

WRITTEN TESTIMONY OF BECKY KEOGH, DIRECTOR  
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BEFORE  
THE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE  
OVERSIGHT HEARING ON:

“COOPERATIVE FEDERALISM: STATE PERSPECTIVES ON EPA  
REGULATORY ACTIONS AND  
THE ROLE OF STATES AS CO-REGULATORS”

MARCH 9, 2016

Chairman Inhofe, Ranking Member Boxer, and Members of the Committee, good morning, my name is Becky Keogh. I am the Director of the Arkansas Department of Environmental Quality, also known as ADEQ. I bring you greetings from Governor Hutchinson of Arkansas, and I appreciated the opportunity to respond to your call from the several states for a local perspective on our relationship and level of cooperation with the United States Environmental Protection Agency.

We in Arkansas are seeking to drive regulatory policy and programs that balance effective environmental results of clean air and water, assure long-term resource management, affordable energy, and economic -growth goals that are important to our citizens, businesses, and the communities in which they seek licenses to operate. We want a state that can attract the newest generation of professionals

who seek communities that offer healthy living and the world-class recreational options that we enjoy in Arkansas. Arkansas is invested heavily in assuring that we are wise stewards of the abundant and clean water, the healthy breathing air, and the amazing vistas with which we have been blessed. We do not take our name of “The Natural State” lightly. We strive to fairly and consistently serve the corresponding and complimentary roles of environmental stewardship and economic development.

Likewise, for decades, we successfully worked with the EPA under a symbiotic governing model that is the topic of today’s hearing—cooperative federalism. This notion is born of something uniquely American, our system of federalism whereby the nation and states function together as co-sovereigns. Until the last several years, when it came to federal regulation, whether it be the Clean Air Act or the Clean Water Act, we would propose and the EPA would dispose. Both the EPA and the states had a relatively balanced seat at the table. And, as we are known to do in the South, we would all sit around the table and have a good-old fashioned meal. There would be lively debate, ample servings, and both us and the EPA would cooperatively prepare the meal. However, this once treasured family-style dining with our federal partners is a thing of the past. Now, we have an

increasingly diminished role in the menu selection or meal preparation. We are forced to eat what is served.

The cooperative-federalism model that has defined Arkansas's relation with the EPA beginning in the 1970s has morphed in something that can be better described as coercive federalism. We have seen a decrease in time and tolerance for State Implementation Programs (SIPs) and a dramatic increase in EPA takeovers, or Federal Implementation Programs (FIPs). Historically FIPs were used as the weapon of last resort for our EPA partner, its nuclear option for states that were unfaithful to the partnership or denied the marriage outright. However, under the prevailing paradigm, FIPs are used as an everyday tool (often of dubious origin) in the EPA's vast arsenal. To give perspective on this shift, it is worth noting that in the past seven years the states have been forced to digest more of these federal hostile takeovers, known as FIPs, than were served in the prior three federal administrations combined, ten times over.

Cooperative federalism regimes rest on governmental cooperation. States will not waste the time to draft their own proposals if they expect the federal government to do what it wants in the end anyway. That is to no one's benefit: A portion of State sovereignty is lost, while our unique and individual state constituencies lose out on

the benefits of local regulatory innovation. Cooperative federalism regimes should be designed to foster cooperation, not discourage it. Congress should aim to remedy this problem through amendment to the current controlling legislation, and should consider the importance of fostering cooperation when it designs new cooperative federalism regimes.

Currently, states are placed in the unfair position of having purchased a very expensive seat at the table—having learned the hard (and expensive) way; if you want local control, it will cost you—but then finding out that all meals are served exclusively from the EPA’s table, and we are to be served a fixed menu, without a fixed price. The notion of *table d’hôte* without *prix fixe*, is distinctly un-American. States shoulder almost ninety percent of the cost of implementation of federal environmental regulation. However, until recent years, we were glad to pick up the tab because the cost to the states was mitigated by the healthy respect and accompanying deference we received from our federal regulatory partner. And, if there was ever a question of the relative standing of our partnership, one could solve the tie by simply pointing to the findings statement contained in the Clean Air Act at 42 USC §7401 (a)(3):

The Congress finds . . . that air pollution prevention (that is the reduction or elimination, through any measures, of the amount of pollutants produced or created

at the source) and air pollution control at its source *is the primary responsibility of States and local governments.*

We ask for your assistance in resetting the needle to the point of its origin, whether this task be accomplished by way of Congressional clarification or judicial charge or the two working in tandem. In our estimation, Congress calls for the meal to be served, the states should hosts occasion, and the EPA in a frequent a faithful guest at each state's table. If the party does not occur is goes beyond what Congress has ordered, the judicial branch steps in to sort out the guest list and menu.

