
July 22, 2019

The Honorable Gerry Connolly
Chairman
Subcommittee on Government Operations
Committee on Oversight and Reform
House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Mark Meadows
Ranking Member
Subcommittee on Government Operations
Committee on Oversight and Reform
House of Representatives
2105 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Connolly and Ranking Member Meadows:

A good faith partnership between states and the federal government will result in more efficient, economic, and effective policy, benefiting the Governors' and the federal government's shared constituents and resulting in a nation that is stronger, more resilient, and more united. Improving state-federal communication and coordination is a goal that transcends party lines, and it is among the Governors' highest priorities. Western Governors urge Congress and the Executive Branch to make fundamental changes to realign and improve the state-federal paradigm.

At the outset of the 116th Congress, Western Governors requested that the House continue a meaningful discussion of issues related to the state-federal relationship. We appreciate that the Subcommittee on Government Operations is pursuing such dialogue at its July 23, 2019 hearing. To inform the Committee's consideration of this important topic, I request that the Committee include the following attachments in the permanent record of the hearing:

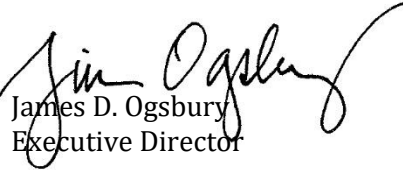
- WGA Policy Resolution [2017-01, *Building a Stronger State-Federal Relationship*](#), which articulates the Western Governors' specific policies on improving the state-federal relationship, and emphasizes the importance of federal agency adoption of clear and accountable processes for early, meaningful, substantive, and ongoing consultation with states regarding federal actions and policies, particularly those that implicate state authorities and equities.
- [Coalition Letter to the Speaker's Task Force on Intergovernmental Affairs Regarding Recommended Statutory Reforms](#), which contains recommendations for statutory changes developed by WGA, the Western Interstate Region of National Association of Counties (NACo), Pacific NorthWest Economic Region (PNWER), Western Interstate Energy Board, and the Western States Water Council (WSWC).
- [Shared Principles on Federalism](#) developed by WGA, Conference of Western Attorneys General, Council of State Governments – West, Western Interstate Region of NACo, PNWER, Western States Air Resources Council, and WSWC, and promoting a true partnership among state, local and federal government officials.
- [States are Not Stakeholders](#), which explains: the legal basis of state sovereignty; the propriety of treating states as co-sovereigns rather than as stakeholders or members of the general public; and the importance engaging states as true partners that merit authentic government-to-government consultation.

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- [Flavors of the State-Federal Relationship](#), which describes the different ways state-federal interactions typically occur on issues that substantially affect states; often these are areas of primary state authority, delegated authority, or shared authority.
- [Analysis of Legal Issues](#), which explains some of the common arguments provided by federal agencies for why they cannot engage in meaningful, substantive consultation with states – most of which do not have a basis in law.
- [January 9, 2019 letter](#) to House leadership requesting continuation of the Committee's meaningful dialogue about institutional improvements to the state-federal relationship.

Thank you for your consideration of this request.

Respectfully,



James D. Ogsbury
Executive Director

Attachments



**WESTERN
GOVERNORS'
ASSOCIATION**

Western Governors' Association Policy Resolution 2017-01

Building a Stronger State-Federal Relationship

A. PREAMBLE

The Governors of the West are proud of their unique role in governing and serving the citizens of this great nation. They recognize that the position they occupy – the chief elected official of a sovereign state – imposes upon them enormous responsibility and confers upon them tremendous opportunity. Moreover, the faithful discharge of their obligations is central to the success of the Great American Experiment.

It was, after all, the states that confederated to form a more perfect union by creating a national government of limited and defined powers. The grant of specific responsibilities for irreducibly common interests – such as national defense and interstate commerce – was brilliantly designed to make the whole stronger than the sum of its parts.

The genius of American democracy is predicated on the separation of powers among branches of government (*viz.* the legislative, executive and judiciary) and the division of power between the federal and state governments (federalism). Under the American version of federalism, the powers of the federal government are narrow, enumerated and defined. The powers of the states, on the other hand, are vast and indefinite. States are responsible for executing all powers of governance not specifically bestowed to the federal government by the U.S. Constitution. This principle is memorialized in the Tenth Amendment, which states in its entirety, “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.”

This reservation of power to the states respects the differences between regions and peoples. It recognizes a right to self-determination at a local level. It rejects the notion that one size fits all, and it provides for a rich tapestry of local cultures, economies and environments.

Because of the Constitutional recognition of state sovereignty, the states have been appropriately regarded as laboratories of democracy. States regularly engage in a kind of cooperative competition in the marketplace of ideas. Western Governors are leaders in innovative governance who employ their influence and executive authority to promote initiatives for improvement of their states' economies, environments and quality of life.

Despite the foregoing, the balance of power has, over the years, shifted toward the federal government and away from the states. The growth in the size, cost and scope of the federal government attests to this new reality. Increasingly prescriptive regulations infringe on state authority, tie the hands of states and local governments, dampen innovation and impair on-the-ground problem-solving. Failures of the federal government to consult with states reflect a lesser appreciation for local knowledge, preferences and competencies.

The inauguration of a new Administration presents a historic opportunity to realign the state-federal relationship. Western Governors are excited to work in true partnership with the federal government. By operating as authentic collaborators on the development and execution of policy, the states and federal government can demonstrably improve their service to the public. Western Governors are optimistic that the new Administration will be eager to unleash the power and creativity of states for the common advantage of our country. By working cooperatively with the states, the Administration can create a legacy of renewed federalism, resulting in a nation that is stronger, more resilient and more united. Such an outcome will redound to the credit of the Administration and inure to the benefit of the American people.

B. BACKGROUND

1. The relationship between state government authority and federal government authority is complex and multi-dimensional. There are various contexts in which the authorities of these respective levels of U.S. government manifest and intersect. For example:
 - a) **Exclusive Federal Authority** – There are powers that are specifically enumerated by the U.S. Constitution as exclusively within the purview of the federal government.¹
 - b) **State Primacy** – States derive independent rights and responsibilities under the U.S. Constitution. All powers not specifically delegated to the federal government are reserved for the states; in this instance, the legal authority of states overrides that of that federal government.²

¹ The structure of the government established under the U.S. Constitution is premised upon a system of checks and balances: Article VI (Supremacy Clause); Article I, Section 8 (Congressional); Article II, Section 1 (Executive Branch); Article III, Section 2 (Judicial Branch). State law can be preempted two ways. If Congress evidences an intent to fully occupy a given “field,” then state law falling within the field is preempted. If Congress has not fully displaced state regulation over the matter, then state law is preempted to the extent it *actually* conflicts with federal law.

² Amendment 10 of the U.S. Constitution: “*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.*”

Governors have responsibilities for the condition of land, air, forest, wildlife and water resources, as well as energy and minerals development, within their state's borders.

- c) **Shared State-Federal Authority** – In some cases, state and/or federal authority can apply, given a particular fact pattern.³ Federal preemption of state law is a concern under this scenario. According to the Council on State Governments, the federal government enacted only 29 statutes that pre-empted state law before 1900. Since 1900, however, there have been more than 500 instances of federal preemption of state law.
- d) **State Authority “Delegated” from Federal Agencies by Federal Statute** – The U.S. Congress has, by statute, provided for the delegation to states of authority over certain federal program responsibilities. Many statutory regimes – federal environmental programs, for example – contemplate establishment of federal standards, with delegated authority (permissive) available to states that wish to implement those standards.

According to the Environmental Council of the States (ECOS), states have chosen to accept responsibility for 96 percent of the primary federal environmental programs that are available for delegation to states. States currently execute the vast majority of natural resource regulatory tasks, including 96 percent of the enforcement and compliance actions and collection of more than 94 percent of the environmental quality data currently held by the U.S. Environmental Protection Agency (EPA).

