, it will cost you. And it did. States to this day shoulder almost ninety percent of the cost of implementation. However, the "sticker shock" to the States was mitigated by the healthy respect and accompanying deference we received from our federal regulatory partner. And, if there was ever a question of the relative standing of our partnership, one could solve the tie by simply pointing to the findings statement contained in the Clean Air Act at 42 USC §7401 (a)(3)

> The Congress finds . . . that air pollution prevention (that is the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source **is the primary responsibility of States and local governments.**

However the cooperative-federalism model that has defined Arkansas's relation with the EPA beginning in the 1970s has morphed into something that can be better described as coercive federalism. We have seen a decrease in time and tolerance for State Implementation Programs (SIPs) and a dramatic increase in EPA takeovers, or Federal Implementation Programs (FIPs). Historically FIPs were used as the weapon of last resort for our EPA partner, its nuclear option for States that were unfaithful to the partnership or denied the marriage outright. However, under the prevailing paradigm, FIPs are used as an everyday tool (often of dubious origin) in the EPA's vast arsenal. To give perspective on this shift, it is worth noting that in the past seven years the States have experienced more of these federal hostile takeovers, known as FIPs, than were delivered in the **prior three federal administrations combined, ten times over.**

The great majority of the FIPs were a result of the recent interpretation of the EPA's "Good Neighbor" provisions. As States, we try and be good neighbors; but when we are told to comply with targets that are

either undisclosed or constantly in flux; and the targets may or may not correspond with any measurable environmental impact; and the mandates come at a great cost to the tax and rate payers of Arkansas, we are ready for new neighbors or a new neighborhood.

For example, in relation to the Clean Water Act, we are left to navigate federal interpretation of Arkansas's water-quality criteria. This system of water-quality protection was designed to establish natural water-quality conditions for **extremely pure** water streams under a robust monitoring protection. However, under recent federal interpretation, these once state-developed, extraordinarily heightened criteria have now become unrealistic and often unachievable minimum water-protection standards. The EPA executed the ultimate bait and switch.

It is my conclusion that not only has the uniquely American cooperative-federalism model fallen to a more totalitarian, coercive federalism scheme, the State role is now **less partner and more pawn.** And, as we are more and more frequently asked to navigate the increasingly litigious "green" lobby fighting on the EPA's "sue and settle" battlefield, we States are left to wonder who currently occupies the seat at the table that was once reserved for us.

I look forward to addressing your committee next week and appreciate the opportunity to offer input from a state-regulator's perspective. Hopefully, we States have a new partner on the horizon. Specifically in Arkansas, we anxiously await the day where we no longer have to expend thirty percent of our agency resources for air-quality programs in a state that **achieves all** national air-quality standards.

With highest regard,

Becky W. Keogh

Becky W. Keogh
Director

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February 9, 2016

The Honorable James M. Inhofe
Chairman, Senate Committee on Environment and Public Works
United States Senate
205 Russell Senate Office Building
Washington, DC 20510-3603

Dear Senator Inhofe:

Thank you for your letter of January 12, 2016, requesting California's perspective on the federal Environmental Protection Agency's (U.S. EPA or Agency) regulatory framework. Through the collaborative relationship the State has developed with U.S. EPA over the last 50 years we have been able to work together with the Agency to implement a host of laws that have successfully protected public health and the environment. These laws have also provided economic benefits to individuals, communities and businesses that rely on a clean environment, healthy workers or more efficient and less wasteful industrial processes. Based on this long and positive association, the California Environmental Protection Agency (CalEPA) provides this reply to inform the Committee on Environment and Public Works' oversight of these essential programs and safeguards.

Federal laws charge the U.S. EPA with implementing and working with states to effectuate important protections for the air we breathe; the water we drink; the rivers and lakes enjoyed and used by our families, fishermen and farmers; and the land that sustains our way of life. These federal laws provide an essential floor of minimum protections and allow states to craft greater levels of protection for their people and natural resources by adopting stronger standards and programs that suit each state's unique circumstances. This cooperative federalism model protects states' rights while also safeguarding public health and welfare and environmental quality.

The federal Clean Air Act is one such landmark environmental law. When enacting this statute, Congress recognized the real dangers caused by air pollution, and it created this law to protect and enhance our national air resources by preventing and controlling such pollution. This law has been an overwhelming success; according to the U.S. EPA, between 1970 and 2014, levels of six common air pollutants decreased by an average of 69 percent while national gross domestic product grew by 238 percent.

This federal law mirrors California's experience. California has a long history of adopting legislation that helped to usher in or build upon the federal Clean Air Act's safeguards. In 1967, then Governor Ronald Reagan signed into law the Mulford-Carrell Air Resources Act, which created the California Air Resources Board; two years later the Board adopted standards for

common types of air pollution. Subsequently, Congress enacted the federal Clean Air Act amendments of 1970, and U.S. EPA adopted national standards for common air pollutants. In 1988, our state adopted the California Clean Air Act, which provided a framework for the federal Clean Air Act amendments adopted in 1990.

In the years ahead, we hope to continue this close collaborative working relationship. For example, California is looking to U.S. EPA to deliver a strong rule for reducing greenhouse gas emissions from the heavy duty vehicle sector. This rule would build on the success of California's original tractor and trailer regulation and the subsequent federal rule that reduced pollution. These requirements had the additional benefit of saving truck users fuel and money by increasing vehicle efficiency. The State has agreed to collaborate with U.S. EPA on the technical and scientific underpinnings of the new rule because it will be an important element of our climate change protection efforts to cut petroleum use in cars and trucks in half by 2030. In addition, a strong rule can lead the way for additional U.S. EPA action on more stringent air pollution (i.e. NOx) controls for vehicles in the heavy duty sector. This will be a significant issue as California works to protect public health by attaining the national ambient air quality standards for ozone and particulate matter.

Similarly, California is supportive of U.S. EPA's greenhouse gas emission standards for power plants, the Clean Power Plan. Reducing greenhouse gases from the electricity sector is vitally important to protecting public health and welfare and is of particular importance to California, where climate change is worsening serious risks from sea level rise, drought, and wildfires. U.S. EPA developed the Clean Power Plan through open communication with state regulators, and included a wide range of state plan options in the final rule that will allow for successful state implementation. In particular, U.S. EPA, in response to comments from the states, expanded the range of state measures that can be used for compliance and allowed further flexibility for plan deadlines and compliance. Since publication of the final rule, U.S. EPA has continued to actively provide states technical support, including providing model plans for review. This collaborative structure builds on the states' decades-long partnership with U.S. EPA to reduce criteria and toxic air pollutants through state planning; indeed, the greenhouse gas reductions promoted by the Clean Power Plan will also help states meet other important federal health standards by encouraging the use of less polluting energy resources generally. Further, this planning effort will provide additional support for California's ongoing programs to reduce the sources of greenhouse gas emissions in the state that contribute to climate change.

In addition, although our current air control programs will reduce smog-forming pollution, such as NOx emissions, in 2030 by over 50 percent from today's levels, sources primarily regulated by the federal government, including locomotives, aircraft and ocean going vessels, represent an ever increasingly portion of emissions in California. We have made substantial progress over the last decade, but the remaining localized risks of cancer and other adverse effects near major freight hubs, such as ports and railyards, are not acceptable and must be significantly reduced. New health science tells us that infants and children are one and a half to three times more sensitive to the harmful effects of exposure to air toxics, like those emitted from freight equipment, than we previously understood; this heightens the need for further risk reduction. Although we have established a number of state requirements, including requirements for cleaner fuels, federal action is needed to meet our health-based air quality standards, to reduce exposure to air toxics and to meet our climate change goals. We look forward to continuing to work collaboratively with U.S. EPA on these issues and encourage Congress to provide the Agency with the resources needed to develop and implement these programs.

Congress has also acted to protect our nation's water resources. When faced with rivers that caught on fire, that could not support fish and wildlife and that presented a threat for recreational uses, Congress used California's Porter-Cologne Water Quality Control Act as a model to create the federal Clean Water Act to protect and restore the rivers, lakes and other waterbodies under federal jurisdiction. California now implements state programs that meet the requirements of the Clean Water Act and provide greater levels of protection. Further, Congress approved the Safe Drinking Water Act to protect the quality of drinking water across the nation. California enacted its own, corresponding version of the act, and enforces drinking water standards that are at least as stringent as federal law.

In the period since Congress and California adopted this much-needed legislation to protect water resources, California's State Water Resources Control Board (Water Board) has worked closely with U.S. EPA Region 9 to oversee implementation of the federal Clean Water Act and the federal Safe Drinking Water Act. They have also collaborated on efforts to implement RCRA's requirements for the safe operation and closure of underground storage tanks. As has been the case with the California Air Resources Board in the area of air quality, the Water Board's experience has been that U.S. EPA Region 9 embraces the spirit of cooperative federalism enshrined in these acts. U.S. EPA coordinates and ensures a national framework, including regulatory minimums, to implement the acts, while providing sufficient latitude for California to develop its own programs to protect the state's vital water resources.

Similar to its active role in reducing air and water pollution, following the tragic incidents in the communities of Love Canal, New York, Times Beach, Missouri, and the Stringfellow Acid Pits in California, the federal government recognized the dangers posed by the mishandling and irresponsible disposal of hazardous waste. To respond to this problem, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund) to help federal and state officials clean up heavily-contaminated sites, and the Resource Conservation and Recovery Act (RCRA) to create a national, cradle-to-grave system for the management of hazardous waste. As was the case with the clean air laws, California also has enacted state-based laws that implement RCRA and mirror Superfund's liability and clean up provisions, but that provide even stronger levels of protection than federal law.

Finally, California's Department of Toxic Substances Control (DTSC) and U.S. EPA have also worked very collaboratively to address threats posed by toxic chemicals in products that people use on a daily basis. For example, DTSC has had an active Memorandum of Understanding with U.S. EPA on Green Chemistry since 2012. The MOU's purpose is to enable collaboration between EPA and DTSC to advance common green chemistry goals through technical support, data exchange, and mutual communication and engagement.

Support and cooperation from U.S. EPA has also made it possible for the State to accelerate implementation of California's Safer Consumer Products regulations. These regulations provide a level of protection to Californians not afforded under the current Toxic Substances Control Act by addressing toxic chemicals in consumer products. U.S. EPA's Office of Chemical Safety and Pollution Prevention and the Office of Research and Development have provided regulatory and scientific expertise and tools which have effectively expanded our capacity to research chemical hazards, consider exposures to chemicals, and analyze products containing such chemicals, all of which are critical elements of our decision making process.

The cooperative relationship between the State and U.S. EPA exhibited in the implementation of all these programs has made the California public safer, while improving the quality of our air

and water, and protecting the national resources that support California's economy. One area where Congress could be of tremendous assistance to the State is in restoring and expanding funds that flow to the states and to U.S. EPA to implement these essential public health and environmental protections. Congress passed these laws with provisions for the federal government to assist states technically and financially in carrying out these federal programs. Unfortunately, this assistance, especially the necessary federal funds, has remained stagnant or decreased in real terms over time. This lack of resources can make it difficult to consistently provide the needed level of attention when implementing these important safeguards.

Thank you again for the opportunity to comment on this critical issue. Principles of cooperative federalism require a strong working relationship between the states and federal government. Through the years California and U.S. EPA have come to recognize that we share many common interests and objectives, and our experience shows that effective, collaborative implementation of federal laws will produce demonstrable improvements in the environment, the economy and in the protection of public health and safety.

Please let us know if you have any questions about our comments or related matters.

Sincerely,

Matthew Rodriquez
Secretary for Environmental Protection

cc: The Honorable Barbara Boxer
Ranking Member
Senate Committee on Environment and Public Works
United States Senate

The Honorable Dianne Feinstein
United States Senate

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February 9, 2016

James M Inhofe, Chairman
Committee on Environment and Public Works
410 Dirksen Senate Office Bldg.
Washington, DC 20510-6175

Dear Chairman Inhofe,

Thank you for your January 12, 2016 letter offering an opportunity to share my perspective on the Environmental Protection Agency's (EPA) current regulatory framework. This letter attempts to summarize a state view of the respective roles of EPA, states and Congress and provide a better understanding of the resources and efforts we believe are necessary to comply with the actions EPA is taking to protect the environment and public health and comply with various environmental statutes such as the Clean Air Act (CAA) and the Safe Drinking Water Act (SDWA). The scope of our state responsibilities is numerous and the CAA and SDWA programs illustrate points that can be extended to many other programs, such as the National Pollution Discharge Elimination System under the Clean Water Act and the Resource Conservation and Recovery Act that are jointly implemented by the states and the EPA.

EPA's role in developing regulatory approaches that allow states to adopt equally protective but specific measures to implement these important programs is appropriate and necessary given its capacity, resources and national and regional perspectives. EPA is able to utilize the science available to it to inform these decisions and the development of associated standards, as Congress intended in its construction of the CAA. Congress has the responsibility to adequately provide funding to EPA and the states to assist in meeting these standards.

While the Clean Air Act authorizes the federal government to provide grants for up to 60 percent of the cost of state and local air programs and calls for states and localities to provide a 40-percent match, Delaware and a number of other states provide over three-fourths of their budgets (not including permit fees under the federal Title V program). Compounding matters, the purchasing power of federal grants has decreased by nearly 16 percent over the past 14 years due to inflation, during which time state and local responsibilities have expanded significantly.

Despite these challenges, Delaware has been able to manage its air quality in accordance with all EPA rules and CAA requirements. We have been successful by focusing time and resources necessary to ensure all emitting sources in the state are reasonably and appropriately controlled. Conversely, if emitting sources in a state are not controlled, these requirements can seem burdensome and difficult to meet, regardless of available resources.

Your letter references a report by the Association of Air Pollution Control Agencies that indicates states are facing nine regulatory deadlines under the Clean Air Act in 2016. I believe Delaware's practice of ensuring all emitting sources are appropriately controlled is key to our being able to manage this workload in light of insufficient funding.

- Five of the actions listed are related to important health based air quality standards. As part of Delaware's efforts to attain and maintain compliance with earlier particulate and ozone standards and the regional haze program, Delaware took measures to ensure all of its large emitting sources are controlled. Because of this prior work Delaware attained compliance with the 2012 PM2.5 standard, and is subject only to the first of these three SO2 requirements. Because of the work EPA did in removing lead from gasoline Delaware is in attainment for the lead NAAQS. By ensuring all Delaware sources were appropriately controlled, and remain so, these actions do not represent significant workload for Delaware in 2016.

- One of the actions is related to the control of CO2 emissions which are endangering public health and welfare (i.e., the September 2016 Clean Power Plan submittal). In 2008 Delaware and eight other states took action to reduce CO2 emissions from power plants through the Regional Greenhouse Gas Initiative (RGGI). Delaware will expend significant resources on the Clean Power Plan in 2016, but because of prior efforts under RGGI Delaware believes it is well positioned to complete this work in 2016. Even so, EPA has given the states consideration and has built into the process a two year extension should additional time be needed.

- Two of these listed actions are related to the ozone standard. All Delaware sources relative to ozone are well controlled, yet Delaware continues to experience poor air quality and impacts from ozone on public health and our economy. Delaware's emission control efforts to reduce ozone precursor emissions have resulted in a situation where greater than 90 percent of the ozone concentrations negatively affecting Delaware is attributable to emissions transported to Delaware from upwind areas. These emissions were required under the CAA to be mitigated by upwind states more than five years ago, yet they have not been. In some cases the problem is that upwind emitting sources have not been controlled. In others, appropriate emissions controls have been installed on units but are not being operated. Any action the committee can take to encourage upwind states to comply with the CAA, and to increase EPA resources to enable the agency to do this, would greatly help Delaware.

- Finally, the last listed action is the November 2016 SSM SIP Call. We believe EPA's action was based on third party petitions which relied on incomplete reviews and suggest that the number of third party interventions could be reduced if EPA were given sufficient resources to conduct reviews of state programs.

Under the Safe Drinking Water Act (SDWA), 49 of the 50 states are delegated the responsibility of implementing and enforcing the drinking water regulations and all of the associated requirements. In Delaware, that responsibility falls to the Department of Health and Social Services. For a full appreciation, one needs to understand the full magnitude of the task undertaken by states -- it's more than simply a matter of the impacts of EPA's current or future regulatory actions. And, we believe the remedies include actions that both EPA and Congress need to take.

States implement drinking water rules covering over 90 chemical, biological, and radiological contaminants. Those rules are becoming increasingly complex to implement – especially those promulgated in the past decade. Instead of simple "in or out of" compliance determinations based on a single value, recently promulgated rules contain a host of elements that need to be evaluated. While the pace of new EPA drinking water rulemaking has slowed in recent years there are a number of recently promulgated rulemakings that states (and water systems) are challenged with meeting as well as one major new rule that will become effective in the near future. The revised Total Coliform Rule – affecting all public water systems, will become effective in April 2016.

States spend much of their time providing technical assistance and training to ensure that water systems have the technical, financial, and managerial capacity to implement drinking water rules. The vast majority of the nation's 160,000+ public water systems are small (serving less than 10,000 people) and require a good deal of state oversight and assistance in order to comply with drinking water regulations.

To its credit, EPA's Office of Ground Water and Drinking Water has generally provided opportunities for early involvement of states in regulatory development actions. EPA and states need to continue to work together in this manner to help ensure that drinking water rules continue to be relevant and reasonable. States also support the provision, under SDWA Section 1412(b)(9), for reviewing all drinking water rules every six years and making revisions, if appropriate.

The Association of State Drinking Water Administrators (ASDWA) recently estimated a yearly shortfall of at least $240 million between the resources available in states (from all sources – both federal and state) and those needed by states to administer minimum required programs. And, for more robust, comprehensive programs, the gap is even larger -- $308 million; this represents a 41% shortfall. State drinking water programs have received roughly $100 million yearly (or, on average, $2 million per state) through the principal federal grant (called the Public Water Supply Supervision [PWSS] grant) to implement this program. In fact, in FY 16, states received less in this grant than they did over a decade ago. When one considers the eroding effects of inflation and the increasing complexity of the program, the funding shortfall is only exacerbated. The other major source of federal funding available to states are "set-asides" from the Drinking Water State Revolving Loan Fund (DWSRF). States can take up to 31% of these funds each year to undertake a variety of activities to assist public water systems. However, more funds set aside from the DWSRF to enable states to address critical public health issues means less funds available for much needed drinking water infrastructure.

We would respectfully suggest that Congress needs to do more to meet its obligations under the CAA and SDWA by adequately funding state implementation efforts. First, we believe Congress needs to more adequately fund the PWSS grant for states. At least $200 million yearly is needed. Second, we believe the DWSRF needs to be more fully funded. In FY 15, Congress appropriated $907 million. That level was cut, in the FY 16 appropriation, by $44 million. The President's budget request for state and local air agency grants under Sections 103 and 105 was $268.2 million, but was cut by $40 million in the FY 2016 appropriation.

This nation has made incredible progress in cleaning up our air and water resources. More work lies ahead and in order to continue to meet these challenges EPA and the states need adequate resources. We urge Congress to provide the necessary funding to meet our respective obligations under the law to protect the public health and the environment.

Thank you for this opportunity to provide you with my perspective.

Sincerely,

David S. Small
Secretary

cc: Barbara Boxer, Ranking Member

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DEPARTMENT OF
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C.L. "Butch" Otter, Governor
John H. Tippets, Director

February 11, 2016

The Honorable James Inhofe
United States Senate
Senate Committee on Environment and Public Works
415 Hart Senate Office Building
Washington, DC 20510-6175

Re: State Implementation of US Environmental Protection Agency Regulatory Programs

Dear Senator Inhofe:

Thank you for the opportunity to provide feedback regarding state resources and efforts necessary to comply with recent US Environmental Protection Agency (EPA) regulatory actions. As you are aware, the Idaho Department of Environmental Quality (DEQ) implements a vast assortment of environmental programs and regulations in our state in lieu of EPA to include monitoring, permitting, and enforcement obligations. In general, this arrangement has worked well and DEQ has good working relationships with our EPA partners. Overall, however, we have found that federal requirements continue to increase while federal funding has largely remained stagnant or in many cases has decreased. This trend is burdensome for our department, jeopardizes state primacy in many areas, and hampers our commitment to quality public service for Idaho citizens.

Several examples in Idaho highlight EPA's tendency to pass down regulations which require ongoing state resources. DEQ's Underground Storage Tank (UST) program, for instance, carries out federal UST program regulations found at 40 CFR Part 280 and was initially funded by federal grants with a mandatory 25 percent state match. Federal funding has been appreciably declining over the years, however. In state fiscal year (July through June) 2013, DEQ's UST program received a 20 percent cut in federal funding, followed by another 20 percent cut in state fiscal year 2015, and an additional 11 percent cut in state fiscal year 2016. Idaho's UST program funding is now at an all-time low. Meanwhile, UST related work has increased, particularly since federal UST program regulations were updated and finalized by EPA in October 2015. These new regulations significantly expanded the scope of the UST program but were not accompanied by additional federal dollars. At current funding levels DEQ can no longer maintain a viable program and has had to request that the Idaho Legislature assist in identifying supplemental funding sources to more sustainably support Idaho's UST program.

As another example, DEQ administers federal and state funds for grants and low-interest loans for infrastructure improvements or expansions in Idaho from the State Revolving Fund (SRF). Increasing SRF requirements from EPA, however, have greatly impacted DEQ as well as funding recipients. Most notably, reporting and compliance requirements associated with SRF grant awards have drastically increased

administrative costs. Such increases correspondingly decrease the scope of projects funded as well as the amount of funding available for future SRF grant awards. Between 2007 and 2015, administrative expenses rose 29 percent for drinking water SRF awards and more than 100 percent for wastewater SRF awards. For each SRF award granted, DEQ is required to complete complex reporting to four separate federal databases, assist and comply with multiple audits, and complete financial statements without standardized accounting guidance. In addition, EPA's Water Resource Recovery and Development Act of 2014 necessitated both rule and procedural changes for DEQ and brought new administrative burdens. To assist with these increased requirements for both DEQ staff and funding recipients, DEQ has not received any additional federal funding.

Similarly, with respect to our air quality program, each new National Ambient Air Quality Standard (NAAQS) brings new requirements but no additional resources. EPA strengthened the $PM_{2.5}$ annual NAAQS in 2012 and the Ozone NAAQS in 2015. Each time EPA revises a NAAQS, states must submit infrastructure and interstate transport State Implementation Plans (SIPs) which have also become more complex and resource intensive with each new NAAQS. Moreover, recent NAAQS revisions have brought additional areas into non-attainment status, such as the West Silver Valley in northern Idaho which was designated nonattainment for $PM_{2.5}$. Idaho must submit an attainment plan for the West Silver Valley within 18 months of designation—a plan which usually takes three years to complete. While Idaho did apply for and receive an airshed grant to help the West Silver Valley community make changes to reach compliance, the grant does not provide assistance to DEQ to develop the attainment plan and meet Clean Air Act requirements.

In addition to the increased workload resulting from NAAQS revisions, DEQ has undertaken several new and significant air quality initiatives in response to federal activities. For example, DEQ has worked with our state partners to evaluate and respond to EPA's Clean Power Plan or Section 111d of the Clean Air Act. Work is anticipated to continue on this front to meet Idaho's carbon reduction goals as outlined by EPA. Such new and ongoing tasks strain already stretched resources, particularly when federal funding used to support DEQ's air quality program has been reduced each of the last three years while salary, benefit, and other costs in the state have increased. Federal grants have also remained stagnant or declined meaning DEQ will be unable to continue an equivalent level of work without identifying supplemental funding sources.

The examples cited here are a small sample of the broad federal EPA requirements being transmitted to state agencies such as DEQ without associated funding to assist implementation. Our agency has made earnest efforts to maintain and improve the public services we provide to the state of Idaho, but a continuation of EPA's current tendency demanding that states do "more with less" will eventually make this impossible. We have reached a point where the number and extent of requirements being passed down must decrease or federal funding levels must increase.

Thank you again for the opportunity to share a bit of DEQ's perspective on managing compliance with federal environmental regulatory actions taken by EPA. Please contact me at (208) 373-0240 if I can be of further assistance.

Sincerely,

John H. Tippets
Director

Press Releases

Inhofe Seeks Feedback from EPW Member States on EPA Regulatory Programs

Tuesday January 12, 2016

Inhofe Seeks Feedback from EPW Member States on EPA Regulatory Programs

WASHINGTON - U.S. Sen. Jim Inhofe (R-Okla.), chairman of the U.S. Environment and Public Works (EPW) Committee, today sent letters to EPW member states requesting feedback on state implementation of U.S. Environmental Protection Agency (EPA) regulatory programs, including resources dedicated to and management of multiple EPA deadlines.

"The Committee seeks to better understand the impacts of recent EPA regulatory actions on states such as yours and identify ways to ensure the unique interests of states are adequately considered by EPA in its regulatory process," Inhofe said in the letter.

Inhofe continued in the letter, **"Accordingly, the Committee respectfully requests your feedback on the state resources and efforts necessary to comply with EPA regulatory actions, and whether the current regulatory framework between EPA and the states upholds the principle of cooperative federalism."**

Letters were sent to the following on January 12th, 2016:

Oklahoma Department of Environmental Quality

Louisiana Department of Environmental Quality

Wyoming Department of Environmental Quality

West Virginia Department of Environmental Protection

Idaho Department of Environmental Quality

Arkansas Department of Environmental Quality

Alabama Department of Environmental Management

Mississippi Department of Environmental Quality

Nebraska Department of Environmental Quality

South Dakota Department of Environment & Natural Resources

Alaska Department of Environmental Conservation

California Environmental Protection Agency

Maryland Department of Environmental Protection

Delaware Department of Natural Resources and Environmental Control

Vermont Department of Environmental Conservation

Rhode Island Department of Environmental Management

Oregon Department of Environmental Quality

New York State Department of Environmental Conservation

New Jersey Department of Environmental Protection

Massachusetts Department of Environmental Protection

JOHN BEL EDWARDS
GOVERNOR

CHUCK CARR BROWN, PH.D
SECRETARY

State of Louisiana

DEPARTMENT OF ENVIRONMENTAL QUALITY
OFFICE OF THE SECRETARY

February 8, 2016

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
Unites States Senate
Washington, D.C. 20510-6175

RE: EPA's Current Regulatory Framework

Dear Senator Inhofe:

By letter dated January 12, 2016, the U.S. Senate Committee on Environment and Public Works ("Committee") requested Louisiana's perspective on the current EPA regulatory framework. More specifically, the Committee seeks "to better understand the scope of ongoing work and resources dedicated to EPA regulatory actions" and "whether the current regulatory framework between EPA and the states upholds the principle of cooperative federalism."

As you are aware, there are currently a number of EPA actions that demand significant resources of state permitting authorities, such as the Louisiana Department of Environmental Quality (LDEQ). Indeed, your letter recognizes nine regulatory deadlines imposed by eight federal air quality regulations in calendar year 2016 alone.

This correspondence will highlight the specific air quality-related obligations of LDEQ in 2016, the resource commitments or challenges associated with each, and describe a number of topics and issues beyond recently-promulgated federal regulations which significantly contribute to the workload of LDEQ's Air Permits Division.

2016 Obligations

SO_2 Data Requirements Rule [1]

The SO_2 Data Requirements Rule requires LDEQ to demonstrate that "applicable sources" (i.e., those with actual SO_2 emissions of 2000 tons per year or more in calendar year 2014) are compliant with the 1-hour SO_2 NAAQS via ambient air monitoring or modeling. Nearby sources of SO_2 may also have to be addressed. Louisiana has 16 "applicable sources" located in 11 parishes.

For each area containing an applicable source, LDEQ must state by July 1, 2016, whether it will characterize air quality through monitoring or modeling. Where modeling is selected, technical protocols are also due to EPA on July 1, 2016, and the final analyses must be submitted by January 13, 2017. Note that if monitoring is selected, LDEQ will still have to conduct modeling to determine the appropriate placement of the ambient monitor(s).

[1] Data Requirements Rule for the 2010 1-Hour Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard (NAAQS) (80 FR 51052; August 21, 2015)

The Committee should be aware that dispersion modeling is a resource-intensive exercise, often necessitating situation-specific decisions regarding the modeling domain, emissions inputs, source characterization, and background concentrations.[2] Even the selection of nearby sources is not a straightforward task. EPA notes that the "determination of whether to include nearby sources in a modeling exercise around a source that exceeds the emissions threshold is case specific, and a standardized methodology cannot be developed to fit all scenarios."[3] For frame of reference, the *initial* modeling for a single area – Calcasieu Parish – and the associated modeling report represent about 116 hours of work.

Clean Power Plan[4]

EPA's Clean Power Plan requires states to develop and implement plans that ensure existing electric generating units (EGUs) achieve the carbon dioxide (CO_2) standards prescribed by EPA. State plans are due to EPA on September 6, 2016, though EPA has made two-year extensions "readily available."[5] LDEQ intends to request such an extension.

In the first half of 2016, LDEQ will be conducting listening sessions in the major metropolitan areas of the state in order to provide an opportunity for public comment and meaningful stakeholder engagement on the department's initial submittal. Development of the plan itself will also require extensive coordination with the Louisiana Public Service Commission, regional transmission organizations, owners/operators of affected EGUs, and the public.

While EPA has appeared to streamline the process for requesting an extension, the Committee should recognize that many hundreds of hours of staff time have already been devoted to this regulation, and thousands more will likely be necessary in order to develop an approvable plan.

2015 8-hour Ozone NAAQS[6]

In 2016, LDEQ will recommend to EPA whether each parish in the state should be designated as attainment, nonattainment, or unclassifiable with respect to the 2015 8-hour ozone NAAQS based on data collected from LDEQ's existing ambient monitoring network. While this obligation is not burdensome per se, the Committee should not overlook the resources that will be directed toward compliance with the new ozone standard before such designations are finalized in late 2017.

Currently, Baton Rouge has a design value of 71 parts per billion (ppb), just one ppb over the NAAQS. Assuming the design value remains above the standard following the upcoming ozone season, LDEQ anticipates that EPA will designate the area as a marginal nonattainment area. Attainment demonstrations are not required for marginal nonattainment areas.

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[2] EPA has released an "SO_2 NAAQS Designations Modeling Technical Assistance Document" to assist state and local permitting authorities in this effort.

[3] 80 FR 51079

[4] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (80 FR 64662; October 23, 2015)

[5] EPA Memorandum: Page, Stephen D., OAQPS, "Initial Clean Power Plan Submittals under Section 111(d) of the Clean Air Act," October 22, 2015

[6] National Ambient Air Quality Standards for Ozone (80 FR 65292; October 26, 2015)

However, the Clean Air Act provides marginal areas with only three years from the effective date of designation to attain the NAAQS. Because compliance with the NAAQS is based on three years of data, any control measures to be imposed by the state must be identified in short order such that they can be implemented expeditiously. If the ozone standard for a marginal area is not met by the attainment deadline, EPA will reclassify the area to "moderate" by operation of law. Based on the input the Committee received from TCEQ,[7] the effort required to develop an attainment demonstration for a moderate ozone nonattainment area is indeed substantial. Therefore, LDEQ cannot afford to delay its efforts to comply with the new NAAQS.

Startup, Shutdown, and Malfunction (SSM) State Implementation Plan (SIP) Call [8]

The Committee should appreciate that increases in permitting authorities' workload may be brought about by changes in federal *policy* and impact state regulations that, in some cases, were approved by EPA more than 20 years ago.

As ease in point, consider EPA's SSM SIP Call. On June 30, 2011, the Sierra Club filed a petition asking EPA to find inadequate and correct a number of SIPs that allegedly "threaten states' abilities to achieve and maintain compliance with NAAQS." EPA agreed, even though many of the provisions in question clearly did not preclude areas from meeting ambient standards.

With respect to Louisiana, EPA determined that seven SIP-approved state regulations are now "substantially inadequate to meet [Clean Air Act] requirements" because they provide exemptions for excess emissions from otherwise applicable limitations during periods of startup, shutdown, malfunction, and/or maintenance. In response, LDEQ will propose to delete six of the seven provisions addressed by the rule. For the seventh, LDEQ will propose work practice standards in lieu of a numerical limitation consistent with EPA's "SSM Policy as of 2015."[9] SIP revisions are due to EPA by November 22, 2016.

Other 2016 and Prior Federal Actions

In addition to the federal regulations described above, several other prominent rulemakings have recently been signed by the Administrator. While these rules do not necessarily prompt action on the part of permitting authorities, significant time is required to review and understand their requirements and implications. Such actions include the:

- Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards;[10] and
- National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters.[11]

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[7] TCEQ reported that "to develop an attainment demonstration and reasonable further progress ... for a moderate [ozone] nonattainment area is 45,000 to 55,000 hours of staff time."

[8] State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction (80 FR 33840; June 12, 2015)

[9] 80 FR 33976 - 33982

[10] 80 FR 75178 (December 1, 2015)

[11] This "notice of final action on reconsideration" was signed on November 5, 2015, but has not yet been published in the *Federal Register*.

The Committee should also consider the obligations imposed by recent regulatory actions in conjunction with the ongoing requirements of prior federal regulations. For example, LDEQ is actively pursuing re-designation of the Baton Rouge area to attainment of the 2008 8-hour ozone NAAQS and working with EPA to develop an approvable SIP demonstrating compliance with the 1-hour SO_2 NAAQS in St. Bernard Parish.

Finally, the Committee must not lose sight of the fact that permitting authorities must continue to process permit applications and take final actions within federal and state deadlines.[12,13]

Proposed Rules

In addition to the resources required to carry out duly promulgated federal regulations, the Committee should not discount the significant time and effort needed to provide meaningful input on *proposed* federal regulations. For example, in just the last four months of 2015, EPA proposed at least five rules which could significantly impact Louisiana's air permitting program, namely the:

- Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS;[14]
- Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations;[15]
- Oil and Natural Gas Sector: Emission Standards for New and Modified Sources;[16]
- Source Determination for Certain Emission Units in the Oil and Natural Gas Sector;[17] and
- Revisions to the Public Notice Provisions in Clean Air Act Permitting Programs.[18]

Proposed rules are often voluminous,[19] accompanied by numerous supporting documents and complex spreadsheets, and rely in part on predictions made by computer models. Permitting authorities must review not only the regulatory text itself, but also the underlying data and assumptions upon which the proposed rule is predicated.

To illustrate this point, the Integrated Planning Model (IPM) employed by EPA to develop the proposed updates to the Cross-State Air Pollution Rule erroneously predicts the retirement of a number of EGUs within the state. In order to address discrepancies such as this, LDEQ must devote sufficient resources to review and, if necessary, comment on proposed rules.

Litigation

The Committee should also be cognizant of the impact litigation has on permitting authorities. State and local officials have devoted countless hours to the implementation of federal programs that were ultimately vacated by the U.S. Supreme Court or the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). For this reason, significant resources must continue to be directed to EPA programs promulgated many years ago.

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[12] See, for example, 40 CFR 70.7(a)(2) & (e)(2)(iv).
[13] Louisiana has 496 Part 70 sources operating under 729 Title V permits.
[14] 80 FR 75706 (December 3, 2015)
[15] 80 FR 64966 (October 23, 2015)
[16] 80 FR 56593 (September 18, 2015)
[17] 80 FR 56579 (September 18, 2015)
[18] 80 FR 81234 (December 29, 2015)
[19] The pre-publication versions of just the five rules identified above exceed 1700 pages, excluding associated documents.

For example, consider the requirement of EPA's Regional Haze Rule to apply "best available retrofit technology" (BART) at certain stationary sources in order to improve visibility in national parks and wilderness areas. In 2006, EPA determined that its Clean Air Interstate Rule (CAIR) was "better-than-BART,"[20] so Louisiana relied on then-applicable CAIR SO_2 and NO_X cap-and-trade programs as an alternative to BART for EGUs in its regional haze SIP. Later, CAIR was remanded to EPA by the D.C. Circuit,[21] but reinstated following the same Court's stay of the Transport Rule.[22] Nevertheless, EPA disapproved this portion of Louisiana's SIP because "CAIR has been remanded and only remains in place temporarily."[23] Consequently, additional SO_2 modeling had to be performed many years after this Regional Haze requirement was thought to have been satisfied.

Another ruling that increased LDEQ's workload involved EPA's "Prevention of Significant Deterioration [PSD] and Title V Greenhouse Gas Tailoring Rule."[24] Subsequent to its promulgation, LDEQ issued 20 Title V permits and 14 PSD permits to so-called "Step 2 sources." However, the Supreme Court later found that "EPA exceeded its statutory authority when it interpreted the Clean Air Act to require PSD and Title V permitting for stationary sources based on their greenhouse-gas emissions."[25] As a result, LDEQ had to reissue minor source permits, modify Title V permits to remove requirements that were no longer applicable, and revise state regulations pertaining to greenhouse gases.

Litigation can also accelerate implementation schedules, thereby depriving permitting authorities of compliance options that would otherwise be available. On March 2, 2015, the U.S. District Court for the Northern District of California accepted, as an enforceable order, an agreement between the EPA and Sierra Club and NRDC to resolve litigation concerning the deadline for completing SO_2 designations. This agreement impacted 28 states and requires EPA to designate certain areas, including Calcasieu Parish and DeSoto Parish in Louisiana, by July 2, 2016. This schedule effectively precludes LDEQ from demonstrating compliance with the 1-hour SO_2 NAAQS via ambient air monitoring, despite the fact that this option is expressly available for other areas per EPA's SO_2 Data Requirements Rule.

LDEQ has not typically quantified the man-hours spent to implement and administer any given federal air quality program (other than the Part 70 Operating Permits Program), but I trust this correspondence contributes to the Committee's understanding of some of the challenges facing state permitting authorities.

The Louisiana legislature has declared that the "maintenance of a healthful and safe environment for the people of Louisiana is a matter of critical state concern."[26] In closing, let me assure you that LDEQ is committed to administering and enforcing the environmental laws of this state to ensure that this objective is achieved.

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[20] 71 FR 60612 (October 13, 2006)
[21] *North Carolina* v. *EPA*, 531 F.3d 896; modified by 550 F.3d 1176 (D.C. Cir. 2008)
[22] *EME Homer City* v. *EPA*, No. 11-1302 (Order)
[23] 77 FR 33642 (June 7, 2012)
[24] 75 FR 31514 (June 3, 2010)
[25] *Utility Air Regulatory Group* v. *EPA*, 573 U. S. ___ (2014) (slip op., at 29)
[26] La. R.S. 30:2002

If you would like to discuss these matters further, please do not hesitate to contact me at (225) 219-3950.

Sincerely,

Chuck Carr Brown, Ph.D.
Secretary

CCB:BDJ

Maryland
Department of
the Environment

Larry Hogan
Governor

Boyd Rutherford
Lieutenant Governor

Ben Grumbles
Secretary

February 23, 2016

The Honorable James M. Inhofe, Chairman
United States Senate Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, DC 20510-6175

Dear Chairman Inhofe:

Thank you for your January 12, 2016 letter seeking input from the Maryland Department of the Environment (the Department) regarding our State's relationship with the U.S. Environmental Protection Agency (EPA), particularly on principles of cooperative federalism. You specifically ask for Maryland's feedback on the state resources and efforts necessary to comply with EPA regulatory actions, and whether the current regulatory framework between EPA and the states upholds the principles of cooperative federalism. The Department's mission is to protect and restore the environment for the health and well-being of all Marylanders and we are grateful for the opportunity to share with the Committee our experiences to date and concerns for the future in partnering with EPA to achieve our mission.

Maryland, as a member of the Environmental Council of the States (ECOS), supports cooperative federalism, a cornerstone principle of the Council, and also E-Enterprise — the high-priority partnership of ECOS and EPA, which is focused on modernizing the business of environmental protection. ECOS' resolution "On Environmental Federalism," revised March 18, 2015, outlines the principles of environmental federalism, including the concepts that "states are co-regulators with the federal government in a federal system," "meaningful and substantial involvement of the state environmental agencies as partners with the U.S. Environmental Protection Agency (U.S. EPA) is critical to both the development and implementation of environmental programs," and "the U.S. Congress has provided by statute for delegation, authorization, or primacy . . . of certain federal program responsibilities to states which, among other things, enables states to establish state programs that go beyond the minimum federal program requirements."[1]

Your letter appropriately documents a number of additional federal environmental rules that have been issued by the EPA in recent years. States' workloads have certainly increased, while federal financial support to implement environmental programs delegated to the states has been in decline. In short, the states are being asked to do more with less. It is certainly appropriate under a system of cooperative federalism for the EPA to establish minimum national standards, ensuring state-to-state

[1] https://dl.dropboxusercontent.com/u/8005220/ECOS%20website%20files/Current%20Website%20Files/Resolution%2000-1%20Federalism%202015v.pdf

consistency in implementation of those national standards, support research and information-sharing, and provide standardized pollution control activities across jurisdictions. It is also appropriate under a system of cooperative federalism for the EPA, when it has delegated programs to the states and the states are meeting the minimum delegated program requirements, to perform an oversight and funding support role, rather than state-level implementation of programs. The EPA should be flexible in adjusting a one-size-fits-all program to allow states to adjust for local conditions and try new procedures and techniques to accomplish agreed-upon environmental program requirements.

It is also important for the EPA, in the spirit of cooperative federalism, to ensure early, meaningful, and substantial state involvement in the development and implementation of environmental statutes, policies, rules, programs, reviews, joint priority-setting, budget proposals, budget processes, and strategic planning. Early and frequent state involvement will increase mutual understanding, improve state-federal relations and communications, remove barriers, reduce costs, and more quickly improve the environment for all. This type of coordination can also lead to a much more meaningful pursuit of delegation and assumption in areas previously left to the Federal government such as Section 404 of the Clean Water Act.

Maryland is proud of the progress that we have made in protecting and restoring the environment, whether it be meeting ground-level ozone standards throughout the state, including in the Baltimore region, for the first time since measurements began in 1980;[2] maintaining steady progress toward water quality targets for the Chesapeake Bay;[3] or demonstrating that Maryland is on-track toward our goal of reducing its greenhouse gas emissions by 25 percent of 2006 levels by 2020, while simultaneously generating substantial economic and job growth.[4] This progress has been driven by state action, in partnership with and collaborative support from the U.S. EPA.

While these efforts have resulted in measurable success, there is still significant, at times a daunting amount of work to be done. There is also a recognition that new and emerging challenges await us. Continued progress can be improved through careful coordination with the EPA and other states. For example, up to 70 percent of ozone measured in Maryland comes from upwind states,[5] and sources of pollution in the Chesapeake Bay are spread across a watershed encompassing six states and the District of Columbia. As these types of issues cannot be completely addressed by Maryland as an individual state, collaboration between Maryland, the EPA, and other states is essential to achieve success.

The Department affirms the basis principle that EPA regulatory actions must consider the unique interests of every state while also considering the broader impacts of individual and cumulative state impacts. This is imperative to ensure states cooperate to meet their shared responsibilities to provide all citizens with clean and healthy environments across the country. Environmental improvements benefit public health and the economy, but as you note in your letter, achieving those improvements requires substantial effort from state agencies. The many sources and types of pollution threatening air, water, and land often require distinct regulatory approaches, resulting in many different

[2] http://news.maryland.gov/mde/2015/08/31/maryland-poised-to-meet-clean-air-standards/
[3] http://www.chesapeakebay.net/presscenter/release/trends_show_jurisdictions_reducing_pollution_entering_chesapeake_bay
[4] http://news.maryland.gov/mde/2015/10/30/maryland-on-track-to-meet-2020-climate-goal/
[5] http://www.mde.state.md.us/programs/Air/Documents/GoodNewsReport/GoodNewsReport2015Final.pdf

standards, regulations, and deadlines, which can lead to financial, managerial, and technical strain on state agencies.