However, where we are now can best be describe as a progressive dinner party gone bad. We are told that in its current form the Clean Air Act affords the EPA no discretion to give states that have acted in good faith a window within which to comply with a newly announced federal standard (despite the fact that the original finding that the states were out of compliance is more than two-years old). This makes little sense. While it seems logical to give the federal government the leeway not to provide a window for state compliance with a new standard where the federal government adjudges that a state has not acted in good faith, it nevertheless seems that the federal government should have the leeway to provide such a window where a state has acted in good faith and realistically could not

guess what standard the federal government would in the end promulgate. Cooperative federalism should reward cooperative behavior, not punish it.

States have recognized an unprecedented level of federal actions. To borrow a saying in the South, “we have more on our plate than we can say Grace over”. The sheer number of mandates and deadlines, further complicated by the complexity of rules being finalized, leaves us in a position where we are being served our appetizer, soup, salad, main course, and dessert, all at the same time. And, if we do not clean every crumb from our plates, we are banished from the table. States rarely have sufficient notice and implementation of rules from EPA to accomplish meaningful outcomes before moving to the next one. And, while we are left unable to get a taste of one course before another arrives, the EPA allows its work to buildup—picking and choosing which items are most savory or will look best on its menu. The EPA is afforded the luxury of being the ultimate picky eater, while we states are struggling to digest these five-course meals, plus last-night’s leftovers.

For example, in the ozone regulations that the EPA recently finalized, states were just beginning to realize the outcomes and benefits of implementation of the recent federal rules (for the 2008 standard), yet another new standard was already being proposed and finalized prior to initiating action again (whether it was necessary or

not). Specifically for Arkansas, we are finalizing SIPs for implementation of new short-term standards, while at the same time new ozone standards are being finalized and (with little notice) a second phase of Cross State Air Pollution standards were proposed that are inconsistent with our existing SIP. As such, we have at best overlapping and at worse conflicting directives, and regardless of which scenario plays out we have wasted resources. At the same time, failure or delay of federal approvals of SIP rules for water-quality and air-quality programs have created more regulatory uncertainty for the states and those regulated. To solve this, Arkansas is now seeking ways to work with the EPA on how we can consolidate or supersede previously submitted rules without facing legal conflicts.

The reality that states are now more pawn than partner is nowhere better evidenced than in the EPA's transformation of a two-sentence legislative passage into a two-thousand page rule with profound consequences and extraordinary costs. In the Clean Power Plan, Arkansas and other states that were already realizing reductions of carbon emissions across the grid were sent on a "race" to find answers to complex and critical analysis that we have referred to as a set of doors. Despite one door being labeled mass and the other being labeled rate, we were unable to predict whether the other side (of either door) provided safety and security of our energy and environment. A majority of states came together and have successfully

petitioned the highest court of the land to take a pause as lower courts hear the arguments of the states that the EPA has gone far beyond the authority granted to it and in fact the establishment of a carbon-reduction target (or any environmental standard for that matter). It is Arkansas's position that the EPA should not be permitted to proceed by simply ignoring Congress or the Constitution. Serving up cooperative federalism in a coercive manner is distasteful, but for the executive branch to ignore that the chairs at our metaphorical table are stabilized by three legs and not just one, makes for a difficult and messy meal.

While we want a seat at the table, as a co-sovereign (that is picking up much of the tab at the end of these expensive meals), we should not be force-fed the EPA's regulation de jour in an un-American fashion. Ironically, the great majority of FIPs that we states have been bombarded with result from the EPA's recent re-interpretation of its "Good Neighbor" provisions. As states, we try and be good neighbors; but when we are told to comply with targets that are either undisclosed or constantly in flux; and the targets may or may not correspond with any measurable environmental impact; and the mandates come at a great cost to the tax and rate payers, we are ready for new neighbors or a new neighborhood.



For example, in relation to the Clean Water Act, we are left to navigate federal interpretation of Arkansas's water-quality criteria. This system of water-quality protection was designed to establish natural water-quality conditions for extremely pure water streams under a robust monitoring protection. However, under recent federal interpretation, these once state-developed, extraordinarily heightened criteria have now become unrealistic and often un-achievable minimum water-protection standards. The EPA executed the ultimate bait and switch.

In conclusion, not only has the uniquely American cooperative-federalism model fallen to a more totalitarian, coercive-federalism scheme, and the state role is now less partner and more pawn, we also see "sue and settle" appearing on the EPA's menu more and more frequently. As we states are more often asked to navigate the increasingly litigious "green" lobby fighting hand-in-hand with the EPA, we states are left to wonder if this vocal special interest currently occupies the seat at the table that was once reserved for us. If this proves to be true and our pleas for relief are not heard and acted upon by Congress or the courts, as we say in the South, "bless our hearts." When the states are disenfranchised, so is the truth of our federalist democracy, and the people the WE represent.