
December 17, 2021

Christopher Coes
Principal Deputy Assistant Secretary for Transportation Policy
Office of the Assistant Secretary for Transportation Policy
U.S. Department of Transportation
1200 New Jersey Avenue S.E.
Washington, D.C. 20590

RE: Docket Number DOT-OST-2021-0140

Dear Principal Deputy Assistant Secretary Coes:

In response to the Office of the Secretary of Transportation's Request for Public Comment (RFC) on the draft Department of Transportation (DOT) Strategic Framework ([86 FR 68720](#)), attached please find the following Western Governors' Association (WGA) Policy Resolutions:

- 2021-07, Transportation Infrastructure in the Western United States;
- 2022-05, Cybersecurity;
- 2021-02, Utilizing State Data in Federal Decision Making; and
- 2021-01, Strengthening the State-Federal Relationship.

In these policy resolutions, Western Governors address Question 4 posed in the Federal Register notice ("How can U.S. DOT best coordinate its activities with Federal, State, local, tribal, labor, private sector, academic, non-profit, international and other stakeholders?"), as well as several issues included in the draft DOT Strategic Framework and its strategic goals, including: the need for a more robust, diverse, and equitable national transportation infrastructure; the modernization of cyber systems to protect against unauthorized access; the benefits of utilizing state data in federal decision making; and the importance of federal consultation with states in the development of policy.

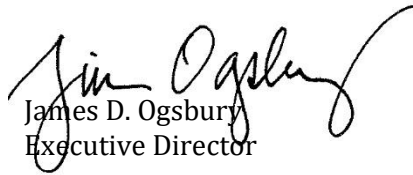
I appreciate your consideration of these comments as they articulate Western Governors' bipartisan policy positions and recommendations on these important issues.

Western Governors submit these remarks through the public notice and comment process for administrative recordkeeping purposes. The Governors, however, maintain that this process is an insufficient channel for state-federal communication on federal actions that may affect state authority or administrative activity. Western Governors strongly urge you to engage in meaningful, substantive, and ongoing consultation with states in advance of prospective decisions or related public processes. Such consultation will result in more effective, efficient, and resilient federal policy benefiting our shared constituents.

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Please contact me if you have any questions or require further information. In the meantime, with warm regards and best wishes, I am

Respectfully,


James D. Ogsbury
Executive Director

Attachments



Policy Resolution 2021-07

Transportation Infrastructure in the Western United States

A. BACKGROUND

Surface Transportation

1. The American West encompasses a huge land mass representing 2.4 million square miles or over two-thirds of the entire country. Over 116 million people live in these states and they reside in large, densely populated cities, smaller cities and towns and in rural areas.
2. Perhaps more than any other region, terrain and landownership patterns in the West underscore the purpose and vital need for a federal role in surface transportation. Western states are responsible for vast expanses of national highways and interstates that often do not correlate with population centers but serve as critical national freight and transportation routes for the nation.
3. Western states ports are national assets, moving needed parts and retail goods into the country, while also providing the gateway for our nation's exports. Although they benefit the entire country, the financial burden of developing, expanding and maintaining them to meet the demands of growing trade is almost entirely borne at the state and local level.
4. The vast stretches of highways and railroad track that connect the West to the nation do not have the population densities seen in the eastern United States.
5. Raising private funds to carry forward infrastructure projects in the rural West will be extremely challenging. The low traffic volumes in rural states will not support tolls, even if one wanted to impose them. Projects in rural areas are unlikely to generate revenues that will attract investors to finance those projects, even if the revenues are supplemented by tax credits. Some western states have implemented or are developing mileage-based fee programs as an additional tool to enhance funding.

Transportation Infrastructure

6. Jobs, the economy and quality of life in the West depend on high quality transportation infrastructure that efficiently, effectively and safely moves goods and people. Western transportation infrastructure is part of a national network that serves national interests. Among other things, transportation infrastructure in the West: moves agricultural and natural resource products from source to national and world markets; carries goods from western ports on western highways and railroad track to eastern and southern cities; and enables travelers to visit the great National Parks and other destinations in the West.
7. The transportation and transit needs in the West differ significantly from our eastern counterparts. Western states are building new capacity to keep up with growth, including new interstates, new multimodal systems including high-speed passenger rail and light rail

transit systems, biking and pedestrian options, and increased capacity on existing infrastructure.

