

**Testimony of Britta Beckstead
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**Before the
United States House of Representatives
Speaker's Task Force on Intergovernmental Affairs**

Hearing on Federalism Fixes: Legislative Concepts to Improve Intergovernmental Affairs

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Chairman Bishop and Members of the Task Force, I appreciate the opportunity to testify regarding the state-federal relationship – a central theme in the work of the Western Governors' Association (WGA). WGA is a bipartisan organization representing the Governors of 19 western states and 3 U.S. territories in the Pacific. My comments will focus on the need to improve federal agencies' consultation with states and legislative clarifications to address this critical issue.

Western Governors commend this Task Force for recognizing that a good faith partnership between states and the federal government will result in more efficient, economic, and effective policy, benefiting the Governors' and Congress' shared constituents. Improving state-federal communication and coordination is a goal that transcends party lines, and it is among the Governors' highest priorities.

This Task Force has conducted hearings to examine the current state of intergovernmental relationships and the history and evolution of federalism. It has also heard from Governors regarding states' co-sovereign status, the importance of distinguishing states from other entities, and the need for improved state-federal communication. This hearing's examination of concrete recommendations is a natural extension of the panel's previous discussions.

As the Task Force knows, states are co-sovereigns with the federal government pursuant to the Tenth Amendment, U.S. Supreme Court case law, federal statutes, and Executive Order 13132. For our system of dual sovereignty to function, federal officials must consult with Governors, as the chief elected officials of sovereignties, on the development and implementation of federal law and policy. Yet, there is a profound misunderstanding throughout the federal government regarding the role and legal status of states.

Western Governors have attempted to engage individual federal agencies and different administrations on the need for genuine, government-to-government engagement with states. Unfortunately, this agency-by-agency, issue-by-issue approach has not yielded structural improvements to the state-federal paradigm. It has become increasingly clear that Congress is best-positioned to effect systemic change.

This does not require Congress to break new ground or delve into uncertain areas, it merely requires clarification of existing law. Such legislation could first recognize that states are co-sovereigns with the federal government, distinct from any other entity or group – which is the foundation for the state-federal relationship and the need to consult with states. It could then address consultation by: (1) identifying basic elements of effective state-federal consultation; (2) directing federal agencies to codify consultation procedures; (3) holding federal agencies accountable for developing and implementing those processes; and (4) eliminating perceived

barriers to consultation. The attachments to this testimony further elaborate on these recommendations.

The Governors assert that consultation requires meaningful, substantive, government-to-government communication and exchange with states, through Governors or their designees, regarding federal actions that affect states. Consultation should occur at the earliest stages of a policy's ideation, throughout its development, and during implementation.

The definition of consultation should also clarify that the rulemaking procedures required by the Administrative Procedure Act do not satisfy agencies' obligation to consult with states. Federal agencies often direct states to provide input in the same manner as a member of the public (i.e., through the notice-and-comment process). This does not qualify as meaningful government-to-government exchange and does not provide the benefits of genuine consultation.

Because there may be unique considerations for different agencies and contexts, Congress could require federal agencies to promulgate rules, in consultation with the Governors, describing the details of their agency-specific consultation process. Directing federal agencies to codify consultation processes will provide some much-needed accountability, because existing law does not hold federal agencies accountable for meaningful state consultation. Congress has additional options to further ensure meaningful consultation occurs, such as: (1) requiring federal agencies to report on the implementation of their consultation process; (2) requiring agencies to publicly identify the official responsible for implementing the process; or (3) providing a remedy for an agency's failure to consult with states.

Congress can also eliminate perceived barriers to state-federal consultation. In states' experiences, federal agencies have suggested that there are legal barriers to consultation, such as internal agency prohibitions on *ex parte* communications, unsupported concerns regarding applicability of the Federal Advisory Committee Act, and subjection to the requirements of the Freedom of Information Act. The agencies have not provided any analysis regarding these alleged barriers, despite WGA's repeated requests. According to our analysis, which is attached to this testimony, such barriers either do not exist or could be addressed through legislative clarification.

The Governors are asking Congress to clarify existing law by recognizing states' legal status and requiring federal agencies to meaningfully consult with states. They are not asking for Congress to require consensus among affected states or a particular result for federal actions that require consultation. This legislative solution would merely establish a process, so that state voices are heard, considered, and respected in accordance with their status as co-sovereigns.

The Governors applaud the Task Force's efforts to improve intergovernmental relationships and are eager to work with the Task Force on these critical issues. Please consider the Governors and WGA as resources and partners in this endeavor. Thank you and I look forward to your questions.

Frequently Asked Questions (FAQs)

1. What is the legal status of states?

States are co-sovereigns with the federal government pursuant to the Tenth Amendment and other federal law. 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.”¹ Federal powers are enumerated and limited in the Constitution, while all other governmental authority is reserved to the states. The Court has recognized a state’s sovereign interest “in all the earth and air within its domain” as independent from the interests of its citizens and that regulation of land and water use is “a quintessential state and local power.”²

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 the 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. [Executive Order 13132](#), Federalism, reinforces these constitutional, statutory, and judicial principles. States, as co-sovereigns and co-regulators with the federal government, cannot be equated with the public, stakeholders, or other entities.

Local and tribal governments are also often improperly equated with stakeholders. Legislation addressing consultation with states could also offer an opportunity to improve federal agency communication with local and tribal governments. This legislation should reflect the different origins and needs of each type of intergovernmental partner.³ It should also recognize the unique and distinct relationship that each has with the federal government.⁴

2. Why are federal administrative agencies required to consult with states?

Due to states’ co-sovereign status, federal agencies must meaningfully engage with states regarding federal actions that may affect states. Such communication and coordination are necessary for our government to function properly and efficiently. In recognition of the need for agencies to consult with sovereign states, Executive Order 13132 requires each agency to “have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.”

3. How can meaningful consultation improve federal decision-making?

Congress has already recognized the benefits of consultation by requiring it in statute. Governors have specialized knowledge of their states’ environments, resources, laws, cultures, and economies that is essential to informed federal decision-making. By incorporating state expertise, federal

¹ See, e.g., *Sossamon v. Texas*, 563 U.S. 277, 283 (2011).

² *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (citations omitted); *Rapanos v. United States*, 547 U.S. 715, 738 (2006).

³ Intergovernmental” describes the partnerships among federal, state, tribal, and local governments. “Federalism,” on the other hand, typically refers to the relationship between the states and the federal government as co-sovereigns.

⁴ The federal government is required to engage with local governments in specific contexts and tribes have a trust relationship with the federal government.

agencies can reduce duplication by using existing state data and documentation. This communication and exchange will also allow federal agencies to accurately assess whether the issue is best addressed at the federal level. Through meaningful dialogues with affected states, federal agencies can also avoid unintended consequences at the state level that they may not be aware of and address or resolve state concerns.

Congress has already recognized the merits of integrating state and community input into federal decisionmaking processes. For example, the 2014 Farm Bill included authority for states to identify insect and disease designation areas, which helps guide the U.S. Forest Service on the prioritization of mitigation projects. That measure also expanded the use of Good Neighbor Authority, which permits states to contribute to projects on federal lands, and Stewardship Contracting Authority, which allows projects on federal lands to use local services – from local industry, units of local government, or non-governmental organizations – to achieve land management goals.

