
March 2, 2020

The Honorable Mary B. Neumayr
Chair
Council on Environmental Quality
730 Jackson Place, N.W.
Washington, DC 20506

Re: Docket ID CEQ-2019-0003; RIN: 0331-AA03

Dear Chair Neumayr:

The Western Governors' Association (WGA) appreciates the opportunity to provide comments on the Council on Environmental Quality's (CEQ) "Update to Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA)" (85 Fed. Reg. 1684, Jan. 10, 2020). Because states manage environmental and natural resources within their borders and serve as cooperating agencies under NEPA, Governors are critical and essential partners with federal agencies in the statute's implementation.

WGA will defer to individual western states to submit their own substantive comments addressing the proposed rule. However, Western Governors stand together in urging CEQ to engage in meaningful, substantive, and ongoing government-to-government consultation with all interested states – through Governors or their designees – on any efforts to modify or update the NEPA process.

To inform CEQ's rulemaking process, please include in the public docket the attached prior correspondence from Western Governors to CEQ:

1. [November 28, 2017 letter](#), providing recommendations for modernizing the environmental review process and improving working partnerships between lead agencies and cooperating agencies in the implementation of NEPA.
2. [August 3, 2018 letter](#), providing responses to questions posed by CEQ in its June 20, 2018, Advance Notice of Proposed Rulemaking ([83 Fed. Reg. 28591](#), June 20, 2018).

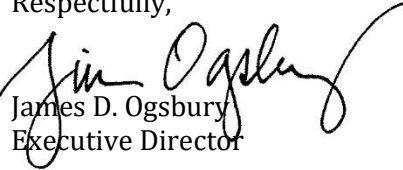
Please also include the attached WGA Policy Resolutions that articulate Western Governors' policy on NEPA and states' vital role in its implementation:

1. [2020-01](#), *Strengthening the State-Federal Relationship*
2. [2018-06](#), *Transportation Infrastructure in the Western United States*
3. [2018-15](#), *Modernizing Western Infrastructure*
4. [2017-08](#), *State Wildlife Science, Data and Analysis*
5. [2017-10](#), *National Forest and Rangeland Management*

The Honorable Mary B. Neumayr
March 2, 2020
Page 2

Western Governors stand ready to work with the Administration to ensure that infrastructure permitting processes and environmental reviews under NEPA are carried out in an efficient and effective manner and are also informed by state data and expertise. Thank you for your attention to this important matter. Please let us know how Western Governors may be of assistance as you consider updates affecting this important environmental statute.

Respectfully,



James D. Ogsbury
Executive Director

Attachments

November 28, 2017

Ted Boling
Associate Director for the National Environmental Policy Act
Council on Environmental Quality
730 Jackson Place N.W.
Washington, D.C. 20503

Dear Associate Director Boling:

Western Governors urge the Council on Environmental Quality (CEQ) to capitalize on an opportunity to strengthen the state-federal relationship through its work to enhance and modernize federal environmental reviews pursuant to Executive Order 13807 ([Executive Order](#)). Because of their authority for the management of the environment and natural resources within their borders and their integral role in federal environmental reviews, states are necessary partners for determining how best to improve review processes. This letter and attachment are intended to initiate a collaborative process to engage Western Governors in the work of CEQ.

Recommendations for Modernizing the Environmental Review Process

The Executive Order directs CEQ to ensure optimal interagency coordination of concurrent, synchronized, timely, and efficient environmental reviews, as well as to provide “an expanded role and authorities for lead agencies” and “more clearly defined responsibilities for cooperating and participating agencies.” Western Governors support improving the efficiency of environmental reviews and eliminating duplication between state and federal activities.

To accomplish these goals, CEQ should focus on expanding the collaboration between cooperating agencies and lead agencies, and should not expand the role of lead agencies at the expense of cooperating agencies or further limit the roles of cooperating agencies. The attachment outlines the Western Governors’ recommendations for fulfilling the objectives of the Executive Order.

In addition, the Executive Order designates the Departments of the Interior and Agriculture as “lead agencies for facilitating the identification and designation of energy right-of-way corridors on Federal lands for Government-wide *expedited environmental review* for the development of infrastructure projects.” Western Governors recommend CEQ regard the West-wide energy corridor designations as an opportunity to streamline the federal environmental review process. The Governors have long advocated incentivizing corridor use by providing a streamlined environmental review process for project proponents; for more detail, please see the Governors’ [letter](#) of October 13, 2016, to the Bureau of Land Management.

Inclusion of States in the Interagency Working Group

The Executive Order further directs CEQ to create an interagency working group, which should include “such other representatives of agencies as CEQ deems appropriate,” to assess environmental review regulations and processes. In CEQ’s Initial List of Actions to Enhance and Modernize the Environmental Review and Authorization Process, [82 FR 43226](#) (September 14, 2017), CEQ has qualified this directive by stating that the working group will consist of “representatives of other such Federal agencies as CEQ shall deem appropriate.” Western Governors ask CEQ to remove this limitation and include representatives from state governments in the working group. The early inclusion of states in CEQ’s process will create a more effective result, which will better satisfy the intent of the Executive Order.

Do not hesitate to contact us to discuss our recommendations and CEQ’s efforts. We are eager to help CEQ improve the federal environmental review process.

Respectfully,



Dennis Daugaard
Governor of South Dakota
Chair, WGA



David Ige
Governor of Hawaii
Vice Chair, WGA

Attachment



Opportunities for the Council on Environmental Quality to Improve the Cooperating Agency-Lead Agency Relationship

This document contains the Western Governors’ recommendations to the Council on Environmental Quality (CEQ) for improving the National Environmental Policy Act (NEPA) process, focusing on the cooperating agency and lead agency relationship. It further cross-references those recommendations to WGA policy resolutions and related documents.