- e) **Other** – Where the federal government has a statutory, historical or “moral” obligation to states.⁴

³ The federal government has authority to regulate federal property under Article IV of the Constitution. That authority, however, is limited. General regulatory authority (including regulation of wildlife and land use) is held by the states, unless Congress passes a specific law that conflicts with a state's exercise of authority. This is discussed in detail in U.S. Supreme Court case, [Kleppe v. New Mexico](#).

⁴ These historic agreements include, but are not limited to: Payments in Lieu of Taxes; shared revenues authorized by the Secure Rural Schools Act; Oregon and California Railroad Revested Lands payments; shared mineral royalties at the historic level of 50% and renewable energy leasing revenues from development on U.S. Forest Service lands, Bureau of Land Management lands and waters off the coasts of the western states; Abandoned Mine Lands grants to states consistent with 2006 Amendments to the Surface Mining Control and Reclamation Act; legally binding agreements and timetables with states to clean up radioactive waste that was generated in connection with nuclear weapons production and that remains on lands managed by the Department of Energy in the West.

2. Over time, the strength of the federal-state partnership in resource management has diminished. Federal agencies are increasingly challenging state decisions, imposing additional federal regulation or oversight and requiring documentation that can be unnecessary and duplicative. In many cases, these federal actions encroach on state legal prerogatives, especially in natural resource management. In addition, these federal actions neglect state expertise and diminish the statutorily-defined role of states in exercising their authority to manage delegated environmental protection programs.
3. The current fiscal environment exacerbates tensions between states and federal agencies. For example, states have a particular interest in improving the active management of federal forest lands. The so-called “fire borrowing” practice employed by the U.S. Forest Service and the Department of the Interior to fund wildfire suppression activities is negatively affecting restoration and wildfire mitigation work in western forests. Changes are needed, as the current funding situation has allowed severe wildfires to burn through crippling amounts of the very funds that should instead be used to prevent and reduce wildfire impacts, costs, and safety risks to firefighters and the public. This also has impacts on local fire protection districts, which often bear the brunt of costs associated with first response to wildfire, and state budgets that are also burdened by the costs of wildfire response. Fire borrowing represents an unacceptable set of outcomes for taxpayers and at-risk communities, and does not reflect responsible stewardship of federal land. In addition, states increasingly are required to expend their limited resources to operate regulatory programs over which they have less and less control. A 2015 report by the White House Office of Management and Budget on the costs of federal regulation and the impact of unfunded mandates notes that federal mandates cost states, cities and the general public between \$57 and \$85 billion every year.
4. States are willing and prepared to more effectively partner with the federal government on the management of natural resources within their borders.
5. The U.S. Advisory Commission on Intergovernmental Relations – established in 1959 and dissolved in 1996 – was the federal government's major platform for addressing broad intergovernmental issues beyond narrow considerations of individual programs and activities.
6. The current Executive Order on Federalism (E.O. 13132) was issued by then-President William Clinton in 1999. That E.O. has not been revisited since and it may be time to consider a new E.O.

C. GOVERNORS' POLICY STATEMENT

1. Review of the Federal-State-Local Relationship

- a) It is time for thoughtful federal-state-local government review of the federal Executive Order on Federalism to identify areas in the policy that can be clarified and improved to increase cooperation and efficiency.
- b) Governors support reestablishment of the U.S. Advisory Commission on Intergovernmental Relations. It is imperative that the President show his commitment to the Constitutional separation of powers by establishing a platform at the highest level to address federalism concerns.

2. Avoiding Preemption of States

- a) In the absence of Constitutional delegation of authority to the federal government, state authority should be presumed sovereign. Accordingly, federal departments and agencies should, to the extent permitted by law, construe, in regulations and otherwise, a federal statute to preempt state law only when the statute contains an express preemption provision or there is some other firm evidence compelling the conclusion that Congress intended preemption of state law, consistent with established judicial precedent.
- b) When Congress, acting under authority granted to it by the Constitution, does preempt state environmental laws, federal legislation should:
 - i. Accommodate state actions taken before its enactment;
 - ii. Permit states that have developed stricter standards to continue to enforce them;
 - iii. Permit states that have developed substantially similar standards to continue to adhere to them without change and, where applicable, without consideration to land ownership.

3. Defining Meaningful State-Federal Consultation

- a) Each Executive department and agency should be required to have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with *early, meaningful* and *substantive*

input in the development of regulatory policies that have federalism implications. This includes the development, prioritization and implementation of federal environmental statutes, policies, rules, programs, reviews, budgets and strategic planning.

- b) Consistent with C(2) and C(3)(a), federal agencies should consult with states in a meaningful way, and on a timely basis.
 - i. **Predicate Involvement:** Federal agencies should take into account state data and expertise in development and analysis of underlying science serving as the legal basis for federal regulatory action. States merit greater representation on all relevant committees and panels (such as the EPA Science Advisory Board and related issue panels) advising federal agencies on scientific, technological, social and economic issues that inform federal regulatory processes.
 - ii. **Pre-Publication / Federal Decision-making Stage:** Federal agencies should engage in early (pre-rulemaking) consultation with Governors and state regulators. This should include substantive consultation with states during development of rules or decisions and a review by states of the proposal before a formal rulemaking is launched (i.e., before such proposals are sent to the White House Office of Management and Budget).
 - iii. **Post-Publication / Pre-Finalization Stage:** As they receive additional information from state agencies and non-governmental entities, Governors and designated state officials should have the opportunity to engage with federal agencies on an ongoing basis to seek refinements to proposed federal regulatory actions prior to finalization.

4. State Authority “Delegated” from Federal Agencies Pursuant to Federal Statute

Where states are delegated authority by federal agencies pursuant to legislation:

- a) Federal agencies should treat states as co-regulators, taking into account state views, expertise and science in the development of any federal action impacting state authority.

- b) Federal agencies should grant states the maximum administrative discretion possible. Any federal oversight of such state should not unnecessarily intrude on state and local discretion. Where states take proactive actions, those efforts should be recognized and credited in the federal regulatory process.
- c) When a state is meeting the minimum requirements of a delegated program, the role of a federal department or agency should be limited to the provision of funding, technical assistance and research support. States should be free to develop implementation and enforcement approaches within their respective jurisdictions without intervention by the federal government.
- d) New federal rules and regulations should, to the extent possible, be consistent with existing rules and regulations. The issuing agency should identify elements and requirements common to both the proposed and existing regulations and provide states an opportunity to develop plans addressing the requirements of both in a coordinated fashion. This will achieve economies of scale, saving both time and money.
- e) When a federal department or agency proposes to take adjudicatory actions that impact authority delegated to states, notice should be provided to affected Governors' offices, and co-regulating states should have the opportunity to participate in the proceedings. Where legally permissible, that right should extend to federal agencies' settlement negotiations impacting state environmental and natural resource management prerogatives. Where their roles and responsibilities are impacted, states should be meaningfully consulted during settlement negotiations, including negotiations aimed at avoiding, rather than resolving, litigation (such as negotiations following a notice of intent to sue under the Endangered Species Act, but prior to a formal complaint being filed to initiate legal action).
- f) States' expertise should be recognized by federal agencies and robustly represented on boards and in other mechanisms upon which agencies rely for development of science to support regulatory action.