4. Why does Congress need to clarify existing law?

Executive Order 13132 is rarely applied. Federal agencies are not required to report on their implementation of the Executive Order or statutory consultation requirements. Accordingly, the Governors greatly appreciate the Task Force's recent request to the Government Accountability Office to investigate agency compliance with their obligations to intergovernmental partners.

States currently have no recourse, through the Executive Order or other accountability mechanisms, for an agency's failure to consult, except for litigation on the merits of a federal decision. Governors have tried to communicate the need for, and benefits of, effective state consultation and the requirements of Executive Order 13132 on an agency-by-agency and issue-by-issue basis with limited success.

5. How should Congress define consultation?

Consultation should be defined as meaningful, substantive government-to-government communication and exchange with affected states, through its Governor or their designees, at the earliest stages of a policy's ideation and throughout its development and implementation. This definition should also clarify that 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.

Directing that consultation occur through the Governors or their designees would yield several benefits, including: (1) minimizing the burden on federal agencies to determine whom they should contact in a state; (2) recognizing Governors' status as the chief executive official of the state; (3) imposing upon Governors a responsibility to deliver a coordinated state response; and (4) preventing consultation "box-checking" by federal agencies.

6. What types of federal actions require state consultation?

Federal agencies should consult with states regarding federal actions that affect states, and states should have a role in determining what federal actions require consultation. Many statutes require federal agencies to consult, coordinate, or cooperate with states on specific decisions or actions;

the need to consult, however, extends beyond express statutory requirements. Executive Order 13132 directs federal agencies to consult with states on “policies with federalism implications.”⁵

There are many types of federal actions that can affect states and warrant open dialogue. These actions include the implementation of federal statutes and the development and implementation of agency policies, rules, programs, reviews (e.g., Governor’s Consistency Reviews), plans (e.g., resource management plans), budget proposals and processes, and strategic planning efforts (e.g., reorganization). In federal litigation or adjudication that affects states, states are also often left out of the process.

7. What qualifies as meaningful consultation?

Meaningful consultation could include: (1) providing federal information and documents to Governors or their designees; (2) providing an opportunity for states to provide input outside of a public process; (3) conducting consultation through federal representatives who can speak or act on behalf of an agency; (4) addressing or resolving, where possible, state issues, concerns, or other input unless precluded by law; (5) documenting how state concerns were resolved or why they were unable to be resolved in final decisions; or (6) making reasonable efforts to achieve consistency and avoid conflicts between federal and state objectives, plans, policies, and programs.

Some state engagement which does not qualify as meaningful (although it may occur in addition to consultation) includes: (1) notifications or updates that merely distribute public information and do not result in a dialogue; (2) invitations for states to provide input unaccompanied by documents, information, or details regarding the federal action or decision under consideration; (3) outreach to states after a federal agency has developed its proposed action or decision; or (4) opportunities to provide comments through notice and comment or stakeholder processes.

8. Does meaningful consultation require all affected states to concur with a final federal decision?

No. Meaningful consultation requires a process that ensures good faith engagement with affected states, consideration of state views and input, and efforts to resolve states’ concerns. It does not require federal agencies to slow or halt federal decision-making because a state opposes the decision or because some or all affected states seek different results.

9. Are there legal barriers to meaningful consultation?

Federal agencies have suggested to states that there are legal barriers to state consultation. Federal agencies, however, have not provided analysis of these barriers to WGA, despite repeated requests. The analysis below (which is elaborated upon in the attachments) is based on WGA research.

Ex Parte Communications: Several federal agencies have policies restricting *ex parte* communications – and define that term to include communications with non-agency officials – during an agency’s rulemaking process. In the vast majority of rulemakings, there is no statutory authority that prohibits federal agencies from communicating with the public or state officials at

⁵ Policies with federalism implications is defined as “regulations, legislative comments or proposed legislation, and other policy statements or actions” that have “substantial direct effects” on states, the state-federal relationship, or the distribution of governmental power and responsibilities.

any point during the rulemaking process.⁶ In addition, many of the federal policies on *ex parte* communication were adopted in response to subsequently overturned federal case law that addressed communication with the public or stakeholders (not state officials). These policies' restrictions on communications with state officials unnecessarily preclude communications that would inform and enhance federal decision-making.

Federal Advisory Committee Act (FACA): Federal agencies have been reluctant to consult with state officials and associations representing those officials due to concerns that such communications would trigger the procedural requirements of FACA. FACA's application to meetings between federal and non-federal officials is limited in scope and only applies to committees that are established to obtain collective advice. Indeed, Congress has recognized the need for open state-federal communication in the Unfunded Mandates Reform Act (UMRA) by exempting certain communications between state and federal officials.⁷

Freedom of Information Act (FOIA): Federal agency officials have expressed concern about sharing – or even discussing the details of – pre-decisional agency documents with state officials due to the possibility that this information would be subject to public disclosure under FOIA.⁸ FOIA also does not contain an exemption for state records that would otherwise be protected under a state open records act and there are concerns that confidentiality agreements between states and federal agencies will not protect state records from FOIA disclosure. These concerns can prevent the exchange of information between states and federal agencies.

Congress could address these alleged barriers by:

- Exempting communications between federal and state officials (or their designees), acting in their official capacities, from any agency definition of, or prohibition against, *ex parte* communications.
- Clarifying 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) are exempt from FACA.
- Clarifying 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

⁶ After a proposed notice of rulemaking is issued, agencies must include communications that are necessary to justify the agency's decision in the rulemaking record for purposes of judicial review; this does not, however, prohibit communications.

⁷ The UMRA exempts meetings held exclusively between federal personnel and non-federal elected officials (or their designees) acting in their official capacities, "relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration."

⁸ Federal case law is unclear whether FOIA's deliberative process exemption applies to documents produced by, or communications between, non-federal entities pursuant to the consultant corollary doctrine. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) (declining to apply the consultant corollary to federal-tribal communications and documents created by the tribe in the context of a long-term operations plan); *Judicial Watch, Inc. v. Department of Transportation*, 950 F. Supp. 2d 214 (D.D.C. 2013) (applying the deliberative process privilege to the meeting minutes and handwritten notes from a federal agency's coordination meeting with state emergency management officials); *People for the American Way v. U.S. Dept. of Education*, 516 F. Supp. 2d 28 (D.D.C. 2007) (declining to apply the consultant corollary to communications between a mayor's office and a federal agency).

creating 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.

10. How can Congress hold federal agencies accountable for establishing and implementing a meaningful state consultation process?

One of the problems of Executive Order 13132 is that it does not require agencies to promulgate rules codifying their consultation process. Requiring federal agencies to promulgate consultation rules, and develop those rules in consultation with states, will provide necessary accountability for agencies to develop agency-specific consultation procedures and then implement that process on a decision-by-decision basis.

Other options for increasing accountability for meaningful consultation could include:

- Increasing Office of Management and Budget (OMB) oversight over development and implementation of consultation regulations;
- Requiring agencies to submit a summary of agency efforts to consult with states. Such a summary could include a discussion of state input and how that input was considered and addressed (or why any state concerns could not be addressed);
- Requiring agencies to publicly identify and provide contact information for a federalism official responsible for implementing the agency's consultation process;
- Mandating periodic reporting to Congress regarding the development of the consultation rules and their implementation;
- Authorizing Governors to notify Congress of an agency's failure to develop or implement consultation rules; and
- Providing Governors with an opportunity for administrative or judicial review of an agency's failure to implement their consultation process.

