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

ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY
5301 NORTHSHORE DRIVE / NORTH LITTLE ROCK / ARKANSAS 72118-5317 / TELEPHONE 501-682-0744 / FAX 501-682-0880
www.adeq.state.ar.us

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

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