RECOMMENDATION	CURRENT STATUS	ISSUE	WGA POLICY
<p><i>Ensure cooperation entails meaningful, substantive, and ongoing government-to-government consultation throughout all stages of the NEPA process.</i></p> <p>To help accomplish this, CEQ could make its suggestions to “Consult,” “Involve”, and “Collaborate” with cooperating agencies mandatory.</p>	<p>CEQ regulations require federal agencies to cooperate with state agencies to the fullest extent possible to reduce duplication between NEPA and comparable state requirements. 40 CFR §1506.2. CEQ regulations do not require the lead agency to incorporate or respond to cooperating agency input and CEQ guidance places the means and extent of cooperation solely at the discretion of the lead agency. CEQ Collaboration in NEPA: A Handbook for NEPA Practitioners (2007), p. 16. CEQ guidance, however, currently provides excellent suggestions for effective cooperation, at p. 13:</p> <ul style="list-style-type: none"> • Consult: Lead agencies should keep cooperating agencies informed and consider their concerns and suggestions on the NEPA process and provide documentation on how their input was considered in the decision-making process. • Involve: Lead agencies should communicate with cooperating agencies to ensure that their input is addressed and reflected within legal and policy constraints and provide iterative feedback on how their input is considered in the decision-making process. • Collaborate: Lead agencies should seek cooperating agency advice and agreement on various aspects of the NEPA process. 	<p>If cooperating agency status does not ensure effective cooperation, there is little incentive for state and local agencies to seek that status.</p> <p>The regulatory directive to cooperate needs more substance to ensure there is a two-sided, government-to-government exchange of information and ideas.</p> <p>Federal agency interaction with states – as sovereigns – should not be relegated to the public stakeholder process, regardless of cooperating agency status.</p>	<p>States must have early, meaningful, and substantive input in the development of regulatory policies that have federalism implications, such as reviews. WGA Policy Resolution 2017-01, <i>Building a Stronger State-Federal Relationship</i>.</p>

<p><i>Guarantee that the coordination and consultation requirements in other federal statutes are respected, regardless of whether an agency is designated as a cooperating agency.</i></p>	<p>NEPA explicitly states that it does “not in any way affect the specific statutory obligations” of a federal agency “to coordinate or consult with any other Federal or State agency” or to act “upon the recommendations or certification of any other Federal or State agency.” 42 U.S.C. §4334.</p> <p>CEQ regulations require agencies to prepare environmental analyses concurrently with other environmental review laws and executive orders to the fullest extent possible. 40 CFR §1502.25(a).</p> <p>CEQ memoranda reminds federal agencies that “cooperating agency status under NEPA is not equivalent to other requirements calling for an agency to engage another governmental entity in a consultation or coordination process. . . [and] not establishing or ending cooperating agency status does not satisfy or end those other requirements.” CEQ Memorandum: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (January 2002).</p> <p>The Federal Land Policy & Management Act’s (FLPMA) consistency requirements and the National Forest Management Act’s coordination requirements apply to states without a designation of the state as a “consulting agency” or “coordinating agency.”</p> <p>BLM has incorporated cooperating agency status into its resource management planning process under FLPMA, describing the cooperating agency model as “an excellent opportunity to meet, and exceed, these coordination responsibilities under FLPMA [maximizing consistency]” because the cooperating agency relationship “goes beyond coordination.” 43 CFR §1610.3-2(b); BLM’s Desk Guide, p. 32.</p>	<p>Federal agencies must meet all applicable statutory requirements. Due to the common overlap between NEPA and resource management planning, simultaneously navigating a cooperating agency relationship and a consultative relationship can be challenging.</p> <p>Clarifying the consultation and cooperating agency relationship interaction will aid both federal and state agencies as they work together on resource management issues.</p>	<p>Federal agencies should provide opportunities for expanded cooperation, particularly where states are working to help their federal partners to improve management of federal lands within their states’ borders. WGA Policy Resolution 2017-01, <i>Building a Stronger State-Federal Relationship</i>.</p>
<p><i>Require the EIS/EA to: (1) incorporate state environmental review requirements in addition to but not in conflict with NEPA into an EIS/EA; and (2) be consistent with state and local plans and laws to the maximum extent possible.</i></p>	<p>Pursuant to CEQ regulation, “[w]here State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.” 40 CFR §1506.2(c).</p> <p>An EIS must address any inconsistency between the EIS and any state or local plan and laws and describe the extent to which the agency would reconcile its proposed action with the plan or law. 40 CFR §1506.2(d).</p>	<p>While it is the clear intent of CEQ regulations to reduce duplication, there is no clear directive for a final EIS/EA to incorporate state environmental review requirements that go beyond federal requirements or to ensure consistency with state</p>	<p>Federal agencies should provide opportunities for expanded cooperation, particularly where states are working to help their federal partners to improve management of federal lands within their states’ borders. WGA Policy Resolution 2017-01, <i>Building a Stronger State-Federal Relationship</i>.</p>

