ENVIRONMENTAL LAW & POLICY CENTER
Protecting the Midwest's Environment and Natural Heritage

May 15, 2017

Administrator Scott Pruitt
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Dear Administrator Pruitt,

The Environmental Law & Policy Center ("ELPC") submits the following comments in response to the United States Environmental Protection Agency's ("EPA") request for input pursuant to Executive Order 13777 regarding existing EPA regulations that:

> (i) eliminate jobs, or inhibit job creation;
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> (ii) are outdated, unnecessary, or ineffective;
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> (iii) impose costs that exceed benefits;
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> (iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
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> (v) are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), or the guidance issued pursuant to that provision in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard of reproducibility; or
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> (vi) derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

Over time, regulations can certainly become outdated. Indeed, past Administrations have also undertaken efforts to identify and revise outdated or unnecessarily burdensome rules, and in many cases have already improved those rules in a way that appropriately balances costs and benefits while still providing essential protections for public health and the environment. For any rulemaking that results from this effort, ELPC urges EPA to follow the same practice of past Administrations of robust engagement with all stakeholders, through public processes that fully consider the costs and benefits of existing regulations. That approach would be consistent with

the Supreme Court's well-established standard that an agency must take account of all relevant evidence and salient policy considerations in order when altering existing rules, and must be particularly careful when undertaking regulatory changes based on a different understanding of the facts than past administrations.[1]

Meanwhile, ELPC believes that there are areas where EPA's existing regulations do not adequately address significant environmental problems that harm Americans' health and the U.S. economy. ELPC therefore submits these comments to offer a few representative examples of outdated or ineffective regulations that EPA can and should improve in order to produce net benefits for both public health and job creation.

**Toxic Wastewater Discharges from Power Plants**

EPA should move swiftly to reinstate updated rules for controlling toxic wastewater discharges from power plants. In late 2015, EPA issued a final rule updating the Clean Water Act ("CWA") Effluent Limitation Guidelines for power plants ("Steam Electric ELG") for the first time since 1982.[2] The Steam Electric ELG set nationwide technology-based control standards for toxic pollutants in power plant wastewater discharge, including mercury, arsenic, and selenium. The rule required power plants to comply with these new standards as soon as possible after November 1, 2018. However, on April 25, 2017, EPA issued a notice stating that it would stay all compliance deadlines for these new toxic control standards indefinitely.[3]

That stay, as long as it remains in place, leaves power plants subject to outdated and ineffective regulation of toxic discharges that "can cause severe health and environmental problems in the form of cancer and non-cancer risks in humans, lowered IQ among children, and deformities and reproductive harm in fish and wildlife."[4] Under the previous 1982 ELG, these toxic discharges had not been subject to limits except on a case-by-case basis at the discretion of permitting authorities. The effect has been little to no restriction on these toxic pollutants. For example, a 2013 report found that 188 out of 274 power plant permits – nearly 70% -- set no limits on discharges of pollutants like mercury and arsenic.[5] Some courts have actually ruled that the

[1] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29 (1983).
[2] 80 Fed. Reg. 67,838 (Nov. 3, 2015).
[3] 82 Fed. Reg. 19,005 (Apr. 25, 2017).
[4] 80 Fed. Reg. at 67,838.
[5] Environmental Integrity Project *et al.*, Closing the Floodgates: How the Coal Industry is Poisoning Our Water and How We Can Stop It, at 7 (July 23, 2013), Dkt. ID No. EPA-HQ-OW-2009-0819-4714, Ex. 1.

existence of the 1982 ELG forecloses permitting officials from even setting reasonable technology-based limits for a particular power plant.[6]

In other words, under the 1982 Steam Electric ELG, these toxic discharges from power plants – the largest source of toxic water pollution in the country[7] – are for the most part unregulated. Therefore, pursuant to Executive Order 13777, EPA should reinstate the 2015 regulation in order to replace the currently applicable 1982 rule that is outdated and ineffective by any measure.

**Nutrient Pollution**

EPA should take steps to improve the effectiveness of its regulation of nitrogen and phosphorus ("nutrient") pollution under the CWA. As recently as September 2016, EPA has recognized the ever-increasing threat of nitrogen and phosphorus pollution in our nation's waters, which contribute to toxic algae blooms that can contaminate drinking water sources and cause substantial economic impacts on recreation, tourism, and fisheries.[8]

This is a particularly acute problem in the Great Lakes region, where a toxic bloom on Lake Erie poisoned drinking water for nearly half a million people over a weekend in August 2014. Research sponsored by a binational U.S.-Canada commission advising on water quality in the Great Lakes has indicated that without action to address algae blooms on Lake Erie, we risk economic harm at the level of hundreds of millions or even billions of dollars from impacts on property values, tourism, and the recreation industry.[9] The lake most impacted by algae blooms, Lake Erie, supports over 100,000 jobs in Ohio alone through tourism.[10] Additionally, monitoring for algal toxins in the water and treatment when they do occur has already cost citizens in the Lake Erie watershed hundreds of millions of dollars.[11] Similar algae blooms have

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[6] *See Louisville Gas & Elec. Co. v. Ky. Waterways Alliance*, 2017 Ky. LEXIS 201 (Apr. 27, 2017); *NRDC v. Pollution Control Bd.*, 2015 IL App (4th) 140644 (July 22, 2015).

