

D I A L O G U E

# Rethinking the Federal-State Relationship

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Summary

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Cooperative federalism can lead to more efficient and pragmatic environmental protection, and allow states to develop effective programs tailored to their needs and resources. Nevertheless, the future of the federal-state relationship in the environmental context is uncertain as state and federal priorities come into conflict: for instance, EPA's proposal to revoke California's authority to regulate tailpipe emissions of greenhouse gases. Recent reports have begun a discussion on the future of cooperative federalism and environmental protection, but significant questions remain unanswered. On February 28, 2019, ELI held a discussion of the opportunities presented by increased state autonomy in environmental protection, including panelists expert in interstate environmental coordination and with significant experience in environmental compliance and stewardship. Below, we present a transcript of the discussion, which has been edited for style, clarity, and space considerations.

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**Donald Welsh** (moderator) is Executive Director of the Environmental Council of the States.

**Julia Anastasio** is Executive Director of and General Counsel at the Association of Clean Water Administrators.

**Scott Fulton** is President of the Environmental Law Institute.

**Sylvia Quast** is Regional Counsel for U.S. Environmental Protection Agency Region 9.

**Donald Welsh:** I've been asked to give a brief overview of the Environmental Council of the States' (ECOS') work on *Cooperative Federalism 2.0*. I am new to ECOS, just starting in my role in January, but I do have 35 years' experi-

ence working in state and federal environmental programs. Over those years, I've been a witness to and a participant in a number of arguments about the appropriate roles for state and federal activity in environmental protection. Those arguments and debates have gone on under a number of buzz terms like top-down, command and control, unfunded mandates, phantom delegation, paradigm shift, and the environmental cop—whether he is or he isn't on the beat. While much seems the same today in those arguments, much has really changed over time.

ECOS has distilled the products of those historic debates and placed them in a modern context. In the 45 years since the environmental statutes were originally passed, the states have assumed more than 96% of the delegable programs and they have gained experience and expertise at running those programs. New tools and new technologies have been developed over the years that allow better use of data and better protection of the environment.

In 2017, ECOS published nine principles of the state and federal roles in environmental protection in *Cooperative Federalism 2.0*.<sup>1</sup> *Cooperative Federalism 2.0* is really a recalibration of state and federal roles that can lead to more effective environmental management at a lower cost. It's important to point out that this isn't intended as a battle over who's boss in environmental protection, but it's really an effort to define the roles, commensurate with the capacities and the strengths of each, to avoid working at cross-purposes and to avoid duplication of effort.

I will attempt to give the short bumper-sticker version of the nine principles included in *Cooperative Federalism 2.0*. But if you want to see the fuller explanation of the principles, you can find the report on the ECOS website.

Principle number one is national minimum standards. The report says that the U.S. Environmental Protection Agency (EPA) should continue to have the lead in setting

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1. ECOS, COOPERATIVE FEDERALISM 2.0: ACHIEVING AND MAINTAINING A CLEAN ENVIRONMENT AND PROTECTING PUBLIC HEALTH (2017), available at <https://www.ecos.org/wp-content/uploads/2017/06/ECOS-Cooperative-Federalism-2.0-June-17-FINAL.pdf>.

the national minimum standards, but that states need to be full partners in the development of those standards.

Principle number two talks about regulatory program implementation, and says that states should lead in program implementation where they are delegated. The feds should step in if states don't elect to take delegation of those programs or if the states are seen to fail in a delegated program.

Number three is flexibility. States should have the flexibility to identify the best ways to achieve the standards in their states, taking into consideration the unique geographical, ecological, social, and environmental conditions that they face. The feds should involve states early and often in the development of new or changed standards or program requirements.

Next is public engagement. States should engage the local governments, regulated community, the tribes, and the public in their implementation of environmental programs. The feds should have a shared role with particular obligations to Native American tribes.

Number five is enforcement. The states should have the primary lead for enforcement in programs and have access to call on the federal government where it's appropriate. The feds should oversee overall state program performance rather than individual case decisions, unless the program audit identifies a particular problem in a particular program.

The next principle is information. States should gather and share with EPA and the public information on how human health and the environment are being protected. EPA should review this information and routinely audit state program performance based on mutually developed criteria and take action when appropriate to make up for any shortfalls in how the state is implementing the program.

The next is innovation. States should be encouraged to pursue state innovations to achieve desired outcomes. The feds should convene and facilitate multistate solutions when there are particular interstate issues that cannot be addressed individually by a state.

Principle eight is shared services and implementation. The states should develop services, tools, and other resources to efficiently implement programs. The feds need to maintain and employ robust scientific research and data-gathering capacity that often is beyond what any individual state can do. It's very helpful and important to states' ability to carry out their mission.

The last principle refers to funding, and says that states should have adequate funding to implement the delegated programs; states should invest sufficient state resources to get the job done; and that the feds need to have adequate funding to meet those obligations to the states.

Since that work has been done, EPA has engaged effectively with the states on cooperative federalism and has identified cooperative federalism as a fundamental priority in the Agency's strategic plan. Some of these principles that I mentioned at some times in some regions and some

states have already been realized and have been the way that people have been doing business. Others are a little more aspirational and will take more work by the states and EPA to make them become standard practice.

We do have the jointly governed *E-Enterprise for the Environment*<sup>2</sup> between the federal government and the states that is helping to pave the way with some of the new tools and processes and procedures that will give life to those principles. There are a number of pilot projects underway and we're planning for some more pilot projects. You can see more information about those pilots on EPA's website.<sup>3</sup>

Of course, bringing this to reality will involve a number of key challenges, and I think the other speakers may touch on some of these. Ones that immediately come to mind are finding appropriate metrics to measure program performance and environmental and human health conditions. We need that to make sure that the public has confidence that a new evolving environmental protection system is actually working.

Another key challenge is how regional and national consistency, which is often referred to as the level playing field, can be harmonized with state flexibility and innovation. And then last on my list is institutionalization. We want to make sure that cooperative federalism is not just a one-time thing. It shouldn't be a partisan process. It shouldn't be linked to specific individual administrations. It needs to be a fundamental change in the way the environmental protection system is managed.