<p>Both an EIS and EA should describe any inconsistency between the document and any state or local plan and laws and describe the extent to which the agency should reconcile its proposed action with the plan or law.</p>	<p>FLPMA requires BLM land use plans to be consistent with state and local land use planning to the maximum extent consistent with federal law, and BLM must assist in resolving inconsistencies to the extent practical. 43 U.S.C. §1712(b)(9). BLM has incorporated cooperating agency status into its resource management planning process under FLPMA. 43 CFR §1610.3-2(b).</p>	<p>and local plans. Such a clear requirement would also reduce potential confusion due to the overlap of FLPMA and NEPA.</p>	
<p><i>Simplify the definition of a cooperating agency.</i></p> <p>CEQ could, for example, define cooperating agency to include a state or local government affected or potentially affected by the proposed federal action that agrees to become a cooperating agency. Alternatively, CEQ could adopt the definition of cooperating agency included in the Responsibly And Professionally Invigorating Development Act of 2015 (RAPID Act).</p>	<p>Under CEQ regulations, a state agency is eligible for cooperating agency status if either: (1) the agency has “jurisdiction by law” – the authority to approve, deny, or finance all or part of a proposal; or (2) special expertise with respect to any environmental impact, which must be relevant to the decisions to be made and demonstrated through program focus and capabilities.</p>	<p>These requirements lend themselves to debate and subjectivity.</p>	<p>Agencies should better define “cooperating agency” under NEPA processes. WGA Regulatory Reform Recommendations.</p>
<p><i>Create a standard, documentation, and review process for a lead agency’s denial of a request for cooperating agency status.</i></p> <p>CEQ regulations should require lead agencies to:</p>	<p>Lead agencies may grant or deny state, federal, local, and tribal government entities’ requests to become cooperating agencies. 40 CFR §1501.6.</p> <p>The standard for, documentation requirements pertaining to, and review of a lead agency’s denial of a request for cooperating agency status are not addressed in CEQ regulations.</p> <p>The Tenth Circuit has held that an agency’s decision to deny a request for cooperating agency status was not judicially reviewable, because CEQ</p>	<p>Without documentation requirements or opportunities for review, lead agencies cannot be not held accountable for their decisions to deny these requests.</p>	<p>Federal agencies should respect state sovereignty. WGA Policy Resolution 2017-01, Building a Stronger State-Federal Relationship.</p>

<ul style="list-style-type: none"> • Provide a clear and thorough explanation of the reasons for the denial of cooperating agency status to the requesting agency; • Record and maintain this explanation at the lead agency and by submission to the Office of Management and Budget; and • Provide a remedy for the requesting agency and a standard of review for that remedy, such as clear and convincing evidence. 	<p>regulations currently provide no standard for the court to apply. <i>Wyoming v. U.S. Dept. of Agriculture</i>, 661 F.3d 1209 (10th Cir. 2011).</p>		
<p><i>Require the use of cooperating agencies’ environmental analyses and data, subject to existing state data protection and transparency requirements, as well as agreement on the methodologies for joint reviews.</i></p>	<p>CEQ regulations require federal agencies to reduce duplication and create a single environmental review document, as well as encourage the performance of joint studies and analyses. 40 CFR §1506.2.</p> <p>CEQ regulations do not require lead agencies to include the information and data submitted by cooperating agencies – or explain why it was not included – in an EIS/EA or to obtain cooperating agency agreement on joint review methodologies.</p>	<p>A cooperating agency will need to create an additional environmental review document if the EIS/EA does not contain the information necessary for that agency to complete its review. This results in duplication and redundancy.</p> <p>A cooperating agency may also be reluctant to engage in a joint study or analysis if its agreement on the methodology is not required.</p>	<p>Federal agencies should leverage the use of state, tribal, and local expertise and science in federal environmental review, consultation and permitting. National Forest and Rangeland Management Initiative June 2017 Special Report</p> <p>Federal actions should use state data and expertise, subject to existing state requirements for data protection and transparency. WGA Policy Resolution 2017-08, State Wildlife Science, Data, and Analysis.</p> <p>States must have early, meaningful, and substantive input in the development of regulatory policies that have federalism implications,</p>

			such as reviews. WGA Policy Resolution 2017-01, Building a Stronger State-Federal Relationship .
Clarify that cooperating agency status continues until the EIS/EA is fully implemented.	<p>CEQ regulations are silent on when cooperating agency status ends. CEQ guidance recommends that the lead agency consider comments received on a draft or final EIS/EA with other cooperating agencies before issuing its final decision, but a lead agency is not required to share public comments on a draft EIS/EA with cooperating agencies prior to the final EIS/EA. CEQ Collaboration in NEPA: A Handbook for NEPA Practitioners (2007), p. 16.</p> <p>CEQ memoranda and BLM's regulations and guidance imply that cooperation ends after the preparation of a proposed EIS. CEQ Memorandum: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (January 2002); 43 CFR §1610.3-2(b); BLM's Desk Guide, p. 30.</p>	Ending cooperating agency status once an EIS/EA is drafted eliminates state engagement at the crucial phases of finalization and implementation.	Federal agencies should consult with states on a regular basis as a predicate to federal action and on an ongoing basis, including throughout implementation. WGA Policy Resolution 2017-01, Building a Stronger State-Federal Relationship .
Extend cooperating agency status to EAs while providing state agencies with the flexibility to decline an invitation to become a cooperating agency.	<p>CEQ regulations do not require federal agencies to invite other governmental entities to participate as cooperating agencies for purposes of producing an EA; CEQ memoranda, however, indicates that lead agencies may, through their own discretion, invite governmental entities to participate as cooperating agencies for EAs. CEQ Memorandum: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (January 2002); CEQ Memorandum: Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (July 1999).</p>	<p>Federal agencies prepare far more EAs than EISs, but in 2015, cooperating agencies were involved in only five percent of EAs (compared to 66 percent of EISs). Attachment A of CEQ 2016 Report.</p> <p>The same reasons for cooperation – depending on the circumstances – can exist for EAs as for EISs.</p>	Federal agencies should be consistent in environmental analysis and align agency practice in conducting EAs with the administrative policy goal of streamlined, summary documents. National Forest and Rangeland Management Initiative June 2017 Special Report
Form an advisory committee with representatives from states to monitor implementation of these recommendations and provide additional recommendations.	<p>The most recent regulatory and legislative task forces on improving the NEPA process submitted their reports in 2003 and 2006, respectively, and were time-limited. 2003 CEQ NEPA Task Force Report on Modernizing NEPA Implementation; 2006 House Natural Resources Committee NEPA Task Force Report on Improving and Updating the National Environmental Policy Act.</p> <p>CEQ's Initial List of Actions to Enhance and Modernize the Environmental</p>	An ongoing committee could work to continuously improve the NEPA process. Currently, CEQ has no formal, ongoing, and permanent method to receive feedback from cooperating agencies or states on the NEPA	States should have representation on all relevant committees and panels advising federal agencies on scientific, technological, social and economic issues that inform federal regulatory processes. WGA Policy Resolution 2017-01, Building a