8. The infrastructure in the region is under strain from both increased movement of goods and people and from underinvestment in preservation and repair and new infrastructure needed to keep pace with this growth and change. Positive and productive partnerships between state department of transportation offices and their local U.S. Department of Transportation (DOT) Federal Highway Administration (FHWA) office have enabled innovative advances in infrastructure funding and development.
9. Modernizing and maintaining the West's network of infrastructure relies upon permitting and review processes that require close coordination and consultation among state, federal and tribal governments. State, federal and tribal coordination is necessary to ensure that infrastructure projects are designed, financed, built, operated and maintained in a manner that meets the needs of our economies, environment, public health, safety and security. Early, ongoing, substantial, and meaningful state-federal consultation can provide efficiency, transparency, and predictability for states and tribes, as well as prevent delays, in the federal permitting and environmental review process.
10. State and local governments often have the best available science, data and expertise related to natural resources within their borders. In cases where the states have primary management authority, such as wildlife and water governance, states also possess the most experience in managing those resources and knowledge of state- and locality-specific considerations that should inform infrastructure siting decisions.
11. The National Environmental Policy Act (NEPA), since its enactment in 1970, has required that federal agencies consider how proposed federal actions may affect natural, cultural, economic and social resources for present and future generations of Americans. The process by which NEPA is implemented has been defined over time through regulations and guidance issued by the Council on Environmental Quality (CEQ).
12. On April 27, 2021, FHWA issued a [guidance document](#), State DOTs Leveraging Alternative Uses of the Highway Right-of-Way Guidance. The guidance encourages FHWA division offices to work with state departments of transportation in order to leverage highway rights-of-way (ROWs) for the siting of renewable energy projects, transmission and distribution assets, broadband infrastructure, and alternative fueling facilities.

Electric Vehicle Infrastructure

13. WGA recently executed the *Electric Vehicles Roadmap Initiative*, its signature policy project for Fiscal Year 2021. The Initiative was principally focused on the planning, siting and coordination of electric vehicle (EV) charging infrastructure in western states and explored a number of federal policy issues that affect the buildout of this infrastructure.
14. Western Governors and states are exhibiting strong leadership on EV infrastructure planning, coordination, and investment. Many western states are actively collaborating with each other via their engagement in the West Coast Electric Highway¹ and Regional Electric Vehicles Plan for the West² (REV West).

¹ California, Oregon and Washington are members of the West Coast Electric Highway.

² Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming are members of the REV West.

15. Western states face a suite of challenges related to planning and siting EV infrastructure, including the unique needs of both underserved and rural communities, vast distances between communities, limited electric grid infrastructure in sparsely populated areas, and a patchwork of federal, state, and private lands ownership boundaries. These factors combine to make EV infrastructure installations more logistically challenging and costly, regardless of whether the infrastructure is funded by public or private sources or a combination of the two.
16. Many western states have engaged with and submitted corridor nominations to the FHWA's Alternative Fuel Corridors Program. The Program assigns "Corridor-Pending" and "Corridor-Ready" designations for interstate, U.S. route, and state highways.
17. In order to meet the "Corridor-Pending" and "Corridor-Ready" metrics, charging or alternative fueling infrastructure must be sited every 100 or 50 miles, respectively, along the proposed corridor. A number of western states have experienced challenges in meeting these defined metrics due to lacking electric infrastructure and suitable charging locations in sparsely populated areas.
18. 23 U.S.C. 111 prohibits Interstate System rest areas built after January 1, 1960, from offering commercial services such as fuel and food on the Interstate System right-of-way. Due to this prohibition, EV charging stations may be sited at Interstate System rest areas, but no fee may be charged for the electricity that is dispensed. This significantly complicates the business case for siting EV charging infrastructure at these rest areas. Western Governors support amending 23 U.S.C. 111 to allow commercial EV charging at all rest areas along the Interstate, but we would note that western states are especially affected by the current prohibition because many rest areas in the West are located far from communities or businesses that could offer suitable locations for EV charging.
19. Western states contain many public federal lands, including areas managed by the Bureau of Land Management, National Park Service and U.S. Forest Service. Many of these federal lands serve as regional tourism attractions and support economic development in rural western communities. Creating and implementing efficient practices for permitting and siting EV infrastructure on federal lands will help support continued tourism and economic opportunities across the West.
20. Private investments in zero-emission vehicle (ZEV) charging and fueling infrastructure can be aided by supportive investment tax credit structures. The current Alternative Fuel Vehicle Refueling Property Investment Tax Credit could be enhanced to improve the business case for private sector investment in ZEV charging and fueling infrastructure.
21. The U.S. Department of Energy's (DOE) Vehicle Technologies Office manages the Clean Cities Coalition (CCC) Program, which has active members across the West. CCCs often serve a crucial role at the local level by leading EV infrastructure planning and implementation projects.
22. The COVID-19 pandemic highlighted disruptions to domestic supply chains across many sectors. On February 24, 2021, President Biden signed an Executive Order on America's Supply Chains ([EO 14017](#)). The EO launches a comprehensive review of certain U.S. supply chains and directs federal departments and agencies to identify ways to secure U.S. supply chains against a wide range of risks and vulnerabilities. Two supply chains included in the