5. **Other Opportunities for Positive Engagement by the Federal Government with Western States**

- a) **Federalism Reviews** – Federal agencies are required by federal Executive Order 13132 to consider and quantify consequences of federal actions on states. In practice, the current process falls short of its stated goals. Governors call on the President to revisit the executive order to, among other things:

- i. Specifically involve Western Governors on issues (e.g., public lands, water and species issues) that disproportionately impact the West;
 - ii. Work with Governors to develop specific criteria and consultation processes: 1) for the initiation of federalism assessments and 2) that guide the performance of every federal Department and agency federalism assessment;
 - iii. Require federal Departments and agencies to meet the criteria developed under C(5)(a)(ii), rather than simply require the consideration of federalism implications;
 - iv. Provide states, through Governors, an opportunity to comment on federalism assessments before any covered federal action is submitted to the Office of Management and Budget for approval.
- b) **Federal and State Land-Use Planning** – Governors possess primary decision-making authority for management of state resources. Accordingly, it is essential that they have an opportunity to review new, revised and amended federal land management plans for consistency with existing state plans. Governors and their staffs have specific knowledge and experience that can help federal agencies craft effective and beneficial plans. A substantive role in federal agencies’ planning processes is vital for Western Governors:
- i. Federal landscape-level planning presents new issues for Governors to consider as they attempt to ensure consistency between state and federal requirements. Agencies should provide Governors sufficient time to ensure a full and complete state review. This is particularly true when agency plans affect multiple planning areas or resources;
 - ii. Agencies should seek to align the review of multiple plans affecting the same resource. This is particularly true for threatened or endangered species that have vast western ranges;
 - iii. When reviewing proposed federal land management plans for consistency with state plans, Governors should be afforded the discretion to determine which state plans are pertinent to the review, including state-endorsed land use plans such as State Wildlife Action Plans, conservation district plans, county plans and multi-state agreements;
 - iv. Governors must retain a right to appeal any rejection of recommendations resulting from a Governor’s consistency review.

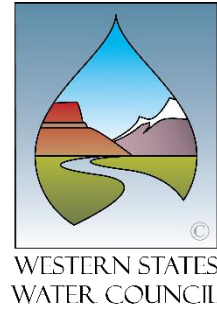
- c) **Honoring Historic Agreements** – The federal government should honor its historic agreements with states and counties in the West to compensate them for state and local impacts associated with federal land use and nontaxable lands within their borders that are federally-owned.
- d) **Responsible Federal Land Management** – The federal government should be a responsible landowner and neighbor and should work diligently to improve the health of federally-owned lands in the West. Lack of funding and conflicting policies have resulted in large wildfires and the spread of invasive species from federally owned forests and grasslands, negatively impacting adjacent state and privately-owned lands, as well as state-managed natural resources (soils, air and water).
- e) **Recognizing State Contributions to Federal Land Management** – The U.S. Congress and appropriate federal departments and agencies should provide opportunities for expanded cooperation, particularly where states are working to help their federal partners to improve management of federal lands within their states’ borders through the contribution of state expertise, manpower and financial resources.
- f) **Avoiding Unfunded Mandates** – The U.S. Congress and federal departments and agencies should avoid the imposition of unfunded federal mandates on states. The federal government increasingly requires states to carry out policy initiatives without providing the funding necessary to pay for implementation. State governments cannot function as full partners if the federal government requires them to devote their limited resources to compliance with unfunded federal mandates.
- g) **Other Considerations in Designing an Effective State-Federal Relationship** – Other important considerations in the design of a stronger state-federal relationship include:
 - i. The U.S. Congress and federal departments and agencies should respect the authority of states to determine the allocation of administrative and financial responsibilities within states in accordance with state constitutions and statutes. Federal action should not encroach on this authority.
 - ii. Federal assistance funds, including funds that will be passed through to local governments, should flow through states according to state laws and procedures.

- iii. States should be given flexibility to transfer a limited amount of funds from one grant program to another, and to administer related grants in a coordinated manner.
- iv. Federal funds should provide maximum state flexibility without specific set-asides.
- v. States should be given broad flexibility in establishing federally-mandated advisory groups, including the ability to combine advisory groups for related programs.
- vi. Governors should be given the authority to require coordination among state executive branch agencies, or between levels or units of government, as a condition of the allocation or pass-through of funds.
- vii. Federal government monitoring should be outcome-oriented.
- viii. Federal reporting requirements should be minimized.
- ix. The federal government should not dictate state or local government organization.

D. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Governors direct the WGA staff, where appropriate, to work with Congressional committees of jurisdiction and the Executive Branch to achieve the objectives of this resolution.
2. Furthermore, the Governors direct WGA staff to develop, as appropriate and timely, detailed annual work plans to advance the policy positions and goals contained in this resolution. Those work plans shall be presented to, and approved by, Western Governors prior to implementation. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual work plans.

Western Governors enact new policy resolutions and amend existing resolutions on a bi-annual basis. Please consult www.westgov.org/policies for the most current copy of a resolution and a list of all current WGA policy resolutions.



August 3, 2018

The Honorable Rob Bishop
Chairman
Speaker's Task Force on Intergovernmental Affairs
United States House of Representatives
123 Cannon House Office Building
Washington, D.C. 20515

Dear Chairman Bishop:

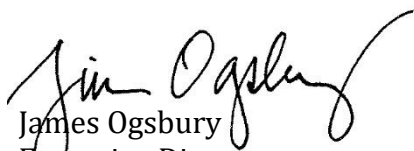
Our organizations represent Governors, states, state agencies and departments, local governments, and the interests of the West. We share a mission to strengthen the relationship between all levels of government through consultation, communication, coordination, and cooperation.


Congress can play a significant role in improving the state-federal relationship, as a more functional and effective state-federal dynamic will benefit our shared constituents through the production of better, more durable and more legally-defensible policy. We are grateful for your continued leadership with respect to this important objective.

The Western Governors' Association (WGA) recently provided the Task Force with specific [recommendations](#) for congressional action. We support congressional discussion and consideration of these potential reforms, which build on the [Principles to Clarify and Strengthen the State-Federal Relationship](#) that several of our organizations have endorsed.

Our organizations are eager to work with the Task Force on legislation to improve intergovernmental collaboration. Please regard our organizations, Governors, states, and counties as resources as you endeavor to make our nation's government more efficient and responsive to its citizens.

Sincerely,


James Ogsbury
Executive Director
Western Governors' Association


Tommie Cline Martin
President
Western Interstate Region of NACo


The Honorable Rob Bishop

August 3, 2018

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Matt Morrison
Executive Director
Pacific NorthWest Economic Region



Dr. Laura Nelson
Chair
Western Interstate Energy Board



Tony Willardson
Executive Director
Western States Water Council

Enclosure: WGA Recommendations for Congress: Process Improvements to Build a Stronger State-Federal Relationship



Recommendations for Congress: Process Improvements to Build a Stronger State-Federal Relationship

The constitutional relationship among sovereign governments, state and national, is inherent in the structure of the Constitution and is formalized and protected by the 10th Amendment.¹ Many statutes expressly recognize state primacy or delegate federal authority to states; and/or require the federal government to consult, coordinate, or cooperate with states on specific issues or actions. Despite this clear and careful balance, the federal government has increasingly infringed on or ignored states' sovereign and co-regulator status. The recommendations for Congress provided below, which build on the principles in WGA Policy Resolution [2017-01](#), *Building a Stronger State-Federal Relationship*, will help realign our federalist system, enhancing the U.S. government's service to its citizens at all levels and resulting in better public policy.