	Review and Authorization Process, 82 FR 43226 (September 14, 2017) includes the creation of an Interagency Working Group.	process.	<i>Stronger State-Federal Relationship.</i>
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August 3, 2018

Mr. Ted Boling
Associate Director for the National Environmental Policy Act
Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

Dear Associate Director Boling:

Thank you for the opportunity to provide comments on potential revisions to Council on Environmental Quality (CEQ) regulations to make administration of the National Environmental Policy Act (NEPA) more efficient, timely, and effective, consistent with the Act's national environmental policy (Docket No. CEQ-2018-0001, 83 Fed. Reg. 119, June 20, 2018). Western Governors support the creation of more efficient infrastructure permitting and environmental review processes without shortening timelines for state input and consultation, or compromising natural resource, wildlife, environmental, or cultural values.

CEQ regulations can help federal agencies engage in early, meaningful, substantive, and ongoing consultation with states, which will reduce duplication between state and federal analyses and promote early and effective resolution of issues. Following are responses to the specific questions included in the request for comments on how CEQ can accomplish its goal of making the NEPA process more efficient, while also improving the state-federal relationship. These recommendations are based on the Governors' policies, as articulated in: WGA Policy Resolution [2018-05](#), *Modernizing Western Infrastructure*; WGA Policy Resolution [2017-01](#), *Building a Stronger State-Federal Relationship*; National Forest and Rangeland Management Initiative June 2017 [Special Report](#); and the Governors' November 28, 2017 [letter](#) to CEQ on strengthening the NEPA process.

Question 2: Should CEQ's NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal, or local environmental reviews or authorization decisions, and if so, how?

CEQ should revise its NEPA regulation to require federal agencies to:

- Work directly with states to obtain and use up-to-date state data and analyses as critical sources of information in the NEPA process.
- Use cooperating agencies' environmental analyses and data, subject to existing state data protection and transparency requirements, as well as obtain cooperating agencies' agreement on the methodologies for joint reviews.

- 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, explain the agency's rationale and the steps taken to mitigate inconsistency or conflict to the maximum extent possible.

Question 3: Should CEQ's NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decisions, and if so, how?

CEQ should revise its regulations to:

- Acknowledge that state, local, and tribal governments, as well as their political subdivisions, have unique and critical duties to serve their citizens and are not ordinary "stakeholders" in the NEPA process.
- Require federal agencies to 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.
- Require federal agencies to 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.
- Simplify the definition of cooperating agency.
- 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.
- Clarify that cooperating agency status extends until an EIS or EA is implemented.

CEQ should revise its regulations to provide greater direction on how federal agencies should "cooperate to the fullest extent possible" with state agencies, as required by 40 CFR §1506.2. It could do so by mandating incorporation of the following suggestions for effective cooperation contained in CEQ Collaboration in NEPA: A Handbook for NEPA Practitioners (2007):

- Consult: Lead agencies should keep cooperating agencies informed and consider their concerns and suggestions on the NEPA process and provide documentation on how their input was considered in the decision-making process.

- **Involve:** Lead agencies should communicate with cooperating agencies to ensure that their input is addressed and reflected within legal and policy constraints and provide iterative feedback on how their input is considered in the decision-making process.
- **Collaborate:** Lead agencies should seek cooperating agency advice and agreement on various aspects of the NEPA process.

NEPA explicitly states that it does “not in any way affect the specific statutory obligations” of a federal agency “to coordinate or consult with any other Federal or State agency” or to act “upon the recommendations or certification of any other Federal or State agency.” 42 U.S.C. §4334. CEQ regulations should include a guarantee that the coordination and consultation requirements in other federal statutes are respected, regardless of whether an agency is designated as a cooperating agency.

Question 13: Should the provisions in CEQ’s NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which alternatives may be eliminated from detailed analysis be revised, and if so, how?

CEQ should revise its regulations to allow agencies to analyze the action and no-action alternatives when a project is collaboratively developed, unless a third alternative is proposed and meets the purpose and need of the project.

Question 17: Are there additional ways CEQ’s NEPA regulations should be revised to improve the efficiency and effectiveness of the implementation of NEPA, and if so, how?

CEQ should revise its regulations to:

- Ensure that agencies set, and adhere to, timelines and schedules for completion of reviews and develop improved metrics for tracking and accountability.
- Clarify significance thresholds and Extraordinary Circumstances language for NEPA based on best practices and provide, where possible, consistent approaches to interpreting these NEPA requirements.

Western Governors appreciate your efforts on this important issue and ask that you utilize Governors and state agencies as resources and partners as you move forward with this endeavor. We look forward to working with you to improve the NEPA process.

