
March 3, 2021

The Honorable Lloyd J. Austin III
Secretary
U.S. Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Secretary Austin:

On behalf of the Western Governors' Association (WGA), we are writing to congratulate you on your confirmation to serve as the Secretary of Defense. We look forward to working with you in your new capacity as the chief principal defense policymaker and adviser of the United States.

WGA represents the Governors of the 22 westernmost states and U.S. territories. The association is an instrument of the Governors for bipartisan policy development, information exchange and collective action on issues of critical importance to the western United States.

WGA is deeply interested in, and has adopted substantive and detailed policies regarding, activities within the jurisdiction of the Department of Defense. The purpose of this communication is to introduce you to those policies and to encourage a close and productive working relationship. Western states are eager to work closely with you as authentic partners in the design and execution of programs and policies that affect our constituents and implicate state authority.

While the focus of your Department is on addressing external security threats to our nation, many of its activities affect states. Military bases and defense activities provide significant economic opportunities for western communities and businesses. The U.S. Army Corps of Engineers plays a significant role in water management in the West. The Corps also has an important part in disaster response, addressing flood and landslide risk in wildfire affected watersheds. We appreciate the Department's commitment to environmental stewardship through platforms such as the Readiness and Environmental Protection Integration Program and its involvement with the Wildland Fire Leadership Council.

The attachment to this letter presents a high-level summary of select gubernatorial priorities within your jurisdiction. We hope you will take time to review this information and remember that Western Governors are enthusiastic partners with respect to these and other issues. Moreover, we expect to be consulted throughout the decision making and rulemaking processes of the Department.

One of Western Governors' foundational policy statements is WGA Policy Resolution 2021-01, *Strengthening the State-Federal Relationship* (attached). The resolution notes that "[e]ach Executive department and agency should have a clear and accountable process to provide each state – through its Governor or their designees – with *early, meaningful, substantive, and ongoing consultation* in the development of federal policies that affect states." (emphasis added). We submit

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that such consultation should commence immediately, both with respect to departmental policies under review and those under development.

Congratulations again on your appointment. We look forward to working with you to realign the state-federal relationship to better serve our common constituencies.

Sincerely,



Kate Brown
Governor of Oregon
Chair, WGA



Brad Little
Governor of Idaho
Vice Chair, WGA

Attachments



Department of Defense Summary of Priorities

This document outlines Western Governors' priorities for the Department of Defense. It is comprised of positions adopted by Western Governors in WGA policy resolutions.

Priority	Governors' Policy
State-Federal Relationship	
<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 by federal agencies. Rather, states should be treated as sovereign entities and engaged in a government-to-government manner.</p>	<p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p>
<p>Preemption</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>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p>
<p>Consultation</p> <p>Seek opportunities for more meaningful consultation through:</p> <ul style="list-style-type: none"> • agency-specific processes; • Executive Branch cross-cutting regulatory efforts; and • administrative reorganization. <p>Require federal agencies to consult with states on agency reorganization and regulatory reform.</p> <p>Consult with states on a regular basis: as a predicate to federal action; through the pre-publication stage of rulemaking; after publication and before adoption of rules and regulations; and on an ongoing basis throughout implementation.</p> <p>Define "consultation" to:</p> <ul style="list-style-type: none"> • 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. <p>Clarify that notice and comment rulemaking procedures do not satisfy agencies' requirements to consult with states where required by law.</p>	<p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p>

Priority	Governors' Policy
<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>Cooperating Agency Status</p> <p>Better define "cooperating agency" under NEPA processes.</p>	<p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p> <p>WGA Policy Resolution 2018-15, Modernizing Western Infrastructure</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 response to that input, and any written communications submitted by states. <p>Provide an opportunity for Governors or their designees to review agencies' regulatory agendas.</p>	<p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</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>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p>

Priority	Governors' Policy
<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>Consistency and Avoidance of Conflicts</p> <p>Require federal agencies to 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>	<p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</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>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p> <p>WGA Policy Resolution 2021-02, Utilizing State Data in Federal Decision Making</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>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p>
<p>Perceived Barriers to the State-Federal Relationship</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>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>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>Investigate and develop solutions for other barriers to state-federal communication presented by FOIA.</p>	<p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p> <p>WGA Policy Resolution 2021-02, Utilizing State Data in Federal Decision Making</p>
<p>Unfunded Mandates Reform Act</p> <p>Eliminate the \$100 million threshold for the application of the UMRA to federal intergovernmental mandates.</p>	<p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p>

