

Written Testimony of Becky W. Keogh  
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to the  
United States Senate Committee on Environment and Public Works  
Subcommittee on Clean Air and Nuclear Safety  
March 5, 2019  
Washington, D.C.

Chairman Senator Mike Braun, Ranking Member Senator Sheldon Whitehouse, and subcommittee members, my name is Becky Keogh and I serve as the Director of the Arkansas Department of Environmental Quality. It is my great honor to appear before the United States Senate Committee on Environment and Public Works Subcommittee on Clean Air and Nuclear Safety. Additionally, I bring greetings from Governor Asa Hutchinson and the rest of our great “Natural State.” We are also proud to have sent to Washington one of our best and brightest, your colleague on this committee, the quintessential statesman, Senator John Boozman. A warm hello to you from home, Senator Boozman.

The fact that this is the second time in the past three years that I have been asked to address this esteemed body about cooperative federalism is a testament to the evolving and improving relationship between the federal government and the states. Only three short years ago, I sat here as a state leader with a career comprised of extensive public environmental experience asking this body for assistance in changing the relationship between the states and their federal counterpart—the Environmental Protection Agency. While legislatively cooperative federalism called for states to be partners with the Environmental Protection Agency, functionally states were more pawn than partner. Not only were states excluded from environmental-policy solutions, we weren’t even a part of the equation.

Thirty-six months later, I am before you again as the Director of the Department of Environmental Quality. I am also now serving as President of the Environmental Council of the States with three years of service as an officer. Since my first testimony, states have gone from asking for a seat at the table to a discussion of what happens when we arrive. We states are now advocating for a standard-operating procedure of shared decision making, shared problem solving, and shared programmatic development between the states and the EPA.

There is no better example of cooperative federalism at its purist than the environmental regulatory framework. But when federalism is at its purist, it is also at its rawest. State regulatory agencies and their federal counterpart are each required to simultaneously regulate from the position of sovereign and subordinate. This inherent challenge of cooperative federalism is compounded by the dynamic and unpredictable subject matter of which we are asked to regulate. Often our most challenging days are ones that cannot be imagined just the day before. Protecting

and preserving the environment requires that we environmental regulators stand at-the-ready to respond to elite edicts such as acts of Congress and the wills of Mother Nature, which are no-less intimidatingly sometimes called acts of God.

Our challenges are at the same time unique to our locality and universal to a larger national community. And each answer is both a part and a whole. That is why it is imperative that we find a way to fine-tune the relationship between the states and the EPA; each of our voices is essential in the effective management of our nation's air, land, water, and wildlife—the precious and limited commodities that we are tasked to protect.

But in order to understand and navigate the future of the states' relationship with the EPA, we must have a better understanding of the past. Mr. Chairman, I understand that prior to your full-time role as a Senator you operated a successful auto-parts distribution and third-party logistics company. And I am sure in working extensively with vehicles that you have noticed the size of the windshield in relation to the rearview mirror. There is a reason the windshield is bigger than the rearview mirror. Certainly the future is bigger than the past, but the rearview mirror serves an undeniable purpose. In order to understand where we are going, we must understand where we have been. Bad habits, past mistakes, and poor decisions have a way of trying to catch up to us after we've long since passed them by. Just like rearview mirrors, "these objects may be closer than they appear."

So, I am before you today advancing a position of decentralization of environmental regulation. This is informed by historical perspective as presented in the following passage:

The conventional narrative of the origins of federal regulation is a fable. Contrary to common perceptions, many measures of environmental quality were already improving prior to the advent of federal environmental laws . . .

Indeed, the rate of improvement for some pollutants was greater before the adoption of federal controls than after.

Adler, Jonathan H., *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection (2002)*. Faculty Publications. 191. (Internal citations removed.) (A more complete passage from this article is referenced at the back of this testimony.)\*

Professor Adler goes on to call for innovation and exploration of "alternative means of ensuring environmental protection." It is through the windshield that we find the path to this call for innovation and exploration. And we can proceed swiftly into the future if, like the windshield's design, we craft a solution that provides optimal surveillance of all possibilities in front of us while protecting us from the elements as we speed ahead. In our design we must advance a system that can safely crack, but not completely shatter, should the innovation or experimentation fail us.