The Department is proud of the gains we have made in protecting and restoring the environment and we are always eager to help Congress, EPA, and our fellow states improve the nation's environmental regulatory framework. Maryland's experience shows that the benefits secured from those regulations are well worth the effort to implement them.

Specific examples of the Department's experience implementing federally delegated programs are included in Attachment A. Again, Maryland is grateful for the Committee's interest in our perspective on cooperative federalism and is happy to share our experiences and expectations in protecting and restoring the environment for the health and well-being of all Marylanders, today and far into the future.

Sincerely,

Ben Grumbles
Secretary

cc: The Honorable Barbara Boxer
The Honorable Benjamin L. Cardin

Attachment A
Cooperative Federalism
Maryland Department of the Environment

Below are specific examples of the Maryland Department of the Environment's (the Department) experience implementing federally delegated programs.

Clean Air Act

The workload under the Clean Air Act (CAA) has expanded significantly over the past few years. It is critical for EPA to ensure that the states have sufficient funding to fulfill the numerous new state responsibilities that we now have to address. The Department believes that the new issues are all appropriate to address environmental health protections and that eliminating these new requirements is not the answer. EPA needs to improve the streamlining of the CAA process and provide the necessary funding to accomplish these goals.

Over the past 20 years, the state air programs have built considerable expertise in clean air issues. Because of this, EPA needs to update its partnership with the states so that this state expertise can be built into new rules, guidance and other federal actions to ensure the most common sense and efficient methods are used to implement the CAA. Recent guidance for ozone is an example where additional state input in the early stages of the process could have lead to a better and more timely product.

EPA should work more closely with, and in many cases defer to, the states on critical issues like designations and State Implementation Plans (SIPs). For the new SO2 standard, EPA appears to be moving in a direction inconsistent with Maryland's recommendation of attainment. Data and analysis shows that the area of concern is below the standard. New controls are being implemented because of the federal Mercury and Air Toxics rule. EPA's decision will create a huge new workload for the State with very little, if any, additional environmental protection.

Clean Water Act

The workload under the Clean Water Act (CWA) has also expanded significantly over the past few years. Information Technology (IT) will improve and simplify the reporting process, but very little monetary support is provided from EPA to implement these systems, which are expensive and complex to build and to maintain. Additionally, reporting is burdensome. Congress and the U.S. EPA should reassess the need for reports that have existed for 15 or more years to determine if they are still needed. Numerous reports are duplicative, for example reports regarding violations and corrective actions taken. In addition, reporting requirements for a particular grant should be the same nationwide. Currently, these practices vary from one EPA region to another.

New rules, for example the e-reporting rule (which Maryland supports), place burdens on states to revise permits, increase and expand levels of permit application evaluation, and make resource-intensive improvements to IT systems. New Initiatives, such as Next Generation Permitting, may be good, but these new initiatives tend to roll downhill to states to figure out and implement with very

little monetary support from EPA. Nationally, funding for environmental programs at EPA and to the States has not kept pace with inflation, while citizens and elected officials ask for more environmental protections in virtually all media

Chesapeake Bay TMDL

The Chesapeake Bay Total Maximum Daily Load (TMDL) effort being led by the EPA embodies principles of cooperative federalism, particularly since the participating states have voluntarily agreed to added requirements and milestones.[6] The Chesapeake Bay TMDL provides jurisdictions the flexibility to meet their individual water quality targets in the way the works best for them. Allowing the Chesapeake Bay states to develop their own plans for Bay restoration is critical to the success of the Bay restoration effort. States are in a better position to implement the programs and policies that work best for their individual state since they are closer to the issues on the ground and have strong relationships with local governments who are also responsible for their own environmental regulatory programs.

Clean Water Act Section 401

The federal CWA Section 401 permit program is an example of successful cooperative federalism.

Under Section 401 of the Clean Water Act states have the authority to develop license conditions for hydropower licensing projects that protect state water quality. States serve an essential role in the Federal Energy Regulatory Commission (FERC) hydropower licensing process. Under the CWA Section 401 water quality certification states can impose conditions on the FERC license that are essential for ensuring that existing and new hydropower projects are built and operated in a manner that is consistent with state and federal environmental laws and are protective of the state water quality. Decades of federal court decisions interpreting Section 401 have established the states' authority to require conditions in FERC licenses necessary to protect water quality, recognizing and affirming the basic principle of cooperative federalism embodied in the Clean Water Act that states have the primary role and responsibility to ensure state water quality standards are met.

Maryland's interest in protecting water quality is as important and relevant today as ever, particularly now as FERC considers the relicensing of the Conowingo hydroelectric dam on the Susquehanna River in Maryland. The Susquehanna River provides approximately 50% of the fresh water to the Chesapeake Bay and is an important driver of the Bay's water quality. A joint study funded by Maryland and the Army Corps of Engineers concluded that the Dam's loss of capacity to trap sediment and nutrients adversely affects the health of the Bay. The precise nature of the Dam's adverse impacts on the health of the Bay and the circumstances under which they occur are currently the subject of additional study. What is clear, however, is that any new FERC license for the Dam will have to contain appropriate conditions to address sediment and nutrient transport and ensure that Maryland's water quality standards are maintained. Without appropriate conditions Maryland may not be able to meet its commitment to achieve EPA's TMDL for the Chesapeake Bay.

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[6] https://www.hklaw.com/publications/Federal-Court-Upholds-the-Final-TMDL-for-the-Chesapeake-Bay-in-Important-Decision-Involving-Cooperative-Federalism-09-23-2013/

Clean Water Act Section 404

The federal CWA Section 404 permit program is an area where there should be increased emphasis on cooperative federalism.

Section 404 of the CWA establishes a program administered by the Army Corps of Engineers and EPA to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. In order to qualify for assumption, a state must meet requirements that assure a level of resource protection that is equivalent to that provided by the federal agencies. EPA is responsible for reviewing state statutes and regulations, and ultimately deciding whether the Section 404 program can be assumed by a state. Although the opportunity has been available since 1977, only two states, Michigan (1984) and New Jersey (1994), have assumed the federal program.

Additionally, the 1977 CWA amendments specified waters and wetlands over which a state could not assume federal jurisdiction, including waters which are or could be used to transport interstate and foreign commerce, waters subject to the ebb and flow of the tide, and wetlands adjacent to these waters. The USACE retains Section 404 jurisdiction over these waters. While maintaining this federal jurisdiction does not preclude operation of a state program in those waters, an authorization issued by the state under a state-assumed program does not provide Section 404 authorization. States that have investigated assumption have not only raised concerns about the scope of waters for which they would be responsible of administering under a state-assumed Section 404 program, but also frustration that the scope of jurisdiction retained by the USACE makes assumption of the federal program impracticable.

The Department is actively pursuing assumption of the federal CWA Section 404 permit program, thereby eliminating duplicative State and federal regulatory programs. Eliminating this duplication would improve the efficiency of the permit program and reduce costs to applicants, while still ensuring protection of state wetlands and aquatic resources.

Water Quality Trading

EPA has been very cooperative in helping states advance water quality trading. This includes legal, technical, and policy support. Maryland appreciates the collaboration between EPA and USDA. More should be done at the federal level to usher in nutrient credit exchange programs, where states and their citizens are looking to accelerate restoration through market-based tools.

Clean Water Act 303(d) Program

The EPA is showing some degree of flexibility in the CWA Section 303(d) program. The EPA recently changed its approach to the management of the 303(d) program to give states greater flexibility in targeting impaired waters for restoration and healthy waters for protection. More can be done, however. By aligning Maryland's program with EPA's New Vision, Maryland can be more efficient in the use of resources available to the program, and there is likely to be a greater improvement in water quality.

Monitoring

An example of good partnerships being used is in the monitoring arena. Five states, including Maryland, have volunteered to supply monitoring data from 'selected' public water systems to the EPA to develop maximum contaminant level (MCL) limits for emerging contaminants. This specialized monitoring is a cooperative effort between these states and EPA to promulgate national regulations to ensure safe drinking water supplies and protect public health. It is important for the EPA to engage states in this way as it develops new national standards, such as MCLs.

Concentrated Animal Feeding Operations

The federal Concentrated Animal Feeding Operations (CAFO) permit requirements under the CWA is a relatively new program. The Department is making its success a priority and has developed a general discharge permit for these operations. The grant the Department receives from the EPA to implement this program has a requirement to inspect 20% of all CAFOs annually. During some years this requirement poses a resource burden on the Department. Additionally, the requirement in the CAFO program to collect data on a field by field basis sometimes causes CAFOs to submit incomplete reports since their record keeping for larger farms becomes onerous. This results in reporting violations where other reporting data is already collected and gives similar indications of compliance with nutrient management plans. The EPA reports required for this program can be confusing and take staff time. It would be an improvement to require one report submitted semi-annually to fulfill EPA requirements in this program.

Resource Conservation & Recovery Act

With respect to regulation of solid waste and hazardous waste under the Resource Conservation and Recovery Act's (RCRA) Subtitles C and D, EPA Region III and the Department have a cooperative relationship. Region III has been helpful in providing training and guidance to our hazardous waste compliance unit, which has undergone significant changes and improvements in recent years, and this assistance has materially improved our inspection program.

Resource Conservation Recovery Act (RCRA) Subtitle C

Maryland's RCRA Subtitle C program (hazardous waste regulatory program) has seen flat funding for several years, which is effectively a cut of resources to implement the federally delegated program. This has been compounded for Maryland by recent changes that EPA has made to the allocation formula for distributing State and Tribal Assistance Grant (STAG) funds. For its delegated RCRA Subtitle C program, Maryland is faced with a 7.5% cut for federal fiscal year 2016, which equates to $126,000. EPA has not made a proportional cut in work commitments that must be met.

The hazardous waste regulatory program under RCRA Subtitle C is intended to be delegated to states through a "program authorization" process. This is a cumbersome process that consumes a significant amount of staff time both at the federal and state levels. States have been implementing hazardous waste regulatory programs for over 40 years. States' long-term record of successful

program implementation should be the basis for a change to the RCRA authorization process under which, once states adopt a federal regulation, they are "presumptively authorized", i.e., are considered to have met authorization requirements unless EPA can demonstrate that the state did not follow proper procedures in incorporating the new requirements into the state's regulatory program, or the state does not have the capability to implement the program changes.

Additionally, the effort required for the RCRA Subtitle C authorization process is disproportionate to the benefit to states. Once a state has adopted new federal requirements, the state can implement and enforce the requirement as a matter of state law. The only real practical implication of a state being authorized for a particular aspect of the federal program is that the EPA can then take separate enforcement action as a matter of federal law. However, as a practical matter, this has limited importance, since EPA's enforcement resources are extremely limited. Also, environmental protection is not compromised by EPA's inability to enforce a provision that is not a formally authorized element of a state program because EPA can always refer observed violations to state regulatory agencies for action.

Resource Conservation Recovery Act (RCRA) Subtitle D

EPA's coal combustion residuals (CCR) regulations as finalized in 2015 are very different from past regulatory schemes, such as the municipal solid waste landfill regulations (40 CFR Part 258). For the municipal solid waste landfill program, the federal approval process required the states to make an application under 40 CFR Part 239 describing how the state will implement the federal requirements. However, in the new CCR regulations, states can only obtain a formal approval of their regulations through the drafting and submission of a chapter of a state solid waste management plan. There is no existing state or federal authority that requires states to write an overarching state plan.

Maryland promulgated comprehensive regulations governing CCRs in 2009[7]. In some ways these are more detailed than the federal regulations, and in a few ways they will need to be revised to meet the new federal standards. Maryland is committed to making these changes to ensure that there is a unified set of rules that the producers of CCRs in Maryland must follow. However, we do not see the value of creating a separate solid waste management plan for the purpose of having the State CCR regulations approved by EPA, when a comparison of the regulations themselves should be sufficient. We believe the federal CCR regulations should be modified to allow this mechanism for program approval.

[7] http://www.dsd.state.md.us/comar/SubtitleSearch.aspx?search=26.04.10.* see COMAR 26.04.10, Coal Combustion Byproducts

Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection
One Winter Street Boston, MA 02108 • 617-292-5500

Charles D. Baker
Governor

Karyn E. Polito
Lieutenant Governor

Matthew A. Beaton
Secretary

Martin Suuberg
Commissioner

March 8, 2016

Senator James M. Inhofe, Chairman
Senate Committee on Environment and Public Works
410 Dirksen Senate Office Bldg.
Washington D.C. 20510-6175

Dear Chairman Inhofe:

Thank you for your letter regarding the Commonwealth of Massachusetts work in complying with federal environmental law requirements.

As your letter notes, MassDEP is responsible for implementing a number of delegated federal programs, including programs under the federal Clean Air Act, the Resource Recovery and Conservation Act, the Toxic Substances Control Act and the Safe Drinking Water Act. With respect to air and climate change related regulations highlighted in your letter, our agency expects to comply with the federally established timelines associated with core activities and address future compliance dates beyond 2016. Annually, we estimate that MassDEP expends over 140,000 hours in implementing Clean Air Act related requirements for these programs.

MassDEP works on an annual basis with EPA Region 1 on Program Performance reviews. Through this process we ensure a common understanding of the work that will be carried out by MassDEP in implementing these and other programs that have been delegated to our state. As we make our commitments to EPA each year, we are also mindful of the fact that federal grant commitments comprise approximately 15% of MassDEP's total budget.

Massachusetts is not currently authorized to administer the National Pollution Discharge Elimination System (NPDES), although MassDEP is convening an effort with its stakeholders to explore and seek delegation of this program. Our experience in other delegated programs is that

state administration allows for effective engagement between our agency and the regulated community and we look forward to working on the NPDES issue in 2016. This issue is especially significant in Massachusetts as the state awaits EPA's issuance of the "MS4" permit governing stormwater management in over 200 municipalities across the Commonwealth. The issues of cost, administration and implementation of the new permitting requirements will be a topic of ongoing discussion between EPA, MassDEP and the cities and towns who will be required to implement the permit requirements. In the process of commenting on the draft permit, MassDEP has urged careful consideration of municipal issues and a real commitment to technical assistance to the cities and towns on this new permit.

In terms of managing multiple federal regulatory deadlines, Massachusetts has engaged in long term regulatory planning. Recently, Governor Baker issued an Executive Order that directs all state agencies to review their regulations. Part of this periodic evaluation is to ensure that regulatory requirements are necessary to provide for public health and safety and to protect the environment without being unduly burdensome to the regulated community. To the extent that we are able, programs, such as the air quality program, combine multiple rule amendments together to meet federal requirements, and keep our code up to date. We have found that regular review of regulations and our plans to amend them are necessary and appropriate as laws are changed, science and information technology advances, and new and innovative methods of monitoring and achieving environmental results emerge. These regulatory review activities provide important opportunities for continuous improvement.

Thank you for the opportunity to provide input on these important questions and please do not hesitate to contact me if I can provide additional assistance.

Sincerely,

Martin Suuberg
Commissioner

cc: Barbara Boxer, Ranking member
Matthew Beaton, Secretary of Energy and Environmental Affairs

STATE OF MISSISSIPPI
PHIL BRYANT
GOVERNOR
MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY
GARY C. RIKARD, EXECUTIVE DIRECTOR

February 8, 2016

Honorable James M. Inhofe
Chairman, Committee on Environment and Public Works
United States Senate

Dear Chairman Inhofe:

I have received, and thank you for, your letter dated January 12, 2016, wherein you requested information regarding the impacts to the Mississippi Department of Environmental Quality (MDEQ) of the myriad of deadlines imposed by recent U.S. Environmental Protection Agency regulatory actions. It is important to note that when delegating authority to the State to manage programs under the federal environmental statutes, EPA retains oversight authority which it exercises through numerous grant requirements including activity quotas and extensive reporting requirements. A large percentage of MDEQ staff time is spent simply trying to comply with these administrative oversight requirements. EPA continues to expand those requirements, and thus the burden on MDEQ, without providing any additional funding. In fact, federal funding has decreased over time while the administrative burdens on the state continue to increase. Accordingly, states continue to be required to do more with less.

In regard to the Clean Air Act alone, recent EPA regulatory actions and changes have resulted in a convergence of deadlines that we anticipate will be difficult for us to manage. Just in the month of January 2016, MDEQ staff was charged with meeting deadlines for commenting on the "Clean Power Plan" (CPP) draft federal implementation plan, the "Exceptional Events" rule, and the revised Cross State Air Pollution Rule (CSAPR). Over the next six calendar years, MDEQ will have the daunting task of developing State Implementation Plan amendments (including attendant interim deadlines) to address the CPP, CSAPR and EPA's recent "SIP call" addressing the long-standing Startup, Shutdown and Malfunction (SSM) defense. The deadlines related to the CPP, CSAPR, and the SSM SIP call overlap (and in some respect conflict with) deadlines regarding compliance with regional haze rules, and the sulfur dioxide and ozone National Ambient Air Quality Standards. We estimate that complying with all of these deadlines will require the devotion, above and beyond what would otherwise be required to conduct core functions, of as many as eleven full time employees, in an agency of less than 425 total employees.

In addition to the Clean Air Act program, MDEQ is charged with administering various programs under the Clean Water Act, including the NPDES discharge permitting program, the

Section 319 non-point source pollution program, and the beach monitoring program, among others. MDEQ also manages the hazardous waste program under the Resource Conservation and Recovery Act and numerous state-level programs. With all of these delegated programs, EPA continues to impose additional grant workplan requirements, without any additional funding and often without being willing to negotiate the terms of those workplans.

With specific regard to your question regarding EPA's level of cooperation with States, I draw your attention to the CPP and the many statements by EPA officials that the plan provides "flexibility" to the states and that EPA collaborated with the States in developing the rule. Contrary to such statements, our experience with EPA during the development of the CPP was that they treated the states, who are ostensibly co-implementers of the Clean Air Act with EPA, no different from any other party who commented on the rule. When they conducted conference calls and other "collaborative" meetings with state regulators, such "collaboration" was perfunctory, with EPA failing, or refusing, to provide the most basic of information needed by the states to understand the proposed rule. Often EPA and the States are co-regulators in name only.

Thank you again for the opportunity to provide our perspective. If you require any additional information, please let us know.

Sincerely,

Gary C. Rikard
Executive Director

STATE OF NEBRASKA

Pete Ricketts
Governor

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The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, DC 20510-6175

Dear Senator Inhofe:

We appreciate the opportunity to share our experience and concerns with meeting ever increasing and challenging regulatory demands. First, let me say that the Nebraska Department of Environmental Quality (NDEQ) does an amazing job achieving regulatory compliance, working proactively to benefit Nebraskans.

As the primary agency in the State of Nebraska for administering the majority of federally delegated environmental programs, we take pride in our service to the public and the regulatory community by implementing these federally delegated programs as cost effectively and efficiently as possible. While Nebraska has a good working relationship with EPA Region VII recent EPA headquarters regulatory actions have snowballed. EPA's compulsive tinkering with standards and limits, often before States have had a reasonable chance to comply, makes it difficult to reconcile these often competing priorities. Some wastewater treatment facilities, for example, can barely complete one plant upgrade before they are asked to meet another more stringent requirement. These upgrades take considerable time and are costly—our communities are strained to constantly make such upgrades before the loan for the previous upgrade is paid off.

Nebraska like many states has a concern with affordability and sustainability of environmental programs in our communities as well as the ability for the community to continue to exist in the coming years. We appreciate when EPA listens to us, such as on the availability of Integrated Management for Clean Water Act activities. While this is a great start it does not go far enough. Integrated Management Plans should consider all federal requirements and their impact on a community, not only Clean Water Act issues. This would allow communities to strive towards long term goals in a sustainable manner.

Funding often does not fully support the level of effort needed to effectively implement these new federal regulations. EPA has never adequately considered the costs to a State to develop new state regulations and the program features to implement the federal rules. We find we are too often diverting state resources from other equally important programs to address the federal environmental priority of the moment. Nebraska has, like many states, had to deal with increased federal mandates and the erosion of our federal funds. We believe a harder look at streamlining federal requirements to avoid unnecessary duplication of effort, by agencies and regulated sources alike, would be worthwhile before adding to already overburdened small businesses and administrative staff.

With respect to Nebraska's air quality program, we have many significant obligations under the Clean Air Act. Nebraskans are fortunate that despite continued challenges, the state is currently in attainment with the National Ambient Air Quality Standards. As you are aware, the Clean Air Act requires the EPA to review these standards every five years, which puts us in a position of continuously implementing ever-evolving programs. These include new efforts, not only the "core" of our clean air activities and the day-to-day responsibilities that are the foundation of our programs. Issuing preconstruction permits, conducting inspections, and developing state implementation plans are core functions. In addition, just in the past year, we have had to undertake new initiatives, such as modeling for sulfur dioxide in accordance with the EPA vs Sierra Club Consent Decree.

Finally, fully recognizing the importance of improving air quality, the Clean Power Plan is a case in point of EPA imposing costs on states that in the interim divert valuable agency time from other priorities described above. Since the rule was first proposed in June 2014, the NDEQ has devoted three fulltime staff to work on this new federal initiative, before we have even put pen to paper to develop a proposed plan. The proposed CPP rule was significantly and arguably wrongfully altered without proper notice. Too often EPA mandates new regulations with little state input and these are changed without adequate notice and involvement. States must work in a litigation environment which is a waste of resources when proposed regulations like the CPP and WOTUS are struck down by the courts.

The CPP rule is complicated and efforts to seek clarification on "specifics" are often not adequately resolved, because EPA staff "did not think of these issues" when they drafted the CPP rule. A case in point is Nebraska's Public Power District proposed retrofit of a boiler to accommodate burning hydrogen gas. Because the CPP rule is so focused on elimination of fossil fuels, true green technology advancements are difficult to implement without considerable negation at EPA headquarters. When states write rules we have to be able to both defend and interpret the rules for our regulated constituency.

This is an unhealthy dynamic. The diversion of resources away from meeting permitting responsibilities, addressing complaints from the public and general community and regulatory outreach creates animosities that do not bode well for future success.

Sincerely,

Jim Macy
Director

SCOTT A. THOMPSON
Executive Director

OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY

MARY FALLIN
Governor

February 4, 2016

Senator James M. Inhofe
Chairman, U.S. Senate Committee on Environment and Public Works
United States Senate
Washington D.C. 20510-6175

Re: Your Request dated January 12, 2016, Regarding U.S. Environmental Protection Agency Regulatory Actions

Dear Senator Inhofe:

Thank you for the opportunity for the Oklahoma Department of Environmental Quality (DEQ) to provide feedback to your Committee on Environment and Public Works concerning: (1) state resources and efforts necessary to comply with EPA regulatory actions, and (2) whether the current regulatory framework between EPA and the states upholds the principle of cooperative federalism.

I. **Resources and efforts necessary to comply with EPA regulatory actions**

The DEQ spent a significant percentage of its budget in State Fiscal Year (SFY) 2015 to implement environmental regulatory programs delegated to Oklahoma by EPA. For the time period SFY 2016 through SFY 2018, the DEQ anticipates an increase in one-time costs for the development of new software applications, equipment purchases, initial staff training, outreach, permit modifications, and so on, associated with the implementation of new or anticipated federal regulations. The DEQ also expects up to a 10-15% increase in ongoing costs for additional personnel, travel, outreach, ongoing training, contracts and supplies. The majority of these increased costs will be in the drinking water and wastewater programs.

The following list of EPA regulatory actions is not exhaustive, but covers recent or pending requirements that are among the most significant to or demanding of state and DEQ resources.

a. EPA Regulatory Actions under the Clean Water Act

DEQ anticipates that the implementation of EPA's "Electronic Reporting Rule," effective December 21, 2015, will require significant agency resources and effort. EPA estimates that the up-front costs for states to implement this rule will be four to five million dollars, but EPA also asserts that the cost will be recovered in the second or third year of implementation. However, states that began early implementation of the rule have noted that there is not only an increase in capital costs to implement the rule, but an increase in workload to provide the assistance that is needed by the regulated community in order to submit their data electronically. Additionally, those states have seen an increase -- rather than a reduction -- in resource demands even after two or three years of implementation. Finally, the rule includes a large expansion in the number and type of data elements that facilities and states will be required to report to the federal data system. While the rule is not without its benefits, implementation is expected to be a costly and time-intensive challenge.

In addition to the Electronic Reporting Rule, the DEQ will soon implement the "Sufficiently Sensitive Test Methods Rule". This rule was finalized by EPA in 2014. States have had a maximum of two years to adopt and implement the rule. The rule contains new sampling and analytical requirements for Clean Water Act pollutants. Since more pollutants will be detectable under these new requirements, DEQ will have to devote additional resources and efforts during the permitting process to review the additional pollutants against the state water quality standards. Any new pollutants included in DEQ-issued discharge permits will also create increased resource demands on staff to track and report the additional volume of data to EPA.

The "Sufficiently Sensitive Test Methods Rule" will also impact the DEQ's State Environmental Laboratory, which will need to devote significant resources and efforts to develop and implement new analytical methods and to add a "cleanroom" modification to its facility. The Laboratory will also need to expand its laboratory accreditation program by adding new-method accreditations and providing outreach and technical assistance.

b. EPA Regulatory Actions under the Safe Drinking Water Act

Other EPA regulatory actions expected to impact the resources of the DEQ include EPA's plan to regulate perchlorate, hexavalent chromium and strontium as well as the plan to modify the existing arsenic rule. These rules will require additional agency resources and efforts for compliance assistance, inspections and enforcement.

Additionally, the "Revised Total Coliform Rule" significantly increases monitoring required for certain public water supply systems and in turn creates additional sample analysis for the DEQ's Laboratory. The Laboratory anticipates a greater demand for customer assistance from the regulated community due to the increase in monitoring requirements.

c. EPA regulatory actions under the Clean Air Act

With respect to the National Ambient Air Quality Standard (NAAQS) for ozone, DEQ has devoted and will continue to devote resources to the implementation of measures in the state designed to avoid nonattainment. These measures include working closely with the Councils of Governments (COGs) across the state, especially the Indian Nations Council of Governments (INCOG) and the Association of Central Oklahoma Governments (ACOG), in educational efforts and continued implementation of voluntary "Ozone Advance" plans.

DEQ also continues to devote resources to implementation of the sulfur dioxide NAAQS, regional haze requirements and the cross-state air pollution rule. EPA has proposed new rules affecting monitoring at refineries and methane emissions from oil and gas operations. DEQ will continue to track developments on these proposals.

Funding for the DEQ's Air Quality program is not currently an issue. However, any additional major unfunded mandates from EPA could strain the program's resources. It is also a possibility, given the current state budget shortfall, that at least some Air Quality revenue streams could be swept up by the state legislature within the next few months.

d. EPA regulatory actions under the Resource Conservation and Recovery Act (RCRA)

In 1985, Oklahoma was the first state in the nation to receive authorization from EPA to administer the federal RCRA program in lieu of EPA. Since that time, DEQ has been authorized to administer every delegable part of the federal RCRA program. In order to maintain authorization status, DEQ must perform certain core RCRA program activities, including issuing and renewing RCRA permits, requiring and overseeing RCRA corrective action, performing program administration and information management functions, and performing compliance inspections and enforcement. Costs to implement the core program have grown annually since 1985. Between 2000 and 2014 alone, the costs to implement the core program increased by an

estimated 33 percent with no commensurate increase in grant funds. DEQ relies on the federal grant to provide 75 percent of the funds necessary to perform the core program activities. The remainder is funded by state dollars to achieve 100 percent funding.

In April 2015, EPA notified DEQ that its federal grant to administer the core RCRA program would be reduced by just over 14 percent between 2016 and 2020. In spite of this reduction in grant funds, EPA will still expect DEQ to perform all core program functions at the same level, and DEQ expects to do so with the core RCRA program unchanged except for a slight change in the number of certain inspections that are performed.

Of course, the grant reduction will mean that DEQ must pull resources from other areas to offset the reduction. In this instance, DEQ will most likely have to use resources set aside for some of the non-regulatory, compliance assistance programs DEQ is attempting to implement in RCRA and which promise to significantly improve compliance outside the normal inspection/enforcement program.

One other example of an additional requirement that EPA has placed on the DEQ's RCRA program without additional funding to defer the costs is the result of the Government Performance and Results Act (GPRA) 2020 goals. Under GPRA, in approximately 2010, EPA required states to identify a number of facilities for which corrective action would be largely completed by 2020. This goal is being treated by EPA as a mandate to fast track corrective action at the targeted facilities. Since DEQ was already making progress in its corrective action program, the GPRA goal addresses, in essence, a non-existent problem for which no additional monies were provided to help the DEQ achieve the "goal".

II. **Whether the current regulatory framework between EPA and states upholds the principle of cooperative federalism**

While it is true that there have been certain situations over the past few years in which DEQ would have preferred a stronger partnership and sense of cooperation with EPA, DEQ does have a reasonably positive relationship with EPA Region 6. Beyond that, EPA Administrator Gina McCarthy has improved relations with states since she has been in office and seems to have a greater interest in listening to issues the states may have with EPA regulatory actions. However, specific examples of what might be characterized as a lack of cooperative federalism follow.

a. Lack of cooperative federalism and overreach in EPA determinations of tribal jurisdiction in Oklahoma

EPA has had for some time a rather blatant practice of overreaching its authority with respect to tribal jurisdiction for environmental programs in Oklahoma. Over the years, DEQ has submitted many and repeated letters and comments on formal and informal rulemakings to EPA and has even filed lawsuits in an effort to help EPA understand state/tribal jurisdiction in environmental programs in Oklahoma. It is only recently that EPA has apparently begun to understand and acknowledge Oklahoma's unique tribal/state jurisdictional situation. In a recent notice of rulemaking published at *81 FR 2791-2803* (January 19, 2016) pertaining to treatment as state for tribes under Section 303(d) of the Clean Water Act, EPA has referenced Section 10211(b) of the *Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 ("SAFETEA")*, Public Law 109-59, 119 Stat. 1144 as it relates to tribal jurisdiction in Oklahoma.

SAFETEA, Section 10211(b), as you know, contains the following provision:

> TREATMENT AS STATE – Notwithstanding any other provision of law, the Administrator may treat an Indian tribe in the State of Oklahoma as a State under a law administered by the Administrator only if –
> (1) The Indian tribe meets requirements under the law to be treated as a State; and
> (2) The Indian tribe and the agency of the State of Oklahoma with federally delegated program authority enter into a cooperative agreement, subject to review and approval of the Administrator after notice and opportunity for public hearing, under which the Indian tribe and that State agency agree to treatment of the Indian tribe as a State and to jointly plan [and] administer program requirements.

In a letter to EPA dated October 6, 2015, DEQ, along with the Oklahoma Water Resources Board (OWRB), requested that EPA elucidate the process that will be used to ensure that the cooperative agreement provision is satisfied, as a threshold matter, during a tribe's TAS application process. EPA has not yet responded to this request.

b. Lack of cooperative federalism and overreach by EPA in Oklahoma's Brownfields program

Another example of EPA's overreach and lack of cooperative federalism relates to the DEQ's Brownfields program. EPA sometimes conducts Targeted Brownfields Assessments (TBAs) in Oklahoma without keeping DEQ fully informed about these activities. Recently, however, EPA

has made an effort to provide DEQ "first right of refusal" to conduct the TBAs instead of EPA. On those occasions when EPA does not offer the first right of refusal to DEQ and conducts the TBA itself, DEQ is unable to draw on its federal grant for the project. If DEQ is not drawing on its grant for TBAs, the agency is penalized on funding during the next funding cycle and the lowered grant amount becomes the baseline year after year.

c. Lack of cooperative federalism in Superfund decisions for site cleanup in Oklahoma

With respect to the Superfund program in Oklahoma, EPA frequently does not afford DEQ an opportunity to take an active role in cleanup decisions in the state or in the cost recovery process. Too often EPA does not respond to DEQ's comments or incorporate its comments into the decision documents that govern the cleanup at any given site. Given the fact that DEQ must pay 10 percent of the costs of the remedial action and 100 percent of operation and maintenance (O&M) costs after the remedial action is complete, DEQ's objective in making comments to EPA is to ensure that cleanups are protective of the environment and human health but also that they are cost effective and not overly burdensome financially to the state and DEQ. EPA frequently does not consider the cost burden to the state when choosing Superfund remedies and tends to select a cheaper remedy, leaving the state with a more expensive and longer-term O&M schedule.

With respect to cost recovery from potentially responsible parties (PRPs), EPA has sometimes failed in the past to include DEQ in claim settlement discussions with PRPs. The result is that the DEQ and the State of Oklahoma have been unable to recoup some of the monies spent on the remedial action and monies that will be needed for O&M relating to at least a couple of key superfund sites in the state. In a November 2015 letter from DEQ to EPA, DEQ requested to initiate a dialogue with EPA that will allow DEQ to participate earlier and more fully in settlement discussions with PRPs in the future.

d. Lack of cooperative federalism in Oklahoma's RCRA program

In 2014, the EPA Office of Land and Emergency Management (OLEM), formerly the Office of Solid Waste and Emergency Response, issued a memo that unilaterally deemed illegal a practice that had been in place for over thirty years at hazardous waste disposal sites across the country. For that time period, EPA had consistently approved the practice in permit reviews for sites with this practice in place. However, EPA issued its unilateral memo with no documented cases of environmental harm to support changing the long-standing practice. The practice at issue involves what are known as "put-piles" at hazardous waste land disposal facilities. These are piles of treated hazardous waste staged temporarily in a properly-constructed and permitted hazardous waste disposal cell while undergoing analysis to verify whether or not the

waste can be finally disposed. Neither the EPA regional offices nor any state environmental agencies were consulted about the effect the memo would have on affected facilities or the state regulatory agencies. Oklahoma has been at the forefront of working with OLEM to revise the memo but to no avail. This is an important issue to DEQ, because if the memo stands, it will significantly increase compliance costs for the affected facility in Oklahoma with no commensurate benefit to public health or the environment. DEQ believes this issue should have gone through EPA's formal rulemaking process.

Thank you again for the opportunity to provide feedback addressing the concerns of your EPW Committee. Please do not hesitate to contact me at (405)702-7161 or scott.thompson@deq.ok.gov, should you have any questions or need additional information.

Sincerely,

Scott A. Thompson
Executive Director

Oregon

Kate Brown, Governor

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February 9, 2016

The Honorable James M. Inhofe
Chairman, Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510-6175

Dear Senator Inhofe:

This letter is in response to your January 12, 2016 request for feedback on the state resources and efforts necessary to comply with U.S. Environmental Protection Agency (EPA) regulatory actions. The Oregon Department of Environmental Quality (ODEQ) appreciates the opportunity to provide comments to the Senate Committee on Environment and Public Works regarding our working relationship with EPA in the implementation of environmental regulations.

Our agency is authorized or delegated to implement a number of federal environmental laws in Oregon including the Clean Air Act, Clean Water Act, Safe Drinking Water Act, and Resource Conservation and Recovery Act. In some cases, we share responsibilities with other state agencies including the departments of health, agriculture and forestry. EPA and our state agency have different roles. It is to the states' advantage that EPA is in an overarching federal role, supporting states in the performance of their responsibilities.

Our agency has been an active member of the Environmental Council of the States (ECOS). ECOS and EPA have been working closely over the past several years to build strong relationships between the states and to allow for greater participation as existing federal rules are modified and new rules are developed and implemented. The dialogue over draft rules helps EPA to better understand the implementation challenges that a state will face. EPA has been receptive to this dialogue and has revised a number of draft rules that in their final version are easier to implement and lead to more effective and less costly compliance. At the state level, ODEQ frequently invites EPA to work with us when developing new water quality standards or addressing challenging permit issues, as this allows the state to benefit from their technical and regulatory expertise. Recent drinking water crises in Charleston, Toledo, and Flint highlight the need for federal, state and local efforts to be well-coordinated if we are to effectively address new and evolving threats to our national drinking water systems.

One of the biggest challenges for many states is helping small communities and businesses understand and comply with environmental rules. Our state has many small communities which lack the financial ability to address environmental compliance. As one example, in 2006 EPA revised the National Ambient Air Quality

Standards for fine particulate matter, also known as PM2.5. Since then the town of Lakeview, Oregon has either come close to exceeding or has exceeded the PM2.5 standard but has not been formally designated as a nonattainment area. In 2013, EPA announced the PM Advance program, which is a voluntary program that allows communities to develop a plan to reduce PM pollution and potentially avoid a future nonattainment designation. In response, Lakeview and Lake County signed up to participate. Local government officials, a local air quality committee and our agency worked together to prepare a plan to reduce PM2.5 emissions through strategies that local citizens and companies can implement. Throughout the planning process, EPA Region 10 Air Quality staff worked with ODEQ and provided guidance on a number of issues to ensure the final plan would work for the community. ODEQ submitted the final Lakeview PM Advance Plan to EPA on September 30, 2014. This is an example of how new tools from EPA along with much needed guidance and cooperation have helped a community improve air quality and avoid the stigma and economic development restrictions of nonattainment status.

Despite such successes, federal support has been declining. Examples are reallocation of Clean Air Act section 105 grants, which will likely result in a 30 to 40 percent reduction in funding to Oregon and other less populated states. The Clean Water State Revolving Fund is proposed to be reduced in 2016 by 23 percent and EPA grant funding to our hazardous waste and underground storage tank programs have decreased by approximately 15 percent over the last ten years. We will be challenged to maintain, let alone make necessary improvements to these programs due to shrinking resources at both EPA and our agency.

Thank you for the opportunity to provide input to the Senate Committee on Environment and Public Works. Our agency's success depends on a cooperative working relationship with EPA to accomplish our collective state and federal environmental goals. We strongly encourage the Committee to consider increased funding through EPA so that we have the resources Oregon needs to update and fully implement programs that maintain environmental compliance, particularly in small communities.

Sincerely,

Dick Pedersen

Dick Pedersen
Director

CC: Oregon Governor Kate Brown
U.S. Senator Jeff Merkley, Oregon
U.S. Senator Ron Wyden, Oregon
Drew Johnston, Federal Relations Director, Oregon Governor's Office
Gabriela Goldfarb, Natural Resources Policy Advisor, Oregon Governor's Office

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
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February 5, 2016

Honorable James M. Inhofe, Chairman
U.S. Senate Committee on Environment and Public Works
Washington, D.C. 20510-6175

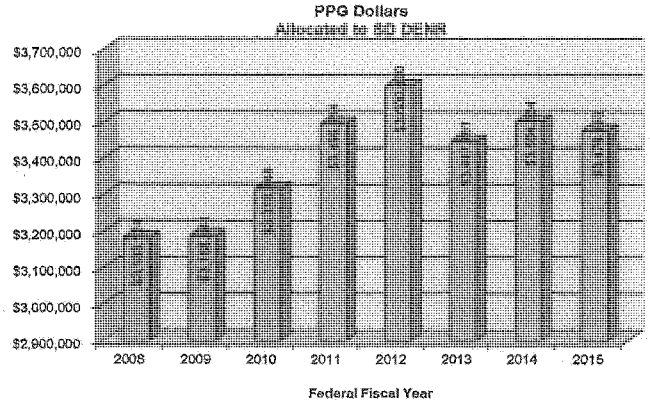
Dear Senator Inhofe:

Thank you for your January 12, 2016, letter requesting feedback on the state resources and efforts necessary to comply with EPA regulatory actions, and whether the current regulatory framework between EPA and the states upholds the principle of cooperative federalism. The short answer is no, the current framework does not uphold the principle of cooperative federalism, but our answer extends beyond EPA to encompass other federal agencies that we deal with as well.

To better understand our response, we need to put the South Dakota Department of Environment and Natural Resources (DENR) into some context for you. DENR is a small state department with only 180.5 authorized FTE. However, DENR's functions are incredibly diverse as we have delegation of nearly all the federal environmental acts from the U.S. Environmental Protection Agency (EPA) such as the Clean Water Act, Clean Air Act, and the Safe Drinking Water Act. In addition, we administer nearly all the environmental protection functions authorized by state law such as the state water planning process, regulation of minerals and mining to include oil and gas, the water appropriation or water rights process, and groundwater protection programs.

With the mix of federal and state programs we administer, DENR's state budget authority consists of 27 percent of state general funds and 39 percent of various fees collected to support administration of the programs that we administer. Fees collected to help support the federal environmental programs include surface water discharge permit (i.e. NPDES) fees, Title V air quality fees, SARA Title III Community Right to Know fees, drinking water fees, and state revolving fund program fees. That leaves 34 percent of our operating budget reliant upon federal funds.

The majority of our federal regulatory program funds are awarded by EPA through a Performance Partnership Agreement (PPG). This agreement includes federal regulatory program funds awarded under the Clean Water, Clean Air, Drinking Water, and Resource Conservation and Recovery Acts. The chart on the following page shows the total amount of federal funds awarded to us through the agreement during the last eight years. While there was some increase early on to reflect new federal responsibilities, the trend the last three years has been down. Consequently, federal EPA funding certainly has not kept up with state salary policies and other operating costs which have been increasing as well. This decreasing trend in federal EPA regulatory grant dollars is of grave concern and is certainly inverse to the huge increase in federal requirements for the delegated programs.



Of equal concern is the deluge of federal attacks on state rights. We have enclosed 15 one-page summaries of specific new federal requirements being thrust upon the state. While the majority of these are coming from EPA, we have also included one from the U.S. Army Corps of Engineers and one from the U.S. Forest Service. The bottom line is nearly all of these new federal requirements will have a tremendous impact on the State of South Dakota, its citizens, and its economy, but will produce little or no benefits in protecting public health and the environment in South Dakota. Due to the limited benefits, we would argue these new requirements do not rise to the level of requiring federal imposition upon all 50 states, but each state should have the responsibility and freedom to address these issues individually, using the principles of cooperative federalism and Executive Order 13132 on Preemption. That is clearly not the case now.

It is hoped this information is useful to you and your committee. Thank you again for the invitation to share it with you.

Sincerely,

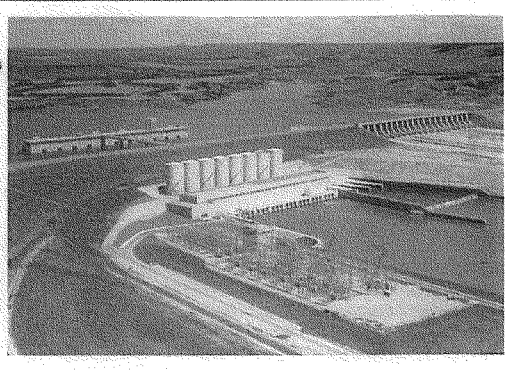
Steven M. Pirner, PE
Secretary

Enclosure: New Federal Requirements

cc: Honorable Senator Barbara Boxer, Ranking Member
Honorable Senator John Thune
Honorable Senator Michael Rounds
Honorable Congresswoman Kristi Noem
Governor Dennis Daugaard, State of South Dakota
Attorney General Marty Jackley, State of South Dakota

DENR Dealing with New Federal Requirements

Title: U.S. Army Corps of Engineers — Missouri River Surplus Water Reports, Reallocation Study, and nationwide rule-making



Date Proposed: Proposed surplus water reports and the reallocation study were to be completed by the summer of 2015. In 2014, the Corps suspended work on drafting the reallocation study pending a review by the Assistant Secretary of the Army and a final decision to issue the surplus water reports.