So, those are some challenges that are apparent. I'm sure there are more. It will be a work in progress. Many of us will be continuing to spend our time trying to give life to the principles that are embodied in the ECOS document. I will stop there and turn the presentation over to the first panelist, Scott Fulton.

**Scott Fulton:** Thank you, Don. It's my pleasure to be part of this panel to talk about such an important topic and such a fundamental question as how we do this work. It falls to me in particular to talk about a report that the Environmental Law Institute (ELI) put out this past fall called *The Macbeth Report: Cooperative Federalism in the Modern Era*.<sup>4</sup> It was named after one of the iconic figures in our profession, Angus Macbeth, who passed away in 2017. There was a clamor of interest in the ELI membership as well as other organizations like the American College of Environmental Lawyers to do some things in Angus' memory and honor. And because Angus was deeply involved in the development of the architecture that we're talking about here, we thought this would be a suitable task to undertake in his memory.

2. E-ENTERPRISE FOR THE ENVIRONMENT, <https://e-enterprisefortheenvironment.net/> (last visited May 5, 2019).

3. *E-Enterprise for the Environment: E-Enterprise Portal*, U.S. EPA, <https://www.epa.gov/e-enterprise/e-enterprise-portal> (last updated Apr. 12, 2018).

4. DAVID CLARK ET AL, *THE MACBETH REPORT: COOPERATIVE FEDERALISM IN THE MODERN ERA* (2018), available at <https://www.eli.org/research-report/macbeth-report-cooperative-federalism-modern-era>.

There are some contextual things that are in the background or maybe even the foreground of our reality as we approach a question like cooperative federalism. I would say that our starting point really was this *Cooperative Federalism 2.0* document that ECOS has put out.

First, despite significant advances and changes in public and private environmental management systems, the basic framework for the state-federal relationship remains virtually unchanged from how it looked some 30-plus years ago when I first started doing this work. The second is that there are near-term and longer-term drivers on the resource side that kind of push this issue in the here and now.

The Donald Trump Administration's rescaling of EPA is premised in part on the idea of devolving additional responsibilities to the states. That's an important pressure point, but it occurs against a backdrop of longer-term decline in public resources for this work at the federal government level. For better or worse, some of that pressure is being replicated as well at the state level. So, this idea of finding more efficient ways of getting this work done is upon us, and it really does behoove us to deal with it in a serious way.

The third contextual point that bears mention is the relentless march of technology and the promise that technology offers, particularly the evolution of sensing technology, to allow for a new generation of accountability measures for public and private actors alike.

The final contextual point is the unfortunate reality that exists with our legislative process at the national level. With the change in leadership to the U.S. House of Representatives, we've moved from the circumstance of gridlock to effective stalemate. So, the idea that we'd be able to legislate changes in an area as sensitive as the state-federal relationship is probably not realistic. As we think about reform, as we think about adjustments, we probably need to take as a given our legal architecture as it exists now.

Again, our conceptualization of this project—that we called in its broad form, the Macbeth Dialogues—was to start with this *Cooperative Federalism 2.0* conceptualization and focus in particular on what we saw as the primary game-changer idea in that document: the notion of moving from a matter-by-matter federal oversight system to an audit system that would have embedded within it much greater state flexibility in the daily workings of the environmental protection machinery. We saw that as an important starting point to do some further sorting and sifting.

So, the key events that transpired in the Macbeth Dialogues are as follows. We had a Chatham House Rule gathering in the summer of 2017. It was a great collection of folks with high-level leadership experience at the state level, at the federal level, and in some circumstances both, to glean their perspectives in a closed-door environment. If you look at *The Macbeth Report* as it exists on the ELI website, you'll see a rendering of that conversation.

We then took that rendering and carried it into a couple of public meetings that occurred in the fall of 2017 to stimulate some public dialogue and debate about these

questions. That was then followed by a survey instrument that we put together and used to survey the ELI membership, which is several thousand strong, the members of the American College of Environmental Lawyers, federal and state officials, business and trade group representatives, private law practitioners, consultants, and members of the nonprofit community.

What's noteworthy about the survey and the material and perspectives that it generated is that nearly one-half of the respondents reported having more than 30 years of experience in environmental law and policy, and nearly three-quarters of the respondents had more than 20 years of experience in environmental law and policy. So, this is a very sophisticated group of respondents and not surprisingly the commentary is likewise sophisticated. This expert community served through the survey process to illuminate the major friction points between federal and state regulators, the strengths that states bring to environmental programs, hesitations about giving states more flexibility, appropriate EPA roles, and other important issues.

There are some caveats about *The Macbeth Report*, some things that it does not do. It does not attempt to address the reforms that are under consideration at EPA regarding how the Agency does its science work. That was simply beyond our scope and means. Also, while it does discuss the importance of a budget alignment with any reconfigured roles and more generally the importance of budget support for the environmental protection mission, it does not provide an in-depth analysis of the significant downward trend in EPA resources over the past half-decade or of the parallel pressure on many states' budgets.

It also does not address the significant talent drain that EPA has experienced in recent years as a result of retirements and budget and other pressures. A 21st-century vision of environmental protection, whatever the federalism architecture, will certainly require a modernized EPA operating at a high capacity with leading, well-trained experts supported by state-of-the-art equipment, operations, and management.

Some key findings in the report include the following. First, there is considerable support for the idea that our environmental systems and our environment protection system in particular may be ready for some fundamental realignments. The qualification to that is that there's some ground to be traveled in terms of gaining the trust necessary to allow for those reforms. Some of that trust challenge is in the relationship between government and the public that the government serves; public confidence is not at its zenith at this moment. Thus, reform in a space that is sometimes politically delicate like this will be challenging without first overcoming those trust reservations.

That said, there is considerable enthusiasm for giving states with demonstrated capabilities more independence and flexibility. There are important changes behind that: the changes in state capacity and sophistication, the change in technology, and also changes in business behavior and

expectations. All of these point in the direction of some realignment opportunity.