Ensure Federalism Principles are Incorporated in Legislative Drafting	
Recommendation	Rationale
<p>States are Sovereigns</p> <p>Ensure that states are not treated as equivalent to stakeholders, interested parties, public or private organizations, industry, or the public in legislation or by federal agencies. Rather, states should be treated as sovereign entities and engaged in a government-to-government manner.</p> <p>Amend the House of Representatives Office of Legislative Counsel Guide to Legislative Drafting to add a fourth important convention in Section VII to distinguish states from stakeholders.</p>	<p>Many statutes currently – and inaccurately – include states as stakeholders, interested parties, public or private organizations, industry, or the public (“entities”); treat states as equivalents to these entities; or do not distinguish between states and these entities.</p> <p>States, as sovereigns, are distinguished from other entities by the Constitution, the 10th Amendment, and U.S. Supreme Court cases. As a result, legislative drafters should not include states, state officials, or state agencies in a list with these entities and should always distinguish the treatment of states, state officials, and state agencies.</p>
<p>10th Amendment</p> <p>Amend Clause 7 of Rule XII the Rules of the House of Representatives for the 116th Congress (and Protocol 8, Constitutional Authority Statements), to read: “(c) A bill or joint resolution may not be introduced unless the sponsor has submitted for printing in the Congressional Record a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution <i>and an explanation why the bill or joint resolution does not infringe on the rights reserved to the states by the 10th Amendment.</i>”</p>	<p>Pursuant to the Constitution, the powers of the federal government are narrow, enumerated and defined, while the powers of the states are vast and indefinite. The presumption of sovereignty should rest with states and uncertainties regarding federal authority should generally be resolved in favor of state authority and regulation.</p> <p>This requirement will ensure that bill or resolution sponsors carefully consider state authority before proposing legislation.</p>

¹ U.S. CONST., amend. 10; *Alden v. Maine*, 527 U.S. 706, 714 (1999).

<p>Preemption and State Authority</p> <p>Recognize states’ sovereign status and authority in legislation.</p> <p>Avoid preemption of state authority in legislation.</p> <p>Ensure legislation grants states the maximum administrative discretion possible and does not create undue burdens on state resources.</p> <p>Explicitly state that preemption is disfavored and require agencies to specify where preemption is warranted. In such cases, agencies must provide affected states notice and an opportunity to participate in proceedings at which the agency must demonstrate the preemption of state authority is needed to accomplish a national purpose.</p>	<p>Our constitutional system encourages a healthy diversity in the public policies adopted by states according to their own conditions, needs, and desires. Effective public policy is achieved when there is competition among states in fashioning different approaches to public policy issues. One-size-fits-all national approaches to public policy problems can inhibit the creation of effective solutions to those problems.</p> <p>In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual states. Uncertainties regarding the legitimate authority of the federal government should generally be resolved in favor of state authority and regulation.</p> <p>EO 13132 directs agencies to not seek legislation that preempts state law, unless preemption is consistent with the fundamental federalism principles outlined in the EO and is the only method of achieving a clearly legitimate national purpose. The EO also requires agencies to construe preemption narrowly – where it is express, clearly evidenced, or state authority conflicts with federal statutory authority – and to provide notice to states and an opportunity to participate in proceedings where an agency is attempting to preempt state authority. This requirement should be codified with associated accountability measures.</p>
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Direct Agencies to Improve the State-Federal Relationship

Recommendation

Definitions

Define “consultation” to:

- Include early, meaningful, substantive, ongoing, government-to-government communication and exchange with states through Governors or their designees.
- Require procedures separate from and beyond the stakeholder or public process.
- Clarify that notice and comment rulemaking procedures do not satisfy agencies’ requirements to consult with states where required by law.

Define “policies with federalism implications” to include: federal regulations, proposed federal legislation, policies, rules, non-legislative

Rationale

Each Executive department and agency should have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state governments as he or she may designate – with early, meaningful and substantive input in the development of regulatory policies that have federalism implications. This includes the development, prioritization, and implementation of federal environmental statutes, policies, rules, programs, reviews, budgets, and strategic planning.

Many statutes require federal agencies to consult with states (as well as coordinate or cooperate with states) without defining the term(s). [Executive Order 13132, Federalism](#) (EO 13132) also does not define consultation.

A definition of the term “consultation” would clarify what Congress intended. Even where consultation is statutorily required, agencies often

<p>rules, guidance, directives, programs, reviews, plans, budget proposals, budget processes and strategic planning efforts that have either: (1) substantial direct effects on the states or on their relationship with the federal government; or (2) the distribution of power and responsibilities, between the federal government and state governments.</p>	<p>direct states to comment on their actions through the stakeholder process, in the same manner as a member of the public. Or agencies argue that state consultation can be fulfilled through typical notice-and-comment rulemaking, which would otherwise be required by law, and which does not involve any meaningful government-to-government exchange with states.</p>
<p>Consultation Regulations</p> <p>Require all federal departments and agencies, including independent regulatory agencies, to codify in regulation a clear, consistent, and accountable process for state consultation on policies with federalism implications. Such processes should include a remedy for states where agencies fail to do so.</p> <p>These regulations should also require:</p> <ul style="list-style-type: none"> • Federal agencies to provide written notification to and an invitation to consult with Governors of all potentially-affected states (or their designees) of policies with federalism implications within the area affected by the proposed federal action. • Federal agencies to provide procedures for written response to Governors’ or their designees’ input prior to a final federal decision. • Federal agency decision-makers to hold regular, ongoing consultation meetings with Governors or their designees regarding policies with federalism implications. 	<p>The principles in EO 13132 are helpful in describing how the relationship between states and the federal government should operate. However, the lack of accountability mechanisms in the EO have resulted in infrequent application of these principles by federal agencies. Requiring and ensuring that federal agencies codify the consultation process in regulation will help improve accountability, but so is providing consequences for the failure to do so.</p> <p>Providing accountability mechanisms on individual actions with federalism implications will further ensure that federal agencies continue to comply with constitutional, statutory, and regulatory requirements.</p>
<p>Rulemaking</p> <p>Prior to promulgation of a rule with federalism implications, require federal agencies to:</p> <ul style="list-style-type: none"> • Ensure that new funds sufficient to pay the direct costs incurred by the state in complying with the regulation are provided by the federal government; and • Provide OMB with a description of the extent of agency's consultation with states, a summary of their input, the agency's 	<p>The Regulatory Flexibility Act (RFA) requires agencies to publish regulatory flexibility agendas in October and April of each year that include: (1) a brief description of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities (which include small businesses, small organizations, and small government jurisdictions); (2) a summary of the objectives and legal basis for the issuance of the rule; and (3) an approximate timeline for the rule.² Small entities are notified and given an opportunity to comment on the proposed actions.</p>

² 5 U.S.C. §602.

<p>response to that input, and any written communications submitted by states.</p> <p>Provide an opportunity for Governors or their designees to review agencies' regulatory agendas.</p>	<p>A similar process should exist for Governors and their designees to be consulted on all policies with federalism implications, including all types of guidance documents and expected rulemakings. Involving states at this early stage would facilitate coordinating regulations, maximizing consultation, resolving conflicts, and involving states in regulatory planning.</p>
<p>Non-legislative Rulemaking/Guidance</p> <p>Require agencies to consult with affected states prior to issuing guidance documents with federalism implications – including memoranda, directives, notices, bulletins, manuals, handbooks, opinions, and letters.</p> <p>Require agencies to develop a transparent and accountable process for determining whether a proposed agency action requires notice-and-comment rulemaking procedures prescribed under Section 553 of the Administrative Procedures Act.</p> <p>Require agencies to publish all existing guidance documents at a single location on their agency's website and publish new and rescissions of guidance documents at the same location on the date they are issued.</p>	<p>To be legally binding, agency rules must be promulgated through notice-and-comment rulemaking. Federal agencies often categorize their proposed rules and regulations as “non-legislative,” which are not subject to the requirements of the 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 often include state governments) to provide input to the agency in the development and adoption of rules. Federal agencies are currently required to consult on policies with federalism implications, which include guidance, by EO 13132, but this rarely occurs.</p>
<p>Consistency and Avoidance of Conflicts</p> <p>Require federal agencies to:</p> <ul style="list-style-type: none"> • Make all reasonable efforts to achieve consistency and avoid conflicts between federal and state objectives, plans, policies, and programs; and • Address and resolve all issues and concerns raised by states, unless precluded by federal law. 	<p>Federal agencies should have to document specifically how their regulatory actions seek to achieve consistency and avoid conflicts between federal and state objectives, plans, policies, and programs. They should also consider alternatives in NEPA analysis that would resolve any conflicts and the selection of a preferred alternative that eliminates or minimizes conflicts with state plans, policies, and programs for land use planning.</p>
<p>State Data</p> <p>Require agencies to incorporate state and local data and expertise, subject to existing state requirements for data protection and transparency, into their decisions. This data should include scientific, technical, economic, social, and other information on the issue the agency is trying to address.</p>	<p>Congress is currently focused on streamlining many types of agency decisions. Federal agencies often do not utilize state data in their decision-making or evaluate their decisions against an accurate baseline. Requiring agencies to use existing state data where possible will reduce burdens on federal agencies and potential duplication and result in better-informed decisions.</p>