Priority	Governors' Policy
<p>Require agencies to incorporate state government input and data, including social and economic data, in their qualitative and quantitative assessment of anticipated costs and benefits of qualifying rules under the UMRA.</p> <p>Strengthen the consultation requirements for federal intergovernmental mandates.</p> <p>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>WGA Policy Resolution 2021-02, Utilizing State Data in Federal Decision Making</p>
<p>State Participation on Federal Boards</p> <p>Require agencies to assure state participation in relevant federal science boards by requiring the selection of state scientists to serve on science-based groups informing federal regulation.</p>	<p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p>
<p>Settlement Negotiations</p> <p>Where their roles and responsibilities are impacted, states should be meaningfully consulted during settlement negotiations, including negotiations aimed at avoiding, rather than resolving, litigation.</p> <p>Provide notice to affected Governors' offices and give co-regulating states opportunities to participate in the proceedings.</p> <p>Where legally permissible, that right should extend to federal agencies' settlement negotiations impacting state environmental and natural resource management prerogatives.</p>	<p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p>
<p>Cost/Benefit Analyses</p> <p>Seek mandatory use of a refined model for federal land management agencies' economic impact and cost/benefit analyses designed in conjunction with affected states and counties.</p>	<p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p> <p>WGA Policy Resolution 2021-02, Utilizing State Data in Federal Decision Making</p>
<p>Streamlining</p> <p>Coordinate, streamline, and increase the flexibility of infrastructure planning and permitting guidelines, rules, and policies to:</p> <ul style="list-style-type: none"> • allow for timely decision-making in the design, financing, and construction of needed infrastructure; • account for regional differences; • balance economic and environmental considerations; • minimize costs. 	<p>WGA Policy Resolution 2015-08, Water Resource Management in the West</p> <p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p> <p>WGA Policy Resolution 2018-15, Modernizing Western Infrastructure</p>

Priority	Governors' Policy
<p>Preemption</p> <p>Require agencies to develop step-by-step internal guidelines on compliance with the preemption provisions of Executive Order 13123.</p> <p>Require internal oversight procedure by which agency scrutinizes potential preemptions of state authority.</p> <p>Improve preemption and federalism review requirements in OIRA's "A-4 Circular" checklist.</p>	<p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p>
<p>Biosecurity and Invasive Species</p>	
<p>Invasive Species</p> <p>Support state, territorial, and tribal invasive species prevention, control and management programs and redouble efforts on federal lands.</p> <p>Build a more sophisticated and centralized biosecurity and invasive species management network, including a National Biosecurity and Invasive Species Management Center based on the model of the NIFC.</p> <p>Ensure that invasive species funding, including support for emergency response, is sustainable, flexible and able to be maximized by federal, state and local agencies with pooled resources and collaborative funding mechanisms.</p> <p>Federal funding, cooperative agreements grants, and procurement contracts for state and local biosecurity and invasive species management should be structured in a deliberate and transparent way that allows for the greatest amount of flexibility and long-term planning.</p> <p>Federal agencies should look for collaborative projects and funding opportunities that multiply state resources and support state-led biosecurity and invasive species management projects.</p> <p>Expand the use of cooperative agreements with state and local governments and should ensure that they are approved in a timely manner and in collaboration with implementing state agencies.</p> <p>Support state biosecurity and invasive species management efforts by ensuring the timely approval of state permits for biosecurity, quarantine, biocontrol, and rapid response actions.</p> <p>Consult with Governors early and substantively regarding biosecurity or invasive species management decisions that affect state resources and state actions.</p> <p>Identify individuals within district and region offices that can be contacted and assist in the planning and implementation of local cross-boundary invasive species management programs.</p>	<p>WGA Policy Resolution 2019-06, Biosecurity and Invasive Species Management</p> <p>Biosecurity and Invasive Species Initiative Special Report</p> <p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p> <p>WGA Policy Resolution 2021-03, National Forest and Rangeland Management</p> <p>WGA Policy Resolution 2021-04, Species Conservation and the Endangered Species Act</p>

