



1000 Vermont Avenue, NW
Suite 1100
Washington, DC 20005
Main: 202-296-8800
Fax: 202-296-8822
www.environmentalintegrity.org

September 4, 2018

Henry Darwin
Acting Deputy Administrator
Office of the Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Mail Room 1101A
Washington, DC 20460

Re: Planned EPA audit policy regarding state programs; August 2018 ECOS meeting

Dear Mr. Darwin:

We are writing regarding your plan to develop a new audit policy regarding EPA oversight of state environmental programs. We understand that the policy may move EPA away from doing reviews of individual state decisions in favor of a more general “after-the-fact” audit approach, and that you presented a draft of that policy during the recent August meeting of the Environmental Council of the States (ECOS). While we understand that you plan to seek input on this policy from the States, we are not aware of any similar effort to seek input from others who may be affected by your new policy. We think it is critical that you seek broader input, as obtaining a broader range of views may result in a well-crafted policy that is fully protective of human health and the environment.

While we would expect to have more specific comments once we have seen a draft document, we note that EPA oversight of state programs has been a critical component of ensuring public health and environmental protection. In particular, reviews by EPA of individual state permits has played an important role of ensuring that such permits include all of the important federal requirements written in clearly enforceable terms. Since state permits – along with state regulations – set the legal standards which operate in place of direct federal requirements, major state permits (like state regulations) historically have been reviewed up-front. After-the-fact audits of state programs inherently come too late to ensure that permits are not issued which violate the minimum federal standards and thus create gaps in what should be nation-wide public health and environmental protection. Revising bad permits *before* they become law keeps communities downwind or downstream from being exposed to pollution that violates federal standards.

We also are concerned that your guidance could stall or stop EPA enforcement actions based on political or “turf” concerns that have little to do with environmental law or public health. We understand that state agencies are vital partners when it comes to implementing or enforcing national environmental standards. But as you know, the Clean Air Act, Clean Water Act and other statutes expressly preserve EPA’s right to take enforcement action against any person

violating those federal laws, and EPA may do so without first obtaining a state's approval. That "rule of law" applies in states that are authorized to administer federal programs.

Any new audit policy regarding EPA oversight of state programs should preserve both meaningful EPA oversight of state enforcement programs, and EPA's authority to take independent enforcement action when needed. In particular, the need for EPA to step in when critical environmental and public health risks are created by lack of state enforcement, or deficient state enforcement, recently was demonstrated by the situation in Flint. As pointed out in the attached letter to Assistant Administrator Bodine, we are concerned that the guidance issued thus far has been one-sided in emphasizing deference to state agencies without considering other values, like the protection of health or the environment, the need for a level playing field, or the public's interest in seeing violators held accountable under the law.

We hope that you will develop a more transparent process for the development of the audit policy. We request that we be sent copies of any draft policy when it is provided to ECOS and other State contacts and would welcome the opportunity to submit comments after our review. Finally, we think that this significant guidance ultimately should go through a formal comment period with the establishment of a docket for receiving comments.

Please feel free to contact Eric Schaeffer at the Environmental Integrity Project should you have any questions about our concerns. Alternatively, please have your staff contact Jeffry Fowley, EIP's consultant for state oversight and authorization matters. He can be reached at jfowley@verizon.net and 339-440-3855.

Sincerely,

Eric Schaeffer
Executive Director
Environmental Integrity Project
Washington, DC
eschaeffer@environmentalintegrity.org

Pat Gallagher
Legal Director
Sierra Club
San Francisco, CA
pat.gallagher@sierraclub.org

Brad Campbell
President
Conservation Law Foundation
Boston, MA
bcampbell@clf.org

Michele Merkel
Co-Director Food & Water Justice
Co-Director Climate & Energy
Food & Water Watch and Food & Water Action
Washington, DC
mmerkel@fwwatch.org

Betsy Nicholas
Executive Director
Waterkeepers Chesapeake
Bowie, MD
Betsy@waterkeeperschesapeake.org

Matt Mehalik
Executive Director
Breathe Project
Pittsburgh, PA
mmehalik@aqc@gmail.com

Joseph Otis Minott, Esq.
Executive Director and Chief Counsel
Clean Air Council
Philadelphia, PA
Joe_minott@cleanaircouncil.org

Joe Lovett
Executive Director
Appalachian Mountain Advocates
Charlottesville, VA
jovett@appalmad.org

Robin Schneider
Executive Director
Texas Campaign for the Environment and TCE Fund
Houston, Austin, Dallas-Fort Worth, TX
robin@texasenvironment.org

Priscilla Villa
South Texas Organizer
Earthworks
San Antonio, TX
pvilla@earthworksaction.org

Luke Metzger
Executive Director
Environment TX
Austin, TX
luke@environmentatexas.org

Jim Schermbeck
Director
Downwinders at Risk Education Fund
Dallas-Fort Worth
schermbeck@aol.com

Emma Cheuse
Staff Attorney
Earthjustice
Washington, DC
Echeuse@earthjustice.org

John Suttles
Director of Litigation and Regional Programs
Southern Environmental Law Center
Chapel Hill, NC
jsuttles@selcnc.org

Rachel Filippini
Executive Director
Group Against Smog and Pollution
Pittsburgh, PA
rachel@gasp-pgh.org

cc: Sam Sankar, Executive Director, ECOS