The Environmental Council of the States (ECOS) Testimony before the Senate Environment and Public Works Committee

On EPA's Regional Offices

Presented by David Paylor of the Commonwealth of Virginia

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Thank you, Mr. Chairman, for providing the Environmental Council of the States (ECOS) the opportunity to present testimony on the interactions between the State environmental agencies and EPA's Regional Offices. My name is David Paylor, and I am the Director of the Virginia Department of Environmental Quality and an officer in our national association ECOS. Today I am speaking on behalf of the environmental agencies in our member States as well as my own State.

Background

The Environmental Council of States is the national non-partisan, non-profit association of State and territorial environmental commissioners. Each State and territory has some agency, known by different names in different States, that corresponds to the United States Environmental Protection Agency. Our members are the officials who manage and direct the environmental agencies in the States and territories. They are the State leaders responsible for making certain our nation's air, water and natural resources are clean, safe and protected.

States have the challenging job of front-line implementation of our nation's environmental pollution laws. States have increased their capacity and as environmental protection has become increasingly important to the general public, more and more responsibilities have been moved to the level of government best able to carry them out – State and local governments – which are best able because they are closest to the problems, closest to the people who must solve the problems, and closest to the communities which must live with the solutions.

Today States are responsible for:

- Managing more than 75% of all federally delegated environmental programs;
- Instituting 95% of all environmental enforcement actions;
- Collecting nearly 95% of environmental monitoring data; and
- Managing all State lands and resources.

These responsibilities have become even more challenging in the face of severe budget deficits. About two thirds of the $15 billion States spend annually on environment and natural resources originate from non-federal sources.

Relationship between EPA's Regional Offices and the States

The State environmental agencies' primary contact with the US EPA is via one of the ten Regional Offices. Former members of ECOS, including a former ECOS President and the former Executive Director of the organization, currently lead five of these offices. For the most part, State relationships with these offices are good.

Most of the major national environmental programs are delegated to the States, and we regularly work with the regions on these matters. As part of this delegation, States negotiate a "Performance Partnership Agreement" or a "State-EPA Memorandum of Understanding" with the regional office each year, or in some cases every few years. This PPA or MOU leads to a grant from which the typical State gets about 20-33% of its operating funds to implement the national programs, such as the Clean Air Act, the Clean Water Act, and so on.

Another significant contact that States have with the EPA regional offices is receiving new federal rules to implement. Since 2000, States have received about 40 new rules each year (in air, wastewater, drinking water, waste, etc.) to add to the already formidable list of environmental responsibilities that the States have.

Yet another significant contact between States and the regional offices is on enforcement issues. Enforcement of the environmental laws is a responsibility of the States to which EPA has delegated the programs. EPA's role should be to assist the States when requested and to oversee the efficacy of the States' programs, and to assure that there is a "level playing field" of enforcement among all the States and all the EPA regional offices.

While State relationships with the regional offices are usually good, they have failed to perform as expected on occasion. ECOS often hears about these problems from our members, and we can summarize our observations into four areas:

1) Enforcement problems
2) EPA is slow to provide grants to State environmental agencies
3) Difficulties that States and regions have with NPM guidances
4) Failure to reduce regional staff after delegations

1. Consistency in Enforcement Among Regional Offices and Related Issues

In January 2004, the ECOS Compliance Committee outlined its concerns about inconsistencies among EPA's regional offices in the agency's review of State enforcement and compliance efforts. Among the States' concerns was the belief that EPA's oversight of State enforcement programs was not consistent or predictable from one region to the next. This dialogue led to the EPA-ECOS "State Review Framework,"

which is a significant commitment of both the agency and the States to revise the manner in which EPA reviews State enforcement efforts.

This effort is currently underway and remains an active joint project of ECOS and EPA. ECOS appreciates Congress' interest in this subject, but we do not think this subject is ripe for Congressional action.

However, States continue to have difficulties with EPA inspectors who conduct inappropriate actions within delegated States. For example, in Nebraska EPA staff from the regional office recently showed up at the State environmental agency to look through NPDES files for "cases so we can get our enforcement numbers up." When the State staff suggested that it needed assistance with basic inspections in a part of the State, the EPA staff declined to assist.

Recommendation. ECOS recommends that Congress ask the Agency for a joint report from it and the States on progress being made in implementing the State Review Framework, with the report due on March 1, 2007.

2. Grant Problems

States rely on federal STAG funding – the Categorical Grants and the Infrastructure Grants – to assist them in implementing the delegated programs. In a typical State environmental agency budget, about 25% of the income is from Categorical Grants, but this can vary from a low of about 5% to a high of about 50% depending on the program and the State. States particularly rely on federal funds for support of certain parts of their programs.

When EPA fails to provide federal grant funds in a timely manner, States may find it difficult to operate the programs due to cash flow problems. For example, in the current fiscal year, Region IV was unable to provide all the STAG grants to Tennessee within the first three months of the current federal fiscal year. Of 12 major grants, only 3 were awarded within the first three months of the fiscal year, even though the State's application had been submitted before the new fiscal year began. EPA took over six months to award four of the grants, and one grant has still not been awarded, as of June 23, 2006. As you might imagine, the lack of timely federal funds to operate various delegated programs in air, water, drinking water and waste puts a significant stress on the cash flow of the State agency and its ability to operate these programs.