Priority	Governors' Policy
<p>Increase the use of innovative biosecurity prevention and detection programs, including increased use of electronic manifesting in interstate shipments for the purposes of inspection, and the use of canine detection resources.</p> <p>The Executive Branch can support state-led rapid response programs by:</p> <ul style="list-style-type: none"> • increasing federal funding for state-led aquatic invasive species rapid response programs, including those that provide mechanisms for flexible, long-term support of state early detection rapid response efforts; • streamlining federal permitting and approval processes for treatment and management actions for new mussel detections; • creating a single federal authority for aquatic invasive species treatment permitting and approval in freshwater systems; and • simplifying reporting on new invasive mussel infestations by creating a single federal point of contact for new mussel detections. <p>USDA quarantines and commodity inspections should incorporate the priorities of the West, including noncontiguous states and territorial islands in the western region.</p> <p>U.S. Coast Guard and the Environmental Protection Agency should consult with Western Governors and work closely and collaboratively with states on the implementation of the Vessel Incidental Discharge Act.</p> <p>Encourage funding and economic incentives for proactive, voluntary conservation efforts to obviate the need for listing a species under the ESA. Activities should include management of invasive species adversely affecting species and habitat.</p>	
Cybersecurity	
<p>Coordination and Consultation</p> <p>Clarify the roles and responsibilities of federal agencies in preventing, preparing for, and responding to cyberattacks, including by providing centralized authority, points of contact, and formalized communication pathways at each level within government and other organizations.</p> <p>Establish a working group with representatives from states and federal agencies to harmonize disparate agency regulations.</p>	<p>WGA Policy Resolution 2019-02, Cybersecurity</p> <p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p>
<p>Information Sharing</p> <p>Emphasize the benefits of information-sharing, while alleviating private sector concerns with this essential communication.</p> <p>Investigate liability protections, such as safe harbor provisions, for entities that report cyber intrusions.</p>	<p>WGA Policy Resolution 2019-02, Cybersecurity</p> <p>WGA Policy Resolution 2021-02, Utilizing State Data in Federal Decision Making</p>
Land Management	

Priority	Governors' Policy
<p>Environmental Review</p> <p>Increase bottom-up coordination among agencies, state and local governments and foster collaboration among diverse stakeholders and project proponents to create efficiency and predictability in the NEPA process.</p> <p>Identify and eliminate inconsistencies in environmental review and analysis across agencies to make the NEPA process more efficient.</p> <p>Allow for existing state environmental review processes to supplement and inform federal environmental review under NEPA. Encourage joint reviews with the states where possible.</p> <p>Consider and apply peer-reviewed environmental science in a consistent manner across agencies as each undertake their NEPA reviews of different projects' impacts on and contributions to environmental quality. Work directly with states to obtain and use up-to-date state data and analyses as critical sources of information in the NEPA process.</p> <p>Clarify that state, local and tribal governments, as well as their political subdivisions, have unique and critical duties to serve their citizens and should not be considered ordinary "stakeholders" for purposes of the NEPA process. Federal agencies should be required to engage with states and state agencies in early, meaningful, substantive and ongoing consultation.</p> <p>Promulgate regulations establishing consultation procedures and clarifying states' roles as cooperating agencies, which include the opportunity to review documents and alternatives prior to the public comment period.</p> <p>Ensure that Environmental Impact Statements (EIS) and Environmental Assessments (EAs) fulfill state environmental review requirements in addition to, but not in conflict with, NEPA and are consistent with state, local, and tribal plans and laws to the maximum extent possible. Where inconsistency or conflict between state and federal requirements necessarily occurs, require federal agencies to include the agency's rationale and the steps taken to mitigate inconsistency or conflict to the maximum extent possible.</p> <p>Invite all qualified state governmental entities to participate in the NEPA process as cooperating agencies for both EISs and EAs, while providing flexibility for those entities to decline the invitation.</p> <p>Provide a standard for, documentation requirements pertaining to, and review of a lead agency's denial of, a request for cooperating agency status. The denial of any bona fide request for cooperating agency status should be accompanied by a clear and thorough explanation from the lead agency denying such request, citing specific factors the agency used in its determination. Such information should be recorded and maintained by the lead federal agency and collected by the Office of Management and Budget.</p>	<p>WGA Policy Resolution 2018-15, Modernizing Western Infrastructure</p> <p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p> <p>WGA Policy Resolution 2021-02, Utilizing State Data in Federal Decision Making</p> <p>October 10, 2018 letter to White House, CEQ, USACE, EPA: clarification of the Administration's One Federal Decision Policy and Section 401 and 404 of the Clean Water Act</p>

