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THE STATES

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Executive Director & General Counsel

August 17, 2016

Ms. Anna Krueger
Economist
U.S. Environmental Protection Agency Headquarters
Mail Code 5303P
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Submitted via electronic transmission to:
Krueger.Anna@epa.gov, Sasseville.Sonya@epa.gov, Barr.Linda@epa.gov, Rupp.Mark@epa.gov, Barbery.Andrea@epa.gov, Hanson.Andrew@epa.gov

Dear Ms. Krueger:

ECOS, the nonprofit, nonpartisan association of state and territorial environmental agency leaders, appreciates the opportunity to comment on U.S. EPA's forthcoming rulemaking to require financial responsibility for hard rock mining under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). These comments are being submitted pursuant to "Federalism" Executive Order E.O. 13132, which directs federal agencies to consult with elected state and government officials, or their representative national organizations, when developing regulations and policies that may impose substantial compliance costs on state and local governments or may preempt current or future state or local laws and regulations. Accordingly, EPA has invited "pre-publication" comments on the federalism implications of EPA's proposed rule.

Over the past several years, the states have acquired extensive expertise and understanding of the various mining methods and technologies used by their hard rock industries, and have gained significant experience in evaluating mining operations, calculating bond amounts based on the unique circumstances of each mining operation, assuring that completion of reclamation and proper mine closure take place, addressing public health and environmental risks, regulating hazardous substances used in mining, and preventing and remediating hazardous releases. The states also have developed the staff and expertise necessary to make informed predictions of how the real value of financial assurance may change over the life of the mine, including post-closure. They have the authority to make adjustments to financial assurance requirements when necessary.

In the course of the Federalism briefings on the forthcoming proposed rule, ECOS members have raised concerns, based on the limited information supplied, that the rule has the potential to duplicate, preempt, and/or weaken state programs and financial assurance requirements. ECOS draws to EPA's attention our resolution entitled *On Environmental Federalism* (attached), reaffirmed in 2015, which expresses opposition to "…preemption of state authority, including preemption that limits the state's ability to establish environmental programs more stringent than federal programs…."

The ECOS resolution goes on to support "early, meaningful, and substantial state involvement in the development and implementation of environmental statutes, policies, [and] rules…." Of particular concern to ECOS is EPA's inability at this time to share details of its formula for calculation of bond amounts, which seeks to adjust the level of CERCLA 108(b) financial responsibility to reflect safer practices. While ECOS understands that EPA is under a tight court-imposed deadline to sign a notice of proposed rulemaking, its members have indicated that a thorough evaluation of EPA's forthcoming proposal is not possible in the absence of the specifics of this calculation. The importance of state evaluation of the formula is only heightened by EPA's stated intention to apply it to other sectors in future 108(b) rulemakings. ECOS thus requests that EPA supply a draft of its formula and allow an opportunity for further consultation with states before issuing a proposed rule.

Thank you for the opportunity to provide early input. ECOS appreciates EPA's consideration of our comments and recommendations. If you have any questions, please contact Lia Parisien, ECOS Executive Project Manager, at (202) 266-4931.

Sincerely,

Alexandra Dapolito Dunn
Executive Director and General Counsel
Environmental Council of the States

Attachment

Resolution 00 - 1
Approved April 12,
2000 Philadelphia,
Pennsylvania

Revised June 13,
2000 By mail vote

Revised April 4,
2003 By mail vote

Revised April 11,
2005 Washington,
DC

Revised September 8,
2005 Kennebunkport,
Maine

Revised September 22,
2008 Branson, Missouri

Renewed September 26,
2011 Indianapolis, Indiana

Revised March 20,
2012 Austin, Texas

Revised March 18,
2015 Washington,
DC

As certified by
Alexandra Dapolito
Dunn Executive
Director

ON ENVIRONMENTAL FEDERALISM

WHEREAS, the states are co-regulators with the federal government in a federal system; and

WHEREAS, the meaningful and substantial involvement of the state environmental agencies as partners with the U.S. Environmental Protection Agency (U.S. EPA) is critical to both the development and implementation of environmental programs; and

WHEREAS, the U.S. Congress has provided by statute for delegation, authorization, or primacy (hereinafter referred to collectively as "delegation") of certain federal program responsibilities to states which, among other things, enables states to establish state programs that go beyond the minimum federal program requirements; and

