April 29, 2019

The Honorable Rob Portman
Chairman
Permanent Subcommittee on Investigations
Committee on Homeland Security
& Governmental Affairs
U.S. Senate
340 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Tom Carper
Ranking Member
Permanent Subcommittee on Investigations
Committee on Homeland Security
& Governmental Affairs
U.S. Senate
340 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Portman and Ranking Member Carper:

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. The Governors have urged the Administration to use its analysis of federal permitting and review processes as an opportunity to strengthen the state-federal relationship.

Thank you for examining federal infrastructure permitting in your May 2, 2019 hearing. To inform the Committee's consideration of this important topic, I request that the Committee include the following attachments in the permanent record of the hearing:

- WGA Policy Resolution 2018-15, *Modernizing Western Infrastructure*;
- WGA Policy Resolution 2018-06, *Transportation Infrastructure in the Western United States*;
- WGA Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*;
- The Governors' April 8, 2019 letter to the Council on Environmental Quality (CEQ) and the U.S. Department of Transportation requesting consultation with states in the review of National Environmental Policy Act (NEPA) processes;
- The Governors' February 8, 2019 letter to CEQ on its proposed NEPA revisions and the implementation of the One Federal Decision Policy;
- The Governors' October 10, 2018 letter to CEQ and other Administration officials regarding the One Federal Decision Policy and other infrastructure plans;
- The Governors' August 3, 2018 comments on CEQ's potential revisions to make the administration of NEPA more efficiently, timely, and effective; and
- The Governors' November 28, 2017 letter urging CEQ to strengthen the state-federal relationship through its work to modernize federal environmental reviews.

Thank you for your consideration of this request.

Sincerely,

James D. Ogsbury
Executive Director

Attachments

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.

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

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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Western Governors' Association
Policy Resolution 2017-01

Building a Stronger State-Federal Relationship

A. PREAMBLE

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

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

The genius of American democracy is predicated on the separation of powers among branches of government (*viz*. the legislative, executive and judiciary) and the division of power between the federal and state governments (federalism). Under the American version of federalism, the powers of the federal government are narrow, enumerated and defined. The powers of the states, on the other hand, are vast and indefinite. States are responsible for executing all powers of governance not specifically bestowed to the federal government by the U.S. Constitution. This principle is memorialized in the Tenth Amendment, which states in its entirety, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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

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

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

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

B. BACKGROUND

1. The relationship between state government authority and federal government authority is complex and multi-dimensional. There are various contexts in which the authorities of these respective levels of U.S. government manifest and intersect. For example:

    a) **Exclusive Federal Authority –** There are powers that are specifically enumerated by the U.S. Constitution as exclusively within the purview of the federal government.[1]

    b) **State Primacy –** States derive independent rights and responsibilities under the U.S. Constitution. All powers not specifically delegated to the federal government are reserved for the states; in this instance, the legal authority of states overrides that of that federal government.[2]

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

[2] Amendment 10 of the U.S. Constitution: "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved tothe States, respectively, or to the people.*"

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

c) **Shared State-Federal Authority –** In some cases, state and/or federal authority can apply, given a particular fact pattern.[3] Federal preemption of state law is a concern under this scenario. According to the Council on State Governments, the federal government enacted only 29 statutes that pre-empted state law before 1900. Since 1900, however, there have been more than 500 instances of federal preemption of state law.

d) **State Authority "Delegated" from Federal Agencies by Federal Statute –** The U.S. Congress has, by statute, provided for the delegation to states of authority over certain federal program responsibilities. Many statutory regimes – federal environmental programs, for example – contemplate establishment of federal standards, with delegated authority (permissive) available to states that wish to implement those standards.

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

e) **Other –** Where the federal government has a statutory, historical or "moral" obligation to states.[4]

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

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

2. Over time, the strength of the federal-state partnership in resource management has diminished. Federal agencies are increasingly challenging state decisions, imposing additional federal regulation or oversight and requiring documentation that can be unnecessary and duplicative. In many cases, these federal actions encroach on state legal prerogatives, especially in natural resource management. In addition, these federal actions neglect state expertise and diminish the statutorily-defined role of states in exercising their authority to manage delegated environmental protection programs.