11. Why are federalism assessments or summary impact statements not providing accountability for meaningful consultation?

Congress and Executive Order 13132 have required federal agencies to document the effects of their actions on states in narrow circumstances. The UMRA requires federal agencies to assess the anticipated costs and benefits of a federal mandate, including the costs and benefits to states, for certain rules before their promulgation.⁹ It applies to rules that will result in expenditures of state, local, and tribal governments, in the aggregate, or by the private sector, of \$1 million or more in a year.

Executive Order 13132 requires agencies to submit a federalism summary impact statements to OMB with respect to any rule that either: (1) preempts state law and has federalism implications, or (2) imposes substantial direct compliance costs on states, is not required by statute, and has

⁹ 2 U.S.C. §1532.

federalism implications. This statement must be submitted to OMB prior to finalization of the subject rule.

Even when federal rules meet these requirements, federalism assessments or statements are not ordinarily prepared with input from affected states. In addition, these documentation requirements only apply at the end of the rulemaking process. They are not a substitute for consultation, which, as discussed above, must occur at the earliest stages of policy development.

These federalism assessments and statements could provide stronger accountability if: (1) they were applied to a greater proportion of rules; (2) federal agencies were required to work with Governors to develop specific criteria and consultation processes for initiating and performing federalism assessments and statements; and (3) states, through Governors, were given an opportunity to comment on federalism assessments and statements before any covered action is submitted to OMB for approval.

12. Would the reestablishment of the U.S. Advisory Commission on Intergovernmental Affairs (ACIR) address the need for meaningful consultation?

As a potential addition to – and not a replacement of – the legislative clarifications discussed in these FAQs, the Governors support an enduring forum to continue to elevate discussions around intergovernmental partnerships. However, the creation of this high-level forum cannot replace individual state consultation on federal agencies’ daily activities or fulfill the need for the statutory clarifications and accountability mechanisms. It is a complementary tool that would function best if the requirements for federal agencies’ consultation with states were strengthened and clarified.

This Task Force has had great success in reinvigorating conversations about the importance of these partnerships and the Governors hope the Task Force continues. A similar entity, especially one with members from all intergovernmental partners, could contribute to the Task Force’s work. If a similar entity is established, it should have the ability and resources to make recommendations.



**WESTERN
GOVERNORS'
ASSOCIATION**

Western Governors' Association Policy Resolution 2017-01

Building a Stronger State-Federal Relationship

A. PREAMBLE

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

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

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

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

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

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

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

B. BACKGROUND

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

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

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

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

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

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

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

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

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

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

C. GOVERNORS' POLICY STATEMENT

1. Review of the Federal-State-Local Relationship

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

2. Avoiding Preemption of States

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

3. Defining Meaningful State-Federal Consultation

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

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

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

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

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

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

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

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

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

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

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

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

D. GOVERNORS' MANAGEMENT DIRECTIVE

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

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



Analysis of Issues Raised Regarding State-Federal Consultation

This document identifies issues that have frequently arisen in the context of state-federal consultation, as well as analyzes the legal foundations and legitimacy of each such issue.

Description of Issue:	Analysis:	Citations:
<p>Ex Parte Communications: Agencies have expressed that general agency policy restricting “<i>ex parte</i>” communications with non-agency officials prohibits communications with state officials (“and other stakeholders”) during an agency’s rulemaking process. Several federal agencies have adopted their own policies which restrict communications with non-agency personnel during the rulemaking process. These policies are non-legislative rules, which are highly immune from legal or administrative challenge.</p>	<ol style="list-style-type: none"> 1) There is no statutory authority, including the APA, which prohibits federal agencies from communicating with non-agency officials at any point during the rulemaking process 2) Many of the federal policies on <i>ex parte</i> communication were hastily adopted in response to overly-restrictive federal case law which has been subsequently overturned. 3) Agency policies addressing <i>ex parte</i> communications have been adopted as non-legislative rules and, thus, cannot have any binding effect. <p style="color: blue;">For detailed analysis, see WGA Memorandum: <i>Ex Parte Communications Between State and Federal Officials in the Federal Administrative Rulemaking Process</i> (attached).</p>	<p>Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981)</p> <p>Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).</p>
<p>Application of FACA to Communications with State Officials (and Representative Organizations): Federal agency officials have expressed reluctance to consult with state interests and associations of elected state government officials due to concern that such communications would trigger the procedural requirements of the Federal Advisory Committee Act (FACA).</p>	<ol style="list-style-type: none"> 1) FACA’s application to meetings between federal and non-federal officials is limited in scope and only applies to committees that are established by federal officials to obtain collective advice. 2) The Unfunded Mandates Reform Act (UMRA) provides an exemption from FACA for consultations held exclusively between federal personnel and non-federal elected officials (or their designees) “relating to the management or implementation of federal programs established pursuant to statute that explicitly or 	<p>Federal Advisory Committee Act, 5 U.S.C. App. II §§ 1-15</p> <p>Unfunded Mandates Reform Act, P.L. 104-4 (1995)</p> <p>Alice M. Rivlin Memorandum (Sep. 21, 1995)</p>

	<p>inherently share intergovernmental responsibilities or administration.”</p> <p>For detailed analysis, see WGA Memorandum: <i>FACA Application to WGA Intergovernmental Meetings with Federal Officials</i> (attached).</p>	
<p>FOIA – Deliberative Process Exemption’s Application to State Consultation: Federal agency officials have expressed concern about sharing – or even discussing the details of – pre-decisional agency documents with state officials due to the possibility the such shared information would be subject to public disclosure under the Freedom of Information Act (FOIA).</p>	<p>1) FOIA’s “Deliberative Process” exemption applies to communications that are: (i) inter-agency or intra-agency; (ii) pre-decisional and not a final policy adopted by an agency; and (iii) part of a process by which governmental decisions and policies are formulated.</p> <p>2) Some federal courts have applied the “consultant corollary,” which extends FOIA’s Deliberative Process exemption to documents produced or communications between non-federal entities in certain circumstances, to communications between federal and state officials when such communications are made exclusively in the context of a federal agency’s deliberative process. The U.S. Supreme Court has declined to apply the consultant corollary to federal-tribal communications and documents created by the tribe in the context of a long-term operations plan.</p> <p>For detailed analysis, see WGA Memorandum: <i>FOIA and the Application of its Deliberative Process Exemption to Communications Between State and Federal Officials</i> (attached).</p>	<p>Freedom of Information Act, 5 U.S.C. § 552, et seq.</p> <p>Dep’t of the Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1 (2001)</p> <p>Compare, Judicial Watch, Inc. v. Department of Transportation, 950 F. Supp. 2d 214 (D.D.C. 2013) with People for the American Way v. U.S. Dept. of Education, 516 F. Supp. 2d 28 (D.D.C. 2007).</p>
<p>Consultation through Notice-and-Comment Rulemaking: In many instances, federal agencies are required (by statute, rule, or executive order) to consult with states when developing and adopting agency rules and regulations. However, several agencies have</p>	<p>1) Federal courts have held that, when required by statute to promulgate rules “in consultation with states,” agencies cannot satisfy this mandate by merely conducting notice-and-comment rulemaking, as otherwise directed by the APA.</p>	<p>California Wilderness Coalition v. Dept. of Energy, 631 F.3d 1072 (9th Cir. 2011)</p>

