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United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

February 5, 2020

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1301 Constitution Ave. NW
Washington, DC 20460

Dear Administrator Wheeler:

We write to request information and records related to the Environmental Protection Agency's (EPA's) recent interactions with The Environmental Council of the States (ECOS). As you know, ECOS is a long-time EPA grant recipient with whom the EPA has forged an indispensable partnership that has thrived for over 20 years. It has come to our attention that this long-standing and productive partnership has recently been strained, potentially due to EPA's retaliatory actions against California (and ECOS's subsequent public criticism of these EPA actions) in the wake of President Trump's displeasure with California's voluntary agreement with four automakers on vehicle greenhouse gas emissions.

ECOS is a national nonprofit nonpartisan organization, whose members are exclusively made up of state and territorial environmental agencies. According to a recent article in E&E News, a public letter that ECOS sent to you on September 26, 2019, criticizing EPA's "unilateral actions" towards state governments (understood to mean California's state government in particular) angered EPA's political leaders and prompted EPA's Associate Deputy Administrator Doug Benevento to orchestrate an effort to convince ECOS member state agencies to publicly discredit the ECOS letter.[1] We have also learned that EPA may have withheld or delayed the disbursement of more than $250,000 from ECOS's grant funding for months, potentially in retaliation for its public criticism of EPA's actions. If true, this would constitute a clear abuse of power and latest in a series of retaliatory steps taken by this Administration. It could also threaten cooperative environmental protection efforts across the country.

ECOS's mission includes, "Provid[ing] for the exchange of ideas, views and experiences among States and with others; [and] Foster[ing] cooperation and coordination in environmental management."[2] Because states have assumed more than 96 percent of delegable authorities under federal environmental law, coordination between state environmental agencies and EPA is essential to facilitating effective policies and programs that protect the environment and public health in the United States.

EPA clearly recognizes that its partnership with ECOS is vitally important. In its FY 2020 Congressional Appropriations Justification, EPA references its ongoing partnership with ECOS no fewer than 14 times, citing cooperative efforts in programs ranging from compliance assurance to scientific research to water

[1] Ariel Wittenberg and Kevin Bogardus, EPA-California fight sows division among state regulators. E&E News (January 23, 2020), https://www.eenews.net/greenwire/2020/01/23/stories/1062158401
[2] ECOS Website: https://www.ecos.org/about-ecos/ (Visited January 30, 2020)

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systems contamination to Superfund site management.[3] The Appropriations Justification also mentions multiple ongoing dialogues and consultations between EPA and ECOS on improving EPA oversight activities of state enforcement and enhancing coordination between federal and state authorities. EPA's budget document also outlines the strategic goals that guide EPA's approach to protecting human health and the environment, including strategic goal #2, which cites ECOS's white paper on Cooperative Federalism and says: "Cooperative Federalism: Rebalance the power between Washington and the states to create tangible environmental results for the American people."[4]

For over two decades, ECOS has partnered with EPA through a series of cooperative agreements. The most recent five-year cooperative agreement on file in the EPA grant database describes the partnership covering, "a wide array of environmental protection topics including: air and water quality, drinking water, mercury and other toxic concerns, planning and resource allocation, data management, compliance and enforcement, solid and hazardous waste, emerging contaminants, climate change, energy and energy efficiency, state capacity building, oversight, reporting burden reduction, performance measures, innovations, and pollution prevention."[5]

However, we have learned that EPA may have withheld or delayed the disbursement of more than $250,000 in grant funding from ECOS that was expected to be disbursed at the end of FY2019. Disturbingly, it seems these funds may have potentially been delayed because ECOS publicly criticized EPA's actions in response to California's voluntary agreement with four automakers on vehicle greenhouse gas emissions. The events related to EPA's potential retaliation against ECOS' action occurred at the same time that EPA was also taking retaliatory action against California:

On July 25, 2019, California and four automakers announced a voluntary agreement on vehicle greenhouse gas emission standards that affirmed California's authority under the Clean Air Act. The following month, on August 21, President Trump issued a tweet criticizing this voluntary agreement and calling the leaders of the automakers "foolish executives."[6] The following week, on August 28, the U.S. Department of Justice launched an antitrust investigation into the four automakers. Legal scholars would later remark that the investigation is "meritless from every angle" and "never has been wielded so explicitly as a tool to make businesses kowtow to the whims of a president."[7] Three weeks later, President Trump announced over twitter his decision to revoke California's federal waiver from preemption on

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[3] United States Environmental Protection Agency, Fiscal Year 2020 Justification of Appropriation Estimates for the Committee on Appropriations, March 2019, (retrieved from: https://www.epa.gov/sites/production/files/2019-03/documents/fy-2020-congressional-justification-all-tabs.pdf)

[4] Id. at p. 29.

