

Testimony of Becky W. Keogh
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to the
Congress of the United States
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Chairman Lamar S. Smith of the 21st Congressional District of Texas
“Expanding Roles of States in EPA Rulemaking”
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Chairman Smith, Ranking Member Johnson, Subcommittee on Environment Chairman Biggs, and Members of the Committee, my name is Becky Keogh, and I hail from the great state of Arkansas, and bring greetings from your former colleague, and now my boss, Governor Asa Hutchinson. In 2015, Governor Hutchinson appointed me to serve in his cabinet as the Director of the Arkansas Department of Environmental Quality and the Arkansas Energy Office. Since taking on this humbling and exciting role, I have been a vocal proponent of returning environmental rulemaking to its constitutional roots, something known as cooperative federalism. Unfortunately, over the past eight years that once noble partnership that balanced state and federal responsibility and accountability had morphed into something

better described as coercive federalism, where the state was more pawn than partner.

In Arkansas, we have been authorized to administer every program that the EPA makes eligible for state delegation. But, despite that delegated authority and our status as a co-sovereign, the EPA treated us (and other similarly situated states) as petulant children, with the EPA taking on the role of “helicopter mom” of the worst order. In fact, only days before Administrator Scott Pruitt took the reins of the EPA, my lawyers were unintentionally copied on an email chain between the EPA and the DOJ that referred to Arkansas as a “recalcitrant” litigant. And, at times, we were. It was the only course left available to states that would not assimilate and accept the EPA overreach.

However, I am pleased to report that we are amidst a season of change. In the short time Administrator Pruitt has been in place, we are seeing extraordinary change in the environmental landscape. I believe our state’s struggle and the promise of progress can best be illustrated using a metaphor I first read in a year-end letter from Steve Streassle, the Principal of Catholic High for Boys in Little Rock, Arkansas. Some of you may have heard of this school (where Congressman French Hill’s son attends) when it was placed in the national spotlight for turning away helicopter parents. On the first day of school, “STOP” signs were placed on each entrance that stated: “If you are dropping off your son’s forgotten lunch, books, homework, equipment, etc., please TURN AROUND and exit the building. Your son will learn to problem-solve in your absence.” It is not accidental that I have chosen to frame my testimony with the story from Principal Streassle’s year-end letter.

Principal Straessle’s address recalled a hike he took with his children over Easter break along the Fiery Gizzard Trail in south central Tennessee where he “noticed a phenomenon that occurred again and

again: trees growing out of boulders along the creek.” He noted that these were not twigs of the Charlie Brown Christmas tree variety, but instead “were three-foot diameter thick trees that reached several stories into the sky.” He noted that it was curious that the “boulder trees were as tall as the others further into the bank, but their root systems were wrapped around rocks that served as foundation. Fate had deposited seeds on top of rocks and those seeds had grown over the decades.”

Principal Straessle continued:

You can't help but think that those trees, as they grew, looked longingly at their comrades on fertile ground that had no visible problems as they sprouted. The other trees were on solid soil and their root depth was uninhibited. But the boulder trees had to figure a way around their obstacle. They had to wrap their roots around the boulder, envelop it, and work painstakingly to reach the soil. It was impressive to see how they must have struggled as they leaned far over the creek and into the sunlight that was otherwise blocked by the better fed vegetation.

Boulder trees have an unfair life. They started in thin dirt on top of a rock. But those trees persevered. Instead of cursing the rock on which they perched, they made those rocks into the firmest foundations and reached ever more for the sunlight that would nourish them, that would help them grow. Reaching for the light is important.

That is why I am testifying today. We states have wrapped our roots around the rocks and reached over the creek into the sun. Over the past decade we withstood sparse soil and overcast skies. We, like boulder trees, wrapped ourselves around what held us back, “enveloped it,

smothered it with strength, and used it as our pedestal for engagement and a rallying cry for perseverance.”

Often with limited resources, we the states sought ways to be efficient in effecting environmental outcomes and to be flexible with the ability to flourish with less. While the bank trees were flourishing in their regulated growth and uniformity, we learned that progress and process are not synonymous. A prolonged permit process yields protracted protection power. We observed firsthand the futility of trying to turn a boulder tree into a bank tree. Our differences should define us not divide us. So, as we move forward into the light, know that we boulder trees, while unique in our appearance and route to soil and sun, are no less mighty than the bank trees. In fact, our struggle to grow has enhanced our strength. The country’s landscape is enhanced when we can recognize the beauty of both the forest and the trees. We look forward to working with our federal partners as we reach for the light together.