Short Description: In 2008, the Corps issued Real Estate Policy Guidance Letter No. 26 which led to a federal moratorium on issuing access easements installing water intakes into all Missouri River reservoirs. The moratorium includes easements for intakes for municipal, industrial, and rural water systems, but not for irrigation intakes. The Corps intends to require water supply contracts for the use of all *"stored water"* by municipal and industrial water users before any easements are granted. Under this new policy, the Corps is considering all water diverted directly from the reservoirs to be federal *"stored water."* This new classification eliminates recognition of any *"natural flow water"* through the reservoirs which has traditionally been considered water under the jurisdiction of states and state water rights. The Corps also intends for the Missouri River studies to become the national model to be implemented through rule-making for all of its reservoirs in the United States.

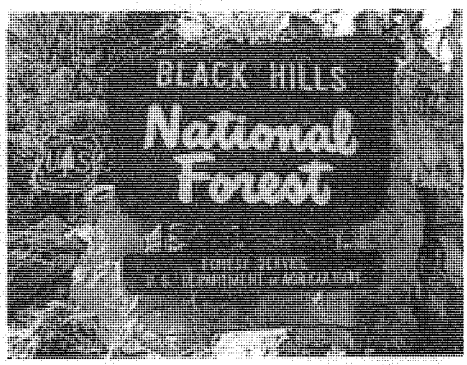
Impacts to South Dakota: This is a major issue for South Dakota because nearly all of our Missouri River water is contained in the Corps reservoirs. By declaring all water in the reservoirs as federal "stored water," the Corps is essentially taking all of our Missouri River water by eliminating *"natural flow water"* in the reservoirs. After strong objections by South Dakota and North Dakota along with other western states, as of August 2014, the Corps placed further public efforts on the surplus reports, reallocation study and nationwide rulemaking on hold while reevaluating issues internally.

Lawsuits DENR has Joined: None yet.

Link to Federal Explanation/Summary: http://www.nwo.usace.army.mil/Missions/CivilWorks/Planning/PlanningProjects/MissouriRiverMlWaterReallocationStudy.aspx

South Dakota Department of Environment & Natural Resources

DENR Dealing with New Federal Requirements



Title: U.S. Forest Service — Agency Directive on Groundwater Resource Management

Date Proposed: Proposed on May 2, 2014; withdrawn on June 19, 2015

Short Description: The U.S. Forest Service proposed a directive with the intent to strengthen the agency's management of groundwater resources and the use of best management practices to improve and protect water quality on national forests and grasslands. Specifically, the proposal provided direction on the consideration of groundwater resources in agency activities, approvals, and authorizations; encouraged source water protection and water conservation; established procedures for reviewing new proposals for groundwater withdrawals on Forest Service lands; required the evaluation of potential impacts from groundwater withdrawals on Forest Service resources and surrounding land; and provided for measurement and reporting of larger groundwater withdrawals.

Impacts to South Dakota: The proposed directive attempted to insert the federal agency into the state water right process and exert authority over the allocation and appropriation of groundwater with no federal authority to do so. South Dakota law provides a process for parties, including the Forest Service, to intervene by petition on any water right application, but the proposed directive was a means for the Forest Service to circumvent the state process. It was another effort to federalize state water by delaying a permitting process or preventing the use of the state's groundwater both on and in areas surrounding Forest Service lands. No federal court has recognized a federal reserved water right to groundwater or authority to regulate ground water although the proposal directed Forest Service personnel to insert federal doctrines, laws, and policies into a state process. To their credit, the Forest Service withdrew their directive for further evaluation.

Lawsuits DENR has Joined: None

Link to Federal Proposal: http://www.fs.fed.us/geology/Templates/Groundwatertemplate.dwt

Withdrawal notice: https://www.federalregister.gov/articles/2015/06/19/2015-15151/proposed-directive-on-groundwater-resource-management-forest-service-manual-2560

DENR Dealing with New Federal Requirements

Title: Clean Water Act – Waters of the United States Rule

Date: Final Rule published June 29, 2015; effective August 28, 2015

Short Description: EPA and the U.S. Army Corps of Engineers developed a rule intending to clarify and define which waterbodies are Waters of the United States, and therefore subject to jurisdiction under the federal Clean Water Act. The rule has faced substantial opposition from our Congressional delegation and the agricultural community.

Impacts to South Dakota: The permitting requirements under the federal Clean Water Act have not changed, but EPA and the Corps have changed the definition of what constitutes waters of the United States. With the new rule, EPA and the Corps are setting boundaries and specifying distances from waterbodies where they will regulate the discharge of pollutants. Businesses, developers, homeowners, and others will be required to obtain a permit for disturbing wetlands or other waterbodies. EPA has stated that its existing exemptions for agricultural activities remain in place. However, producer groups and others opposed believe the rule represents a broad expansion of the types of waters that would be subject to federal permit requirements, limiting farming practices and other land-uses.

Lawsuits DENR has Joined: Attorney General Marty Jackley joined a lawsuit with North Dakota and 11 other states to block the rule, largely on a state's right basis — see http://farmanddairy.lyleprintingandp.netdna-cdn.com/wp-content/uploads/2015/06/1-main.pdf?e694b2 *"Our concerns continue to be that these agencies are overstepping their Congressional authority and that our State will be losing considerable decision making control over our waters and land use,"* said Jackley. A preliminary Injunction hearing was held in Fargo on Friday, August 21, 2015, and on August 27, 2015, Ralph R. Erickson, Chief District Judge, District of North Dakota, granted the injunction to the 13 states on the lawsuit. A stay has since been granted nationwide.

Links to Federal Explanation/Summary:

Rule: http://www2.epa.gov/cleanwaterrule/final-clean-water-rule

EPA's explanation of what the rule does:
http://www2.epa.gov/cleanwaterrule/what-clean-water-rule-does

EPA's explanation of what the rule does not do:
http://www2.epa.gov/cleanwaterrule/what-clean-water-rule-does-not-do

South Dakota Department of Environment & Natural Resources

DENR Dealing with New Federal Requirements

Title: Clean Water Act – Ammonia Water Quality Criteria

Date Proposed: Final rules published April 2013

Short Description: There are existing water quality standards for ammonia, NH3, because it can be toxic to fish. EPA proposed this more stringent update to the freshwater ammonia aquatic life ambient water quality criteria to protect several freshwater mussel species that had not been tested previously.

Impacts to South Dakota: Ammonia is a common constituent in municipal wastewater. The new criteria are more stringent and will result in increased costs to municipalities to meet. Smaller towns that rely on discharging sewage lagoons or ponds for wastewater treatment may not be able to meet these new criteria. If this happens, small communities will either have to expend substantial funds to build enough ponds to become total retention facilities that do not discharge or construct complex mechanical treatment plants that will have high operation and maintenance costs. Larger cities that already have mechanical wastewater treatment plants with processes to remove ammonia will likely have to be enlarged at a high capital cost.

Lawsuits DENR has Joined: None; DENR is exploring options for implementing these new criteria that protect sensitive species yet result in appropriate, achievable ammonia limits for our communities.

Link to Federal Explanation/Summary:

http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/ammonia/

DENR Dealing with New Federal Requirements

Title: Clean Water Act – Nutrient Water Quality Criteria

Date Proposed: National nutrient criteria documents first published by EPA in 2000.

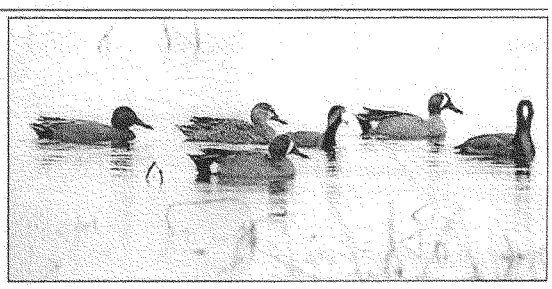
Short Description: Excess nutrients in waterbodies, such as nitrogen and phosphorus, can lead to excessive growth of algae and aquatic weeds because they act as fertilizers. Aquatic weeds can limit recreational uses of waterbodies and algal blooms can harm the aquatic ecosystem and even become toxic. For example, the *"dead zone"* in the Gulf of Mexico, the water quality problems in the Chesapeake Bay, and toxic algal blooms in the Great Lakes which have shut down drinking water systems have been widely reported and all blamed on high levels of nutrients. In response, EPA is putting pressure on states to adopt numeric standards for nutrients in all waters.

Impacts to South Dakota: Nutrient pollution in South Dakota has a definite adverse impact on our lakes, especially our shallow prairie lakes East River. DENR is working to reduce nutrient inputs to our lakes through no discharge requirements for cities and industries, nutrient management plans in feedlot permits, and providing financial assistance for reducing nonpoint source pollution through installing best management practices to reduce nonpoint source pollution in lake watersheds. Adverse effects from nutrients on our rivers and streams is limited, yet establishing numeric nutrient criteria as water quality standards would require municipalities and industries that discharge to our rivers and streams to invest in expensive upgrades to their wastewater treatment systems to treat and remove nutrients. This significant expenditure of funds spent on reducing nutrients from wastewater treatment systems that discharge to rivers and streams will have potentially no discernable improvement in water quality.

Lawsuits DENR has joined: None; DENR continues to work to address nutrient issues in ways that make sense for our state through cooperative funding programs and targeted watershed work. Numeric nutrient criteria and a one-size-fits-all approach will be expensive and ineffective for South Dakota.

Link to Federal Explanation/Summary: http://www2.epa.gov/nutrientpollution

DENR Dealing with New Federal Requirements



Title: Clean Water Act – Selenium Water Quality Criteria

Date Proposed: Rules proposed on July 27, 2015

Short Description: Selenium pollution was first widely reported as a toxin when it was traced back as the source of a rapid die-off of migratory waterfowl, fish, insects, plants and algae in the Kesterson Reservoir in California in the 1980s. EPA established stringent water quality standards for selenium after that incident. EPA is now proposing an update to make the chronic freshwater selenium criterion even more stringent because selenium has been found to bio-accumulate in fish and people, meaning selenium builds up in a body when eaten. The new criterion has both water quality levels and allowable levels in fish flesh.

Impacts to South Dakota: The water quality criterion would decrease from 5.0 micrograms per liter (i.e. equivalent to parts per billion) of selenium to 1.2 micrograms per liter for lakes/ponds/ reservoirs and 3.1 micrograms per liter for streams and rivers. Selenium is naturally-occurring in some parts of the state and will be difficult to control at these extremely low levels. Because a number of wastewater treatment systems in the state are already required to treat and remove selenium down to the 5.0 micrograms per liter level, the new more stringent criterion will result in increased treatment costs for these systems.

Lawsuits DENR has joined: None

Link to Federal Explanation/Summary:

http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/selenium/

South Dakota Department of Environment & Natural Resources

DENR Dealing with New Federal Requirements

Title: Clean Water Act – Effluent Limitations for Dental Offices

Date Proposed: October 22, 2014

Short Description: EPA is proposing technology-based standards for discharges of amalgam from dental practices. The proposed rules would require dental offices to reduce the discharge of mercury and other metals from dental amalgam into municipal wastewater sewer systems. Under the proposal, dental offices would be required to install amalgam separators and use best management practices to keep mercury and metals from going down the drain. While mercury is a naturally-occurring element, it acts as a powerful neurotoxin in humans and wildlife. Mercury can bio-accumulate in fish and humans. Because of all these adverse health effects, this rule is intended to minimize one of the sources of mercury that is discharged into the environment.

Impacts to South Dakota: Under the proposal, any dental office that uses dental amalgam for fillings or removes old fillings will be required to either have an amalgam separator or demonstrate they are removing 99 percent of the mercury from waste streams going down the drain to the city sewer. The South Dakota Dental Association estimated that at least 300 dental offices in South Dakota will be impacted by this rule. The rule will be expensive to implement for many dental offices in spite of the fact that 99 percent of the mercury in South Dakota's water resources comes from atmospheric sources beyond our state borders. Therefore, this rule will provide no discernable improvement in water quality for South Dakota.

Lawsuits South Dakota has joined: None

Links to Federal Explanation and Summary:

Rule: https://federalregister.gov/a/2014-24347

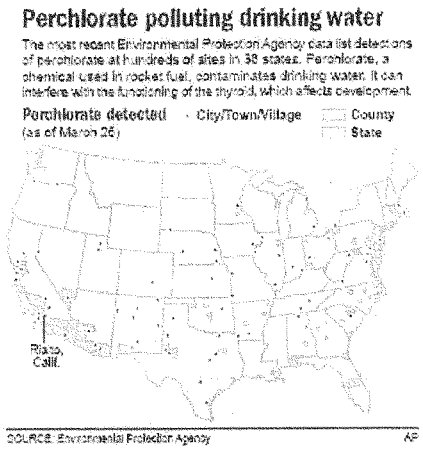
EPA's Website Explaining the Rule: http://water.epa.gov/scitech/wastetech/guide/dental/

DENR Dealing with New Federal Requirements

Title: Safe Drinking Water Act — Perchlorate Rule

Date Proposed: Proposed rule under development

Short Description: EPA has decided to regulate perchlorate under the Safe Drinking Water Act. This decision reverses a 2008 preliminary determination, and considers input from almost 39,000 public commenters on multiple public notices (May 2007, October 2008, and August 2009) related to perchlorate. Perchlorate is both a naturally occurring and man-made chemical that is used to produce rocket fuel, fireworks, flares and explosives. Perchlorate can also be present in bleach and in some fertilizers. Once the primary drinking water standard is finalized by EPA, certain public drinking water systems will be required to take action to comply with the regulation in accordance with the schedule specified in the regulation.



Impacts to South Dakota: As shown by the map above, there were no detections of perchlorate in South Dakota drinking water systems when monitoring for perchlorate was conducted under the Unregulated Contaminant Monitoring Rule. Consequently, DENR submitted written comments when the rule was first proposed requesting that EPA not develop a national regulation for a pollutant that shows up in only some states. DENR continues to monitor this rule and will provide written comments to EPA after the proposed rule is published in the Federal Register. If the proposed rule does not include language for waivers for states where no perchlorate has been detected, DENR will again submit written comments requesting that a waiver provision be included so that states where no perchlorate has been detected do not have to develop a regulatory program for it and unnecessary monitoring costs are not incurred by drinking water systems in those states.

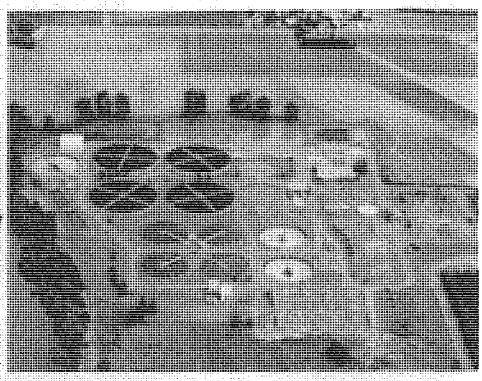
Lawsuits DENR has Joined: None

Link to the Federal Explanation/Summary:

http://water.epa.gov/drink/contaminants/unregulated/perchlorate.cfm

South Dakota Department of Environment & Natural Resources

DENR Dealing with New Federal Requirements



Title: Water Resources Reform and Development Act - Clean Water State Revolving Fund Amendments

Date: The Clean Water State Revolving Fund Amendments were tacked on to the 2014 Water Resources Reform and Development Act by Congress in mid-May with no advance notice to the states and the bill was signed into law by President Obama on June 10, 2014.

Short Description: The 2014 Water Resources Reform and Development Act made significant changes to the existing Clean Water State Revolving Fund program by amending Titles I, II, V, and VI of the Federal Water Pollution Control Act. The Act also created the new Water Infrastructure Finance and Innovation Authority.

Impacts to South Dakota: On the positive side, the amendments expanded some eligibilities of the Clean Water State Revolving Fund, primarily regarding land costs, decentralized wastewater systems, and stormwater management.

On the negative side, the following federal strings to the existing Clean Water State Revolving Fund program have now been codified by Congress and will likely stay in place forever for new projects receiving financial assistance through the program:

- buy only American iron and steel;
- requiring Davis-Bacon wage rates;
- loan recipients have to certify projects have been studied and selected that maximize the potential for water and energy conservation;
- principal forgiveness limited to recipients meeting an affordability criteria to be established by the state or for EPA sanctioned "green" projects; and
- new procurement process requirements for architectural and engineering services.

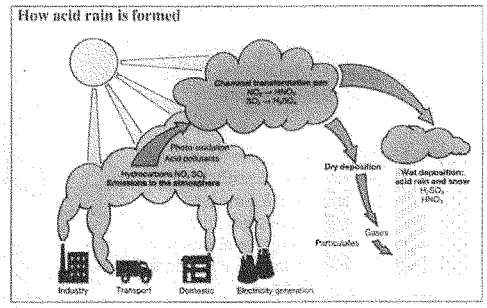
Lawsuits DENR has Joined: None

Link to Federal Explanation/Summary:

https://www.govtrack.us/congress/bills/113/hr3080/text

https://www.congress.gov/bill/113th-congress/house-bill/3080

DENR Dealing with New Federal Requirements



Title: **Clean Air Act — Consent Decree for 1-Hour Sulfur Dioxide Standard**

Date: Filed March 2, 2015

Short Description: On June 22, 2010, EPA revised the National Ambient Air Quality Standard for sulfur dioxide and established a 1-hour standard. On June 2, 2011, DENR submitted its designation letter and documentation to support EPA designating every county in South Dakota as attaining the new standard. The Sierra Club and other environmental groups sued EPA in California federal district courts over missing the deadline to set state designations for the 1-hour sulfur dioxide standard. The resulting consent decree establishes new deadlines to meet and requires South Dakota, along with other states, to submit additional designation letters. The first round of designation letters required by the consent decree involves counties with large emission sources of sulfur dioxide based on calendar year 2012. In South Dakota, only Grant County where the Big Stone Power Plant is located was listed in the consent decree. The second designation letter for Grant County was submitted September 16, 2015. To meet the consent decree's schedule, EPA is forcing states to use modeling to designate these areas because there is not enough time to monitor (three years baseline monitoring required) for sulfur dioxide and demonstrate compliance.

Impacts to South Dakota: DENR is opposed to using EPA's models because they over-predict air concentrations which may result in Grant County being designated as not attaining the 1-hour sulfur dioxide standard. Plus, this could set precedence for EPA forcing states to use models instead of actual, real-life ambient monitoring data for future designations. DENR has one year of sulfur dioxide monitoring data from the Grant County area showing no violations of the standard, but three years is needed to demonstrate attainment. DENR would not be required to do any of this if EPA took into account the new air pollution controls the Big Stone Power Plant installed at a cost of $384 million. These new air pollution controls comply with the federal Regional Haze Program and will reduce sulfur dioxide emissions below the thresholds established in the consent decree.

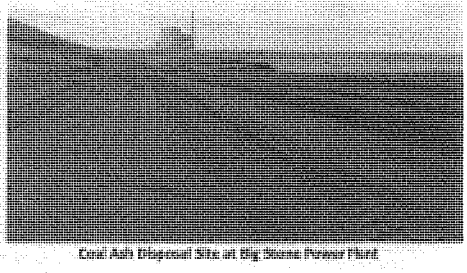
Lawsuits DENR has Joined: Joined a lawsuit against EPA with North Dakota and other states, but it was stayed pending near identical litigation in the California federal district courts. The parties in California are appealing the district court's adoption of the consent agreement between EPA and the Sierra Club.

Link to Federal Explanation/Summary:

http://www.epa.gov/airquality/sulfurdioxide/designations/data.html

DENR Dealing with New Federal Requirements

Title: Resource Conservation Recovery Act – Final Rule on Coal Combustion Residuals Generated by Electric Utilities



Coal Ash Disposal Site at Big Stone Power Plant

Date Proposed: Final rule published in Federal Register on April 17, 2015; effective date of October 19, 2015

Short Description: On June 21, 2010, EPA proposed regulations under the Resource Conservation Recovery Act to regulate for the first time coal combustion residuals (i.e. ash) generated from the combustion of coal at electric utilities and independent power producers. This was prompted by the large liquid coal ash spill at the Tennessee Valley Authority power plant in Kingston, Tennessee in 2008. The new rules will create regulatory requirements related to: structural integrity for surface impoundments, ground water monitoring, liner design criteria, location restrictions, storm water and air quality operating requirements, record keeping and Internet posting, and closure and post closure.

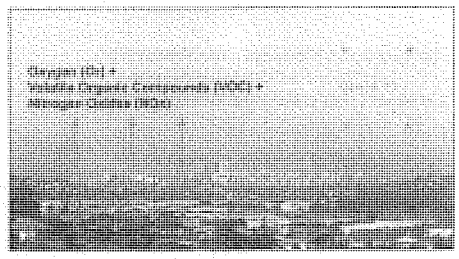
Impacts to South Dakota: EPA's new rules are self-implementing meaning that regulated facilities must comply with the new rules without the engagement of federal or state regulatory authorities. States are not required to adopt the rules or develop a permitting program, but EPA is strongly encouraging states to do so. In the absence of a state program, enforcement of these federal rules will be by citizen suits (or by states acting as citizens). Currently, the only coal-fired power plant in South Dakota subject to the new rules is the Big Stone Power Plant near Milbank. DENR's Waste Management Program already regulates coal ash disposal at this facility through a solid waste permit. Because the new federal rules essentially preempt the existing state solid waste permit, DENR is continuing negotiations with EPA Region 8 to evaluate potential administrative rule changes to adopt the new federal requirements in the least disruptive manner.

Lawsuits DENR has Joined: None

Link to Federal Explanation/Summary: http://www2.epa.gov/coalash/coal-ash-rule

DENR Dealing with New Federal Requirements

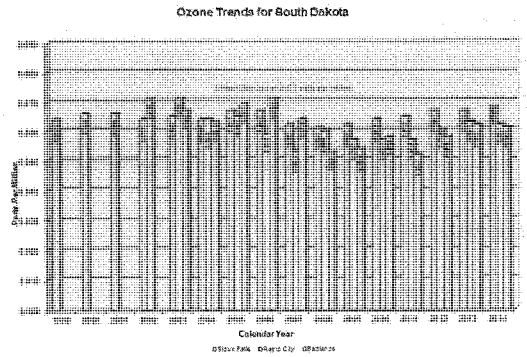
Title: Clean Air Act — Revised National Ambient Air Quality Standard for Ozone



Dates: Proposed November 25, 2014; Final rule published October 26, 2015

Short Description: EPA used protecting public health as the basis to propose lowering the National Air Quality Standard for ozone from 0.075 parts per million to a new standard somewhere in a range of 0.060 to 0.070. The final rule established the level at 0.070 parts per million.

Impacts to South Dakota: The bar graph below shows ozone levels in South Dakota are below the old standard of 0.075 parts per million, but ozone levels at all monitoring stations are greater than 0.060 parts per million. There are few major sources of volatile organic compounds or nitrogen oxides in South Dakota which then reacts with sunlight to form ozone, so the sources of our existing ozone are either background or come from other states. Lowering of the ozone standard to 0.070 parts per million is better than 0.060 which would have placed some, if not all, of South Dakota in jeopardy of violating the new standard, but as the graph below shows, we are still in jeopardy of losing our status of being a state that meets all National Ambient Air Quality Standards everywhere in the state. A non-attainment status will increase DENR's workload, place economic hardships on businesses and communities in and near the areas violating the standard, and place federal highway funds in jeopardy.



Lawsuits DENR has Joined: None

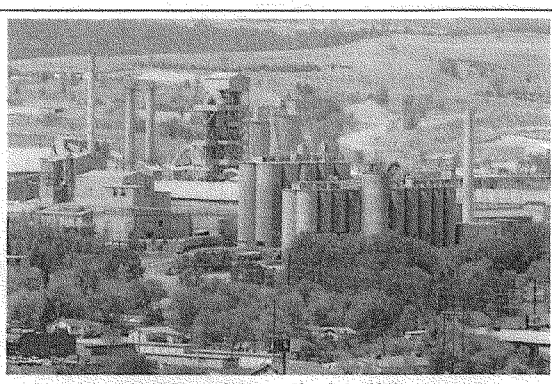
Link to Federal Explanation/Summary: http://www.epa.gov/airquality/ozonepollution/

South Dakota Department of Environment & Natural Resources

DENR Dealing with New Federal Requirements

Title: Clean Air Act — State Implementation Plan Call on DENR's Startup, Shutdown, and Malfunction Exemption

Dates: Final rule issued June 12, 2015



GCC Dacotah Cement Plant in Rapid City

Short Description: In response to a petition from the Sierra Club that argued affirmative defense and exemptions during start-up, shutdown, and malfunction events constitute a loophole that allows facilities to release air pollutants in excess of permit limits, EPA issued a new rule that finds certain startup, shutdown, and malfunction exemptions in 36 states are substantially inadequate to meet the Clean Air Act requirements. To rectify the inadequacies, EPA's rule issued a *"State Implementation Plan Call"* that requires each of the 36 states to eliminate the exemption.

Impacts to South Dakota: In South Dakota, the exemption allowed by DENR's rules allows for brief periods of visible emissions during periods of soot blowing, startups, shutdowns, and malfunctions. DENR's rule was first established in 1975, was approved by EPA, and has not caused or interfered with South Dakota staying in full compliance with all of the federal National Ambient Air Quality Standards. In fact, South Dakota is one of only 10 states in the nation that are in full attainment of all the federal national ambient air quality standards everywhere in the state. If South Dakota eliminates this exemption in accordance with EPA's *"State Implementation Plan Call,"* industry will lose their affirmative defense and exemptions for brief periods of visible emissions during soot blowing, start-ups, shutdowns, and malfunctions. Consequently, environmental groups, citizens, and EPA could take legal action against facilities and small businesses that are unable to meet South Dakota's opacity limit of 20 percent during soot blowing, startups, shutdowns, or malfunctions, but there will be no discernible improvement in air quality.

Lawsuits DENR has Joined: On August 4, 2015, on behalf of DENR, Attorney General Marty Jackley joined Florida's lawsuit against EPA's *"State Implementation Plan Call"* along with 15 other states. *"We will not step aside while the EPA, through heavy-handed federal overreach, threatens to upend a system that the EPA has approved multiple times and has provided a consistent, reliable framework to safely provide electricity to millions of Floridians across the state,"* Florida Attorney General Pam Bondi said in a statement.

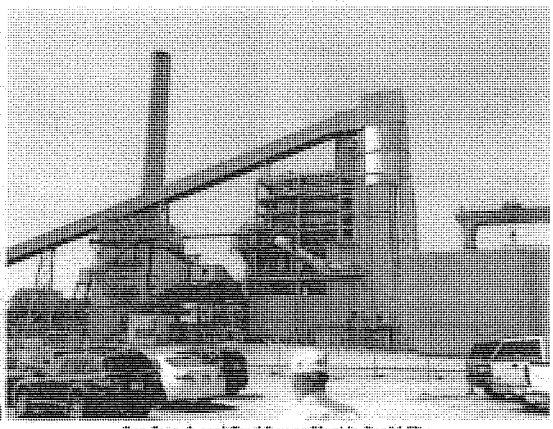
Link to Federal Explanation/Summary: Nothing available at this time.

DENR Dealing with New Federal Requirements

Title: **Clean Air Act — Carbon Pollution Standards for new, modified, and reconstructed power plants**

Date: EPA published the final regulation in the Federal Register on October 23, 2015.

Short Description: These rules regulate the greenhouse gas carbon dioxide from new, modified, and reconstructed power plants (e.g. construction after January 2014) designed to burn a fossil fuel (e.g. coal, natural gas).



Ben French coal-fired Power Plant in Rapid City

Impacts to South Dakota: Because these rules apply only to new, modified, and reconstructed power plants, there is no immediate impact to South Dakota. However, the final rule expects the use of carbon capture and sequestration systems to be used on new coal-fired power plants to meet the finalized emission limits. South Dakota commented during the public notice period that carbon capture and sequestration systems are not commercially available. For the foreseeable future, most of the electric power generating industry believe the effect of this rule will be a federal moratorium on the construction of new coal-fired power plants. If true, this rule will impact South Dakota by guaranteeing that Otter Tail's Big Stone II or Basin's Next-Gen coal-fired plant proposed near Selby will never be built.

Lawsuits DENR has Joined: On behalf of DENR, Attorney General Marty Jackley joined West Virginia's lawsuit against EPA along with 22 other states and state agencies.

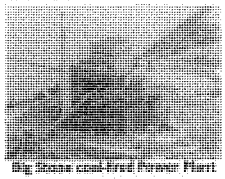
Link to Federal Explanation/Summary:

http://www.epa.gov/climatechange/

http://www2.epa.gov/cleanpowerplan/carbon-pollution-standards-new-modified-and-reconstructed-power-plants

DENR Dealing with New Federal Requirements

Title: Clean Air Act - 111(d) Clean Power Plan for Existing Plants


Big Stone coal-fired Power Plant

Date: EPA's Administrator, Gina McCarthy, signed the final 1,650-page rule on August 3, 2015, and it was published on October 23, 2015.

Short Description: This rule requires states to submit a plan to regulate greenhouse gases from existing power plants that burn a fossil fuel (e.g. coal, natural gas). The rule identifies four options:

1. Sub-category rate-based limit based on a two-year average starting in 2030:
   a. Coal-fired steam generation = 1,305 pounds of carbon dioxide per net megawatt-hour.
   b. Natural-gas fired turbine = 771 pounds of carbon dioxide per net megawatt-hour.
2. Statewide rate-based limit for all affected electric generating units of 1,167 pounds of carbon dioxide per net megawatt-hour based on a two-year average starting in 2030.
3. Mass-based limit of 7,078,962 short tons of carbon dioxide based on two-year blocks starting with 2030-2031.
4. EPA implements federal plan for states that do not submit a state plan.

Impacts to South Dakota: The EPA rules affect the Big Stone Plant near Milbank (shown above) and Deer Creek Station near White. DENR is taking the required steps to seek a two-year extension by the September 2016 deadline and submit a plan by September 2018.

Lawsuits DENR has Joined: SD Attorney General Marty Jackley joined the following lawsuits:

- Murray Energy Corp. petitioned the United States Court of Appeals for the District of Columbia Circuit for a writ of prohibition against the EPA for its proposed rule. Murray Energy Corp. asked the court to review EPA's statutory mandate and its authority to implement its proposed greenhouse gas regulations. South Dakota moved to intervene along with 26 other states. Arguments were heard on April 16, 2015; judgment was filed June 9, 2015 denying the writ.
- South Dakota joined with West Virginia and 11 other states in filing a petition challenging the legality of a 2010 finalized settlement agreement in which the EPA agreed to impose new regulations under 111(d) of the Clean Air Act upon existing coal-fired power plants. Arguments were held on April 16, 2015, before the same federal panel set to hear the Murray Energy petition. Judgment was filed on June 9, 2015, denying the petition filed by the states.
- South Dakota has also joined with West Virginia and approximately 26 other states in filing petitions for review directly challenging the published §111(d) regulation. Along with the petitions a Motion to Stay was filed that was recently denied by the D.C. Circuit Court of Appeals. Many states, including South Dakota, have alternatively sought a stay from the United States Supreme Court. The petitions for review are currently set to be argued before the D.C. Circuit Court of Appeals in early June, 2016. The case has been consolidated with approximately 25 others at last count.

Link to Federal Explanation/Summary: http://www.epa.gov/climatechange/ and http://www2.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants

ORAL ARGUMENT HAS BEEN SCHEDULED FOR JUNE 2, 2016

No. 15-1363 (and consolidated cases)

In the
United States Court of Appeals
for the District of Columbia Circuit

STATE OF WEST VIRGINIA, et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

BRIEF FOR MEMBERS OF CONGRESS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

On Petition for Review from the Environmental Protection Agency

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Attorneys for Amici Curiae Members of Congress

February 23, 2016

CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Amici Curiae Members of Congress respectfully file this Certificate as to Parties, Rulings, and Related Cases, as required by Fed. R. App. P. 28(a)(1) and D.C. Cir. Rule 28(a)(1).

I. PARTIES AND AMICI

The Parties, Intervenors, and other Amici to the proceeding in this Court are listed in Petitioners' briefs filed with this Court on February 19, 2016.

II. RULING UNDER REVIEW

Under review in this proceeding is an Environmental Protection Agency ("EPA") final action identified as the *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, EPA-HQ-OAR-2013-0602, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (the "Final Rule").

III. RELATED CASES

This case is consolidated with Case Nos. 15-1364, 15-1365, 15-1366, 15-1367, 15-1368, 15-1370, 15-1371, 15-1372, 15-1373, 15-1374, 15-1375, 15-1376, 15-1377, 15-1378, 15-1379, 15-1380, 15-1382, 15-1383, 15-1386, 15-1393, 15-1398, 15-1409, 15-1410, 15-1413, 15-1418, 15-1422, 15-1432, 15-1442, 15-1451, 15-1459, 15-1464, 15-1470, 15-1472, 15-1474, 15-1475, 15-1477, 15-1483, 15-

1488. Certain other related cases are set forth in Petitioners' briefs filed with this Court on February 19, 2016.

On February 9, 2016, the United States Supreme Court entered an order staying EPA's implementation of the Final Rule pending the outcome of the current litigation before this Court and/or the Supreme Court. (Case Nos. 15A773, 15A776, 15A778, 15A787, and 15A793).

/s/ Ed R. Haden
Counsel for Amici Curiae

STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY

Amici are 34 Senators and 171 Representatives duly elected to serve in the Congress of the United States in which "[a]ll legislative Powers" granted by the Constitution are vested.[1] U.S. Const. art. I, § 1. A full list of Amici is provided below. Amici have strong institutional interests in preserving Congress' role in making law for the nation, including the determination of climate change-related laws and policies. In light of the issues in this case involving the Clean Air Act, 42 U.S.C. § 7401 et seq., Amici seek to provide new and additional insights for the benefit of the Court as it considers this important matter. Amici submit this brief as governmental entities, in an official capacity as officers of the United States, pursuant to Fed. R. App. P. 29(a) and D.C. Cir. Rule 29(b) and (d).

[1] No party's counsel authored this brief in whole or in part, nor has a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief, nor has a person contributed money that was intended to fund preparing or submitting the brief. Other attorneys with the undersigned counsel's law firm are counsel of record for certain of the Petitioners, but those attorneys had no part in the authoring, preparing, or filing of this brief.

List of Amici Curiae

Senator Mitch McConnell of Kentucky

Senator James M. Inhofe of Oklahoma

Representative Fred Upton of Michigan, 4th Congressional District

Representative Ed Whitfield of Kentucky, 1st Congressional District

Senator Lamar Alexander of Tennessee

Senator John Barrasso of Wyoming

Senator Roy Blunt of Missouri

Senator John Boozman of Arkansas

Senator Shelly Moore Capito of West Virginia

Senator Bill Cassidy of Louisiana

Senator Dan Coats of Indiana

Senator John Cornyn of Texas

Senator Michael D. Crapo of Idaho

Senator Ted Cruz of Texas

Senator Steve Daines of Montana

Senator Michael B. Enzi of Wyoming

Senator Deb Fischer of Nebraska

Senator Orrin G. Hatch of Utah

Senator John Hoeven of North Dakota

Senator Ron Johnson of Wisconsin

Senator James Lankford of Oklahoma

Senator Joe Manchin of West Virginia

Senator John McCain of Arizona

Senator Lisa Murkowski of Alaska

Senator Rand Paul of Kentucky

Senator James E. Risch of Idaho

Senator Pat Roberts of Kansas

Senator M. Michael Rounds of South Dakota

Senator Marco Rubio of Florida

Senator Tim Scott of South Carolina

Senator Richard C. Shelby of Alabama

Senator Dan Sullivan of Alaska

Senator John Thune of South Dakota

Senator Patrick J. Toomey of Pennsylvania

Senator David Vitter of Louisiana

Senator Roger Wicker of Mississippi

Speaker Paul Ryan of Wisconsin, 1st Congressional District

Majority Leader Kevin McCarthy of California, 23rd Congressional District

Majority Whip Steve Scalise of Louisiana, 1st Congressional District

Representative Cathy McMorris Rodgers of Washington, 5th Congressional District

Representative Brian Babin of Texas, 36th Congressional District

Representative Lou Barletta of Pennsylvania, 11th Congressional District

Representative Andy Barr of Kentucky, 6th Congressional District

Representative Joe Barton of Texas, 6th Congressional District

Representative Gus Bilirakis of Florida, 12th Congressional District

Representative Mike Bishop of Michigan, 8th Congressional District

Representative Rob Bishop of Utah, 1st Congressional District

Representative Diane Black of Tennessee, 6th Congressional District

Representative Marsha Blackburn of Tennessee, 7th Congressional District

Representative Mike Bost of Illinois, 12th Congressional District

Representative Charles W. Boustany, Jr. of Louisiana, 3rd Congressional District

Representative Kevin Brady of Texas, 8th Congressional District

Representative Jim Bridenstine of Oklahoma, 1st Congressional District

Representative Mo Brooks of Alabama, 5th Congressional District

Representative Susan W. Brooks of Indiana, 5th Congressional District

Representative Ken Buck of Colorado, 4th Congressional District

Representative Larry Bucshon of Indiana, 8th Congressional District

Representative Michael C. Burgess of Texas, 26th Congressional District

Representative Bradley Byrne of Alabama, 1st Congressional District

Representative Ken Calvert of California, 42nd Congressional District

Representative Earl L. 'Buddy' Carter of Georgia, 1st Congressional District

Representative John R. Carter of Texas, 31st Congressional District

Representative Steve Chabot of Ohio, 1st Congressional District

Representative Jason Chaffetz of Utah, 3rd Congressional District

Representative Mike Coffman of Colorado, 6th Congressional District

Representative Tom Cole of Oklahoma, 4th Congressional District

Representative Chris Collins of New York, 27th Congressional District

Representative Doug Collins of Georgia, 9th Congressional District

Representative K. Michael Conaway of Texas, 11th Congressional District

Representative Kevin Cramer of North Dakota, At-Large Congressional District

Representative Ander Crenshaw of Florida, 4th Congressional District

Representative John Abney Culberson of Texas, 7th Congressional District

Representative Rodney Davis of Illinois, 13th Congressional District

Representative Jeff Denham of California, 10th Congressional District

Representative Ron DeSantis of Florida, 6th Congressional District

Representative Scott DesJarlais of Tennessee, 4th Congressional District

Representative Sean P. Duffy of Wisconsin, 7th Congressional District

Representative Jeff Duncan of South Carolina, 3rd Congressional District

Representative John J. Duncan, Jr. of Tennessee, 2nd Congressional District

Representative Renee Ellmers of North Carolina, 2nd Congressional District

Representative Blake Farenthold of Texas, 27th Congressional District

Representative Chuck Fleischmann of Tennessee, 3rd Congressional District

Representative John Fleming of Louisiana, 4th Congressional District

Representative Bill Flores of Texas, 17th Congressional District

Representative J. Randy Forbes of Virginia, 4th Congressional District

Representative Virginia Foxx of North Carolina, 5th Congressional District

Representative Trent Franks of Arizona, 8th Congressional District

Representative Scott Garrett of New Jersey, 5th Congressional District

Representative Bob Gibbs of Ohio, 7th Congressional District

Representative Louie Gohmert of Texas, 1st Congressional District

Representative Bob Goodlatte of Virginia, 6th Congressional District

Representative Paul A. Gosar of Arizona, 4th Congressional District

Representative Kay Granger of Texas, 12th Congressional District

Representative Garret Graves of Louisiana, 6th Congressional District

Representative Sam Graves of Missouri, 6th Congressional District

Representative Tom Graves of Georgia, 14th Congressional District

Representative H. Morgan Griffith of Virginia, 9th Congressional District

Representative Glenn Grothman of Wisconsin, 6th Congressional District

Representative Frank C. Guinta of New Hampshire, 1st Congressional District

Representative Brett Guthrie of Kentucky, 2nd Congressional District

Representative Gregg Harper of Mississippi, 3rd Congressional District

Representative Vicky Hartzler of Missouri, 4th Congressional District

Representative Jeb Hensarling of Texas, 5th Congressional District

Representative Jody B. Hice of Georgia, 10th Congressional District

Representative J. French Hill of Arkansas, 2nd Congressional District

Representative Richard Hudson of North Carolina, 8th Congressional District

Representative Tim Huelskamp of Kansas, 1st Congressional District

Representative Bill Huizenga of Michigan, 2nd Congressional District

Representative Will Hurd of Texas, 23rd Congressional District

Representative Robert Hurt of Virginia, 5th Congressional District

Representative Evan H. Jenkins of West Virginia, 3rd Congressional District

Representative Lynn Jenkins of Kansas, 2nd Congressional District

Representative Bill Johnson of Ohio, 6th Congressional District

Representative Sam Johnson of Texas, 3rd Congressional District

Representative Walter B. Jones of North Carolina, 3rd Congressional District

Representative Jim Jordan of Ohio, 4th Congressional District

Representative Mike Kelly of Pennsylvania, 3rd Congressional District

Representative Trent Kelly of Mississippi, 1st Congressional District

Representative Steve King of Iowa, 4th Congressional District

Representative Adam Kinzinger of Illinois, 16th Congressional District

Representative John Kline of Minnesota, 2nd Congressional District

Representative Doug LaMalfa of California, 1st Congressional District

Representative Doug Lamborn of Colorado, 5th Congressional District

Representative Robert E. Latta of Ohio, 5th Congressional District

Representative Billy Long of Missouri, 7th Congressional District

Representative Barry Loudermilk of Georgia, 11th Congressional District

Representative Frank D. Lucas of Oklahoma, 3rd Congressional District

Representative Blaine Luetkemeyer of Missouri, 3rd Congressional District

Representative Cynthia M. Lummis of Wyoming, At-Large Congressional District

Representative Kenny Marchant of Texas, 24th Congressional District

Representative Tom Marino of Pennsylvania, 10th Congressional District

Representative Thomas Massie of Kentucky, 4th Congressional District

Representative Michael T. McCaul of Texas, 10th Congressional District

Representative Tom McClintock of California, 4th Congressional District

Representative David B. McKinley of West Virginia, 1st Congressional District

Representative Martha McSally of Arizona, 2nd Congressional District

Representative Mark Meadows of North Carolina, 11th Congressional District

Representative Luke Messer of Indiana, 6th Congressional District

Representative John L. Mica of Florida, 7th Congressional District

Representative Jeff Miller of Florida, 1st Congressional District

Representative John Moolenaar of Michigan, 4th Congressional District

Representative Alex X. Mooney of West Virginia, 2nd Congressional District

Representative Markwayne Mullin of Oklahoma, 2nd Congressional District

Representative Tim Murphy of Pennsylvania, 18th Congressional District

Representative Randy Neugebauer of Texas, 19th Congressional District

Representative Dan Newhouse of Washington, 4th Congressional District

Representative Richard B. Nugent of Florida, 11th Congressional District

Representative Devin Nunes of California, 22nd Congressional District

Representative Pete Olson of Texas, 22nd Congressional District

Representative Steven M. Palazzo of Mississippi, 4th Congressional District

Representative Stevan Pearce of New Mexico, 2nd Congressional District

Representative Scott Perry of Pennsylvania, 4th Congressional District

Representative Robert Pittenger of North Carolina, 9th Congressional District

Representative Joseph R. Pitts of Pennsylvania, 16th Congressional District

Representative Ted Poe of Texas, 2nd Congressional District

Representative Mike Pompeo of Kansas, 4th Congressional District

Representative John Ratcliffe of Texas, 4th Congressional District

Representative Jim Renacci of Ohio, 16th Congressional District

Representative Reid Ribble of Wisconsin, 8th Congressional District

Representative Scott Rigell of Virginia, 2nd Congressional District

Representative David P. Roe of Tennessee, 1st Congressional District

Representative Harold Rogers of Kentucky, 5th Congressional District

Representative Mike Rogers of Alabama, 3rd Congressional District

Representative Dana Rohrabacher of California, 48th Congressional District

Representative Todd Rokita of Indiana, 4th Congressional District

Representative Peter J. Roskam of Illinois, 6th Congressional District

Representative Keith J. Rothfus of Pennsylvania, 12th Congressional District

Representative David Rouzer of North Carolina, 7th Congressional District

Representative Steve Russell of Oklahoma, 5th Congressional District

Representative Pete Sessions of Texas, 32nd Congressional District

Representative John Shimkus of Illinois, 15th Congressional District

Representative Bill Shuster of Pennsylvania, 9th Congressional District

Representative Michael K. Simpson of Idaho, 2nd Congressional District

Representative Adrian Smith of Nebraska, 3rd Congressional District

Representative Jason Smith of Missouri, 8th Congressional District

Representative Lamar Smith of Texas, 21st Congressional District

Representative Chris Stewart of Utah, 2nd Congressional District

Representative Steve Stivers of Ohio, 15th Congressional District

Representative Marlin A. Stutzman of Indiana, 3rd Congressional District

Representative Glenn 'GT' Thompson of Pennsylvania, 5th Congressional District

Representative Mac Thornberry of Texas, 13th Congressional District

Representative Patrick J. Tiberi of Ohio, 12th Congressional District

Representative Scott R. Tipton of Colorado, 3rd Congressional District

Representative David A. Trott of Michigan, 11th Congressional District

Representative Michael R. Turner of Ohio, 10th Congressional District

Representative Ann Wagner of Missouri, 2nd Congressional District

Representative Tim Walberg of Michigan, 7th Congressional District

Representative Greg Walden of Oregon, 2nd Congressional District

Representative Jackie Walorski of Indiana, 2nd Congressional District

Representative Mimi Walters of California, 45th Congressional District

Representative Randy K. Weber of Texas, 14th Congressional District

Representative Daniel Webster of Florida, 10th Congressional District

Representative Brad R. Wenstrup of Ohio, 2nd Congressional District

Representative Bruce Westerman of Arkansas, 4th Congressional District

Representative Lynn A. Westmoreland of Georgia, 3rd Congressional District

Representative Roger Williams of Texas, 25th Congressional District

Representative Joe Wilson of South Carolina, 2nd Congressional District

Representative Robert J. Wittman of Virginia, 1st Congressional District

Representative Steve Womack of Arkansas, 3rd Congressional District

Representative Rob Woodall of Georgia, 7th Congressional District

Representative Kevin Yoder of Kansas, 3rd Congressional District

Representative Ted S. Yoho of Florida, 3rd Congressional District

Representative Don Young of Alaska, At-Large Congressional District

Representative Todd C. Young of Indiana, 9th Congressional District

Representative Ryan Zinke of Montana, At-Large Congressional District

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GLOSSARY

CAA or the Act	Clean Air Act, 42 U.S.C. § 7401 et seq.
CO_2	Carbon Dioxide
EPA	Environmental Protection Agency
Final Rule	*Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, EPA-HQ-OAR-2013-0602, 80 Fed. Reg. 64,662 (Oct. 23, 2015)
HAPs	Hazardous Air Pollutants
MATS Rule	Mercury and Toxic Standards Rule, 40 C.F.R. pt. 63, subpt. UUUU
OLRC	Office of Law Revision Counsel

STATEMENT REGARDING ADDENDUM

All pertinent statutes and regulations are contained in the Addendum to Petitioners' briefs filed with this Court on February 19, 2016.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers . . . ." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472, 121 S. Ct. 903, 912 (2001) (Scalia, J., majority opinion). "[W]hen Congress confers decisionmaking authority upon agencies," an important principle applies: Congress cannot give, and an agency cannot exercise, "decisionmaking authority" without an "intelligible principle" to which the agency "is directed to conform." *Id.* Thus, when an agency sets "air standards that affect the entire national economy," there must be "substantial guidance" from Congress that the agency must follow. *Id.* at 913. This case involves a new regulation where the agency fails to "conform" to clear congressional instructions and is seeking to usurp the role of Congress to establish climate and energy policy for the nation. *Cf.* U.S. Const. art. II, § 3 (requiring the Executive Branch to "take Care that the Laws be faithfully executed").