<p>demonstrated that their “consultation” requirements can be satisfied by typical notice-and-comment rulemaking, which would otherwise be required by law, and which does not involve any meaningful “consultation” with states.</p>	<p>2) Federal agencies should afford states with opportunities for “government-to-government” consultation in their rulemaking processes. Consultation should involve early, meaningful, substantive, and ongoing back-and-forth communications between state and federal officials with decision-making authority.</p> <p>3) Federal agencies should designate agency officials with decision-making authority to conduct consultations with states.</p> <p><i>For detailed analysis, see WGA Memorandum: Federal Agencies’ Use of Notice-and-Comment Rulemaking to Satisfy Requirements to Consult with States (attached).</i></p>	
<p>Federalism Consultation with States (Executive Order 13132): Federal agencies have largely ignored the mandates expressed in E.O. 13132, <i>Federalism</i>, which requires agencies to “have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” Agencies must consult with state and local officials early in the process of developing any proposed regulation which has federalism implications or imposes substantial direct compliance costs on state or local governments. Agencies’ failure to adhere to the procedural requirements of E.O. 13132 (or with the mandates of E.O.’s, generally) does not give rise to legal challenge or administrative appeal.</p>	<p>1) E.O. 13132 applies to all agency “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”</p> <p>2) OMB guidance expresses that agencies “must include elected State and local government officials or their representative national organizations in the consultation process.”</p>	<p>Executive Order 13132, Federalism, 64 Fed. Reg. 43255 (Aug. 4, 1999)</p> <p>OMB Guidance for Implementing E.O. 13132, “Federalism” (Oct. 28, 1999)</p>



Federal Agencies' Use of Notice-and-Comment Rulemaking to Satisfy Requirements to Consult with States

Each year, federal agencies collectively take thousands of administrative actions for purposes of carrying out their statutorily-defined missions. Many of these actions involve the promulgation of agency rules, which often pose serious economic and federalism implications for state governments. A transparent administrative rulemaking process, which encourages early and meaningful consultation with state officials, provides more informed, effective, and durable rules.

There is a growing trend, however, for federal agencies to fail to involve meaningful state input in their rulemaking processes, even when required to do so by federal statute or executive order. Agencies often equate state governments – possessing their own sovereign and delegated legal authorities – with the general public, whose right to participate in rulemaking is typically limited to providing federal agencies with written comments addressing published proposed rules. In certain instances, federal agencies bypass all public participation during rulemaking, by wrongfully mischaracterizing legally-binding substantive rules as mere policy statements or interpretive rules.

Agencies have vaguely identified a number of possible reasons for limiting, or refusing altogether, communications with states during their rulemaking processes. Often, the agency officials have been reluctant to cite any relevant legal grounds for doing so. This has resulted in a non-uniform patchwork of unpredictable intra-agency rules and policies to address states' roles in federal rulemaking. Federal agencies' approaches to involving states in their rulemaking are particularly insulated from legal challenge, as judicial doctrine affords agency decisions with substantial deference. Limiting meaningful involvement of states in the rulemaking process prevents informed agency decisions based on states' expertise and unique viewpoints.

This memorandum focuses on agencies' increased use of notice-and-comment rulemaking – representing the most basic procedural safeguards to ensure public participation and agency transparency – with “consultation” with states as part of the administrative rulemaking process. Many such instances are rooted in a fundamental misunderstanding of an agency's duties when directed to “consult” with states in the development of their administrative rules, policies, and regulations. Other issues arise when agencies, for a variety of reasons, may want to exclude states' voices or limit the exposure of rules to judicial review.

APA Notice-and-Comment Agency Rulemaking

When promulgating a rule, federal administrative agencies must, at a minimum, follow the procedural requirements of the Administrative Procedure Act (APA).¹ Authorizing statutes or applicable regulations may require an agency to conduct specific, additional steps in their rulemaking processes. But, in general, the APA requires all federal agencies to follow three basic steps whenever promulgating a substantive rule: (i) publish a Notice of Proposed Rulemaking (NPRM) in the *Federal Register*; (ii) provide interested members of the public with an opportunity to comment on the proposed rule; and (iii) publish the final rule that the agency will adopt prior to

¹ 5 U.S.C. § 551, *et seq.*

its effective date.² This “notice-and-comment” rulemaking process is intended to foster public participation and input in an agency’s rulemaking. It also allows for the general public to remain informed of an agency’s actions and to provide input, which the agency must address in the publication of its final rule. Additionally, notice-and-comment rulemaking \promotes agency accountability by producing a comprehensive public record which may form the basis for judicial review if an agency’s final rule is challenged in court.

State Consultation vs. Notice-and-Comment Rulemaking

The basic procedural requirements of notice-and-comment represents a baseline for states’ ability to participate in federal agency rulemaking. That process, however, does not recognize states’ unique interests and concerns as sovereign powers and as partners with agencies in the implementation and administration of numerous federal statutes programs. Rather, notice-and-comment rulemaking under the APA focuses on allowing for input from the general public while keeping them apprised of an agency’s intentions in promulgating rules. Several federal statutes require agencies to develop rules in consultation with states or state agencies with expertise in a particular matter. In such instances, “consultation” is rarely defined by statute or regulation, and agencies often misunderstand their duties to consult with states as another directive to allow states to participate in notice-and-comment rulemaking. However, “consultation” and “comment” have very different meanings in the context of states’ roles in the rulemaking process.

Faced with this issue, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) set aside a Department of Energy (DOE) rule which DOE developed without adhering to the authorizing statute’s express requirement that the rule be developed “in consultation with affected states.”³ DOE argued that it had fulfilled its duty to consult with states by allowing states to participate in notice-and-comment rulemaking and inviting certain state officials to participate in a national technical conference addressing the rule. DOE also refused to share with states technical data which it relied upon in the development of its rule. The court concluded that Congress had envisioned a much greater state role in the rulemaking when it directed DOE to consult with states, by looking to the New Oxford Dictionary’s definition of “consult”: “to seek information or advice from (someone with expertise in a particular area)” or to “have discussions or confer with (someone), typically before undertaking a course of action.”⁴ Noting that this conclusion finds unanimous support in all rules of statutory construction, the court ruled that “DOE’s interpretation of ‘consult’ to mean no more than notice-and-comment would render part of the statute superfluous. If ‘consultation’ means no more than ‘an opportunity for comment,’ there was no reason for Congress to use distinct language [in the authorizing statute].” The *CA Wilderness* court looked to a prior Ninth Circuit opinion in *Environmental Defense Center v. EPA* which considered whether a federal agency fulfilled its statutory directive to conduct rulemaking “in consultation with the States.” In upholding EPA’s rule, the *Environmental Defense Center* court determined that several factors supported the agency’s assertion that its efforts to consult with states satisfied the statutory rulemaking requirements. Particularly, the court noted during the rulemaking: (i) EPA circulated a draft report to states, EPA regional offices, the Association of State and Interstate Water Pollution Control Administrators, and other stakeholders and revised the draft based on comments received; and (ii) EPA established a federal advisory committee, which included state representatives, as well as balanced representation from various other types of stakeholders.⁵

² 5 U.S.C. § 553.