Priority	Governors' Policy
<p>Simplify the definition of cooperating agency and clarify that cooperating agency status extends until an EIS or EA is implemented.</p>	
<p>Cross-Boundary Projects</p> <p>Strive to find new ways to collaborate on forest and rangeland management projects, as well as to explore ways to improve state-federal coordination on existing management projects.</p> <p>Work to support effective collaboration on federal projects and all-lands initiatives.</p> <p>Look to local communities as a source of strength, knowledge, and support during the planning and implementation of forest and rangeland management projects.</p> <p>Work with local communities while planning forest and rangeland management projects.</p> <p>Establish multi-agency pilot projects, which can suggest models for subsequent formal agreements.</p> <p>Strive to identify business practice barriers to cross-boundary projects.</p> <p>Target funding from USFS, BLM, the NRCS and state sources to address cross-boundary management goals (and support monitoring and assessment frameworks) in priority areas. Projects using this targeted funding should be consistent with State Forest Action Plans, wildlife action plans, community wildfire protection plans, and projects in other priority areas determined by federal, state, local and tribal partners based on the best available science.</p>	<p>WGA Policy Resolution 2021-03, National Forest and Rangeland Management</p> <p>WGA Policy Resolution 2021-04, Species Conservation and the Endangered Species Act</p> <p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p>
<p>Prescribed Fire</p> <p>Expand the use of prescribed fire and should look for ways to reduce the statutory and regulatory barriers to its expanded use on western forests and rangelands.</p> <p>Identify reforms that reduce barriers to prescribed fire and reduce overall health impacts from smoke.</p> <p>Improve interagency use of smoke management best practices.</p> <p>Examine liability protection for fire managers and compensation for private property owners negatively affected by escaped prescribed burns.</p> <p>Increase workforce capacity for prescribed fire activities, as well as science-based vegetation management activities, oversight and planning.</p> <p>Identify ways to increase the cultural acceptance of the use of prescribed fire in the West.</p>	<p>WGA Policy Resolution 2021-03, National Forest and Rangeland Management</p>

Priority	Governors' Policy
<p>Incorporate Native American cultural burning and tribal practices more effectively into federal and state planning management processes.</p> <p>As necessary, utilize incident command teams for prescribed fires in a manner similar to suppression fires.</p>	
<p>Wildfire</p> <p>Look for ways to further incorporate local fire protective associations into regional wildfire dispatch and coordination centers.</p> <p>Pair the Wildfire Hazard Potential index and map with spatial data for use at the community level.</p> <p>Modernize the wildland fire service and adapt it for the West’s increasingly long and intense fire seasons.</p> <p>Examine reliance on 1039 seasonal staff, shift a higher percentage of wildland fire staff from seasonal to permanent and permanent subject to furlough positions, and evaluate policies related to the use of Administratively Determined emergency firefighters.</p> <p>Implement hazard pay for federal firefighters performing prescribed fire operations.</p> <p>Ensure that incident command teams have adequate access to training and preparedness activities and are, as necessary, utilized for prescribed fires in a manner similar to suppression fires.</p> <p>Seek opportunities, including revisions to forest plans, to enhance safety and reduce costs in suppression decisions while protecting communities.</p> <p>Create incentives for local governments to take voluntary actions to support the creation and expansion of fire-adapted and smoke-ready communities and resilience, including the promotion of education, fuels management projects and improved integration of community wildfire protection plans with land use decisions when compatible with local goals.</p>	<p>WGA Policy Resolution 2021-03, National Forest and Rangeland Management</p> <p>WGA Policy Resolution 2018-08, Water Resource Management in the West</p> <p>WGA Policy Resolution 2018-03, Federal Disaster Recovery Assistance for Communities in the West</p>
<p>Collaboration</p> <p>Expand opportunities for state and local collaborative involvement in decision-making processes.</p> <p>Provide funding and support to states for cost incurred during in their role as conveners of collaborative interagency forest and rangeland management efforts.</p> <p>Striving to identify business practice barriers to cross-boundary projects.</p>	<p>WGA Policy Resolution 2021-03, National Forest and Rangeland Management</p> <p>WGA Policy Resolution 2021-04, Species Conservation and the Endangered Species Act</p> <p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p>