<p>Settlement Negotiations</p> <p>In settlement negotiations impacting policies with federalism implications, require federal agencies to provide notice of the action to affected states, consult with affected states on any negotiations, and seek state concurrence regarding the settlement.</p>	<p>Agencies are often driven by deadlines or requirements established by litigation or adjudication – not statute or regulation. In negotiations regarding litigation or adjudication that has federalism implications, states are often left out of the process. Involving states in such negotiations would prevent conflicts from arising as the agencies implement the outcomes of those negotiations.</p>
<p>Congressional Oversight</p> <p>Establish a Federalism Office within the White House or reestablish the U.S. Advisory Committee on Intergovernmental Relations to ensure federal agencies meet their federalism obligations.</p> <p>Request a report on existing federalism requirements and/or require regular and ongoing reporting on federalism requirements.</p>	<p>Such an office would work solely on federalism issues and ensure adequate oversight over executive agencies and provide advice to the President.</p> <p>A comprehensive analysis of all requirements on federalism currently applicable to federal agencies would help identify gaps and inform legislation. For example, there is little to no information on how often federal agencies perform federalism assessments pursuant to EO 13132. Either the Government Accountability Office or OMB could conduct this analysis.</p>
<p>Eliminate Perceived Barriers to the State-Federal Relationship</p>	
<p>Recommendation</p>	<p>Rationale</p>
<p><i>Ex Parte</i> Communications</p> <p>Require agencies to revise or establish their <i>ex parte</i> rules or policies in accordance with current case law, which permits these communications in informal rulemaking proceedings; and/or exempt communications with states and state officials from the definition of <i>ex parte</i> communications.</p>	<p>Many federal agencies have adopted policies which restrict communications with non-agency personnel during the rulemaking process. However, there is no statutory authority or other law that prohibits these communications. Many of the federal policies on <i>ex parte</i> communication were hastily adopted in response to overly-restrictive federal case law, which was subsequently overturned.³ A 2014 report by the Administrative Conference of the United States contradicted the restrictive approach taken by agencies upon reviewing relevant statutes and case law.⁴</p> <p>In addition, there are major discrepancies between federal agencies' policies on <i>ex parte</i> communications. For example, the Federal Emergency Management Agency (FEMA) has proposed a rule that requires restrictions on <i>ex parte</i> communications for the entire development of a rule: from publication of the notice of proposed rulemaking, until issuance of a final action. The FEMA proposed rule exempts tribal consultation from these</p>

³ See *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).

⁴ Administrative Conference of the United States, [Ex Parte Communications in Informal Rulemaking](#) (May 1, 2014).

	<p>restrictions but makes no similar exception for states.⁵ In contrast, the Surface Transportation Board has promulgated a final rule that permits <i>ex parte</i> communications in informal rulemaking proceedings.⁶</p> <p>Congress could clarify that communications with sovereigns and co-regulators is exempt from the definition of <i>ex parte</i> communications. Restrictions on communications with states throughout the rulemaking process have a chilling effect on consultation and coordination with states. This clarification would ensure consistency in the application of <i>ex parte</i> communication policies.</p>
<p>Federal Advisory Committee Act (FACA) Exemptions</p> <p>Exempt all meetings held exclusively between federal personnel and non-federal elected officials (or their designees) acting in their official capacities or in areas of shared intergovernmental responsibilities or administration from FACA.</p>	<p>The Unfunded Mandate Reform Act (UMRA) exempts the following intergovernmental communications from FACA: (1) meetings are held exclusively between federal officials and elected officers of state, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities; and (2) such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.⁷</p> <p>A similar exemption is not currently contained in FACA, which creates confusion. The rationale for exempting such consultation from FACA in the UMRA extends to state-federal meetings unrelated to federal intergovernmental mandates. An exemption in FACA will encourage intergovernmental communication, which is an essential element of our system of federalism and is often statutorily required.</p>
<p>Freedom of Information Act (FOIA)</p> <p>Create statutory exceptions to FOIA disclosure for state data and analysis in instances where publication of state data provided to federal agencies would be violation of existing state statutes.</p>	<p>FOIA mandates the disclosure of records held by a federal agency, unless the documents fall within enumerated exemptions.⁸ Under FOIA, an “agency record” is a record that is (1) either created or obtained by an agency; and (2) under agency control at the time of the FOIA request.⁹ FOIA also does not contain an exemption for data that would otherwise be protected under a state open records act. If a state open records act</p>

⁵ Update to FEMA’s Regulations on Rulemaking Procedures, [82 FR 26414](#) (June 7, 2017).

⁶ Ex Parte Communications in Informal Rulemaking Proceedings, [83 FR 9222](#) (March 5, 2018).

⁷ 2 U.S.C. §1534(b).

⁸ 5 U.S.C. §522.

⁹ *DOJ v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

Investigate and develop solutions for other barriers to state-federal communication presented by FOIA.	prohibits disclosure of certain types of information, that information should not be disclosed except as required by law. There are also concerns that confidentiality agreements between states and federal agencies will not protect state data from disclosure under FOIA. These concerns can prevent states from exchanging valuable state data with federal agencies.
Make the Unfunded Mandates Reform Act (UMRA) Relevant	
Recommendation	Rationale
<p>UMRA Threshold</p> <p>Eliminate the \$100 million threshold for the application of the UMRA to federal intergovernmental mandates.</p>	<p>Over the past 10 years, only five agency rules have met the threshold of the UMRA for federal mandates that may result in the expenditure by state, local, or tribal governments, in the aggregate, or by the private sector of \$100 million in any one year.¹⁰ A federal mandate is defined as a federal intergovernmental mandate or federal private sector mandate.¹¹ A federal intergovernmental mandate is defined as a regulation that “would impose an enforceable duty upon State, local, or tribal government” with two exceptions.¹² The application of the UMRA to intergovernmental mandates is limited by the definition of federal mandate and the \$100 million threshold.</p> <p>Eliminating the \$100 million threshold for federal intergovernmental mandates would require OMB to report to Congress on a greater proportion of federal intergovernmental mandates, providing accountability and requiring agencies to adhere to the UMRA’s consultation procedures for more federal intergovernmental mandates.</p>
<p>State Input and Data</p> <p>Require agencies to incorporate state government input and data, including social and economic data, in their qualitative and</p>	<p>Although UMRA currently requires agencies to assess the costs and benefits of a rule to state governments and consult with them on the rule, it does not require agencies to incorporate state input and data into this assessment.</p>

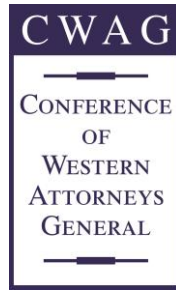
¹⁰ 2017 Draft OMB [Report](#) to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, pp. 36-37.

¹¹ 2 U.S.C. §1502, incorporating the definitions of 2 U.S.C. §658 by reference.