³ *California Wilderness Coalition v. U.S. Dep’t of Energy*, 631 F.3d 1072 (9th Cir. 2011).

⁴ *Id.* at 1081.

⁵ *Id.* at 1081.



“Ex Parte” Communications Between State and Federal Officials during the Federal Administrative Rulemaking Process

Throughout their rulemaking processes, federal administrative agencies initiate and participate in various levels of engagement and communication with persons outside the agencies, including officials of state governments. Federal decisions which are informed by state input and expertise result in more effective, focused, and legally-durable policy and action. However, federal agency officials have, at times, expressed a clear reluctance to engage with state officials in off-the-record communications during their rulemaking processes, indicating that such conversations violate their agency’s policies on “*ex parte*” communications. This practice has often prohibited state input into federal decisions and actions that have direct effects on states, even in circumstances where federal agencies have been directed to consult with states through statute or executive order.

While the statutory restrictions on *ex parte* communications are very limited, a line of federal cases from the late 1970’s and early 1980’s prompted several agencies to adopt internal policies which – in an abundance of caution – direct their personnel to generally avoid engaging in *ex parte* communications, particularly after publication of a Notice of Proposed Rulemaking (NPRM). The legal precedent giving rise to these policies was quickly overturned. However, federal agencies continue to apply unnecessary and counter-productive restrictions on communications with state officials during their rulemaking and decision-making processes. The effect has been an absence of state consultation and engagement, leading to less-informed federal decisions and policies.

***Ex Parte* Communications in Notice-and-Comment Rulemaking**

In American jurisprudence, the term “*ex parte*” has historically been associated with courtroom proceedings, where exclusive communications between one party and a decisionmaker pose substantial implications for an adverse party or for judicial impartiality, generally. Federal agencies have expanded and applied this concept to administrative rulemaking processes, where the concept of *ex parte* communications has expanded to communications made to a federal agency official outside of the agency’s publicly-announced methods for submitting written comments in accordance with the requirements of the federal Administrative Procedure Act (APA). The APA provides the basic legal template for agency rulemaking and, importantly, does not expressly forbid federal agencies from engaging in or utilizing *ex parte* communications during notice-and-comment rulemaking. However, courts have, in rare instances, set aside final agency rules where such communications were found to have (i) violated due process, or (ii) benefited a private party competing for a specific valuable privilege (*e.g.*, a federal license or contract).

Many of the current agency policies restricting *ex parte* communications were originally developed in response to a particularly restrictive D.C. Circuit case, *Home Box Office, Inc. v. FCC (HBO)*, which set aside a final rule due to *ex parte* communications in notice-and-comment rulemaking.¹ The court required public disclosure of any *ex parte* communication that may have formed the basis for an agency’s final action, including those occurring prior to the agency’s issuance of a notice of

¹ *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977)

proposed rulemaking (NPRM).² Additionally, the *HBO* court imposed new requirements to informal rulemaking, not found in the APA or other applicable federal statute: “Once [an NPRM] has been issued...any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding, should ‘refuse to discuss matters relating to the disposition of a rulemaking proceeding with any interested private party, or an attorney or agency for any such party, prior to the (agency’s) decision’ ...If *ex parte* contacts nonetheless occur, we think that any written document or summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon.”³ Notably, the court limited its restrictions to interested private parties and did not discuss the appropriateness of *ex parte* communications with states (or other government entities) during notice-and-comment rulemaking.

Federal agencies viewed the D.C. Circuit’s decision in *HBO* as an express direction to cease engaging in all *ex parte* communications during any rulemaking process and, the immediate aftermath of its issuance, adopted very restrictive internal policies prohibiting agency officials from seeking or utilizing information or opinions from outside parties. Many of the legal principles relied upon in the *HBO* decision were overruled or limited shortly thereafter by subsequent case law, including two D.C. Circuit opinions – *Action for Children’s Television v. F.C.C.* (1977)⁴ and *Sierra Club v. Costle* (1981)⁵ – which greatly narrowed *HBO*’s scope. Additionally, the U.S. Supreme Court’s 1978 decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*⁶ prohibited courts from imposing any procedural requirements to notice-and-comment rulemaking beyond those expressed in the APA, which was exactly what the D.C. Circuit had done in its *HBO* decision.

Where an agency has not adopted rules or policies restricting *ex parte* communications in its rulemaking processes, the APA controls, and such communications are generally allowed. However, many of the *ex parte* communications policies that have been adopted by federal agencies continue to reflect the overly-cautious approach demanded by the *HBO* court. The result is a non-uniform patchwork of ambiguous and overly-restrictive agency policies that are frequently misapplied to communications between state and federal officials which should be allowed, and even encouraged. In general, agencies’ policies direct personnel to avoid *ex parte* communications during rulemaking, particularly after the issuance of an NPRM. Where *ex parte* communications do occur, agencies are often required to document any significant information that has been exchanged. Agencies’ *ex parte* communications policies rarely, if ever, distinguish states or state consultation processes from general public participation in the notice-and-comment rulemaking process.

***Ex Parte* Communications in State Consultations Relating to Agency Rulemaking**

Critical for understanding states’ roles in rulemaking is that, in many instances, they extend beyond typical “public participation” required under notice-and-comment rulemaking. In promulgating their rules, federal agencies are often required by statute (as well as intra-agency rules and policies) or directed by Executive Order to “consult” with states or state agencies with particular expertise in the relevant subject matter. However, the language of intra-agency policies, as well as agencies’ communications with states, demonstrate that there is widespread confusion within

² *Id.* at 57.

³ *Id.* at 57.

⁴ *Action for Children’s Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977).

⁵ *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

⁶ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

federal agencies as to the proper application of restrictions on *ex parte* communications. Agencies regularly conflate their obligations to “consult” with states with their duties to allow for public “comment.” As a result, federal agencies wrongfully preclude the inclusion of states’ expertise and unique viewpoints during the development of federal rules and regulations.

2014 Administrative Conference of the United States Report

In 2014, the Administrative Conference of the United States (ACUS) issued its report, *Ex parte Communications in Informal Rulemaking*, which examines the legal parameters of informal rulemaking under the APA and the treatment of *ex parte* communications by statute, court decisions, and various federal agencies.⁷ ACUS’s report recognizes that agency procedures exist “on a spectrum: some agencies permit or even welcome *ex parte* communications; other agencies discourage or refuse them.”⁸

In 1977, ACUS had issued Recommendation 77-3, *Ex parte Communications in Informal Rulemaking*, in direct response to *HBO* and its restrictive approach to *ex parte* communications, concluding that the court’s blanket prohibition was not proper: “Informal rulemaking should not be subject to the constraints of the adversary process. Ease of access to information and opinions...should not be impaired.”⁹ Rather than a general prohibition on all *ex parte* communications, the 1977 ACUS Report recommended that all written communications received after the NPRM should be promptly added to the public record. Additionally, agencies were urged to “experiment in appropriate situations with procedures designed to disclose oral communications from outside the agency of significant information or argument respecting the merits of proposed rules,” including agency memoranda, public meetings, or other methods.¹⁰

ACUS’s updated 2014 Report, guided by the post-1977 opinions of *Vermont Yankee* and *Sierra Club*, reaches the following legal conclusions: (i) “*Ex parte* communications are permissible during all stages of the informal rulemaking process...the APA does not impose any legal requirements on agencies for dealing with such communications;”¹¹ (ii) “Disclosure of post-NPRM *ex parte* communications is necessary to ensure an adequate record for any future judicial review;”¹² and (iii) “Agencies must disclose the *ex parte* communications on which the agency wants to rely or otherwise supports the agency’s decisionmaking. But exactly what must be disclosed, when and how it must be disclosed, and who must disclose *ex parte* communications, remain open questions under D.C. Circuit case law.”¹³ The 2014 Report goes on to provide the following recommendations to agencies for addressing *ex parte* communications:

- 1) Agencies should adopt written *ex parte* communication policies and make them publicly available.