Since 1963, Congress has enacted a collection of federal air protection laws, most notably the Clean Air Act ("CAA" or the "Act") and its major amendments in 1970, 1977, and 1990. Petitioners challenge a rule issued by the U.S. Environmental Protection Agency ("EPA") ostensibly pursuant to CAA Section 111(d), a rarely used provision of the Act that reflects policy choices made by

Congress about the regulation of sources of emissions. *See* 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) ("Final Rule"). Congress amended Section 111(d) of the Act in 1990 to prevent duplicative regulation of the same source categories under both Sections 111(d) and 112 of the CAA. In 2011, the Supreme Court also recognized that "EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated . . . under . . . [Section 112]." *Amer. Elec. Power. Co. v. Connecticut*, 564 U.S. 410, 131 S. Ct. 2527, 2537 n. 7 (2011) ("*AEP*"). Because EPA already regulates power plants under Section 112, Section 111(d) cannot serve as the statutory basis for EPA's authority to promulgate the Final Rule. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("If the statutory language is plain, we must enforce it according to its terms."). Thus, the Final Rule has no lawful basis.

Furthermore, contrary to the policy choices made by Congress, the Final Rule seeks to transform the nation's electricity sector by setting carbon dioxide ("CO_2") emission reduction mandates for the States. Congress never authorized EPA to compel the kind of massive shift in electricity generation effectively mandated in the Final Rule. To the contrary, the plain language of Section 111(d) authorizes EPA to establish procedures for the States to submit plans establishing "standards of performance" for "existing sources," 42 U.S.C. § 7411(d), and, in

turn, Congress defined "standard of performance" in terms of the "application of" the "best system of emission reduction" for those sources. *Id.* at § 7411(a).

The Final Rule goes well beyond the clear statutory directive by, among other things, requiring States to submit, for approval, state or regional energy plans to meet EPA's predetermined CO_2 mandates for their electricity sector. In reality, if Congress desired to give EPA sweeping authority to transform the nation's electricity sector, Congress would have provided for that unprecedented power in detailed legislation. Indeed, when an agency seeks to make "decisions of vast 'economic and political significance'" under a "long-extant statute," it must point to a "clear" statement from Congress. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160, 120 S. Ct. 1291, 1315 (2000)). EPA can point to no statement of congressional authorization for the Final Rule's central features, precisely because there is none.

Nor has Congress authorized EPA to make the policy choices that are reflected in the Final Rule—a rule that imposes enormous costs on States and the public without achieving meaningful climate benefits. Because of the Final Rule, States will face unprecedented new regulatory burdens, electricity ratepayers will be subject to billions of dollars in compliance costs, and American workers and their families will experience the hardship of job losses due to power plant

shutdowns, higher electricity prices, and overall diminishment of the nation's global economic competitiveness. Choices of this nature are inherently Congressional decisions. *See W. Minn. Mun. Power Agency v. Fed. Energy Regulatory Comm'n*, 806 F.3d 588, 593 (D.C. Cir. 2015) ("Agencies are empowered to make policy only insofar as Congress expressly or impliedly delegates that power.") (citing *Util. Air Regulatory Grp.*, 134 S. Ct. at 2445 (2014)). Congress has not authorized EPA to make the central policy choices in the Final Rule and, in many respects, has affirmatively rejected those policies, as it certainly did with respect to cap-and-trade programs for CO_2 emissions from power plants.

Accordingly, the Final Rule that has been properly stayed by the Supreme Court should now be vacated by this Court.

ARGUMENT

I. Congress Excluded Section 112-Regulated Power Plants From Concurrent Regulation Under Section 111(d).

The Final Rule cites CAA Section 111(d) as its sole statutory basis, *see* 80 Fed. Reg. at 64,710, even though Congress clearly stated that provision does not apply to sources regulated under Section 112 (the "Section 112 Exclusion"). EPA seeks to avoid the Section 112 Exclusion, both as written by Congress and as articulated by the Supreme Court, in two ways: first, by effectively rewriting Section 111(d), and second, by relying on an inexecutable remnant of statutory

language that was properly excluded from the U.S. Code when the 1990 amendments to the CAA were codified in 1992. Both infringe upon the legislative powers of Congress and must be rejected.

A. EPA May Not Disregard Section 111(d)'s Plain Meaning.

Section 111(d) is a provision of limited scope and applicability and, as such, has only been employed by EPA with respect to a few source categories like fertilizer plants and pulp mills, primarily in the 1970s and 1980s. Since 1990, when Section 111(d) was narrowed even further, only one other source category has been regulated under this authority—municipal landfills. *See* 40 C.F.R. pt. 60, subpt. CC.

In Section 111(d), Congress excluded from regulation under that provision any existing source categories that are regulated under Section 112, which is a section of the Act establishing costly and burdensome standards for sources of hazardous air pollutants ("HAPs"). Specifically, in Section 111(d), Congress authorized EPA to issue procedures for States to establish standards of performance[2] "for any existing source for any air pollutant . . . which is not . . . emitted from a source category which is regulated under section [112]." 42 U.S.C.

[2] A "standard of performance" is defined under Section 111 to mean "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1).

§ 7411(d). EPA has previously explained that, by inserting the Section 112 Exclusion into the Act, "the House [of Representatives] did not want to subject Utility Units [power plants] to duplicative or overlapping regulation." 70 Fed. Reg. 15994, 16031 (Mar. 29, 2005). EPA also has acknowledged that "a literal reading of [the House] amendment is that a standard of performance under section 111(d) cannot be established for any air pollutant—HAP and non-HAP—emitted from a source category regulated under section 112." *Id.* As explained in pt. I.B of this brief, the House amendment is the statutory language properly in the U.S. Code.

EPA currently regulates, among other things, coal-fired power plants under a rule issued in 2012 under the authority of CAA Section 112. *See* 77 Fed. Reg. 9,304 (Feb. 16, 2012) (codified at 40 C.F.R. pt. 63, subpt. UUUU) ("Mercury and Air Toxics Standards" or "MATS Rule"). Therefore, according to the plain language of the Section 112 Exclusion, EPA cannot *also* regulate the same power plants under Section 111(d).

In the Final Rule, however, EPA has effectively rewritten the law to allow it to regulate power plants under both Section 111(d) and Section 112, so long as EPA simply identifies *different pollutants* for each rule. *See* 80 Fed. Reg. at 64,710 ("[S]ection 111(d) applies to *air pollutants* that are not regulated . . . as a *hazardous air pollutant* (HAP) under CAA section 112.") (emphases added). This

new interpretation is not what the statute says in plain terms, as EPA had recognized for two decades prior to the Final Rule.

In addition to contradicting the statute's plain language, EPA's new interpretation of Section 111(d) also differs from the Supreme Court's own explanation of Section 111(d) in *AEP*. There, the Court articulated the Section 112 Exclusion in the context of a CO_2-specific case without limiting its application to the *same pollutants*. Specifically, the Supreme Court explained: "There is an exception: EPA may not employ [Section 111(d)] *if existing stationary sources* of the pollutant in question *are regulated* under . . . the 'hazardous air pollutants' program, [Section 112]." *AEP*, 131 S. Ct. at 2537 & n. 7 (emphases added). While it is true that, in 2011, the Supreme Court acknowledged EPA's ability to regulate power plants under Section 111(d), *id.* at 2537–38, EPA effectively surrendered such authority when it issued the MATS Rule in 2012—a rule promulgated under Section 112 that remains in effect today. In other words, because EPA chose to promulgate the MATS Rule (thereby regulating coal-fired power plants under Section 112), EPA cannot rely on Section 111(d) as the source of its authority for the Final Rule. The plain language of the statute cannot be read otherwise, and EPA's purported "interpretation" should be accorded no deference. *Utility Air Regulatory Grp.*, 134 S. Ct. at 2446 (stating that EPA may not "rewrite clear statutory terms to suit its own sense of how the statute should operate").

B. The U.S. Code Sets Forth the Complete and Accurate Text of Section 111(d) as Amended.

To support its reinterpretation of Section 111(d), EPA relies on an obsolete "conforming amendment" in the Statutes at Large. EPA claims there are really "two differing amendments"—House and Senate—which were "never reconciled in conference." 80 Fed. Reg. at 64,711. In EPA's view, because the U.S. Code reflects only the House amendment, the Code language is incomplete. "Both amendments," EPA reasons, "were enacted into law, and thus both are part of the current CAA." 80 Fed. Reg. at 64,711–12. Contrary to EPA's assertions, the House and Senate reconciled their substantive amendments to the CAA in conference, and their agreement is accurately reflected in the text of Section 111(d) in the U.S. Code. A brief examination of the legislative history of the amended Section 111(d) in the U.S. Code eliminates any confusion about what constitutes the correct text of the statute.

1. The Senate Receded to the House, Making the Senate's Conforming Amendment Obsolete.

The legislative history of the 1990 amendments to the CAA shows that Congress intended the language in the U.S. Code to be the law. The provisions of Section 111(d) in the U.S. Code were proposed by the President in legislation

formally submitted to Congress in the summer of 1989,[3] which was subsequently incorporated into legislation considered and passed by the House. The Senate and House conferees considered and amended the substantive section containing House-originated statutory language providing that sources regulated under Section 112 cannot be regulated under Section 111(d). The Senate then expressly receded to the House with respect to this substantive provision.[4] To say the Senate "receded" to the House is simply to say that, as agreed to by the House and Senate conferees, the substantive House amendment controls. Moreover, by receding to the House language, the conferees effectively removed obsolete references to Section 112(b)(1)(A) in the underlying Clean Air Act.

The legislative history also shows that a Senate-originated provision—a non-substantive "conforming amendment" in language revising Section 112—was inadvertently included in the enacted statute. The Senate amendment's sole purpose was to update a cross-reference to account for the fact that parts of Section 112 were renumbered by other amendments. Once the substantive House provisions were adopted—which removed the reference to Section 112(b)(1)(A)—this technical edit was rendered inexecutable because the reference it replaced no

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[3] *See* Proposed Legislation, "Clean Air Act Amendments of 1989," available at http://docs.house.gov/meetings/IF/IF03/20151022/104065/HHRG-114-IF03-20151022-SD009.pdf.

[4] Chafee-Baucus Statement Of Senate Managers, S. 1630, The Clean Air Act Amendments Of 1990, 136 Cong. Rec. S16933–53.

longer existed. Specifically, because the House amendment removed the reference to Section 112(b)(1)(A) entirely, there was no "(1)(A)" left to remove through a "conforming amendment."

The independent Office of Law Revision Counsel ("OLRC"), discharging its statutory duty to make technical, non-substantive corrections when compiling enacted statutes for inclusion in the U.S. Code, identified this obsolete provision and corrected it in 1992.[5] In fact, as the Law Revision Counsel has explained in correspondence:

> The amendments made by Public Law 101-549 were first reflected in the Code in Supplement II to the 1988 edition of the Code, published in 1992. With respect to section 302(a) [*i.e.*, the Senate amendment language], that Supplement included an amendment note for 42 U.S.C. § 7411 [CAA Section 111], saying, "§ 302(a), which directed the substitution of '7412(b)' [CAA Section 112(b)] for '7412(b)(1)(A)' [CAA Section 112(b)(1)(A)] **could not be executed** because of the prior amendment" made by section 108(g) [*i.e.*, the House amendment language].[6]

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[5] The OLRC is an independent, non-partisan office within the House of Representatives, which Congress has charged with preparing a compilation of the laws of the United States "which conforms to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections . . . with a view to the enactment of each title as positive law." 2 U.S.C. § 285(b)(1).

[6] Letter from Ralph V. Seep, Law Revision Counsel, Office of the Law Revision Counsel, to Hon. Tom Marino, Chairman, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on the Judiciary, at 3 (Sept. 16, 2015) ("OLRC Letter") (emphasis added). A copy of the letter is attached to the November 2, 2015 letter from Reps. Upton, Murphy, and Whitfield to EPA Administrator McCarthy, which is available at http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/114/Letters/20151102EPA.pdf.

The OLRC, thus, did exactly what it was required to do: it eliminated the obsolete conforming amendment because it "could not be executed."

2. Removing Obsolete Conforming Amendments Is Standard Practice.

There is nothing unusual about the OLRC removing an obsolete conforming amendment inadvertently included in the Statutes at Large.[7] Under standard OLRC practice, the presence of an inexecutable conforming amendment in the Statutes at Large cannot be taken as evidence that there are somehow two separate, competing versions of the same provision, as EPA would have it. This is because basic principles of legislative drafting, as reflected in House and Senate drafting manuals, require that substantive amendments be applied first, followed by any remaining conforming amendments that have not been rendered obsolete.[8]

Here, the OLRC followed this standard procedure by giving precedence to the substantive House provision over what otherwise would have been a necessary, but non-substantive, technical correction. There was no dispute about whether the Senate text was a conforming amendment.[9]

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[7] *See* Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review, at 36 n.15 (collecting examples), *West Virginia v. EPA*, No. 15A-773 (U.S. Jan. 26, 2016).

[8] *See* Senate Legislative Drafting Manual § 126(b)(2)(A); *accord* House Legislative Counsel's Manual on Drafting Style § 332(b)(2) (identifying a conforming amendment as "relat[ed] [to the] principal amendment").

[9] The Senate language is found in Section 302 of the Public Law text. As the Law Revision Counsel explains: "Note that the heading of section 302 of Public Law 101-549 is

As the Law Revision Counsel notes, EPA has not identified any provision in the revised Section 112 language that would still require the conforming amendment in Section 111:

> If there is no such provision in section [112], the reason may be that the inclusion of section 302(a) in Public Law 101-549 was a mistake—perhaps because it was a remnant of an early version of the bill that contained provisions making changes that were later dropped from the bill—and not an attempt to pass off a significant change as a conforming amendment.[10]

Because the obsolete conforming amendment has no substantive effect on Section 112—and neither EPA nor anyone else has shown otherwise—"section 302(a) [the Senate amendment] would properly be treated as a dead letter." *Id.*

3. EPA's Reinterpretation Is Implausible.

EPA's argument that Congress intended to give substantive weight to an obsolete conforming amendment assumes an implausible view of the legislative process. As the Law Revision Counsel observes:

> For a member to include under the heading "CONFORMING AMENDMENTS" a provision that actually is intended to make a change in the meaning or effect of a law, not as an adjunct to but as an addition to changes made elsewhere in a bill, would be seen as a breach of trust among the members, to put it mildly.[11]

'SEC. 302. CONFORMING AMENDMENTS.' A legislator uses that heading to indicate to the other members of the legislative body that the section contains nothing that would change the meaning or effect of the law, [and] that it contains only technical changes in provisions of law that are inarguably necessary to allow changes made in other sections to be effectuated . . . ." OLRC Letter, at 4.

[10] *Id.*

[11] *Id.*

There is no evidence that such a breach of trust occurred.

In fact, EPA itself has repeatedly acknowledged that the presence of the obsolete Senate amendment language in section 302(a) of the Public Law print of the bill is the result of "apparent drafting errors."[12] As this Court found in *American Petroleum Institute v. SEC*, a mere "scrivener's error" should not be taken as "creating an ambiguity." 714 F.3d 1329, 1336–37 (D.C. Cir. 2013). EPA nevertheless now seeks to transform this technical error that had no substantive effect into a statutory "ambiguity," thereby "laying claim to extravagant statutory power over the national economy"—even though "the authority claimed would render the statute 'unrecognizable to the Congress that designed' it." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (quotation omitted).

II. Through the Final Rule's Expansive Regulatory Requirements, EPA Has Usurped the Role of Congress.

The Final Rule, which spans 303 pages of the Federal Register, is a testament to the creative inclinations of federal agencies. Virtually no part of the nation's electricity sector is unaffected. Creativity is one thing; the bounds of the law are quite another. As described below, EPA is seeking to exercise powers the agency simply does not have. Just as the courts lack "creative power akin to that

[12] *See* Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units, at 21, available at http://www.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf; *see also* 70 Fed. Reg. at 16,031 (acknowledging that the Senate amendment is nothing more than a "a drafting error . . . [that] should not be considered").

vested in Congress,"[13] federal agencies, too, lack such powers unless they are delegated by Congress, and even then, only within the parameters set by law.[14] Any congressional grant of authority to an agency, including the authority given to EPA under the CAA, is subject to a duty to act "in accordance with law." *See* 5 U.S.C. § 705; *see also* 42 U.S.C. § 7607(d)(9). The regulatory scheme adopted by EPA in the Final Rule violates the bounds of the Act in at least four respects.

A. The Final Rule Violates the Clean Air Act's Foundational Principle of Cooperative Federalism and the Tenth Amendment.

Under our constitutional system of government, the "Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925, 928, 117 S. Ct. 2365, 2380–81 (1997) (explaining that State officers cannot be "'dragooned' . . . into administering federal law"). Congress was well aware of this fact when it enacted the CAA, which is built on a principle that the federal government will work cooperatively with the States to achieve air quality goals. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1046 (D.C. Cir. 2001). Under cooperative federalism statutes, Congress may choose to give agencies, such as EPA, a

[13] *AEP*, 131 S. Ct. at 2536.

[14] *See Am. Trucking Ass'ns*, 531 U.S. at 472, 121 S. Ct. at 912 ("[The] Constitution . . . permits no delegation of [legislative] powers . . ., and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.") (quotation marks and citations omitted; emphasis in original).

prescribed role to set national standards while leaving the administration, implementation, and enforcement of those standards primarily in the hands of the States. With respect to the electricity sector, Congress has sought to guard the States' traditional powers over electricity generation, distribution, and use from the kinds of encroachments found in the Final Rule. In particular, the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206, 103 S. Ct. 1713, 1723 (1983); *see also* 16 U.S.C. § 824(b)(1) (reserving jurisdiction over electric generation, distribution, and intrastate transmission to the States); *id.* at § 824o(i)(3) (preserving State authority over the "safety, adequacy, and reliability of electric service").

In the Final Rule, however, EPA takes a *coercive* approach that commandeers the States to implement and enforce the agency's policy choices. EPA does so by mandating CO_2 reductions in most States that cannot be achieved by controls on power plants alone and, instead, would require the States to restructure their electricity sectors. In particular, the Final Rule requires States to, among other things, adopt measures that may include fundamentally altering generation, transmission, and consumption of electricity, enacting new state legislation, adopting emissions trading programs, pursuing energy efficiency and

renewable energy mandates, and expending significant State and local governmental resources to achieve compliance. These will not be short-term obligations. The compliance requirements in the Final Rule continue beyond 2030. *See* 80 Fed. Reg. at 64,669 (requiring efforts to achieve 2030 emission mandates and "maintain that level subsequently").

Assertions about "flexibility" in the Final Rule are unconvincing in light of the substantial reductions in CO_2 emissions mandated for each State—for many, reductions greater than 40% compared to 2012 emission levels.[15] In truth, States have few, if any, real options other than implementing the rule on EPA's terms at great cost to the States and their citizens, or foregoing compliance and awaiting imposition of an onerous federal plan. *See* 80 Fed. Reg. 64,966 (Oct. 23, 2015) (proposed federal implementation plan).

Rules of this nature are inherently contrary to the cooperative federalism that Congress intended the CAA to exemplify and, instead, would commandeer State legislatures and regulatory agencies to achieve EPA's mandates, in violation of both the CAA and the Constitution. *See New York v. United States*, 505 U.S. 144, 175, 112 S. Ct. 2408, 2413 (1992) (holding that the Tenth Amendment prohibits the federal government from "commandeer[ing] state governments into the service

[15] *See* Congressional Research Service, *EPA's Clean Power Plan: Highlights of the Final Rule*, at 11 (Aug. 14, 2015) (listing in Table A-1 state-specific emission rate targets and reduction requirements compared to 2012 baselines).

of federal regulatory purposes"). On many fronts, the Final Rule ventures deep into the regulatory domain of the States without a "clear indication"—or, as in this case, *any* indication—"that Congress intended that result." *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172, 121 S. Ct. 675, 683 (2001). An interpretation of a statute that not only encroaches on State authority but also commandeers State legislatures must be set aside. *See id.*

B. EPA Unlawfully Interprets the CAA to Impose Measures That Extend Beyond the Regulated Source.

Regulatory agencies are creatures of the law and, as such, are limited in their powers by the statutes they are authorized to administer. *See Motion Picture Ass'n of Am., Inc. v. F.C.C.*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("An agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress."). In the Final Rule, EPA imposes measures that affect a wide range of other facilities and activities beyond the regulated source. *Cf. Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 ("When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [courts should] greet its announcement with a measure of skepticism.") (citation and quotations omitted). This is directly contrary to the plain language of the Act, which limits EPA's regulatory authority to "sources" of emissions. This is seen throughout the Act, starting with how Congress defines "air pollution prevention"—*i.e.*, with regard to measures designed to reduce or

eliminate "pollutants produced or created *at the source*." 42 U.S.C. § 7401(a)(3) (also referencing "air pollution control *at its source*") (emphasis added).

Likewise, Section 111(d) calls for standards of performance for "any existing source." *Id.* at § 7411(d)(1). When defining "standards of performance" in Section 111(a), Congress answered whether a beyond-the-source approach is permissible in this context. It is not. According to the statutory definition of "standard of performance," the standard must reflect the degree of emission limitation achievable through the "*application of* the best system of emission reduction" that has been "adequately demonstrated." *Id.* at §§ 7411(a)(1) & (d)(1) ("applying a standard of performance *to any particular source*" and allowing consideration of "the remaining useful life of the existing *source to which such standard applies*") (emphases added). Plainly, the term "application" means "the act of applying" an emission reduction system, as in "the act of laying on or of bringing into contact." *Webster's 3d New International Dictionary* 105 (3rd ed. 1993) (defining "application"); *accord* 1 *Oxford English Dictionary* 576 (2d ed. 1989). This would include, for instance, pollution control devices installed at affected "sources"—the word "source" or "sources" is used eight times in Section 111(d) alone. Other key terms relevant to the Section 111(d) analysis do not allow for the kind of regulatory scheme in the Final Rule. *See, e.g.*, *Essex Chem. Corp. v.*

Ruckelshaus, 486 F.2d 427, 433 (D.C. Cir. 1973) (involving a CAA Section 111 case where "achievability" was evaluated with respect to the source).

In contrast, the interpretation of Section 111(d) that EPA urges here—that a "standard of performance" can be determined following an electricity sector-wide approach rather than being based on measures taken at the specific regulated source—is untenable. Congress does not grant such expansive authority without speaking clearly. In the context of a CAA case, the Supreme Court has explained that, to avoid an unlawful delegation of powers to an agency, Congress "must provide substantial guidance on setting air standards that *affect the entire national economy.*" *Am. Trucking Ass'ns*, 531 U.S. at 475, 121 S. Ct. at 913 (emphasis added). Likewise, as this Court explained in *American Bar Association v. FTC*, it is unreasonable to conclude that Congress would have "hidden a rather large elephant in a rather obscure mousehole." 430 F.3d 457, 469 (D.C. Cir. 2005) (overturning a Federal Trade Commission decision that claimed new authority to regulate the practice of law as "financial institutions").

C. The Final Rule Seeks to Establish a CO_2 Cap-and-Trade Program Despite Congress' Repeated Rejection of Such a Program.

The Final Rule seeks to establish state and regional emissions trading programs for CO_2 emissions from the electricity sector. 80 Fed. Reg. at 64,732. This includes detailed provisions related to emissions trading, credits, allowances, monitoring and verification requirements, recordkeeping and reporting, and

"trading-ready" plans. *Id.* at 64,734. This is a crucial part of the regulation, as shown by the fact that the Final Rule employs the word "trading" 530 times. Tellingly, the Final Rule states that "EPA believes that it is reasonable to anticipate that a virtually nationwide emissions trading market for compliance will emerge." *Id.* at 64,732.

Congress has never authorized the creation of a cap-and-trade program to address CO_2 emissions from the electricity sector. In fact, in 2009, the U.S. House of Representatives narrowly approved H.R. 2454, which would have instituted a broad cap-and-trade program for CO_2, but that bill was never brought to a vote in the Senate. Likewise, a cap-and-trade bill introduced in 2009 in the Senate was never put to a vote, due in large part to concerns about impacts on the economy and jobs. *See* Clean Energy Jobs & Am. Power Act, S. 1733, 111th Cong. (2009).[16]

In contrast, Congress spoke clearly when it intended to authorize the creation of cap-and-trade programs elsewhere in the CAA. Specifically, Congress has authorized a cap-and-trade program to address sulfur dioxide (SO_2) and nitrogen oxide (NO_x) emissions from power plants. *See* 42 U.S.C. § 7651(b). This "Acid Rain Program" was created by Congress *after* finding that acid rain "from the atmosphere" is a threat to public health and the environment *and* "strategies

[16] *See also* Clean Energy Jobs and American Power Act, Report of the Committee on Environment and Public Works to Accompany S. 1733 together with Additional and Minority Views, S. Rep. No. 111-121 (2010).

and technologies for the control of precursors to acid deposition exist *now* that are *economically feasible*." *Id.* at §§ 7651(a)(1) & (4) (emphasis added). Congress also found that "control measures to reduce precursor emissions from steam-electric generating units [*i.e.*, power plants] should be initiated without delay." *Id.* at § 7651(a)(7).

The Acid Rain Program spans sixteen sections of the Clean Air Act (42 U.S.C. §§ 7651 through 7651o), spelling out precise details and even identifying, by name, the affected power plants with initial emission allowances. *See id.* at § 7651c, Table A. In the course of establishing the Acid Rain Program, Congress made the determination on virtually all key policy questions, leaving few details to be determined by EPA in rulemaking. Meanwhile, nothing in the CAA so much as hints at a similar cap-and-trade system for CO_2 emissions. Accordingly, this Court should reject EPA's argument that, concurrent with creating a detailed trading program for SO_2 and NO_x emissions from power plants in the 1990 Amendments, Congress tucked away in Section 111(d) an even greater power for EPA to create, *sua sponte*, a comprehensive regulatory emissions trading system for CO_2 emissions, all without any conditions, limitations, or instructions from Congress. This simply cannot be. While the CAA does allow for certain cap-and-trade programs to address SO_2 and NO_x emissions, "the Congress did not—and EPA may not, consistent with *Chevron*, create an additional [program] on its own."

Natural Res. Def. Council v. EPA, 489 F.3d 1250, 1259–60 (D.C. Cir. 2007); *see also Sierra Club v. EPA*, 294 F.3d 155, 160 (D.C. Cir. 2002) (refusing to allow EPA to extend ozone attainment deadlines where Congress gave the agency power to extend such deadlines under other circumstances but not in the context of ozone transport).

During recent floor debates pertaining to S.J. Res. 24, a resolution disapproving the Final Rule that was adopted by the Senate with bipartisan support,[17] Senators expressed concern that EPA is making policy choices that are inherently reserved for Congress. Senator Shelley Moore Capito, for example, explained that "EPA is attempting to impose the same type of cap-and-trade system that Congress rejected."[18] The House of Representatives also adopted this same resolution disapproving the Final Rule on a bipartisan vote.[19]

In short, when it comes to any "question of deep 'economic and political significance' that is central to [a] statutory scheme," if "Congress wished to assign that question to an agency, it surely would have done so expressly." *King*, 135 S. Ct. at 2489. Here, Congress did the opposite. And if anything can be inferred from Congress' repeated rejection of proposed cap-and-trade legislation for CO_2

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[17] Roll Vote No. 306, 161 Cong. Rec. S8012 (Nov. 17, 2015).

[18] 161 Cong. Rec. S7980 (Nov. 17, 2015) (statement of Sen. Capito).

[19] Roll Vote No. 650, 161 Cong. Rec. H8837 (Dec. 1, 2015).

emissions, it is that Congress had no intention of conferring upon EPA the very authority that the agency now claims to wield as a central part of the Final Rule.

D. The Final Rule Reflects Policy Decisions That Are Inherently Reserved for Congress.

While EPA is authorized to implement the CAA, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez v. United States*, 480 U.S. 522, 526, 107 S. Ct. 1391, 1393 (1987). In the Final Rule, EPA usurps this essential policy-setting role of Congress by determining, on its own, to impose significant economic burdens on States and the nation to address climate change in EPA's prescribed way without achieving measurably significant climate benefits. This is not a policy choice that EPA is allowed to make. "No regulation is 'appropriate' if it does significantly more harm than good." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

A report accompanying the joint resolution passed by the House and Senate disapproving of the Final Rule identifies estimates of "annual compliance costs averaging $29 billion to $39 billion" and projections that "losses to U.S. consumers [could] range from $64 billion to $79 billion," and that electricity ratepayers in most states could experience "double digit rate increases." H.R. Rep.

No. 114-349, at 4 (2015).[20] Likewise, testimony received by Congress reflects that American workers and their families will suffer job losses and other hardships resulting from plant shutdowns and other impacts.[21]

Even though the costs that would be imposed on American ratepayers would be in the billions of dollars, EPA does not project that the Final Rule will produce any meaningful impact on global greenhouse gas emissions. H.R. Rep. No. 114-349, at 4 (2015). In fact, in the United States, energy-related CO_2 emissions already have significantly declined, and according to the Energy Information Administration, even in the absence of the rule, U.S. energy-related CO_2 emissions will remain below 2005 levels through 2040. *Id.* The U.S. share of worldwide emissions will continue to decline over that period, whereas CO_2 energy-related emissions in the developing world are projected to grow substantially. *Id.*

Moreover, EPA did not quantify benefits accruing to the United States and its citizens from the Section 111(d) rulemaking in terms of global temperatures, sea

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[20] This report accompanied H.J. Res. 72, which is identical to S.J. Res. 24, a resolution passed by the Senate and the House on November 17 and December 1, 2015, respectively.

[21] *See, e.g., EPA's Proposed 111(d) Rule for Existing Power Plants and Ratepayer Protection Act: Hearing Before the House Committee on Energy & Commerce*, 114th Cong. 12–13 (2015) (statement of Lisa D. Johnson, Seminole Electric Cooperative, Inc., on behalf of the National Rural Electric Cooperative Association) (discussing job loss concerns associated with EPA's rule); *id.* at 3–5 (statement of Eugene M. Trisko, American Coalition for Clean Coal Electricity) (citing "[l]arge electricity price increases" and income declines that will result from the implementation of the Clean Power Plan), available at https://energycommerce.house.gov/hearings-and-votes/hearings/epa-s-proposed-111d-rule-existing-power-plants-and-hr-ratepayer.

levels, or other climate-related concerns that are the rationale for the Final Rule.[22] Nonetheless, EPA made a unilateral policy choice, contrary to any authority given to it by Congress, to impose unprecedented environmental compliance burdens on the nation.

CONCLUSION

For the reasons set forth above, the Final Rule is not authorized by law and should be vacated in its entirety by this Court.

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[22] H.R. Rep. No., 114-171, at 3 n.7 ("In response to an Additional Question for the Record (QFR) following the June 19, 2014 hearing, EPA Acting Assistant Administrator McCabe stated that EPA did not model the impacts of the proposed rule on global temperatures or sea rise levels."); *see also* EPA, Clean Power Plan Final Rule – Regulatory Impact Analysis, at Table 4-1, available at http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis ("Table 4-1 summarizes the quantified and unquantified climate benefits in this analysis" but shows no data that quantifies "improved environment" or "reduced climate effects" from CO_2 emissions reductions).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and D.C. Cir. Rule 32(a)(2), I hereby certify that the textual portion of the foregoing brief (exclusive of the tables of contents and authorities, glossary, and certificates of service and length, but including footnotes) contains 6,100 words as determined by the word-counting feature of Microsoft Word.

Respectfully submitted,

/s/ Ed R. Haden
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

Pursuant to D.C. Cir. Rule 25(c), I hereby certify that, on this the 23rd day of February, 2016, I caused the foregoing document to be electronically filed with the Clerk of Court via the CM/ECF system, which shall effect service upon all counsel of record who are registered CM/ECF users.

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State of Vermont
Agency of Natural Resources

Deborah L. Markowitz
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Trey Martin
Deputy Secretary

February 4, 2016

The Honorable James Inhofe
205 Russell Senate Office Building
Washington, DC 20510-3603

Dear Senator Inhofe,

I am writing in response to your January 12, 2016 letter seeking feedback regarding the impacts of recent U.S. Environmental Protection Agency (EPA) regulatory actions.

As your letter correctly notes, delegated states such as Vermont are primarily responsible for the oversight and implementation of federal environmental programs. Presently, Vermont is delegated to manage the Resource Conservation and Recovery Act (dealing with hazardous waste), the National Pollution Discharge Elimination System (Clean Water Act), the Clean Air Act, the Safe Drinking Water Act and the Toxic Substances Control Act.

The federally delegated programs that Vermont manages were not forced on our state by the EPA or the federal government, rather Vermont chose to take on the responsibility to run these programs. There are many reasons that Vermont made the decision to assume primary responsibility for these programs. First and foremost Vermont's environment is vital to our economy, which is led by tourism. Business and industry in Vermont use the state's natural beauty and pristine environment as a draw for high quality employees to stay or relocate here. By managing these delegated programs Vermont is in the driver's seat for insuring that our state's most vital resources, our environment and our people, are properly protected by consistent assistance, regulation and when needed, enforcement. This local control is even more important in light of the ever-shifting political views regarding the environment in Washington.

Your letter also notes that the EPA promulgates new rules that the delegated states such as Vermont are required to implement. You are correct that implementing any new rule takes staff time and effort to accomplish. While it sounds like some states are troubled by new EPA rules, in Vermont we are appreciative that the EPA has the expertise to study the environment and manmade impacts on it, and formulate rules that best protect human health and the environment. It would be very difficult and inefficient for each state to try to take on all of the important work done by the EPA. Doing so would

result in a patchwork of regulations that would vary from state to state, and would encourage, at least in some states, a race to the bottom in an effort to attract economic development.

As I am sure you aware, when a state like Vermont is delegated to manage an EPA program federal funds are provided to the state to run that delegated program. One area where you and your committee could most benefit all the delegated states would be to adequately fund state implementation efforts of new rules and programs. For example, it has been estimated by the Association of State Drinking Water Administrators (ASDWA) that federal funding under the Safe Drinkwater Act is falling short to the tune of $240 million just to administer a minimum program and $308 million to run a more robust program. Over time, Congress has failed to increase the funding provided to the states which, as a result of inflation, has further exacerbated this problem. I truly hope that you and your committee will work to insure that delegated states have adequate funding to properly administer these important programs.

Another area where the Senate Public Works Committee can assist the states is in supporting business process improvement strategies that the EPA and the states are undertaking. For example, EPA is currently working in partnership with Vermont to consolidate public notice and comment processes to foster a more accessible, consolidated and cost-effective process for the public and the regulated community. We greatly appreciate the EPA's focus on finding efficiencies to streamline processes while achieving environmental and public health protections.

In closing, I want to reiterate the important work that EPA is doing to protect human health and the environment. The delegated states simply could not do this work without the leadership of the EPA. In Vermont, our partnership with EPA is crucial to our efforts to protect our environment and the health of our citizens.

Thank you again for seeking our opinion on this important matter. I look forward to seeing you and your committee taking the lead to increase funding levels to the delegated states to a level appropriate to the work that the states undertake and to support business process improvements that allow us to better achieve our shared goals.

Sincerely,

Deb Markowitz, Secretary
Vermont Agency of Natural Resources

west virginia department of environmental protection

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February 19, 2016

The Honorable James M. Inhofe, Chairman
Committee on Environment and Public Works (EPW)
United States Senate
Washington, DC 20510-6175

Re: West Virginia Department of Environmental Protection's Response to Your January 12, 2016 Letter

Dear Senator Inhofe:

Thank you for the opportunity to provide the West Virginia Department of Environmental Protection's (WVDEP) perspective on the U.S. Environmental Protection Agency's (EPA) regulatory framework. As you correctly noted in your January 12, 2016 letter, to which I am responding, the concept of cooperative federalism is imbedded in the Clean Air Act, Clean Water Act and other federal environmental statutes. Common among these laws is a design under which the states serve as the primary regulators. Congress' carefully crafted approach places the core responsibilities in state agencies, which are much closer and more responsive to the local concerns of the people and the environment they protect than the distant bureaucracies in Washington. Another feature of state operation of programs for protection of the environment is that the states must do this in a cost-effective manner. Unlike their federal counterparts, state agencies must live within the reality of balanced budgets.

Over the past few years, EPA and other federal agencies seem to have been on a mission to totally remake the American regulatory landscape. They have undertaken this effort with a marked indifference to the impacts of their continual parade of new regulatory demands on state agencies that are already resource-constrained in carrying out existing mandates. State agencies face flat, if not declining, budgets for funding and personnel. Each new regulatory burden EPA places on the states further stretches our finite resources. As reflected by your letter's citation of the Association of Air Pollution Control Agencies (AAPCA) document which sets forth nine major deadlines facing state clean air agencies in 2016, many though not all, of these new demands on the states come in the air pollution control area. Below, I am listing some examples of what West Virginia has faced and still faces:

Federalism in EPA's Carbon Rules for Electric Generating Units (EGUs)

Perhaps no state is more affected by EPA's efforts to regulation carbon dioxide emissions than West Virginia. The coal industry has been a central part of the state's economy for over one hundred years. Nearly all of our electricity comes from coal-fired EGUs. Necessarily, EPA's development of carbon rules is a high priority for our Division of Air Quality. EPA's overly aggressive approach on nearly every aspect of these rules challenges not only our employees but the legal constraints of the Clean Air Act (CAA), as well.

From a federalism perspective, EPA's vehicle for regulating carbon emissions from existing power plants, section 111(d) of the Clean Air Act, is one of the CAA's brightest beacons. It establishes a specific division of responsibility between EPA and the states. EPA is authorized to promulgate procedural regulations, similar to the state implementation plan process under the CAA's section 110, for submission of state section 111(d) plans to EPA for a determination of whether they are satisfactory. Section 111(d)(1); *see*, section 111(d)(2). The substantive authority under section 111(d) is assigned to the states. Section 111(d) gives the authority to establish standards of performance for existing sources to the states, not EPA.

What Congress gives to the states, the EPA takes away. The general implementing regulations EPA promulgated for section 111(d) go well beyond its statutory role of merely establishing a procedure for submission of state plans. Based on its authority to determine a "best system of emissions reduction", EPA appropriates to itself the authority to establish an "emissions guideline" for states, 40 C.F.R. § 60.22, and further prescribes required content for state plans under section 111(d). 40 C.F.R. §§ 60.24-26. Compounding the overreach of EPA's section 111(d) implementing regulations, its final section 111(d) "emission guideline" rule for carbon emissions takes away all of the flexibility that states should have under the authority the statute gives them. Instead, EPA prescribes nearly every minute detail of a complex regulatory program. Even where EPA's rule gives states the opportunity to choose from among different regulatory options, EPA has specified the minute details of these options. Under EPA's regulations, the federalism embodied in section 111(d) is only illusory.

The Burden on States from EPA's Carbon Rules

The section 111(d) rule EPA proposed for existing EGUs had thousands of pages of text of proposed rule and accompanying technical support documents to be analyzed. The version of this rule EPA finalized has nearly as many serious legal defects as there are states and state agencies challenging it in court (at least 27). Notwithstanding the Supreme Court's stay of this rule, which underscored the significant doubt that exists as to its legality, EPA has indicated that it intends to continue move forward with related rulemakings for section 111(d) model state plans and a federal plan as well as development of the details of the 111(d) rule's Clean Energy Incentive Program (CEIP) and guidance as to the section 111(d) rule's evaluation, measurement and verification (EM & V) requirements. This has put and will continue to put quite a strain on the same core group of people in our Division of Air Quality who must also tend to the growing multitude of other EPA national deadlines and initiatives in the air quality arena such as those

AAPCA identified, plus state-specific air quality issues with EPA (including two recent "SIP Calls") and the day-to-day operation of the state's Air Quality agency. The development and implementation of these rules has placed a huge burden on states without providing any new resources whatsoever.