¹² The definition of “Federal intergovernmental mandate” excludes “a condition of Federal assistance” and “a duty arising from participation in a voluntary Federal program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority” and would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decreases the Federal Government’s responsibility to provide funding” in a situation in which the State, local, or tribal governments “lack authority” to adjust accordingly. 2 U.S.C. §658(5).

<p>quantitative assessment of anticipated costs and benefits of qualifying rules under the UMRA.</p>	<p>Adding this requirement will reinforce the need for meaningful consultation, as well as provide more informed assessments with locally-generated data. The UMRA could be amended to require assessments to include state input and data on the costs and benefits of the rule, including social and economic costs.</p>
<p>Consultation on Intergovernmental Mandates Strengthen the consultation requirements for federal intergovernmental mandates.</p>	<p>The current language of the UMRA does not provide a clear standard for what is an “effective process” to permit input from state officials. However, Section 1532 refers to this effective process as consultation.¹³ OMB Memorandum M-95-09 specifies that “intergovernmental consultations should take place as early as possible, and be integrated into the ongoing rulemaking process.”</p> <p>The UMRA should be amended to specify that an effective process should ensure early, substantive, meaningful, and ongoing consultation with state officials in the development of regulatory proposals containing federal intergovernmental mandates.</p>
<p>Review of Failures to Implement Authorize a court to compel substantive, meaningful consultation with elected officers of state governments if an agency fails to develop or implement the effective process under the UMRA.</p>	<p>A remedy currently exists in the UMRA for an agency’s failure to prepare a written statement. However, it does not exist for an agency’s failure to allow meaningful input from state governments, despite UMRA’s requirement to do so for federal intergovernmental mandates.</p> <p>Providing a remedy for failure to allow meaningful input from states will provide accountability for agencies to make a good faith effort to consult with these governments. The statute’s existing limitations on judicial review of the failure to prepare a written statement could extend to the failure to consult.</p>

¹³ 2 U.S.C. §1532(a)(5)(A).



December 15, 2016

Honorable Donald J. Trump
President-elect of the United States
Trump/Pence Transition Office
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Honorable Mike Pence
Vice President-elect of the United States
Trump/Pence Transition Office
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear President-elect Trump and Vice President-elect Pence:

State and local government officials are proud of their unique role in governing and serving the citizens of this great nation. They recognize that the positions they occupy impose upon them enormous responsibility and confer upon them tremendous opportunity. Moreover, the faithful discharge of their obligations is central to the success of the Great American Experiment.

It was, after all, the people who came to form a more perfect union by creating a national government of limited and defined powers. The grant of specific responsibilities for irreducibly common interests – such as national defense and interstate commerce – was brilliantly designed to make the whole stronger than the sum of its parts.

The genius of American democracy is predicated on the separation of powers among branches of government (*viz.* the legislative, executive and judiciary) and the division of power between the federal and state governments (federalism). The federalism principle is memorialized in the Tenth Amendment, which states in its entirety, “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.”

Under the American version of federalism, the powers of the federal government are narrow, enumerated and defined. The powers of the states, on the other hand, are vast and indefinite. States are responsible for executing all powers of governance not specifically bestowed to the federal government by the U.S. Constitution. In many cases, states delegate a portion of their authority to counties and other local governments. Though local governments are diverse in structure, all are on the front lines of delivering vital services to residents.

The reservation of power to the states and people respects the differences between regions and peoples. It recognizes a right to self-determination at a local level. It rejects the notion that one size fits all, and it provides for a rich tapestry of local cultures, economies, and environments.

Honorable Donald J. Trump
Honorable Mike Pence
December 15, 2016
Page 2

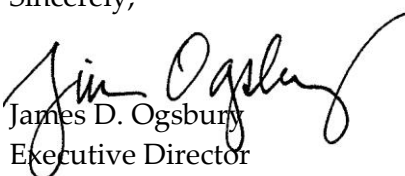
Because of the Constitutional recognition of state sovereignty within our federalist system, state and local governments have been appropriately regarded as laboratories of democracy, regularly engaging in a kind of cooperative competition in the marketplace of ideas. Indeed, state and local governments demonstrate great ingenuity in promoting innovative initiatives for improvement of their economies, environments, and quality of life.


State and local government officials are excited to work in true partnership with the federal government. By operating as authentic collaborators in the development and execution of policy, the states, local governments and federal government can demonstrably improve their service to the public. By working cooperatively with states and local governments, the Administration can create a legacy of renewed federalism, resulting in a nation that is stronger, more resilient and more united. Such an outcome will redound to the credit of the Administration and inure to the benefit of the American people.

Our organizations pledge that we will act as conduits to provide notice of relevant federal action to our respective members so that they may provide this Administration with input regarding such action.

It is in a spirit of bipartisan cooperation, optimism and good will that we offer the following federalism principles for the Administration's consideration and action.

Sincerely,

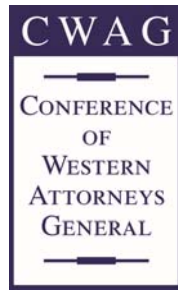

James D. Ogsbury
Executive Director
Western Governors' Association


Douglas S. Chin
Attorney General of Hawai'i
Chair, Conference of Western Attorneys General


Representative Jeff Thompson
Idaho House of Representatives
Chair, The Council of State Governments West


Commissioner Doug Breidenthal
President
Western Interstate Region of NACo


Matt Morrison
Executive Director
Pacific NorthWest Economic Region



December 15, 2016

Honorable Paul Ryan
Speaker of the House
U.S. House of Representatives
H-232 U.S. Capitol
Washington, D.C. 20515

Honorable Mitch McConnell
Majority Leader
U.S. Senate
S-230 U.S. Capitol
Washington, D.C. 20510

Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
H-204 U.S. Capitol
Washington, D.C. 20515

Honorable Charles Schumer
Minority Leader-elect
U.S. Senate
419 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators McConnell and Schumer and Representatives Ryan and Pelosi:

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Honorable Paul Ryan
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December 15, 2016
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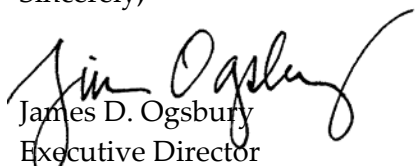
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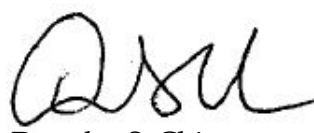
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Principles to Clarify and Strengthen the State-Federal Relationship

A. Fundamental Federalism Principles

1. The structure of government established by the United States Constitution is premised upon a system of checks and balances.
2. The Constitution created a federal government of supreme, but limited and enumerated, powers. The sovereign powers not granted to the federal government are reserved to the people or to the states, unless prohibited to the states by the Constitution. The constitutional relationship among sovereign governments, state and federal, is memorialized in the Tenth Amendment to the Constitution. Under this Constitutional framework, states also confer governmental powers to counties and local governments.
3. Our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires.
4. Effective public policy is achieved when there is competition among the several states in the fashioning of different approaches to public policy issues. The search for enlightened public policy is advanced when individual states and local governments are free to experiment with a variety of approaches to public issues. One-size-fits-all national approaches to public policy problems can inhibit the creation of effective solutions to those problems.
5. In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual states. Uncertainties regarding the legitimate authority of the federal government should generally be resolved in favor of state and local authority and regulation.
6. To the extent permitted by law, federal executive departments and agencies should not construe, in regulations and otherwise, a federal statute to preempt state or local authority unless the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of state or local authority, or when the exercise of state or local authority directly conflicts with the exercise of federal authority under the relevant federal statute or U.S. Constitution.
7. When an executive department or agency proposes to act through adjudication or regulatory action to preempt state or local authority, the department or agency must provide all affected states and local governments notice and an opportunity for

appropriate participation in the proceedings [as outlined in B(2)].

