Cooperative Federalism
In the Trump Administration

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“Cooperative federalism is key to maintaining clean air,” said EPA Administrator Scott Pruitt.
“What we see with the current EPA approach is almost an attitude that the states are a mere vessel of federal will....” --Scott Pruitt, 2015

“It’s a paternalism . . . to say: ‘We know best, you cannot take care of yourselves.’” --Scott Pruitt, 2015
I appreciate that most of our environmental laws are built around the framework of cooperative federalism. Under cooperative federalism, states and the federal government have important and complementary roles in implementing federal environmental statutes.

Communication with state agencies is a critical part of cooperative federalism.
The Congress finds ... that air pollution prevention and air pollution control at its source is the primary responsibility of States and local governments.

Clean Air Act, 42 U.S.C. §7401(a)(3)
The 1970 Clean Air Act establishes a “division of responsibilities” between the state and federal governments commonly known as “cooperative federalism.”

Train v. Natural Resources Defense Council, Inc., 421 US 60 (Supreme Court 1975)
Federalism?
Confederalism?
Federalist Society?
Dual Federalism?
Cooperative Federalism?
Before “Cooperative Federalism”

- 11-15-77 sent to the 13 states for ratification
- Limited central government
- Preserved independence and sovereignty of states
- "The . . . States . . . enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare . . . ."
This Constitution, and the Laws of the United States shall be the supreme Law of the Land... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (Article 6, Sec. 2)
Bill of Rights

United States

Congress of the United States

began and held at the City of New York, on

Wednesday, the fourth of March, one thousand seven hundred and eighty

The Conventions of a number of the States having, at the time of their adopting the Constitution, enumerated
the rights of the people to be protected against certain described acts of Government, that the enumeration of
these rights, in the Constitution, will best ensure their preservation, and that the following Articles are proposed
by the Senate and House of Representatives of the United States in Congress assembled, to be valid to all
intents and purposes, as part of this Constitution, and forming therein Articles.

Art. 1. That the following Articles, with a provision for their adoption, shall be proposed to the States of the Union,
for their ratification and acceptance, as amendments to the Constitution of the United States:

Sec. 1. That no freeman shall be deprived of life, liberty, or property, without due process of law; and that
nor shall any person be held to answer for a capital, or otherwise infamous crime, unless on a presentment or
indictment of a grand jury, except in cases arising in the land and naval forces, or in the militia, when in actual
service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in
jeopardy of life or limb; nor shall double jeopardy be suffered; nor shall a person be compelled in any criminal
prosecution to be a witness against himself, nor be deprived of life, liberty, or property, without due process of
law; and that no Bill of Attainder shall be passed; nor private property be taken for public use, without just
compensation.

Sec. 2. That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or
invading armies; nor shall any person be imprisoned, except for an expressed and legal cause, to be determined
by law, and no private law or executive or private process shall issue, or be used, except as may be required
by law, or to be determined by law.

Sec. 3. That the right of the people to keep and bear arms shall not be infringed; and that a militia being necessary
to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Sec. 4. That the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable
searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by
oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Sec. 5. That no otherwise unknown law shall be enacted, nor any ex post facto law, nor law impairing the obligation
of contracts, nor law passing a bill of attainder, nor expropriating the property of any one, without due process of
law.

Sec. 6. That a bill of attainder or ex post facto law shall not be passed; and no person shall be deprived of life, liberty,
or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sec. 7. That no person shall be deprived of life, liberty, or property, without due process of law; and that no law
shall be passed impairing the obligation of contracts; and that no otherwise unknown law shall be enacted, nor
any ex post facto law, nor law impairing the obligation of contracts, nor law passing a bill of attainder, nor
expropriating the property of any one, without due process of law.

Sec. 8. That the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable
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Sec. 9. That no person shall be deprived of life, liberty, or property, without due process of law; nor shall private
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Sec. 10. That no person shall be deprived of life, liberty, or property, without due process of law; and that no law
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Sec. 11. That the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable
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Sec. 12. That no person shall be deprived of life, liberty, or property, without due process of law; nor shall private
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Sec. 13. That no person shall be deprived of life, liberty, or property, without due process of law; and that no law
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Sec. 26. That the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable
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Sec. 30. That no person shall be deprived of life, liberty, or property, without due process of law; nor shall private
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Amendment X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
Who's the Boss?

Who's in Charge?

WHO DECIDES?
The Kentucky Resolution of 1798
States’ Resolutions of 1798

Resolved,

That the several States . . . of America, are not united on the principle of unlimited submission to their general government...and that whenever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force...that the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers....
inter-Governmental Relationships

“Layer Cake” Federalism based on delineated and clearly separate levels of authority

“Marble Cake” Federalism based on cooperation and intermixing of powers and responsibilities between national, state and local levels of authority
Environmental Council of States
June 2017
Cooperative Federalism 2.0
“A Recalibration” of the Federal-State Relationship
Examples - FIPs

Clean Air Act FIPs promulgated by EPA
During George H.W. Bush, Bill Clinton and George W. Bush = 5
During Barack Obama + 50
Examples – Sue and Settle

Between 2009 and 2012, EPA chose not to defend itself in over 60 lawsuits from special interest advocacy groups. These cases resulted in settlement agreements and EPA publishing more than 100 new regulations - including the Clean Power Plan.
Examples – Sue and Settle

“The days of regulation through litigation are over,” – EPA Administrator Scott Pruitt.
Among others, a petition submitted by Sierra Club seeking an objection by EPA to the significant Title V permit modification, Permit No. 561209 (hereafter “Proposed Permit”), proposed by the Tennessee Department of Environment and Conservation (“TDEC”) for Tennessee Valley Authority’s Gallatin Fossil Plant (“Gallatin”).
EPA News Release 12/22/2017

“EPA Advances Cooperative Federalism Through Designation Process for Sulfur Dioxide and Ozone Standards”
Questions?

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