I offer more specific paths to light and fertile soil below. I hope these technical remarks will be useful as we begin to till the soil into finer bits for planting seeds that return us to our constitutional roots, where states and the EPA are partners in the planting of progress and the harvesting of success.

SO₂ designations

Pursuant to section 107(d) of the Clean Air Act (CAA), the EPA was required to designate areas as either “unclassifiable,” “attainment,” or “nonattainment” for the 2010 one-hour sulfur dioxide (SO₂) Primary National Ambient Air Quality Standard (NAAQS). On June 3, 2010, EPA revised the primary health based SO₂ NAAQS by establishing a new one-hour standard at a level of 75 parts per billion (ppb), which is met on an air quality monitoring site when the three-year average of the

99th percentile of one-hour daily maximum concentrations do not exceed 75 ppb. On August 5, 2013, EPA published a final rule establishing air quality designations for twenty-nine areas in the United States for the 2010 SO₂ NAAQS, including two areas in Arkansas.

Typically, when EPA establishes a new national ambient air quality standard (NAAQS) or revises an existing standard for each criteria air pollutant, it sets in motion a series of actions aimed at ensuring that air quality throughout the country meets those standards. It is the job of **states and tribes to submit NAAQS designation recommendations to the EPA**, not third party non-governmental organizations, except during a comment period, as to whether or not an area is attaining the national ambient air quality standards for a criteria pollutant. After working with the **states and tribes, EPA will “designate”** an area as attainment or nonattainment for the standard. EPA is required to promulgate designations for all areas of the country within two years of promulgation of the revised NAAQS.

After EPA published initial SO₂ designations, three lawsuits were filed alleging that EPA had not met the deadlines to designate counties around the country. On March 2, 2015, the U.S. District Court for the Northern District of California accepted a proposed settlement agreement among the EPA, Sierra Club, and the Natural Resources Defense Council to resolve this litigation concerning the deadlines for completing SO₂ designations. The court-approved order directed EPA to complete designations for all remaining areas in the country in up to three additional rounds:

On August 21, 2015, EPA issued its Data Requirements Rule, which required modeling or actual monitoring for categories of sources based on annual SO₂ emission rates. The Data Requirements rule directs **state and tribal air agencies** to characterize current air quality. At the time of

the EPA settlement, the timelines seemed reasonable for completing designations. There were some different protocols for the states to choose from to determine within the timelines whether areas that were initially designated unclassifiable or unclassifiable/attainment due to lack of available information were actually in attainment and could be classified by the state and EPA as in attainment. In the event ambient monitoring was chosen by the state, monitors had to be operational by January 1, 2017; then the first three years of data would be collected for calendar years 2017-2019; and then the intended designation process for the such area would be completed in 2020.

For those states that chose modeling for such areas, the modeling needed to conform to EPA modeling guidelines. The accepted near-field refined dispersion modeling protocol, for example, is AERMOD, which is listed in Appendix W, 40 CFR Part 51, and is one of the EPA modeling protocols required to be used for State Implementation Plan revisions for existing sources and for New Source Review and Prevention of Significant Deterioration programs. For those states that chose to model sources under the rule, the affected areas were to be designated by EPA by December 31, 2017, based on the results from the modeling.

However, the guidelines and deadlines ultimately were not appropriate or fair due to unanticipated delays by EPA in determining the final AERMOD modeling protocol. As a result, and very unfortunately, some accepted AERMOD modeling protocols/calculations were modified twenty months into the process of the states undertaking to perform SO₂ designations. The AERMOD Revision Rule did not become effective until May 22, 2017. Arkansas is currently in the midst of uncertainty as to information that has been submitted to comply with the SO₂ Data Requirements Rule. At every step, Arkansas has timely complied with the requirements of the rule.

Despite our timely compliance, EPA Region 6 has inappropriately allowed third-party modeling to derail the approval process. EPA first allowed our Round 2 submission to be stalled by faulty Sierra Club modeling. The modeling was basic, unrefined, and did not adhere to the Data Requirements Rule, and incorrectly combined emissions in a cumulative fashion resulting in concentrations above the NAAQS. EPA would not have allowed this submittal by a state and confirmed in correspondence to the state that the third party modeling was premised on several factors that are inconsistent with the modeling protocol. Now, EPA has delayed its approval of our Round 3 submission, again referencing the fact that 3rd party modeling could be an important consideration.

