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## ALL ABOARD: STATE LEGISLATIVE RESPONSES



A variety of tools are at the disposal of state legislators to make their voices heard in early 2011 in opposition to EPA's regulatory train wreck. This publication provides an introduction to some of the approaches and language that has been utilized by legislatures in this session and the last, as well as some additional, innovative strategies being tested throughout the United States. There is no silver bullet for stopping EPA's power grab, and a full menu of options is listed below. The model legislation discussed below is available from [www.alec.org](http://www.alec.org).

### ***Highest Priority for Early 2011***

The highest priority should be to get the state on record as calling on Congress to stop this regulatory train wreck. The resolution is needed to bolster our allies in Congress and to show EPA and the Administration that consequences will follow across the country if they refuse to pull back.

A model resolution has been developed for this purpose: Resolution Opposing EPA's Regulatory Train Wreck (see page 49). As adopted by Wyoming (Senate Joint Resolution 6<sup>1</sup>) and Indiana (House Resolution 13<sup>2</sup>) in early 2011, this is the most up-to-date and comprehensive resolution on this issue. Calling on Congress to slow and stop EPA's train wreck is a critical first step for efforts to rethink and potentially replace existing federal environ-

mental institutions and statutes.<sup>3</sup> Highlighting the scope of EPA's regulatory onslaught and the failure by the Agency to study the economic, employment, or environmental impacts of their rulemakings, this resolution calls on Congress to:

1. Adopt legislation prohibiting EPA by any means necessary from regulating GHG;
2. Impose a moratorium on any new air quality regulation for at least two years (unless to address an imminent health or environmental emergency);
3. Require the Administration to undertake a multi-agency study identifying all EPA regulatory activity and the cumulative effect on the economy, jobs, and American competitiveness.

### ***Other Resolutions***

Specific, coordinated resolutions from states in opposition to the pending EPA regulatory train wreck provide an excellent vehicle to express collective dissatisfaction and can offer guidance for both your state's Congressional delegation and state regulators required to carry out EPA's edicts. These resolutions highlight that states are not merely branches of the federal government and that the model of cooperative federalism upon which

the Clean Air Act is based is a thing of the past. The best resolutions clearly lay out the objections to EPA's agenda and offer comprehensive recommendations to rectify this train wreck. In 2010, two dozen states considered resolutions opposing EPA regulation of greenhouse gas emissions in a number of different ways. Individual rulemaking resolutions include:

[Resolution on Best Available Control Technology for Coal-Based Electric Generation](http://www.alec.org) (www.alec.org)

This resolution offers guidance to state regulatory agencies on how to interpret "Best Available Control Technology" when issuing Prevention of Significant Deterioration permits for the Best Available Control Technology requirements for greenhouse gases from coal-based electric generation (as mandated by EPA under the Clean Air Act beginning in 2011) to fully consider the need for new electric generation that is efficient and economically practicable. The resolution encourages accommodation of highly efficient power technologies, like super-critical and ultra super-critical coal-fired electric generating units, to serve the dual purpose of reducing the overall emissions profile of the electricity generation unit while providing efficient, affordable, and available power today and into the future. Considering the extremely vague guidance offered by EPA as to what constitutes "Best Available Control Technology," legislatures should consider weighing in to prevent overly restrictive interpretations that could devastate investment and certainty.

[Resolution to Retain State Authority Over Coal Ash as Non-Hazardous Waste](http://www.alec.org) (www.alec.org)

Passed by ALEC in early 2010, this resolution supports the 2000 EPA determination that coal combustion residuals do not warrant federal regulation as hazardous waste and concludes that states are best positioned to serve as the principal regulatory authority for CCRs as non-hazardous waste.

[Resolution in Opposition to EPA's Plan to Regulate Greenhouse Gases Under the Clean Air Act](http://www.alec.org) (www.alec.org)

This resolution, approved by ALEC in September 2008, opposes EPA's endangerment finding and any regulation of greenhouse gases, citing the massive economic burden that would result and the global nature of climate emissions.

[Resolution on Reform of New Source Review Regulations](http://www.alec.org) (www.alec.org)

This resolution supports Bush administration efforts to reform New Source Review regulations, which would allow necessary power plant upgrades to reduce emissions and improve efficiency without triggering costly and unmanageable regulations designed to apply to entirely new sources.