3. The current fiscal environment exacerbates tensions between states and federal agencies. For example, states have a particular interest in improving the active management of federal forest lands. The so-called "fire borrowing" practice employed by the U.S. Forest Service and the Department of the Interior to fund wildfire suppression activities is negatively affecting restoration and wildfire mitigation work in western forests. Changes are needed, as the current funding situation has allowed severe wildfires to burn through crippling amounts of the very funds that should instead be used to prevent and reduce wildfire impacts, costs, and safety risks to firefighters and the public. This also has impacts on local fire protection districts, which often bear the brunt of costs associated with first response to wildfire, and state budgets that are also burdened by the costs of wildfire response. Fire borrowing represents an unacceptable set of outcomes for taxpayers and at-risk communities, and does not reflect responsible stewardship of federal land. In addition, states increasingly are required to expend their limited resources to operate regulatory programs over which they have less and less control. A 2015 report by the White House Office of Management and Budget on the costs of federal regulation and the impact of unfunded mandates notes that federal mandates cost states, cities and the general public between $57 and $85 billion every year.

4. States are willing and prepared to more effectively partner with the federal government on the management of natural resources within their borders.

5. The U.S. Advisory Commission on Intergovernmental Relations – established in 1959 and dissolved in 1996 – was the federal government's major platform for addressing broad intergovernmental issues beyond narrow considerations of individual programs and activities.

6. The current Executive Order on Federalism (E.O. 13132) was issued by then-President William Clinton in 1999. That E.O. has not been revisited since and it may be time to consider a new E.O.

C. GOVERNORS' POLICY STATEMENT

1. Review of the Federal-State-Local Relationship

a) It is time for thoughtful federal-state-local government review of the federal Executive Order on Federalism to identify areas in the policy that can be clarified and improved to increase cooperation and efficiency.

b) Governors support reestablishment of the U.S. Advisory Commission on Intergovernmental Relations. It is imperative that the President show his commitment to the Constitutional separation of powers by establishing a platform at the highest level to address federalism concerns.

2. Avoiding Preemption of States

a) In the absence of Constitutional delegation of authority to the federal government, state authority should be presumed sovereign. Accordingly, federal departments and agencies should, to the extent permitted by law, construe, in regulations and otherwise, a federal statute to preempt state law only when the statute contains an express preemption provision or there is some other firm evidence compelling the conclusion that Congress intended preemption of state law, consistent with established judicial precedent.

b) When Congress, acting under authority granted to it by the Constitution, does preempt state environmental laws, federal legislation should:

i. Accommodate state actions taken before its enactment;

ii. Permit states that have developed stricter standards to continue to enforce them;

iii. Permit states that have developed substantially similar standards to continue to adhere to them without change and, where applicable, without consideration to land ownership.

3. Defining Meaningful State-Federal Consultation

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

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

b) Consistent with C(2) and C(3)(a), federal agencies should consult with states in a meaningful way, and on a timely basis.

i. **Predicate Involvement:** Federal agencies should take into account state data and expertise in development and analysis of underlying science serving as the legal basis for federal regulatory action. States merit greater representation on all relevant committees and panels (such as the EPA Science Advisory Board and related issue panels) advising federal agencies on scientific, technological, social and economic issues that inform federal regulatory processes.

ii. **Pre-Publication / Federal Decision-making Stage**: Federal agencies should engage in early (pre-rulemaking) consultation with Governors and state regulators. This should include substantive consultation with states during development of rules or decisions and a review by states of the proposal before a formal rulemaking is launched (i.e., before such proposals are sent to the White House Office of Management and Budget).

iii. **Post-Publication / Pre-Finalization Stage**: As they receive additional information from state agencies and non-governmental entities, Governors and designated state officials should have the opportunity to engage with federal agencies on an ongoing basis to seek refinements to proposed federal regulatory actions prior to finalization.

4. State Authority "Delegated" from Federal Agencies Pursuant to Federal Statute

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

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

b) Federal agencies should grant states the maximum administrative discretion possible. Any federal oversight of such state should not unnecessarily intrude on state and local discretion. Where states take proactive actions, those efforts should be recognized and credited in the federal regulatory process.

c) When a state is meeting the minimum requirements of a delegated program, the role of a federal department or agency should be limited to the provision of funding, technical assistance and research support. States should be free to develop implementation and enforcement approaches within their respective jurisdictions without intervention by the federal government.

d) New federal rules and regulations should, to the extent possible, be consistent with existing rules and regulations. The issuing agency should identify elements and requirements common to both the proposed and existing regulations and provide states an opportunity to develop plans addressing the requirements of both in a coordinated fashion. This will achieve economies of scale, saving both time and money.

