Asked and Answered: Issues Raised Regarding State-Federal Consultation

This document identifies issues which have, in the past, frequently arisen in the context of state consultation during the federal administrative rulemaking process, as well as analyses of the legal foundations and legitimacy of each such issue.

Description of Issue:	Legal Analysis:	Relevant Legal Authorities:
Non-Legislative Rulemaking: Federal agencies often categorize their proposed rules and regulations as "non-legislative," which are not subject to the requirements of the Administrative Procedure Act (APA) for notice-and-comment rulemaking. This practice precludes transparency in the rulemaking process, as well as the opportunity for the "public" (in which agencies include state governments) to provide input to the agency in the development and adoption of rules.	1) All agency rules intended to be legally binding (on the agency and/or the public) must be promulgated through procedures for notice-and-comment rulemaking. 2) "Rules which do not merely interpret existing law or announce tentative policy positions, but which establish new policy positions that the agency treats as binding must comply with the APA's notice-and-comment requirements, regardless of how they initially are labeled." (OMB Good Guidance Bulletin). For detailed analysis, see WGA Memorandum: *Non-Legislative Rulemaking to Circumvent Basic Procedural Requirements.*	Administrative Procedure Act, Section 553 (5 U.S.C. § 553) *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007) E.O. 12866, *Regulatory Planning and Review* (58 Fed. Reg. 51735; Oct. 4, 1993)
***Ex Parte* Communications:** Agencies have expressed that general agency policy restricting "*ex parte*" communications with non-agency officials prohibits communications with state officials ("and other stakeholders") during an agency's rulemaking process. Several federal agencies have adopted their own policies which restrict	1) There is no statutory authority, including the APA, which prohibits federal agencies from communicating with non-agency officials at any point during the rulemaking process 2) Many of the federal policies on *ex parte* communication were hastily adopted in response to overly-restrictive federal case	*Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

communications with non-agency personnel during the rulemaking process. These policies are non-legislative rules, which are highly immune from legal or administrative challenge.	law which has been subsequently overturned. 3) Agency policies addressing *ex parte* communications have been adopted as non-legislative rules and, thus, cannot have any binding effect. For detailed analysis, see WGA Memorandum: *Ex Parte Communications Between State and Federal Officials in the Federal Administrative Rulemaking Process.*	
Application of FACA to Communications with State Officials (and Representative Organizations): Federal agency officials have expressed reluctance to consult with state interests and associations of elected state government officials due to concern that such communications would trigger the procedural requirements of the Federal Advisory Committee Act (FACA).	1) FACA's application to meetings between federal and non-federal officials is limited in scope and only applies to committees that are established by federal officials to obtain collective advice. 2) The Unfunded Mandates Reform Act (UMRA) provides an exemption from FACA for consultations held exclusively between federal personnel and non-federal elected officials (or their designees) "relating to the management or implementation of federal programs established pursuant to statute that explicitly or inherently share intergovernmental responsibilities or administration." For detailed analysis, see WGA Memorandum: *FACA Application to WGA Intergovernmental Meetings with Federal Officials.*	Federal Advisory Committee Act, 5 U.S.C. App. II §§ 1-15 Unfunded Mandates Reform Act, P.L. 104-4 (1995) Alice M. Rivlin Memorandum (Sep. 21, 1995)
FOIA – Deliberative Process Exemption's Application to State Consultation: Federal	1) FOIA's "Deliberative Process" exemption applies to communications that are: (i)	Freedom of Information Act, 5 U.S.C. § 552, *et seq.*

agency officials have expressed concern about sharing – or even discussing the details of – pre-decisional agency documents with state officials due to the possibility the such shared information would be subject to public disclosure under the Freedom of Information Act (FOIA).	inter-agency or intra-agency; (ii) pre-decisional and not a final policy adopted by an agency; and (iii) part of a process by which governmental decisions and policies are formulated. 2) Some federal courts have applied the "consultant corollary," which extends FOIA's Deliberative Process exemption to documents produced or communications between non-federal entities in certain circumstances, to communications between federal and state officials when such communications are made exclusively in the context of a federal agency's deliberative process. The U.S. Supreme Court has declined to apply the consultant corollary to federal-tribal communications and documents created by the tribe in the context of a long-term operations plan. For detailed analysis, see WGA Memorandum: *FOIA and the Application of its Deliberative Process Exemption to Communications Between State and Federal Officials.*	*Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) *Compare*, *Judicial Watch, Inc. v. Department of Transportation*, 950 F. Supp. 2d 214 (D.D.C. 2013) *with* *People for the American Way v. U.S. Dept. of Education*, 516 F. Supp. 2d 28 (D.D.C. 2007).
Tribal Consultation Model: Most federal agencies have developed and adopted comprehensive policies and rules which prescribe procedures for consulting with federally-recognized Indian tribes throughout the course of an agency's rulemaking process. Although similarly directed to do so by effective Executive Orders, federal agencies have largely failed to adopt similar policies for consulting with state officials.	1) Comprehensive federal agency procedures for tribal consultation have developed over multiple presidential administrations. 2) Federal agencies should afford at least comparable "government-to-government" consultation opportunities to elected state officials in their rulemaking processes. Such consultation should involve early, meaningful, substantive, and ongoing back-and-forth communications between	E.O. 13175, *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67249 (Nov. 6, 2000) Presidential Memorandum on Tribal Consultation (Nov. 5, 2009)

	state and federal officials with decision-making authority. For detailed analysis, see WGA Memorandum: *Federal Policies Regarding Tribal Consultation as a Model for State Consultation Regulatory Reform.*	
Consultation through Notice-and-Comment Rulemaking: In many instances, federal agencies are required (by statute, rule, or executive order) to consult with states when developing and adopting agency rules and regulations. However, several agencies have demonstrated that their "consultation" requirements can be satisfied by typical notice-and-comment rulemaking, which would otherwise be required by law, and which does not involve any meaningful "consultation" with states.	1) Federal courts have held that, when required by statute to promulgate rules "in consultation with states," agencies cannot satisfy this mandate by merely conducting notice-and-comment rulemaking, as otherwise directed by the APA. 2) Federal agencies should afford states with opportunities for "government-to-government" consultation in their rulemaking processes. Consultation should involve early, meaningful, substantive, and ongoing back-and-forth communications between state and federal officials with decision-making authority. 3) Federal agencies should designate agency officials with decision-making authority to conduct consultations with states.	*California Wilderness Coalition v. Dept. of Energy*, 631 F.3d 1072 (9th Cir. 2011)
Federalism Consultation with States (Executive Order 13132): Federal agencies have largely ignored the mandates expressed in E.O. 13132, *Federalism*, which requires agencies to "have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." Agencies must consult with state and local officials early in the process of	1) E.O. 13132 applies to all agency "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."	Executive Order 13132, *Federalism*, 64 Fed. Reg. 43255 (Aug. 4, 1999) OMB Guidance for Implementing E.O. 13132, "Federalism" (Oct. 28, 1999)

developing any proposed regulation which has federalism implications or imposes substantial direct compliance costs on state or local governments. Agencies' failure to adhere to the procedural requirements of E.O. 13132 (or with the mandates of E.O.'s, generally) does not give rise to legal challenge or administrative appeal.	2) OMB guidance expresses that agencies "must include elected State and local government officials or their representative national organizations in the consultation process."	