review are critical minerals, including rare earth elements, and large capacity batteries such as those used in electric vehicle production.

23. Battery EVs require a number of critical minerals in their production, including lithium, nickel and cobalt, among others. Consumption of these critical minerals essential to EV supply chains will rise as more EV batteries are produced. EVs sold in 2019 alone accounted for more than one quarter of the total battery capacity deployed nationwide.³ With increasing demand for EVs, it is projected that demand for these minerals will concurrently increase in coming decades.

Aviation

24. Lack of reliable air service is a significant barrier to fulfilling the needs of rural communities in the West. Air service is essential infrastructure for connecting many remote communities. It is important not only to recreation and emergency services, but to economic, social and cultural needs. In some communities it is the only way to bring doctors or other non-local workers in and out of where they work but may not live.
25. The DOT Essential Air Service (EAS) Program was put into place in 1978 to guarantee that small communities served by certificated air carriers before passage of the Airline Deregulation Act maintained a minimum level of scheduled air service. This is generally accomplished by DOT subsidizing two round trips a day with 30- to 50-seat aircraft, or additional frequencies with aircraft with 9 seats or fewer, usually to a large- or medium-hub airport. The Department currently subsidizes commuter and certificated air carriers to serve communities in Alaska and in the lower 48 contiguous states that otherwise would not receive any scheduled air service.⁴
26. Of the communities that participate in EAS, 63 percent are in the West, illustrating the rurality of these areas and their need for connectivity. EAS has a significant economic effect on rural communities. A 1 percent increase in traffic to an EAS airport results in a 0.12 percent increase in income for the entire community, and an 8 percent increase in traffic results in a 1 percent income increase. Businesses need connectivity to the national and global economy to succeed and rural communities with good air service are more attractive to remote workers.⁵
27. The Small Community Air Service Development Program (SCASDP) is a DOT grant program designed to help small communities address air service and airfare issues. SCASDP's eligibility criteria are broader than EAS and provide a grant applicant the opportunity to self-identify its air service deficiencies and propose an appropriate solution compared to an EAS direct subsidy.⁶ Air service started by the SCASDP often continues without further funding once the grant is over, exemplifying that the service proves itself to be commercially viable beyond its value to the community and the public.⁷

³ <https://www.ucsusa.org/sites/default/files/2021-02/ev-battery-recycling-fact-sheet.pdf>

⁴ [DOT Essential Air Service Program](#)

⁵ WGA *Reimagining the Rural West* [Initiative Appendix](#)

⁶ [DOT Small Community Air Service Development Program](#)

⁷ WGA *Reimagining the Rural West* [Initiative Appendix](#)