Priority	Governors' Policy
<p>Develop training on state and federal contracting procedures and administration for all partners to improve implementation of cross-boundary projects.</p> <p>Streamline and consolidating agency processes with partners.</p> <p>Establish multi-agency pilot projects, which can suggest models for subsequent formal agreements.</p> <p>Reward successful implementation of collaborative projects through funding, retained-receipt authority, or other capacity to pursue subsequent projects.</p> <p>Strive to find new ways to collaborate on forest and rangeland management projects, as well as to explore ways to improve state-federal coordination on existing management projects.</p> <p>Work to support effective collaboration on federal projects and all-lands initiatives.</p> <p>Look to local communities as a source of strength, knowledge, and support during the planning and implementation of forest and rangeland management projects.</p> <p>Work with local communities while planning forest and rangeland management projects.</p> <p>The Services, working with the states, should establish consistent criteria to assess modeling related to projected scientific information, such as climate change, possible genetic distinction between populations, and long-term population viability among other factors in their scientific review. In these circumstances, federal agencies should partner with states and management authorities with expertise over the given model to develop and utilize mutually acceptable predictive techniques and consensus-based metrics that are grounded in science and measurable outcomes.</p> <p>Urge federal land management agencies– in coordination with state fish and wildlife agencies – to work with private landowners and local communities to identify monetary and non-monetary incentives to encourage voluntary corridor and habitat conservation efforts.</p> <p>Any federal efforts to identify, regulate, or conserve wildlife migration corridors through administrative or legislative action must rely upon coordination and consultation with states and should advance collaborative, locally driven initiatives to conserve key wildlife corridors and habitat.</p>	<p>WGA Policy Resolution 2021-02, Utilizing State Data in Federal Decision Making</p>
<p>Consultation</p> <p>Promote early, meaningful consultation with states in the promulgation or development of any rules, regulations, directives, or agency action that affects or influences states' management or allocation of water resources.</p>	<p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p>

Priority	Governors' Policy
	WGA Policy Resolution 2018-08 , Water Resource Management in the West
Water	
<p>Management of Water Resources</p> <p>Expressly, unambiguously, and conspicuously recognize states' primary authority over water management and allocation decisions in all new federal laws, rules, regulations, and guidance documents.</p> <p>Respect limits set by Congress and the U.S. Supreme Court for any definition of "Waters of the United States" in the Clean Water Act and recognize the authority of states to manage water within their boundaries.</p> <p>Recognize states' exclusive authority over the allocation and administration of rights to develop groundwater resources and expressly preclude federal agencies from usurping such authority through rulemakings, regulations, guidance documents, or agency directives.</p>	<p>WGA Policy Resolution 2018-08, Water Resource Management in the West</p> <p>WGA Policy Resolution 2018-12, Water Quality in the West</p> <p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p> <p>February 20, 2019 group letter to EPA and USACE: coalition process reforms to improve CWA Section 401 permitting processes</p>
<p>Clean Water Act</p> <p>Engage the states as co-regulators and ensure that state water managers have a robust and meaningful voice in the development of any federal rule regarding Clean Water Act jurisdiction.</p> <p>Allow states to adopt flexible water quality standards and establish total maximum daily loads that are tailored to the specific characteristics of western water bodies, including variances for unique state and local conditions.</p> <p>Coordinate with states in establishing and, if necessary, modifying any water quality standards under Section 303 of the Clean Water Act to ensure any changes do not unduly interfere with sound existing practices.</p> <p>Ensure that authority delegated to states under Clean Water Act Section 401 is preserved.</p>	<p>WGA Policy Resolution 2018-08, Water Resource Management in the West</p> <p>WGA Policy Resolution 2018-12, Water Quality in the West</p> <p>WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship</p> <p>February 20, 2019 group letter to EPA and USACE: coalition process reforms to improve CWA Section 401 permitting processes</p>



Policy Resolution 2021-01

Strengthening the State-Federal Relationship

A. **BACKGROUND**

1. Western Governors are proud of their unique role in governing and serving the citizens of this great nation. As the chief elected officials of sovereign states, they bear enormous responsibility and have tremendous opportunity. Moreover, the faithful discharge of their obligations is central to the success of the Great American Experiment.
2. It was the states that confederated to form a more perfect union by creating a national government with specific responsibilities for common interests. In this union, the states retained their sovereignty and much of their authority.¹
3. 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 and encompass 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: “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.”
4. This reservation of power to the states respects the differences between regions and peoples, recognizes a right to self-determination at a local level, and provides for flexible, tailored solutions to policy challenges. It also requires the federal government to engage with states – our nation’s dynamic laboratories of democracy – on a government-to-government basis befitting their co-sovereign status.
5. In addition to states’ reserved sovereign authorities, Congress has recognized state authority in federal statute by: (1) directing the federal government to defer to state authority, including such authority over land and water use, education, domestic relations, criminal law, property law, local government, taxation, and fish and wildlife; and (2) delegating federal authority to states, including the regulation of water quality, air quality, and solid and hazardous waste.
6. [Executive Order 13132](#), Federalism, reinforces these constitutional, statutory, and judicial principles and directs federal agencies to have an accountable process to ensure meaningful and timely input from state officials in developing policies with federalism implications.
7. The relationship between state and federal authority is complex and multi-dimensional. There are various contexts in which these authorities manifest and intersect:

¹ The U.S. Supreme Court has confirmed that, “[d]ual sovereignty is a defining feature of our Nation’s constitutional blueprint” and “States entered the Union with their sovereignty intact.” *See, e.g., Sossamon v. Texas*, 563 U.S. 277, 283 (2011).

- a) **State Primacy** – All powers not specifically delegated to the federal government in the Constitution. In the absence of Constitutional delegation of authority to the federal government, state authority should be presumed sovereign. *Examples: groundwater, wildlife management (outside of the Endangered Species Act), natural resources management, electric transmission siting.*
 - b) **Shared State-Federal Authority** – Fact patterns in which federal authority and state primacy intersect. *Examples: wild horses and burros on federal lands, interstate water compacts.*
 - c) **Federal Authority Delegated to States** – Federal authority that Congress has delegated to states by statute. Many such statutes require federal agencies to set federal standards (and ensure those standards are met) but authorize states to implement those standards. *Examples: water and air quality, solid and hazardous waste.*
 - d) **Federal Statutory or Other Obligations to States** – Where the federal government has a statutory, historical, or moral obligation to states. *Examples: Payments in Lieu of Taxes; Secure Rural Schools Act; shared mineral royalties; agreements to clean up radioactive waste that was generated by federal nuclear weapons production.*
 - e) **Exclusive Federal Authority** – Powers enumerated in the Constitution as exclusive powers of the federal government. In areas of exclusive federal authority, state law can be preempted if Congress clearly and unambiguously articulates an intent to occupy a given field or to the extent it conflicts with state law. *Examples: national defense, production of money.*
8. In contravention of the Founders’ design, the balance of power has shifted toward the federal government and away from the states. Increasingly prescriptive regulations 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 insufficient appreciation for local knowledge, preferences, and competencies. In many cases, these federal actions encroach on state legal prerogatives, neglect state expertise, and/or infringe on state authority.
 9. The federal government often requires states to execute policy initiatives without providing the funding necessary for their 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.
 10. State authority and autonomy is also eroded when prescribed federal policies become effectively mandatory through the contingency of federal funding streams that states depend on to deliver critical services.
 11. Too often, federal agencies: solicit input from states after a decision is already made or a public process is started; ask states to provide feedback on a proposed action without providing details or documents regarding what the agency is proposing; or do not respond to state input or incorporate feedback from states into their decisions. This does not afford states with the respect and communication required by law, and states currently have no

recourse for an agency's failure to consult except for litigation on the merits of a federal decision.

12. Congress and Executive Order 13132 currently require federal agencies to document the effects of their actions on states in certain circumstances. In practice, federal agencies rarely prepare these prescribed federalism assessments or statements. Even when federal agencies prepare such documents, they are not ordinarily informed by input from affected states. In addition, these documentation requirements only apply at the end of the rulemaking process and cannot substitute for early and meaningful consultation with states.
13. Federal agencies have suggested to states that there are legal or other barriers to state consultation, such as: federal agency policies restricting ex parte communications; concerns about the applicability of Federal Advisory Committee Act (FACA) procedures to meetings between state and federal officials; and issues with sharing information that would otherwise be exempt from disclosure under the Freedom of Information Act (FOIA).
14. Federal agencies do not adequately incorporate state data and expertise into their decisions. This can result in duplication, inefficiency, and federal decisions that do not reflect on-the-ground conditions. Consideration and incorporation of state, tribal, and local data and analysis will result in federal actions that are better-informed, more effectively coordinated among all levels of government, and tailored to the communities they affect.
15. Many of these issues stem from a profound misunderstanding throughout the federal government regarding the role and legal status of states. Over the past several years, Western Governors have worked to improve the federal government's understanding of state sovereignty, authority, and state-federal consultation; meaningful structural change, however, has yet to occur.