The argument for decentralization is not an argument for eliminating the federal role in environmental protection. Rather, it is an argument for redefining the federal-state balance. Specifically, the federal government should focus its efforts where the federal government has a comparative advantage over state and local governments. This is not the case in designing and implementing drinking water standards or improving urban air quality. It is, however, the case when it comes to interstate pollution. Where pollution from one state spills over into another state, there is an unimpeachable case for federal intervention. Yet there are relatively few provisions of federal environmental law that specifically address such spillover concerns and what few provisions exist have been rarely invoked. It is also important for the federal government to clarify the extent of its current role.

Leaving the precise contours of existing federal authority unclear results in uncertainty, which discourages states from filling the gaps because they do not know how much of a gap there is to fill. State governments are not likely to squander resources duplicating federal regulations, so the lack of clear boundaries on federal regulation may be resulting in lower levels of environmental protection. More importantly, the federal government needs to create clear and legally defined opportunities for state and local experimentation. A policy of “ecological forbearance,” under which state governments could seek relief from existing federal mandates so as to experiment with alternative means of environmental protection could reopen the laboratories of democracy in environmental policy. This is not an argument for simply scrapping the regulatory structure that exists today. Rather, it is a call for facilitating greater innovation and evolution in environmental policy by creating opportunities for policy change.

Finally, it is important to note that there is no such thing as achieving environmental nirvana. Modern human civilization inevitably entails environmental impact. The question is not which policy approach or mix of policies will eliminate all environmental problems. Rather, the question is what mix of institutions and policies will do the best-or perhaps the least-bad-job of helping us reach the environmental goals that we seek to attain. Every approach is going to have problems; every approach that we point to is going to fail at some point. So the answer to the question will simply be the approach that does the most acceptable job. It is in some senses an historical accident that state leadership in environmental policy was supplanted by federal regulation, and environmental policy could be improved if states regained more of their historic role.

The federal government did not come to dominate environmental policy because a more decentralized system was leading to environmental ruin. Rather, an accidental spark on the Cuyahoga River helped ignite the political push for national regulation — a push that was then furthered by other factors within the political process. Recognizing the fables of federal environmental regulation, and decentralizing control over environmental policy, could restore a more healthy and productive balance in environmental policy. A more decentralized approach would not only be more efficient, but also more effective and equitable as well.

States today bear little resemblance to states in the 1960s, and our role in environmental protection has fundamentally changed. We have been transformed by growth of professional staffs, vigorous two-party systems, use of referenda and initiatives to make policy, and procedural requirements that assure greater public participation in regulatory decisions. Many aspects of environmental protection have also been assimilated into state and local politics, as they have been into national politics.

Seventy percent of important environmental legislation enacted by the states now has little or nothing to do with national policy and only about 25 percent (approximately \$2.8 billion) of the total amount states now spend annually on environment and natural resources comes from Washington. State and local governments are responsible for nearly all the enforcement of national environmental laws and continue to dominate decisions in areas like land use and waste disposal.

The benefits of a state-centered environmental protection future are apparent if you peer through the windshields of the states. In fact, the Arkansas Department of Environmental Quality does most of the things that were once exclusively the role of the federal government. We operate thirteen federally delegated environmental programs, with a three-hundred plus staff of engineers, ecologists, geologists, biologists, lawyers, accountants, and epidemiologists. We operate a state-of-the-art lab that informs our permitting, reporting, and enforcement actions.

Air Quality in Arkansas is among the best in the country. The entire State is in attainment with all National Ambient Air Quality Standards. The most recent available data indicates that Arkansas remains below visibility goals for regional haze for the first planning period for each of its two Class I Areas: Caney Creek and Upper Buffalo Wilderness Areas. These achievements are being realized all while implementing a robust permitting system, delegated to the State of Arkansas by EPA. The ADEQ Office of Air Quality implements all air programs delegated by EPA Region 6 to the State of Arkansas. These programs include the Title V program for major sources of pollutants, the New Source Performance Standards, the National Emission Standards for Hazardous Air Pollutants, Prevention of Significant Deterioration, and the State Implementation Plan.