B. GOVERNORS' POLICY STATEMENT

Surface Transportation

1. Western Governors believe there is a strong federal role, in partnership with the states and local governments, for the continued investment in our surface transportation network – particularly on federal routes and in multimodal transportation networks throughout the West that are critical to interstate commerce and a growing economy. These routes and networks traverse hundreds of miles without traffic densities sufficient to either make public-private partnerships feasible or allow state and local governments to raise capital beyond the historic cost share.
2. Western Governors believe the current project decision-making role of state and local governments, with meaningful participation from affected communities, particularly tribes and historically underserved communities, in investment decisions should continue. Western Governors desire additional flexibility to determine how and where to deploy investment in order to maximize the use of scarce resources.
3. Western Governors believe that a viable, long-term funding mechanism is critical to the maintenance and expansion of our surface transportation network and encourage Congress to work together to identify a workable solution that adequately funds the unique needs of the West.
4. Western Governors believe in enhancing the ability to leverage scarce resources by supplementing traditional base funding by creating and enhancing financing mechanisms and tools that are appropriate for all areas of the United States, including those with low traffic densities where tolling and public private partnerships are not feasible.
5. Western Governors believe using the historic formula-based approach for the distribution of funds would ensure that both rural and urban states participate in any infrastructure initiative and it would deliver the benefits of an infrastructure initiative to the public promptly.
6. Western Governors believe the Highway Trust Fund (HTF) and the programs it supports are critically important to success in efforts to maintain and improve America's surface transportation infrastructure. Currently, the HTF will not be able to support even current federal surface transportation program levels and will not meet the needs of the country that will grow as the economy grows. Congress must provide a long-term solution to ensure HTF solvency and provide for increased, sustainable federal transportation investment through the HTF.
7. Western Governors strongly encourage western states port operators and their labor unions to work together to avoid future work slowdowns by resolving labor issues well before contracts are set to expire. In recent years, protracted disagreement in bargaining between parties has had an adverse effect on the American economy that should not be repeated.
8. Western Governors believe modern ports infrastructure is essential to strong national and western economy and urge Congress to fully fund the Harbor Maintenance Trust Fund and to reform the Harbor Maintenance Tax to ensure western ports remain competitive. Furthermore, Western Governors believe the federal government must work

collaboratively with states, along with ports, local governments and key private sector transportation providers like the railroads, to ensure the necessary public and private investments to move imports and exports efficiently through the intermodal system, as well as community organizers and the Environmental Protection Agency's National Environmental Justice Advisory Council to effectively mitigate environmental and public health impacts to port communities.

Transportation Infrastructure

9. Western Governors believe regulation accompanying federal transportation programs should be evaluated and if necessary, revised to encourage expediting project delivery and streamlining the environmental review process without diminishing environmental standards or safeguards.
10. The federal infrastructure permitting and environmental review process must be transparent, predictable, accessible and consistent for states, project developers, and affected community stakeholders. Federal processes must ensure that agencies set, and adhere to, timelines and schedules for completion of reviews and develop improved metrics for tracking and accountability.
11. Federal programs that increase bottom-up coordination among agencies, state and local governments and that foster collaboration among project proponents and diverse stakeholders, particularly rural communities, underserved communities, and tribes can create efficiency and predictability in the NEPA process, including reducing the risks of delays due to litigation.
12. Western Governors encourage consistency in the implementation of NEPA within and among agencies and across regions. The federal government should identify and eliminate inconsistencies in environmental review and analysis across agencies to make the process more efficient.

Electric Vehicle Infrastructure

13. Western Governors emphasize western states' collaborative efforts to improve the planning and siting of EV charging infrastructure to promote equitable access, particularly along highway corridors, rural areas, underserved communities, or anywhere that users do not have the ability to charge at home. We encourage Congress and the Administration to leverage these state partnerships when designing federal programs and allocating surface transportation and infrastructure funds focused on EV infrastructure. Coordinating with these multi-state groups would help promote targeted investments and partnerships that expand cohesive, regional EV charging networks.
14. Western Governors request that FHWA promote additional flexibility within the Alternative Fuel Corridors program to recognize the unique geographic and infrastructure conditions in western states. Western Governors and states are eager to work with FHWA to ensure that western states are not adversely affected by federal funding opportunities that are tethered to Alternative Fuel Corridors "Corridor-Pending" and "Corridor-Ready" designations.
15. Western Governors support legislative measures that address prohibitions within 23 U.S.C. 111 that limit the siting of EV charging stations at Interstate System rest areas and the issuance of a fee for the use of that infrastructure.