8. With respect to federal statutes and regulations administered by states and local governments, the federal government should grant states and local governments the maximum administrative discretion possible. Any federal oversight of such state and local administration should not unnecessarily intrude on state and local discretion or create undue burdens on state and local resources.

B. Actions by Federal Agencies That Should Be Covered by Federalism Executive Order / Consultation

1. Actions having federalism implications include federal regulations, proposed federal legislation, policies, rules, guidances, directives, programs, reviews, budget proposals, budget processes and strategic planning efforts that have substantial direct effects on the states and/or local governments or on their relationship with the federal government, or the distribution of power and responsibilities, between the federal government and the states and local governments.
2. "Consultation" -- Each federal executive department / agency should be required to have a clear, consistent and accountable process (see Section C below) to provide states and localities with early, meaningful and substantive input in the development of regulatory policies that have federalism implications.
3. Independent regulatory agencies should be required to comply with the same federalism-related requirements that other executive departments and agencies are required to follow.

C. Federalism Review Process

1. The head of each federal executive department and agency should be required to designate an official responsible for ensuring that the federalism consultation process is executed appropriately and completely.
 - a. Regulatory actions [see B(1)] with federalism implications should trigger preparation of a federalism assessment. Such assessments should be considered in all decisions involved in promulgating and implementing the policy.
 - b. Each federalism assessment should accompany any submission concerning the policy that is made to the Office of Management and Budget pursuant to Executive Order No. 12291 or OMB Circular No. A19, and:

- i. contain the designated official's certification that the policy has been assessed in light of the principles, criteria and requirements contained in this document;
 - ii. identify any provision or element of the policy that is inconsistent with the principles, criteria, and requirements stated in this document;
 - iii. specifically identify the extent to which the policy imposes additional costs or burdens on state or local governments, including the likely source of funding for the state and local governments and the ability of the states and impacted local governments to fulfill the purposes of the policy; and
 - iv. specifically identify the extent to which the policy would affect impacted governments' abilities to discharge traditional state and local governmental functions, or other aspects of state sovereignty and local government authority.
2. No executive department or agency should promulgate any regulation that is not authorized by federal statute. Where regulations are appropriate, authorized and Constitutional, but have federalism implications or impose substantial direct compliance costs on states or localities, the executive department or agency must:
 - a. Ensure that new funds sufficient to pay the direct costs incurred by the state or local government in complying with the regulation are provided by the federal government to the impacted state and local governments for the duration of the impact; and
 - b. Prior to the formal promulgation of the regulation:
 - i. in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provide to the Director of the Office of Management and Budget a description of the extent of the executive department / agency's prior consultation with representatives of affected states and local governments, a summary of the nature of their concerns, and the executive department / agency's position supporting the need to issue the regulation; and
 - ii. makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by states or local governments.

D. Increasing Flexibility for State and Local Waivers

1. Agencies should review the processes under which states and local governments apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.
2. Each agency should, to the extent practicable and permitted by law, favorably consider any application by a state or local government for a waiver of statutory or regulatory requirements in connection with any program administered by that agency. In general, federal agencies should operate with a general view toward increasing opportunities for utilizing flexible policy approaches at the state or local level in cases in which the proposed waiver is consistent with applicable federal policy objectives and is otherwise appropriate.
3. Each agency should, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency. If the application for a waiver is not granted, the agency should provide the applicant with timely written notice of the decision and the reasons for the application's rejection.
4. This process would apply only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.



States Are Not Stakeholders – Legal Primer

“Some truths are so basic that, like the air around us, they are easily overlooked.”

- Justice O’Connor (on State sovereignty in *New York v. U.S.*, 505 U.S. 144, 187 (1992)).

States are sovereigns.

- U.S.C.A. Const. Amend. 10.
- The U.S. Supreme Court has recognized that the States entered the federal system with their sovereignty intact. *Blatchford v. Native Vill. Of Noatak*, 501 U.S. 775, 779 (1991).

The U.S. Supreme Court and Congress recognize that States are entitled to the degree of respect due a co-equal governmental institution.

- See, e.g. *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002); *Alden v. Maine*, 527 U.S. 706, 750 (1999); *Printz v. U.S.*, 521 U.S. 898, 928 (1997); *New York v. U.S.*, 505 U.S. 144, 156-57 (1992); federal agency enabling acts; Unfunded Mandates Reform Act, 2 U.S.C. § 1501 *et. seq.* (Guidelines and Instructions for Implementing Section 204, *State, Local, and Tribal Government Input*); *Federalism*, E.O. 13132.

Congress has, through various statutes, expressly recognized States’ unique status as sovereignties with their own inherent authority – as well as instances in which States serve as co-regulators with federally-delegated authority – and has directed federal agencies to consult with States accordingly.

- As recognized by the U.S. Supreme Court, Congress directs federal agencies to defer to State authority in areas such as: land and water use and zoning, education, domestic relations, criminal law, property law, local government, taxation, and fish and game.
- Congress directs federal agencies to co-regulate with the States under statutes such as: Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act, and Comprehensive Environmental Response, Compensation, and Liability Act.

Because States are sovereign, the U.S. Supreme Court provides the States with unique consideration for the purposes of invoking federal court jurisdiction. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (finding states are not “normal litigants”).

Federal agencies are directed by Executive Order 13132, *Federalism*, to adhere to fundamental federalism principles and develop an accountable process to ensure meaningful and timely input from States when formulating policies that have federalism implications.

Will litigation be the ultimate form of State involvement over federal regulatory policies?

Proper agency consultation with states produces more informed, effective, and durable administrative rules, regulations, and policies.



WESTERN GOVERNORS' ASSOCIATION

FEDERAL-STATE RELATIONSHIP – AUTHORITY FRAMEWORK¹

SCENARIO I	Federal Authority Exclusively
Explanation	There are powers that are specifically enumerated by the U.S. Constitution as exclusively the purview of the federal government. ²
Some Examples	National defense, interstate commerce, border control.
SCENARIO II	State Primacy Rules
Explanation	All powers not specifically delegated to the federal government by the U.S. Constitution are reserved for the states, allowing state legal authority to overrule federal intrusion.
Some Examples	Groundwater, ³ water allocations/management, wildlife management (outside

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² U.S. Constitution Article VI (Supremacy Clause), Article I (Congressional) Section 8; Article II, Section 1 (Executive Branch), Article III, Section 2 (Judicial Branch). State law can be preempted two ways: Congress evidences an intent to fully occupy a given “field,” then state law falling within the field is preempted. If Congress has not fully displaced state regulation over the matter, state law is preempted to the extent it *actually* conflicts with federal law.

³ Congress recognized states as the sole authority over groundwater in the Desert Land Act of 1877. The U.S. Supreme Court has repeatedly emphasized the exclusive nature of state authority over water management, including in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

	ESA context) ⁴ and natural resource management under state “trust” authorities. ⁵
SCENARIO III	Shared State-Federal Authority
Explanation	Where state and/or federal authority can apply, given a particular fact pattern. ⁶ Risk of federal preemption of state law is a concern with this scenario.
Some Examples	Water (e.g. federal water rights adjudicated through state water courts), wildlife (ESA-triggered and in wilderness and National Wildlife Refuges), land management (especially under landscape-based planning models), planning and siting of linear facilities.
SCENARIO IV	State Authority “Delegated” from Federal Agencies via Federal Statute
Explanation	Where a statutory regime contemplates establishment of federal standards, with delegated authority (permissive) available to states that wish to implement those standards. ⁷
Some Examples	CAA, CWA, EPCRA, FIFRA, OPCA, RCRA, SDWA, SMCRA, TSCA. ⁸

⁴ See AFWA’s 2014 report: “[Wildlife Management Authority, the State Agencies’ Perspective.](#)”

⁴ Amendment 10 of the U.S. Constitution: “*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.*” Public trust doctrine is a common-law concept concerning public rights to lands and water to be held “in trust” by states for certain public uses. This is the basis of states’ so-called “trust” authority over natural resources and wildlife. The manner in which states hold title to such lands and water is described in the U.S. Supreme Court case [Illinois Central Railroad vs. Illinois](#). In the wildlife context, this is further articulated through the [North American Model of Wildlife Conservation](#)

⁵ Per the 10th Amendment, state authority dominates in the pre-listing conservation context.