The EPA should recognize that the states have on-the-ground experience with regulating the facilities within their borders and defer to them and their expertise in appropriate instances on important permitting and planning issues. Arkansas has taken the lead in implementing protective and timely permitting processes. Arkansas is among the few states with a single permit system in which facilities receive both a Title I and Title V operating permit. This single-permit system provides certainty to business upfront when they make investments, reduces duplicative processes in permit issues, and helps ensure swift permit issuances.

ADEQ has a defensible regulatory agenda, successfully protecting the environment and protecting investment decisions that are bringing Arkansas forward. Our leadership in

technology and transparency through e-permitting, advanced monitoring, and transformation efforts resulted in ADEQ becoming one of the nation's leaders in (1) reduced backlog of Title V renewals, (2) lowest permit administrative costs, and (3) achievement of air quality standards. According to the data from EPA's National Title V database, Arkansas is among the top quartile of state agencies in timeliness of Title V significant modification issuances. Arkansas is also ranked 5th in the timeliness of Title V renewals among state agencies.

Arkansas resolves compliance concerns swiftly and with few appeals. During the state fiscal year for 2018, one hundred twenty-three cases were resolved informally. Another fifty-eight cases were referred for enforcement. Of those, fifty cases were resolved in settlement through Consent Administrative Orders, and only four led to the issuance of Notices of Violation, which initiate administrative legal proceedings against the alleged violator. The Office of Air Quality has overseen increasingly sophisticated modeling and analyses needed to meet Clean Air Act requirements.

ADEQ staff recently utilized EPA's prognostic meteorological data to support a request to re-designate a county of unclassifiable to attainment/unclassifiable. This was the first of its kind request in the nation. EPA recently proposed approval of this re-designation request and received no adverse comments. We expect approval shortly. Similarly, the Office of Air Quality also performed an analysis using NOAA's HYSPLIT model in support of the development of the Arkansas "good neighbor" SIP revision, which addresses interstate impacts for the 2015 Ozone standard.

Our state's Office of Air Quality has also worked to develop tools and resources to educate and inform the regulated community and the public on regulatory requirements. To this end, Arkansas is engaged in a consensus-based process that is open to stakeholders and the public, which is intended to streamline Arkansas Air Regulations as well as to produce helpful permitting guidance. This process is called the Air Regulatory Efficiency and Streamlining Effort or "EASE."

Efforts are underway to convene regular workgroup meetings to produce deliverables as a result of collaborative efforts. Similarly, Arkansas recently engaged with its federal and state partners in a Fire Policy Forum that facilitated a vibrant dialogue surrounding the use of "fire as a land management tool," air quality considerations, and solutions to the challenges of balancing these two necessities. This Forum featured Congressman Bruce Westerman as well as Wayne Cascio, who is the Director of the National Health and Environmental Effects Research Laboratory with EPA's Office of Research and Development.

We find value in working with our partner agencies to better inform our working knowledge of issues of common concern and to establish best work practices moving forward. These outcomes often have the benefit of driving improvements in air quality as well. We believe that EPA can continue to foster this type of dialogue by allowing flexible sources of

funding that allow states to consider solutions to issues that states themselves determine are important to them, which may include fire policy in Arkansas. Cooperative federalism means trusting states as the co-equal sovereigns that they are and creating an environment in which states can thrive with support of EPA.

Our agency has a major role in advancing the two dominant industries of our state, agriculture and tourism. As such, our permitting and enforcement record are not only checked by the EPA but, more close-to-home, they are checked by the competing political interests within the state. The state of our state in terms of economic development and prosperity of our citizens rests on two industries that are often interested in the same resources. As a regulatory agency, ADEQ has an inherent incentive to let science, not passion or politics, dictate our decisions as regulators.

Under Governor Hutchinson's transformation of government efforts, the Arkansas Energy Office has been aligned with ADEQ. In administering energy advancement and efficiency programs, Arkansas is seeing record investment in solar-energy investments and energy-performance solutions, realizing reductions in greenhouse gas emissions well beyond those which were to be mandated under previous regulatory agendas. One early adopter was an energy project that resulted in 20 million dollars in savings at Arkansas State University—Jonesboro. The project allowed clean air and reduced energy demand, which allowed the University to direct savings from lower utility bills to increased investment in education.

