



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 7, 2017

Hon. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, 1101A
1200 Pennsylvania Avenue, N.W.
Washington D.C. 20460

Re: Request to reexamine delegation of certain environmental regulation authority to the States in accordance with the express terms of the Clean Air and Water Acts; from State of Texas, from State of Alabama, from State of Arizona, from State of Arkansas, from State of Georgia, from State of Indiana, from State of Kansas, from State of Kentucky, from State of Louisiana, from State of Mississippi, from State of Missouri, from State of Montana, from State of Nebraska, from State of Nevada, from State of North Dakota, from State of Oklahoma, from State of South Carolina, from State of West Virginia, from State of Wyoming

Dear Administrator Pruitt:

We write to call your attention to the fact that the extensive regulation from the Environmental Protection Agency during the last decade is directly at odds with the express terms and structure of the Clean Air Act and Clean Water Act. We ask that as you assess the performance of your Agency, you do so with a keen eye toward compliance with these governing laws and not repugnance to them.

These federal laws acknowledge basic truths: that the primary regulators of the environment are the States and local governments. The Clean Air Act wastes no time making this point. The very first section states that “air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments.” 42 U.S.C. § 7401(a)(3). The Clean Air Act then establishes a preferred method for the federal government to assist States and local governments: “to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs.” *Id.* § 7401(b)(3). The Act’s terms such as “encourage,” “assist,” and “promote” envision a collaborative arrangement.¹ As one court summarized,

¹ The Clean Water Act is based on a collaborative framework that is substantially similar to the cooperative arrangement underlying the Clean Air Act. *See, e.g.*, 33 U.S.C. § 1251(b) (providing that the policy of the Clean Water Act is to preserve the “primary responsibilities of States to prevent, reduce, and eliminate” water pollution).

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“[t]he great flexibility accorded the states under the Clean Air Act is ... illustrated by the sharply contrasting, narrow role to be played by EPA.” *Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 587 (5th Cir. 1981).

The methods we have seen from the Agency as of late, however, are in direct conflict with the cooperative arrangement the Act establishes. The Agency has replaced “encourage” and “promote” with “command” and “commandeer.” Take one recent example. Texas formulated a state implementation plan for Regional Haze. That plan imposed reasonable regulations on such things as power generators in the State to ensure air quality was sufficiently high to allow good visibility. The Agency rejected the State’s plan, imposed a federal plan costing \$2 billion without achieving any visibility changes, and tried to insulate itself by requiring Texas to challenge the rejection of its plan in the D.C. Circuit.

Unsurprisingly, the Fifth Circuit rejected the Agency’s attempt to transfer venue and stayed the federal plan.² At that point, the Agency had the opportunity to return to using its authority under the Act—rather than acting on its own. Instead, the Agency imposed a renewed regional haze rule almost as bad as the first.³ These actions show that the Agency ignored the efforts of the State, perhaps blinded by the belief that good results can only result from top down management by the federal government. Or worse, the prior Administration’s agenda and policy goals drove the Agency’s decision rather than the requirements of the statute.

The federal government must respect the clear terms of cooperative federal-state enactments. For example, federal agencies may not add conditions on the receipt of federal funds unless the terms are clearly stated in the controlling statute. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). And federal agencies may not stray outside the boundaries of their statutory authority by relying on policy documents and other non-statutory materials. *See, e.g., Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 931 (5th Cir. 2012).

Similarly, the federal government may interpose itself between a State and its municipal subdivisions only if Congress provides a clear directive to do so. *Tennessee v. FEC*, 832 F.3d 597, 610 (6th Cir. 2016). From our perspective, the recent overreach by the Agency amounts to a striking departure from the Clean Air and Clean Water Acts. Respectfully, we ask that you consider the steps that the Agency may take to restore the principles of cooperative federalism embodied in these important statutes.

Sincerely yours,

² *Texas v. United States Env'tl. Prot. Agency*, 829 F.3d 405 (5th Cir. 2016).

³ 82 Fed. Reg. 3,078 (Jan. 10, 2017)

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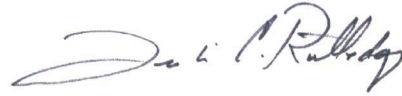
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cc: Hon. Jeff Sessions, United States Attorney General