[Resolution in Opposition to EPA's Regulation of Greenhouse Gases from Mobile Sources](http://www.alec.org) (www.alec.org)

This resolution takes issue with the Supreme Court's review of climate science and Congressional intent in ruling that EPA has authority to regulate greenhouse gases under the Clean Air Act in *Massachusetts v. EPA*. It opposes the EPA endangerment finding and subsequent regulation of mobile source emissions.

[Resolution in Opposition of Carbon Dioxide Standards](http://www.alec.org) (www.alec.org)

This resolution opposes voluntary and mandatory carbon dioxide emission standards and cap-and-trade regimes as obstacles to economic growth, energy affordability, and electric reliability.

### ***Enhanced Regulatory Review***

An additional approach for legislatures is to establish more robust procedures for reviewing environmental regulatory enforcement, including development of State Implementation Plans to comply with EPA requirements. In the context of GHG regulation, *Inside EPA* recently argued that "[p]ermits issued after Jan. 2 will become the testing ground for the litany of economic harms predicted by industry, as litigation on the merits of EPA's

authority to limit GHGs will run well into 2011.”<sup>4</sup> Improvements in regulatory review can enable greater legislative input on state implementation of EPA regulations as well as unnecessary and duplicative state policies.

In November 2010, the Institute for Policy Integrity released a comprehensive analysis and grading of the regulatory review processes for all 50 states. While this monograph has some problems with its overall ranking methodology, it does provide a glimpse into some of the legislative tools currently on the books.<sup>5</sup> In addition to the tools discussed below, a new study entitled “Environmental Regulation in Michigan: A Blueprint for Reform,” provides lessons for all states. Written by Russ Harding, director of the Mackinac Center’s Property Rights Network and former director of the Michigan Department of Environmental Quality, the report outlines necessary regulatory innovations, from legislative approval of regulations to a regulatory bill of rights.<sup>6</sup>

Below are some ALEC model options for enhancing and improving legislative review of your state’s regulatory structure:

#### Climate Accountability Act ([www.alec.org](http://www.alec.org))

Endorsed by ALEC in 2010, this model bill requires that any government expenditure to reduce greenhouse gas emissions must, before implementation, provide the overall cost per ton of carbon dioxide-equivalent to be achieved by the policy. This bill is designed to ensure that states receive the greatest return possible on environmental investments.

#### Legislative Authorization

States should consider requiring legislative authorization for state participation in greenhouse gas regulatory programs. ALEC’s model State Responses to Kyoto Climate Change Protocol contains language that prevents state regulators, in the absence of an act of the legislature, from submitting to EPA or any other federal agency “any legally enforceable commitments related to the reduction of greenhouse gases” (available at [www.alec.org](http://www.alec.org)).

Former Governor Dave Freudenthal of Wyoming seized upon similar language in the Wyoming Environmental Quality Act to make that case that the state could not participate in GHG regulation.<sup>7</sup> Arizona H.B. 2442, enacted in 2010, also required express legislative authorization prior to any state regulation of GHG.

#### Notification Requirements

States can require environmental agencies to provide necessary notification to the legislature and relevant committees before submitting a State Implementation Plan for carrying out EPA requirements. For example, ALEC’s Ozone Attainment State Implementation Plan Act ([www.alec.org](http://www.alec.org)) requires that an agency administrator must provide the appropriate legislative committee “with copies of any State Implementation Plan or other legally enforceable commitments... not less than 60 days prior to the submission” to the U.S. EPA.

#### Economic Impact Statements Act ([www.alec.org](http://www.alec.org))

ALEC’s model Economic Impact Statement Act is designed to provide environmental protection without compromising growth by requiring an economic analysis of new environmental regulations. Key components of the bill include: detailed short-term and long-term projections of the economic effects of regulation and legislative review of regulators.

#### Conditioning Regulation of Non-Pollutant Emissions on Science Act ([www.alec.org](http://www.alec.org))

This legislation requires a state environmental administrator to perform an assessment prior to implementing regulation of an emission not explicitly listed as a “pollutant” under the Clean Air Act. This includes a “regulatory right to know” disclosure to include: reasonable demonstration that authority is necessary to protect public health or welfare; whether there is a significant impact on energy availability or price; and if the regulation is feasible and superior to alternatives.