16. Promoting visitation to federal public lands and state parks is a high priority for Western Governors. Western Governors would welcome the opportunity to work with state and federal land management agencies to address challenges that affect the permitting and siting of EV charging infrastructure on state and federal public lands.
17. Western Governors support legislative efforts that seek to extend and expand the Alternative Fuel Vehicle Refueling Property Investment Tax Credit and improve the business case, especially in rural and underserved areas, for private investment in ZEV charging and refueling infrastructure.
18. Western Governors emphasize the important functions that Clean Cities Coalitions have served in coordinating and implementing ZEV infrastructure projects across the West and encourage Congress to provide funding support for the DOE Vehicle Technologies Office and Clean Cities Coalition Network.
19. Western Governors support strengthening domestic supply chains of critical minerals vital to electric vehicle battery production without compromising environmental and health and safety standards. Governors also support development of emerging tools and technologies that address barriers to mineral supply chain reliability, including technologies that help recycle or reuse existing critical mineral resources for use in electric vehicles and other clean energy technologies.

Aviation

20. Western Governors encourage the executive branch to include full funding for the EAS and SCASDP programs in the President's annual budget request. Western Governors also support legislative actions to maintain and secure the longevity of these programs.

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 June 2024. Western Governors enact new policy resolutions and amend existing resolutions on a semiannual basis. Please consult <http://www.westgov.org/resolutions> for the most current copy of a resolution and a list of all current WGA policy resolutions.



Policy Resolution 2022-05

Cybersecurity

A. BACKGROUND

1. In the age of automation, digitization, big data, artificial intelligence, and machine-to-machine learning, the United States' capabilities to prevent, detect and respond to cyberattacks are of ever-growing importance to our society. The cybersecurity of our nation is an all-of-government and industry-wide endeavor.
2. Aging information technology (IT) infrastructure and systems pose serious cybersecurity risks and increase vulnerabilities for government and organizations. Due to the longstanding financial and national security implications of prior cybersecurity breaches resulting in data theft and other adverse outcomes, modernizing these systems to help prevent successful cyberattacks and better safeguard our data is imperative.
3. The COVID-19 pandemic has transformed society and accelerated the shift to a virtual environment, further increasing vulnerabilities across systems as threat actors become more complex and widespread. Ransomware attacks, a type of malicious software attack that threatens to publish sensitive information or impedes access to data or computer systems until the victim pays a ransom to the attacker, have grown by 148 percent due to the rise in remote activities. These attacks can shut down public and private sector operations, posing particular challenges to critical infrastructure functions.
4. Cybersecurity is especially imperative for critical infrastructure, which includes the nation's electric grid, energy resource supply and delivery chains, finance, communications, election systems, the chemical industry, commercial facilities, critical manufacturing, defense industrial base, emergency services, food and agriculture, government facilities, health care and public health, information technology, transportation, and water and wastewater systems. Large-scale cyber incidents, including the SolarWinds and Colonial Pipeline attacks, demonstrate the risk cybercrime now presents to national security.
5. Addressing cybersecurity needs across critical infrastructure sectors is further complicated by the increasing interdependency and interconnectedness of our nation's data systems to a myriad of non-critical infrastructure systems and a dynamic threat environment. Effective cybersecurity programs require strategic and functional relationships and information sharing between federal, state and local levels of government, and the public and private sectors.
6. The cybersecurity of their states and the nation is a high priority of Western Governors. State governments are responsible for securing public networks, the state's digital assets, and citizen data, as well as coordinating their cybersecurity efforts with federal agencies and potentially-affected private entities (e.g., utilities, financial institutions, transportation, and health). Governors lead efforts to plan and implement state cybersecurity programs, respond to cyberattacks, and investigate intrusions.