To give you an example of how the survey results look, when asked for their opinions on the following statements, 71% of respondents agreed or strongly agreed that where states can do a better or as good a job as the federal government, the federal government should stand down. Eighty-five percent of respondents agreed or strongly agreed that in delegated programs each state should have the flexibility to determine how best to meet minimum national standards and to establish more stringent standards as appropriate. However, there also were deep concerns about what proposed reforms might portend.

More than 60% of respondents were concerned that the race-to-the-bottom phenomenon that animated the formation of the statutes in the first place still exists in theory, and want to avoid seeing it exist in practice. This worry that states, in the effort to attract and retain industry, will relax their standards or relax their implementation of their standards persists in a fairly significant way—frankly, more significantly than I expected to see in the responses to the survey.

Also, more than 60% of the respondents believed that federal intervention should not be limited to those circumstances that are high-risk in nature. In other words, there continues to be a preponderance view, at least in this respondent community, that the gorilla in the closet—that is the enforcement machinery and the oversight machinery at EPA—needs to cast a shadow that is broad enough to induce the kind of performance that's desired broadly and not just limited to high-risk scenarios.

There is resounding support for continued EPA leadership in some particular areas. Ninety-three percent of respondents agreed or strongly agreed that EPA still has a critical role to play in environmental science and technology leadership. Ninety-one percent of respondents agreed or strongly agreed that interstate issues warrant a greater federal role. Ninety-six percent of respondents agreed or strongly agreed that EPA should continue to lead in setting standards—and national minimum standards at that—to protect human health and the environment. But also that the states should be engaged as increasingly important partners with the federal government in that pursuit.

There was considerable support in the respondent community for the idea of focusing on some select cooperative federalism reforms rather than lurching in the direction of wholesale change, in part because this was seen as a firmer bridge that all parties can cross with a greater measure of confidence.

So, taking all of that input and feedback, and I've just scratched the surface of it, there really is a lot of useful material here. There were some suggestions from ELI, as we looked at this, of things that could perhaps be done or at least entertained. One, we think that more could be done to address the so-called whipsaw effect, this idea of regulated entities finding themselves caught in a tug-of-

war of sorts between federal and state regulators pulling in slightly different directions, imposing slightly different expectations. A few ideas along those lines are outlined in the report. One is to do more with the ombudsperson role, to create a navigator if you will, who can be activated by a member of the regulated community that's caught in the whipsaw. We think that might be helpful.

There's an idea here about trying to focus perhaps the inspector general community's attention, both federal and state, toward poor implementation decisions as a means of progressively shifting the focus toward accountability in government decisionmaking rather than putting the primary onus on the regulated community, on private businesses who are pulled between government regulators. Interestingly enough, this is a model that can be found in the framing of the Chinese approach to environmental protection. If we want to pursue it, there may be some reference points there worth looking at.

Last on this topic, there is a need to establish transparent deadlines for decisionmaking and the consequences of not meeting those deadlines in a more across-the-board fashion. The collective experience suggests that where those things are part of the hardwiring of a regulatory program or they're built into regulations, they tend to drive outcomes in a way that pushes down dissent and reaches for compromise. We ought to learn something from that and harness that dynamic more broadly.

A second key finding: our thought is to pilot the audit concept first, to use piloting to test, assess, and adapt the concept. It strikes us that permit review might be a good starting point for this. Part of the reason for that is that there are other mechanisms, including judicial review of permit decisions, that provide safeguards if mistakes were made. This is not so readily apparent in the enforcement setting.

Enforcement tends to be a little dicier in some respects for other reasons as well. So, our thought is to maybe test out the audit concept in the permit context and use that testing as a way to gain experience and public confidence. That said, we think there are some ways to refine enforcement that bear consideration, including demarcating more clearly matters that present unique federal interest and conversely matters that are less sensitive to the federal government and arguably should be less subject to federal intervention.

We're wondering whether, in some circumstances, allowing states a first option to proceed with the enforcement action even in matters involving unique federal interest is worth looking at. The fact that there's a unique federal interest presented doesn't necessarily dictate what the response mechanism ought to be for protecting that interest; even though we've tended to default in the direction of parallelism on that in the past, we're wondering whether that is a given.

Also, we would suggest implementing a transparent, across-the-board, notice-and-comment procedure for enforcement settlements to deal with the so-called "sue and settle" issue—a pesky issue that we think is noisier

than it needs to be. This is part of the regulatory framework under some of the statutes. In our view, there's not a compelling reason not to extend it, and it actually should reduce the noise if it were extended.

The final point here, and perhaps the most challenging or provocative idea in the suite that we offered on enforcement, is to look at whether we can refine or redefine how we think about what constitutes compliance and non-compliance. What's on our minds here is the fact that the proliferation of environmental requirements has made it exceedingly difficult to track absolute compliance with any measure of confidence. We have a highly evolved system in most businesses at this point around environmental management, and these systems were intended to ferret out and correct environmental anomalies as they emerge. We're wondering whether instead of talking about absolute compliance and tracking compliance from that vantage point, we could think about an actionable noncompliance standard that will have us tracking noncompliance only if it's not corrected within a given period of time and then have that increasingly influence all of these dynamics including the question of federal intervention.

The third notion here is the more liberal use of elevation or dispute resolution protocols. Our sense is that where those things are part of the regulatory framework they tend to force decisions at lower levels because no one on either side of the debate is interested in having an issue elevated. It's a dynamic that we could probably harness more fully.

Fourth is the notion of pairing resources with responsibility realignments. We, like ECOS and others, were very distressed by this Administration's choice to cut not only EPA's budget, but also state categorical grants at the same time. It's a little hard to reconcile those thrusts.

Fifth is the suggestion to give downwind/downstream states a greater voice in federal decisionmaking. This tracks back to the notion that federal engagement is at its most robust and meaningful in the interstate context, as the constitutional premise for federal engagement emerges from the Commerce Clause. What if we were to involve downstream/downwind states in a more material way in permit decisions and in noncompliance correction associated with upstream/upwind activity? This might again start to shift the federal focus in the direction where many see it as needing to go.