e) When a federal department or agency proposes to take adjudicatory actions that impact authority delegated to states, notice should be provided to affected Governors' offices, and co-regulating states should have the opportunity to participate in the proceedings. Where legally permissible, that right should extend to federal agencies' settlement negotiations impacting state environmental and natural resource management prerogatives. Where their roles and responsibilities are impacted, states should be meaningfully consulted during settlement negotiations, including negotiations aimed at avoiding, rather than resolving, litigation (such as negotiations following a notice of intent to sue under the Endangered Species Act, but prior to a formal complaint being filed to initiate legal action).

f) States' expertise should be recognized by federal agencies and robustly represented on boards and in other mechanisms upon which agencies rely for development of science to support regulatory action.

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

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

i. Specifically involve Western Governors on issues (e.g., public lands, water and species issues) that disproportionately impact the West;

ii. Work with Governors to develop specific criteria and consultation processes: 1) for the initiation of federalism assessments and 2) that guide the performance of every federal Department and agency federalism assessment;

iii. Require federal Departments and agencies to meet the criteria developed under C(5)(a)(ii), rather than simply require the consideration of federalism implications;

iv. Provide states, through Governors, an opportunity to comment on federalism assessments before any covered federal action is submitted to the Office of Management and Budget for approval.

b) **Federal and State Land-Use Planning** – Governors possess primary decision-making authority for management of state resources. Accordingly, it is essential that they have an opportunity to review new, revised and amended federal land management plans for consistency with existing state plans. Governors and their staffs have specific knowledge and experience that can help federal agencies craft effective and beneficial plans. A substantive role in federal agencies' planning processes is vital for Western Governors:

i. Federal landscape-level planning presents new issues for Governors to consider as they attempt to ensure consistency between state and federal requirements. Agencies should provide Governors sufficient time to ensure a full and complete state review. This is particularly true when agency plans affect multiple planning areas or resources;

ii. Agencies should seek to align the review of multiple plans affecting the same resource. This is particularly true for threatened or endangered species that have vast western ranges;

iii. When reviewing proposed federal land management plans for consistency with state plans, Governors should be afforded the discretion to determine which state plans are pertinent to the review, including state-endorsed land use plans such as State Wildlife Action Plans, conservation district plans, county plans and multi-state agreements;

iv. Governors must retain a right to appeal any rejection of recommendations resulting from a Governor's consistency review.

c) **Honoring Historic Agreements** – The federal government should honor its historic agreements with states and counties in the West to compensate them for state and local impacts associated with federal land use and nontaxable lands within their borders that are federally-owned.

d) **Responsible Federal Land Management** – The federal government should be a responsible landowner and neighbor and should work diligently to improve the health of federally-owned lands in the West. Lack of funding and conflicting policies have resulted in large wildfires and the spread of invasive species from federally owned forests and grasslands, negatively impacting adjacent state and privately-owned lands, as well as state-managed natural resources (soils, air and water).

e) **Recognizing State Contributions to Federal Land Management** – The U.S. Congress and appropriate federal departments and agencies should provide opportunities for expanded cooperation, particularly where states are working to help their federal partners to improve management of federal lands within their states' borders through the contribution of state expertise, manpower and financial resources.

f) **Avoiding Unfunded Mandates** – The U.S. Congress and federal departments and agencies should avoid the imposition of unfunded federal mandates on states. The federal government increasingly requires states to carry out policy initiatives without providing the funding necessary to pay for implementation. State governments cannot function as full partners if the federal government requires them to devote their limited resources to compliance with unfunded federal mandates.

g) **Other Considerations in Designing an Effective State-Federal Relationship** – Other important considerations in the design of a stronger state-federal relationship include:

i. The U.S. Congress and federal departments and agencies should respect the authority of states to determine the allocation of administrative and financial responsibilities within states in accordance with state constitutions and statutes. Federal action should not encroach on this authority.

ii. Federal assistance funds, including funds that will be passed through to local governments, should flow through states according to state laws and procedures.

iii. States should be given flexibility to transfer a limited amount of funds from one grant program to another, and to administer related grants in a coordinated manner.

iv. Federal funds should provide maximum state flexibility without specific set-asides.

v. States should be given broad flexibility in establishing federally-mandated advisory groups, including the ability to combine advisory groups for related programs.

vi. Governors should be given the authority to require coordination among state executive branch agencies, or between levels or units of government, as a condition of the allocation or pass-through of funds.

vii. Federal government monitoring should be outcome-oriented.

viii. Federal reporting requirements should be minimized.

ix. The federal government should not dictate state or local government organization.

D. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Governors direct the WGA staff, where appropriate, to work with Congressional committees of jurisdiction and the Executive Branch to achieve the objectives of this resolution.

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

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April 8, 2019

The Honorable Elaine L. Chao
Secretary
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

The Honorable Mary Neumayr
Chair and Managing Director
Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

Dear Secretary Chao and Chair Neumayr:

Western Governors appreciate the February 15, 2019, response of the Council on Environmental Quality (CEQ) to our letter of October 10, 2018. In addition, thank you for CEQ's February 26, 2019, Memorandum M-19-11, which clarifies the applicability of Executive Order 13807 to states assigned National Environmental Policy Act (NEPA) authority under the Surface Transportation Project Delivery Program administered by the U.S. Department of Transportation (DOT). We also appreciate the time DOT and CEQ invested with WGA staff in February.

The Moving Ahead for Progress in the 21st Century Act (MAP-21) established the Surface Transportation Project Delivery Program, which authorizes states to assume the Federal Highway Administration's NEPA responsibilities for federal highway projects. Western states assigned NEPA responsibilities under this program have had great success in reducing the timelines for project approval and can provide valuable input on the program's efficacy. These states should be consulted in the development of any federal policy affecting this program. Furthermore, Western Governors urge DOT to engage in meaningful and substantive consultation with states on any guidance it develops regarding the April 9, 2018, One Federal Decision Memorandum of Understanding.

Many of the benefits of meaningful state involvement can also be achieved through improvements to the cooperating agency-lead agency relationship in all applications of NEPA. We urge CEQ to consult with Governors' offices on how best to realize these benefits as the agency continues the review of NEPA regulations. CEQ's rulemaking is of central importance to states, because it will affect how all federal agencies interact with states in NEPA implementation. Please see our August 3, 2018, letter for the Governors' detailed recommendations on CEQ's rulemaking.

As part of this rulemaking, CEQ can also model how states should be treated in the federal rulemaking process. The invitation to provide input as part of a notice-and-comment rulemaking process – equating states with stakeholders or members of the public – does not qualify as government-to-government consultation with a co-sovereign. In federal rulemakings affecting states – such as CEQ's review of its NEPA regulations – federal consultation with states should include document exchange and opportunities for feedback prior to public release. If CEQ believes there are obstacles to such an exchange, Western Governors are eager to discuss how to overcome them.

Western Governors stand ready to work with the Administration to make infrastructure permitting and environmental reviews as efficient as possible. Because state-federal consultation can make these processes more effective, Governors urge DOT and CEQ to prioritize meaningful consultation as part of their streamlining efforts and to have substantive discussions with Governors on how to best accomplish this goal.

Sincerely,

David Ige
Governor of Hawai'i
Chair, WGA

Doug Burgum
Governor of North Dakota
Vice Chair, WGA

February 8, 2019

The Honorable Mary Neumayr
Chair and Managing Director
Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

Dear Chair Neumayr:

Congratulations on your appointment to lead the Council on Environmental Quality (CEQ). Western Governors look forward to working with you to create more efficient federal environmental reviews without shortening timelines for state input and consultation, or compromising natural resource, wildlife, environmental quality, or culture values.

Because states manage environmental and natural resources within their borders, Governors are necessary partners in federal permitting and environmental reviews potentially affecting those resources. Early, meaningful and substantive federal consultation with states and the use of state expertise can reduce duplication and conflict, rendering these reviews more efficient and effective. Accordingly, we urge CEQ to strengthen the partnership between federal agencies and state governments on permitting and environmental review.

The proposed revisions to CEQ's National Environmental Policy Act (NEPA) and Freedom of Information Act (FOIA) regulations, as well as implementation of the One Federal Decision Policy, provide important opportunities for CEQ to work with Governors to promote a more functional state-federal relationship. In response to CEQ's request for comment, the Governors have provided specific recommendations for improving NEPA procedures. In addition, the Governors submitted questions to CEQ and other Administration officials seeking clarity regarding the One Federal Decision policy and other infrastructure plans. We have not received any response from CEQ regarding these recommendations and questions.