B. GOVERNORS' POLICY STATEMENT

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

State Sovereignty and Authority

3. States are co-sovereigns with the federal government pursuant to the Tenth Amendment of the U.S. Constitution and other federal law. Congress and federal agencies must recognize state sovereignty and must not conflate states with other entities or units of government. States should not be treated as stakeholders or members of the public.
4. State authority is presumed sovereign in the absence of Constitutional delegation of authority to the federal government.

- a) Federal legislative and regulatory actions should be limited to issues of national significance or scope, pursuant to federal constitutional authority. Preemption of state laws should be limited to instances of necessity.
 - b) Where Congress preempts state law (acting pursuant to federal constitutional authority), federal law should accommodate state laws, regulations, and policies before its enactment and permit states that have developed alternate standards to continue to enforce and adhere to them.
 - c) Federal agencies should construe federal law to preempt state law only when a statute contains an express preemption provision or there is some other compelling evidence that Congress intended to preempt state law.
5. Congress and federal agencies should respect the authority of states to determine the allocation of state administrative and financial responsibilities in accordance with state constitutions and statutes. It should further:
- a) Ensure that federal government monitoring is outcome-oriented;
 - b) Minimize federal reporting requirements; and
 - c) Refrain from dictating state or local government organization.
6. When a state is meeting the requirements of a delegated program, the role of a federal agency should be limited to the provision of funding, technical assistance and research support. States should have the maximum discretion to develop implementation and enforcement approaches within their jurisdiction without federal intervention. Federal agencies should recognize and credit states' proactive actions.
7. Congress and federal agencies should avoid imposing unfunded federal mandates on states. In addition:
- a) Federal assistance funds, including funds that will be passed through to local governments, should flow through states according to state laws and procedures;
 - b) States should have the flexibility to transfer a limited amount of funds from one grant program to another and to coordinate the administration of related grants;
 - c) Federal funds should provide maximum state flexibility without specific set-asides; and
 - d) Governors should have 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.
8. Congress and the Executive Branch should create or re-establish entities to discuss and act on federalism issues, such as the Speaker's Task Force on Intergovernmental Affairs, the U.S. Advisory Committee on Intergovernmental Relations, the Subcommittee on Intergovernmental Affairs, or a federalism office within the White House. These entities should have the ability and resources to make recommendations to improve the state-

federal relationship and include states in their membership or actively involve states in their discussions.

State-Federal Consultation

9. Federal agencies must engage in consultation with states on a government-to-government basis in accordance with states' legal status. Congress should clarify and promote the need for state-federal consultation.
10. Improving state-federal consultation will result in more effective, efficient, and long-lasting federal policy for the following reasons:
 - a) Governors have specialized knowledge of their states' environments, resources, laws, cultures, and economies that is essential to informed federal decision-making;
 - b) Federal agencies can reduce duplication through the use and incorporation of state expertise, data and documentation;
 - c) Authentic communication and information exchange will help federal agencies determine whether an issue is best addressed at the federal level; and
 - d) Through meaningful dialogues with affected states, federal agencies can also avoid unintended consequences and address or resolve state concerns.
11. Each Executive department and agency should have a clear and accountable process to provide each state – through its Governor or their designees – with early, meaningful, substantive, and ongoing consultation in the development of federal policies that affect states. The extent of the consultation process should be determined by engaging with affected states. At a minimum, this process must involve:
 - a) Conducting consultation through federal representatives who can speak or act on behalf of an agency;
 - b) Inviting states to provide input outside of a public process and before proposals are finalized;
 - c) Enabling states to engage with federal agencies on an ongoing basis to seek refinements to proposed federal actions prior to finalization;
 - d) Providing robust information and documents (including non-final, non-public, draft, and supporting documents) about potential federal actions, including proposed rules, to Governors or their designees;
 - e) Addressing or resolving, where possible, state issues, concerns, or other input unless precluded by law;
 - f) Documenting how state concerns were resolved or why they were unable to be resolved in final decisions; and