[7] EPA, Environmental Assessment for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, Doc. No. EPA-821-R-15-006, Dkt. ID No. EPA-HQ-OW-2009-0819-6427, at 3-15, Table 3-3 (Sept. 2015).

[8] EPA Memorandum, Renewed Call to Action to Reduce Nutrient Pollution and Support for Incremental Actions to Protect Water Quality and Public Health (Sept. 22, 2016).

[9] M. Bingham et al., Economic Benefits of Reducing Harmful Algal Blooms in Lake Erie at 2-4 (Oct. 2015), http://ijc.org/files/tinymce/uploaded/Publications/Economic-Benefits-Due-to-Reduction-in-HABs-October-2015.pdf.

[10] Christopher J. Winslow, Ohio Sea Grant College Program, Ecological and Economic Importance of Lake Erie and the Impacts of Harmful Algal Blooms (Mar. 10, 2015), http://35.8.121.91/IWR/wp-content/uploads/2015/04/GLC_15_winslow.pdf.

[11] Ariel Wittenberg, E&E News, *Trump budget spooks region dogged by toxic algae* (Apr. 25, 2017), https://www.eenews.net/greenwire/2017/04/25/stories/1060053534.

plagued other shallow water bays on the Great Lakes such as Green Bay, Wisconsin and Saginaw Bay, Michigan.[12]

Other regions of the country also face significant economic and environmental impacts from nutrient pollution. In Iowa, the Des Moines water utility has spent millions of dollars and may spend hundreds of millions more to treat large amounts of nitrate pollution contaminating the source of the city's drinking water, resulting in large part from discharges from nearby agricultural and livestock operations.[13] Those costs are borne by the more than 500,000 residents of Des Moines.

Thus far, EPA and the states have made little progress in effectively addressing this emerging threat, and in 2015 Congress amended the Safe Drinking Water Act to direct EPA to formulate a "strategic plan for assessing and managing risks associated with algal toxins in drinking water provided by public water systems."[14] That strategic plan identifies the protection of source waters from nutrient pollution that causes toxic algae blooms as a key, often cost-effective approach to dealing with this problem.[15] In the meantime, a number of organizations have offered suggestions for updates to EPA rules, guidance, and other regulatory efforts in order to provide more effective source water protection. For example, ELPC and other groups in the Mississippi River Collaborative have called upon EPA to take several steps to facilitate effective regulation of nutrient pollution, including: (1) develop regional or national numeric nutrient criteria to guide state efforts to effectively achieve nitrogen and phosphorus reductions; (2) where states have developed total maximum daily loads, or pollution "caps" for water bodies, under 33 U.S.C. § 1313(d), require the state to provide reasonable assurance that nonpoint source reductions are likely to occur; and (3) ensure that states' Nutrient Reduction Strategies contain implementation plans detailing point and nonpoint source reductions needed, responsible parties, funding mechanisms, milestones, measurement metrics, and reasonable timelines.[16]

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[12] *See, e.g.*, David Biello, *Deadly Algae Are Everywhere, Thanks to Agriculture*, Scientific American (Aug. 8, 2014), https://www.scientificamerican.com/article/deadly-algae-are-everywhere-thanks-to-agriculture; Great Lakes Restoration Initiative Report to Congress and the President at 5 (July 20, 2015), https://www.epa.gov/sites/production/files/2015-09/documents/21050720-report_to_congress-2.pdf.

[13] Complaint, *Board of Water Works Trustees of the City of Des Moines, Iowa v. Sac County Board of Supervisors et al.* (N.D. Iowa Mar. 16, 2015).

[14] Public Law No. 114-45.

[15] EPA, Algal Toxin Risk Assessment and Management Strategic Plan for Drinking Water (Nov. 2015) at 16, https://www.epa.gov/sites/production/files/2015-11/documents/algal-risk-assessment-strategic-plan-2015.pdf.

[16] Mississippi River Collaborative, Decades of Delay: EPA Leadership Still Lacking in Protecting America's Great River (Nov. 2016), http://www.msrivercollab.org/wp-content/uploads/Decades-of-Delay-MRC-Nov-2016.pdf; http://www.msrivercollab.org/wp-content/uploads/07-31-2008-MRC-Petition-to-EPA-for-Nutrient-Rulemaking.pdf.

**Animal Feeding Operations**

A key contributor to nutrient pollution along with other air and water quality problems are Concentrated Animal Feeding Operations ("CAFOs"), which produce and dispose of huge volumes of animal waste – more than 300 million tons annually according to a 2008 EPA estimate[17] – without adequate oversight under current EPA rules.