These communications and others, as well as the Governors' policy statements on environmental review, include:

- An October 10, 2018 letter to CEQ and other Administration officials regarding the One Federal Decision Policy and other infrastructure plans.
- An August 3, 2018 letter to CEQ regarding potential revisions to CEQ's NEPA procedures.
- A November 28, 2017 letter to CEQ regarding recommendations for modernizing the environmental review process (to which CEQ provided a brief response on April 13, 2018).
- WGA Policy Resolution 2018-05, *Modernizing Western Infrastructure.*
- WGA Policy Resolution 2017-08, *State Wildlife Science, Data, and Analysis*.

- The *Western Governors' National Forest and Rangeland Management Initiative* June 2017 Special Report.

In the Fall 2018 Unified Agenda, CEQ identified plans to revise its FOIA regulations in 2019 (RIN 0331-AA02). Western Governors encourage you to use this opportunity to improve CEQ's procedures regarding the disclosure of information provided by state governments. States share their data and expertise with federal agencies to strengthen federal decision-making and reduce duplication. Congress has recognized the value of state fish and wildlife data and directed federal agencies to fully utilize state fish and wildlife data and analyses as a primary source to inform land use, planning, and related resource decisions.[1] This information – particularly non-aggregated raw data – can be sensitive and is subject to differing levels of statutory protection under various state laws on open records and disclosure.

Nevertheless, CEQ, along with many other federal agencies, does not have procedures for engaging in early and substantive consultation with states to establish data sharing protocols and assess whether sensitive state data, if shared, may be liable to publication through application of FOIA. Western Governors request that CEQ consider including such procedures in its revisions to its FOIA regulations.

Western Governors urge CEQ to capitalize on these opportunities to improve the state-federal relationship and consult with states on the Council's proposals. States are eager to collaborate on these critical issues and to help make federal environmental decision-making more efficient and effective. Thank you for your consideration of our requests as you step into this important role.

Sincerely,

David Ige
Governor of Hawai'i
Chair, WGA

Doug Burgum
Governor of North Dakota
Vice Chair, WGA

[1] 164 Cong. Rec. No. 50- Book II, at H2609 (2018); 163 Cong. Rec. No. 76- Book II, at H3874 (2017); H. Rept. No. 114-632, at 6 (2016); H. Rept. No. 114-170, at 6 (2015); H. Rept. No. 113-551, at 7 (2014).

October 10, 2018

Mr. Douglas L. Hoelscher
Special Assistant to the President and
Deputy Director of Intergovernmental Affairs
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Mr. Alex Herrgott
Associate Director for Infrastructure
Council on Environmental Quality
730 Jackson Place, N.W.
Washington, D.C. 20503

The Honorable R.D. James
Assistant Secretary
U.S. Army Corps of Engineers (Civil Works)
441 G Street, N.W.
Washington, D.C. 20314

The Honorable David Ross
Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Deputy Director Hoelscher, Associate Director Herrgott, Assistant Secretary James, and Assistant Administrator Ross:

Thank you for your webinar presentation to Western Governors' staff on the Administration's One Federal Decision policy and states' assumption of primary permitting authority under Clean Water Act (CWA) Section 404. Western Governors are eager to work in true partnership with the Administration and federal agencies to build a stronger state-federal relationship. By operating as authentic collaborators on the development and execution of policy, the states and federal government can improve their service to the public, resulting in a nation that is stronger, more resilient and united.

Specifically, Western Governors appreciate the Administration's interest in improving the administrative process and creating additional opportunities for state assumption of federal authority. Western Governors look forward to working with the Administration in the development of more efficient infrastructure permitting and environmental review processes. We can accomplish this while providing enhanced opportunities for state input and consultation, and conserving natural resource, wildlife, environmental quality, and cultural values.

On a related item, our staff was encouraged by the short discussion about CWA Section 401 authority. Western Governors are pleased to hear that the Administration no longer seeks statutory changes to the CWA that would restrict or eliminate the current delegations of authority authorized by the statute. Respecting and supporting current state authority under the law is an important foundation on which to build future opportunities. We also appreciate your efforts to provide additional opportunity for state assumption of federal authorities, such as the CWA Section 404 permitting authority. Taken together, these two significant actions signal a desire to work collaboratively with states to improve environmental regulatory processes. Western Governors would like to build on this positive momentum and begin to discuss concrete, definable actions we can jointly take to improve these processes.