We also coordinate with other state and local governments units and other sovereigns to solve complex cross-jurisdictional problems. Just this month we have asked for (and received) assistance from the states of Texas and Louisiana and from our state's National Guard and departments of Health, Agriculture, and Forestry to help us extinguish an expansive underground fire that is threatening the air and water quality of one of our most vulnerable communities. But, frustratingly both to us and our federal counterpart, there is little the EPA has the authority to do to assist when it comes to one-offs. Acting Secretary Wheeler and our Regional Administrator, Anne Idsal, are both dedicating substantial time and energy looking for ways the federal government can help us close the gaps on this environmental challenge that exceeds the scope of our small-state's resources.

Looking through that expansive windshield, in the not-so-far distance down the road, we must find a better path. The role of the states has evolved, but there has not been a substantial modification of the federal role. Now that states do the majority of the lifting once done in Washington, why not use the wealth of EPA resources, both technical and financial, to help states fill the gaps. Consider allowing the EPA the flexibility to offer support that is not duplicative of the substantial state activity, but instead is niche in nature. Consider the federal government's primary charge in environmental protection as a supporting role as opposed to the lead. States, no matter how robust or progressive in their programs, will benefit from a central

source of support, science, and standards. But the support cannot be one-size fits all; it must bend to recognize the strengths and weaknesses of each state in terms of geography and wealth.

Arkansas is a model for how states efficiently and effectively take the lead in improving and maintaining air quality across the country. That is why a “state’s first” approach to regulation makes sense. We states can at the same time be experts and novices depending on the specific challenge.

\*You've heard the story. Industrialization and economic growth laid waste to the American environment through much of the twentieth century. Common law based environmental protections were ineffective, and state and local governments were unable or unwilling to address environmental concerns. As a result, environmental quality was in continuous decline until comprehensive federal legislation was adopted in the late 1960s and early 1970s. The infamous 1969 Cuyahoga River fire and the massive oil spill off the coast of Santa Barbara focused public attention on the nation's environmental plight and helped spur the passage of needed federal environmental laws.

This is the conventional account of the origins of federal environmental law. It is a story often told to explain how the nation moved from a mix of property-based, common law rules and state and local regulations to a sprawling federal regulatory apparatus. But it is wrong. The conventional narrative of the origins of federal regulation is a fable. Contrary to common perceptions, many measures of environmental quality were already improving prior to the advent of federal environmental laws. The Environmental Protection Agency's first national water quality inventory, conducted in 1973, found that there had been substantial improvement in water quality in major waterways during the decade before adoption of the federal Clean Water Act, at least for the pollutants of greatest concern at the time, organic waste and bacteria.

Throughout the 1950s and 1960s, state and local governments began to recognize the importance of environmental quality and adopted first-generation environmental controls. Some states' efforts were more comprehensive and more successful than others, and different states had different priorities. Environmental protection did not always trump health care, education, or other local concerns. Nonetheless, by 1966, every state had adopted water pollution legislation of some sort.

A similar pattern of state and local action preceded federal regulation in other areas as well. Federal regulation of wetlands, for example, began after a federal district court interpreted the Clean Water Act to require it in 1975. But state and local regulation had begun much earlier. In 1963, Massachusetts became the first state to regulate wetland development, modeling its initial efforts on preexisting local rules. By 1975, all fourteen states in the continental United States with more than ten percent of their land area in wetlands adopted wetland protection measures.

The story of air pollution control follows a similar pattern. Cincinnati and Chicago became the first cities to adopt effective smoke control ordinances in 1881, and action by cities increased dramatically after the Second World War. In

some cities, such as Pittsburgh, the business community played a leading role in supporting such regulation. State regulations followed in much of the country.

Indeed, the rate of improvement for some pollutants was greater before the adoption of federal controls than after. Robert Crandall of the Brookings Institution found that pre-federal air pollution control efforts were more successful than is typically assumed, as have Indur Goklany and Paul Portney of Resources for the Future.

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The oft-told explanation for federal environmental legislation—that ever-deteriorating environmental quality made federal regulation necessary—does not fit the historical record. Rather, a mix of factors led to the adoption of federal environmental laws, even though environmental quality was already improving in many respects. With a better understanding of the sources of federal regulation, perhaps we can reevaluate the current federal role and explore alternative means of ensuring environmental protection.

Adler, Jonathan H., *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection* (2002). Faculty Publications. 191. (Internal citations removed.)