EPA's Use of Guidance

The EPA has increasingly been issuing "non-binding" guidance that for all practical purposes does in fact bind the states. By doing this, EPA is circumventing proper notice and comment rulemaking. States that attempt to exercise discretion outside the confines of such guidance face an almost insurmountable hurdle. Along with the use of binding guidance that has not gone through public notice and comment, EPA has also expanded the use of "non-regulatory dockets" as EPA develops guidance. In this scenario, EPA seeks public comment for the development of new "guidance" but, unlike the formal rulemaking process, it is not obligated to either heed any of the concerns raised by the comments or even to respond to them. The Clean Energy Incentive Program (CEIP) concept within EPA's section 111(d) rule is a current example of EPA's use of a non-regulatory docket to develop guidance that will be binding on states in development of compliance plans that subject to EPA approval.

Requiring States to Apply the Environmental Justice (EJ) Executive Order

On February 11, 1994, President Clinton issued Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations". This order was intended to address the concern that racial minority and low-income populations bear a higher environmental risk burden than the general population. As the title suggests, this order was directed to federal agencies. Over the years since the order was issued, an entire bureaucracy dedicated to EJ concepts has grown up within EPA. Also, as time has passed, EPA has increasingly been applying EJ concepts to states. Most recently, EPA's final section 111(d) rule emphasizes the need for states to make a particular effort, above and beyond that made for the general public, to engage low-income communities and communities of color in the public involvement stage of development of state carbon reduction plans. To comply with EPA's expectation that states engage low income communities, EPA encourages states to use the proximity analysis and "EJ Screen" tools it has developed pursuant to President Clinton's Executive Order in order to identify "overburdened communities" as part of the state's public outreach effort to low-income communities and communities of color.

While the West Virginia Department of Environmental Protection does not seek to further burden the impoverished and disadvantaged, several observations about EPA's effort to expand the reach of this order to the states are warranted. First, our state's and our nation's environmental laws protect the health and welfare of the entirety of the public without regard to economic status or race. Second, there are other laws that are designed to broadly protect against discrimination against the classes of people who are the subject of EPA's EJ effort. In addition, a multitude of other laws seek to advance the state of the poor and disadvantaged in our society. Third, EPA's bureaucratic approach to EJ may be workable in the economically and racially

stratified communities of the urban areas along the northeast corridor, but has little value in a state like West Virginia which has historically had one of the nation's highest poverty rates and which is comprised nearly entirely of small towns and rural areas. In comparison to the urban areas of the country, the small communities and locales in our state are not nearly so divided along the lines of economic status and race. In West Virginia, any outreach effort by our agency that effectively reaches the public at large necessarily also reaches the economically disadvantaged and racially diverse, without resort to EPA's EJ tools. Fourth, and most important in your consideration of federalism, the EJ order applies only to the federal government. Any attempt to expand its reach to state agencies should be undertaken only by Congress and, then, only in a manner consistent with the principles of federalism embodied in the Constitution.

Water Quality Standard Approval

An important part of the federalism that is built into the Clean Water Act (CWA) is Section 303, which allocates primary responsibility for development of water quality standards (WQS) to the states. 33 U.S.C. § 1313(a) – (c). When a state changes its WQS, EPA is to determine whether the change "meets the requirements" of the CWA and, if so, approve the changes within sixty days of the state's submission of the change to EPA. 33 U.S.C. § 1313(c). If EPA determines a state's WQS change is "not consistent with the applicable requirements" of the CWA, it must notify the state of this determination within ninety days of the state's submission of the change to EPA. *Id.* This notice must "specify the changes necessary to meet such requirements." *Id.*

In West Virginia, a change in WQS is accomplished through a process of notice and comment rulemaking, much as occurs with federal regulations, plus formal legislative approval of the WQS rule in a bill adopted by the legislature and signed by the governor. This process gives our WQS the force and effect of a state statute. Even though changes in state WQS may be finally adopted as a matter of state law, federal law prevents them from taking effect until they are approved by EPA. Timely action by EPA on a change in WQS is important both to provide state waters with the protection our Division of Water and Waste Management has determined to be necessary and to avoid an unconstitutional depravation of legal force and effect to the sovereign act of our state legislature in adopting these revised standards as the law of the state.

In 2015, the West Virginia Legislature approved WQS revisions which included the removal of a long-standing use exemption, as well as a site-specific copper "water effect ratio" (WER). Despite using an EPA-developed procedure for its development, and communicating with EPA throughout the process, EPA declined to either approve or deny this portion of WVDEP's WQS in ninety days. In EPA's letter indicating this deferral, it did not specify changes needed to assure compliance, as required by 33 U.S.C. § 1313(c) and 40 C.F.R §131.21(a)(2). More recently, EPA's sixty and ninety day time frames for approval/disapproval of two other West Virginia WQS changes passed without any EPA action. One of these, a WQS for selenium, was derived in the same manner EPA has proposed to use for this pollutant. The other, a WQS for aluminum, involved a hardness-based criterion EPA has approved for use by at least three other states. In the case of each of these three WQS revisions, EPA inaction is denying effect to state law without any legitimate reason.

Water Quality Standard Interpretation

Another example of egregious EPA intrusion into a state's rightful domain under federal environmental laws occurred under the federal Clean Water Act. Fourth and a half months into the current administration's initial term in office, it brought the new Secretary of the Interior, new EPA Administrator and Acting Assistant Secretary of the Army together to sign a Memorandum of Understanding (MOU) dated June 11, 2009 which bound EPA, the Interior Department's Office of Surface Mining (OSM) and the Army Corps of Engineers (Corps) to change the way they regulate coal mining in the Appalachian region. Notwithstanding the primacy of the State of West Virginia and other Appalachian states over the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting program, this MOU required EPA to "improve and strengthen oversight and review" of state NPDES permits and state water quality certifications under CWA section 401. This MOU also called upon EPA to take "appropriate steps to assist the States to strengthen state regulation, enforcement, and permitting".

Pursuant to the MOU, EPA revoked its waiver of review of NPDES permit applications for mining-related NPDES permits in West Virginia, including even those permits that EPA's own regulations would classify as "minor". What ensued thereafter was an effort by EPA to impose its own, newly minted re-interpretation of the State's narrative WQS for protection of the aquatic ecosystem in each and every NPDES permit the state issued for a coal mining operation. EPA's permit review effectively established a veto over state permitting decisions that did not follow its new interpretation. By fiat, EPA tried to impose radical changes in coal mine permitting. EPA did this without following any of the procedures set forth in the Clean Water Act and EPA's own regulations for it to substitute its own judgment for that of the state as to WQS. In a state like West Virginia, which has long lead the Appalachian region in coal production, there is a high volume of NPDES permitting activity for these mines. EPA's actions caused an immediate halt to permit approvals and a large backlog of permitting actions to develop.

The state was forced to sue EPA over the application of its new interpretation of West Virginia's narrative WQS. The state contended that EPA was applying its new interpretation of West Virginia's WQS as if it was a rule even though EPA had not gone through the proper procedures for establishing it as such under the federal Administrative Procedure Act and the CWA. The initial decision in this lawsuit by a federal district court agreed with the state and held that EPA could not legally apply this interpretation. Even though the district court's decision was reversed on appeal, the result remained the same. EPA could not legally apply its new interpretation of West Virginia's WQS. The court of appeals was of the opinion that this new interpretation was not a rule, therefore, EPA could not lawfully apply it.

Increased Demands for Program Administration

Across many of our regulatory programs, we see demands from EPA that have continually increased the metrics we are required to report to EPA. Even after a work plan for a given grant

cycle is finalized with EPA, we have been asked to report on additional metrics that were not included in the finalized plans. Some of the additional metrics EPA has demanded require tracking for which our agency does not have the necessary software or mechanisms in place. These additional metrics have been required without providing additional funding to support the necessary database upgrades or funding to cover the additional personnel costs associated with the time spent collecting additional data.

Federalism Issues in Other Environmental Programs

Although the primary thrust of your inquiry concerns federalism in the environmental programs operated by states under EPA oversight, the unique circumstances in West Virginia cause us to be acutely aware of abuses of federal authority in other environmental programs outside EPA's purview. West Virginia is a state in which coal mining has long played a prominent role. In terms of numbers of personnel, permits and mining operations, we operate the largest state program under the Surface Mine Control and Reclamation Act of 1977 (SMCRA). State programs under SMCRA are overseen at the federal level by the Interior Department's Office of Surface Mining (OSM). Although there are enough federalism issues arising from the states' relationship with OSM to support an entirely separate (and perhaps even longer) letter, I will only bring a few of them to your attention here.

Proposed Stream Protection Rule

This proposed rule is an outgrowth of the June 11, 2009 MOU mentioned above. It suffers from problems far too numerous to discuss in detail. What began as a command to OSM to provide clarity to a relatively obscure regulation OSM adopted in 1983 has evolved into a massive re-write of the details of the overall SMCRA regulatory program. In developing this proposed rule OSM:

- Is fundamentally changing a mature regulatory program, something it should not undertake without a new mandate from Congress;
- Is merely carrying out a political mandate that is not justified by the states' regulatory experience;
- Has purposely excluded state cooperating agencies, including the West Virginia Department of Environmental Protection, from any involvement in the Environmental Impact Statement (EIS) it has prepared in support the rule – even though these states are the front line regulators with hands-on experience applying SMCRA and OSM is not;
- Would unlawfully eliminate the exclusive regulatory authority SMCRA confers on states; and,
- Establishes innumerable unlawful conflicts with federal and state clean water laws.

Approval of State Program Amendments

Under the current administration, OSM has all but ignored its responsibility to review and approve amendments the states have adopted, resulting in a huge backlog of such amendments

awaiting approval. Since 2009, West Virginia has submitted nine state program amendments to OSM which continue to await action. The only West Virginia program amendments to receive any kind of federal approval during this time have been those which increase fees or taxes on industry. Importantly, even these program amendments have only been approved on an "interim" basis and have not been finally approved. Just as in the case of the WQS revisions discussed above, each of these changes has been effectively adopted as a statute by the state legislature. Under OSM's regulations, these program amendments cannot take effect until OSM has approved them. OSM's failure to act on these program amendments unconstitutionally denies effect to the sovereign acts of our state legislature.

Use of Ten-Day Notices to Correct Alleged Permit Defects

The federalism embodied in section 521(a) of SMCRA provides for OSM to give a state regulatory authority notice of potential violations of which OSM becomes aware, with an opportunity for the state to respond within ten days. If the state's response to OSM is deemed to be appropriate, nothing further happens. If OSM deems the state response to be inappropriate, SMCRA authorizes OSM to conduct an inspection of the alleged violation and take federal enforcement action if circumstances discovered in the inspection warrant it. An October 21, 2005 decision by the Assistant Secretary of the Interior Department concluded that this ten-day notice process could not lawfully be used to correct alleged defects in state-issued permits that are not manifested in an on-the-ground violation.

The June 11, 2009 MOU, discussed in two places above, commanded OSM to remove impediments to OSM's correction of defects in state issued permits. In response to this command, the director of OSM issued an internal memorandum on November 15, 2010, which rejected the previous decision by the Assistant Secretary as to use of ten-day notices for alleged permit defects. OSM followed this memorandum with a policy directive on January 31, 2011 which formally sanctioned OSM's use of the ten-day notice process for permit defects. The command of the June 11, 2009 MOU, OSM's November 15, 2010 memorandum, and OSM's January 31, 2011 policy directive all seek to alter the balance between federal and state authority established in section 521 of SMCRA. OSM's ten-day notices directed at alleged defects in individual state permits are unlawful. As to permitting, the D.C. Circuit explained the exclusive jurisdiction states enjoy under SMCRA:

> [T]he state is the sole issuer of permits. In performing this centrally important duty, the state regulatory authority decides who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place. *See* Act ss 506, 510. It decides whether a permittee's techniques for avoiding environmental degradation are sufficient and whether the proposed reclamation plan is acceptable. Act s 510(b).

In Re Permanent Surface Mining Litigation, 653 F.2d 514, 519 (D.C. Cir. 1981).

Conclusion

We do not want to create the impression that all of the West Virginia Department of Environmental Protection's interactions with EPA and the federal government are negative. Across many of our programs, we have built very good working relationships with our counterparts in EPA's Region 3. Most of the issues with EPA outlined above emanate from EPA headquarters, which has very tightly directed and controlled all programs. Regional offices have had little autonomy to oversee programs as best fits the situations of states in the region. Decisions are made at a distance and without taking local situations into consideration.

We look forward to better days when the states are freer to carry out the responsibilities with which Congress has entrusted us – to promote a healthy environment for all of our citizens.

Sincerely,

Randy C. Huffman
Cabinet Secretary

RCH/tc

Department of Environmental Quality

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

DEQ

Matthew H. Mead, Governor

Todd Parfitt, Director

February 9, 2016

The Honorable James M. Inhofe
Chairman
U.S. Senate Committee on Environment and Public Works
410 Dirksen Senate Office Bldg.
Washington, D.C. 20510-6175

Re: Response to January 12, 2016 letter on cooperative federalism and necessary state resources and efforts to comply with EPA actions

Dear Chairman Inhofe,

Thank you for the opportunity to share with the U.S. Committee on Environment and Public Works Wyoming's perspective on the current U.S. Environmental Protection Agency's (EPA) regulatory framework, particularly in the context of cooperative federalism. One of the benefits of the system of cooperative federalism is that individual states can leverage local knowledge. This helps to build upon the baseline of federal requirements and find additional opportunities for environmental benefits and administrative efficiencies. When cooperative federalism is present, that benefit is evident in Wyoming. When cooperative federalism is lacking, benefits and efficiencies are lost and the state is faced with a heavy drain on its resources and efforts. Over the past several years, Wyoming has experienced an ever increasing drain on its resources from efforts necessary to comply with EPA and other regulatory actions.

In regard to the Clean Power Plan, EPA stated that states and utilities have sufficient time to implement, given that the first compliance date is in 2022. Prior to the Supreme Courts stay, the Clean Power Plan was draining substantial state resources. *See West Virginia et al. v. EPA*, U.S. Sup. Ct. Case No. 15A773, *West Virginia et al. v. EPA*, D.C. Cir. Case No. 15-1363, *Wyoming Petition for Reconsideration*, EPA (Dec. 21, 2015). Even though the Rule is stayed, Wyoming is still expending state resources on other EPA initiatives associated with the Clean Power Plan, such as the model rule, Clean Energy Incentive Program and the like.

EPA recently proposed significant changes to the process of determining when to aggregate sources in the oil and gas sector for various permitting decisions. In Wyoming, this proposal would undermine our established and effective minor source oil and gas permitting program, which EPA has relied upon to develop other regulations in the oil and gas sector. For a more detailed analysis of the illegality and impracticability of this proposal, see Letter from Director Parfitt to Administrator McCarthy (November 30, 2015). Should this proposal become law, it will create significant additional work for Wyoming's New Source Review permitting program, Title V permitting program and compliance program. That additional work will not result in additional environmental benefits because the analysis of appropriate pollution controls does not change in different permitting pathways.

Wyoming has a history of maintaining an effective working relationship with EPA regional compliance staff. This can be a productive relationship whereby the federal agency provides the state with training and other assistance. However, EPA's recently announced national enforcement initiatives for 2017-2019 adds unnecessary complexity to this relationship. EPA's national enforcement initiative focuses on what EPA views as the most pressing national environmental problems. In these cases, EPA is driven by a national policy instead of an analysis of local environmental concerns. As a result, these cases often involve protracted negotiations over several years which consume and shift state resources from matters of local concern. Additionally, these national enforcement initiatives legal cases are often not filed in a Wyoming court. *See, e.g., U.S. v. Frontier Refining Inc.*, No. 09-CV-1032 (D. Kans. 2009). This means that the state must appear in an inconvenient forum and expend additional resources to hire outside counsel to represent the State.

A recent letter from Governor Matthew H. Mead to Chairman Rob Bishop (November 4, 2015) highlights specific examples of federal overreach that harmed Wyoming. The specific examples highlight the lack of cooperative federalism when federal agencies do not work with the state to leverage local knowledge and instead thrust the federal agency decision upon the state. Those examples are germane to your request for information regarding cooperative federalism and necessary state resources and efforts to comply with EPA actions

This lack of cooperative federalism eliminates the opportunity for federal agencies to consider local knowledge and priorities when establishing the baseline of federal requirements. The possibility to identify additional environmental benefits and administrative efficiencies is lost. Instead, because the federal agencies hijack the process, states like Wyoming are left with no choice but to expend a significant amount of state resources litigating against the federal government. Wyo. Stat. Ann. § 9-4-218(a)(iii). These are lost resources that would otherwise be available to spend towards achieving those environmental benefits and administrative efficiencies.

These are but a few examples that highlight how the federal government, through cooperative federalism, could better recognize state authority, responsibilities and expertise. Allowing state and federal resources to work together provides for increased environmental benefits and administrative efficiencies.

Thank you again for the opportunity to share Wyoming's perspective on this matter. Please let me know if I can be of further assistance.

Sincerely,

Todd Parfitt
Director

Attachments

Cc: Governor Matt Mead
Senator John Barrasso
Senator Michael B. Enzi
Representative Cynthia Lummis

Attachment A

November 30, 2015

Letter from Director Parfitt to
Administrator Gina McCarthy

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

November 30, 2015

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Attention Docket ID No. EPA-HQ-OAR-2013-0685
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Submitted electronically via www.regulations.gov

Re: Source Determination for Certain Emission Units in the Oil and Natural Gas Sector; Docket ID No. EPA-HQ-OAR-2013-0685

Dear Administrator McCarthy:

In the above-referenced docket, the United Stated Environmental Protection Agency (EPA) has proposed to clarify the term "adjacent" for the purpose of determining when to aggregate sources in the oil and gas sector in the New Source Review (NSR), Prevention of Significant Deterioration (PSD), and Nonattainment NSR permitting contexts (Proposed Rule). The State of Wyoming Department of Environmental Quality, Air Quality Division (AQD), respectfully requests that the EPA rescind this rulemaking. The AQD has an established oil and gas minor source permitting program that ensures public participation and imposition of best available control technology (BACT). The EPA's Proposed Rule will bar many Wyoming facilities from utilizing our minor source permitting program and will greatly burden the AQD with no environmental benefit and no additional public involvement. This Proposed Rule exceeds the EPA's statutory authority under the Clean Air Act and does not comport with relevant case law.

Regulatory Background

The Clean Air Act establishes that air pollution prevention is the "primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). Under the Clean Air Act, the EPA is empowered to provide "financial assistance and leadership" to the States. 42 U.S.C. § 7401(a)(4). Once a State has obtained primacy through the EPA's approval of a State Implementation Plan (SIP), the State is directly responsible for ensuring that sources within its borders are permitted in accordance with the Clean Air Act and related regulations. The State of Wyoming has an EPA-approved permitting program that addresses all of the federal permitting requirements for issuing and enforcing PSD and Title V permits.[1]

One of the benefits of the system of cooperative federalism is that individual States can leverage local knowledge to build upon the baseline of federal requirements and find additional opportunities for

[1] See, Chapter 6, Sections 2 and 4 of the Wyoming Air Quality Standards and Regulations (WAQSR). Permitting requirements for all facilities under Chapter 6, Section 2 of the WAQSR have been in existence since May 29, 1974, and the PSD requirements under Chapter 6, Section 4 of the WAQSR have been in existence since January 25, 1979. Chapter 6, Section 13 of the WAQSR contains all federally required nonattainment NSR permitting requirements. This section of the WAQSR was submitted to Region 8 of the EPA as a SIP submission on November 6, 2015.

environmental benefits and administrative efficiencies. This is certainly the case in Wyoming, where we have developed a minor source permitting program for the oil and gas production sector, portions of which the EPA has relied upon when developing federal regulations. See *e.g.*, 76 Fed. Reg. 52738, 52757 (Aug. 23, 2011) (The EPA's new source performance standards for crude oil and natural gas production, transmission, and distribution were based partially on Wyoming's minor source permitting program.).

In Wyoming, owners and operators of minor oil and gas production facilities have two permitting pathways: (1) they may wait to drill until they have applied for and received a Chapter 6, Section 2 construction or modification permit; or (2) they may wait to permit a well until 90 days after the first date of production (FDOP), assuming that they have installed BACT within 60 days of FDOP. Although it seems counterintuitive, waiting until after the well has been drilled to perform control analyses enables operators to make more precise pollution control decisions. It is not possible to accurately predict certain important factors about a well prior to production, such as flow rate and hydrocarbon liquid composition. The AQD has issued and frequently updates an interpretive policy that describes presumptive BACT (P-BACT) for minor oil and gas production sources. *See* Wyo. Stat. Ann. § 35-11-801(e) and Oil and Gas Production Facilities Chapter 6, Section 2 Permitting Guidance, last revised September 2013 (Guidance). Virtually all permit applications, whether they occur during the pre-drill period or after the initial well or wells have been drilled, involve a 30-day public comment period, which will culminate with a public hearing on air quality concerns, when requested.

Under this permitting program, the AQD is able to ensure more public participation and derive additional environmental benefits than would be possible under a permitting program predicated on the EPA's proposed definition of "adjacent." Currently, if an operator wants to add an additional well to a preexisting site, that operator must control that new well's emission sources with BACT. The operator must also permit the well, which will almost always involve a 30-day comment period, and will involve a public hearing on air quality concerns, when requested. Under the current state permitting regime, there is no possible exercise, netting for PSD applicability or otherwise, that would enable an operator to legally modify an existing wellsite by adding a well without installing AQD-approved controls 60 days after FDOP.

The EPA's Proposed Rule creates administrative burden for the AQD without benefit

However, under the EPA's proposed regime, if an operator wanted to add an additional well to an existing well site, then the operator would not have to control air emissions from the additional well as long as it could perform a PSD analysis demonstrating that there would not be a significant net emissions increase of a regulated NSR pollutant. Taking into consideration factors such as declining production from preexisting wells, it is likely that many operators would be able to modify preexisting well sites without controlling air pollution from the new well or wells. In other words, the EPA's Proposed Rule would minimize the AQD's ability to cut emissions of volatile organic compounds and other harmful pollutants from the oil and gas sector. Moreover, making certain modifications to PSD facilities does not require a public comment period. Thus, the EPA's Proposed Rule would also allow operators to add additional wells to groups of wells classified as "major sources" without first engaging with members of the public.

In addition, this Proposed Rule will create additional administrative burden for regulatory agencies without creating additional environmental benefits. This Proposed Rule would require the AQD to reopen and reanalyze many pre-existing permits, and not for the purpose of additional environmental controls, but for the sole purpose of determining whether pre-existing sites require Title V permits. If the AQD does not do this voluntarily, they may be compelled to do so by citizen suits. This Proposed Rule would not change

the AQD's analysis of BACT at any new or modified well site. When the AQD performs a BACT analysis, regardless of whether it is in the NSR context, the PSD context, the Title V context, or as an intellectual exercise, the process is the same. The factors which alter a BACT analysis relate to where a facility is sited and what emission sources it contains, but not the permitting pathway. BACT is BACT, regardless.

The Proposed Rule will also increase the administrative burden of reviewing permits for new minor oil and gas production sites. Instead of focusing their resources on best available, cost-effective control technologies, AQD permit writers would also be required to review PSD modeling (Class I, Class II, and Air Quality Related Values), coordinate with federal land managers, which may include consultation meetings, assess secondary growth, and perform site ownership review of all wells within a one-quarter mile distance throughout the entire process to ensure that there have been no sales, transfers, or corporate restructuring that would alter the number of facilities subject to the PSD analysis. Finally, the Proposed Rule would require AQD inspectors to perform additional inspections on sites that are determined to be Title V facilities. In the absence of additional financial resources from the EPA, this would require significant additional work from current AQD employees, and might not even be possible.

Finally, the one-quarter mile bright line test could impact production well sales between companies, arbitrarily creating permitting challenges for companies seeking to buy neighboring well sites. In the Jonah field, for instance, the majority of wells are located within one-quarter mile of each other. (See Attachment). The EPA's proposal would add a layer of permit analyses onto many transactions in the Jonah field, for no environmental benefit. Currently, if one company wants to acquire another company's production facility, all it has to do is comply with the preexisting permit and submit name change paperwork to the AQD. Under the Proposed Rule, acquiring one preexisting well could require a company to perform expensive PSD analysis. The AQD would not require additional controls, as the preexisting well would already be permitted and controlled, but the AQD would still be required to review the PSD analysis.

In short, the EPA's Proposed Rule alters the AQD's permitting program in a manner that greatly increases administrative burden, minimizes the AQD's ability to ensure that all new and modified oil and gas production facilities utilize BACT, and lessens public involvement in the permitting process. It creates a new incentive for oil and gas production companies to site facilities over much larger areas. This will negatively impact the Wyomingites who live near oil and gas production areas and understandably desire the smallest possible surface area disturbances in their backyards. This will also harm Wyoming wildlife populations that require sufficient undisturbed wintering habitats and migration pathways. This Proposed Rule will increase the AQD's workload without providing any public benefit to justify the additional use of state resources; accordingly, the AQD respectfully requests that the EPA rescind this proposed rulemaking.

The EPA's Proposed Rule is unlawful

Under the Clean Air Act and relevant case law, the emissions from certain sources may be aggregated for the purposes of determining whether the minor sources, in combination, qualify as one "major source" that requires additional permitting oversight. *Alabama Power v. Costle*. 636 F.2d 323, 397 (D.C.C 1980); *See also* 45 Fed. Reg. 154, 52,676, 52,694 (Aug. 7 1980) ("In EPA's view, the December opinion of the court in *Alabama Power* sets the following boundaries on the definition for PSD purposes of the component terms of "source" : (1) it must carry out reasonably the purposes of PSD; (2) it must approximate a common sense notion of "plant"; and (3) it must avoid aggregating pollutant-emitting

activities that as a group would not within the ordinary meaning of 'building,' 'structure,' 'facility,' or 'installation.' ").

The concept of aggregation enables air pollution prevention agencies to make realistic analyses of industrial operations without expending substantial administrative resources. For many years, the EPA has struggled to find a common sense and straightforward approach towards determining when one or more oil and gas production sources should be considered, together, as one "building, structure, installation, or facility." *Compare* Memorandum from EPA Acting Assistant Administrator William L. Wehrum to Regional Administrators I-X. *Source Determinations for Oil and Gas Industries* (Jan. 12, 2007) *with* Memorandum from Assistant Administrator Gina McCarthy to Regional Administrators Regions I – X. *Withdrawal of Source Determinations for Oil and Gas Industries* (Sep. 22, 2009).

Most recently, the EPA attempted to incorporate an additional layer of analysis into the question of adjacency related to "functional interrelatedness." The Sixth Circuit Court of Appeals vacated a permitting decision by the EPA to aggregate a natural gas sweetening plant with multiple wells in a 43 square mile area. *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012). The Court noted that the EPA's permitting decision was "an ironic showcase of the very fears that caused the agency not to adopt a functional relatedness test for source determinations in the first instance." *Id.* at 750.

In this Proposed Rule, the EPA puts forward two definitions for adjacent – the first definition, preferred by the EPA, defines multiple facilities as adjacent if they are within one-quarter mile. This definition contains no guidance on whether this would entitle permitting agencies to link together multiple facilities into a "daisy chain" or whether the one-quarter mile distance must be used as a radial distance from a central facility. The EPA's second definition, which they have identified as the less preferred option, defines multiple facilities as adjacent if they are within one-quarter mile and if they are located at a distance of more than one-quarter mile but have "exclusive functional interrelatedness." The EPA does not attempt to explain how regulatory agencies should approach this analysis. These definitions are both unlawful because they exceed the legal boundaries established by the *Alabama Power* Court. Further, the first definition is unlawful because it purports to define the term in a way that exceeds the ordinary meaning of adjacent, and the second definition is unlawful because in addition to defining the term in a way that exceeds its ordinary meaning, it also inexplicably adds "functional interrelatedness" as a factor that should be used to define the word adjacent.

The EPA's proposed definition of "adjacency" is at odds with the *Alabama Power* Court's guidance on the EPA's statutory authority to aggregate minor sources. The *Alabama Power* Court interpreted the Clean Air Act to bar the EPA from aggregating minor sources in a manner that would not "fit within the four permissible statutory terms[,]" i.e., structure, building, facility, and installation. *Alabama Power* at 397. By arbitrarily selecting one-quarter mile as the defining factor for adjacency, the EPA necessarily sets up a permitting analysis that will aggregate production wells that do not fit within the ordinary understanding of the term "facility" or "installation." This will be exacerbated in areas where companies have chosen to minimize their footprints for the purposes of minimizing impact to wildlife, at the request of local residents, or for any other beneficial reason.

Agencies do not have the authority to define unambiguous terms. *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council*, 467, U.S. 837, 842 (1984). If a term is contextually ambiguous, the agency may define the term, but only to clarify the contextual ambiguity. The ordinary meaning of adjacent is "close or near; sharing a border, wall, or point." Merriam-Webster Dictionary, *available at* www.merriam-webster.com

(search "adjacent") (last visited November 19, 2015). This leaves open the question of how close facilities must be to be considered adjacent and how large the shared border, wall, or point must be. Courts have agreed that if the term "adjacent" is ambiguous, it is only ambiguous with reference to physical proximity. *See, Summit Petroleum* at 743 ("While some courts conclude that 'adjacent' is ambiguous in the limited sense of lacking an abstract definition, there is common recognition of the fact that adjacency is a purely physical and geographical, even if case-by-case, determination.")

Here, the EPA seeks to define the term "adjacent" with a bright-line distance or with a bright-line distance and additional analysis unrelated to the concept of adjacency or closeness. The EPA does not have the authority to put forth its first and preferred definition because a one-quarter mile distance implies that the two facilities are not touching, *i.e.* not adjacent. Additionally, the EPA does not have statutory authority to define the term "adjacent" with reference to functional interrelatedness, because the term 'adjacent' is only ambiguous, if at all, relative to distance, and not any other factor.

Despite consistently conflicting advice from federal leadership, the Wyoming AQD has followed a relatively straightforward process, based on the initial approach put forward by the EPA. This analysis involves a three-part test that looks at common control, common industrial grouping, and co-location. 45 Fed. Reg. 52,694. The EPA's purpose in developing this test was to avoid "embroil[ing] the Agency in numerous, fine-grained analyses." 45 Fed. Reg. 52,695. However, at times even this simplified approach requires significant analysis. *See, e.g.*, In the Matter of a Permit Application (AP-10535) From Encana Oil & Gas (USA) to Modify the Pavillion Compressor Station in Fremont County, Wyoming (June 16, 2011). The AQD would encourage the EPA to rescind this Proposed Rule to allow our program to continue to utilize the current, effective approach, built from the EPA's initial approach towards analyzing aggregation of oil and gas production facilities.

The EPA's Proposed Rule adds confusion instead of clarity

The Proposed Rule creates more questions than it answers. Where does the one-quarter mile distance begin and end? Is it measured from the center of each facility, the edge of each facility's concrete pad, or each facility's fence line? How does the one-quarter mile distance interplay with any ambient air boundaries permitted through the PSD process? Is there a central facility from which the one-quarter mile is measured, or are facilities daisy-chained together? Is there a size above which a footprint of aggregated facilities definitively exceeds the "common-sense notion of a plant?" In certain fields with concentrated development, Wyoming producers could end up with so-called facilities larger than some Eastern states.

Additionally, if one company owns oil and gas production facilities on two sides of a state line, within one-quarter mile of each other, with aggregated emissions that exceed major source thresholds, should the EPA act in oversight role over the two states, who must then issue proportionate Title V permits? What happens if there is a compliance issue? And, how will this Proposed Rule interact with plugged and abandoned coalbed methane wells? If a company plugs and abandons several coalbed methane wells and then seeks to drill new oil or gas wells within one-quarter mile, will it be required to perform monitoring on the plugged and abandoned wells? Finally, what are the implications for other industries? Although the EPA proposed this definition in the oil and gas context, there are other industries, such as bentonite mining and sand mining, with equally spread out operations that are undoubtedly watching this Proposed Rule. Should these industries consider the one-quarter mile buffer when they make decisions about future mining investments?

Conclusion

In conclusion, Wyoming respectfully requests that the EPA rescind this Proposed Rule. Wyoming has a robust minor source program that enables us to achieve significant environmental benefits while maximizing administrative efficiencies and ensuring adequate public involvement whenever a new oil or gas production facility is constructed or modified. EPA's Proposed Rule would place great administrative burdens on the AQD without providing any environmental benefit or additional public involvement to justify those significant costs. EPA's Proposed Rule would also limit the AQD's ability to control air emissions from new and modified oil and gas production facilities.

Thank you for the opportunity to provide comment on this Proposed Rule. Please feel free to contact me at 307-777-7937, or Nancy Vehr, Air Quality Division Administrator, at 307-777-7391, should you have any questions regarding these comments.

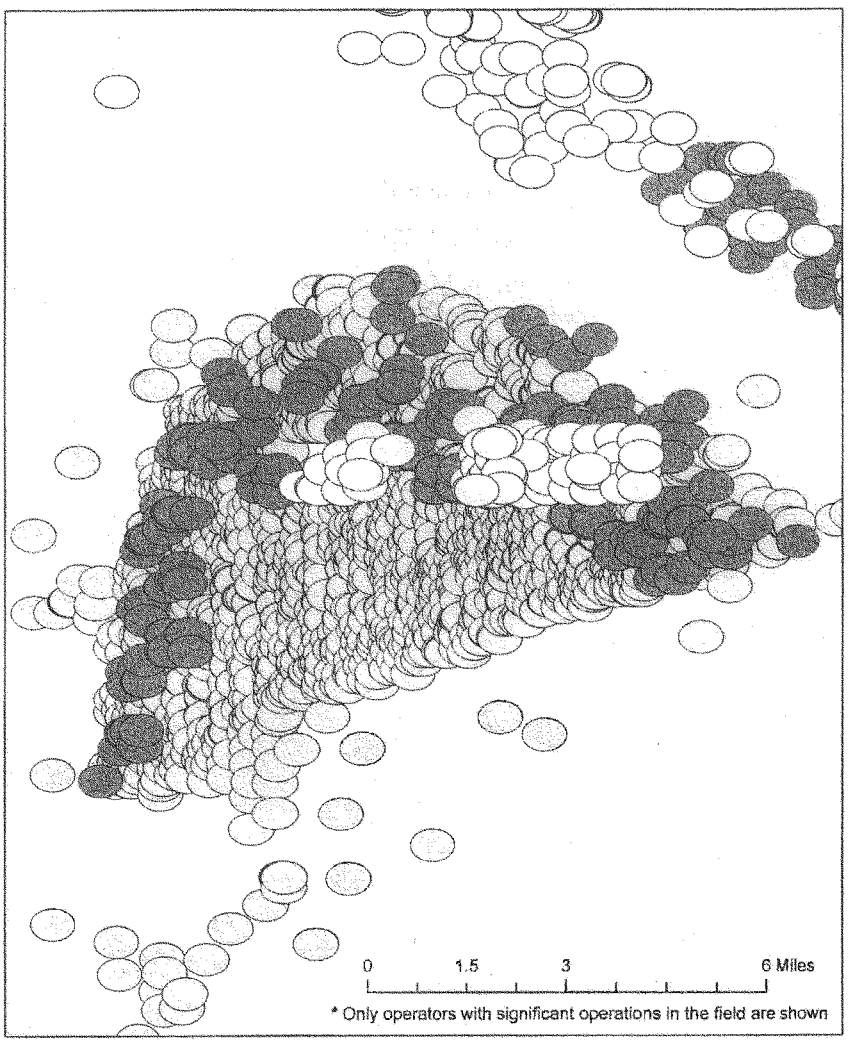
Sincerely,

Todd Parfitt
Director
Dept. of Environmental Quality

Attachment: Map of Quarter Mile Buffers Around Well Sites in Jonah Field

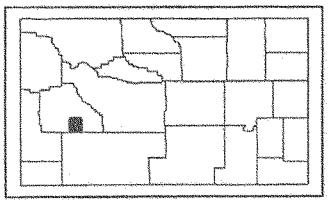
cc: Nancy Vehr, Air Quality Division
Elizabeth Morrisseau, Wyoming Attorney General's Office
Cole Anderson, Air Quality Division

Quarter Mile Buffers Applied in the
Jonah Field in Sublette County, Wyoming



Companies

- ULTRA RESOURCES INC
- LINN OPERATING INC
- JONAH ENERGY LLC



DEQ
WYOMING DEPARTMENT OF
ENVIRONMENTAL
QUALITY

Attachment B

November 4, 2015

Letter from Governor Matthew H. Mead to
The Honorable Rob Bishop

MATTHEW H. MEAD
GOVERNOR

THE STATE OF WYOMING

STATE CAPITOL
CHEYENNE, WY 82002

Office of the Governor

November 4, 2015

The Honorable Rob Bishop
Chairman
House Committee on Natural Resources
1324 Longworth House Office Building
Washington, D.C. 20515

Re: Additional responses to October 21, 2015 letter on oversight hearing – "Respecting State Authority, Responsibilities and Expertise Regarding Resource Management and Energy Development."

Dear Chairman Bishop,

You wrote asking for specific examples of federal overreach that had harmed Wyoming. There are, unfortunately, too many. I have chosen several that are illustrative of the problem.

The U.S. Environmental Protection Agency (EPA) made a jurisdictional determination that expanded the boundaries of the Wind River Indian Reservation for the purposes of the Clean Air Act. That expanded Reservation boundary now covers Wyoming's 9th largest city. To achieve this result, the EPA had to misinterpret a clear act of Congress from 1905 in which the Tribes ceded nearly half of their Reservation to the United States. The EPA's decision upsets 110 years of settled expectations for the residents of the City of Riverton, Wyoming. Its impacts go well beyond the Clean Air Act, for example the EPA's decision has the potential to suddenly change the way many civil and criminal issues are handled. Wyoming is currently challenging the EPA's decision before the 10th Circuit Court of Appeals.

Another example is seen in the EPA denying Wyoming's Regional Haze State Implementation Plan (SIP). The Federal Implementation Plan will cause utility rate increases and complicate long term planning. The SIP developed by the State, is by contrast, sensible and meets the goal of the Regional Haze Rule. The EPA's proposal requires new and different emission controls for Wyoming facilities costing hundreds of millions of dollars more than Wyoming's plan, ironically, with no perceptible increase in visibility. These more restrictive and costly controls without measurable benefit will ultimately cost ratepayers millions of dollars.

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Next, the Bureau of Land Management (BLM) proposes to regulate hydraulic fracturing on federal lands in Wyoming. In 2010, Wyoming was the first state in the nation to adopt rules for the public disclosure of chemicals used in hydraulic fracturing operations. Wyoming also updated its well bore integrity standards and water management practices. Wyoming's rules are enforced on federal, state and private lands. BLM acknowledges the State of Wyoming's regulations are strong. Wyoming not only regulates hydraulic fracturing, it has committed resources to implement its regulatory program. The BLM rule creates unnecessary duplication and expense. It causes confusion and delays. It harms Wyoming and the nation. I have attached my comments on this rule.

This final example demonstrates why states believe federal agencies have lost touch with their mission. The state developed a non-attainment new source review state implementation plan (NNSR). Wyoming submitted the NNSR to EPA Region 8. EPA disapproved our NNSR. Wyoming's NNSR was identical to the EPA regulation in that it incorporated by reference EPA's regulation. Other states had done this exact same thing and were approved by EPA. EPA threatened to withhold federal highway funds from Wyoming. This action on our NNSR and overreaction on the proposed penalties are expensive and inexplicable. Wyoming has had no approved NNSR for over four years as a result of EPA's actions.

I hope these examples are helpful. Please contact my office if you have any further questions. Colin McKee on my staff will be available to assist. He can be contacted at 307-777-7930.

Sincerely,

Matthew H. Mead
Governor

MHM:dh

MATTHEW H. MEAD
GOVERNOR

THE STATE OF WYOMING

STATE CAPITOL
CHEYENNE, WY 82002

Office of the Governor

August 23, 2013

The Honorable Sally Jewell
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Re: Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Proposed Rule

Dear Secretary Jewell,

Wyoming is proud of its progressive and effective regulation of the oil and gas industry. In 2010, Wyoming was the first state in the nation to adopt rules for the public disclosure of chemicals used in hydraulic fracturing operations. Wyoming also updated its well bore integrity standards and water management practices. Last year the Environmental Protection Agency (EPA) released its final rule setting air standards for natural gas production and wells that are hydraulically fractured. Not surprisingly, the EPA's regulations were modeled after those Wyoming had already implemented. Wyoming and other states have demonstrated meaningful leadership. The federal government, including the Bureau of Land Management (BLM) should defer to state leadership, not implement duplicative regulation. The BLM's proposed rule on hydraulic fracturing should be rejected. If the BLM is allowed to implement the proposed rule, then Wyoming should be exempted. BLM should defer to states effectively regulating the practice.

As a leading energy producer, Wyoming continues to set the standard for development and environmental stewardship. Earlier this year, I released Wyoming's Energy Strategy – *Leading the Charge: Wyoming's Action Plan for Energy, Environment and Economy.* Guided by this energy strategy, Wyoming is establishing baseline groundwater sampling, analysis and monitoring regulations. Later this year, Wyoming will initiate a review of state oil and gas environmental regulations. Wyoming's vision is to achieve excellence in energy development, production, and stewardship of its natural resources for the highest benefit of its citizens. Wyoming is committed to cooperation, evidence-based decision making, and a responsible balance between environmental protection and energy production. The BLM's proposed rule disrupts this balance at the expense of jobs, revenue and efficient, effective government.
I do not oppose regulation of hydraulic fracturing; rather, I challenge the BLM's authority to

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promulgate these rules. In 2005, Congress expressly prohibited EPA from regulating hydraulic fracturing under the Safe Drinking Water Act (SDWA) for practices that do not use diesel fuel in the fracturing fluid. This prohibition removed hydraulic fracturing (fracturing without the use of diesel) from federal purview. Congress reserved exclusive authority to the states for the regulation of non-diesel hydraulic fracturing. Based on this clear direction from Congress, Wyoming promulgated its own hydraulic fracturing regulation. These regulations control well bore integrity, flowback and produced water, and fracturing fluid disclosure. BLM's proposed rule supplants Wyoming's regulations and disregards Congress's intent to prohibit federal regulation of hydraulic fracturing.

BLM's statutory authorities do not allow BLM to regulate hydraulic fracturing. BLM cites four sections of the Federal Land Policy and Management Act of 1976 (FLPMA) in support of the proposed rule. None of these citations or FLPMA's general management policies authorize BLM to develop an underground injection control program. FLPMA only authorizes BLM to promulgate rules for which FLPMA grants BLM underlying authority. BLM has not identified any underlying authority for the agency to regulate hydraulic fracturing. Had Congress intended FLPMA to grant BLM authority to regulate underground injections outside the SDWA, Congress would have said so. It did not. In fact, Congress made it clear that FLPMA may not be construed "as affecting in any way any law governing...use of...water on public lands." Yet, this is precisely what BLM's proposed rule does.

BLM cites mineral leasing statutes as alternative authority, giving it the ability to regulate hydraulic fracturing. These statutes authorize BLM only to promulgate rules necessary for leasing federally owned minerals and calculating and collecting royalties. They do not authorize BLM to create its own special underground injection control program.