To prepare for these discussions and opportunities, Governors would like to better understand the Administration's goals and plans for state delegation and infrastructure permitting and environmental reviews. Below are observations and questions regarding the Administration's recent actions concerning state delegation, permitting, and environmental review in the One

Federal Decision policy, White House's Legislative Outline for Rebuilding Infrastructure in America (Infrastructure Plan), and CWA Section 404.

One Federal Decision Policy and Infrastructure Plan

Executive Order (EO) 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (EO), established the One Federal Decision policy for major infrastructure projects. This policy requires federal agencies to designate a single lead federal agency, then establish and adhere to a project timetable for federal environmental and authorization decisions. The policy establishes a goal of completing all federal decisions for major infrastructure projects within two years. The EO only addresses federal agencies (whether lead, cooperating, or participating) and does not discuss state delegation.

Following publication of the EO, the Office of Management and Budget (OMB) and Council on Environmental Quality (CEQ) issued a memorandum (Memorandum) on its implementation. This document includes a template Memorandum of Understanding (MOU) for federal agencies with each other. Several federal departments and agencies, including U.S. Army Corps of Engineers and Environmental Protection Agency (EPA), have executed an MOU modeled on the template. The MOU establishes non-federal cooperating agency responsibilities and includes non-federal cooperating agencies in the schedule for projects (Permitting Timetable). It also requires the schedule to "account for any federally-required decisions or authorizations, including those that are assumed by, or delegated to, State, tribal, or local agencies." It does not otherwise discuss state delegation.

The Infrastructure Plan sets forth the goal of, "delegating more decision-making to States and enhancing coordination between State and Federal reviews." The plan, however, it limits its recommendation of expanded delegation to states to the contexts of National Environmental Policy Act (NEPA) and Department of Transportation (DOT) non-NEPA project-level decisions. The Infrastructure Plan does not mention the CWA as an area for increased state delegation.

Your response to the following questions would help Western Governors better understand the Administration's One Federal Decision policy, its Infrastructure Plan, and the future implementation of these policies:

- How will the Administration ensure that state consultation is not compromised with the One Federal Decision policy's two-year goal for all permitting, authorization, and NEPA decisions?

- What processes did OMB and CEQ use to consult with states on the Memorandum, which could impact state NEPA, permitting, and authorization decisions?

- Do the references to cooperating agencies in the Memorandum include instances where states are delegated with authority by statutes other than NEPA, such as in the Clean Water Act or Clean Air Act?

- Does the Permitting Timetable described in the MOU apply to state decisions or authorizations, such as those pursuant to the Clean Water Act or Clean Air Act? What will happen if a state fails to meet the deadline in the Permitting Timetable?

- What actions is the Administration taking to expand delegation of federal NEPA authority to states? Is this delegation intended to be on a project-by-project or programmatic basis? Will there be federal funding for state assumption of federal NEPA authority?

- What actions is the Administration taking to expand delegation of federal DOT project-level authority to states? Is this delegation intended to be on a project-by-project or programmatic basis? Will there be federal funding for state assumption of federal DOT authority?

- How is CEQ's review of its NEPA regulations being coordinated with the One Federal Decision policy? How is the Administration ensuring that the cooperating agency-lead agency relationship will be improved by this review of the NEPA regulations? What are CEQ's plans for consulting with Governors on its review of its regulations?

Clean Water Act Section 404

The Administration has expressed its commitment to empower more states and tribes to assume primary authority for the issuance of dredge-and-fill permits under Section 404 of the CWA. On August 7, the Army Corps of Engineers issued a memorandum adopting the findings of the EPA Assumable Waters Subcommittee's May 2017 Final Report. The report clarifies which waters may have administrative authority assumed by states and which waters would remain under the administrative authority of the Corps of Engineers.

Your response to the following questions would help Western Governors better understand the CWA Section 404 permitting program and issues involved with states' assumption of the program:

- Which states have expressed interest in assuming Section 404 permitting authority? What concerns have been expressed by state officials? What reasons have states provided for their interest in assuming Section 404 permitting authority?

- Beyond the lack of clarity as to which waters would be eligible for state assumption of administrative authority, what factors have states cited as prohibitive to their assumption of Section 404 permitting authority?

- How does state assumption of permitting authority under Section 404 relate to the One Federal Decision policy or Infrastructure Plan?

- How will the current rulemaking efforts of EPA and the Corps of Engineers to clarify "waters of the United States," as that term applies to the jurisdictional scope of the CWA, affect state permitting authority under Section 404 (where assumed by states)?