In addition, states are being forced to aim for a moving target in regards to the modeling EPA will accept. EPA's modifications in the published final AERMOD regulation rendered the originally-proposed AERMOD models unacceptable in many cases. States, including Arkansas, had relied upon these models to determine whether the affected areas in their states met the 75 ppb SO₂ one-hour standard. Some states found themselves in a situation in which the model they had relied upon is no longer applicable and their counties no longer meet the one-hour SO₂ standard due to no fault of affected sources or the affected states. The AERMOD Revision Rule was published in the Federal Register as **final fifteen days after the deadline of January 1, 2017** for states to have air monitors installed and operational. This delay rendered the option for an affected state to install SO₂ air monitors untimely under the above described deadlines. The delayed modifications to the AERMOD model are extremely unfair to those sources, and states that relied on the original model, and have wasted the time, money and resources of the affected sources and states, also creating confusion and more delays for those states to obtain the proper designation. We believe it is reasonable

for EPA to take action to extend compliance dates for affected states to reassess the methods used to properly determine attainment designation and to allow them time to institute such methods. These deadlines should be extended at least twenty months from the final effective date of the AERMOD Revision Rule.

ADEQ is currently working with its contractor on updated modeling in response to EPA's letter of March 8, 2017. We have now spent twenty-one months and \$75,000 to provide modeling to address concerns by EPA Region 6 in response to 3rd party modeling and will be forced to continue to spend funds to if EPA's current policy is continued. These funds are being expended to reach the same result that could have been achieved if EPA had merely accepted the initial model.

We request that the imposed deadlines to determine compliance with the SO₂ standard by affected sources and states should be extended due to the unanticipated delayed modifications to EPA's air modeling protocol. We also request that Arkansas and other affected states be allowed to reassess and choose alternative methods, including monitoring, to demonstrate compliance.

Regional Haze

In late 2016, Arkansas achieved unprecedented progress improving visibility in the Buffalo River National Park and Caney Creek Wilderness Area according to IMPROVE monitoring data. Despite this improvement, Arkansas was not celebrating the improved scenic beauty at these areas because Arkansas could have made even greater improvement at Buffalo River National Park and Caney Creek Wilderness Areas if EPA had approved the State Implementation Plan (SIP) that Arkansas submitted eight years before. Instead, the state was

grappling with EPA final Federal Implementation Plan (FIP) for Regional Haze for this planning period.

On September 27, 2016, EPA's final Federal Implementation Plan (FIP) was published in the Federal Register. The Final FIP will require installation of more than \$2 billion in control technology at the White Bluff, Flint Creek, and Independence power plants. EPA is requiring this burdensome and expensive control technology even though monitoring data showed that Arkansas has surpassed its reasonable progress goals for this planning period is improving visibility at a greater rate than that needed to achieve the goal of the program: natural visibility conditions by 2064.

EPA took several shortcuts to reach its conclusion that more than two \$2 billion in control technology should be required to achieve visibility improvement that has already occurred. To save time, EPA relied upon modeling that it admitted was "unrefined" compared to the modeling it relied upon in Texas. EPA did not consider significant reductions in emissions by the facilities that had been achieved through the use of low-sulfur coal. In addition, EPA ignored the fact that visibility improvements to be gained from the installation of this equipment are virtually nil in this planning period. Even though Regional Haze sets a "visibility standard," the improvement cannot be seen with the naked eye.

Arkansas is one of the least wealthy states in the nation, and the electric rate increases that will result from these expensive controls will disproportionately impact some of the nation's poorest communities without any need for these controls to meet the goals of this program. No visibility improvement from these requirements will be seen in the first implementation period, which ends next year, because of the time required to order and install these controls. Not only could all of this

have been avoided, but Arkansas could have made even greater progress had EPA relied upon the expertise of the states and simply approved the Arkansas SIP when it was submitted in 2008.

Arkansas urges EPA to return the Regional Haze program to the states and allow Arkansas to submit a SIP that addresses appropriate controls based on accurate and up-to-date visibility trends while considering the cost of controls and the remaining useful life of affected facilities. Any resolution must provide the State of Arkansas with the opportunity to revise its state plan, thereby vesting the state with rightful control over the fate of its own environment.

It is only fitting that these technical comments contain an optimistic prologue. In a personal meeting with Administrator Pruitt, he assured me that the EPA will seek new paths of partnership, noting that “the future ain’t what it used to be.” I am encouraged that we states will be allowed to implement and execute legally sound and scientifically informed environmental policy from our firmly rooted, rock-solid foundation rather than the shifting sands of late. If given the opportunity to lean toward the light together, we can achieve success of Biblical proportion.