⁷ Sferra-Bonistalli, Esa L., Administrative Conference of the United States, *Ex parte Communications in Informal Rulemaking*, Final Report (May 1, 2014). Available at: https://www.acus.gov/sites/default/files/documents/Final%20Ex%20Parte%20Communications%20in%20Informal%20Rulemaking%20%5B5-1-14%5D_0.pdf

⁸ *Id.* at 40.

⁹ Administrative Conference of the United States, Recommendation 77-3, “*Ex parte* Communications in Informal Rulemaking Proceedings,” Sept. 15-16, 1977, at 1. Available at: <https://www.acus.gov/sites/default/files/documents/77-3.pdf>

¹⁰ *Id.* at 3

¹¹ Sferra-Bonistalli, *supra* note 7, at 69.

¹² Sferra-Bonistalli, *supra* note 7, at 75.

¹³ Sferra-Bonistalli, *supra* note 7, at 77.

- 2) Agencies should define “*ex parte* communication” broadly. Agencies should exclude from *ex parte* communication policies any communication involving only status inquiries or procedural information.
- 3) Agencies should align *ex parte* communications policies and existing comment policies.
- 4) Agencies should set a general policy encouraging, or remaining neutral toward, *ex parte* communications.
- 5) Agencies should disclose at least the fact of all pre-NPRM *ex parte* communications.
- 6) Agencies should place the burden of disclosing *ex parte* communications on public stakeholders.
- 7) Agencies should require prompt disclosure of *ex parte* communications.
- 8) Agencies should exempt confidential or otherwise protected information from *ex parte* disclosures.
- 9) Agencies should use digital technology to disclose *ex parte* communications and address its use for *ex parte* communications, including through social media.¹⁴

Analysis

In promulgating rules, federal agencies often engage in communications with interested parties outside of the prescribed public comment forum provided for in the APA. These *ex parte* communications can be oral or in writing and may be used to inform agency decisions at any point before or during the rulemaking process. Where an agency has not adopted its own intra-agency policies, informal rulemakings are bound only by the requirements of the APA which, absent extraordinary circumstances, does not prohibit (or limit) *ex parte* communications in agency rulemaking. Final rules will only be set aside where a reviewing court finds that: (i) an agency’s *ex parte* communications violated due process where two parties are competing for a “valuable privilege;” or (ii) post-NPRM comments on which an agency relied upon in making its final decision are not added to the public record.

Additionally, neither agency officials, nor reviewing courts, can unilaterally impose any additional requirements for informal rulemaking, including any requirements addressing *ex parte* communications. However, the 1977 *HBO* decision, which did impose additional requirements to informal rulemaking, served as the impetus and guidance for several federal agency policies which place unnecessary restrictions on *ex parte* communications beyond those required under law and which remain in effect today. These policies often direct (or imply) agency personnel to refuse to communicate with non-agency parties due to fear that a court may set aside a final rule if it determines that *ex parte* communications were relied upon in its promulgation. This overly-cautious approach precludes many effective and well-intentioned communications between agency personnel and outside parties and inevitably leads to less-informed rulemaking. The result is states, who are sovereignties and often partners with federal agencies, are prohibited from communicating with federal agencies.

¹⁴ *Id.* at 84-88.

There are several methods by which an updated, balanced, and uniform approach to *ex parte* communications in informal rulemaking could be adopted and applied. Changes could come in the form of: (i) an executive order directing agencies to adopt an accountable approach to consulting states which does not prohibit *ex parte* communications; (ii) amendments to the APA clarifying that the concept of prohibiting “*ex parte*” communications does not apply to state-federal communications or informal rulemaking, generally; or (iii) a new statute addressing the issue. Any new federal policy should adopt a common definition of “*ex parte* communication” and an approach that fosters informed and flexible, yet transparent and impartial, rulemaking. Many necessary changes are expressed in the recommendations proposed by the 2014 ACUS Report.



Application of FACA to Intergovernmental Meetings Between State and Federal Officials

Federal Advisory Committee Act

The Federal Advisory Committee Act (FACA),¹ enacted in 1972, prescribes procedures and requirements for advisory committees established or utilized by the federal government. When a federal agency establishes or manages/controls an advisory committee comprised of one or more members that are non-federal employees, absent an exemption, certain requirements are triggered that are aimed at providing transparency and accountability to the public and Congress and to reduce government waste.

FACA defines “advisory committee” to include any committee or similar group which is: (i) established by statute; (ii) established or utilized by the President; or (iii) established or utilized by one or more federal agencies “in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.”² Expressly excluded from this definition of “advisory committee” are (i) the Advisory Commission on Intergovernmental Relations; (ii) the Commission on Government Procurement; and (iii) any committee comprised entirely of full-time officers or employees of the federal government.

The Unfunded Mandates Reform Act of 1995 (UMRA) was enacted to “strengthen the partnership between the federal government and state, local, and tribal governments” and provides an exemption from FACA for intergovernmental consultations held exclusively between federal officers and employees and non-federal elected officials (or their authorized designees) relating solely to intergovernmental responsibilities or administration. However, federal officials largely remain unaware of this statutory exemption when refusing to consult with states out of concern that FACA, and its associated requirements, would be triggered by doing so.

WGA Policy Resolution 94-001, Federal Advisory Committee Act

WGA Policy Resolution 94-001, adopted June 14, 1994 (and since expired) addressed Western Governors’ frustrations with FACA’s application to intergovernmental communications between federal agencies and the states. Specifically, the Resolution states, “To apply FACA to the states causes an added burden to the states, hinders the free flow of communication between jurisdictions, and raises serious federalism issues.”³ Included in the Resolution’s Policy Statement is the Governors’ support for “legislation that would clarify the states’ role under FACA, the role of various associations in which states participate, and legislation that would exempt any committee comprised wholly of any full-time officers or employees or state government acting in their official capacities who are directed by statute to meet with federal officials and employees regarding

¹ Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. App. II §§ 1-15) (“FACA”).

² *Id* at § 3(2).