- g) Making reasonable efforts to achieve consistency and avoid conflicts between federal and state objectives, plans, policies, and programs.
12. Governors affirm their reciprocal role in advancing a clear, predictable, timely, and accountable consultation process. Governors or their designees must continue to provide clear expectations for the appropriate scope and scale of consultation and must work with federal agencies to make consultation processes as efficient as practicable. As chief executives, Governors must also ensure the views of the state are clearly and consistently conveyed throughout the consultation process by prioritizing significant issues and resolving competing viewpoints across state government.
13. In many cases, federal agencies are required – whether by statute, executive order, regulation, policy, or other mandate – to consult, cooperate, and coordinate with states before taking action. However, due to states’ unique legal status, the need for federal-state engagement is not limited to express directives and should extend to any federal actions that may have direct effects on states, on the relationship between the federal government and states, or on the distribution of power or responsibilities among the various levels of government. Federal agencies should consult with states regarding what types of agency actions typically affect states and the extent of consultation required for these types of actions.
- a) These actions include the implementation of federal statutes and the development, prioritization, and implementation of agency policies, rules, programs, reviews (e.g., Governor’s Consistency Reviews), plans (e.g., resource management plans), budget proposals and processes, strategic planning efforts (e.g., reorganization), and federal litigation or adjudication that affects states.
 - b) When a federal agency proposes to enter into any agreement or settlement that affects states, the agency should provide all affected Governors or their designees with notice of the proposal and consult with, and seek the concurrence of, Governors or their designees who respond to the notice.
14. Congress and the Executive Branch should require federal agencies to promulgate regulations in consultation with Governors, setting forth their procedures to ensure meaningful, substantive consultation with states on federal actions that affect states. This direction should also clarify that, for rulemakings affecting states:
- a) An agency’s satisfaction of rulemaking requirements under the Administrative Procedure Act (including the solicitation of public comments) does not satisfy an agency’s obligation to consult with states; and
 - b) Consultation should occur before publication of a notice of proposed rulemaking or before an advanced notice of proposed rulemaking is submitted to the Office of Management and Budget (OMB).
15. Congress and the Executive Branch should consider the following additional accountability measures:

- a) Requiring the designation of a federalism official with the responsibility for implementing state-federal consultation and publish this official's name, title, and contact information on the agency's website;
 - b) Requiring OMB to regularly submit a report to Congress and Governors on state-federal consultation and implementation of agency consultation rules;
 - c) Requiring federal agencies to provide a summary of their efforts to consult with states, including a discussion of state input and how that input was considered or addressed, in any proposed and final rules;
 - d) Creating a process where Governors can notify OMB of an agency's failure to consult or comply with their consultation procedures; and
 - e) Providing an opportunity for Governors or their designees to seek judicial review of an agency's failure to consult.
16. Congress and the Executive Branch could make federalism reviews more effective by:
- a) Working with Governors to develop specific criteria and consultation processes for initiating and performing these reviews.
 - b) Providing Governors with an opportunity to comment on federalism assessments before any covered federal action is submitted to OMB for approval.
17. Congress and federal agencies should take the following actions to clarify that *ex parte* policies, FACA, and FOIA are not barriers to consultation:
- a) Federal agencies should (and Congress should require them to) clearly identify and provide rationale for any perceived barriers to consultation;
 - b) Federal agencies should clarify that consultation with state officials does not qualify as *ex parte* communications and that *ex parte* communications are not prohibited at any point during an informal rulemaking process;
 - c) Congress should clarify that meetings held exclusively between federal personnel and state elected officials or their designees acting in their official capacities or in areas of shared responsibilities or administration (and not for the purpose of obtaining collective advice) do not qualify as requiring compliance with FACA procedures; and
 - d) Congress should clarify that FOIA's exemptions apply to federal records shared or exchanged with states (as if those records were shared, exchanged, or created solely within the federal government) and create a statutory exemption to FOIA disclosure for state records in instances where publication of state records provided to federal agencies would violate existing state law.

State Data and Expertise

18. Federal agencies should utilize state data, expertise, and science in the development of federal actions that affect states.
19. Congress and the Executive Branch should, subject to existing state requirements for data protection and transparency, require agencies to incorporate state and local data and expertise into their decisions. This data should include scientific, technical, economic, social, and other information on the issue the agency is trying to address.
20. States merit greater representation on all relevant committees and panels advising federal agencies on scientific, technological, social, and economic issues that inform federal regulatory processes.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Governors direct WGA staff to work with congressional committees of jurisdiction, the Executive Branch, and other entities, where appropriate, to achieve the objectives of this resolution.
2. Furthermore, the Governors direct WGA staff to consult with the Staff Advisory Council regarding its efforts to realize the objectives of this resolution and to keep the Governors apprised of its progress in this regard.

This resolution will expire in December 2023. Western Governors enact new policy resolutions and amend existing resolutions on a semiannual basis. Please consult westgov.org/resolutions for the most current copy of a resolution and a list of all current WGA policy resolutions.