### Opportunity to Correct Act ([www.alec.org](http://www.alec.org))

The Opportunity to Correct Act improves state oversight of compliance with state and federal laws. It allows the regulated community an opportunity to correct a violation prior to the issuance of a Notice of Violation.

### **Reclaiming State Sovereignty**

With the growing threat of overbearing federal authority in a several areas, legislators are looking to new strategies to push back against the Leviathan and reassert Tenth Amendment authority. ALEC's recent "Restore the Balance" initiative offers a series of model bills and proposed constitutional amendments to emphasize state powers.<sup>8</sup> From interstate compacts to the so-called Madison Amendment, available tools have been thoroughly discussed in "Reclaiming the Constitution: Towards An Agenda for State Action"<sup>9</sup> and "Shields of Federalism: Interstate Compacts in Our Constitution"<sup>10</sup> (both by Ted Cruz and Mario Loyola of the Texas Public Policy Foundation), and "The Federalism Toolkit: Ten Tactics for Citizens and States to protect Individual Liberty by Restoring State Sovereignty," by the Goldwater Institute's Nick Dranias.<sup>11</sup> States should consider legislation specific to the EPA threat posed in their state. For example, West Virginia Delegate Gary Howell has introduced the Intrastate Coal and Use Act, which would remove EPA permitting authority for coal staying within the state.<sup>12</sup>

Below are two targeted pieces of model legislation to help rectify federal-state imbalances as it relates to EPA:

### State Sovereignty through Local Coordination Act ([www.alec.org](http://www.alec.org))

This model legislation grants city and town governments the authority to demand that the federal or state government coordinate its law or regulation with that of the local government when the federal or state government imposes a law or regulation more restrictive than local law or regulation. According to American Stewards for Liberty, coordination is mandated by federal law and "requires federal agencies to coordinate their plans, programs and management activities with local governments. It is a powerful

tool that can be used to protect private property rights, productive uses of land, and local economies from burdensome government regulations."<sup>13</sup>

### State Regulatory Responsibility Act ([www.alec.org](http://www.alec.org))

This Act clearly establishes the role of a state environmental agency when confronted with attempted intrusive and unauthorized actions by the federal government. The purpose of the Act is to ensure the division of governmental responsibilities between the federal government and the states under the principles of federalism, so those state agencies are free to implement their powers without unauthorized federal interference. Toward that end, the legislation establishes three policies:

First, the Act prevents a state agency from complying with a federal requirement that is inconsistent with state law unless the requirement is clearly expressed in a federal statute or rule, and is adopted pursuant to the Federal Administrative Procedures Act.

Second, the Act precludes a state agency from allowing federal law to preempt state law unless the state Attorney General finds that such preemption is required.

Lastly, the Act prohibits state agencies from complying with any federal regulatory mandate or requirement unless adequate funds are provided, the state agency has express state statutory authority to implement the program, and the action does not conflict with state law. These provisions ensure that the state does not accept unfunded mandates and has the authority to implement a delegated program consistent with state law.

### **Other Avenues to Make Your Voice Heard**

States should pursue all available legal means for opposing EPA regulation, including filing appeals of EPA rules or filing interventions of amicus briefs in the appropriate proceedings. As of late December 2010, 18 states are party to a case before the D.C. Circuit appeal on the EPA endangerment finding and GHG rules: TX, MI, HA, IN, KY, LA, NE, ND, OK, SC, SD, UT, MI,

AK, FL, VA, AL, and GA. One approach to this litigation, as proposed in New Hampshire in 2011, would require incoming Attorney Generals to join on-going lawsuits over EPA regulation.

State legislators should consider filing comments on individual EPA rules. While the Agency has proceeded on an unnecessarily rapid path to the regulatory train wreck, there should be an opportunity for state legislators to protect their constituents' interests by filing comments at [www.regulations.gov](http://www.regulations.gov).

Particularly if your federal representatives are on the fence about action to limit EPA's agenda, state legislators should write focused, joint letters to their Congressional delegations. For example, Wyoming's Joint Minerals, Business and Economic Development Interim Committee recently co-authored a letter to their incoming and outgoing Governors and Congressional delegation, asking them to "stand as one against the efforts of the United States Environmental Protection Agency (EPA) as they seek to regulate carbon dioxide and other greenhouse gases in the state of Wyoming."