³ Western Governors’ Association, Policy Resolution 94-001 (1994).

programs that are shared by federal, state, and local or which are administered by state governments or delegated by the states to local governments.”⁴

Procedural Requirements if FACA is Triggered

When an advisory committee falls under the purview of FACA, several procedural requirements apply to the committee’s activities. Each advisory committee must be established by charter which must contain, among other things: (i) the committee’s official designation; (ii) the committee’s objectives and scope of authority; (iii) the period of time necessary to carry out the committee’s purposes; (iv) the agency or official to whom the committee reports; (v) a description of the committee’s duties and, if such duties are not solely advisory, a specification of the authority for such functions; and (vi) the committee’s termination date. FACA requires that an officer or employee of the federal government must be present at each committee meeting and must have the authority to adjourn any such meeting.⁵ Advisory committee meetings, and their corresponding agendas, must be approved in advance by a designated federal officer or employee.⁶ FACA requires that the membership of all applicable advisory committees be “fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.”⁷

FACA also requires that, with limited exceptions, advisory committee meetings be open to the public. Timely notice must be published in the Federal Register and interested persons must be allowed to attend, appear before, or file statements with any advisory committee (subject to reasonable rules and regulations).⁸ An advisory committee must keep detailed minutes of each meeting, certified by the chairman, which include: (i) the persons present; (ii) a complete and accurate description of matters discussed and conclusions reached; and (iii) copies of all reports received, issued, or approved by the committee.⁹ The records, reports, transcripts, minutes, and other documents made available to, or prepared for, an advisory committee must be made available for public inspection and copying until the committee is terminated.¹⁰

Meetings That do not Fall Within the Scope of FACA

There are numerous situations in which meetings between federal agencies or officers and non-federal persons or entities do not trigger FACA and its procedural requirements. Such circumstances include:

- Meetings held between federal agencies and non-federal entities for the purpose of exchanging information and gathering facts. FACA only applies to committees that are established or utilized to obtain collective advice.
- Meetings held between federal agencies and one or more outside groups to obtain the advice of the individual group(s). A meeting with one outside group to obtain that group’s advice does not trigger FACA because advice from one individual is not “group advice.” Similarly, when a federal agency meets with more than one outside group at a time to

⁴ *Id* at § (B)(2).

⁵ FACA, *supra* note 1, at § 10(e).

⁶ *Id* at § 10(f).

⁷ *Id* at § 5(b)(3).

⁸ *Id* at § 10(a).

⁹ *Id* at § 10(c).

¹⁰ *Id* at § 10(b)

receive each group's individual advice, those meetings do not necessarily trigger FACA, as the agency is not seeking group advice.

- Meetings held at the request of outside groups to discuss their individual or collective view. Such meetings are not subject to FACA because the federal government is not establishing a group to obtain group advice, but rather is meeting with the outside parties at their request to listen to their views.
- Meetings of a group established by a non-federal entity where a federal officer or employee does not manage or control the group. Federal officials may attend such meetings and participate without automatically triggering FACA if: (i) they are invited to do so by the convening entity; and (ii) they do not take actions to manage or control the group.
- Meetings attended by individuals who are not federal officers or employees, such as staff of associations, when only performing a supporting role. Staff support persons may answer factual questions, but should not communicate recommendations, advice, or the positions of their non-federal employer or participate in the group's deliberations and decision making.

Unfunded Mandates Reform Act of 1995

The UMRA was enacted to, among other purposes, "strengthen the partnership between the federal government and state, local, and tribal governments." Section 204(b) of UMRA provides an exemption from FACA for intergovernmental consultations held exclusively between federal officers and employees and non-federal elected officials (or their authorized designees) relating solely to intergovernmental responsibilities or administration. In order for the UMRA exemption from FACA to apply to such meetings, Section 204(b) requires that the following two conditions be satisfied:

- 1) The meetings are held exclusively between federal officials and "elected officers of state, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities;" and
- 2) The meetings are solely for the purpose of exchanging views, information, or advice "relating to the management or implementation of federal programs established pursuant to statute, that explicitly or inherently share intergovernmental responsibilities or administration."

The UMRA requires that, no later than six months after the date of its enactment, the President "shall issue guidelines and instructions to Federal agencies for appropriate implementation" of the UMRA exemptions to FACA consistent with applicable laws and regulations. To fulfill that mandate, on September 21, 1995, OMB Director Alice M. Rivlin issued a memorandum, *Guidelines and Instructions for Implementing Section 204, "State, Local, and Tribal Government Input," of [Section 204(b)]* (Rivlin Memo).¹¹ The Rivlin Memo provides federal agencies, officers, and employees with the following guidance for the implementation of the UMRA's FACA exemption:

¹¹ Memorandum from Alice M. Rivlin, Director, Office of Management and Budget, to the Heads of Departments and Agencies regarding "Guidelines and Instructions for Implementing Section 204 "State, Local, and Tribal Government Input: of Title II of P.L. 104-4 (Sept. 21, 1995). Available at: <http://www.gsa.gov/portal/content/101011>.

- **Exemption to be Construed Broadly.** In accordance with the legislative intent of UMRA, the FACA exemption - and the scope of meetings covered thereby - should be read broadly to facilitate intergovernmental communications on responsibilities or administration. Exempted meetings include, but are not limited to, those called to: (i) seek consensus; (ii) exchange views, information, advice, and/or recommendations; or (iii) facilitate any other interaction relating to intergovernmental responsibilities or administration.
- **Application to All Federal Agencies:** The exemption applies to all federal agencies subject to FACA and is not limited to the intergovernmental consultations required by Section 204(b), but instead applies to the entire range of intergovernmental responsibilities or administration.
- **Heads of Government:** Federal agencies should seek to consult with the “highest levels of the pertinent government units” (*e.g.*, Office of the Governor, Mayor, or Tribal Leader), as they have been “elected to represent the people and are the ones that the public holds directly accountable for the actions of those government units.”
- **FACA Exemption Extends to “Washington Representatives” of Elected State, Local, and Tribal Officials.** The Rivlin Memo expresses that UMRA’s FACA exemption extends to meetings with the “Washington representatives” of elected state, local, and tribal officials. A June 26, 2013 EPA Memorandum, *Applicability of FACA to Meetings with Outside Groups*, recognizes that the Rivlin Memo “distinguishes between employees of associations representing elected officials and employees of associations representing appointed or career officials. Under the OMB guidance, meetings with employees of associations whose members are elected officials of state, tribal, or local governments, such as the National Governors’ Association, are covered by the exemption. In contrast, meetings with employees of associations representing appointed or career officials of state, tribal, or local governments (such as the Environmental Council of States) are not covered by this exemption.”¹² Neither the Rivlin Memo, nor other federal guidance provides a definition of the term “Washington representative.” However, the Rivlin Memo states that such associations “often know which local elected officials are the most knowledgeable about, interested in, or responsible for, implementing specific issues, regulations, or programs, and can ensure that a broad range of government officials learn of and provide valuable insight concerning a proposed intergovernmental mandate.”¹³

Federal Case Law Addressing UMRA’ FACA Exemption and FACA’s Application to Representatives of Elected State Officials

There is very limited case law addressing the applicability of FACA and its exemption under UMRA to state officials and their representative associations. However, federal courts appear to have been liberal in finding exemptions to the application of FACA to intergovernmental communications. In its only case addressing FACA, the U.S. Supreme Court in *Public Citizen v. United States Department of Justice* opined that communications subject to FACA should be limited in order to foster more open and productive communications: “FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals;

¹² Memorandum for Carol Ann Siciliano, Associate General Counsel, Cross-Cutting Issues Law Office to Cynthia Jones-Jackson, Acting Director, Office of Federal Advisory Committee Management and Outreach (June 26, 2013) (emphasis added).