Sincerely,



David Ige
Governor of Hawai'i
Chair, WGA



Doug Burgum
Governor of North Dakota
Vice Chair, WGA



Policy Resolution 2020-01

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:
 - 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

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).

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 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.

Federal and State Land Management and Planning

21. Governors possess primary decision-making authority for management of state resources. States also have knowledge and experience that are necessary for the development of effective plans. Accordingly, it is essential that Governors have a substantive role in federal agencies' planning processes and an opportunity to review new, revised, or amended federal land management plans for consistency with existing state plans. Federal agencies should:
 - a) Provide Governors with sufficient time for a full and complete state review, especially when federal plans affect multiple planning areas or resources.
 - b) Align the review of multiple plans affecting the same resource, especially for threatened or endangered species that have vast western ranges.
 - c) Afford Governors the discretion to determine which state plans should be reviewed against federal plans for consistency, including State Wildlife Action Plans, conservation district plans, county plans, and multi-state agreements.
 - d) Maintain Governors' right to appeal any rejection of recommendations resulting from a Governor's consistency review.
22. The federal government should honor its historic agreements with states and counties in the West to compensate them for state and local impacts associated with federal land use and federally owned, nontaxable lands within their borders.
23. The federal government should be a responsible landowner and neighbor and should work diligently to improve the health of federal lands in the West. Federal actions or failures to act on federal lands affect adjacent state and privately-owned lands, as well as state-managed natural resources.
24. Congress and federal agencies should provide opportunities for expanded cooperation, particularly where states are working to help their federal partners to improve management of federal lands through the contribution of state expertise and resources.

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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Policy Resolution 2018-06

Transportation Infrastructure in the Western United States

A. BACKGROUND

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. 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.
5. 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 transit systems and increased capacity on existing infrastructure.
6. The infrastructure in the region is under strain from both increased movement of goods and people and from underinvestment in repair and new infrastructure needed to keep pace with this growth and change.
7. 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.
8. 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.

B. GOVERNORS' POLICY STATEMENT

1. Western Governors believe there is a strong federal role, in partnership with the states, 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 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 regulation accompanying Federal Transportation programs should be reduced by expediting project delivery and streamlining the environmental review process without diminishing environmental standards or safeguards.
4. 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.
5. 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.
6. 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.
7. 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.
8. 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 impact on the American economy that should not be repeated.
9. 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.

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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Policy Resolution 2018-15

Modernizing Western Infrastructure

A. BACKGROUND

1. Western states depend on a safe, reliable and resilient network of infrastructure to move goods, people, energy, and agricultural products to meet growing demands across our nation and world. Investments to modernize our state's infrastructure, including ports, water systems, bridges, pipelines, highways, airports, electric generation and transmission, communications facilities, recreational assets and railways not only support the economic well-being of our communities, they also serve to position our economies to attract and retain investment through maintaining our competitive advantage in a growing global marketplace. Because a significant portion of the West is federally-owned, federal processes impact the region's infrastructure.
2. 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 and federal 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, as well as prevent delays, in the federal permitting and environmental review process.
3. Western Governors applaud the principles and intent of the National Environmental Policy Act (NEPA) which, since its enactment in 1970, has required that federal agencies consider how proposed federal actions may impact 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).
4. Congress recognized the need for improved state-federal coordination in the NEPA process in the Fixing America's Surface Transportation (FAST) Act, passed in December 2015, which implements reforms regarding cooperating agency status and coordination with state and local governments. This statute should be consistently implemented.
5. NEPA mandates federal agency cooperation with state and local governments through the designation of qualified "cooperating agencies." Under existing law, an entity shall: (i) participate in the NEPA process at the earliest possible time; (ii) participate in the NEPA scoping process; (iii) assume, at the lead agency's request, responsibility for developing information and preparing environmental analyses; (iv) provide staff support upon request of the lead agency; and (v) use its own funds in its participation as a cooperating agency.¹

¹ 40 CFR § 1501.6(b).

6. The manner in which cooperating agencies are selected by a lead agency to participate in the NEPA process is unclear and inconsistently implemented. Additionally, a lead agency's determination of whether or not to grant cooperating agency status to a federal or non-federal governmental entity is not subject to judicial review.
7. 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.

B. GOVERNORS' POLICY STATEMENT

1. Western Governors support improved infrastructure permitting and environmental review processes that result in more efficient reviews without shortening timelines for state input and consultation, or compromising natural resource, wildlife, environmental quality or cultural values.
2. Western states have a diverse mix of infrastructure needs spanning rural and urban areas and across multiple sectors of our economies. Infrastructure financing reforms should recognize this diversity and should avoid shifting costs to states or creating undue or disproportionate impacts to the infrastructure that connects the West's cities and rural communities with the nation and world. Federal infrastructure financing appropriations should acknowledge and support the diverse infrastructure needs facing western states.
3. The federal infrastructure permitting and environmental review process must be transparent, predictable and consistent for states and project developers. 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.
4. Federal programs that increase bottom-up coordination among agencies, state and local governments and that foster collaboration among diverse stakeholders and project proponents can create efficiency and predictability in the NEPA process, including reducing the risks of delays due to litigation.
5. 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.
6. Federal agencies should be required to engage with states and state agencies in early, meaningful, substantive and ongoing consultation. Federal agencies should be required to invite all qualified state governmental entities to participate in the NEPA process as "cooperating agencies" and promulgate regulations to clarify consultation procedures and states' roles as cooperating agencies. The denial of any *bona fide* request for cooperating 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.