Legislators should also consider holding oversight hearings over EPA's regulatory train wreck, including both regional and national EPA officials as well as state administrators.

ALEC members should also look to bring their case against EPA to the public by writing op-eds and pursuing other press opportunities to highlight the damage that this train wreck will cause to the local economy.

Finally, legislators should feel free to get in touch with ALEC and the Energy, Environment and Agriculture Task Force for additional resources. Clint Woods can be contacted at 202.742.8542 or [cwoods@alec.org](mailto:cwoods@alec.org).

<sup>1</sup>Introduced text available at: <http://legisweb.state.wy.us/2011/Introduced/SJ0006.pdf>.

<sup>2</sup>Text available at: <http://www.in.gov/legislative/bills/2011/PDF/HRESP/HR0013.pdf>.

<sup>3</sup>Examples of some of these comprehensive ideas can be found at: Steve Everley, "Why We Must Replace the EPA," January 27, 2011, <http://www.americansolutions.com/energytax/2011/01/why-we-must-replace-the-epa.php>; Jay Lehr, "It Is Time to Trust the States with Environmental Protection," *Environment & Climate News*, January 2011, [http://www.heartland.org/environmentandclimate-news.org/article/28889/It\\_Is\\_Time\\_to\\_Trust\\_the\\_States\\_with\\_Environmental\\_Protection.html](http://www.heartland.org/environmentandclimate-news.org/article/28889/It_Is_Time_to_Trust_the_States_with_Environmental_Protection.html); and David Schoenbrod, Richard B. Stewart, and Katrina M. Wyman, *Breaking the Logjam: Environmental Protection That Will Work* (New Haven, CT: Yale University Press, 2010).

<sup>4</sup>Victoria Finkle, "With Stay Denied, State Permits Emerge as New Test for EPA Climate Rules," *Inside EPA*, December 15, 2010, [http://environmentalnewsstand.com/component/option,com\\_ppv/Itemid,298/id,2348533/](http://environmentalnewsstand.com/component/option,com_ppv/Itemid,298/id,2348533/).

<sup>5</sup>Jason A. Schwartz, "52 Experiments with Regulatory Review: The Political and Economic Inputs into State Rulemaking," November 2010, [http://policyintegrity.org/files/publications/52\\_Experiments\\_With\\_Regulatory\\_Review.pdf](http://policyintegrity.org/files/publications/52_Experiments_With_Regulatory_Review.pdf).

<sup>6</sup>Russ Harding, "Environmental Regulation in Michigan: A Blueprint for Reform," 2010, <http://www.mackinac.org/archives/2010/s2010-04.pdf>.

<sup>7</sup>Cited in: Dustin Bleizeffer, "Governor: Wyoming can't control its greenhouse gases," September 11, 2010, *Casper Star Tribune*, [http://trib.com/news/state-and-regional/article\\_4752f527-8e95-51e7-85c2-57310621ed2d.html](http://trib.com/news/state-and-regional/article_4752f527-8e95-51e7-85c2-57310621ed2d.html).

<sup>8</sup>ALEC, "Restore the Balance," [http://www.alec.org/AM/Template.cfm?Section=ALEC\\_Model\\_Legislation](http://www.alec.org/AM/Template.cfm?Section=ALEC_Model_Legislation).

<sup>9</sup>Ted Cruz and Mario Loyola, "Reclaiming the Constitution: Towards An Agenda for State Action," November 2010, <http://www.texaspolicy.com/pdf/2010-11-RR11-TenthAmendment-ml.pdf>.

<sup>10</sup>Ibid., "Shields of Federalism: Interstate Compacts in Our Constitution," December 2010, <http://www.texaspolicy.com/pdf/2010-12-PP21-InterstateCompacts-tcruz-mloyola.pdf>.

<sup>11</sup>Nick Dranias, "The Federalism Toolkit: Ten Tactics for Citizens and States to protect Individual Liberty by Restoring State Sovereignty," December 20, 2010, [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=nicholas\\_dranias](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=nicholas_dranias).

<sup>12</sup>Taylor Kuykendall, "EPA responds to state mine legislation," *The Register Herald*, January 7, 2011, <http://www.register-herald.com/todaysfrontpage/x1919696049/EPA-responds-to-state-mine-legislation/print>.

<sup>13</sup>More information at: <http://americanstewards.us/coordination/coordination-main-page>.