7. National Guard cyber protection teams, serving in 59 cyber units, provide invaluable assistance to states across the country with threat assessment and cyber incident response and remediation. Currently, states can mobilize Guard members through State Active Duty (SAD) and Title 32 of the U.S. Code. Supported by state funds, Governors can activate SAD for disasters or homeland defense, although state constitutions or statutes often constrain deployment of the Guard to state emergencies. Title 32 gives Governors the authority to order the Guard to duty, using federal funds, with the approval of the President or the Secretary of Defense. However, this process can create barriers to rapid and nimble action in the face of cyberattacks. While both of these functions are vital resources, potential exists to further leverage the capabilities of the National Guard for the cybersecurity posture of states.
8. Although state and local governments remain significant targets for cyberattacks, they often lack adequate funding to address these issues and modernize their systems. According to a study by Deloitte and the National Association of State Chief Information Officers, state cybersecurity budgets comprise less than 3 percent of their overall IT budgets.
9. Prior to the passage of Public Law 117-58, the Infrastructure Investment and Jobs Act, the Homeland Security Grant Program was the primary federal mechanism to provide cybersecurity funding to state, local, territorial, and Tribal governments. Over the years, less than 4 percent of that funding was allocated to cybersecurity. Such low levels of funding have been insufficient for states to meet their pressing, and rapidly growing, cybersecurity needs. The Infrastructure Investment and Jobs Act sought to address this issue by establishing a much-needed standalone cybersecurity grant program for state and local governments, marking a huge increase in federal support for state and local cybersecurity efforts.
10. The \$1 billion program will be administered by the Federal Emergency Management Agency (FEMA) for four years, with the Cybersecurity and Infrastructure Security Agency (CISA) serving in an advisory role. Funding will be distributed to states, tribes, and territories, who must allocate about 80 percent to their localities. States must also meet varying match requirements to share the financial burden and account for cybersecurity costs in their budgets.
11. State election systems remain targets of foreign interference. As Governors, we remain committed to protecting our states' election systems. There is nothing more fundamental to the enduring success of our American democracy, and we take seriously our responsibility to protect the integrity and security of our elections. This is an imminent national security threat that transcends party lines. This is a matter of protecting and preserving fair elections – the underpinning of our democracy.
12. The Office of Management and Budget and Department of Homeland Security May 2018 Federal Cybersecurity Risk Determination Report and Action Plan concluded that 71 of 96 federal agencies are at risk or high risk of cyber intrusions. It also determined that federal agencies are not equipped to determine how threat actors seek to gain access to their information. This deficiency results in ineffective allocations of the agencies' limited cyber resources.

13. Currently, there is a severe deficit of cyber workers, especially in government. Our nation cannot defend itself without a well-trained, experienced cyber workforce. The public sector must dedicate resources to “K through gray” cybersecurity education, training, work-based learning and apprenticeships, and recruitment programs and encourage the private sector to do the same through effective policy.
14. While investments in workforce development and human capital are a key component in addressing workforce shortages, states can leverage other tools to meet the scale of these challenges. Technology and innovation will be needed to alleviate workforce strains and keep pace with a wide range of attacks while also reducing burdens associated with operational functions.

B. GOVERNORS' POLICY STATEMENT

1. Western Governors urge Congress to improve coordination of congressional oversight and legislative activity on cybersecurity, including by reducing the number of committees in Congress that have jurisdiction over this issue.
2. Western Governors support modernizing our systems to be more resilient to minimize vulnerabilities and protect against unauthorized access to information and data theft. We request that FEMA and CISA work collaboratively with Governors in executing the newly created state and local cybersecurity grant program to ensure the funds are administered in a flexible and measurable manner to all states, Tribes, and territories. Designated, flexible, and measurable cybersecurity funding would help ensure that states, Tribes, and territories have resources to build resilient systems and meet growing cybersecurity challenges.
3. The federal government has a responsibility to provide adequate funding for states to meet election security needs. Western Governors encourage Congress and the Administration to work cooperatively with states in developing election security legislation and mandates, and to fully fund implementation.
4. Federal agencies must engage in early, meaningful, substantive, and ongoing consultation with Governors or their designees on all aspects of cybersecurity. Western Governors advise the federal government to clearly define the roles for state representatives in CISA's recently established Joint Cyber Defense Collaborative.
5. Western Governors recommend that the federal government continue the DHS State, Local, Tribal, and Territorial Engagement Program, which provides cybersecurity risk briefings and resources to Governors and other officials. The Governors also support CISA Central, with which state chief information officers regularly interact.
6. The federal government must continue to clarify the roles and responsibilities of federal agencies in preventing, preparing for, and responding to cyberattacks. Centralized authority, points of contact, and formalized communication pathways are necessary to address increasingly complex threats. In addition, these pathways must occur at each level within government and other organizations.
7. The federal government must also improve agency coordination to use often-constrained security resources more efficiently and harmonize disparate regulations that put an

unnecessary burden on state governments. Western Governors urge Congress to provide appropriations for the Office of the National Cyber Director commensurate with the importance of the office's position in leading federal coordination efforts.

