



Maryland

Department of the Environment

Larry Hogan
Governor

Boyd Rutherford
Lieutenant Governor

Ben Grumbles
Secretary

February 23, 2016

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

Dear Chairman Inhofe:

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

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

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

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

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

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

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

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

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

² <http://news.maryland.gov/mde/2015/08/31/maryland-poised-to-meet-clean-air-standards/>

³ http://www.chesapeakebay.net/presscenter/release/trends_show_jurisdictions_reducing_pollution_entering_chesapeake_bay

⁴ <http://news.maryland.gov/mde/2015/10/30/maryland-on-track-to-meet-2020-climate-goal/>

⁵ <http://www.mde.state.md.us/programs/Air/Documents/GoodNewsReport/GoodNewsReport2015Final.pdf>

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

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

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

Sincerely,

A handwritten signature in blue ink that reads "Ben Grumbles". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Ben Grumbles
Secretary

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

Attachment A
Cooperative Federalism
Maryland Department of the Environment

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

Clean Air Act

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

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

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

Clean Water Act

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

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

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

Chesapeake Bay TMDL

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

Clean Water Act Section 401

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

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

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

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

Clean Water Act Section 404

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

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

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

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

Water Quality Trading

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

Clean Water Act 303(d) Program

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

Monitoring

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

Concentrated Animal Feeding Operations

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

Resource Conservation & Recovery Act

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

Resource Conservation Recovery Act (RCRA) Subtitle C

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

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

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

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

Resource Conservation Recovery Act (RCRA) Subtitle D

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

Maryland promulgated comprehensive regulations governing CCRs in 2009⁷. In some ways these are more detailed than the federal regulations, and in a few ways they will need to be revised to meet the new federal standards. Maryland is committed to making these changes to ensure that there is a unified set of rules that the producers of CCRs in Maryland must follow. However, we do not see the value of creating a separate solid waste management plan for the purpose of having the State CCR regulations approved by EPA, when a comparison of the regulations themselves should be sufficient. We believe the federal CCR regulations should be modified to allow this mechanism for program approval.

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