7. 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.
8. Federal NEPA regulations should allow for existing state environmental review processes to supplement and inform federal environmental review under NEPA. Federal agencies, in their NEPA implementation guidelines, should encourage joint reviews with the states where possible.
9. The federal government should 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. Federal agencies should work directly with states to obtain and use up-to-date state data and analyses as critical sources of information in the NEPA process.

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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Western Governors' Association Policy Resolution 2017-08

State Wildlife Science, Data and Analysis

A. **BACKGROUND**

1. Large intact and functioning ecosystems, healthy fish and wildlife populations, and ample public access to natural landscapes are significant contributing factors to the West's economy and quality of life.
2. Wildlife-associated recreation — including hunting, fishing, and wildlife watching — generates over \$65 billion annually in 19 western states.
3. Through broad trustee and police powers, states have primary management authority over fish and wildlife within their borders. States also exercise sovereign authority over the allocation, planning, protection, and development of water resources within their borders. States work cooperatively with federal agencies on species and habitat issues throughout the West.
4. Federal and state agencies need data-driven science, mapping and analysis to manage species and habitat. State agencies often have the best available science, expertise and other scientific and institutional resources such as mapping capabilities, biological inventories, state wildlife action plans and other important data. The federal government should recognize and utilize valuable state resources, including scientific information about species population numbers, conservation status, and habitat availability. Such information is needed to address potential species listings under ESA, the spread of invasive species and the impacts of drought, water transfers and energy development.
5. The value of state wildlife data and expertise has been recognized by Congress. For the past four years, House and Senate appropriators have adopted report language directing federal agencies to use state fish and wildlife data and analyses as a primary source to inform federal land use, land planning, and related natural resource decisions¹.

¹ [H. Rept. No. 114-632, at 6 \(2016\)](#); [H. Rept. No. 114-170, at 6 \(2015\)](#); [H. Rept. No. 113-551, at 7 \(2014\)](#)

6. Early and ongoing substantive consultation between federal agencies and states regarding state generation and analyses of data will result in durable and implementable solutions, better conservation outcomes, and effective allocation of limited federal budgets and resources.
7. Members of Congress have advocated for greater transparency of the data used in federal management and decision-making – under the Freedom of Information Act (FOIA) generally and the Endangered Species Act (ESA) specifically.
8. Western Governors understand Congress’ need to exercise meaningful oversight over the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, “Services”), and their implementation of ESA and other federal actions impacting species management. Nevertheless, blanket requirements to make publicly available all data considered by federal agencies² – 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. 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. Such a circumstance may occur, for example, when disclosed data reveals specific locations of rare or sensitive species, or sites that possess significant historical or cultural significance.
9. Congress and federal agencies have previously recognized the need to protect private landowner data. Under Section 1619 of the 2008 Farm Bill, the Natural Resources Conservation Service (NRCS), an agency of the U.S. Department of Agriculture (USDA), is prohibited from disclosing certain categories of personally identifiable information provided by landowners participating in USDA programs. The Services have no such data protections built into voluntary conservation programs like Candidate Conservation Agreements with Assurances (CCAAs).

B. GOVERNORS’ POLICY STATEMENT

1. The Services should utilize state wildlife data, analysis and expertise as principal sources in development and analysis of science serving as the legal basis for federal regulatory action.
2. State wildlife science, data and analyses are invaluable tools for informing federal project planning and research efforts related to wildlife management. Western

² 21st Century Endangered Species Transparency Act, S. 376, 115th Cong. (2017)

Governors encourage federal-state coordination on wildlife data collection to avoid spending scarce resources on duplicative data collection efforts.

3. State data – particularly non-aggregated raw data – is subject to differing levels of statutory protection under various state laws. Western Governors encourage Congress and federal agencies to recognize the limitations on complete transparency of state data in federal decision-making.
4. Governors support transparency around data and information supporting ESA decisions or other federal wildlife management actions that would impact state interests. State and federal agencies should engage in early and substantive consultation to establish data sharing protocols and assess whether sensitive state data, if shared, may be liable to publication under FOIA.
5. Governors support efforts to provide statutory exceptions to FOIA disclosure for state wildlife data and analysis in instances where publication of state data provided to federal agencies would be violation of existing state statutes.

C. GOVERNORS' MANAGEMENT DIRECTIVE

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

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Western Governors' Association Policy Resolution 2017-10

National Forest and Rangeland Management

A. BACKGROUND

1. The American West encompasses a huge landmass representing 2.4 million square miles or over two-thirds of the entire country. Over 112 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, forces of nature, and land ownership patterns in the West underscore the purpose and vital need for a more active federal role in forest management. Western states include more than 75 percent of our national forest and grassland system. These public lands serve as critical economic drivers, and they provide numerous conservation benefits, water supply, and recreational opportunities for Western communities and the nation.
3. States have a particular interest in improving the active management of federal forest lands. State governments have trust authority over water, wildlife and forest resources, along with primary authority and expertise to protect community health and safety. Poorly managed forests can have significant and broad impacts on the landscapes and communities of the West, including negative impacts to air quality and public health, degradation of rivers and streams and associated water quality (including drinking water), reduced forage for domestic livestock, impaired habitats for wildlife and fish, and the loss of forest products and associated jobs.
4. Relative to decades past and other forest landowners, forest managers today operate under a constrained decision space as they work to address contemporary issues such as climate change, invasive pests and diseases, habitat diversity, fuel build-ups and fire risk, and legacy impacts. Adding to this challenge are concerns about the economic and social vitality of rural communities that experience impacts from reduced timber supply and compromised forest health. Displaced workers, declines in school enrollment, aging demographics, property loss, business closures and revenue impacts due to wildfire, and high unemployment are not uncommon to these communities.
5. States are managers as well, and many Western states own extensive public land holdings that require forest products infrastructure to achieve community vitality and land management goals, including ecological restoration objectives and healthy and resilient forests.

