



ECOS

Resolution 11-8
Approved September 26, 2011
Indianapolis, Indiana

Revised September 17, 2014
Santa Fe, New Mexico

Revised September 13, 2017
Jackson, Wyoming

Revised October 2, 2020
Via Conference Call

Renewed August 30, 2023
Boulder, Colorado

As certified by
Ben Grumbles
Executive Director

ON THE USE OF GUIDANCE

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. EPA that they have adopted laws, regulations, and policies at least as stringent as federal laws, regulations, and policies; and

WHEREAS, from time to time, U.S. EPA may issue guidance, documents, interim guidance, draft policy, or reinterpretation policy all collectively herein called “guidance;” and

WHEREAS, U.S. EPA issuance of timely guidance may serve to facilitate understanding, implementation, and compliance with the statutes and regulations by states; and

WHEREAS, U.S. EPA’s use of guidance does not require public notice or participation as does a regulatory proposal, nor is U.S. EPA required to provide notice to the states, as co-regulators, or seek their participation in the development of guidance; and

WHEREAS, U.S. EPA recognizes that guidance does not have the force of law by including disclaimer language that acknowledges that guidance documents are intended to describe the agency’s current understandings; and

WHEREAS, consistent with U.S. EPA acknowledgement upon issuing guidance, guidance is not legally binding and should not be used as the legal basis for making a federal objection to a delegated state action; and

WHEREAS, in June 2020, ECOS submitted a letter to comment on the proposed rule, *Guidance: Administrative Procedures for Issuance and Public Petitions* which supports the principle from *Executive Order 13891: Promoting the Rule of Law through Improved Agency Guidance Documents* which states that guidance should not be used to create new obligations or substitute for a regulation.

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

Believes that U.S. EPA has the right to use guidance for the purposes declared above;

Believes that U.S. EPA should use guidance to provide states with direction for implementing federal laws, but not require compliance by states with guidance in the implementation of delegated programs and should not use guidance as the legal basis for objection to permits or for disapproval of other actions;

Urges U.S. EPA, when guidance is deemed necessary, to seek early, meaningful, and substantial involvement from states about the content of guidance and the practicalities of implementation;

Urges U.S. EPA to collaborate closely with states to issue implementation guidance as close as possible to publication of new rule promulgation; and

Urges U.S. EPA to use guidance only to interpret its regulations rather than as a substitute for regulation, as a change to its regulation, or as an expansion of its regulation.