Finally, whatever we construct needs to foster proactive private environmental governance. This is a parallel or a corollary system that has emerged that we are convinced is durable. It has its own force that is driven by considerations other than just fear of government intervention. We're not doing the job we could in harnessing that. We're doubly not doing it because technology is not informing those choices in the way that it might. We would encourage us all to be thinking in the direction of technology-based, private environmental governance-rich parallels that will make the task of public governance in this space less onerous and will reduce the pressure on state-federal relationships.

**Sylvia Quast:** One of the things that really struck me about the cooperative federalism debate, and maybe it's symptomatic of the times we live in, but everyone tends to move immediately to extremes. And suddenly here's the discussion of cooperative federalism and the first thing they think is, oh my gosh, EPA is going to totally abdicate all responsibility. The states are going to take things over, and it's going to be a race to the bottom, which is what got us into having these big federal environmental laws in the first place, like the Clean Water Act (CWA), the Clean Air Act (CAA), the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). That's not what cooperative federalism is about. It really can't be about that given the structure of environmental laws we have in this country.

I do think that EPA will continue to lead. It has to. These are the times we live in, and I think EPA is going to continue to play that role. But the states are obviously going to be an important part of that as well.

It was clear that federalism was a key part of all the major environmental laws, right? And we now have a situation where most of the states are largely responsible for implementing the CWA, the CAA, RCRA, and so on. They're playing that key role. EPA is going to continue to be there, but we are and we're going to have to keep working with states on that.

One of the things I'm struck by in thinking about this whole conversation is that 18 or 19 years ago, I was writing speeches for John Cruden when he was the acting assistant attorney general at the U.S. Department of Justice (DOJ) in Washington. One of the key features that we put in every single speech was the enforcement pyramid and talking about how the base of the enforcement pyramid, the largest part of the environmental enforcement that's done in the country, is done by the states and localities. That's in part because of the setup of the federal environmental laws.

So, the notion that the states and localities aren't playing an important role here and that we're not working for states, that's just not the reality that we've been living in now or for a long time. A question that people are talking about is do we need to do some tweaks to that, thinking that there might be some wholesale change where the states are just going to take things over. I don't think most states have the resources to do that. Correct me if I'm wrong, Don. There are some states that have resources, for example California. But we have other states that don't have the kinds of resources that California does.

Thus, the notion that the states are going to step in and take over and EPA is just going to stand back and not be doing much of anything, I just don't think that's realistic. Frankly, people want that type of protection, so I don't see that working politically from the point of view of states either. People don't want to live in states that are polluted and full of business establishments that are engaging in all kinds of behaviors that make it unsafe for their children, for example.

An example of this is in California, the Central Valley, which is kind of the middle part of the state and typically more conservative. But still, the environment there is a huge concern for people. They want a place where they can raise their children and they don't have to worry about their kids getting asthma because of the air quality that they're living in. The notion that we're going to be racing to the bottom I think is just not realistic.

The other thing that I wanted to mention here is that none of us has unlimited resources. So, we've got to work together to figure out how to make best use of those resources. It's going to vary from state to state. Some states have more resources than others, but I think we all have to work together. We certainly don't have unlimited resources here at EPA. I don't see that changing anytime soon.

What we've been seeing here is thinking about how we can do a better job and being a little bit more systematic at how we're coming at this. Part of this for me is I started here at Region 9 about five years ago. When I came on board, we were already working pretty closely with our states in terms of what we were doing in enforcement, and trying to be collaborative and cooperative in how we were looking at enforcement issues.

It's been true for a long time that DOJ has insisted to EPA that we'd be working with states when we're thinking about bringing enforcement actions and talk to the states if they want to be a part of it, particularly in states that are delegated. We've been doing that for a long time.

But I think what you're seeing right now is EPA taking a more systematic look at this and thinking about the circumstances in which we want to be working together. Where does it make sense to have EPA playing a bigger role? Where does it make sense for the states to be playing a bigger role? The product of that was the interim Office of Enforcement and Compliance Assurance guidance on enhancing regional state planning and communication on compliance assurance work in authorized states, which is the memo that Susan Bodine put out on January 22, 2018.<sup>5</sup> It lays out the thinking about this engagement. I do want to note that this is an interim document. We are in the process of talking about that right now and seeing how that works.

One of the key things that's discussed in that memo is periodic joint work planning. That's basically having all of the regions talk to their states on a regular basis—for some states as much as quarterly, for other states not quite so frequently, semi-annually or on an annual basis at least. It's working with our states to figure out our big compliance problems in each state; what we need to be doing; how we

can best use our resources here at EPA; states' resources to address those types of issues; and having a focused conversation on that.

Scott and I were talking—and this is probably true for Don and Julia as well—about how it seems like 75% of our day is focused on whatever the latest crisis or emergency is, and maybe 25% of our time is spent having bigger thoughts about how to do things better. I was laughing and Scott was saying that I've lost 25% of my time.

What this memo is really doing, for lack of a better word, is institutionalizing and saying let's carve out some time and make sure that we're sitting down with our states rather than dealing with things on an emergency basis. Talking about what are the big issues, what do we need to deal with, what are we facing in California, what are we facing in Nevada, what are we facing in all our states? I'm thinking about how we can do a better job of addressing those issues.

One of the things that the memo talked about is sharing a list of planned inspections. We're not required to do that, but I can tell you that we have been doing that with our states because we want to coordinate with them. If we're going to be doing an enforcement action with them, it makes sense to be working from the very get-go on things and being together on an inspection, for example. So, our inspector is talking about what issues really need to be addressed.

We also want to work with our states on program audits. We come in and take a look at how a state is doing when there are concerns or when there are not concerns. We have regularly planned state regulatory frameworks where we come in and take a look at what people are doing and reviewing how their programs are being implemented, and we give our thoughts on how things could be improved. But it is a chance also for us to talk about how we can work better together.

We've been doing that for a long time in Region 9. I think it's a good idea generally to have something like that more memorialized and out there, and to have people thinking about it as opposed to being some sort of last minute thought of, my gosh, we haven't really sat down to talk to some key states in our region about what their needs are and how we can better work together.

