west virginia department of environmental protection

Executive Office
601 57th Street SE
Charleston, WV 25304

Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
www.dep.wv.gov

February 19, 2016

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

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

Dear Senator Inhofe:

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

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

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

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

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

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

The Burden on States from EPA's Carbon Rules

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

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

EPA's Use of Guidance

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

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

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

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

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

Water Quality Standard Approval

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

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

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

Water Quality Standard Interpretation

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

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

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

Increased Demands for Program Administration

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

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

Federalism Issues in Other Environmental Programs

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

Proposed Stream Protection Rule

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

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

Approval of State Program Amendments

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

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

Use of Ten-Day Notices to Correct Alleged Permit Defects

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

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

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

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

Conclusion

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

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

Sincerely,

Randy C. Huffman
Cabinet Secretary

RCH/tc