In response to the increasing prevalence of CAFOs and their substantial pollution contributions, EPA has sought to update its rules regarding CAFOs over the last two decades.[18] In its latest attempt in 2011, EPA proposed (but later withdrew) a rule to collect comprehensive, facility-specific data regarding all CAFOs in the United States, acknowledging that its lack of information regarding "[f]acility location and basic operational characteristics that relate to how and why a facility may discharge is essential information needed" to effectively carry out its duties under the CWA.[19] In fact, according to EPA's own 2010 analysis, substantial numbers of the 11,200 CAFOs not covered by CWA permits in the United States at that time might in fact be discharging manure without any oversight.[20] However, adverse court decisions and EPA's own delays have left outdated rules in place despite their evident lack of effectiveness.

EPA has a meaningful opportunity to address the weaknesses in its CAFO regulatory regime by acting on all or some of a petition for rulemaking submitted to the agency in March 2017 by a broad range of citizens groups.[21] That petition lays out a wide array of recommendations for improvements to EPA's CAFO regulations in light of the last several decades of inadequate application and enforcement of CWA protections against pollution of U.S. waters by manure discharges. Absent action on those recommendations, EPA's existing regulations in this arena will remain outdated and ineffective in implementing the Clean Water Act.

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[17] 68 Fed. Reg. 7176, 7180 (Feb. 12, 2003).

[18] *See, e.g.*, National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs); Final Rule, 68 Fed. Reg. 7176 (Feb. 12, 2003). In *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 506 (2d Cir. 2005), the Second Circuit invalidated this rule's expansion of the scope of CWA permitting requirements for CAFOs.

[19] National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 76 Fed. Reg. 65,431 (Oct. 21, 2011).

[20] EPA, National Pollutant Discharge Elimination System (NPDES) Information Collection Rulemaking and CAFO (Sept. 2010), https://www.regulations.gov/document?D=EPA-HQ-OECA-2009-0274-0124.

[21] Petition to Revise the Clean Water Act Regulations for CAFOs (Mar. 8, 2017), https://www.foodandwaterwatch.org/sites/default/files/citizens_cafo_cwa_petition.pdf.

**Clean Air Act New Source Review**

We note that many of the suggestions submitted to EPA thus far address the Clean Air Act permitting programs, in particular the Nonattainment New Source Review, the Prevention of Significant Deterioration, and the Title V Operating Permit programs. These programs are essential elements of the framework Congress established in the Clean Air Act. They ensure that as new emitting operations are built and as existing ones are upgraded or expanded, they employ up to date pollution control equipment and practices. They ensure that there is appropriate compliance monitoring so that the facility, the permitting agency, and the public can be assured that the facility is meeting its permit terms. They ensure that air quality in areas where air quality does not meet national health standards is not made worse by additional pollution. And the required notice and comment provisions ensure that the public can be aware of and comment on facilities emitting air pollution in their neighborhoods. Any attempt at revisions of these crucial rules should include a comprehensive public process involving outreach to all concerned stakeholders for dialogue and feedback prior to any proposal.

EPA has already made changes and improvements to these programs over the years. Most recently, on December 20, 2016, the Administrator signed a final rule that revises the *Guideline on Air Quality Models*.[22] The *Guideline* provides EPA-recommended models and other techniques, as well as guidance for their use, for predicting ambient concentrations of air pollutants. These revisions enhance and update the guidelines for permit applicants performing air quality modeling to determine impacts of increases in air pollution. EPA worked closely with industry and environmental groups to address their issues and concerns. The final rule was published in the Federal Register on January 17, 2017, and the effective date of this action has been deferred to May 22, 2017, with the result that permit applicants must still comply with outdated modeling requirements. The deferral also creates uncertainty for the regulated community and other stakeholders. ELPC urges EPA to let these updates become effective as soon as possible.

**Conclusion**

As detailed above, ELPC's focus in these comments is in large part on the need for EPA to move forward with existing updates to regulations that are the result of extensive public input and thorough agency consideration to ensure that they meet statutory requirements and reasonably protect public health and the environment. However, to the extent that EPA intends to consider new rules or modifications of existing rules, the agency should undertake such changes only after a robust public process that includes a wide range of stakeholders and provides opportunities to understand and discuss changes EPA may be considering before the issuance of a Notice of

[22] Revisions to the Guideline on Air Quality Models: Enhancements to the AERMOD Dispersion Modeling System and Incorporation of Approaches To Address Ozone and Fine Particulate Matter, 82 Fed. Reg. 5182 (Jan. 17, 2017).

Proposed Rulemaking. Such public input is essential for the agency to timely identify and account for relevant facts and policy considerations as required under applicable Supreme Court precedent.[23]

Sincerely,

Madeline Fleisher
Staff Attorney
On behalf of:

Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, Illinois 60601
(312) 673-6500

[23] *See supra* note 1.