[5] EPA Grants Database, https://yosemite.epa.gov/oarm/igms_egf.nsf/3b85f9fbd4a5e54b85256fb60070e5a2/af786512a60572e985257d6f007177c6!OpenDocument&Highlight=0,Environmental,Council,of,the,States (visited January 30, 2020)

[6] Donald J. Trump (@realDonaldTrump), Twitter (Sept. 18, 2019, 11:19 AM), https://twitter.com/realdonaldtrump/status/1174342163141812224?lang=en

[7] Mark A. Lemley and David McGowan, Trump's Justice Department's Antitrust 'investigation' of California's deal with car makers is an abuse of power, CALMATTERS (October 20, 2019), https://calmatters.org/commentary/auto-investigation/

clear air emissions.[8] EPA and the U.S. Department of Transportation subsequently finalized rules to preempt California's authority.[9]

However, the apparently retaliatory actions taken in response to California's voluntary agreement did not remain confined to the area of vehicle greenhouse gas emission standards. On September 24, you wrote to Mary D. Nichols, Chair of the California Air Resources Board, and told the California Air Resources Board that if it did not withdraw a series of still unapproved State Implementation Plans (SIPs) [10] to reduce air pollution in areas that do not meet National Ambient Air Quality Standards. EPA would begin the disapproval process of all 130 SIPs. You also ominously noted that if EPA disapproves a SIP, it would trigger a statutory clock for highway funding sanctions, "which could result in a prohibition on federal transportation projects and grants in certain parts *[sic]* California."[11]

EPA's actions also were not confined to matters related to air pollution. On September 18, President Trump announced that EPA would be issuing a notice of violation directed at environmental harms he blamed on California's homeless population.[12] On September 26, you sent a letter to California Governor Gavin Newsome, expressing concern about California's homeless population and "potential water quality impacts from pathogens and other contaminants from untreated human waste entering nearby waters." According to reporting by the New York Times, this ostensible oversight letter was developed "without the knowledge of California-based [EPA] staff, which normally issues such notices." Instead, this letter was authored by a "small group of political appointees in Washington assigned specifically to target California." Furthermore, when EPA's West Coast office learned of this letter, its leaders reportedly convened an all-hands meeting of the San Francisco staff, in which the staff was informed that the concerns about California's water pollution expressed in your September 26 letter were exaggerated.[13]

It was against this backdrop that members of ECOS convened on September 26 in Seattle, Washington for their fall meeting where they approved a letter to you expressing concern, "about a number of unilateral actions by U.S. EPA that run counter to the spirit of cooperative federalism and to the appropriate relationship between the federal government and the states who delegated the authority to implement federal environmental statutes."[14]

In its September 26 letter, ECOS explains:

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[8] Donald J. Trump (@realDonaldTrump), Twitter (Sept. 18, 2019, 11:19 AM), https://twitter.com/realdonaldtrump/status/1174342163141812224?lang=en

[9] News Release, U.S. Environmental Protection Agency, Trump Administration announces One National Program Rule on Federal Preemption of State Fuel Economy Standards, (Sept. 19, 2019), Retrieved from: https://www.epa.gov/newsreleases/trump-administration-announces-one-national-program-rule-federal-preemption-state-fuel

[10] Letter from Andrew Wheeler, E.P.A. Administrator, to Mary D. Nichols, Chair of California Air Resources Board (Sept. 24, 2019) , https://www.documentcloud.org/documents/6427369-Letter.html#document/p2

[11] Id.

[12] Michael D. Shear, Thomas Fuller & Peter Baker, San Francisco to Get Environmental Violation for Homelessness, Trump Says. N.Y. Times (Sept 28, 2019),https://www.nytimes.com/2019/09/18/us/politics/trump-san-francisco-homeless.html.