⁴Ibid.

⁶ The federal government has authority to regulate federal property under Article IV of the Constitution. However, that authority is limited. General regulatory authority (including regulation of wildlife and land use) is held by the states, unless Congress passes a specific law that conflicts with state policy. This is discussed in detail in U.S. Supreme Court case, [Kleppe v. New Mexico](#). On the other hand, federal authority can extend to state public trust lands adjacent to so called “special use” federal property (e.g. designated wilderness areas) when state uses interfere with the federal property. This concept is discussed in U.S. Supreme Court cases, [Camfield v. United States](#) and [United States v. Alford](#).

⁷There are requirements that federal facilities and activities comply with state environmental laws, The CWA, CAA, RCRA, SDWA, TSCA and CERCLA all include provisions that require implementation activities involved to be subject to, and comply with, all federal, state, interstate and local requirements.

⁸ See ECOS, “[State Delegation of Environmental Acts.](#)” (Feb. 2016) for lists of states accepting delegation under various federal environmental statutes. According to ECOS, states implement 96.5% of federal programs that can

SCENARIO V	Other Opportunities for State Engagement / State Rights Afforded by Statute / EO
Explanation	Where the federal government has a statutory, historical or “moral” obligation to states.
Some Examples	PILT/SRS, mineral royalties, unfunded mandates, required regulatory review, cost-benefit and economic impacts analyses, federalism reviews, NEPA cooperating agency status, ESA cooperating agency (Section 7) and Section 6 cooperative agreements and “maximum extent practicable” clause (Section 6).
SCENARIO VI	Voluntary Federal-State Collaboration Models
Explanation	Where state(s) and federal governments enter wholly voluntary collaborative relationships.
Some Examples	WGA Chair initiatives, conservation joint ventures ⁹ , collaboratives.

be delegated to states. States conduct over 90% of environmental inspections, enforcement, environmental data collection.

⁹ AFWA 2014 report: “[Wildlife Management Authority, the State Agencies’ Perspective](#),” pages 26-27



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:
<p>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.</p>	<ol style="list-style-type: none"> 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). <p>For detailed analysis, see WGA Memorandum: <i>Non-Legislative Rulemaking to Circumvent Basic Procedural Requirements</i>.</p>	<p>Administrative Procedure Act, Section 553 (5 U.S.C. § 553)</p> <p>Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000)</p> <p>OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007)</p> <p>E.O. 12866, Regulatory Planning and Review (58 Fed. Reg. 51735; Oct. 4, 1993)</p>
<p>Ex Parte Communications: Agencies have expressed that general agency policy restricting “<i>ex parte</i>” 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</p>	<ol style="list-style-type: none"> 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 <i>ex parte</i> communication were hastily adopted in response to overly-restrictive federal case 	<p>Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981)</p> <p>Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).</p>

<p>communications with non-agency personnel during the rulemaking process. These policies are non-legislative rules, which are highly immune from legal or administrative challenge.</p>	<p>law which has been subsequently overturned.</p> <p>3) Agency policies addressing <i>ex parte</i> communications have been adopted as non-legislative rules and, thus, cannot have any binding effect.</p> <p>For detailed analysis, see WGA Memorandum: <i>Ex Parte Communications Between State and Federal Officials in the Federal Administrative Rulemaking Process.</i></p>	
<p>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).</p>	<p>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.</p> <p>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.”</p> <p>For detailed analysis, see WGA Memorandum: <i>FACA Application to WGA Intergovernmental Meetings with Federal Officials.</i></p>	<p>Federal Advisory Committee Act, 5 U.S.C. App. II §§ 1-15</p> <p>Unfunded Mandates Reform Act, P.L. 104-4 (1995)</p> <p>Alice M. Rivlin Memorandum (Sep. 21, 1995)</p>
<p>FOIA – Deliberative Process Exemption’s Application to State Consultation: Federal</p>	<p>1) FOIA’s “Deliberative Process” exemption applies to communications that are: (i)</p>	<p>Freedom of Information Act, 5 U.S.C. § 552, et seq.</p>

<p>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).</p>	<p>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.</p> <p>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.</p> <p><i>For detailed analysis, see WGA Memorandum: FOIA and the Application of its Deliberative Process Exemption to Communications Between State and Federal Officials.</i></p>	<p><i>Dep't of the Interior v. Klamath Water Users Protective Ass'n</i>, 532 U.S. 1 (2001)</p> <p><i>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).</i></p>
<p>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.</p>	<p>1) Comprehensive federal agency procedures for tribal consultation have developed over multiple presidential administrations.</p> <p>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</p>	<p><u>E.O. 13175, Consultation and Coordination with Indian Tribal Governments</u>, 65 Fed. Reg. 67249 (Nov. 6, 2000)</p> <p><u>Presidential Memorandum on Tribal Consultation</u> (Nov. 5, 2009)</p>

	<p>state and federal officials with decision-making authority.</p> <p>For detailed analysis, see WGA Memorandum: <i>Federal Policies Regarding Tribal Consultation as a Model for State Consultation Regulatory Reform</i>.</p>	
<p>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.</p>	<ol style="list-style-type: none"> 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. 	<p><i>California Wilderness Coalition v. Dept. of Energy</i>, 631 F.3d 1072 (9th Cir. 2011)</p>
<p>Federalism Consultation with States (Executive Order 13132): Federal agencies have largely ignored the mandates expressed in E.O. 13132, <i>Federalism</i>, 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</p>	<ol style="list-style-type: none"> 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.” 	<p><i>Executive Order 13132, Federalism</i>, 64 Fed. Reg. 43255 (Aug. 4, 1999)</p> <p>OMB Guidance for Implementing E.O. 13132, “Federalism” (Oct. 28, 1999)</p>

<p>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.</p>	<p>2) OMB guidance expresses that agencies "must include elected State and local government officials or their representative national organizations in the consultation process."</p>	
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January 9, 2019

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-204 U.S. Capitol
Washington, D.C. 20515

The Honorable Kevin McCarthy
Minority Leader
U.S. House of Representatives
2421 Rayburn House Office Building
Washington, D.C. 20515

Dear Speaker Pelosi and Minority Leader McCarthy:

As you begin the 116th Congress, Western Governors strongly encourage you to retain an emphasis on and seek improvements to the state-federal relationship.

Over the past two years, Western Governors have engaged the Speaker's Task Force on Intergovernmental Affairs (Task Force) and Oversight and Government Reform Subcommittee on Intergovernmental Affairs (Subcommittee) in a meaningful dialogue about institutional improvements to the state-federal relationship. Governors appreciate the opportunities these panels have provided for thoughtful consideration of issues surrounding the respective authorities of the federal government and the states – issues that are central to efficient and effective governance. We believe that continued bipartisan attention to these issues could lead to meaningful and beneficial adjustments to the state-federal paradigm, as well as to more productive working relationships between state and federal officials.

The significance of the state-federal relationship in our system of government warrants continued and dedicated congressional attention. We are optimistic that you, in partnership with Governors and interested parties, will consider and develop enduring structural changes to improve operational aspects of that relationship over the course of the 116th Congress.

With appreciation for your favorable consideration of this request, we are

Sincerely,



David Ige
Governor of Hawaii
Chair, WGA



Doug Burgum
Governor of North Dakota
Vice Chair, WGA