8. The National Institute for Standards and Technology (NIST) Cybersecurity Framework and other standards can facilitate effective, consistent, and risk-based decision making in government and industry. Real-world simulations of attacks on critical infrastructure are essential to prepare our nation for potential threats.
9. The federal government should build a stronger international framework for cybercrime and use the full range of economic tools, including travel and financial sanctions, to deter cyberattacks organized, supported, or harbored by nation-states.
10. Western Governors recognize the need for states, Tribes, and territories to work together to address gaps or vulnerabilities in these systems to reduce disruptions. The public sector, particularly the federal government, must take steps to mitigate global supply chain and national critical infrastructure risks (e.g. ransomware) in collaboration with the private sector.
11. Western Governors implore Congress and the Administration to reduce bureaucratic burdens and change restrictive guidance related to deploying the National Guard under USC Title 32 for cybersecurity prevention, detection, and response activities. Clarifying the use of the National Guard for these purposes and streamlining the approval process would improve state capacity to confront cyberattacks, contain threats, and help protect neighboring jurisdictions. Western Governors also support efforts to develop civilian cybersecurity reserves, which help alleviate workforce shortages and augment National Guard forces.
12. The Administration should propose, and Congress should provide, long-term authorization and sufficient appropriations for high-quality cybersecurity education and workforce development programs to grow and sustain the cybersecurity workforce, including those that target underrepresented populations, those that include rotational components to retain personnel, and work-based learning opportunities such as apprenticeships. The federal government should also expand the CyberCorps: Scholarship for Service program and continue to support educational initiatives, such as NIST's Initiative for Cybersecurity Education and National Centers of Academic Excellence in Cyber Defense.
13. Government and industry should increase the cybersecurity awareness of government and private employees through training and education. Western Governors encourage the federal government to develop a national cybersecurity literacy and awareness campaign to educate citizens about how to stay safe online and prevent effective cyberattacks.
14. Western Governors support incentives for the creation of and participation in programs that encourage information sharing across all levels government, industry verticals, and regions. We also support other policies that incentivize the private sector to improve cybersecurity and share information regarding cyber threats as early as possible, including policies to improve access to information or create common standards for information-sharing. The federal government should emphasize the benefits of information sharing, while alleviating private sector concerns with this essential communication. The federal

government and states should continue to investigate liability protections, such as safe harbor provisions, for entities that report cyber intrusions.

15. Our nation requires innovation in detecting, preventing, and responding to continually evolving cyber threats. More research is required to understand the use of blockchain and encryption by perpetrators and its utility for defense against cyber threats, and address vulnerabilities of other emerging technologies, including connected vehicles and Internet of Things devices. The federal government should provide funding and technical assistance for these and other types of cybersecurity research and development.

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 2024. Western Governors enact new policy resolutions and amend existing resolutions on a semiannual basis. Please consult <http://www.westgov.org/resolutions> for the most current copy of a resolution and a list of all current WGA policy resolutions.