[13]Lisa Friedman, E.P.A. Bypassed Its West Coast Team as a Feud With California Escalated, N.Y. Times (Oct. 15, 2019), https://www.nytimes.com/2019/10/15/climate/epa-trump-california.html

[14] Letter from Donald S. Welsh, ECOS Executive Director, to Andrew Wheeler, E.P.A. Administrator (September 26, 2019) (retrieved from https://www.ecos.org/documents/ecos-letter-to-u-s-epa-on-state-federal-cooperation/)

> "Recent letters to states and Federal Register notices that lacked discussion with and notification to states violate the principles of Cooperative Federalism 2.0
>
> We are concerned about the lack of advance consultation with states and the impact of these and several other actions on the ability of states to protect human health and the environment, and call on U.S. EPA to return to the appropriate relationship with the states as coregulatory under our nation's environmental protection system."[15]

According to E&E News, this letter "sparked a chain of correspondence among state regulators who were caught off guard by the letter as well as from [EPA Associate Deputy Administrator Doug Benevento] trying to drum up public support for the Trump Administration. The conflict also stoked fears that EPA might pull federal funding for ECOS, which relies significantly on government grants... Email and text messages show...Benevento reached out to state officials and helped draft their statements praising EPA. The documents, released in response to public records requests, shed light on the agency's moves behind the scenes to push back on ECOs before its criticism went public." Among the many emails and letters that circulated among ECOS members in the wake of ECOS's September 26 letter, Lance LeFleur, director to the Alabama Department of Environmental Management, articulated a fear that ECOS's criticism of EPA actions may jeopardize grant funding to ECOS. He wrote on October 18, 2019, "The [ECOS September 26] letter does not show due deference for EPA as the major financial contributor to ECOS, without such support ECOS would not exist."[16]

As of January 29, the funding ECOS has been expecting the disbursement of for months had yet to be made. If EPA political leaders are delaying the disbursement of or withholding grant funding from ECOS as part of a retaliatory response to the ECOS letter that expressed concern with EPA's actions toward state agencies, this would constitute another clear abuse of power. It would also run entirely contrary to the strategic goals that you have purported guide your leadership of EPA, namely the fostering of a cooperative and balanced relationship between EPA and state environmental authorities.

Accordingly, we request that you provide answers to the following questions and requests for information:

1. For what reasons has EPA delayed obligating grant funds to ECOS, which in recent years are regularly dispersed in the September/October timeframe to assist with ongoing cooperative activities under the EPA/ECOS Cooperative Agreement?

2. Does EPA plan to renew its cooperative agreement with ECOS on substantially similar terms as the existing five-year cooperative agreement by the end of Calendar Year 2020, when the existing agreement is due to expire?

3. Please provide copies of the following records:

    a) A listing of all financial disbursements that EPA has delivered to ECOS under the EPA-ECOS Cooperative Agreement, which includes the amounts disbursed, the dates the disbursements were made, and the project description for each disbursement, for each of the past three fiscal years.

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[15] Id.
[16] Wittenberg and Bogardus

b) Any communications (including but not limited to emails, memos, meeting notes, correspondence, and calendar items) related to ECOS, its state member agencies, ECOS's September 26, 2019 letter to EPA, or EPA's grant to ECOS; authored by, received by, sent by or within the possession or control of i.) Associate Deputy Administrator Doug Benevento or ii.) any other EPA political appointee between September 26, 2019 and the present.

Please provide answers to these questions and records responsive to these document requests no later than February 26, 2020. If you have any questions, please feel free to ask the appropriate member of your staff to contact Michal Freedhoff (Michal_Freedhoff@epw.senate.gov) or Brian Eiler (Brian_Eiler@epw.senate.gov) of the Environment and Public Works Committee staff, or Dan Dudis (Dan_Dudis@whitehouse.senate.gov) of Senator Whitehouse's staff. Thank you for your attention to this matter.

With best regards, we are,

Sincerely yours,

Thomas R. Carper
Ranking Member
Committee on Environment and Public Works

Sheldon Whitehouse
Ranking Member
Subcommittee on Clean Air and Nuclear Safety