Another thing that the interim guidance talks about is state primacy in authorized programs and the importance of respecting state primacy on these things. But to me, the notion that this is some kind of new, dramatic change, I think it hasn't really conformed to the reality of how we've been living for years now in the environmental sector. That's what I was talking about in terms of the enforcement pyramid. I think the reality is that the states have been doing the vast majority of environmental regulation and enforcement for many, many years now. There's stuff that goes on, smaller actions, on a daily basis. The states and the localities are much closer to the ground and aware of what's going on. So, I think the reality is that this has been going on for a long time.

5. Memorandum from Susan Bodine, U.S. EPA Assistant Administrator, to Regional Administrators on Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States (Jan. 22, 2018), available at <https://www.epa.gov/sites/production/files/2018-01/documents/guidance-enhancingregionallstatecommunicationoncompliance.pdf>.

It's also complicated. I think part of what the memo does a good job of recognizing is that you can't just say, oh, the states have primacy in these various authorized programs, and so EPA isn't going to be doing anything. That's never been how it's worked. I don't think that's how it's going to work in the future, partially again because of limited resources. I think a lot of states are really challenged.

One thing that comes to mind is someone who's worked in the U.S. Attorney's Office or has done criminal enforcement for years. My sense is that a lot of states don't really have much of an environmental enforcement program in the criminal arena, but rather they tend to be much more focused on the civil side.

I bet you just about every lawyer has heard about a situation where a client is engaging in behavior and you're just shaking your head thinking, you know, this is really serious stuff and it shouldn't be happening. It is criminal. I think of what one of the justices of the U.S. Supreme Court used to say about pornography: you know it when you see it. And I certainly have cases like that where I'll hear about a factual circumstance, and I'm like, whoa, that's criminal. Someone has to be able to call that, and EPA does have the ability to do that nationwide. I think that's a real advantage.

But this is all a way of saying, in talking about state primacy, that it's complicated. You can't just say the states have primacy and we'll just sit back and do nothing.

One circumstance that the interim guidance lays out in terms of how it gets complicated is emergency situations. There was a situation in December in California where we had a facility that was violating RCRA left and right. We had to go in and do something right away. We were able to coordinate with the state on that and work with them. But there are situations where there isn't always enough time to coordinate and take care of a real immediate threat to public health and the environment. So, that's a situation where the ideal of the state having primacy in taking care of things has to be modified somewhat.

Another category is response to state requests for assistance. We have a request right now from one of our states for us to come and do some enforcement work in the stormwater area because they want to get something done in short order or they're a little bit short-staffed and they could use our help, and we are happy to help out on that.

Another category is when EPA has specialized equipment, such as forward-looking infrared cameras. When the states don't have that type of equipment and they don't have the necessary funds, we are happy to help out in those circumstances. The guidance outlines circumstances like that where we should work with our states. And I've already talked about criminal activity in dealing with that.

Another area is federal and state-owned or -operated facilities. We had a situation with one of our states and their Department of Transportation. It was a disaster when it came to stormwater. It was challenging because of intrastate relations for the state's Department of Environmental

Protection to be dealing with the Department of Transportation on that and then we came in. We weren't the gorilla in the closet. We were the gorilla at the negotiating table. There are situations like that where it's important that we are there and available to play that kind of role, and we can carry that kind of weight that's hard for the state to do given internal and political and other dynamics.

Then there are the harder situations that no one really likes to talk about, because it's not very fun, but there are some states with program deficiencies and things aren't where they need to be. The guidance outlines that we need to get involved there as well.

We had another situation recently in one of our states, where the state said it wanted to take over the pretreatment enforcement program in the state. We said, okay, how many people do you have to do that? They said, well, we have one-and-a-quarter inspectors for the entire state. We were like, wow, that's a big program to be taking on and you don't have a lot of people, you only have a person-and-a-quarter. You don't have a lot of experience in that area, maybe we can work together on that.

That's the role that we're working on to figure out, if there is a way that we can address the challenge in really building up our program and working with the state to build up a program so it can step in and do that type of enforcement.

If we've got a state that has the people, and the knowledge, and the experience to step in, then we're happy to let them be working on that part of the base of the enforcement pyramid as well. But if a state comes to us and says, we want to do the enforcement in this area but we don't have the people or experience to do it, then we need to talk more about how that's going to work.

If there's a situation where there's significant noncompliance, that's another circumstance where there's a role for us to play. We're lucky in Region 9 because we don't really have anyone that falls into that category. I think that may be an issue in other states, but we don't have to deal with that here.

Another area is multistate facilities. For example, I was recently involved in negotiations under CAA §112(r) with Chevron. We entered into a consent decree. We did have one authorized state, Mississippi, participate on that, but it is a nationwide consent decree that we are able to put together. Again, you want to have a level playing field, so it's really helpful to have EPA involved and working with the state. There's no reason not to. But it's important for us to play that kind of role, and ditto for cross-boundary impacts because there may be a state that wants to accommodate an industry and thinks it's no skin off its back because the problems that are going to result from what the facility is doing are going to be felt by another state instead. I think EPA has an important role to play in that as well.

Finally, there's the category of national compliance initiatives in developing areas nationwide where we really need to be focusing our enforcement efforts. That is some-

thing where we get a lot of state input beforehand to figure out what to do. So, it all fits within that cooperative federalism framework.

These are the various areas that are laid out where state primacy in authorized programs may need to be tempered somewhat—not in really dramatic ways, but in ways that make sense for all of us in terms of making sure that we have a level playing field in place.

We are literally in the middle of evaluating that interim guidance document that I've been talking about and figuring out how it's working. Does it need to be modified in any way, strengthened in any way, changed around? We had a call yesterday where all the regional councils were talking about their experiences in implementing the interim guidelines.

What's been interesting to me is there are some exceptions but, by and large, it doesn't mean that things have really changed that dramatically. It's been kind of a re-upping and reaffirming of our commitment to work with our states because, frankly, we have to since that's the resource situation that we're in and that's the structure of the environmental laws in the first place.

To close, I'm really glad that we're having this dialogue. But I think for those who are concerned about there being this huge dramatic change in how we're carrying out the environmental laws in this country, I don't think folks really need to worry about that. I think that we're going to continue to be working together.