This is by no means an isolated case. On June 6-7, 2006 States and EPA staff met to discuss this very issue. The summary report stated: "An issue of great importance to the workgroup (and the States in general) is grant timeliness. When the grant cycle suffers delays, it affects the States' ability to promptly implement the programs. The group discussed several approaches to resolving this problem, including better defining the roles and responsibilities of the State grant managers and the EPA program managers, allowing flexibility, and promoting consistency across the regions." A similar conclusion was

present in EPA's December 23, 2005 memorandum entitled "Timely Award of State and Tribal Continuing Environmental Program Grants."

Recommendation. ECOS recommends that Congress instruct the agency to issue continuing grants (i.e., the Categorical Grants in the STAG account) to States and tribes no later than 90 days after the passage of EPA's budget, and to provide authorization for States and tribes to draw on those accounts at least every 90 days during the fiscal year.

3. NPM Guidances

As we indicated in the above issue, States negotiate with EPA regional offices each year on a work plan that leads to the STAG Categorical Grants. These negotiations are very extensive, covering every delegated program that States have taken from EPA in water, drinking water, waste and air. States rely on "National Program Manager Guidance" to assure that rules are implemented similarly across the nation.

Unfortunately, the guidances are not always communicated in a clear manner as they move from EPA headquarters to the Regional offices and to the States. Our experiences show that interpretations of the guidance that have sometimes led to confusion about how States should implement the rules.

For example, Oklahoma recently determined that the cooling water discharge from a facility was exempt from a certain rule. EPA initially agreed with the facility that asked the agency's opinion. However, when the State agency contacted EPA to confirm this, the Agency hedged. The result was that it is not clear from the guidance whether the facility is exempt or not.

In another example from the same State, a facility petitioned the State that it should be treated as two separate facilities under PSD (an air rule). The State tended to agree, but asked the region to confirm that the interpretation was consistent with existing EPA guidance on the subject. However, the Agency did not respond and the State therefore was forced to act unilaterally.

Inconsistencies from State to State occur when 1) EPA does not interpret its rules in a timely manner, 2) it excessively interprets them, and/or 3) it adds additional requirements to the rules so as to change them or make them unimplementable.

4. Size of Staff in Regional Offices

In 1992, EPA conducted a study that determined that about 45% of the delegated programs had been actually delegated to the States. At that time, EPA had about 18,000 employees.
By 2002, about 75% of the programs had been delegated to the States – a considerable shift of the workload. However, EPA's staff was still about 18,000.
During this ten-year period only one new environmental program was created, the Safe Food Act of 1996.

While we understand that EPA has many responsibilities, many States are unsure why the number of staff at the agency remained the same while the bulk of the agency's responsibilities for implementation of its programs was being handed to the States. At the same time, States do not have sufficient information to recommend to you whether EPA's regional staff should be reduced, not has ECOS taken such a position.

Recommendation. ECOS suggests that Congress review the relationship between the rules and programs delegated to the States from the period 1992 through current and the size of the Regional Office staff required to continue other agency responsibilities.

Recommendations

In addition to the recommendations listed in our testimony above, ECOS recommends the following delineation of appropriate roles as an approach to appropriate roles:

EPA HEADQUARTERS	***EPA REGIONAL OFFICES***	***STATES/TRIBES/LOCALS***
• Advise Congress and the administration on national legislation	• Advise EPA Headquarters on regional/State needs and concerns in national legislation	• Advise EPA on State needs and concerns in national legislation
• Issue regulations implementing national legislation	• Participate, representing regional and State interests, in the development of national regulations	• Participate representing State interests in the development of national regulations
• Delegate national programs as defined by law and implementing regulations;	• Implement non-delegated programs	• Implement delegated programs
• Develop/set minimum national standards for -media air and water quality, -protection of public health, and -technology-based pollution prevention and control	• Provide technical assistance in standard setting to address regional variability--geological, ecological, resource, in standard setting	• Provide State specific/unique information for standard setting; implement minimum national standards and determine when State standards should be more stringent than Federal standards
• Issue guidance, develop tools, and conduct training to enable program implementation	• Enable delegations and implementation of delegated programs -provide training, technical and policy assistance as needed -respond to requests for assistance, including developing permit terms and conditions	• Apply guidance and tools ; ensure training/certification of State staff; advise EPA of unmet needs in tools and training
• Ensure compliance with and enforce Federal laws and implementing regulations; oversee delegated programs	• Assist delegated States and national programs to ensure compliance and enforce Federal laws	• In delegated programs: provide compliance assistance; conduct inspections, and take enforcement actions

• Conduct/fund scientific research needed to support program implementation	• Advise national programs on scientific research needs, representing regional and State interests	• Identify scientific research needs for in the implementation of delegated and/or special programs
• Identify/anticipate/respond to emerging public health, environmental, and natural resource issues and emergencies nationally	• Identify/anticipate/respond to regional/State specific emerging public health, environmental, and natural resource issues and emergencies	• Identify/anticipate/respond to State specific public health, environmental, and natural resource issues and emergencies
• Facilitate and enable programs to address multi-state trans-boundary issues and protect multi-state ecosystems of national concern	• Facilitate and enable programs to address multi-state trans-boundary issues and protect multi-state ecosystems of regional concern	• Represent State interests in multi-state trans-boundary issues and protect multi-state ecosystems
• Facilitate and enable programs to address international issues and protect global ecosystems	• Facilitate and enable programs to address regional international issues and protect regional ecosystems	• Represent State interests in regional international issues and protect regional ecosystems
• Accountable to Congress and the American public on the state of the nation's health and air, water, and lands	• Accountable to the States and public in the Region, contributing to the overall health of the nation's public, air, water, and lands	• Accountable to State legislatures and State residents, contributing to the overall health of the nation's public, air, water, and lands

Thank you, Mr. Chairman, for this opportunity to testify.