



August 21, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Federal Building
1200 Pennsylvania Avenue, NW
Washington, DC 20503

Administrator Pruitt:

Congratulations on your confirmation as Administrator of the Environmental Protection Agency (EPA).

As you know, state and federal environmental regulations and programs have matured significantly since major federal environmental laws were adopted decades ago. Under your Administration, this is an exciting time that provides us an excellent opportunity to review our regulatory climate to ensure we continue to protect the citizens of this country, while at the same time ensuring our regulatory structure is not unnecessarily burdensome. As co-regulators, we have the ability to examine the roles of the federal government and states in environmental regulation. In the states' role, we value the right to develop initiatives and deliver programs that meet the needs of the taxpayer and reflect local priorities and values. In order to best serve our citizens, and to make the best use of our resources, we need to work together to define our appropriate roles, and to do our work in the most efficient way possible.

In our dual roles as regulators, EPA sets federal environmental standards and generally delegates authority to the states to implement those standards, subject to EPA oversight. In the states' role as implementer, we are in a unique position to understand some of the challenges associated with implementing federal programs on the ground. In that regard, there are a number of ideas that we would like to advance for your consideration.

Tribal Regulation of Water and Air Quality Reform. Tribes have the ability to create their own air and water regulatory standards under the Clean Water and Clean Air Acts. In addition to applying to businesses on reservation lands, these standards also apply to businesses that have discharges or emissions that potentially impact water or air quality on reservations. These standards are in addition to any applicable state or federal standards. Overlaying another regulatory layer on top of existing state and federal regulations, which are designed to protect public health and the environment, discourages economic growth in these geographic areas.

While the Clean Water and Air Acts could be amended in a number of different ways to address this duplicative regulatory structure, there are also a number of actions that could be taken administratively. EPA has recently changed its interpretation of the Clean Water Act "Treatment as a State" (TAS) provisions to make it easier for tribes to establish water quality standards. In addition, EPA has also proposed to create water quality standards for tribes that have not adopted standards. EPA could return to its longstanding, original interpretation of the Clean Water Act "Treatment as a

State” provisions. It could also stop its efforts to impose additional water quality standards on sovereign nations.

Require EPA to Defer to State Permit Decisions for Delegated Programs

EPA should defer to state decision-making in regard to programs delegated to the state (e.g., Clean Air Act, Clean Water Act) except in extreme circumstances. Second-guessing state permitting decisions creates regulatory uncertainty and stifles investment. For example, after being asked for input, EPA questioned a state permitting decision made eight years earlier as a permit was coming up for renewal. This type of approach results in businesses not being able to rely on permitting decisions made by state entities that have met the requirements and been approved by EPA to implement these federal programs. In the event there is a disagreement, a change should be addressed prospectively and not in the context of revisiting past decisions.

Revising the Clean Air Act's National Ambient Air Quality Standards (NAAQS) and Permitting Problems. Pursuant to the Clean Air Act, EPA is required to establish National Ambient Air Quality Standards (NAAQS) for pollutants considered harmful to public health and the environment. EPA designates geographic areas as either meeting those standards (“attainment areas”), not meeting those standards (“nonattainment areas”), or as not having enough information to designate as attainment or nonattainment areas (“unclassifiable areas”).

Wisconsin has nonattainment areas and will probably have them in the future as standards are continually revised and often tightened. Considering regulations apply in these areas that do not apply elsewhere, manufacturing may be discouraged from investing in those areas. In addition, because Wisconsin nonattainment areas are largely caused by emissions occurring outside those areas, applying requirements inside the nonattainment areas often will not result in the areas meeting the standards.

Recommendations for consideration to address some of the challenges include fairly addressing ozone air transport issues. The Clean Air Act requires an area that exceeds a NAAQS to implement requirements to bring the area into attainment, even though the area may not be the source of emissions causing the violation (e.g., Sheboygan and Kenosha Counties, WI). Nonattainment areas should not be required to implement controls when emissions in the nonattainment areas are not the primary cause of the air quality problems. An additional recommendation is to modify the Clean Air Act to provide that revisions of the NAAQS are not required every five years. This timeframe is simply too short, and results in overlapping regulatory standards.

Further, EPA should speed up the process to re-designate nonattainment areas that now meet the NAAQS to attainment areas and allow for the concept of emission offsets to be used in attainment areas. EPA should also allow projects in attainment areas to move forward once appropriate control technologies are implemented or offsets obtained, even if modeling does not demonstrate compliance with the NAAQS. Additionally, in attainment areas, EPA should provide states with the flexibility in determining when modeling is necessary to determine compliance with a NAAQS. Finally, allow modeling to be based on “most likely” or actual scenarios rather than “worst case” or potential scenarios, while still protecting public health.