Wyoming and the BLM are co-regulators of oil and gas development on federal lands. BLM's proposed rule discounts Executive Order 13132, *Federalism*, stating, "...this rule would not have significant Federalism effects. A Federalism assessment is not required because the rule would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government." The BLM incorrectly surmises "the rule would affect the relationship between operators, lessees, and the BLM, but would not impact States."[1] I disagree. I request the BLM analyze state impacts this rule will have. The BLM consulted with some states earlier this month, after numerous requests by Wyoming and others states. I understand that the conversation was productive. I appreciate the time the BLM staff committed to the discussion. I request the BLM engage with Wyoming and other states in substantive ways – alleviating any appearance that the initial meeting was only a formality. This is important if the BLM is sincere in its approach to maintain "efficiency and flexibility while reducing duplication."[2]

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[1] Federal Register, Vol. 78, No. 101, p. 31669
[2] Federal Register, Vol. 78, No. 101, p. 31644

Current federal permitting is plagued by delay and undercapitalization. The BLM acknowledges, "...the rule would pose additional burden to the BLM; however, it is unclear the extent to which the BLM can meet the additional burden with existing capacity."[3] The BLM estimates the additional administrative burden to implement the proposed rule includes an additional 8.44 FTE of workload in the first year of implementation. This appears to be a gross underestimation. Unfortunately, the BLM provides no justification for its estimate or technical qualifications necessary to carry out the rule. The BLM cannot assume current staff have the technical expertise to implement the proposed rule (i.e., review of cement evaluation logs). The BLM should conduct this analysis immediately. This analysis will inform the BLM and others of the true cost of staffing resources. It is critical that implementation of the proposed rule be adequately capitalized with budget and expertise; otherwise, both development and protection of natural resources are compromised.

In your testimony before the U.S. Senate Committee on Energy and Natural Resources on June 6, 2013 you state, "Wyoming is one of the states that leads in terms of having sophisticated fracking regulations that are likely to meet or exceed the standards we're coming out with." I appreciate your recognition that hydraulic fracturing is a process that is already efficiently and effectively managed by the State of Wyoming. Unfortunately the BLM's rule, as drafted, does not allow compliance to Wyoming's regulation.

The background section of the proposed rule mentions, "for lands within the jurisdiction of a State or tribe that the State or tribe could work with the BLM to craft a variance that would allow compliance with State or tribal requirements to be acceptable as compliance with the rule, if the variance meets or exceeds this rule's standards."[4] However, the actual rule language states, "The ***operator*** may make a written request to the authorized officer for a variance from the requirements under this section."[5] [***Emphasis added***] Despite BLM's contention that states will be afforded opportunity to work with the BLM to craft a variance, the mechanism in the rule only allows operators to pursue a variance.

The BLM states, "Variances apply only to operational activities, including monitoring and testing technologies, and do not apply to the actual approval process."[6] In Wyoming, an operator submits an application for permit to drill (APD) prior to drilling on federal, private or state land. Approval of that APD signifies that an operator's plan for drilling complies with applicable state regulations, including those for hydraulic fracturing. If the BLM and Wyoming execute a memorandum of understanding that recognizes that Wyoming's rule meets or exceeds the BLM's standard (variance), then the BLM should consider an operator's state-approved APD to constitute a federal approval. If not, what efficiency is achieved? I request reconsideration of this provision and provide a meaningful mechanism for government-to-government consultation, approvals and administrative agreements.

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[3] Federal Register, Vol. 78, No. 101, p. 31666
[4] Federal Register, Vol. 78, No. 101, p. 31640
[5] (Federal Register, Vol. 78, No. 101, p. 31677
[6] Federal Register, Vol. 78, No. 101, p. 31660

In conclusion, Wyoming adequately regulates hydraulic fracturing and has committed resources to implement its regulatory program. In light of Wyoming's commitment, there is no need for the BLM to expand its administrative footprint in Wyoming.

State agencies will provide detailed individual comments to the extent these rules pertain to the mission of their offices. Those comments are incorporated here by reference. Please review and consider my previous comments and those submitted by state agencies as they pertain to this revised proposed rule and previous drafts.

Please contact me if I can provide additional information or if you have questions.

Sincerely,

Matthew H. Mead
Governor

MHM:md

cc: The Honorable Michael B. Enzi, U.S. Senate
The Honorable John Barrasso, U.S. Senate
The Honorable Cynthia Lummis, U.S. House of Representatives

Senator INHOFE. I look forward to receiving additional State responses and to hear more from our witnesses today as we take a hard look at what works and what does not work.

And to hear the other side, Senator Boxer.

[The prepared statement of Senator Inhofe follows:]

Statement of Senator James M. Inhofe

U.S. Senate Committee on Environment and Public Works Hearing:

"Cooperative Federalism: State Perspectives on EPA Regulatory Actions and the Role of States as Co-Regulators."

Wednesday, March 9, 2016, at 9:30 a.m.

Today's hearing is critical to our understanding of the success of environmental programs across the country. Indeed, in appreciation for our unique system of federalism, Congress, and in particular this Committee, must check in with states to ensure this system is fully functioning when it comes to actions initiated by the U.S. Environmental Protection Agency (EPA). For this reason, I want to thank our state regulators for being here today to share your feedback on whether the current regulatory framework between states and the EPA is working and upholding the principle of cooperative federalism.

Cooperative federalism is a core principle of environmental statutes, including the Clean Air Act, the Clean Water Act, Safe Drinking Water Act, the Resources Conservation and Recovery Act to mention a few, where EPA and the states work together to meet environmental goals.

Unfortunately, under the Obama Administration, we have observed a flood of new regulations breaking down this system, in what seems to be *un*cooperative federalism. The Obama-EPA has embarked on an unprecedented regulatory agenda that simply runs over states by imposing an increasing number of federal regulatory actions on states while requesting even less funds to help states carry out these actions. As some state regulators have explained, EPA is requiring them

to "do more, with less." Many of these actions are driven from EPA headquarters to fulfill a political agenda that often results in years of litigation and inefficiencies that cost citizens more taxpayer dollars and reap little to no environmental benefits.

Today, we have a diverse panel of witnesses from states across the country, working with different EPA regions, and experiencing unique environmental issues who will expand on this breakdown. While state feedback varies, there are several troubling themes that have consistently emerged:

- EPA has neglected their responsibility to consult with states at the beginning stages of regulatory actions;
- EPA gives states little time to digest complex regulations and provide meaningful analysis during short comment periods;
- EPA has allowed environmental activists to set regulatory deadlines imposed on states through sue-and-settle agreements, without state input;
- EPA has increasingly used regulatory guidance to circumvent the regulatory process;
- EPA has a severe backlog of approving state implementation plans, yet has issued an unprecedented number of federal implementation plans over state air programs;
- EPA budget requests have called for decreased levels of state funding while requesting increased funds for EPA bureaucrats; and
- EPA is deviating from its core functions and duty to uphold cooperative federalism.

These concerns are not limited to our witnesses today. Last month, I sent letters to all Committee Member's state environmental agencies asking for feedback on EPA actions and the level of cooperative federalism. I appreciate the many responses the Committee has already received, which echo these concerns.

I look forward to receiving additional state responses and to hear more from our witnesses today as we take a hard look at what works and does not, and identify ways we ensure consistency and ensure states have a role in environmental quality regulation.

OPENING STATEMENT OF HON. BARBARA BOXER
U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. How did you know?

[Laughter.]

Senator BOXER. Friends on the panel, thank you all for being here, and do count me in on people who want to hear from the States. So many of our States are leaders on the environment, my own being a prime example. We have proven that we can cleanup our environment and also create very good paying jobs, and it has been proven over and over again.

I think that all wisdom certainly does not reside here. I think every one of us would say that. And that is why I have always liked the idea of minimum standards being set by the Federal Government to protect all of our people, but allowing the States to do more to protect their people from pollution; and that is really at the heart of what this debate is all about. To me it is not about States' rights, it is about protecting people at a minimum level and then allowing the States to do more if they want to.

Now, States have a very important role to play in carrying out our landmark environmental laws, which we can talk about them all day. I will make a prediction: We will never repeal the Clean Air Act. We will never repeal the Clean Water Act. We will never repeal the Safe Drinking Water Act. We will never repeal the Superfund Act. We will never repeal the Brownfields Act. Why? Because 90 percent of the American people support that.

So what happens here in this committee, since my friend took the chair, it was tough to swallow, but nothing personal, what has happened is we are trying to see an undermining of those laws through the back door, making it impossible, lawsuits and the rest. So I just want to say this, and I will ask unanimous consent to place my full statement in the record.

Senator INHOFE. Without objection.

Senator BOXER. You have to learn, all of us, by what happens. We have to learn history; we have to look at current events. And I am speaking for myself and only for myself when I say this. When I look at what happened in Michigan, when I look at the way that State handled the situation in Flint, I think for us to be holding a hearing saying the Federal Government shouldn't do anything, the fact is EPA, in writing, warned them.

Did the EPA do enough? Not in my book. But they warned them in writing. They told them to put anti-corrosive treatment into those pipes. They ignored it. And I am not pointing the finger at any one person, but somebody there is going to be blamed for this at the end of the day when the suits finally come to the courts.

But to me it is a moral crime. It is a moral crime. So to just say the States should do it all, there shouldn't be minimum standards, we shouldn't really triple-check these water systems, I just don't buy it. And I think that what our laws do I think are very happy compromise between the right of the people who vote for president, who vote for senators, who vote for House members, to know they will have a basic standard so that they can be protected and their children can be protected, and then say to the States, look, you are the laboratory. If you can do more, fine, but protect them to at least a minimum level. And that has been the way I have viewed

this job. That is why when we preempt States on this I think it is a terrible thing to do, and I have shown that through my whole career.

But again I want to say thank you all, whether you agree with me or not. I know two do and three don't, something like that. But I am very happy to see all of you here.

Senator INHOFE. Thank you, Senator Boxer.

Senator Boozman, would you like to introduce your guest from Arkansas? I already told her I was about half hog and explained the genesis of that statement.

Senator BOOZMAN. Well, in the interest of time, I just want to thank her for being here and thank her for the tremendous job that she is doing in Arkansas. We are very grateful to have her onboard.

Like I say, we are just very pleased that you are here and all that you represent. Thank you.

Senator INHOFE. Thank you, Senator Boozman.

We are going to start with you, Ali. I am going to follow the direction of Senator Carper and take your short name, all right? You are recognized.

STATEMENT OF ALI MIRZAKHALILI, DIRECTOR, DIVISION OF AIR QUALITY, DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

Mr. MIRZAKHALILI. Chairman Inhofe, Ranking Member Boxer, and members of the Committee, my name is Ali Mirzakhalili, and I am Delaware's Director of Air Quality. I thank you for the opportunity to testify today.

I would like to share with you Delaware's view of the respective roles and responsibilities of the EPA, State, and the U.S. Congress with respect to complying with various environmental statutes and associated regulatory actions to protect public health and the environment.

The Clean Air Act has been a huge success, preventing literally hundreds of thousands of premature deaths, as well as averting millions of incidents of morbidity. The health benefits associated with the Clean Air Act far outweigh the cost of reducing pollution by more than 30 to 1. Moreover, we have accrued these health benefits over the same period as our Nation's gross domestic product has grown. It is fair to say that the Clean Air Act has not only been one of our Nation's most effective environmental statutes; it is likely to go down in history as one of the most effective domestic laws ever passed.

The public generally does not differentiate between levels of government; it simply expects the entire system to work. Therefore, it is imperative that each part of Government, EPA, Congress, and the States, fulfill its respective roles and perform as effectively as possible.

As I State in my written statement, I believe EPA can best fulfill its role by focusing on six important tenets: one, using sound science to set national standards; two, providing States flexibility to meet those national standards; three, issuing guidelines and rules in a timely manner; four, ensuring that States are held accountable for their actions; five, providing a level playing field; six,

setting standards for sources of pollution that are of national significance and where States may be preempted from doing so.

Congress also has a major responsibility in environmental protection, including, most importantly, ensuring that it provides adequate funding to EPA and the States to assist in meeting our Nation's clean air goals. Unfortunately, in recent years Congress has fallen short in this respect. The Clean Air Act authorizes the Federal Government to provide grants for up to 60 percent of the cost of State and local air pollution control programs, and calls for States and localities to provide a 40 percent match. Unfortunately, this has not been the case. State and local responsibilities have expanded significantly since 1990, while the grants have not, resulting in Delaware and most other States self-funding over 75 percent of their air programs' operating budget.

Despite all these challenges, States are trying to do their best to comply with all EPA rules and regulations under the Clean Air Act. In Delaware, I am proud to say we are meeting all of our Clean Air Act obligations. We succeed by being proactive, collaborative, and focusing our limited resources so as to ensure all emitting sources in the State are reasonably and appropriately controlled.

This year States face a number of important regulatory deadlines under the Clean Air Act. These deadlines do not differentiate between large States with ample resources and small States like ours with fewer resources. I believe Delaware's practice of ensuring all emitting sources are appropriately controlled is key to our ability to manage this workload in light of insufficient funding. If we can do it, so can others.

Because of Delaware's effort to attain and maintain compliance with earlier particulate and ozone standards, those efforts are not wasted, and the Regional Haze program, Delaware is complying with the 2012 PM2.5 standards and is subject only to the first of the three sulfur dioxide requirements. These deadlines do not represent an unmanageable workload for Delaware in 2016.

We are continuing to work this year to reduce greenhouse gas emissions, which are endangering public health and welfare. This year Delaware will continue its work under the Regional Greenhouse Gas Initiative and prepare our State's strategy under the Clean Power Plan. I believe the CPP is an excellent example of how EPA is thoughtfully and successfully working with States and stakeholders to craft achievable and flexible rules.

Delaware continues to experience poor air quality, however, and impacts from ozone on public health and our economy. Delaware's emissions control efforts to reduce ozone precursor emissions have resulted in a situation where over 90 percent of the ozone concentration adversely affecting Delawareans are attributable to emissions transported into Delaware from upwind States. Under the Clean Air Act, upwind States were required to mitigate these emissions more than 5 years ago, yet they have not done so.

In some cases the problem is that upwind emitting sources have not controlled the emissions; in others appropriate emission controls have been installed on units but, incredibly, are not being operated. Any action this Committee can take to require upwind States to comply with the Clean Air Act and to increase EPA's re-

sources to enable the Agency to ensure equity would greatly help Delaware and others in similar situations.

Thank you for this opportunity to testify. I look forward to answering questions.

[The prepared statement of Mr. Mirzakhalili follows:]

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TESTIMONY OF ALI MIRZAKHALILI BEFORE THE

UNITED STATES SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

HEARING ON

COOPERATIVE FEDERALISM: STATE PERSPECTIVES ON EPA REGULATORY

ACTIONS AND THE ROLE OF STATES AS CO-REGULATORS

MARCH 9, 2016

Chairman Inhofe, Ranking Member Boxer and other members of the Committee, my name is Ali Mirzakhalili and I am Delaware's Director of Air Quality. I also serve as the Chairman of the Ozone Transport Commission's (OTC) Stationary and Area Sources Committee, Co-Chair of the National Association of Clean Air Agencies' (NACAA) Permitting and New Source Review Committee and Immediate Past Chair of the Mid-Atlantic Regional Air Management Association (MARAMA). I thank you for the opportunity to testify today on "Cooperative Federalism: State Perspectives on EPA Regulatory Actions and the Role of States as Co-Regulators."

I would like to share with you Delaware's view of the respective roles and responsibilities of the U.S. Environmental Protection Agency (EPA), states and the U.S. Congress with respect to complying with various environmental statutes and associated

regulatory actions to protect public health and the environment. I will focus my comments on the Clean Air Act (CAA), but believe they also illustrate points that can be extended to many other programs jointly implemented by EPA and the states, such as the Safe Drinking Water Act, the National Pollutant Discharge Elimination System under the Clean Water Act and the Resource Conservation and Recovery Act.

Congress has provided state and local air pollution control agencies with "primary responsibility" for implementation of the federal CAA. Indeed, our most important responsibility under this legislation is to protect the health and welfare of citizens throughout the country from the harmful effects of air pollution. We have come a long way since Congress first authorized the CAA and we continue to see tremendous health and welfare benefits from its implementation. The CAA has prevented literally hundreds of thousands of premature deaths, as well as averted millions of incidences of morbidity, including, for example, heart disease, chronic bronchitis and asthma. The health benefits associated with the CAA far outweigh the costs of reducing pollution by more than 30 to 1. Moreover, we have accrued these health benefits over the same period as our nation's gross domestic product has grown. It is fair to say that the Clean Air Act has not only been one of our nation's most effective environmental statutes, it will likely go down in history as one of our most effective domestic laws ever passed.

The public generally does not differentiate between levels of government; it simply expects the entire system to function effectively. Therefore, it is imperative that each part of government – EPA, Congress and the states – fulfill its respective roles and perform as effectively as possible so that we can continue to protect public health and the environment.

I believe that EPA can best fulfill its role by focusing on the following:

1) Sound science. EPA must set national standards, as Congress mandated, which rely on sound science as a cornerstone of its work and continue to follow the recommendations of its

independent science advisors – the Clean Air Scientific Advisory Committee. I believe EPA has done a good job of setting national standards that are scientifically based.

2) Flexibility. Once EPA establishes its standards, the agency should provide states with appropriate flexibility to meet their obligations under the CAA and protect public health and the environment. States that have been innovative and progressive should be allowed to implement measures that produce better outcomes for them, their citizens and their neighbors. EPA must be demanding of the outcome but receptive to creative and flexible approaches. EPA has sought to do this under the Ozone and PM Advance programs and, most recently, under the Clean Power Plan rule.

3) Timely Rules and Guidance. It is important that EPA issue timely implementation rules and guidance for use by states. These rules and guidance must be finalized in a timeframe that enables states to successfully meet their statutory obligations, including preparing and submitting plans by stipulated deadlines. EPA is improving in this regard with the ozone implementation rule due to be proposed later this year, which will be within one year of the issuance of the final 2015 ozone National Ambient Air Quality Standards (NAAQS).

4) Accountability. EPA should be consistent in the outcomes it expects from states across the country and hold itself and state and local air pollution control agencies accountable for meeting their commitments.

5) Equity. EPA must provide for a level playing field amongst the states. As a downwind state, Delaware finds many requirements are skewed in that most of our air pollution is now coming from our upwind neighbors, yet our state is still required to impose further emission reductions within our borders. We believe that it is EPA's role to ensure equity between where pollution is produced and where it is received.

6) Nationwide Sources. EPA must address sources that states are either preempted from regulating or lack the necessary expertise to regulate or that are most efficiently regulated on a national level. This applies to all sources of national significance, including a variety of mobile sources that should remain an EPA regulatory priority both because of their emissions contribution and because individual states, with the exception of California, do not have authority to regulate them on their own (although some states may opt into California-adopted motor vehicle standards). Other source categories, such as consumer products and paints, are also good candidates for updated EPA rulemakings. Federal measures will bring about improvements in air quality across all states and help everyone meet their State Implementation Plan obligations under the CAA.

Congress also has a major responsibility in environmental protection, including most importantly, ensuring that it provides adequate funding to EPA and the states to assist in meeting legislative mandates and that clean air goals are met. Unfortunately, in recent years, Congress has fallen short in this respect. The CAA authorizes the federal government to provide grants for up to 60 percent of the cost of state and local air pollution control programs and calls for states and localities to provide a 40-percent match. In reality, however, this has not been the case. State and local responsibilities have expanded significantly since 1990, while the grants have not, resulting in Delaware and most other states self-funding over 75 percent of their air program operating budgets. State air programs are dramatically underfunded, which is resulting in the degradation of states' abilities to fulfill their statutory obligations and, more importantly, to provide the citizens of this nation the clean, healthful air to which they are entitled.

Despite these challenges, states are trying to do their best to comply with all EPA rules and regulations under the Clean Air Act. In Delaware, I am proud to say, we are meeting all of

our CAA obligations, focusing our limited resources so as to ensure all emitting sources in the state are reasonably and appropriately controlled.

This year, states face a number of important regulatory deadlines under the CAA. These deadlines do not differentiate between large states with ample resources and small states, like ours, with fewer resources. I believe Delaware's practice of ensuring all emitting sources are appropriately controlled is key to our ability to manage this workload in light of insufficient funding. If we can do it, so can others.

Five of the deadlines states face this year are related to important health-based air quality standards. As part of Delaware's efforts to attain and maintain compliance with earlier particulate and ozone standards and the regional haze program, Delaware took measures to ensure all of our large emitting sources are controlled. Because of this prior work, Delaware has complied with the 2012 $PM_{2.5}$ standard, and is subject only to the first of the three sulfur dioxide requirements. Because of EPA's work in removing lead from gasoline, Delaware attained the lead NAAQS many years ago. By ensuring all Delaware sources were appropriately controlled, and remain so, these deadlines do not represent a significant workload for Delaware in 2016.

We are continuing our work this year to reduce greenhouse gas (GHG) emissions, which are endangering public health and welfare. In 2008, Delaware and eight other states took action to reduce GHG emissions from power plants through the Regional Greenhouse Gas Initiative (RGGI). This year, Delaware will continue its RGGI work and prepare our state's strategy under the Clean Power Plan (CPP). While we had anticipated submitting our full CPP state plan in September 2016 – before the court stayed the CPP – we will be ready to submit our plan as soon as the stay is lifted. I believe the CPP is an excellent example of how EPA is thoughtfully and successfully working with states and stakeholders to craft achievable and flexible rules. By meeting frequently with and listening carefully to states during the rule development process,

EPA was well informed of their perspectives and issued a final rule that provides states tremendous flexibility for meeting their targets.

Two of the other upcoming deadlines are related to the ozone standard. All Delaware sources emitting smog-forming pollution are well controlled, yet Delaware continues to experience poor air quality and impacts from ozone on public health and our economy. Delaware's emission control efforts to reduce ozone precursor emissions have resulted in a situation where more than 90 percent of the ozone concentrations adversely affecting Delaware are attributable to emissions transported into Delaware from upwind areas. Under the CAA, upwind states were required to mitigate these emissions more than five years ago, yet they have not done so. In some cases the problem is that upwind emitting sources have not been controlled. In others, appropriate emissions controls have been installed on units but, incredibly, are not being operated. Any action this Committee can take to require upwind states to comply with the CAA, and to increase EPA resources to enable the agency to ensure equity, would greatly help Delaware and others in similar situations.

In closing, Delaware believes the appropriate relationship between federal and state/local governments is as it is envisioned in the CAA, where the EPA sets targets based on the best science available and then allows the states to develop strategies to meet those targets while providing technical assistance as needed.

Our nation has made incredible progress in cleaning up our air resources. More work lies ahead and in order to continue to meet these challenges, EPA and the states must have adequate resources. We urge Congress to do more to meet its obligations under the CAA by adequately funding state implementation efforts. For FY 2016, the President's budget request for state and local air agency grants under Sections 103 and 105 of the CAA was $268.2 million, but was cut by Congress by $40 million in the FY 2016 appropriation. For FY 2017, the President has again

requested $268.2 million for state and local air agency grants. We recommend that you appropriate at least this amount to keep faith with our citizens that all levels of government are doing their part to protect the public health and the environment.

Once again, thank you for this opportunity to testify. I look forward to answering your questions.

Senator INHOFE. Thank you, Ali.
Ms. Markowitz.

STATEMENT OF DEBORAH MARKOWITZ, SECRETARY, VERMONT AGENCY OF NATURAL RESOURCES

Ms. MARKOWITZ. Good morning, all. My name is Deb Markowitz. I am the Secretary of Vermont's agency of Natural Resources, and I know if Senator Sanders was not in Florida, he would be introducing me today.

Thank you for inviting me to testify on cooperative federalism and environmental regulation.

Vermont is a delegated State. This means we take responsibility for the oversight and implementation of Federal environmental programs. We implement the Resource Conservation and Recovery Act, the Clean Water Act, and the National Pollution Discharge Elimination System Permit Program, the Clean Air Act, and the Safe Drinking Water Act.

Vermont chose to take on these federally delegated programs; EPA did not force us to do so. The Federal Government didn't require it. Vermont chose to take responsibility to implement these important regulatory programs in our State because we know how important they are to Vermonters' health, safety, and prosperity.

Not only do we rely on clean air and clean water and clean land to protect the health of our people, but Vermont has a land-based economy. Our top industries include tourism, agriculture, and forestry. Each relies on a clean and healthy natural environment. People come from all over the world to swim in our lakes, fish in our rivers, hike in our forests, and ski in our mountains. But this isn't all. In our manufacturing and high-tech sectors, indeed, in every sector of business and industry in Vermont, it is the natural beauty of our State and our pristine environment that enables us to attract good jobs and high quality employees to stay or relocate in Vermont.

By managing these delegated programs, Vermont can ensure that our State is protected through regulation, assistance, and enforcement. This local control is even more important in light of the highly charged political dialog that our environmental laws and regulations engender here in Washington.

While new rules promulgated by EPA take time and effort for us to implement in our States, there are many good reasons to support a strong Federal approach. First, we look to EPA for the expertise to study and develop the science and technology that underlies our environmental regulations. We could not meet our mission to protect human health and to safeguard our natural environment without this important Federal contribution.

Second, we see value in having national standards for environmental protection. As the children in Rutland, Vermont who suffer from asthma and the anglers who can't eat the fish they catch because of mercury pollution know well, pollution does not honor State lines. EPA has given us many important protections and Vermonters, as well as all Americans, have come to depend upon them.

Finally, national environmental regulations provide an even playing field among States, helping to prevent a regulatory race to

the bottom in a misguided attempt to attract economic development.

It is important to acknowledge that the System of co-regulation between EPA and the States is not always simple or without a natural tension. There are times when we want to address a problem differently than EPA's approach did in the past, or when the Federal approach may have unintended consequences for us in Vermont because of our small size and rural character. In situations like these, we have found EPA willing to listen to our concerns and to work with us to find a solution.

On numerous occasions and across sectors the EPA has supported Vermont in our efforts to implement programs to protect the environment. EPA has allowed flexibility in Vermont's program implementation, cooperated with us to achieve our shared environmental goals, included Vermont's voice in efforts to develop new rules and standards, and has shared resources and expertise to help us more efficiently and effectively implement our programs.

In my written testimony I have included a number of specific examples, if that would be helpful.

In closing, I want to reiterate the value of our relationship with EPA and that, for Vermont, this partner is essential to protect our environment and the health of our citizens, and exemplifies the doctrine of cooperative federalism, and I am very happy to take questions. Thank you.

[The prepared statement of Ms. Markowitz follows:]

"Cooperative Federalism:
State Perspectives on EPA Regulatory Actions and the Role of States as Co-Regulators"

Secretary Deb Markowitz
Vermont Agency of Natural Resources

Testimony to the
U.S. Senate Committee on Environment and Public Works
Wednesday, March 9, 2016 at 9:30 AM
Dirksen Senate Office Building, Room 406

My name is Deb Markowitz. I am the Secretary of the Vermont Agency of Natural Resources. Thank you for inviting me to testify today on the role of the federal and state governments as co-regulators of the environment. Delegated states such as Vermont are primarily responsible for the oversight and implementation of federal environmental programs. Presently, Vermont is delegated to manage the Resource Conservation and Recovery Act (dealing with hazardous waste), the Clean Water Act and the National Pollution Discharge Elimination System (NPDES) Permit Program, the Clean Air Act, and the Safe Drinking Water Act.

Vermont chose to take on these federally delegated programs. EPA did not force us to do so. The federal government did not require us to do so. Vermont chose to take responsibility to implement these important regulatory programs in our state because we know how important they are to Vermonters' health, safety and prosperity.

Not only do we rely on clean air, clean water and clean land to protect the health of our people, but Vermont has a land based economy. Our top industries include tourism, agriculture and forestry. Each relies on a clean and healthy natural environment. People come from all over the world to swim in our lakes, fish in our rivers, hike in our forests and ski our mountains. But this is not all. In our manufacturing and high tech sectors, indeed in every sector of business and industry in Vermont, it is the state's natural beauty and pristine environment that enables us to attract good jobs and high quality employees to stay or relocate here. By managing these delegated programs, Vermont can ensure that our state is protected through regulation, assistance and enforcement. This local control is

even more important in light of the highly charged political dialogue that our environmental laws and regulation engender in Washington DC.

While new rules promulgated by EPA take time and effort for us to implement in our states, there are many good reasons to support a strong federal approach. First, we look to EPA for the expertise to study and develop the science and technology that underlies our environmental regulations. We could not meet our mission to protect human health and to safeguard our natural environment without this important federal contribution. Second, we see value in having national standards for environmental protection. As the children in Rutland, Vermont who suffer from Asthma, and the anglers who can't eat the fish they catch because of mercury pollution know well; pollution does not honor state lines. EPA has given us many important protections that Vermonters and Americans have come to depend upon. Finally, national environmental regulations provide an even playing field among states, helping prevent a regulatory race to the bottom in a misguided attempt to attract economic development.

It is important to acknowledge that the system of co-regulation between EPA and the states is not always simple or without a natural tension. There are times when we want to address a problem differently than EPA has approached it in the past, or when the federal approach may have unintended consequences for us in Vermont because of our small size and rural character. In situations like these we have found EPA willing to listen to our concerns and work with us to find a solution.

When the EPA delegates federal programs to the states, the U.S. Government provides federal funds to the states to help run those programs. One area where your committee could benefit all delegated states would be to adequately fund state implementation efforts of new rules and programs. For example, the Association of State Drinking Water Administrators (ASDWA) estimates that federal funding under the Safe Drinking Water Act is falling short to the tune of $240 million just to administer a minimum program, and $308 million to run a more robust program. Over time, Congress has failed to increase the funding provided to states and inflation has further exacerbated this problem. I truly hope your committee will work to ensure that states have adequate funding to administer the delegated programs.

On numerous occasions, and across sectors, the EPA has supported Vermont in our efforts to effectively and efficiently implement programs to protect the environment. EPA has allowed flexibility in Vermont's program implementation; cooperated with Vermont to achieve our shared environmental goals; included Vermont's voice in efforts to develop new rules and standards; and shared resources and expertise to help us more efficiently and effectively implement our programs. I would like to mention a few examples below:

Flexibility in Program Implementation

- **Performance Partnership Agreement (PPA):** Every four years, Vermont establishes a Performance Partnership Agreement with EPA. This agreement forms the work plan for a significant portion, roughly $5 million, of the funding Vermont receives annually from EPA to implement our delegated programs. Recognizing that federal funding is flat while program implementation costs are increasing, in fiscal year 2014, EPA Region 1 began an investment/disinvestment process that provided an opportunity for states to take a fresh look at this agreement and suggest major changes.

  Vermont has participated in this process over the past two years and has found it to be valuable. For example, because the Vermont Air Quality and Climate Division has a backlog of stationary source permits, we proposed to address that backlog in exchange for EPA delaying a time-consuming requirement to develop industrial regulations for specific industries, such as fiberglass boat manufacturing, which comprise only a small portion of air emissions in Vermont. EPA agreed. The result is cleaner air for Vermonters and an increased level of service to the regulated community. Finally, EPA has also reduced the administrative burden of the PPA by modifying its requirement to present an annual work plan to every second year and by moving the process online. This shift was the result of a business process improvement initiative between the State of New Hampshire and EPA, which expanded to other states in the region.

- **Permit Process Improvements.** Vermont currently has public notice processes for 85 different permits. Nearly all have unique requirements that result in inconsistent notice and comment periods for our permits – even those that apply to a single project. This can lead to confusion, inefficiencies, and increased costs. EPA is currently working in close partnership with Vermont to consolidate the public notice and comment processes for federally delegated permits in order to foster a more

accessible, consolidated, and cost-effective process for the public and the regulated community. We greatly appreciate EPA's support of Vermont's efforts to streamline permit processes while protecting public health and the environment.

- **Hazardous Waste Program:** EPA Region 1 has helped Vermont develop state hazardous waste regulations that are functionally equivalent to the federal RCRA hazardous waste regulations. The willingness of EPA to consider unique but equally protective state regulations in Vermont has resulted in regulations that provide flexibility and make sense for Vermont. EPA recently proposed revisions to its hazardous waste generator regulations ("Generator Improvement Rule") that include some of the approaches adopted in Vermont. Some examples of functionally equivalent Vermont regulations include:

  - Accumulation of hazardous waste in "short-term storage areas" in lieu of "satellite" accumulation so long as certain conditions are met.
  - A provision in the "used oil filter exemption" that allows removal of oil from spent oil filters by means of crushing instead of the "hot-draining" method specified in the federal exemption. One can't "hot drain" oil filters from a junk vehicles that won't start.
  - Expansion of the applicability of the "circuit board recycling exemption" to include intact circuit boards in addition to "shredded circuit boards."
  - Staging of hazardous waste for up to three days prior to recycling at hazardous waste recycling facilities.
  - A provision that allows Vermont's conditionally exempt generators (the smallest hazardous waste generator category) to deliver hazardous waste to another Vermont facility for subsequent management provided the second facility is owned or operated by the same corporate entity and is either a small quantity generator or large quantity generator.

Cooperating to Meet Vermont's Environmental Goals

- **Lake Champlain Total Maximum Daily Limit (TMDL).** The development of a total maximum daily limit (TMDL) for phosphorus in Lake Champlain is a perfect example of the collaborative and productive relationship Vermont has with EPA. EPA has worked closely with Vermont

over the past four years to develop the TMDL, which was issued in draft form in August 2015.

EPA Region I engaged Vermont as a full partner every step of the way as it developed the TMDL for Lake Champlain. As a consequence we are confident that this TMDL can be successfully implemented, taking a watershed approach to hold our municipalities, highways, farms and developers to a high standard of stormwater management, while reducing pollution from our wastewater treatment facilities over time. As a result of this collaboration we expect the final TMDL to (a) require wastewater treatment upgrades for phosphorus reduction only when actual phosphorus load approach 80% of a facility's limits; (b) approve compliance schedules that allow for adequate time to conduct planning, engineering and budgeting; and (c) allow reasonable timeframes to develop and implement municipal stormwater and road general permits. Through this flexible approach, Vermont will be able to achieve a clean lake using cost-effective and common-sense strategies.

- **The Ozone Transport Commission (OTC).** Much of Vermont's air pollution originates elsewhere. For this reason, the OTC, created under the Clean Air Act, is important to us. The OTC brings together Northeast and Mid-Atlantic states with EPA to work together to identify and implement strategies that reduce harmful ground-level ozone concentrations and to control the formation and long-range transport of this damaging pollutant.

- **Brownfield Redevelopment.** The State of Vermont recently started the Brownfields Economic Revitalization Alliance (BERA), which prioritizes selected brownfield sites throughout the State. Through the EPA Brownfields Program, EPA Region I consistently ensures that EPA's staff time, resources and funding are directed to Vermont's redevelopment priorities. This winter, the EPA Region I lab assisted in a statewide background study of PAHs, arsenic and lead in soil, in fulfilment of a state requirement to find more cost-effective ways to dispose of lightly contaminated soils.

Including States' Voices in Developing Rules & Standards

- **EPA Clean Power Plan (CPP).** The Clean Power plan is an example of a rule that was made better as a result of the unprecedented outreach and public engagement undertaken by the EPA. As a result of EPA's

engagement with the states, the final Clean Power Plan is fair, flexible and will help the transition to cleaner power. Although Vermont is the only state that has no compliance target under the CPP, we offered comments during the rulemaking that strongly urged the EPA to ensure that market-based solutions like the Regional Greenhouse Gas Initiative (RGGI) could be a compliance mechanism for states. We were pleased that EPA made sure that there were strong but achievable standards for power plants and customized goals for states to cut the carbon pollution that is driving climate change, and that market-based approaches can be used to help states meet their goals.

- **Safe Drinking Water.** Over the past year, EPA Region 1 staff have assisted Vermont in implementing the Revised Total Coliform Rule (RTRC). EPA staff have facilitated quarterly teleconferences in which representatives of all New England states and EPA rule managers come together to discuss implementation status and efforts and to answer questions. The rule managers have made themselves available to answer any and all questions and strive to be a hub of documents and information for sharing. EPA has also provided and forwarded scores of guidance documents, implementation assistance, and pre-made fact sheets for distribution to water systems and users specifically related to the RTCR. The safety of Vermont drinking water, through implementation of this and other regulations, is one of my agency's highest priorities.

Sharing Resources to Increase Efficiency and Effectiveness of our Programs

- **Emergency Response.** Vermont's close relationship with EPA Region 1 was especially evident after **Tropical Storm Irene** in 2011. Tropical Storm Irene caused significant damage across Vermont, including extensive damage to state offices in Waterbury, Vermont. Over 1,000 state employees were displaced, and many paper and electronic records were destroyed by flooding. EPA deployed the EPA Region 1 Water Team to contact more than 200 public water supply systems across the state. EPA relayed information back to the Vermont Department of Environmental Conservation and Vermont Rural Water Association. Because of EPA's oversight role, the EPA could quickly gain access to electronic resources that Vermont could not access due to the destruction of records caused by the storm.

- **Superfund.** Vermont could not manage the scope of complicated hazardous waste sites without the EPA Removals Program. At the JARD site in

Bennington Vermont, the EPA Removals Program conducted a very thorough evaluation of the site and the impacted media (soil, groundwater, surface water, indoor air) and implemented effective mitigation all in collaboration with the Vermont Department of Environmental Conservation (VTDEC). At the point that the removals program could no longer implement work, the project was transitioned to the pre-remedial program and eventually the Superfund program.

The State of Vermont has thirteen Superfund Sites, some led by the Responsible Party and some by the EPA. EPA provides funding for all staff oversight and includes VTDEC staff in all decisions related to site investigation and remedial action. These sites are managed in the best sense of cooperative federalism.

- **National Emissions Inventory.** The triennial National Emissions Inventory (NEI) is the result of significant ongoing collaboration between the U.S. EPA, Vermont, and other State / Local / Tribal Environmental Agencies. This comprehensive inventory integrates many different types of data available from individual State programs and from EPA, and uses best-available methods and advanced computer modeling to characterize emissions sources and the quantities of air pollutants they emit. This inventory is instrumental in identifying important emissions sources, tracking emissions trends over time, and informing good air quality management decisions.

- **Public outreach and education.** Vermonters and citizens across the nation are able to stay informed about the quality of the air they breathe through a partnership between state environmental agencies and the U.S. EPA known as **EnviroFlash**. Measurements from air quality monitoring stations are used to calculate Air Quality Index (AQI) values. These AQIs combined with local weather data are used to issue daily air quality forecasts via local radio, television, and EnviroFlash e-mails that alert the public when unhealthy levels of air pollution are likely to occur nearby.

In closing, I want to reiterate the important work that EPA is doing to protect human health and the environment. The delegated states simply could not do this work without the leadership of the EPA. In Vermont, our partnership with EPA is crucial to our efforts to protect our environment and the health of our citizens, and exemplifies the doctrine of cooperative federalism.

Senator INHOFE. Thank you.
Now, Mr. Huffman.

STATEMENT OF RANDY C. HUFFMAN, CABINET SECRETARY, WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

Mr. HUFFMAN. Good morning, Mr. Chairman and members of the Committee. Thank you for the opportunity to address this Committee concerning federalism and environmental regulations.

As West Virginia's chief environmental regulator, I view the cooperative relationship with our Federal partners envisioned by Congress in all of our environmental statutes as critical. According to the environmental council or the States, over 95 percent of the environmental regulatory duties in this Country are actually carried out by the States. Congress placed the most important core responsibilities with the States because it knew States are far more responsive to local concerns and much more aware of the local environment than distant bureaucracies.

In addition, States must be cost-effective, have balanced budgets, and perform in the face of flat or declining revenues. It is within these constraints that States have repeatedly demonstrated not only that we are up to the challenge, but that we actually continue to deliver the results Congress envisioned when it created our environmental framework within the model of cooperative federalism.

Unfortunately, federalism under the current Administration has been less than cooperative with both EPA and Interior's Office of Surface Mining. There is a constant flow of new regulations, guidance and initiatives from these Federal agencies, and much of it encroaches on the authority Congress gave to the States, and nearly all of it adds new regulatory burdens to State resources that are already stretched thin. At best, EPA and OSM are indifferent to the mounting consequences of their actions. At worst, we see these Federal agencies continue to basically rewrite our Nation's congressional environmental acts with no accountability.

I have many examples, but time will only permit me to cover a few.

My first example is one with which we are all familiar. Regardless of the position individual States take on climate change, Section 111(d) of the Clean Air Act actually puts the States, not EPA, in charge of developing standards of performance. With little regard to the role Congress gave it, EPA has seized the States' authority. Its carbon rule establishes the minute details of one of the most complex new regulatory initiatives in the history of the Clean Air Act.

EPA is increasingly establishing what amounts to binding rules through guidance. States are expected to conform to the results of this process as if EPA had promulgated a valid rule. There are at least two problems with this: EPA guidance further eliminates State discretion and it allows them to avoid the accountability and transparency of rulemaking.

My final examples relate to similar actions by Interior's Office of Surface Mining. The proposed Stream Protection Rule, which I testified about before the Senate Energy and Natural Resources Committee in October, is another example of a Federal agency attempt-

ing to rewrite part of an act of Congress with no mandate to do so. They further fail to involve the States, which have primacy under the Surface Mining Act to carry out these duties. The result is a proposal that has multiple unlawful conflicts with Federal and State clean water laws.

OSM also routinely fails to approve State program amendments upon which it is obligated to act. In fact, since 2009, West Virginia has submitted nine amendments to the Office of Surface Mining for consideration, and only those that propose to increase fees or taxes on the mining industry have been approved, and only then on an interim basis.

My last example is OSM's misuse of 10-day notices to correct permit defects. Ten-day notices are an OSM obligation under the Surface Mining Act to notify the States when a mining violation is suspected and has not been properly addressed. It is clearly an enforcement measure to be applied to active operations. In 2009, OSM was directed to use this regulatory tool to correct deficiencies in State-issued permits, which is clearly contrary to the Surface Mining Act.

Most States, including West Virginia, embrace the idea and practice of cooperative federalism in regulating industrial activity and protecting the environment. The practice is sound, has great validity, and has been successful in the past. Since 2009, I have watched EPA and OSM go about executing an agenda that does not concern itself with the rule of law for making changes to our Nation's environmental statutes.

I don't want to create the impression that all of West Virginia's interactions with EPA and OSM are negative. Across many of our programs we have built very good working relationships with our Federal counterparts at the regional level. Most of the issues I have discussed appear to emanate from EPA and OSM headquarters, which have little or no understanding of what it takes to run a State environmental regulatory program.

[The prepared statement of Mr. Huffman follows:]

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Cabinet Secretary
West Virginia Department of Environmental Protection

Written Testimony for the Hearing of the
Senate Environment and Public Works Committee on

Cooperative Federalism: State Perspectives on
EPA Regulatory Actions and the Role of States as Co-Regulators

March 9, 2016

Thank you for the opportunity to provide the West Virginia Department of Environmental Protection's (WVDEP) perspective on the U.S. Environmental Protection Agency's (EPA) regulatory framework. The concept of cooperative federalism is imbedded in the Clean Air Act, Clean Water Act and other federal environmental statutes. Common among these laws is a design under which the states serve as the primary regulators. Congress' carefully crafted approach places the core responsibilities in state agencies, which are much closer and more responsive to the local concerns of the people and the environment they protect than the distant bureaucracies in Washington. Another feature of state operation of programs for protection of the environment is that the states must do this in a cost-effective manner. Unlike their federal counterparts, state agencies must live within the reality of balanced budgets.