**Julia Anastasio:** I'm going to shift gears and give you some examples from my experience representing the members of the Association of Clean Water Administrators (ACWA) in terms of how *Cooperative Federalism 2.0* is becoming more real. To start, I'll give you an idea of who my members are. These are basically the state water quality program managers, those folks who are primarily focused on your surface waters within your states. We represent all 50 states and six interstates. Really, we are the national voice in the District of Columbia for the state water quality program managers. We work in partnership with ECOS, as well as groups like the Association of State Drinking Water Administrators and others.

Today, I'm going to take the themes from ECOS' *Cooperative Federalism 2.0* document and make them a little bit real with some examples, and then talk about opportunities to move these concepts forward. The one thing I'd say, and I think all of the other speakers have hinted at it, is this is not a new concept. It's embedded in the environmental laws. It's something that just about every administration has said they are a defender and supporter of and they want to partner with the states.

It's just a matter of degrees of how well we have achieved making cooperative federalism real. It's one of those issues where it's sort of one step forward, two steps back. It may be working in one sense and not working someplace else. But I do think ECOS and ELI have done a good job of re-elevating the conversation and putting some context

around it again to try to move these things forward and maybe give it a little more heft.

Primarily, states are the implementing and enforcement entities, but we do need that strong federal partner to establish national minimum standards so that we'll have that level playing field and so that it's not too messy, because cooperative federalism is, in fact, messy. We need a strong federal partner that can do the robust and defensible science research that states do not have the resources, whether it's financial or expertise, to do. Filling those gaps has been mentioned previously where states were not living up to their obligations or when they may need help, such as with tools, resources, and funding. We're looking at engagement and collaboration, flexibility and innovation.

To start, I think one of the really good things that this Administration has done is that they are in fact working to institutionalize these concepts. Again, I've said other administrations have talked about it, but I haven't necessarily seen them putting words on a page and sort of direct the staff within the Agency to move forward.

We have the Andrew Wheeler memo<sup>6</sup> that came out earlier this year that talked about oversight of federal environmental programs and again generally calls for EPA to defer to those state partners. It responds to the ECOS *Cooperative Federalism 2.0* document and mentions that withdrawal of program implementation authority is the last option. It's sort of a big deal to go in and say to a state, you are absolutely not living up to your obligations and we're going to take this program back from here.

States are the primary implementing and enforcement entities. One recent example under the water quality standards rubric is that Missouri has just had some new and novel approach to deal with their nutrient criteria within the state. This new approach deviates from a 2013 guidance on integrating causal response parameters into numeric nutrient criteria. The Agency determined that the Agency guide is not mandatory for states and that the Missouri Department of Natural Resource's rule provides a reasonable approach to achieve the same objective.<sup>7</sup>

But at the end of the day, the Agency decided that Missouri's approach ultimately gets toward the legal requirement of improving water quality standards even though it's a little bit new and novel. They intimated that even if it may not have been the approach that the federal agency would have taken, it's still a valid approach and they've approved it. We'll see if this makes other states feel comfortable in trying these new and novel approaches.

We've already talked about the Bodine memo, so I won't go too much into it, but that's another really great example

6. Memorandum from Andrew Wheeler, U.S. EPA Acting Administrator, on the Principles and Best Practices for Oversight of Federal Environmental Programs Implemented by States and Tribes to Administrators (Oct. 30, 2018), available at <https://www.acwa-us.org/wp-content/uploads/2018/11/State-Oversight-Memo.pdf>.

7. U.S. EPA, *Guiding Principles on an Optional Approach for Developing and Implementing a Numeric Nutrient Criterion That Integrates Causal and Response Parameters* (2013), available at <https://www.epa.gov/sites/production/files/2013-09/documents/guiding-principles.pdf>.

of institutionalizing these concepts. Susan also reaffirmed a lot of it in her testimony before the House. So, we're feeling relatively confident that that relationship between state and federal enforcement is working pretty well.

In terms of having a strong federal partner, again, all of us have talked about and recognized the fundamental aspect of this. We need a strong federal EPA that can establish national minimum standards so that there is a level playing field across the states.

One area where I think it might be too soon to say whether or not it's a good example of cooperative federalism working is with regard to the per- and polyfluoroalkyl substances (PFAS) conversation that's been going on in the drinking water context. These are chemicals that end up persisting in the environment for quite some time. Many states have been calling on EPA to issue either a maximum contaminant level for their drinking water standards or a national PFAS standard.

EPA has been a little slow to do this, and there's a very legitimate reason for that. It's a very complicated issue. It's going to take some time to get it through. But that's one place where EPA can really take the lead and help the states out instead of having individual states throughout the country develop their own standards and then end up with this uneven playing field where you have different standards among different states.

Similarly, in terms of conducting robust and defensible science, I know the members of ACWA have been working very closely with EPA as they work to develop some numeric nutrient criteria for lakes and reservoirs. Part of that has been testing a model that EPA has been working on to see if it will in fact enable a state to create these numeric nutrient criteria values. It's been a really good relationship. EPA has taken a lot of feedback that the states have provided, and hopefully that will end up with a much more robust model at the end of the day.

Again, PFAS is another really good example of conducting robust and defensible science. I think we all know or suspect that these chemicals are toxic and pretty bad for us, but we don't actually have a lot of data to demonstrate it, as opposed to, say, the known hazards of arsenic. So, a state may be in the position of having to decide where to shift resources with regard to whether they focus on PFAS or on arsenic. Having some science will enable the states to make more important decisions and really meet the needs of their citizens.

A good example on defensible science would be moving the water reuse conversation forward. There are a lot of questions about water reuse and whether or not it's safe in certain circumstances, especially if you're talking about direct potable reuse. This is an area where the states could use some help with regard to the science backing up the safety of these resources.

Filling the gaps for states that may not be living up to their requirements. Flint, Michigan, is a poster child for that. There were many failures on all levels of government,

but it is an example of where the federal government can come in and provide that backstop and assistance.