EPA Program Review. For environmental programs delegated to the states by EPA, the EPA frequently will opine on whether a certain practice, rule or statute adopted by the state is consistent with federal requirements. If not, EPA will require the state to change the practice, statute, or rule, to

be consistent with federal law. In many instances, the changes required by EPA have no or a nominal impact on how the state is implementing a specific regulatory program.

In these instances, the state usually communicates with EPA to ensure agreement that the proposal will address EPA's concern. This is important due to the effort that goes into addressing EPA's concerns, which can be substantial. For example, addressing these concerns can require the state to embark on a multi-year rulemaking process. There have been a number of instances in which the state thought it was addressing the concern after receiving feedback from EPA, only to find out later that it had not. This results in the state having to embark in another effort to address the issue.

Recommendations for consideration to address this challenge include creating a formal process by which states can request EPA to make a determination as to whether a proposal meets federal requirements. EPA should be required to respond within a certain time period, such as within 90 days of receipt of the proposal. EPA should also be required to explain what specific parts of the proposal does not meet federal requirements, and explain in detail why the proposal does not meet requirements. If EPA approves a proposal, it should be bound by that determination unless there is a federal law change (rule, statutory, or court decision) that makes its determination no longer valid.

Lack of Timely Responses for Approvals from EPA. EPA must approve many state actions under the Clean Water Act (CWA) such as administrative rules related to CWA implementation and permit variances. Often there are significant delays to obtain these approvals. This previously has delayed numerous permit issuances, caused confusion and uncertainty for stakeholders and added cost. For example, the multi-discharger variance request was submitted to EPA on March 30, 2016 and no approval decision has been forthcoming to date. This has delayed numerous permit issuances, caused confusion and uncertainty for stakeholders and added cost. Another timeliness concern relates to when EPA fails to provide timely guidance on major regulatory requirements, particularly when states are required to meet federal deadlines.

Recommendations for consideration to address this challenge include requiring federal agencies by statute or rule to approve certain state actions within a date unless an extension is mutually agreed to by the state. A failure to meet the deadline results in approval of the action. Another approach would be to establish metrics that require certain timeframes to be met, include corresponding performance objectives, and hold people accountable for missing deadlines.

Ten Year Permits. The Clean Water Act specifically restricts water discharge permits to five years in duration. Many permits, upon renewal, are simply a continuation of the existing permit. In order to minimize workload while continuing to protect the environment, revise the Clean Water Act to provide that permits may be for ten years in duration. If, during the ten year period, a significant change is warranted, (e.g., the facility wishes to significantly increase capacity or a new water quality standard is adopted), permits can be modified at that time. An alternative could be to allow 5 year extension options to permits instead of going through the full reissuance process as long as the permittee is in compliance and has no significant changes.

Significant Inconsistency in Regulatory Approach Between EPA Regional Offices. In EPA's current structure of the agency with a Headquarters and 10 regions, there appears to be a substantial amount of inconsistency with regard to implementing federal rule and law, federal guidance, enforcement, and approaches to working with state agencies. This diffused organizational structure contributes to this inconsistency given that it appears that EPA Regional Directors and staff have a fair amount of autonomy within their regions.

The effect of this inconsistency is that from an implementation perspective there are 11 EPA's. The result at the state level is the actual intent of federal rule, law, enforcement, and policy direction not being uniformly applied, which creates an uneven playing field for both businesses and states.

One option to address this issue is to re-organize EPA to a "line organization" in which all programmatic staff and supervisors in the regions report to a Program Director and management staff in EPA headquarters. Under this organizational structure, Regional Directors could focus on leading collaborative and innovative efforts with the states, leading significant projects and issues within their geographic areas, helping ensure that EPA programs are taking an integrated approach to regulation, and providing input on the feasibility of implementing rules and guidance.

Require EPA to Allow States Greater Flexibility to Customize Programs to Fit States' Needs. States have a better idea about how to administer environmental programs in their states. The EPA's role should be to provide general sideboards (since air and water do cross state lines) but allow states greater flexibility to customize their programs to fit their needs – without constant federal approvals. EPA has a role to set overall performance standards for clean water and air, but states establish the details about how to accomplish them. EPA's approval role is limited to determining consistency with a broad standard. A model could be how the Natural Resource Conservation Services (NRCS) develops technical standards – a broad set of standards and topic areas to be addressed are identified at the national level, while states are allowed to fill in the details.