WHEREAS, States that have received delegation have demonstrated to the U.S. EPA that they have the independent authority to adopt and they have adopted laws, regulations, and policies at least as stringent as federal laws, regulations, and policies; and

WHEREAS, states have further demonstrated their commitment to environmental protection by taking responsibility for 96% of the primary environmental programs which can be delegated to states; and

WHEREAS, because of this delegation, the state environmental agencies have a unique position as co- regulators and co-funders of these programs; and

WHEREAS, the delegation of new federal environmental rules (issued as final and completed actions and published by the U.S. EPA) to the states to implement increases each year; and

WHEREAS, federal financial support to implement environmental programs delegated to the states has declined since 2005; and

WHEREAS, cuts in federal and state support adversely affect~~s~~ the states' ability to implement federal programs in a timely manner and to adequately protect human health and the environment; and

WHEREAS, states currently perform the vast majority of environmental protection tasks in America, including 96% of the enforcement and compliance actions; and collection of more than 94% of the environmental quality data currently held by the U.S. EPA; and

WHEREAS, these accomplishments represent a success by the U.S. EPA and the states working together in ways the U.S. Congress originally envisioned to move environmental responsibility to the states; and

WHEREAS, the U.S. EPA provides great value in achieving protection of human health and the environment by fulfilling numerous important functions, including; establishing minimum national standards; ensuring state-to-state consistency in the implementation of those national standards; supporting research and providing information; and providing standardized pollution control activities across jurisdictions; and

WHEREAS, with respect to program operation, when a program has been delegated to a state and the state is meeting the minimum delegated program requirements, the role of the U.S. EPA is oversight and funding support rather than state-level implementation of programs; and

WHEREAS, under some federal programs the U.S. EPA grants to states the flexibility to adjust one-size- fits-all programs to local conditions and to try new procedures and techniques to accomplish agreed-upon environmental program requirements, thereby assuring an effective and efficient expenditure of the taxpayers' money.

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES:

Affirms its continuing support for the protection of human health and the environment by providing for clean air, clean water, and proper handling of waste materials;

Affirms that states are co-regulators, co-funders and partners with appropriate federal agencies, including the U.S. EPA, and with each other in a federal environmental protection system;

Affirms the need for adequate funding for both state environmental programs and the U.S. EPA, given the vitally important role of both levels of government;

Affirms that expansion of environmental authority to the states is to be supported, while preemption of state authority, including preemption that limits the state's ability to establish environmental programs more stringent than federal programs, is to be opposed;

Supports the authorization or delegation of programs to the states and believes that when a program has been authorized or delegated, the appropriate federal focus should be on program reviews, and, further, believes that the federal government should intervene in such state programs where required by court order or where a state fails to enforce federal rules particularly involving spillovers of harm from one state to another;

Supports early, meaningful, and substantial state involvement in the development and implementation of environmental statutes, policies, rules, programs, reviews, joint priority setting, budget proposals, budget processes, and strategic planning, and calls upon the U.S. Congress and appropriate federal agencies to provide expanded opportunities for such involvement;

Specifically calls on U.S. EPA to consult in a meaningful, timely, and concurrent manner with the states' environmental agencies in the priority setting, planning, and budgeting of offices of the U.S. EPA **as** these offices conduct these efforts;

Further specifically calls on U.S. EPA to consult in a meaningful and timely manner with the states' environmental agencies regarding the U.S. EPA interpretation of federal regulations, and to ensure that the U.S. EPA has fully articulated its interpretation of federal regulations prior to the U.S. EPA intervention in state programs;

Believes that such integrated consultation will increase mutual understanding, improve state-federal relations, remove barriers, reduce costs, and more quickly improve the nation's environmental quality;

Noting the extensive contributions states have made to a clean environment, affirms its belief that where the federal government requires that environmental actions be taken, the federal government ought to fund those actions, and not at the expense of other state programs;

Affirms that the federal government should be subject to the same environmental rules and requirements, including the susceptibility to enforcement that it imposes on states and other parties;

Affirms its support for the concept of flexibility and that the function of the federal environmental agency is, working with the states, largely to set goals for environmental accomplishment and that, to the maximum extent possible, the means of achieving those goals should be left primarily to the states; especially as relates to the use of different methods to implement core programs, such as risk-based inspections or multi-media environmental programs, and particularly in the development of new programs which will impact both states and the U.S. EPA; and

Directs ECOS staff to provide a copy of this resolution to the U.S. EPA Administrator.