With regards to tools and templates, there's an awful lot of work that goes on collaboratively between groups like ACWA and ECOS on identifying these tools or templates or areas where there are actual resources that could help states move forward. I know at ACWA we've worked with our partners at the Association of State Wetland Managers (ASWM) and EPA on putting together a template to develop a water quality criteria for wetlands. That was an area that was kind of sticky for some states. This template has helped out a little bit in terms of getting them to move forward. We're also doing some work on the variance front under the CWA to again try to design a template that makes it a little easier for states to evaluate the feasibility of issuing a variance moving forward.

Engagement and collaboration are really important and I think something that I've probably spent a good portion of my time talking to EPA about in terms of our expectations. This is another area where it works really great sometimes and other times not so much.

We've been working with EPA since the last administration and this Administration as they develop some recreational criteria for cyanotoxins. These are the compounds that ultimately end up where you have a green slime in your lake or river because of a horrible algal bloom.

EPA originally came to the states and said that they were going to issue a criteria value. My members counseled them that for some states that might not be a useful thing for them to have. So, after discussions, we ended up with this hybrid approach in which a state could either issue a recreational toxin advisory similar to a beach advisory or an actual criteria.

We're still waiting for the finalization of this work, but I know we've had a lot of conversations about it. The states are feeling very good in the sense that their partners at EPA heard their concerns and worked to provide some of that important state flexibility because, ultimately, what we're all trying to get at is improved water quality at the end of the day.

Another good example of engagement that's been going on with the Agency is the question of CWA §404(g), which deals with states assuming the §404 dredge and fill program. Right now, there are only two states that have delegation under the §404 program, Michigan and New Jersey. But there certainly, over time, have been many more states that have been interested in thinking about whether or not assumption of the program is something that would make sense for their priorities.

ACWA, ECOS, and ASWM in 2013 or 2014 called on EPA to form a federal advisory committee to begin to think through these issues. EPA took us up on that offer. We ended up last year with a final report from the Assumable Water Subcommittee.<sup>8</sup> And we've seen an awful lot of

8. NATIONAL ADVISORY COUNCIL FOR ENVIRONMENTAL POLICY AND TECHNOLOGY, FINAL REPORT OF THE ASSUMABLE WATERS SUBCOMMITTEE

good signals from the current Administration. Whether it's actually just signals, they basically said they plan on clarifying these regulations so that those states that think this might be an approach that they would like to take know what the process will be and what it will take for them. So, we've had some initial conversations. I imagine those conversations will continue as the Agency begins to think through some of these details in more depth.

I can't give a talk these days without mentioning "waters of the United States," but that's another example of engagement where it worked well at times and not so well at times. But in general, agencies have sort of come to the states. Obviously, this is a fundamental definitional question within the CWA that will impact how states implement the federal CWA. But also in some instances, there are state obligations under state laws. So, the states have been actively engaged in the discussion. This is one of those areas where there are times we'd like a little bit more engagement and collaboration with the Agency given how fundamental the issue is for us.

Flexibility and innovation is another really important concept for the states. The total maximum daily load (TMDL) vision was something that occurred in the last administration.<sup>9</sup> The idea was to give states some flexibility with regard to their TMDL obligations under the CWA. Really, it's about identifying priorities and potential alternatives to going through a full-blown TMDL process.

The states that have been engaged in it have been pretty happy because, as we all know, TMDL is pretty difficult to put together. But some have not seen it moving forward as quickly as they would like. Don mentioned the E-Enterprise. This e-reporting rule is a component of the E-Enterprise efforts. This was a first-step area focusing on the national pollutant discharge elimination system program. We're trying to bring EPA into the 21st century.

This would allow electronic filing of discharge monitoring reports and other reports. And the states like the idea of electronic filing and moving forward to follow that. This is one area where there's a feeling that EPA was moving ahead maybe without necessarily respecting the realities on the ground for our states in terms of getting the new systems up in place and meeting deadlines and those sorts of things. Ultimately, we seem to be on track and things seem to be working.

Variances in and of themselves are pretty innovative tools under the CWA and provide flexibility for regulated entities. They haven't been used very much, but EPA has been giving signals and providing implementation guidance and help to the states that may in fact want to use variances as a means of helping their regulated communities.

The recent EPA memo on improving water quality<sup>10</sup> is another institutionalization of some of the cooperative federalism concepts that the Agency has recently put out. It's all about flexibility and innovation and promoting market-based mechanisms to improve water quality. So, it's not entirely focused on your traditional context of water quality trading, but it does (1) provide states with a bid signal that trading is something that will be supported by EPA, and (2) provide some context and guidance around the issues that states should think about as they're trying to move water quality trading forward.

As I said, I don't see cooperative federalism as a new concept. I think it's getting a little more play these days. It's out there in the consciousness. So, whether or not most of us or those folks who are not practicing in this field ever think about it, I don't know. But the progress I see is the institutionalization of these concepts, whether it's the Wheeler memo, the Bodine memo, or other pieces of concrete paper evidence that the Agency is committed to seeing these concepts move forward. But again, I do think a really good movement has been made in that direction.

We need to continue to apply the concepts of cooperative federalism. I put the burden on groups like ECOS and ACWA and others. We need to keep reminding our partners that there is a wealth of expertise at the state level, and information that can be shared to help us either create better programs or avoid unintended consequences and those sorts of things.

Then ultimately from the CWA side, I'd like to be seeing some other federal agencies embracing the concepts of cooperative federalism. The U.S. Army Corps of Engineers (the Corps) and the Federal Energy Regulatory Commission (FERC) have little pieces where they're involved in CWA decisions. We have not seen as much of a willingness to commit to working collaboratively with their state partners as, say, our friends at EPA. So, I see that as an area where we can really begin to make some more progress, and primarily the Corps, for it has to do with CWA §401 and water quality certifications of federal licenses. It is a hot topic these days.

In conclusion, I would also agree with Sylvia. I don't think this is going to be like all of a sudden everything's going back to the states and it's going to devolve into rivers on fire again. The states do not want their natural resources to be compromised any more than the federal government does. What it always comes down to is the balancing of choices and risks and priorities and politics. That's why I think ultimately cooperative federalism will always be messy. But as long as we're trying to move the ball forward, I think we do make some improvements in the relationship and ultimately in a better public health and environmental system.

