



Resolution Number 11-1
Approved March 30, 2011
Alexandria, Virginia

As certified by
R. Steven Brown
Executive Director

**OBJECTION TO U.S. ENVIRONMENTAL PROTECTION AGENCY'S IMPOSITION
OF INTERIM GUIDANCE, INTERIM RULES, DRAFT POLICY AND
REINTERPRETATION POLICY**

WHEREAS, protection of public health and the environment is among the highest priorities of governments, requiring a united and consistent effort at all levels of government; and

WHEREAS, U.S. Congress has provided by statute for delegation, authorization, or primacy (hereinafter referred to as delegation) of certain federal program responsibilities to states; and

WHEREAS, states that have received delegation have demonstrated to the U.S. Environmental Protection Agency (U.S. EPA) that they have adopted laws, regulations, and policies at least as stringent as federal laws, regulations, and policies; and

WHEREAS, states have developed and demonstrated the capability to maintain existing and assume new delegations; and

WHEREAS, U.S. Congress in environmental statutes and the Administrative Procedure Act (APA) establishes a formal rulemaking process to provide a mechanism for public comment, offering amendments, or allowing states to object, and providing standards for judicial review of agency actions; and

WHEREAS, it is a fundamental responsibility of U.S. EPA to work cooperatively and collaboratively with the states as co-regulators to ensure that regulations and programs can be effectively implemented; and

WHEREAS, some states are required by state law to conduct their own rulemaking prior to implementing federal regulations; and

WHEREAS, some states are prohibited by state law from implementing any requirement more stringent than the federal requirement; and

WHEREAS, the states have limited options to challenge U.S. EPA imposition of objection authority based on interim guidance, interim rules, draft policy or reinterpretation policy, and the Courts are inconsistent in their findings for judicial review in these cases; and

WHEREAS, the processes, rather than the environmental substance of the underlying rules, U.S. EPA may be using to impose interim guidance, interim rules, draft policy or reinterpretation policy, may result in a state agency being forced to choose whether it will comply with either U.S. EPA's policy or its own state laws; and

WHEREAS, U.S. EPA interim guidance, interim rules, draft policy or reinterpretation policy may not be legally binding and states using these as the basis for issuing permits or other actions may result in delays and potential job losses; and

WHEREAS, U.S. EPA's continued imposition of interim guidance, interim rules, draft policy or reinterpretation policy may lead to uncertainty regarding actions taken by state and federal regulatory bodies; and

WHEREAS, ECOS published an ECOS Green Report, "Recent U.S. EPA Positions on Interim Guidance, Rules, and Policies", in December 2010 that presents known cases of these policies and discusses some of their implications for state and federal roles in implementing national environmental policies.

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES:

Believes that U.S. EPA should adhere to the requirements of federal environmental statutes, the APA and its own guidance governing rulemaking to provide for adequate public notice and comment on proposed and final actions;

Believes that U.S. EPA should engage the states as co-regulators prior to and during the rulemaking process seeking early, meaningful, and substantial involvement from states to ensure high quality regulations that can be effectively implemented by delegated states;

Believes that U.S. EPA should minimize the use of interim guidance, interim rules, draft policy and reinterpretation policy and eliminate the practice of directing its regional or national program managers to require compliance by states with the same in the implementation of delegated programs;

Urges U.S. EPA, when interim guidance, interim rules, draft policy or reinterpretation policy is deemed necessary, to consult with states and require its regional and national program managers at the earliest possible opportunity to engage in meaningful and consultative discussion with each of their states about the content of interim guidance, interim rules, draft policy or reinterpretation policy and the practicalities of implementation;

Urges U.S. EPA to make its guidance, rules and policies final prior to seeking state adherence and implementation;

Believes U.S. EPA should not use its objection authority when based entirely or in part on interim guidance, interim rules, draft policy or reinterpretation policy;

Requests that for formal objections to state-issued permits, U.S. EPA modify its processes to designate that its objection is a final agency determination subject to judicial review;

Further requests that U.S. EPA establish firm and timely deadlines for it to issue or deny those permits to which it has objected; and

Request that a copy of this resolution be transmitted to the appropriate U.S. Senate and House of Representatives committees and to the U.S. EPA Administrator.