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.

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.

In a settlement agreement under the Clean Air Act between EPA and the Sierra Club, the Big Stone 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 ten 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 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.

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## 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.

"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.

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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.