(2017), available at <https://www.epa.gov/cwa-404/submission-assumable-waters-subcommittees-final-report>.

9. *New Vision for Implementing the CWA Section 303(d) Impaired Waters Program Responsibilities: State Partnerships*, U.S. EPA, <https://www.epa.gov/tmdl/new-vision-implementing-cwa-section-303d-impaired-waters-program-responsibilities> (last updated Sept. 7, 2018).

10. Memorandum from David P. Ross, U.S. EPA Assistant Administrator, to Regional Administrators on Updating EPA's Water Quality Trading Policy to Promote Market-Based Mechanism for Improving Water Quality (Feb. 6, 2019), available at <https://www.epa.gov/sites/production/files/2019-02/documents/trading-policy-memo-2019.pdf>.

**Donald Welsh:** We have a few minutes for questions. I think this one would be aimed at Sylvia. How do Region 9 and other EPA regions ensure that states are adequately implementing federal laws? Are there specific criteria that guide the regional review? What might those criteria be?

**Sylvia Quast:** I think there are specific criteria that are part of the State Review Framework. I don't do that myself, so I don't know what exactly those are, but I think there are definitely guidelines for things that we look for running down the list to make sure that things are in place.

My observation on this, and this is true in the private sector as well, is when people play by the rules and they see other people not playing by the rules, they don't like that very much. They tend to let you know who it is and where you need to look for things. I think that's true in the state and local government context just as it is in the private context.

**Donald Welsh:** I will chime in that I believe one of the primary tasks that the cooperative federalism framework suggests is working on those mutually agreed-upon criteria, so that not only the federal government and the states understand what it is they're measuring, but the public is able to understand how we are measuring our progress toward environmental goals in society. I think it is a key question and there are criteria that are used, but they need to be better. We need to develop them so that they make sense to the public and make sense to the regulators who have to work with them.

I'll aim another question at Scott Fulton. Can new data tools and new technologies point the way to better metrics so that we can escape some of the bean-counting that I think, to use your phrase, is sometimes noisier than it needs to be?

**Scott Fulton:** The short answer is yes. I think we're entering a pretty extraordinary period in terms of how much information is going to be available not just to regulators, but also to the public at large about environmental quality as the pricing of sensor technology continues to precipitously drop and the quality of products and the information generated by those products continues to ramp up.

I think we're going to have a situation in the not-too-distant future where we're going to know so much more about the ambient environment than we do now, and then, on a real-time basis, that data itself will start to serve as one of the primary accountability systems for determining whether government regulators are doing their job.

To give an example of this, there's a company that right now is collaborating with us in the context of their concept, which is a fleet of 30 satellites that would have as their specific purpose the measurement of air quality and would have the capacity to measure basically something in the range of 30 air quality parameters. When that space sensing is combined with what we already have the capacity to

do at the stratospheric level or through drone technology, it will be possible to assess on an hourly basis for every corner of the earth what's happening with air quality in a 15-meter column from the surface of the earth to space. Just imagine what that means. Our already somewhat outdated stationary source monitoring system will ultimately become obsolete. The public will have access to much of this information. They'll see what regulators are seeing and are going to be demanding near-term responses to perceived phenomena.

So, just to play that out a little bit from the short answer I gave at the beginning, the answer is absolutely yes. There's likely to be an important intersection between this environmental big data stimulated by the sensor explosion, and social media information-sharing platforms that will surface the data and allow the data to tell stories that will probably drive the response of regulated entities before regulators can even figure out what to do about it.

**Donald Welsh:** And for Julia, could you expand on how including other agencies in this concept of cooperative federalism can be beneficial in hot topics like CWA §401?

**Julia Anastasio:** It's basically for all the same reasons why we think cooperative federalism with EPA is important. The states are delegated to run the CWA program. They are closer to the ground and have more expertise and experience in dealing with the issues. We know that right now, agencies like the Corps and FERC are contemplating changes to the water quality certification process. States have up to one year to issue a water quality certification on a federal permit or license. There's some talk of restricting that down to 60 days.

We think that with cooperative federalism, if they are engaging with us and working cooperatively, we might be able to explain to them how difficult a 60-day time frame may be for states to meet and why, and/or we could develop some best practices potentially for answering some questions surrounding when a project application is complete. That is when the clock starts to toll, so it's a key point. And there's a little disagreement in terms of when that time actually starts. Sitting down and talking with the states that are on the ground doing this work I think again could provide some real-world truth-telling and avoid some unintended consequences.

**Donald Welsh:** I will lay out a toss-up question and see who wants to answer it first. Do you feel that the things we're seeing in this area today present an opportunity for real change, or will we still be rehearsing some of these same arguments in another 35 or 45 years?

**Sylvia Quast:** I think it's an opportunity for being more thoughtful in our relationship and maybe taking that extra 25% of the time Scott and I talked about to really be thinking ahead and being a little bit more proactive. I think these debates will continue to go on. It mirrors the

larger context that we find ourselves in in terms of people thinking that a stronger central government role is the way to go and other people feel like, no, it should be much more devolved in states and localities.

**Scott Fulton:** I'd like to think that there are meaningful changes that are possible. As an optimist, I'm going to cling to that. But I think we also have to recognize that there are some wild cards that are going to be forever present within these dynamics.

The Flint, Michigan, matter that Julia was talking about is a case in point. So, here is a circumstance where you've got a delegated program. You've got an intrastate issue, not an interstate issue, and any effort by the state to defer to

the city in that circumstance or the federal government to defer to the state was viewed by the public as an abdication of responsibility. Government officials have been indicted. An EPA regional administrator got sacked over that. It reminds us that there's a charge to these issues that our best efforts at redesign will probably not successfully overcome. So, will we still be talking about this? Yes, but hopefully in a somewhat refined and improved form.

**Julia Anastasio:** I agree with what my fellow panelists have said. I'd just point out that we've been having these federalism discussions since the founding of the country. I think it will continue.