6. The U.S. Forest Service business model has historically been based on a combination of federal appropriations that were supplemented with revenue from resource sales and fees. Until the early 1990s, the Forest Service was a net contributor to the Federal Treasury. Over the past 20 years, timber sales have dramatically declined.
7. In addition, the last decade has seen several large, very expensive wildfires, which have increased the U.S. Forest Service wildfire suppression costs from 13 percent of the agency's FY 1991 budget to nearly 50 percent over the last several fiscal years. Consequently, under the current agency budgeting framework, forest management, hazardous fuels reduction, habitat improvement, and outdoor recreation programs have been negatively impacted across national forests and Department of Interior lands.
8. An April 2015 study by the U.S. Forest Service, the *Collaborative Forest Landscape Restoration Program 5-Year Report, FY 2010 – 2014*, found that the past century of wildfire suppression and legacy management practices have contributed to forests being overstocked and primed for larger and more intense blazes, and that changes in land use and increasing social pressures make it difficult for the agency to let fire play its natural role of clearing the forest understory in certain forest types. Active forest management has historically played a pivotal role in the growth and mortality cycle of forests to manage fuel loading, which in turn can reduce fire-fighting costs and improve habitat resilience. Today, the U.S. Forest Service estimates that roughly 90,625 square miles – an area larger than Utah – is at high or very high risk of severe wildfire and in need of treatment.
9. Insect infestation and disease have damaged many of the forests throughout the West. Severe drought conditions that are impacting western states, particularly California, have only exacerbated insect infestations and tree mortality. The impacts go well beyond fire risk, and timber and fiber production are negatively impacted, threatening the viability of the surviving forest product infrastructure. The significant decline in forest health has also created serious threats and challenges to watershed integrity, wildlife and fisheries habitats, recreational uses, businesses and tourism. All of these impacts present substantial challenges for forest-dependent communities across the West.
10. The dire forest conditions, unmet management needs, and the failure to provide lasting protections for some landscapes have brought diverse stakeholders together to find solutions. Community collaboration on forest health projects is robust in numerous places across the West forging broad agreements among diverse stakeholders on projects that encompass fuels reduction, fiber production, habitat restoration, long-term protection for critical areas, and other community objectives. It is not uncommon to find mill owners, hunters and anglers, loggers, small business owners, conservationists, and local elected leaders working together around the table.

11. Collaborative planning and project implementation across National Forests and state and private forest lands on a larger scale allows for more diverse interests to address their particular needs for a landscape or a watershed. Taking a broad look at a landscape for planning purposes minimizes the challenges associated with managing lands for the benefit of a particular species or to address a specific need. Well-planned projects that are strategically placed across a landscape can result in a higher level of benefits than those that are more randomly or opportunistically placed. Processes associated with planning and implementing a project have become so time consuming and expensive for National Forests in particular that a disincentive often exists for their managers to proceed with management actions that are needed to attain desired ecological, social, and economic objectives.
12. Collaborative efforts have shown initial successes in reaching consensus, but there is a shortage of formal mechanisms that encourage their creation in areas with conflict or reward their success within the context of public process. Further, there is little to no formal incentive for the management agencies and collaboratives to ensure collaborative work happens in a timely and efficient manner that achieves a pace and scale of management that matches the ecological, social, or economic needs of public and private forestlands and surrounding communities.
13. Despite this good work the full benefits of these collaborative efforts have not been realized on the land. Working constructively with collaborators requires resources to be productive and the federal agencies often lack the necessary staff and funding. In addition, the federal agencies have sometimes been reluctant to embrace collaboration, because they either have unclear legal authority to favor collaborative efforts or don't welcome the input.
14. Further, and even when collaborative forest health projects enjoy broad support from diverse stakeholders and the agencies, administrative objections and litigation remain a too frequent outcome. One result is that community collaborative efforts become fatigued, and future opportunities are lost. Another outcome is that Forest Service restoration projects often go through exhaustive, time-consuming analysis, driving up costs and preventing the agency from scaling up management to meet the scope of the problem.
15. Today the costs associated with planning and implementing a management project on National Forest lands are significantly more than those of the private sector. This cost, along with the time associated with drafting, analyzing, incorporating public involvement, and responding to appeals and/or litigation at the project level, lead many federal managers to focus their limited staff, funds and time on projects with the least likelihood to be challenged. This approach does not adequately address the larger socio-economic and ecological needs of our National Forests and dependent communities.

16. The 2014 Farm Bill provided the Forest Service with several new tools to accelerate forest restoration. A Governor could nominate landscapes substantially affected or threatened by insects and disease to the Secretary of Agriculture for designation as Priority Areas for expedited NEPA and administrative process and judicial review. 16 Western Governors nominated areas for this designation, the vast majority of which were approved by the Secretary of Agriculture.
17. In addition, the new Farm Bill authorities provided for a categorical exclusion (CE) for insect and disease projects on areas as large as 3,000 acres that are the product of a collaborative effort. The new CE has the potential to greatly magnify the role of collaboration and strengthen the results of those efforts, and to reduce the time and cost for forest health projects, resulting in on-the-ground restoration work that is accomplished more quickly and across a larger landscape. Not yet in wide use, the Farm Bill also added expanded "Good Neighbor" authority that enhances the ability of states to partner with the Forest Service and implement projects on federal land.
18. The shortcomings of federal forest management have also impacted local governments directly. In 1908, when Congress created the National Forest System, it also passed the National Forest Revenue Act in 1908 directing the Forest Service to share 25 percent of gross revenues with local governments. Then in 1976, Congress passed "Payments in Lieu of Taxes" (PILT) legislation providing federal payments to local governments regardless of gross revenues that result from timber harvest and other forest management activities. After revenues from the sale of timber dropped substantially, Congress passed the Secure Rural Schools and Self Determination Act (SRS) in 2000, allowing counties to choose between a payment based on historical average and the 25 percent revenue share. SRS has expired several times, and PILT has been subject to funding uncertainty as well. Western Governors support efforts to ensure counties and states continue to receive payments under the Secure Rural Schools program, and that these payments should be based upon historic federal land management receipts. These payments are vital to providing state and county public goods and services, such as roads, emergency response, and wildlife and natural resources protection in communities adjacent to federal lands.
19. There have been several efforts in Congress to reform federal forest management, and recent legislation reflects the continued frustration of Congress as it attempts to find a path forward to address this issue in a productive, bipartisan manner.