- What is the process for a state that would like to assume Section 404 authority? How can the Western Governors' Association best facilitate such assumption? Who at the EPA and Corps of Engineers are the best points of contact for Governors' offices to discuss assumption of Section 404 authority?

- Is there federal funding for state assumption of Section 404 authority? Will funds be shifted from other state-assumed programs under the CWA? If no new funds are to be designated for state Section 404 programs, how does the Administration envision states' implementation would be funded?

- What type of engagement with states and state consultation do the EPA and Corps of Engineers plan to undertake in the development of revised regulations addressing state assumption of Section 404 permitting authority?

- During the webinar, the Endangered Species Act (ESA) was identified as an area of potential complication in states' assumption of Section 404 permitting authority. What issues does the Administration anticipate may arise in the implementation of the ESA when states assume Section 404 permitting authority, particularly in the context of consultations under ESA Section 7? How have New Jersey and Michigan – the two states that have already assumed Section 404 permitting authority – addressed these issues?

The answers to these questions will help western states better understand the Administration's plans and goals regarding CWA and infrastructure permitting and environmental review, as well as the opportunities for expanded state delegation in these areas. We look forward to your responses and further discussion of these topics.

Sincerely,

David Ige
Governor of Hawai'i
Chair, WGA

Doug Burgum
Governor of North Dakota
Vice Chair, WGA

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

WESTERN GOVERNORS' ASSOCIATION

DENNIS DAUGAARD
GOVERNOR OF SOUTH DAKOTA
CHAIR

DAVID IGE
GOVERNOR OF HAWAII
VICE CHAIR

JAMES D. OGSBURY
EXECUTIVE DIRECTOR

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.

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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
Ensure cooperation entails meaningful, substantive, and ongoing government-to-government consultation throughout all stages of the NEPA process. To help accomplish this, CEQ could make its suggestions to "Consult," "Involve", and "Collaborate" with cooperating agencies mandatory.	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: • 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.	If cooperating agency status does not ensure effective cooperation, there is little incentive for state and local agencies to seek that status. The regulatory directive to cooperate needs more substance to ensure there is a two-sided, government-to-government exchange of information and ideas. Federal agency interaction with states – as sovereigns – should not be relegated to the public stakeholder process, regardless of cooperating agency status.	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, *Building a Stronger State-Federal Relationship*.

Guarantee that the coordination and consultation requirements in other federal statutes are respected, regardless of whether an agency is designated as a cooperating agency.	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 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). 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). 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." 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.	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. Clarifying the consultation and cooperating agency relationship interaction will aid both federal and state agencies as they work together on resource management issues.	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, *Building a Stronger State-Federal Relationship*.
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.	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). 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).	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	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, *Building a Stronger State-Federal Relationship*.

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.	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).	and local plans. Such a clear requirement would also reduce potential confusion due to the overlap of FLPMA and NEPA.	
Simplify the definition of a cooperating agency. 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).	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.	These requirements lend themselves to debate and subjectivity.	Agencies should better define "cooperating agency" under NEPA processes. WGA Regulatory Reform Recommendations.
Create a standard, documentation, and review process for a lead agency's denial of a request for cooperating agency status. CEQ regulations should require lead agencies to:	Lead agencies may grant or deny state, federal, local, and tribal government entities' requests to become cooperating agencies. 40 CFR §1501.6. 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. The Tenth Circuit has held that an agency's decision to deny a request for cooperating agency status was not judicially reviewable, because CEQ	Without documentation requirements or opportunities for review, lead agencies cannot be not held accountable for their decisions to deny these requests.	Federal agencies should respect state sovereignty. WGA Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*.

• 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.	regulations currently provide no standard for the court to apply. *Wyoming v. U.S. Dept. of Agriculture*, 661 F.3d 1209 (10th Cir. 2011).		
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.	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. 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.	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. A cooperating agency may also be reluctant to engage in a joint study or analysis if its agreement on the methodology is not required.	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 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*. 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, *Building a Stronger State-Federal Relationship*.
Clarify that cooperating agency status continues until the EIS/EA is fully implemented.	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. 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.	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.	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).	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. The same reasons for cooperation – depending on the circumstances – can exist for EAs as for EISs.	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.	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. CEQ's Initial List of Actions to Enhance and Modernize the Environmental	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.	*Stronger State-Federal Relationship.*