Over the past few years, EPA and other federal agencies seem to have been on a mission to totally remake the American regulatory landscape. They have undertaken this effort with a marked indifference to the impacts of their continual parade of new regulatory demands on state agencies that are already resource-constrained in carrying out existing mandates. State agencies face flat, if not declining, budgets for funding and personnel. Each new regulatory burden EPA places on the states further stretches our finite resources. Many though not all, of these new demands on the states come in the air pollution control area. Below, I am listing some examples of what West Virginia has faced and still faces:

Federalism in EPA's Carbon Rules for Electric Generating Units (EGUs)

Perhaps no state is more affected by EPA's efforts to regulate carbon dioxide emissions than West Virginia. The coal industry has been a central part of the state's economy for over one hundred years. Nearly all of our electricity comes from coal-fired EGUs. Necessarily, EPA's development of carbon rules is a high priority for our Division of Air Quality. EPA's overly aggressive approach on early every aspect of these rules challenges not only our employees but the legal constraints of the Clean Air Act (CAA), as well.

From a federalism perspective, EPA's vehicle for regulating carbon emissions from existing power plants, section 111(d) of the Clean Air Act, is one of the CAA's brightest beacons. It establishes a specific division of responsibility between EPA and the states. EPA is authorized to promulgate procedural regulations, similar to the state implementation plan process under the CAA's section 110, for submission of state section 111(d) plans to EPA for a determination of whether they are satisfactory. Section 111(d)(1); *see*, section 111(d)(2). The substantive authority under section 111(d) is assigned to the states. Section 111(d) gives the authority to establish standards of performance for existing sources to the states, not EPA.

What Congress gives to the states, the EPA takes away. The general implementing regulations EPA promulgated for section 111(d) go well beyond its statutory role of merely establishing a procedure for submission of state plans. Based on its authority to determine a "best system of emissions reduction", EPA appropriates to itself the authority to establish an "emissions guideline" for states, 40 C.F.R. § 60.22, and further prescribes required content for state plans under section 111(d). 40 C.F.R. §§ 60.24-26. Compounding the overreach of EPA's section 111(d) implementing regulations, its final section 111(d) "emission guideline" rule for carbon emissions takes away all of the flexibility that states should have under the authority the statute gives them. Instead, EPA prescribes nearly every minute detail of a complex regulatory program. Even where EPA's rule gives states the opportunity to choose from among different regulatory options, EPA has specified the minute details of these options. Under EPA's regulations, the federalism embodied in section 111(d) is only illusory.

The Burden on States from EPA's Carbon Rules

The section 111(d) rule EPA proposed for existing EGUs had thousands of pages of text of proposed rule and accompanying technical support documents to be analyzed. The version of this rule EPA finalized has nearly as many serious legal defects as there are states and state agencies challenging it in court (at least 27). Notwithstanding the Supreme Court's stay of this rule, which underscored the significant doubt that exists as to its legality, EPA has indicated that it intends to continue move forward with related rulemakings for section 111(d) model state plans and a federal plan as well as development of the details of the 111(d) rule's Clean Energy Incentive Program (CEIP) and guidance as to the section 111(d) rule's evaluation, measurement and verification (EM & V) requirements. This has put and will continue to put quite a strain on the same core group of people in our Division of Air Quality who must also tend to the growing multitude of other EPA national deadlines and initiatives in the air quality arena such as those AAPCA identified, plus state-specific air quality issues with EPA (including two recent "SIP Calls") and the day-to-day operation of the state's Air Quality agency. The development and implementation of these rules has placed a huge burden on states without providing any new resources whatsoever.

EPA's Use of Guidance

The EPA has increasingly been issuing "non-binding" guidance that for all practical purposes does in fact bind the states. By doing this, EPA is circumventing proper notice and comment rulemaking. States that attempt to exercise discretion outside the confines of such guidance face an almost insurmountable hurdle. Along with the use of binding guidance that has not gone through public notice and comment, EPA has also expanded the use of "non-regulatory dockets" as EPA develops guidance. In this scenario, EPA seeks public comment for the development of new "guidance" but, unlike the formal rulemaking process, it is not obligated to either heed any of the concerns raised by the comments or even to respond to them. The Clean Energy Incentive Program (CEIP) concept within EPA's section 111(d) rule is a current example of EPA's use of a non-regulatory docket to develop guidance that will be binding on states in development of compliance plans that subject to EPA approval.

Requiring States to Apply the Environmental Justice (EJ) Executive Order

On February 11, 1994 President Clinton issued Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations". This order was intended to address the concern that racial minority and low-income populations bear a higher environmental risk burden than the general population. *As the title suggests, this order was directed to federal agencies. Over the years since the order was issued, an entire bureaucracy dedicated to EJ concepts has grown up within EPA. Also, as time has passed, EPA has increasingly been applying EJ concepts to states. Most recently, EPA's final section 111(d) rule emphasizes the need for states to make a particular effort, above and beyond that made for the general public, to engage low-income communities and communities of color in the public involvement stage of development of state carbon reduction plans.* To comply with EPA's expectation that states engage low income communities, EPA encourages states to use the proximity analysis and "EJ Screen" tools it has developed pursuant to President Clinton's Executive Order in order to identify "overburdened communities" as part of the state's public outreach effort to *low-income communities and communities of color*.

While the West Virginia Department of Environmental Protection does not seek to further burden the impoverished and disadvantaged, several observations about EPA's effort to expand the reach of this order to the states are warranted. First, our state's and our nation's environmental laws protect the health and welfare of the entirety of the public without regard to economic status or race. Second, there are other laws that are designed to broadly protect against discrimination against the classes of people who are the subject of EPA's EJ effort. In addition, a multitude of other laws seek to advance the state of the poor and disadvantaged in our society. Third, EPA's bureaucratic approach to EJ may be workable in the economically and racially stratified communities of the urban areas along the northeast corridor, but has little value in a state like West Virginia which has historically had one of the nation's highest poverty rates and which is comprised nearly entirely of small towns and rural areas. In comparison to the urban areas of the country, the small communities and locales in our state are not nearly so divided along the lines of economic status and race. In West Virginia, any outreach effort by our agency that effectively reaches the public at large necessarily also reaches the economically disadvantaged and racially diverse, without resort to EPA's EJ tools. Fourth, and most important in your consideration of federalism, the EJ order applies only to the federal government. Any attempt to expand its reach to state agencies should be undertaken only by Congress and, then, only in a manner consistent with the principles of federalism embodied in the Constitution.

Water Quality Standard Approval

An important part of the federalism that is built into the Clean Water Act (CWA) is Section 303, which allocates primary responsibility for development of water quality standards (WQS) to the states. 33 U.S.C. § 1313(a) – (c). When a state changes its WQS, EPA is to determine whether the change "meets the requirements" of the CWA and, if so, approve the changes within sixty days of the state's submission of the change to EPA. 33 U.S.C. § 1313(c). If EPA determines a state's WQS change is "not consistent with the applicable requirements" of the CWA, it must notify the state of this determination within ninety days of the state's submission of the change to EPA. *Id.* This notice must "specify the changes necessary to meet such requirements." *Id.*

In West Virginia, a change in WQS is accomplished through a process of notice and comment rulemaking, much as occurs with federal regulations, plus formal legislative approval of the WQS rule in a bill adopted by the legislature and signed by the governor. This process gives our WQS the force and effect of a state statute. Even though changes in state WQS may be finally adopted as a matter of state law, federal law prevents them from taking effect until they are approved by EPA. Timely action by EPA on a change in WQS is important both to provide state waters with the protection our Division of Water and Waste Management has determined to be necessary and to avoid an unconstitutional depravation of legal force and effect to the sovereign act of our state legislature in adopting these revised standards as the law of the state.

In 2015, the West Virginia Legislature approved WQS revisions which included the removal of a long-standing use exemption, as well as a site-specific copper "water effect ratio" (WER). Despite using an EPA-developed procedure for its development, and communicating with EPA throughout the process, EPA declined to either approve or deny this portion of WVDEP's WQS in ninety days. In EPA's letter indicating this deferral, it did not specify changes needed to assure compliance, as required by 33 U.S.C. § 1313(c) and 40 C.F.R §131.21(a)(2). More recently, EPA's sixty and ninety day time frames for approval/disapproval of two other West Virginia WQS changes passed without any EPA action. One of these, a WQS for selenium, was derived in the same manner EPA has proposed to use for this pollutant. The other, a WQS for aluminum, involved a hardness-based criterion EPA has approved for use by at least three other states. In the case of each of these three WQS revisions, EPA inaction is denying effect to state law without any legitimate reason.

Water Quality Standard Interpretation

Another example of egregious EPA intrusion into a state's rightful domain under federal environmental laws occurred under the federal Clean Water Act. Fourth and a half months into the current administration's initial term in office, it brought the new Secretary of the Interior, new EPA Administrator and Acting Assistant Secretary of the Army together to sign a Memorandum of Understanding (MOU) dated June 11, 2009 which bound EPA, the Interior Department's Office of Surface Mining (OSM) and the Army Corps of Engineers (Corps) to change the way they regulate coal mining in the Appalachian region. Notwithstanding the primacy of the State of West Virginia and other Appalachian states over the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting program, this MOU required EPA to "improve and strengthen oversight and review" of state NPDES permits and state water quality certifications under CWA section 401. This MOU also called upon EPA to

take "appropriate steps to assist the States to strengthen state regulation, enforcement, and permitting".

Pursuant to the MOU, EPA revoked its waiver of review of NPDES permit applications for mining-related NPDES permits in West Virginia, including even those permits that EPA's own regulations would classify as "minor". What ensued thereafter was an effort by EPA to impose its own, newly minted re-interpretation of the State's narrative WQS for protection of the aquatic ecosystem in each and every NPDES permit the state issued for a coal mining operation. EPA's permit review effectively established a veto over state permitting decisions that did not follow its new interpretation. By fiat, EPA tried to impose radical changes in coal mine permitting. EPA did this without following any of the procedures set forth in the Clean Water Act and EPA's own regulations for it to substitute its own judgment for that of the state as to WQS. In a state like West Virginia, which has long lead the Appalachian region in coal production, there is a high volume of NPDES permitting activity for these mines. EPA's actions caused an immediate halt to permit approvals and a large backlog of permitting actions to develop.

The state was forced to sue EPA over the application of its new interpretation of West Virginia's narrative WQS. The state contended that EPA was applying its new interpretation of West Virginia's WQS as if it was a rule even though EPA had not gone through the proper procedures for establishing it as such under the federal Administrative Procedure Act and the CWA. The initial decision in this lawsuit by a federal district court agreed with the state and held that EPA could not legally apply this interpretation. Even though the district court's decision was reversed on appeal, the result remained the same. EPA could not legally apply its new interpretation of West Virginia's WQS. The court of appeals was of the opinion that this new interpretation was not a rule, therefore, EPA could not lawfully apply it.

Increased Demands for Program Administration

Across many of our regulatory programs, we see demands from EPA that have continually increased the metrics we are required to report to EPA. Even after a work plan for a given grant cycle is finalized with EPA, we have been asked to report on additional metrics that were not included in the finalized plans. Some of the additional metrics EPA has demanded require tracking for which our agency does not have the necessary software or mechanisms in place. These additional metrics have been required without providing additional funding to support the necessary database upgrades or funding to cover the additional personnel costs associated with the time spent collecting additional data.

Federalism Issues in Other Environmental Programs

Although the primary thrust of the committee's inquiry concerns federalism in the environmental programs operated by states under EPA oversight, the unique circumstances in West Virginia cause us to be acutely aware of abuses of federal authority in other environmental programs outside EPA's purview. West Virginia is a state in which coal mining has long played a prominent role. In terms of numbers of personnel, permits and mining operations, we operate the largest state program under the Surface Mine Control and Reclamation Act of 1977 (SMCRA). State programs under SMCRA are overseen at the federal level by the Interior Department's Office of Surface Mining (OSM). Although, there are enough federalism issues

arising from the states' relationship with OSM to support an entirely separate (and perhaps even longer) letter, I will only bring a few of them to your attention here.

Proposed Stream Protection Rule

This proposed rule is an outgrowth of the June 11, 2009 MOU mentioned above. It suffers from problems far too numerous to discuss in detail. What began as a command to OSM to provide clarity to a relatively obscure regulation OSM adopted in 1983 has evolved into a massive re-write of the details of the overall SMCRA regulatory program. In developing this proposed rule OSM:

- Is fundamentally changing a mature regulatory program, something it should not undertake without a new mandate from Congress;
- Is merely carrying out a political mandate that is not justified by the states' regulatory experience;
- Has purposely excluded state cooperating agencies, including the West Virginia Department of Environmental Protection, from any involvement in the Environmental Impact Statement (EIS) it has prepared in support the rule – even though these states are the front line regulators with hands-on experience applying SMCRA and OSM is not;
- Would unlawfully eliminate the exclusive regulatory authority SMCRA confers on states; and,
- Establishes innumerable unlawful conflicts with federal and state clean water laws.

Approval of State Program Amendments

Under the current administration, OSM has all but ignored its responsibility to review and approve amendments the states have adopted, resulting in a huge backlog of such amendments awaiting approval. Since 2009, West Virginia has submitted nine state program amendments to OSM which continue to await action. The only West Virginia program amendments to receive any kind of federal approval during this time have been those which increase fees or taxes on industry. Importantly, even these program amendments have only been approved on an "interim" basis and have not been finally approved. Just as in the case of the WQS revisions discussed above, each of these changes has been effectively adopted as a statute by the state legislature. Under OSM's regulations, these program amendments cannot take effect until OSM has approved them. OSM's failure to act on these program amendments unconstitutionally denies effect to the sovereign acts of our state legislature.

Use of Ten Day Notices to Correct Alleged Permit Defects

The federalism embodied in section 521(a) of SMCRA provides for OSM to provide a state regulatory authority notice of potential violations of which OSM becomes aware, with an opportunity for the state to respond within ten days. If the state's response to OSM is deemed to be appropriate, nothing further happens. If OSM deems the state response to be inappropriate, SMCRA authorizes OSM to conduct an inspection of the alleged violation and take federal enforcement action if circumstances discovered in the inspection warrant it. An October 21, 2005 decision by the Assistant Secretary of the Interior Department concluded that this ten day

notice process could not lawfully be used to correct alleged defects in state-issued permits that are not manifested in an on-the-ground violation.

The June 11, 2009 MOU discussed in two places above, commanded OSM to remove impediments to OSM's correction of defects in state issued permits. In response to this command, the director of OSM issued an internal memorandum on November 15, 2010, which rejected the previous decision by the Assistant Secretary as to use of ten day notices for alleged permit defects. OSM followed this memorandum with a policy directive on January 31, 2011 which formally sanctioned OSM's use of the ten day notice process for permit defects. The command of the June 11, 2009 MOU, OSM's November 15, 2010 memorandum, and OSM's January 31, 2011 policy directive all seek to alter the balance between federal and state authority established in section 521 of SMCRA. OSM's ten day notices directed at alleged defects in individual state permits based are unlawful. As to permitting, the D.C. Circuit explained the exclusive jurisdiction states enjoy under SMCRA:

> [T]he state is the sole issuer of permits. In performing this centrally important duty, the state regulatory authority decides who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place. *See* Act ss 506, 510. It decides whether a permittee's techniques for avoiding environmental degradation are sufficient and whether the proposed reclamation plan is acceptable. Act s 510(b).

In Re Permanent Surface Mining Litigation, 653 F.2d 514, 519 (D.C. Cir. 1981).

Conclusion

We do not want to create the impression that all of the West Virginia Department of Environmental Protection's interactions with EPA and the federal government are negative. Across many of our programs, we have built very good working relationships with our counterparts in EPA's Region 3. Most of the issues with EPA outlined above emanate from EPA headquarters, which has very tightly directed and controlled all programs. Regional offices have had little autonomy to oversee programs as best fits the situations of states in the region. Decisions are made at a distance and without taking local situations into consideration.

We look forward to better days when the states are freer to carry out the responsibilities with which Congress has entrusted us – to promote a healthy environment for all of our citizens.

Senator INHOFE. Thank you, Mr. Huffman.
Ms. Keogh.

STATEMENT OF BECKY KEOGH, DIRECTOR, ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY

Ms. KEOGH. Chairman Inhofe, Ranking Member Boxer, and Senator Boozman, as well as members of the Committee, good morning. I bring you greetings from Governor Hutchinson of Arkansas, and I appreciated the opportunity to respond to your call this morning.

We in Arkansas are seeking to drive regulatory policy that balance effective environmental results, assure long-term resource management, affordable energy, and economic growth goals. We want a State that can seek to attract the newest generation of professionals searching out healthy living lifestyles and Arkansas's world-class recreational opportunities.

Arkansas has invested heavily in assuring that we are wise stewards of the abundant and clean air, healthy breathing air, the amazing vistas with which we have been blessed. We do not take our status as The Natural State lightly. In fact, we strive to fairly and consistently the corresponding and complimentary roles of environmental stewardship and economic development.

Likewise, for decades we have successfully worked with EPA under a symbiotic governing model that is the topic of today's hearing. This notion is born of something uniquely American, our system of federalism whereby the Nation and States function together as co-sovereigns. Both the EPA and States had a relatively balanced seat at the table, and we are known to do in the south, we would all sit around the table and have a good old-fashioned meal. There would be lively debate, ample servings, and we would cooperate and prepare a meal together.

However, this once treasured family style dining with our Federal partners has become a thing of the past. Now we have an increasingly diminished role in the menu selection and meal preparation. We are often forced to eat what is served.

The cooperative federalism model that has defined Arkansas's relationship with EPA beginning in the 1970's has morphed into something that is better described today as coercive federalism. We have seen a decrease in time and tolerance for State implementation plans and a dramatic increase in EPA takeovers, or Federal Implementation Plans. Historically, these FIPs were used as weapons of last resort for our EPA partner, its nuclear option for States that were unfaithful to the partnership or denied marriage outright.

Now FIPs are often used as an everyday tool, often of dubious origin, in the EPA's vast arsenal. In the past 7 years, States have been forced to digest more of these Federal takeovers, known as FIPs, than were ever served in the prior three Federal Administrations combined ten times over.

States will not waste the time to draft their own proposals if they expect the Federal Government to do what it wants to in the end. State sovereignty is diminished, and the opportunity for local innovation is destroyed. Cooperation should be fostered, not discour-

aged. We call on you, our Congress, to help remedy this broken marriage through amendment or ancillary legislation.

States are placed in the unfair position of having purchased a very expensive seat at the table, but then finding out meals are served exclusively from the EPA table. We are to be served a fixed menu without a fixed price. States' willingness to split the check, and occasionally buy dessert, was mitigated by a healthy respect and accompanying deference we received. Now we ask your assistance in resetting that needle to its point of origin.

For air pollution, we seek air pollution prevention and control is the primary responsibility of the States and local governments. In our estimation, Congress should ring the dinner bell calling for the meal to be served. States should host that occasion and EPA should be a frequent and faithful guest at each State's table. However, where we are now we can best describe as a progressive dinner party gone bad.

States have recognized an unprecedented level of Federal actions. To borrow a saying in the South, we have more on our plate than we can say grace over. The sheer number of mandates and deadlines further complicated by the complexity of the rules leaves us in a position where being served appetizer, soup, salad, main course, and dessert all at the same time. And if we do not clean our crumbs, we are banished from the table.

States rarely have sufficient notice and implementation of the rules to establish meaningful outcomes before moving to the next one, and we are left unable to get a taste of one course before the next one arrives. The EPA is afforded the luxury of being the ultimate picky eater while they select what they prefer on the menu, while we States are struggling to digest the meals plus leftovers.

The reality that States are often now more pawn than partner is nowhere more evidenced in the EPA's transformation from a two-sentence legislative passage to the Clean Power Plan, which had profound consequences and extraordinary costs. Arkansas is seeking ways to work with how we can work with EPA on consolidating efforts and superseding FIPs and SIPs without facing legal conflicts.

In addition to the Clean Water Act, the State-developed robust eco region natural condition water criteria in Arkansas have now become unrealistic and often unachievable minimum water protection standards. In this case, EPA has executed an ultimate bait and switch.

Serving up cooperative federalism in a coercive manner is distasteful, but the executive branch to ignore at our metaphorical table that are stabilized by three legs and not just one makes for a difficult and messy meal. We do want a seat at this table. We should not be fed the regulation of the day. In fact, the great majority of the FIPs we have result from reinterpretation of the good neighbor provisions.

In conclusion, not only has the uniquely American cooperative federalism model fallen, and the State role is now less partner and more pawn, we do see sue and settle appearing on the menu. We are left to wonder if special interest groups currently occupy our seat at the table that once was reserved for us. When States are

disenfranchised, so is the truth of our Federal democracy and the people we represent.

Thank you.

[The prepared statement of Ms. Keogh follows:]

WRITTEN TESTIMONY OF BECKY KEOGH, DIRECTOR
ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY

BEFORE
THE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE
OVERSIGHT HEARING ON:

"COOPERATIVE FEDERALISM: STATE PERSPECTIVES ON EPA REGULATORY ACTIONS AND
THE ROLE OF STATES AS CO-REGULATORS"

MARCH 9, 2016

Chairman Inhofe, Ranking Member Boxer, and Members of the Committee, good morning, my name is Becky Keogh. I am the Director of the Arkansas Department of Environmental Quality, also known as ADEQ. I bring you greetings from Governor Hutchinson of Arkansas, and I appreciated the opportunity to respond to your call from the several states for a local perspective on our relationship and level of cooperation with the United States Environmental Protection Agency.

We in Arkansas are seeking to drive regulatory policy and programs that balance effective environmental results of clean air and water, assure long-term resource management, affordable energy, and economic -growth goals that are important to our citizens, businesses, and the communities in which they seek licenses to operate. We want a state that can attract the newest generation of professionals

who seek communities that offer healthy living and the world-class recreational options that we enjoy in Arkansas. Arkansas is invested heavily in assuring that we are wise stewards of the abundant and clean water, healthy breathing air, and the amazing vistas with which we have been blessed. We do not take our name of "The Natural State" lightly. We strive to fairly and consistently serve the corresponding and complimentary roles of environmental stewardship and economic development.

Likewise, for decades, we successfully worked with the EPA under a symbiotic governing model that is the topic of today's hearing—cooperative federalism. This notion is born of something uniquely American, our system of federalism whereby the nation and states function together as co-sovereigns. Until the last several years, when it came to federal regulation, whether it be the Clean Air Act or the Clean Water Act, we would propose and the EPA would dispose. Both the EPA and the states had a relatively balanced seat a the table. And, as we are known to do in the South, we would all sit around the table and have a good-old fashioned meal. There would be lively debate, ample servings, and both us and the EPA would cooperatively prepare the meal. However, this once treasured family-style dining with our federal partners is a thing of the past. Now, we have an

increasingly diminished role in the menu selection or meal preparation. We are forced to eat what is served.

The cooperative-federalism model that has defined Arkansas's relation with the EPA beginning in the 1970s has morphed in something that can be better described as coercive federalism. We have seen a decrease in time and tolerance for State Implementation Programs (SIPs) and a dramatic increase in EPA takeovers, or Federal Implementation Programs (FIPs). Historically FIPs were used as the weapon of last resort for our EPA partner, its nuclear option for states that were unfaithful to the partnership or denied the marriage outright. However, under the prevailing paradigm, FIPs are used as an everyday tool (often of dubious origin) in the EPA's vast arsenal. To give perspective on this shift, it is worth noting that in the past seven years the states have been forced to digest more of these federal hostile takeovers, known as FIPs, than were served in the prior three federal administrations combined, ten times over.

Cooperative federalism regimes rest on governmental cooperation. States will not waste the time to draft their own proposals if they expect the federal government to do what it wants in the end anyway. That is to no one's benefit: A portion of State sovereignty is lost, while our unique and individual state constituencies lose out on

the benefits of local regulatory innovation. Cooperative federalism regimes should be designed to foster cooperation, not discourage it. Congress should aim to remedy this problem through amendment to the current controlling legislation, and should consider the importance of fostering cooperation when it designs new cooperative federalism regimes.

Currently, states are placed in the unfair position of having purchased a very expensive seat at the table—having learned the hard (and expensive) way; if you want local control, it will cost you—but then finding out that all meals are served exclusively from the EPA's table, and we are to be served a fixed menu, without a fixed price. The notion of *table d'hôte* without *prix fixe*, is distinctly un-American. States shoulder almost ninety percent of the cost of implementation of federal environmental regulation. However, until recent years, we were glad to pick up the tab because the cost to the states was mitigated by the healthy respect and accompanying deference we received from our federal regulatory partner. And, if there was ever a question of the relative standing of our partnership, one could solve the tie by simply pointing to the findings statement contained in the Clean Air Act at 42 USC §7401 (a)(3):

> The Congress finds . . . that air pollution prevention (that is the reduction or elimination, through any measures, of the amount of pollutants produced or created

at the source) and air pollution control at its source *is the primary responsibility of States and local governments.*

We ask for your assistance in resetting the needle to the point of its origin, whether this task be accomplished by way of Congressional clarification or judicial charge or the two working in tandem. In our estimation, Congress calls for the meal to be served, the states host the occasion, and the EPA be a frequent guest at each state's table. If the party does not occur is goes beyond what Congress has ordered, the judicial branch steps in to sort out the guest list and menu.

However, where we are now can best be described as a progressive dinner party gone bad. We are told that in its current form the Clean Air Act affords the EPA no discretion to give states that have acted in good faith a window within which to comply with a newly announced federal standard (despite the fact that the original finding that the states were out of compliance is more than two-years old). This makes little sense. While it seems logical to give the federal government the leeway not to provide a window for state compliance with a new standard where the federal government adjudges that a state has not acted in good faith, it nevertheless seems that the federal government should have the leeway to provide such a window where a state has acted in good faith and realistically could not

guess what standard the federal government would in the end promulgate. Cooperative federalism should reward cooperative behavior, not punish it.

States have recognized an unprecedented level of federal actions. To borrow a saying in the South, "we have more on our plate than we can say Grace over". The sheer number of mandates and deadlines, further complicated by the complexity of rules being finalized, leaves us in a position where we are being served our appetizer, soup, salad, main course, and dessert, all at the same time. And, if we do not clean every crumb from our plates, we are banished from the table. States rarely have sufficient notice and implementation of rules from EPA to accomplish meaningful outcomes before moving to the next one. And, while we are left unable to get a taste of one course before another arrives, the EPA allows its work to buildup—picking and choosing which items are most savory or will look best on its menu. The EPA is afforded the luxury of being the ultimate picky eater, while we states are struggling to digest these five-course meals, plus last-night's leftovers.

For example, in the ozone regulations that the EPA recently finalized, states were just beginning to realize the outcomes and benefits of implementation of the recent federal rules (for the 2008 standard), yet another new standard was already being proposed and finalized prior to initiating action again (whether it was necessary or

not). Specifically for Arkansas, we are finalizing SIPs for implementation of new short-term standards, while at the same time new ozone standards are being finalized and (with little notice) a second phase of Cross State Air Pollution standards were proposed that are inconsistent with our existing SIP. As such, we have at best overlapping and at worse conflicting directives, and regardless of which scenario plays out we have wasted resources. At the same time, failure or delay of federal approvals of SIP rules for water-quality and air-quality programs have created more regulatory uncertainty for the states and those regulated. To solve this, Arkansas is now seeking ways to work with the EPA on how we can consolidate or supersede previously submitted rules without facing legal conflicts.

The reality that states are now more pawn than partner is nowhere better evidenced than in the EPA's transformation of a two-sentence legislative passage into a two-thousand page rule with profound consequences and extraordinary costs. In the Clean Power Plan, Arkansas and other states that were already realizing reductions of carbon emissions across the grid were sent on a "race" to find answers to complex and critical analysis that we have referred to as a set of doors. Despite one door being labeled mass and the other being labeled rate, we were unable to predict whether the other side (of either door) provided safety and security of our energy and environment. A majority of states came together and have successfully

petitioned the highest court of the land to take a pause as lower courts hear the arguments of the states that the EPA has gone far beyond the authority granted to it and in fact the establishment of a carbon-reduction target (or any environmental standard for that matter). It is Arkansas's position that the EPA should not be permitted to proceed by simply ignoring Congress or the Constitution. Serving up cooperative federalism in a coercive manner is distasteful, but for the executive branch to ignore that the chairs at our metaphorical table are stabilized by three legs and not just one, makes for a difficult and messy meal.

While we want a seat at the table, as a co-sovereign (that is picking up much of the tab at the end of these expensive meals), we should not be force-fed the EPA's regulation de jour in an un-American fashion. Ironically, the great majority of FIPs that we states have been bombarded with result from the EPA's recent re-interpretation of its "Good Neighbor" provisions. As states, we try and be good neighbors; but when we are told to comply with targets that are either undisclosed or constantly in flux; and the targets may or may not correspond with any measurable environmental impact; and the mandates come at a great cost to the tax and rate payers, we are ready for new neighbors or a new neighborhood.

For example, in relation to the Clean Water Act, we are left to navigate federal interpretation of Arkansas's water-quality criteria. This system of water-quality protection was designed to establish natural water-quality conditions for extremely pure water streams under a robust monitoring protection. However, under recent federal interpretation, these once state-developed, extraordinarily heightened criteria have now become unrealistic and often un-achievable minimum water-protection standards. The EPA executed the ultimate bait and switch.

In conclusion, not only has the uniquely American cooperative-federalism model fallen to a more totalitarian, coercive-federalism scheme, and the state role is now less partner and more pawn, we also see "sue and settle" appearing on the EPA's menu more and more frequently. As we states are more often asked to navigate the increasingly litigious "green" lobby fighting hand-in-hand with the EPA, we states are left to wonder if this vocal special interest currently occupies the seat at the table that was once reserved for us. If this proves to be true and our pleas for relief are not heard and acted upon by Congress or the courts, as we say in the South, "bless our hearts." When the states are disenfranchised, so is the truth of our federalist democracy, and the people the WE represent.

Senator INHOFE. Thank you, Ms. Keogh.
Mr. Pirner.

STATEMENT OF STEVEN M. PIRNER, SECRETARY, SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Mr. PIRNER. Chairman Inhofe, Ranking Member Boxer, members of the Committee, my name is Steve Pirner, Secretary of the South Dakota Department of Environment and Natural Resources. I appreciate the opportunity to share with you our perspectives on why we do not believe the current regulatory framework between EPA and the States upholds the principle of cooperative federalism.

Let me provide you a few examples.

To help fund the administration of Federal regulatory programs, EPA awards us a Performance Partnership Grant. In 2012, the Grant peaked in funding, but has declined during the last 3 years. This decrease is certainly inverse to the huge increase in Federal requirements for delegated programs and, in our view, is an erosion of cooperative federalism.

An increase of Federal preemption on what we hold as State rights is also detrimental to cooperative federalism. For example, EPA and the Corps of Engineers developed a rule intending to clarify which water bodies are subject to jurisdiction under the Clean Water Act. The rule has faced substantial opposition in South Dakota and we joined a lawsuit with 12 other States to block the rule. Upon joining the challenge, South Dakota Attorney General Marty Jackley was quoted as saying, "The EPA is overstepping its congressional authority and seizing rights specifically reserved to the States."

Also under the Clean Water Act, EPA has proposed or finalized new national water quality and effluent standards for ammonia, nutrients, selenium, and dental offices. The bottom line is that these new, more stringent standards are going to cause additional wastewater treatment, which is going to drive wastewater treatment costs up, perhaps to the point of being cost-prohibitive.

Under the Resource Conservation Recovery Act, EPA finalized regulations to regulate coal ash. This was prompted by the liquid coal ash spill in Tennessee. Our single coal-fired power plant, the Big Stone Power Plant, disposes of only dry ash, but is still subject to the new rules which preempt DENR's existing solid waste permit.

In a settlement agreement under the Clean Air Act between EPA and the Sierra Club, the Big Stone Power Plant was listed as a large source and needing to demonstrate compliance with EPA's 1-hour sulfur dioxide standard. EPA never took into account the new air pollution controls installed at a cost of $384 million to meet the Regional Haze Rule. There is no doubt these new controls will reduce sulfur dioxide emissions below the thresholds established in the consent decree.

Another Clean Air dispute involves ozone. South Dakota is one of only 10 States in the Nation that is in full attainment with the national ambient air quality standards but, against our recommendations, EPA adopted a new, lower standard for ozone. We are now at risk of having a non-attainment status; not because our

air has gotten dirtier, but because EPA lowered the standards potentially below our background levels.

In response to another petition from the Sierra Club, EPA determined that certain startup, shutdown, and malfunction exemptions in 36 States, to include South Dakota, are inadequate under the Clean Air Act and need to be eliminated. Our exemption allows for brief periods of visible emissions because certain pieces of equipment are not fully functional when these events take place. DENR's rule was first established in 1975, was approved by EPA, and has not caused or interfered with South Dakota staying in compliance with the national standards. South Dakota has joined Florida's lawsuit against the rule, along with 15 other States.

The final rule that highlights the lack of cooperative federalism is the carbon dioxide standard for existing power plants. In 2012, which is the base year that EPA used, 74 percent of the power generated in South Dakota came from renewable sources. In spite of this remarkable record, EPA's rule threatens the economic viability of the two fossil fuel-fired power plants that we do have in the State and could strand the Regional Haze controls previously mentioned at the Big Stone Plant. Here again our attorney general has joined lawsuits against the rule, most notably with West Virginia.

The bottom line is these new Federal requirements will have a huge impact on our citizens and on our economy, but will produce little or no known noticeable benefits in South Dakota. For this reason, we believe that each State should have the right and the freedom to address these issues individually, using the principles of cooperative federalism and Executive Order 13132 on federalism. As stated in the Executive Order, "The Framers recognized that the states possess unique authorities, qualities, and abilities to meet the needs of the people and should function as laboratories of democracy." That is not the case now.

I hope this information is useful to the Committee. Thank you again.

[The prepared statement of Mr. Pirner follows:]

Testimony of Steven Pirner, PE
Secretary, South Dakota Department of Environment and Natural Resources
to the
U.S. Senate Committee on Environment and Public Works

"Cooperative Federalism: State Perspectives on EPA Regulatory Actions and the Role of States as Co-Regulators."

March 9, 2016
Washington, D.C.

Chairman Inhofe, Ranking Member Boxer, and Members of the Committee, my name is Steve Pirner, Secretary of the South Dakota Department of Environment and Natural Resources (DENR). I appreciate the opportunity to share with you our perspectives on why we do not believe the current regulatory framework between EPA and the states upholds the principle of cooperative federalism.

To help fund the administration of federal regulatory programs, EPA awards us a Performance Partnership Grant. In 2012, the grant peaked in funding, but has declined during the last next three years. This decrease is certainly inverse to the huge increase in federal requirements for delegated programs, and in our view, is an erosion of cooperative federalism.

An increase of federal preemption on what we hold as states' rights is also detrimental to cooperative federalism. For example, EPA and the Corps of Engineers developed a rule intending to clarify which waterbodies are subject to jurisdiction under the Clean Water Act. The rule has faced substantial opposition in South Dakota and we joined a lawsuit with 12 other states to block the rule. Upon joining the challenge, South Dakota Attorney General Marty Jackley was quoted as saying, "*The EPA is overstepping its Congressional authority and seizing rights specifically reserved to the states.*"

Also under the Clean Water Act, EPA has proposed or finalized new national water quality and effluent standards for ammonia, nutrients, selenium, and dental offices. The

bottom line is that these new, more stringent standards are going to cause additional wastewater treatment which is going to drive wastewater treatment costs up, perhaps to the point of being cost prohibitive.

Under the Resource Conservation Recovery Act, EPA finalized regulations to regulate coal ash. This was prompted by the liquid coal ash spill in Tennessee. Our single coal-fired plant, the Big Stone Power Plant, disposes of only dry ash, but it is still subject to the new rules which preempt DENR's existing solid waste permit.

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In response to another petition from the Sierra Club, EPA determined that certain startup, shutdown, and malfunction exemptions in 36 states, to include South Dakota, are inadequate under the Clean Air Act and need to be eliminated. Our exemption allows for brief periods of visible emissions because certain pieces of equipment are not fully functional when these events take place. DENR's rule was first established in 1975, was approved by EPA, and has not caused or interfered with South Dakota staying in full compliance with the National Air Quality Standards. South Dakota has joined Florida's lawsuit against the rule along with 15 other states.

The final rule that highlights the lack of cooperative federalism is the carbon dioxide standard for existing power plants. In 2012, 74 percent of the power generated in South

Dakota already came from renewable sources. In spite of this remarkable record, EPA's rule threatens the economic viability of the two fossil fuel fired power plants and could strand the Regional Haze controls previously mentioned at the Big Stone Power Plant. Here again, our Attorney General has joined lawsuits against the rule, most notably with West Virginia.

The bottom line is these new federal requirements will have a huge impact on our citizens and economy, but will produce little or no noticeable benefits in South Dakota. For this reason, each state should have the right and the freedom to address these issues individually, using the principles of cooperative federalism and Executive Order 13132 on Federalism. As stated in the Executive Order, *"The Framers recognized that the states possess unique authorities, qualities, and abilities to meet the needs of the people and should function as laboratories of democracy."* That is not the case now.

I hope this information is useful to the committee. Thank you again.

Senator INHOFE. Thank you, Mr. Pirner.

All right, would you hold the poster up that we have there?

Ms. Keogh, according to this December 2015 timeline by the Association of Air Pollution Control Agencies, there are nine Clean Air Act deadlines for States this year alone. Your testimony describes a number of these EPA actions as, and I am quoting now from your statement, "we have, at best, overlapping and, at worst, conflicting directives." Can you explain how competing deadlines impact your department?

Ms. KEOGH. Thank you, Chairman. It is a bit frustrating as we seek implementation of these numbers of regulations in a very short timeframe. What we see as our program staff evaluate these rules and seek implementation, we are modeling different and often conflicting results for the exact same source or the facility, and it often ignores the progress that the States are already making, or continuing to make, on different timeframes.

Senator INHOFE. Thank you very much.

Mr. Huffman, on February the 23d of 2016, I led some 200 House and Senate members, 34 of those were Senate members, in filing an amicus brief with the D.C. Circuit in opposition to EPA's Clean Power Plan.

I did observe, Ms. Markowitz, you were the only one talking favorably about the Power Plan, but I have to point out that is because you are one of four States that is exempt from it. So I think the others would probably agree with you if that were the case.

Anyway, the brief argues, among other things, that the Clean Power Plan violates the Clean Air Act's principle of cooperative federalism, explaining, quoting from the brief, "The EPA takes a coercive approach that commandeers the States to implement and enforce the Agency's power choices."

So I would ask Mr. Huffman, do you agree that the Clean Power Plan coerces States to implement EPA's policy choices, not the choices of States?

Mr. HUFFMAN. Yes, Senator. I believe EPA's biggest challenge in implementing the Clean Power Plan is it had to go about it in a way that is unconventional. Typically, EPA will regulate pollutants at the end of the stack, if you will, or at the end of the pipe. And with regard to the Clean Power Plan, the only way to do that would be to put a regulatory number, a limit on carbon dioxide. And the only way to do that in a way that gave the effect that they would want would essentially shut down all fossil fuel production in this Country.

So the way they went about managing every minute detail of how this Clean Power Plan should be implemented we think ran in conflict with Section 111(d) of the Clean Air Act, which gives the States the authority to establish those performance standards; and EPA has done that instead of setting the threshold and allowing the States to figure out how to do it.

Senator INHOFE. All right, thank you.

Mr. Pirner, there is a little bit of confusion, lack of clarity following the Supreme Court stay of the Clean Power Plan. Has your State continued to work on the rule? And if the stay is ultimately lifted, do you expect compliance deadlines to be extended? In other

words, are you continuing to work as if the stay were not a reality? How are you preparing for it?

I might ask the others the same thing.

Go ahead.

Mr. PIRNER. Mr. Chairman, our plan before the stay was issued was to proceed along a path such that we could do enough to get the 2-year extension. EPA had said that that was not going to be a high bar to reach, so we read through what they were going to require and we had started to work on those items. One of those items was a public participation process. In response to that, we established a Website where people could view some information and give us comments. We had also scheduled some public input meetings.

The day after the stay was issued we canceled those public meetings. The word that we are getting back from the legal team that is leading that lawsuit is that they expect those deadlines will be adjusted by the courts once the decision is made.

Senator INHOFE. But expecting that and knowing that are two different things.

Mr. PIRNER. Yes, sir.

Senator INHOFE. Anyone else want to comment on that?

All right, Senator Boxer.

Senator BOXER. Thank you, Mr. Chair.

Mr. Mirzakhalili, as you described in your testimony, Delaware is a downwind State, such as Rhode Island, I am sure we will hear more about that, and much of the air pollution in your State comes from upwind States. You say that "it is EPA's role to ensure equity between where pollution is produced and where it is received."

It seems to me that is right spot on. So if EPA did not set minimum standards and all this went to your neighboring State who is sending smog and everything else over your way, and we left it all to each State, what would it be like for the people of Delaware in terms of asthma, in terms of COPD, and the other problems that come from filthy air?

Mr. MIRZAKHALILI. Thank you for the question, Senator Boxer. I can answer that by saying they will be having a feast while we get the smoke in our eyes. We suffer from the consequence of those emissions if they are unabated. As I mentioned in my testimony, some of those are simple to remedy. The equipment has been installed, and they are just not operating because the current scheme is a cap control.

Senator BOXER. Thank you. You answered that very well.

Ms. Keogh, I would love to be invited to your house for dinner, because you obviously are focused on that, and it would be fun. So you just heard our witness from Delaware talk about the fact that if we didn't have these basic minimum standards his State, they are wonderful people there, but they are located in a place where they get those winds and they get that pollution.

So if your State was in that circumstance, I know you do get some pollution from surrounding States, but not to the extent that some of these other States get it, wouldn't you think it would be fair to limit that pollution? Because wouldn't you be concerned? The science tells us there is a direct link between dirty air and asthma and COPD and worse.

Can you understand their point, is what I am asking.

Ms. KEOGH. Yes, Chairman.

Senator BOXER. Ranking Member.

Ms. KEOGH. Ranking Member. I apologize.

Senator BOXER. It doesn't matter. He would be unhappy if you called me chairman.

Ms. KEOGH. I understand that.

With due respect, Chairman.

Arkansas does have very clear air and healthy air, and it is difficult for a State like Arkansas to reflect on the model assumptions that are made to implicate States which measure and monitor such clean air against other States or impacting those States.

Senator BOXER. But that wasn't my question. My question was if you were one of those States that got a huge amount of pollution from a next door State which did nothing to prevent it, would you put yourself in the shoes of Delaware or Rhode Island or these other States? It is just a simple yes or no.

Ms. KEOGH. Our States work together when we have a situation like that. We have worked with our neighboring States.

Senator BOXER. OK, so your position is that your State can tell another State what to do, and you are criticizing the EPA. Now you are going to say one State is going to tell the other State what to do. It is not realistic at all, and that is the reason we passed Federal legislation, under Nixon, I might say.

Ms. Markowitz, can you explain why it is essential that we have national minimum standards, while also allowing States to be more stringent in protecting their citizens?

Ms. MARKOWITZ. We are also an upwind State, so we are also suffering. Vermont is a clean green State. We have some of the worst air pollution in the Country in the little town of Rutland, and that is because of the way the winds come from coal-burning States into Vermont, and that is a problem for us. And we have tried to work cooperatively with these States to put in place those pollution controls that in many cases they already have.

But in Vermont we want to do more. We recognize that we have this culture of environmentalism, but, at a baseline, when other States want to do less, it impacts our quality of life.

Senator BOXER. OK, let me interrupt you only to say you are making my point. Minimum Federal standards let the States do more.

Ms. MARKOWITZ. That is right.

Senator BOXER. And I think that is what the beauty is of the Clean Air Act which is under such fierce attack.