B. GOVERNORS' POLICY STATEMENT

1. Western Governors support sound forest management policies that maintain and promote ecologic, economic and social balance and sustainability.

2. Today, the Forest Service's forest management program is primarily a byproduct of restoration projects intended to reduce wildfire risk and/or improve forest resilience, water quality, watershed health, key wildlife habitat, and/or intrinsic value. Western Governors recognize and support these forest values, but also believe it is reasonable to expect that some portion of the federal landscape will be focused on long-term, ecologically-sound forest management — where jobs, forest products, and revenues are priorities and generated through sound stewardship.
3. Western Governors encourage the Forest Service to develop and help fund new technologies and wood based markets for some non-traditional products. USDA's Forest Products Laboratory is a hub for research and innovation. We should continue to encourage the application of their knowledge and experience in a practical way in the western United States so that some of the federally funded infrastructure that develops from such efforts could first be demonstrated on private lands. Also, since federal forests are now more focused on large landscape forest health projects, there is a good opportunity to ensure we have a broader suite of outlets, in addition to traditional sawmills and existing biomass facilities.
4. We can achieve sustainable forest management across every acre of our federal and nonfederal forestlands while including an equitable mix of uses to meet many ecological, social, and economic needs.
5. Western Governors believe that our citizens are capable of rolling up their sleeves and working together with the federal agencies to address difficult issues such as forest management, and that not enough is done to incent and reward the current collaborative work that is occurring across the West.
6. It is important to retain citizens' rights to question governmental decisions through administrative and legal means. However, there are situations where the threat of litigation is a key factor resulting in either delay of agency activity and progress or the stifling of productive collaborative work. The lack of funding and resources for federal agencies is also a significant factor. Western Governors believe an effort needs to be made to better understand the scope and scale of this problem. There may be an opportunity to further streamline appeals and litigation associated with National Forest decision making in association with other changes designed to incent collaboration and provide more certainty as to outcomes.
7. The 2014 Farm Bill authorities are significant expansions of Forest Service authority and are powerful new tools to boost forest management, promote collaboration, and limit the impacts of administrative objections and litigation. Western Governors encourage federal agencies to fully implement the tools provided in the 2014 Farm Bill.

8. Western Governors are on record as strong supporters of ending the practice of fire borrowing, and Congress should pass legislation to fund federal wildfires off-budget as many states already do, and ensure the Forest Service budget for forest restoration, recreation, road maintenance, hazardous fuels reduction, and wildlife/watershed protection is fully restored.
9. Western Governors believe clear, coordinated and consistent application of federal vegetation management practices is integral to maintaining the health of western forests, preventing dangerous and damaging fires, and maintaining grid reliability. The Governors support effective and efficient cross-jurisdictional coordination that enables utilities to undertake necessary vegetation management actions on federal transmission rights-of-way – and to do so without fear of strict liability imposition for necessary vegetation management actions taken adjacent to transmission rights-of-way.
10. Western Governors are well-suited to engage in a productive and bipartisan dialogue on the broader topic of federal forest management reform, engaging westerners and examining on the ground realities across western landscapes. Western states are land owners and managers and well understand the challenges associated with forest management under changing social, economic and environmental conditions.
11. A meaningful and successful discussion of forestry reform in the West will require a transparent and inclusive process that engages those diverse interests who have a direct stake in forest management outcomes. The impacts of forest management are felt most directly by those who live, work and recreate in and adjacent to those forests, so the discussion needs to begin there. This is perhaps where Western Governors can provide the most productive bipartisan contribution to this national discussion. Our nation's forests belong to all Americans, and in the end and through their elected representation all Americans will determine the scope and success of any efforts to reform forest management.
12. There is significant dissatisfaction in the West among many stakeholders with the current level of National Forest management. There is a general sense that the current level of forest management is not meeting anyone's needs, whether it's putting logs on trucks, protecting water quality, addressing fire risk, protecting key habitats and landscapes, providing for recreation, or other important community needs. Successful forest management reform will achieve a balance among all of these important objectives, and provide the opportunity for certainty such that diverse interests will be encouraged to work together to achieve shared outcomes.
13. It is time to reconsider the business model of the U.S. Forest Service. Western Governors believe it may be possible to reform the Forest Service business model in a manner that reduces project planning costs, sources funds from non-federal partners and recognizes that the agency no longer generates large revenues from commodity programs.

14. Any discussion of forest management reform must include consideration of the financial relationship between the Federal and local governments, the existence of PILT, and the limited tax base for counties with significant federal ownership.
15. Western Governors support the recommendations identified over the course of the WGA National Forest and Rangeland Management Initiative, and [incorporate the recommendations into this resolution by reference.](#)

C. GOVERNORS' MANAGEMENT DIRECTIVE

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

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