Require EPA to Inform States Prior to Conducting Work Within State Boundaries. If EPA intends to conduct any type of work, including studies, research, inspections, tribal or public meetings within a state, they should be required to reach out to and inform the appropriate state contacts. This will ensure good coordination and cooperation on regulatory issues and sharing of information.

Require EPA to Confer With States Before Policy or Regulatory Changes That Affect Those States. EPA should involve states early and often on policy or regulatory changes that are delegated for implementation by those states, including regional approaches or guidance.

Require EPA to Consult With States On Their Needs to Produce a Scientific Strategy on Water Quality Indicators and Other Matters. EPA could play a more active role in developing a scientific basis for actions based on state needs and feedback. An example is the decision on which bacteria species to base water quality standards. For many years it was fecal coliform, then EPA switched it to E. coli, and then it was a bacillus species. EPA then decided to study it further and there was no indicator species established. Eighty years later, after no progress, EPA went back to E. coli. Recommendations for consideration to address this challenge include EPA consulting with states as to their needs and establish a science strategy in consultation and collaboration with state programs.

Federal Agencies (EPA) Regulatory Reform. EPA should consult with states and potentially other stakeholders in the development of proposals to streamline or simplify regulations, and to explore creative alternative regulatory approaches. A deadline should be established to produce a list of proposals.

Revise the Clean Water Act's Grant Dollars to States (s. 319). Clean Water Act s. 319 grant dollars to states are restricted to be used for nonpoint source pollution abatement projects and further restricted to be used only in watersheds with specified plans (Nine Key Element) approved by EPA.

Recommendations for consideration to address this challenge include revising the Clean Water Act to allow greater flexibility in the use of these funds to include nonpoint-based pollution in permitted municipalities (storm water) and certain activities at CAFOS. Additionally, revise federal regulations to remove the restrictions that these funds may only be used in watersheds with approved "Nine Key Element" plans. Lastly, a suggested recommendation is to reduce the plan requirements. State programs could use these funds based on the greatest environmental need and/or outcome, rather than if there is an approved, complicated plan.

Coordinate the Timeline of Federal Regulation Dates. The states are constantly implementing new federal rules and sometimes they can interact and affect other rules. The federal government should better coordinate when rules are released and how they potentially affect other ones. In order to ensure coordination of rules, and to provide some certainty to the regulated community, any new rules should take into account the timing and impact of other existing or proposed rules.

For example, any new air quality rule proposals should include an analysis of other existing and proposed rules that may impact emissions that will also be regulated under the new rule, and issuance of these rules should be carefully coordinated so as to be issued contemporaneously. Companies should be ensured that when they make investments in control technologies that investment will be sufficient to meet regulatory requirements for a defined period of time. EPA needs to provide adequate implementation timelines for new requirements.

New Review System for State Compliance with Federal Requirements. EPA, when exercising its approval authority over state actions (e.g., administrative rules, variances, floodplain maps) will often indicate approval over the course of working on the issue only to raise significant objections at the last minute, or after the state has finalized an approval. This significantly increases the workload by state staff to address these last minute objections and adversely affects the credibility of the state with its stakeholders, who may have been through years of good-faith negotiations. Federal agencies should have a deadline to exercise approval authority over state actions that is consistent with state processes.

In addition, there should be a new, formal process by which states can request EPA to make a determination as to whether a proposal meets federal requirements. EPA should be required to respond within certain a time period, such as within 90 days of receipt of the proposal. If EPA determines all or part of a proposal does not meet federal requirements, EPA should be required to explain what specific parts of the proposal do not meet federal requirements.

If EPA approves a proposal, it should be bound by that determination unless there is a federal law change (rule, statutory, or court decision) that makes its determination no longer valid.

Same Project/Different Programs. Different programs in EPA will pursue the same project with different programs at the state level. This results in duplication, confusion and inconsistency. A recommendation to solve this issue is to require EPA to have a multi-discipline project coordination team so that different programs within these large agencies have a better idea of what the other is doing – especially for major and expensive initiatives.

Require Federal Agencies to Consult with States as an Integral Partner in Establishing National Environmental Policy. Federal environmental regulations are often established without adequate state involvement or input. An example is the Waters of the United States (WOTUS) rule. Require federal agencies to offer a consultation role to states as an integral partner in establishing national environmental policy. In the WOTUS rule example, states were not consulted at all in its development. The state agency could have informed EPA of the ramifications of their approach, worked with EPA to address many of the current concerns and perhaps had a workable rule, avoiding much of the controversy and legal time and cost.

We would welcome the opportunity to discuss these concepts with you in more detail at your convenience.

Thank you for your consideration.

Sincerely,



Cathy Stepp
Secretary

CC: Governor Scott Walker
Wisconsin Congressional Delegation