Policy Resolution 2021-02

Utilizing State Data in Federal Decision Making

A. **BACKGROUND**

1. State and federal agencies increasingly rely on quantitative and qualitative data to inform evidence-based policymaking, improve service delivery, more effectively manage resources, improve regulatory enforcement, and more accurately measure program performance and effectiveness.
2. States serve a critical function as a primary sources and stewards of economic, social, geospatial, scientific, technical, and other datasets that support a wide array of federal agencies and programs. State agencies often have the best available science, expertise, and other institutional data resources for purposes of federal decision-making processes.
3. States are both sovereignties and the primary administrators of numerous federal administrative and regulatory programs under a system of cooperative federalism, which distinguishes them from other non-federal sources of data.
4. State agencies also rely on timely access to current and accurate federal datasets to inform their own decision-making processes, develop more effective policy, improve service delivery and public communication, and to administer federally-delegated administrative programs.
5. In addition to federal laws and regulations, state agencies operate under their own privacy and data stewardship laws, regulations, and policies that protect personal and confidential information from public disclosure or other inappropriate use or disclosure. These protections help establish public trust that ultimately improves government effectiveness.
6. Public access to datasets that serve as the basis for federal agency actions promotes transparency and accountability in the decision-making process. Nevertheless, blanket requirements to make publicly available all data considered by federal agencies – particularly if this data consists of raw data provided by states – may infringe upon states' statutory imperatives to protect personally identifiable and otherwise sensitive information. It may also infringe upon fundamental privacy and data stewardship principles like purpose specification and data minimization. Even where there is no state legal barrier to disclosure of raw data, state agencies may maintain significant reservations about the public release of raw data.
7. The 2019 Federal Data Strategy directs federal agencies to “[e]ffectively, routinely, transparently, and appropriately use data in policy, planning, and operations to guide decision-making [and] share the data and analyses behind those decisions.” Additionally, agencies are directed to “[f]acilitate data sharing between state, local, and tribal governments and the Federal Government, where relevant and appropriate and with

proper protections, particularly for programs that are federally funded and locally administered, to enable richer analyses for more informed decision-making.”

8. Improvements in intergovernmental data sharing, stewardship, integration, protection, and utilization will require robust federal investments in a modern data infrastructure, technology, and training.

B. GOVERNORS' POLICY STATEMENT

1. State data serves a critical role in the successful implementation of a variety of federal programs and in federal agencies' fulfillment of their statutory missions and directives.
2. Subject to state laws and other requirements for data protection and transparency, federal agencies should be required to incorporate state and local data and expertise into their analysis and decision-making processes. This data should include geospatial, scientific, technical, economic, social, and other information relevant to issues the agency is trying to address.
3. Congress and the Executive Branch should look to states and state agencies as partners – rather than ordinary stakeholders – in the collection, stewardship, analysis, and use of data to inform federal decision-making processes. Federal agencies should recognize the existence and limitations of state privacy and data stewardship laws, regulations, and policies and work with states to develop strategies that encourage effective state-federal data sharing while appropriately protecting data according to state law.
4. State data – particularly non-aggregated raw data – is subject to differing levels of protection under various state laws, regulations, and policies. Western Governors encourage Congress and federal agencies to recognize the limitations on complete transparency of state data in federal decision making and to work with states to identify ways in which protected data can inform federal decision-making processes without conflicting with applicable state laws, regulations, or policies.
5. Federal agencies should consult with states – on a government-to-government basis – in the development and implementation of policies, programs, and strategies to more effectively and consistently incorporate state data into federal decision making, including implementation of applicable federal statutes and programs, as well as the Federal Data Strategy and development of annual Federal Data Strategy Action Plans.
6. Federal agencies should also consult with states to ensure that state and local partners have access to timely and reliable federal datasets for purposes of informing state and local decision-making processes.
7. Congress and the Executive Branch should support, and work with state toward, the modernization of our nation's data infrastructure and intergovernmental data-sharing and analysis capabilities. Data infrastructure should be based on best practices for data stewardship and must properly protect personal and confidential information in accordance with state and federal law. Federal agencies should consult with states to develop guidelines for intergovernmental data-sharing agreements and other protocols that include commitments to fundamental privacy and data stewardship principles like purpose specification and data minimization.

8. Federal agencies should work with state and local partners to develop uniform data standards, where appropriate, to maximize data quality and facilitate intergovernmental data use, access, sharing, and interoperability.
9. Western Governors support congressional efforts to broaden statutory exemptions under the Freedom of Information Act to protect personally identifiable and sensitive state-shared data from disclosure.
10. Western Governors urge the Executive Branch to develop uniform privacy and data stewardship policies based on best practices and uniform interpretations of federal privacy and data stewardship laws, regulations, policies, and other directives applicable to data received from states, as well as other non-federal sources.

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 <http://www.westgov.org/resolutions> for the most current copy of a resolution and a list of all current WGA policy resolutions.



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.

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