Now, Mr. Huffman, the January 2014 spill from the Freedom Industry's chemical storage facility contaminated the drinking water supply of more than 300,000 residents of Charleston. You know that. We are now facing another drinking water crisis in Flint, Michigan, where children were poisoned by the city's toxic drinking water. Given these events, do you think EPA and the States should be doing more, not less, to protect the public's drinking water?

Mr. HUFFMAN. Yes, Senator. I think that your point about minimum Federal standards and then let the States figure it out, that is absolutely the model that we should be following.

Senator BOXER. Good. Good.

Mr. HUFFMAN. That is absolutely what we should be doing. My point today, and I think the frustration with West Virginia, with some it has been about what those standards are, but the real problem for me as a regulator is the way they go about implementing these standards. They are bypassing the guidelines under the Federal environmental statutes for how to implement one of these changes in minimum standards.

Senator BOXER. Well, Mr. Huffman, since my time has run out and my chairman is coughing, which means he wants me to stop, let me just say that I really respect what you just said. I don't think that any agency, the Federal Government or any State agency, should overstep its bounds. So we will talk more about, because I think what you said is very fair. Minimum standards, yes, but implemented in the right way.

Mr. HUFFMAN. Correct.

Senator BOXER. Thank you.

Senator INHOFE. Thank you, Senator Boxer.

Senator Rounds.

Senator ROUNDS. Thank you, Mr. Chairman. We pride ourselves in South Dakota with the clean air. We do have challenges at times. If there is a forest fire in California, we suffer from the smoke from that. So we understand, when you talk about you want clean air. We want it too. We think we do a good job in our State.

Secretary Pirner, you have spent decades administering and implementing environmental regulations on both the State and the Federal level. Can you discuss, in your experiences, the differences you have seen in terms of the quality and benefits of regulations that have resulted from a process that incorporates more State input compared to the regulations that have recently been promulgated by the EPA?

Mr. PIRNER. Senator Rounds, based on my experience, if you go back and EPA rolled out an issue, and if everybody came to the table and agree this is a problem and agree this is some options that are viable, things get done, it works. If you don't have that process in place and the Federal Government, EPA in this case, is identifying the problem along with the option, or a couple options, none of which work for you, then we are left with the rash of lawsuits that I just mentioned in my testimony.

Senator ROUNDS. Talk about ozone a little bit. In South Dakota we are in compliance. We are one of the few States that is in compliance. You have seen the new numbers coming out. Can you talk a little bit about what that does in terms of a State like South Dakota, where we are one of the 10 that actually complies with the guidelines right now? You mentioned they want to make a change in this, down to perhaps below our basic numbers. Can you talk about that a little bit, about how frustrating that is?

Mr. PIRNER. Yes, Senator. To form ozone you have to have certain emissions, and it has to react with sunlight and then you get ozone. So ozone may actually form in a downwind State. In South Dakota, we are a population of, what, about 800,000 people. We don't have the sources of the chemicals that react with the sunlight to form the ozone.

So the ozone that we do have in South Dakota is either from upwind States or is basically our background levels. And I think

based upon what we have seen, the new limit that EPA has come out with is very, very close, if not above, our background levels.

Senator ROUNDS. So what is a State like South Dakota supposed to do when we are not in compliance?

Mr. PIRNER. We haven't been there yet, thank goodness, but I would assume we would go into a non-attainment status. We would have to try to work with the EPA on figuring out what to do, but, since we don't have the sources, I don't know what we would do.

Senator ROUNDS. In your experience, how would you recommend EPA change its practices of making regulations to better incorporate States' perspectives in the regulatory process? In other words, what are the implications of the EPA enacting broad, overreaching national mandates rather than regulations that take into account the differing characteristics of individual States?

Mr. PIRNER. Senator, your hearing today is on cooperative federalism, and if you read that Executive Order that I quoted in my testimony, it says in there that one of the principles of federalism is that those decisions that affect people that are made by the unit of government closest to the people are usually the best decisions, and we would say that is still true.

Senator ROUNDS. I would suggest that during your tenure, from 1979 on, you have gone through multiple administrations. Can you share with us a little bit about what you are seeing right now with regards to either the consultations that are either not there or the directives that are being laid out right now versus the way it used to work? Whether it was in a Democrat administration or a Republican administration, what is different about what is going on right now?

Mr. PIRNER. Senator Boxer said we are not going to repeal the Clean Air Act and we are not going to repeal the Safe Drinking Water Act, and we are not going to repeal these environmental Federal acts; and I don't think anybody wants to repeal those Federal acts. When those acts were put in place, there were real problems in this Country; the environment was really, really suffering, and that was the reason those acts were put in place.

But in the intervening time period now tremendous progress has been made; our water is cleaner, our drinking water is safer, our air is cleaner. So I guess what bothers me some about this is now we are trying to ratchet down to the next environmental problem and we are getting to such low levels that we are going to spend a lot of time, we are going to spend a lot of money, we are going to spend a lot of resources, and in the end what is going to be the benefit?

Senator ROUNDS. Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Rounds.

I mentioned in my opening statement that all these acts, the Clean Air Act, we on the Republican side were very supportive of that. In fact, I was one of the initial co-sponsors of those. So I wouldn't want people to think that these things are not working. They are working. We understand that.

Senator Carper.

Senator CARPER. Thanks so much.

Again, thanks to all of you.

I am going to put my old hat on as a recovering Governor just to followup on what Ali said. During the time that Ali was serving in the Department of Natural Resources, Christof Tulou, sitting behind me, was the secretary and I was Governor for 8 years, also chairman of the National Governors Association for a while. I get the idea that States are laboratories of democracy. I like the idea that the Federal Government would set some standards and say to the States, you figure out how to do it, figure out the most cost-effective way to meet those standards. I thought the six points that you outlined in your testimony, Ali, I am almost tempted to go over them again and ask everybody on this panel if you agree with those.

Before I do that, just be thinking about that. I am telegraphing a pitch. That is what I am going to ask next. So just be thinking what he said and how you feel about that.

The Chairman and I go to a Bible study that meets most Thursdays. He has been to a prayer breakfast this morning. We are people of different faiths here, but we actually do try to figure what our faith is and abide by it. We are all people with different faiths. But one of the things I think all of us agree on, I don't care what religion we are, is treat other people the way we want to be treated. I think that is a standard that we can all embrace. I don't care what religion you are; it is there in your religion. I think it applies here.

I could have shut down the State of Delaware's economy when I was Governor, literally shut it down, and we would still have been out of compliance in any number of air quality metrics. That is just not fair. That is not right. That is why we need others to be a good neighbor and to look out for their neighbor.

There are some places in the Midwest where they create cheap energy, burn coal, 500-foot tall smokestacks. Put the stuff up in the air, it blows all the way over to the East Coast, we get it. We end up with dirtier air. We have to spend more money to clean up our air because other people are getting cheap electricity, and it is just not right. So I would just ask for all of us to keep in mind the Golden Rule: treat other people the way we want to be treated.

The other thing I want us to keep in mind is I think it was something, Mr. Pirner, that you said. We have made great progress. When I was at Ohio State University, a Navy midshipman there, there was a river up in Cleveland that caught on fire, the Cuyahoga River. We all remember that.

I got on the train this morning in Wilmington, Delaware, there was a river that goes right by the train station there in Wilmington, the Christina River. We can't eat the fish there. In fact, we can't eat the fish in most of the rivers in my State. Frankly, there are a whole lot of other rivers in a whole lot of other States where they can't eat their fish either. And while we are making progress, the Cuyahoga River doesn't catch on fire anymore, but we still can't eat our fish, and we can do better.

We all agree that we ought to be guided by sound science. Part of sound science says that some of the real problems for air pollution is the size of the particulates that get into our lungs that are most dangerous are the smallest. We have only been concerned about the larger ones, but we find out, as we learn more through

science, the really dangerous stuff is the really teeny weeny ones, micro jobs. So I would just ask us to keep that in mind.

I want to go back to what Ali said. He made six points that I just want everybody to say whether or not you think he is on target.

He said, I believe EPA can best fulfill its role by fulfilling the following: one, sound science. EPA must set national standards as Congress mandated which rely on sound science as a cornerstone of its work. That is No. 1.

No. 2, flexibility. Once EPA establishes its standards, this agency should provide States with appropriate flexibility to meet their obligations under the Clean Air Act and protect public health and the environment. That is No. 2.

No. 3, timely rules and guidance. It is important that EPA issue timely implementation rules and guidance for use by the States.

No. 4, accountability. EPA should be consistent in the outcomes it expects from States across the States and hold itself and the States and local air pollution control agencies accountable for meeting their commitments.

No. 5, equity. EPA must provide for a level playing field among the States, kind of the Golden Rule deal that I just was laying out.

And, finally, nationwide sources. EPA must address sources that States are either preempted from regulating or lack the necessary expertise to regulate, or that are most effectively regulated on a national level.

Let me just start with you, Ms. Markowitz. Do you agree with those? Has he laid it out pretty well or not?

Ms. MARKOWITZ. Yes, I agree with that. It makes tremendous sense. I think that is how we have been operating. We personally, in Vermont, have experienced tremendous flexibility in our relationship with Region 1.

Senator CARPER. Thank you.

Mr. Huffman.

Mr. HUFFMAN. Yes, Senator, those are great principles. We agree with them and we long for those days when the execution follows that ideal.

Senator CARPER. All right.

Ms. Keogh. Think of this as a menu.

Ms. KEOGH. I agree with Cabinet Secretary Huffman as well, and the other members. These are good principles. It comes down to the implementation and how we can work cooperatively, and find solutions rather than create new challenges.

Senator CARPER. Thank you.

Mr. Pirner.

Mr. PIRNER. Yes, Senator, I would agree with those six points as well and, as the other witnesses have said, basically, it is how you carry it out.

Senator CARPER. All right, good.

Mr. Chairman, I would say the ayes have it. Thank you all very much.

Senator INHOFE. Well, thank you.

Senator Capito.

Senator CAPITO. Thank you, Mr. Chairman.

I want to thank all of you. And I neglected to mention, when I talked about Secretary Huffman, that he also is a colonel and serves as the Vice Wing Commander of the 130th Airlift. So thank you for your service there, Colonel Huffman.

I am glad that Senator Carper went to the principles that you laid out because I was going to use that in terms of my questioning.

Secretary Huffman, you highlighted Section 303 of the Clean Water Act in your testimony, and basically it says that the EPA is asked to determine whether a change in the State's water quality standard meets the requirements of the Clean Water Act. And if the EPA determines that a water quality standard isn't consistent, by law, the EPA has to notify within 90 days.

My understanding is that the West Virginia legislature approved a change in the State's water quality standard just last year, but the EPA failed to either approve or deny the change within 90 days. I think the substance of the talk we are talking about today is not so much the standards; as you mentioned, it is the implementation, it is the lawfulness with which the Federal agency is moving forward.

So, in my view, with them not notifying in the timely fashion or giving you good direction, it violates the timely rules and guidance that the director in Delaware was talking about, and also the accountability portion of that.

How vital is that feedback for EPA, that it come in a timely fashion to you so that you can fully implement?

Mr. HUFFMAN. Well, thank you, Senator. Good to see you again. It is critical because there are a lot of moving parts in the environmental regulatory business. There is a lot going on. We need to make these requests and we need to get answers, and we need to move on. What is really frustrating is I can submit a change for a water quality standard, and not get it, and wrangle for months and sometimes years, but, yet, whenever I get an opportunity to comment on proposed rules, I might have 3 days, I might have 4 days. And that is very frustrating and it makes me wonder, if I were a conspiracy theorist, I might wonder what their agenda is, what is going on here. So it is frustrating.

Senator CAPITO. Let me ask you, too, the difference between guidance and rules and regulations. You brought that up in your testimony. We find that, really, throughout the Administration in terms of offering guidance instead of rulemaking because it does evade the legal aspects of creating a regulation. Are you getting more guidance than you have in the past? Is it more difficult? Is there enforcement mechanisms to guidance?

Mr. HUFFMAN. Well, when you govern by guidance, instead of going through the protocols that the Congress has set up in our environmental statute, it allows you to get by with more; it allows you to avoid the transparency and how you get to your point; and we are seeing a lot of that not only with EPA, but, as I mentioned, with the Office of Surface Mining.

Senator CAPITO. I think most of you have mentioned that what you need is the Federal minimum standard nobody has a problem with; it is the implementation aspect of it. But, also, most of you have mentioned the flexibility that the States need to have. Obvi-

ously, in West Virginia, we have a much different situation than you have in Vermont. We are blessed with a lot of coal and we use it and have used it, and we are cleaning it up every day, but it is a bigger challenge for us in certain. So we need that flexibility in West Virginia to meet those standards because, as every member would say, clean air, clean water is just as valuable to us. And I think we can eat a lot of the fish that we catch in West Virginia, so we are very happy about that.

Is the flexibility aspect probably the most difficult hurdle for you all to overcome? I will start with you, Secretary Huffman.

Mr. HUFFMAN. I don't know if it is the flexibility or the frustration. I know we are running out of time here. The frustration really seems to be it is an inconvenience to involve the public, to involve the States. It takes time. If you want to make a rule, it takes time. And, as you all know, that is a very cumbersome process.

The convenient way to do that would be, by fiat, to impose it upon the States. That is what we are seeing. There is little to no flexibility because it is already written. By the time we get it, it is already written and the minds are made up, and it is very difficult to overcome that.

Senator CAPITO. And I would just finally note that you participated or agreed to participate with OSM to develop the new stream buffer rule. Many States were involved with this. And because of the numerous frustrations and really the lack of listening that OSM was doing, most of the States pulled out of that, I think. Is that correct?

Mr. HUFFMAN. That is correct. There was a draft of that rule that OSM mistakenly made public before, within days of us signing on as a cooperating agency, it was already written.

Senator CAPITO. It was already written. Thank you.

Senator INHOFE. Thank you, Senator Capito.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you very much, Chairman. Let me associate myself with the remarks of Governor and now Senator Carper. As the attorney general of my State, Rhode Island, I saw exactly the circumstance that he very well described. Not only did the upwind States not make any effort to treat us fairly, we often had to try to sue the upwind States with EPA, or sometimes even sue EPA to enforce compliance with the Clean Air Act.

On a perfect Rhode Island summer morning, you could drive to work and hear on the radio a warning that today was a bad air day, and the children and the elderly and people with breathing difficulties should stay indoors. Stay indoors.

And, like Delaware, we could have shut down every outlet of emissions in the State of Rhode Island and not gotten ourselves into compliance, because it came from other States; other States that fought compliance; other States that often had not even put scrubbers on their smokestacks yet; other States that specifically built high smokestacks so it would project the emissions out of their State. They were very often States in compliance with these air regulations, even though they were the source of the emissions that were taking Rhode Island out of compliance.

So I know there are going to be States that are going to unhappy with EPA regulation. They would love to have the regulation be as

close to the people as possible because those people have wangled it so that they can export their pollution to my State, and not have to pay for it and not have to clean it up.

And that is a real problem that I think EPA has to address. It is very important to our downwind States. It is just not fair for kids in Rhode Island not to play on a summer day because they are having a bad air day. And what we have seen is that EPA has cracked down more and more, sometimes because States have sued, sometimes because they have acted on their own, actually, our bad air days are diminishing.

But it took EPA to get after the States that were happy to go along with the gag, because they had made their pollution somebody else's problem. That somebody else was my Rhode Island children, elderly, and people with breathing difficulties.

So, for the record, our engagement with Region 1 of EPA is terrific in Rhode Island. We don't have complaints. We talk back and forth; it is very open; there is no problem. So I don't know if there is a significance to the fact that the States that seem to be more in the export business are the ones that have of the problem with EPA, and the ones that are more in the we are getting clobbered business are the ones that appreciate EPA, but certainly from Rhode island's perspective, we appreciate very much what EPA is doing.

Let me ask a quick question just to kind of see where folks stand, and let me start with Mr. Pirner.

Mr. Pirner, do carbon emissions from fossil fuel burning cause changes in our atmosphere and oceans that portend harm to people and to ecosystems?

Mr. PIRNER. Senator, I am not going to enter into that particular debate. What I would argue is that if we are going to control carbon emissions, it has to be done in a way that can work and that is feasible, and the first proposal that EPA laid out in our State simply was not feasible at all.

Senator WHITEHOUSE. Why are you unwilling to answer a question at a hearing that is as simple as, do carbon emissions from fossil fuel burning cause changes in our atmosphere and oceans that portend harm to human beings? Why are you not willing to enter into what you call a debate?

Mr. PIRNER. Senator, because I am not an expert in that particular topic.

Senator WHITEHOUSE. Ms. Keogh, do carbon emissions from fossil fuel burning cause changes to our atmosphere and oceans that portend harm to humans and to ecosystems?

Ms. KEOGH. I think you can find scientists that say both, yes and no.

Senator WHITEHOUSE. And what do you say?

Ms. KEOGH. Well, I am not an expert, either, as the other witness indicated.

Senator WHITEHOUSE. Mr. Huffman, do carbon emissions from fossil fuel burning cause changes to our atmosphere and oceans that portend harm to humans and to ecosystems?

Mr. HUFFMAN. I am sorry, I didn't mean to interrupt you, Senator. I do believe that the science would indicate that our climate is changing. I think that there is a lot of, unfortunately, we are

having the debate in the wrong place in this Country over climate change. We are name-calling. It is reduced to name-calling over whether you believe or don't believe in climate change. Sure, the climate is changing. What we need to be debating is what we should be doing about it. And I don't know that we have come together as a Nation on that.

Senator WHITEHOUSE. Well, clear enough for me.

Let me just say for the record, as I close out, that I think every national lab, our U.S. military, NOAA and NASA, and every single one of our lead home State universities would have found that an easy question to answer with a plain and simple yes. Thanks.

Senator INHOFE. Senator Boozman.

Senator BOOZMAN. Thank you, Mr. Chairman.

Ms. Keogh, in your testimony you cite a dramatic decrease in time and tolerance or State implementation plans and dramatic increase in EPA Federal implementation plans under the Administration. As depicted in this chart, the Obama EPA has taken over State programs 54 times, more than the three previous administrations combined times 10.

Director Keogh, are you concerned about this trend? Isn't it true that State plans are integral to the Clean Air Act's cooperative federalism structure and Federal plans were intended as only as a last resort?

Ms. KEOGH. Thank you, Senator. We are concerned about this trend, and we understand as a State that Federal plans may be necessary sometimes, in circumstances where States do not act or choose not to act. But the frequency and process of the FIPs have become so alarming, mainly because they take a Federal solution that may be developed in a very short period of time with limited information and replace a very thoughtful and extensive process at a State level, where we have dealt with what could be a reasonable solution, we vett it through transparent processes and also search out whether we have unintended consequences. So that is our biggest concern, is that we replace our well thought out judgment with somebody else's solution that may not have seen that same thoughtful process.

Senator BOOZMAN. Very good. As you know, under the Regional Haze program, States develop implementation plans. EPA has limited authority to reject the State plan and issue a Federal plan instead. Still yet, in Arkansas, EPA rejected our State plan and proposed an extremely expensive Federal takeover. Director Keogh, is it true our State plan was on track to achieve natural visibility conditions?

Ms. KEOGH. Yes, sir.

Senator BOOZMAN. And its proposed Federal Regional Haze Plan for Arkansas, did EPA go beyond its limited procedural role prescribed by the Clean Air Act?

Ms. KEOGH. In Arkansas, we do believe so. In fact, when I asked EPA, when they offered up the Federal proposal, why they expanded the scope of the Regional Haze Plan to include sources that were not legally authorized under the rule, EPA answered, because we can.

Senator BOOZMAN. How will the requirements of the Federal Regional Haze Plan interact with possible actions under the Clean Power Plan? Are those timelines intertwined in a complicated way?

Ms. KEOGH. They are for Arkansas, at least. Our State air experts that evaluated both rules and have been working diligently to assess impacts and solutions looked at models, and I think it is important to show that the model under the Regional Haze Plan, where they take into account cost-effectiveness, assumes a source could install multi-million dollar control equipment and do it cost-effectively.

However, when you look at the models and the timelines of the Clean Power Plan, that same source no longer operates just a few years later, after those controls are installed, and that would be a very extremely costly mistake for Arkansans to pay for, to install multi-million dollar controls, only to have the source shut down to comply with the subsequent rule compliance date.

Senator BOOZMAN. Thank you.

Mr. Ali mentioned about the unfunded mandates. I think that is something that I think we can all agree on is a real problem. Some of these things we are having trouble on agreement, but the unfunded mandates really is a problem.

Randy, can you address that a little bit?

Mr. HUFFMAN. Well, it has really always been an issue. The funding for the vast majority, and I don't know the number, of our environmental regulatory programs in the States is provided by the States, either through the General Fund budgets or, in our case there is a lot of special revenue type accounts, through assessments and fees on the industries that we regulate. I don't know that I have ever seen any kind of an analysis by EPA when a new rule is imposed or a new guidance. There is never an analysis done, that I have seen, that would indicate what the costs are that are associated with.

Senator BOOZMAN. Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Boozman.

Senator Markey.

Senator MARKEY. Thank you, Mr. Chairman, very much.

Ali, thank you for being here. Some of your fellow regulators have expressed concern about not being able to comment on EPA rules. The Clean Power Plan changed significantly from its draft to final form based on input from the States, industry, and other stakeholders. Do you find that the EPA is listening to you in terms of the flexibility, the concerns which you have been expressing?

Mr. MIRZAKHALILI. I absolutely do, especially in terms of the Clean Power Plan. I think that the level of outreach and dialog with stakeholder involvement was unprecedented in that effort. We see marked difference between what they proposed and what was finalized, and we see our comments reflected in those changes.

Senator MARKEY. Earlier in the hearing there was a discussion of the number of deadlines approaching for the Clean Air Act. The Massachusetts Department of Environmental Protection has corresponded with Chairman Inhofe for this hearing and he noted that Massachusetts will meet these deadlines. Will Delaware be able to meet those deadlines as well?

Mr. MIRZAKHALILI. We absolutely will be.

Senator MARKEY. Will Vermont be able to meet these deadlines?

Ms. MARKOWITZ. We absolutely will be. I want to acknowledge that under the Clean Power Plan we don't have regulated entities, so we don't have an obligation there.

In answer to your earlier question, though, there was an unprecedented involvement even of Vermont in the development of those rules because we are deeply concerned that whatever the implementation is, that it could include the Regional Greenhouse Gas Initiative that we are part of.

Senator MARKEY. So let me followup with you, Secretary Markowitz. The Safe Drinking Water Act allows States to manage public water systems within their jurisdiction if they meet national standards set by the EPA. Given the ongoing situation in Flint, Michigan, it is clear that we still have a long way to go to ensure safe drinking water for every American. What are the ways that we can enhance Federal-State cooperation to ensure safe drinking water for all in our Country?

Ms. MARKOWITZ. Well, this is an area where we are having direct experience right now. We have an issue with a chemical, PFOA, which was not a regulated chemical which is nevertheless a carcinogen and an endocrine disrupter that has been found in wells in Bennington; it is a chemical that is used in the making of Teflon. And we really rely on EPA and their scientific expertise to help us manage that.

In addition, they have come out with some new rules and standards for the limits in copper and some other things that we can find in our drinking water. This is an area of partnership that is really important. The standards that they set help us ensure that our Vermonters are healthy when they are taking water from their taps.

Senator MARKEY. OK.

Ali, let me come back to you. As we are all aware, climate change is a global problem, but it requires local solutions in order to solve the problem, and Pope Francis, who taught high school chemistry, came to Congress to preach his sermon on the Hill to us to tell us that the planet was warming and the science proved that, and that human beings were contributing to it and the science proved that, and that we had a moral responsibility to be the leaders for the planet.

So my question is since both Delaware and Vermont are part of the Regional Greenhouse Gas Initiative, which has been partnering now coming up to eight or 10 years to reduce greenhouse gases, can you talk about how the EPA has been coordinating with you to ensure that this problem, this global warming problem can be solved by cooperation amongst the States and working with the States?

Mr. MIRZAKHALILI. Thank you for the question, Senator. And they have been. One of the key comments we made after the proposal was for EPA's final rule to accommodate and use the framework that we already set on the RGGI, and it is certainly being accommodated. We think our RGGI solution is a very good solution that can be actually expandable nationwide, and the rule accommodates, actually.

Senator MARKEY. Thank you. And I appreciate the interState aspect of this as well, much less the international aspect of it, there

is no question about it, but there has to be cooperation. Silvio Conte, Congressman from Western Massachusetts, and I introduced the first acid rain bill in 1981. It took until 1990 to pass the bill, but 1981. And that was just because people in Ohio were putting these smokestacks football field high into the air and blowing the smoke right toward us, so we were the ones principally affected, Vermont and all the New England States.

So it is clear that unless we work together we can't solve problems of that magnitude, so we thank all of you for your work in trying to accomplish that.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you.

Senator FISCHER.

Senator FISCHER. Thank you, Mr. Chairman and thank you, Senator Boxer, for holding this hearing today, and thanks to all the witnesses for coming.

The Nebraska Department of Environmental Quality shares in the concerns that have been expressed by many of the witnesses today. In the letter addressed to the Committee, our State has written that "While Nebraska has a good working relationship with EPA Region 7, recent EPA headquarters regulatory actions have snowballed. EPA's compulsive tinkering with standards and limits, often before States have had a reasonable chance to comply, make it difficult to reconcile those often competing priorities."

Secretary Pirner, in your response letter that was sent to the Committee, you State that nearly all new Federal requirements will have an impact on your State, its citizens, and its economy, but will "produce little or no benefits in protecting public health and the environment." Like my home State of Nebraska, South Dakota is a rural State that hosts many unique and critical natural resources that benefit citizens and communities.

Can you please elaborate on the challenges many rural communities will face as a result of expansive EPA regulations? And what are the economic impacts in terms of job growth and industry investment from the EPA rules?

Mr. PIRNER. Senator, part of my concern is that on the water quality and effluent standards that I talked about in my testimony, it is not that we are against having minimum standards; but now we are ratcheting those standards down to such a degree as to be almost infeasible in some cases.

I will just talk about the ammonia standard. We were one of the first States to include ammonia as a water quality standard. Ammonia can be toxic to fish. So we agreed with that and we agreed that all of our large cities pretty much have what is called tertiary treatment that treat for ammonia, and have for many years now. But if we ratchet that level down, now we are going to have install even more treatment.

Basically, the new standard is based not on fish anymore, it is based on mussels. So I am going, well, then how did the mussels do it when we didn't treat for any ammonia? And, again, I am not a biologist and I don't understand all that, but all I do understand is that the levels are getting down to such a point as to be cost-prohibitive, and that concerns me because if we do try to comply

with those new standards, we are going to be spending a lot of time and a lot of money that could be spent in other areas.

Senator FISCHER. Right. The Nebraska Department of Environmental Quality, they discussed the need for streamlining those Federal requirements. We are always worried about that unnecessary duplication. So, Mr. Pirner, do you agree with that statement? In your experience, do you see duplication as a reoccurring theme among State regulators as they try to interpret and then try to implement all these Federal mandates?

Mr. PIRNER. Senator, I am not exactly sure I understand the question. You mean duplication between the State and EPA?

Senator FISCHER. In many cases, yes, but also between Federal agencies. So it is not just EPA that comes down with standards, but you have other agencies as well.

Mr. PIRNER. Well, we certainly have other Federal issues with the Corps of Engineers, with Bureau of Land Management, with Forest Service. So there are many other Federal agencies that we believe are infringing on States' rights besides EPA, if that is the answer.

Senator FISCHER. How much time does that add when you are trying to meet regulations, when you have different agencies out there that I would say they are piling on a number of the regulations that we look at?

Mr. PIRNER. Senator, it is certainly of concern. I will give you an example. In our Department, we are a relatively small Department. Our clean air program I think has 14 FTE in it for the whole State. When the Clean Power Plan came out, we took two of those people and they worked when it first came out and we were trying to do comments and trying to figure out what was going on.

Then, when the final rule came out, we had to go through that process all over again. Basically, we process, I am going to say, somewhere around 80 air quality permits per month that are renewals and new and so on. I had to take 2 out of the 14 FTE out of that process to devote to just the clean air plan.

Senator FISCHER. Right. In your testimony you talk about the EPA's rule to regulate coal ash, and you note that the new rule will preempt the existing solid waste permit that is currently administered in your State. It is my understanding the EPA is encouraging States to amend their State solid waste management plans. Are you concerned about the timing for that?

Mr. PIRNER. Yes, Senator, very much so. Again, we believe our existing solid waste permit was adequately protecting the environment. Now there is a host of new requirements that somehow we have to merge in with that existing permit, and we have to try to figure out how to do that in the least disruptive manner to both the agency and the industry.

Senator FISCHER. Are you limited in your flexibility?

Mr. PIRNER. All I can say at this point is our negotiations with Region 8 are ongoing.

Senator FISCHER. Thank you.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Fischer.

Senator Gillibrand.

Senator GILLIBRAND. Thank you, Mr. Chairman.

Ms. Markowitz, as you know, New York and Vermont share Lake Champlain, and both are part of the Lake Champlain basin program. Working with EPA to improve the water quality of Lake Champlain is very important to both our States. It is my understanding that the EPA and the State of Vermont have been working together to establish a new total maximum daily load for Lake Champlain. Could you elaborate on how the EPA has worked collaboratively with your agency to negotiate this agreement?

Ms. MARKOWITZ. Thank you. This is actually a perfect example of an issue that could have been seen as an overreach but, instead, really has ended up with a path forward that offers us flexibility and an innovative approach to cleaning up our waters. Lake Champlain suffers from terrible algae blooms from phosphorus pollution. Unlike in the 1970's and 1980's, it is not because of what is coming out of the wastewater treatment facilities as it is coming off the landscape. So rather than being point-source, it is non-point-source pollution, precipitation-driven pollution.

So as we were working on a new TMDL for Lake Champlain, we have been working on it actually for 4 years, they could have just done it on their own, but they engaged us because they understood that if we were going to clean up the Lake, we really had to be involved because we understood what it would take to engage municipalities and farmers and business owners and developers and our transportation department in managing stormwater-driven pollution.

It has been tremendously successful. We are waiting for the final TMDL to come out. We already have a plan, though, to implement that has been passed by our legislature, including some funding, and I am happy to share it in more detail to any of you because I think it is really the gold standard for this cooperative Federalist approach.

Senator GILLIBRAND. Thank you. In your written testimony you wrote that "pollution does not honor State lines," which is why you see the value of having national standards.

Mr. Mirzakhalili, you describe that our most important responsibility under the Clean Air Act is to protect the health and welfare of citizens throughout the Country from the harmful effects of air pollution. Could you discuss some examples how pollution in one State affects the health and citizens in another?

And from your perspectives as State environmental regulators, is the health of the citizens in Vermont, Delaware, New York, or any State better protected by having national standards that limit the amount of pollution that can be emitted into the air we breathe? And, last, do you agree that the EPA has not overstepped its authority in setting national standards using the Clean Air Act, the Clean Water Act, and other Federal environmental laws that States then implement and which are based on what the science shows to be necessary to protect public health and the environment?

Mr. MIRZAKHALILI. Certainly. Thank you for the question, Senator. Delaware, Vermont, the Northeast is perfect examples of States that are suffering from air pollution transport, and that is EPA has come up with a transport rule recently to allocate responsibility and establish how much State contributes to the other. We

happen to think that they haven't gone far enough. We think EPA needs to do more. Some of the transport good neighbor steps were due to us about 5 years ago, so I think that some of the deadlines that you see here are the result of things not getting done when they were supposed to get done.

So I absolutely think EPA should do more in this area, and I think we stand to benefit from that. We can't meet air quality standards; right now, in practice, 90 percent of our air quality, air resources have been allocated to upwind States. I can't come into compliance without help.

Senator GILLIBRAND. Do you want to add to that?

Ms. MARKOWITZ. Well, that is our experience as well. We are barely in compliance in a number of parts of Vermont and, of course, we have no contributing industries, so, again, it is all upwind States. We have tried to negotiate; we have tried to sue. EPA has had rules on the books, and we are very pleased that they have come out with compliance deadlines, because that will make a difference to the health of the people of the State of Vermont.

Senator GILLIBRAND. Thank you.

Thank you.

Senator INHOFE. Thank you, Senator Gillibrand.

Senator SULLIVAN.

Senator SULLIVAN. Thank you, Mr. Chairman.

I want to thank the panelists for their testimony on a very important topic.

I think it is very clear on this Committee we are all very committed to clean water, clean air. There has been a lot of focus on the Flint issue. Certainly nobody wants to have our drinking water have poison in it, so the issue of clean water is certainly going to come up because of that. I am really interested in having to work with my committee members.

In my State, we have entire communities, entire communities in Alaska that don't have running water, that don't have flush toilets. Thousands of Alaskans, Americans, which I think is outrageous, and I certainly want to work with this Committee on not only addressing Flint, but other places that don't have any of the benefits that most Americans just assume they have. We don't have that in my State in a lot of communities, and it is something we need to fix, not just in other places in the Country.

But, Ms. Keogh, I want to followup. Your statement I think really sums up a lot of the frustrations that so many of us have, where you just stated where the EPA stated because we can. Can you elaborate on that a little bit more, what you just mentioned? I find that remarkably arrogant. I find that an Agency that certainly dismisses the rule of law. I think there is example after example after example, and it is not just members from this Committee.

I am always surprised why this Committee, on a bipartisan basis, isn't more focused on making sure Federal agencies follow the law. Right now the EPA, in the last two Supreme Court terms, lost, the EPA v. Utility Air Regulators case in the Supreme Court lost; the EPA v. Michigan case has a stay on the WOTUS case where over 30 States have sued; and in an unprecedented, unprecedented action, the U.S. Supreme Court put a stay on the Clean Power Plan.

So the EPA is losing every single major rule that they are undertaking in the courts, with Obama administration officials, other officials who are Federal judges, saying the EPA is overstepping its legal bounds.

And you may have seen what Gina McCarthy said on TV on the eve of the EPA v. Michigan case. When asked if she thought they were going to win the case, she said yes. They didn't. But then she said, "Even if we don't win the case, it was 3 years ago. Most of the States; companies are already in compliance. Investments have been made. We will catch up." So it was kind of like, hey, even if we lose, we win because everybody had to abide by the law. I think that is outrageous, and it is the source of frustration that so many Americans feel.

Can you just elaborate on this "because we can" quote? I just find it the height of arrogance. Just for everybody's information, the EPA is supposed to abide by the law, and the Federal courts are showing in the last 3 years they don't. Because we can is not an appropriate answer on people who work for you.

Ms. KEOGH. Yes, Senator. Thank you. It is disheartening. We, as State regulators, find ourselves in that position every day as we effect regulation to make sure that we follow the law that is set forth.

Senator SULLIVAN. Of course. That is what we are supposed to do, right?

Ms. KEOGH. We do not create the law; we implement law. So it is frustrating. Admittedly, I had very short notice that this Federal plan was coming at the time, so I felt like it was a genuinely honest question to understand so I could communicate effectively why requirements were re-adding to the State plan, and it was very disheartening, at a minimum, and very frustrating or perhaps a violation of trust to answer it with "we can."

Senator SULLIVAN. So they didn't attempt to cite a law or a reg; they just said "because we can." Sounds like a king to me.

Ms. KEOGH. The discussion went from a statement where Arkansas made that we are on a glide path with the Regional Haze Rule to actually advance and comply early, and that we were doing everything in our State plan that was required under the law. They went in and then, beyond that statement, discussed a provision about rate of progress and how they could require additional requirements under this phrase of rate of progress, and we questioned that, when we have a rate of progress that already exceeds or shortens the timeline and we actually achieve compliance early.

So it became a bit of a circular conversation, to be honest with you that it was around there is a phrase in the law that says we can go beyond BART sources to seek a better rate of progress. And that was where they left it. And we did not end with a positive outcome at that, and obviously we continue to discuss that with EPA today.

Senator SULLIVAN. Mr. Chairman, do I have time for one more question? I see that there is no other remaining members.

Senator INHOFE. You don't have time, but go ahead.

Senator SULLIVAN. I just want to followup just on the issue of consultation, where one of my frustrations, and I had been the attorney general of the State of Alaska and the commissioner of nat-

ural resources, but we often found that the consultation either didn't exist or was very cursory. And yet in every statute that we are talking about, the Clean Air Act, the Clean Water Act, every EPA-focused statute, the consultation requirement is not optional; it is mandatory.

So I would just like any of the witnesses here to, if you have a sense on the consultation more as just a box check when you indeed get it, or do they try to actually listen and implement your concerns? Because one of the things that we have seen is a one-size-fits-all rule form Washington rarely works, whether it is Alaska or Vermont or Arkansas or South Dakota. So I am wondering about your experience with mandatory consultation, that is what it is in all the laws, it is mandatory. Do you feel that you are getting that enough?

Maybe I will start with Mr. Pirner.

Mr. PIRNER. Senator, I think it is more of they check the box, in my opinion. A lot of these proposals that come out, there is a public comment period. We comment along with everybody else, but just in the example of the Clean Power Plan they received, what, 1.6 million comments or something. So if you are talking a State to Federal agency consultation process, I wouldn't consider submitting one set of comments, which we submitted under the Governor's signature, go as being a State to Federal agency consultation.

Senator SULLIVAN. Anyone else on the consultation issue?

Mr. MIRZAKHALILI. Senator, if I may. I co-chair a committee, National Association of Clean Air Agencies, and I can tell you that EPA is present on every call they attended. And that is not just with my committee; with other committees where the organization has a presence of EPA staff. They bring their thinkings to us, they share early drafts, they explain. So that may be a good place to plug in a conversation with EPA.

Could they do better? In some instances, yes. We hear there is friction and tension between guidance and flexibility. You said you wanted the rules. I understand. You said you want to go to rulemaking. Rulemakings are rigid. The guidance gives you a little more flexibility. So we have to be careful what we ask for of EPA and make sure they can produce what it is that we want. So the rules set the minimum standards; guidance provides some technical assistance; and the rest of it is our responsibility to collaborate and cooperate and get done.

Senator SULLIVAN. Thank you.

Ms. MARKOWITZ. I would add to that I am on the executive committee of the Environmental Council of the States, and EPA is at every meeting and comes on to monthly calls if we ask them to.

So as described by Ali, they have made themselves remarkably available to us. In our region, as we are developing our performance partnership agreement, they also, in Region 1 at least, are offering tremendous flexibility in terms of how we are going to be managing our obligation under our delegated programs.

And, of course, they could always do better. One of the places, there is a difference between listening and agreeing, so I think they do a great job listening. They don't always agree. And that is, really, in part, some of the frustrations that you sometimes hear from my colleagues. They tend, in this Administration, we tend to agree

with them more, so we are not dissatisfied with the level of attention that we are getting from them in this dialog.

Senator SULLIVAN. Mr. Huffman, do you have any thoughts on that?

Senator INHOFE. Senator Sullivan, we will have to chop it off here. You are 5 minutes over.

Senator SULLIVAN. OK, Mr. Chairman. Thanks. There is no one else here, so I was just wondering.

Senator INHOFE. OK. I mean, Senator Boxer wants to have the extra time that you have used, and that is fine.

Senator SULLIVAN. I mean usually, most committees, if there is no one else here and we still have questions, it doesn't seem to be a big ask to continue to ask questions.

I will submit questions for the record.

Senator INHOFE. All right, that is fine. Thank you.

Senator Boxer, take whatever time.

Senator BOXER. That is very sweet of you.

Senator INHOFE. Thank you.

Senator BOXER. I just want to talk about the courts, because my colleague, Senator Sullivan raised the issue, so we looked it up. EPA has won 70 percent of the cases before the Supreme Court. As a matter of fact, on the 30 percent that they lost, sometimes they lost because they were not doing enough. And we can send you the memo on that, because I think that is important.

I also think it is important to reiterate a fact clearly that should be in evidence. This is one Nation under God, indivisible, with liberty and justice for all. We know that. So to think that the Federal Government would not be an important partner to the States is wrong.

Now, I know some of you say it is fine for them to be a partner, but I want to pick up on what Mr. Pirner said, because it is very clear. This has been a great panel, by the way. All of you have been so articulate and it has been very interesting here.

But, Mr. Pirner, you said, look, in the 1970's we had terrible air pollution and it is understandable, it made sense to cut the pollution. And now you said things are so much better EPA is going too far. I mean, that is essentially what you said. And I have to give you some facts that I am going to put in the record, with the Chairman's agreement. And this is important.

Eleven million Americans have COPD, chronic obstructive pulmonary disease. Eleven million. 22.6 million Americans have asthma, including 6.1 million children. And there are 1.68 million estimated new cases of cancer in 2016. So to sit there and say that there is not work to do it seems to me strange. And you are in such an important position to help those people.

Now, maybe some of them live in your State, some of them live in a neighboring State, and to say that you have a great relationship with a State and they will be fine is just not a fact in evidence.

Ms. Keogh, you are here, you are giving testimony to this Committee, and it has to be truthful, and I know you were. So over the next week can you please send me the name of who told you, the name of the person who said we are ordering you to do this because we can? I want the name of that person because whoever said that

was absolutely wrong, and I don't want people to just throw it out. Who did it? If you can put that in writing confidentially, I would greatly appreciate it, because I want to find out why they would say such a thing.

I just think overall this panel has really proved the point.

There is another fact on coal ash which you complained about, Mr. Pirner. Right now there are 331 hazardous coal ash ponds that could, if not improved, lead to a loss of life. So, you know, maybe you can sit there and say what you say, but when I swear to protect the people, I am going to do it; and this is the Environment Committee, this isn't the pollution committee.

And Senator Inhofe and I have a different view of the role of the Federal Government. I think it is all very fair, but at the end of the day this is one Nation, so setting minimum standards, making sure our people are protected, whether they are in my State or a State adjacent where the pollution from my State may actually go to another State, I have an obligation, even if it is in my State.

And, by the way, we have 40 million people and a lot of pollution, a lot of industry. We try our best. We do have forest fires; we have natural disasters. So we have an obligation, and my State doesn't complain about it, they just cleanup their act. And it is just a function of what is right, what is morally right. And you can measure the progress as you look at the health of the people.

This is not some conversation about the meaning of the Twelfth Amendment, the Tenth Amendment, the First Amendment; it is really about the health of our people. We should do everything we can to protect their health, and as long as I am vertical that is what I am going to be working on.

Thank you.

Senator INHOFE. Well, thank you, Senator Boxer. Anything else?

Senator BOXER. No.

Senator INHOFE. All right.

Let me just make a final comment here that it seems like every time we have a hearing it ends up to be a global warming hearing, or at least that is injected into it. Let me just share my personal thought that climate is always changing. I have said this on the Senate floor. I can't remember, I wasn't alive in 1895, but in 1895 we went through a period where they first started using another ice age. In 1918 was the first time they used global warming. And then, of course, that changed again in 1945 when that was another ice age they were talking about. And then, of course, that changed in 1975. So about every 30 years this happens, it has always been changing.

The interesting thing is in 1945 that was the year they had the highest CO2 emissions in the history of this Country, recorded history, and that precipitated not a warming period, but a cooling period that sustained for another 30 years. So I just think that has to be said. I know that the public understands that now. I can remember back when I was the bad guy and we were talking about this back in 2000. At that time it was considered to be the No. 1 concern; not it is 15 out of 15 according to Gallup's March poll. So people have caught on and they are going to enjoy continuing to bring that up.

Last thing is we all want a clean environment, and when you mention the Clean Air Act and all these other acts, we were all for them, and I was back then. In fact, I was an initial sponsor of the Clean Air Act.

So, with that, we will go ahead and adjourn. I would like to have one short quick word with Mr. Huffman and Ms. Markowitz, if I could. Thank you.

[Whereupon, at 11:27 a.m. the committee was adjourned.]