¹³ Rivlin Memo, *supra* note 11, at 2.

although its reach is extensive, we cannot believe that it was intended to cover every formal and informal consultation between the President or an executive agency and a group rendering advice.”¹⁴

Citing *Public Citizen*, the U.S. Court of Appeals for the Circuit of Washington D.C. ruled in *Natural Resources Defense Council v. EPA*¹⁵ that a Governors’ Forum on Environmental Management formed to address states’ abilities to carry out federally-delegated environmental programs did not fall under FACA. The court opined that the Governors serving on the Forum “should not be viewed as merely advisors to EPA. Rather...they act operationally as independent chief executives in partnership with the federal agency.”¹⁶ The Court stated that it could not “ignore the federalism and separation of powers concerns, which would arise if the Court were to determine that a body of nine Governors organized to address an environmental problem constitutes an advisory committee under FACA.”¹⁷

Analysis

The application of FACA to any meeting between federal employees and officials and non-federal parties, including WGA, must be analyzed on a case-by-case basis. This is due to the numerous factors that trigger FACA, including but not limited to whether: (i) the group was established or utilized by a federal agency; (ii) the group is managed or controlled by a federal employee or officer; (iii) the group provides collective advice or recommendations to the federal government. If each of these elements are not satisfied, FACA and its mandates will not apply.

¹⁴ *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 453 (1989).

¹⁵ *Nat. Res. Defense Council v. EPA*, 806 F.Supp. 275 (D.D.C. 1992).

¹⁶ *Id* at 277.

¹⁷ *Id* at 278.



FOIA and the Application of its Deliberative Process Exemption to State-Federal Communications

In the course of states' consultations with federal agencies, agency officials have expressed reluctance in sharing – or discussing the detail of – pre-decisional agency documents with states officials, due to the possibility that such information sharing would be subject to public disclosure under the federal Freedom of Information Act (FOIA).¹ This approach ignores judicial interpretations of FOIA's "deliberative process" exemption and has frustrated the exchange of vital information between federal agencies and states during agency rulemaking.

Freedom of Information Act

FOIA, enacted in 1966, provides the public the right to request access to records involved with any federal agency's decisionmaking process. Upon receiving a proper request, an agency must promptly make records available to a requester, unless such records fall within one of FOIA's nine express exemptions. Courts have ruled that the exemptions under FOIA are to be interpreted narrowly so that their application does not "obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."² The agency to which a records request has been submitted bears the burden of justifying any determination of non-disclosure.³ The exemptions under FOIA may be waived by an agency's disclosure of privileged information to a non-federal person or entity; the inquiry into whether a specific communication constitutes a waiver is fact-specific.

Among FOIA's exemptions, and most relevant to the communications between states and federal agencies, is Exemption 5, which protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."⁴ Courts have interpreted Exemption 5 to extend to documents used as part of an agency's "deliberative process," which includes "documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated."⁵ The deliberative process privilege applies to communications that are: (i) inter-agency or intra agency; (ii) pre-decisional and not a final policy adopted by an agency; and (iii) part of a process by which governmental decisions and policies are formulated.⁶ The deliberative process exemption serves three primary purposes: (i) candid communications between policymakers; (ii) prevention of release of proposed, non-final policies; and (iii) protection against public confusion and the spread of erroneous information.⁷

¹ 5 U.S.C. § 552, *et seq.*

² *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

³ 5 U.S.C. § 552(a)(4)(B).

⁴ 5 U.S.C. § 552(b)(5).

⁵ *Dep't of the Interior v. Klamath Water Users*, 532 U.S. 1, 8 (2001).

⁶ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).

⁷ *Judicial Watch, Inc. v. U.S. Dep't of Transportation*, 950 F.Supp. 2d 213, 216 (D.D.C. 2013).

Federal Case Law Addressing FOIA's Deliberative Process Exemption

Federal case law provides conflicting opinions as to the applicability of Exemption 5 to communications between federal agencies and states during an agency's deliberative process. While courts have generally ruled that such communications cannot qualify as "inter-agency" communications due to the fact that states are not "agencies" – a term limited to federal agencies – courts have read Exemption 5 broadly to include a "consultant corollary" under which communications with consultants may be considered "intra-agency" and, therefore, exempted from FOIA disclosure. The U.S. Supreme Court has declined to apply Exemption 5's consultant corollary to documents exchanged between an Indian tribe and the Department of the Interior in the course of tribal consultation addressing a water rights adjudication and long-term operation plans for the Klamath Irrigation Project. The Court concluded that the consultant corollary of Exemption 5 did not apply in instances where a tribe, representing its own legitimate interests, is "seeking Government benefit at the expense of other [parties]," and the "object of the tribe's communications is a decision by an agency of the Government to support a claim by the tribe that is necessarily adverse to the interests of the competitors."⁸

In *People for the American Way v. US Dept. of Education*, 516 F. Supp. 2d 28 (D.D.C. 2007), the D.C. Circuit reviewed the application of Exemption 5 to communications between the D.C. mayor's office and the Department of Education pursuant to a co-regulatory relationship established by Congress. The court determined that the mayor's office could not qualify as a consultant and the communications were "not part of the deliberative process," because the mayor's office represented "its own constituency" and the Department of Education could not unilaterally make decisions. The court held that "there is simply no precedent for withholding documents under Exemption 5 where a federal agency and a non-federal entity share ultimate decision-making authority with respect to a co-regulatory project."

However, the same court has also applied Exemption 5 to the meeting minutes and handwritten notes from a coordination meeting with state emergency management officials, finding that they were "extra-agency personnel acting in a consulting capacity."⁹ Mostly recently, in *Judicial Watch, Inc. v. Department of Transportation*, 950 F. Supp. 2d 214 (D.D.C. 2013), the court interpreted *Klamath* and subsequent D.C. decisions narrowly: "When communications between an agency and a non-agency aid the agency's decision-making process and the non-agency did not have an outside interest in obtaining a benefit that is at the expense of competitors, the communication must be considered an intra-agency communications for the purposes of FOIA Exemption 5." The *Judicial Watch* court held that documents exchanged between a state and federal agency as part of a consulting relationship under NEPA were exempt, despite the economic, financial, and social benefits to the state from the project, because they did not "directly advocate" and "other states were not vying" for similar projects.

Klamath and the inconsistency of the U.S. District Court for the District of Columbia's decisions cast doubt on whether documents exchanged or communications between state and federal agencies are protected by Exemption 5 under the consultant corollary. [BLM's Desk Guide to Cooperating Agency Relationships](#) interprets *Klamath* to apply to communications from a state agency: "Communications from a [cooperating agency] will not qualify as exempt from release under FOIA exemption 5 where that agency is advancing a competitive position that would be detrimental to another party, *which will almost always be the case here.*" (emphasis added).

⁸ *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 13-14 (2001).

⁹ *Citizens for Responsibility and Ethics in Washington v. DHS*, 514 F. Supp. 2d 36 (D.C. Cir. 2007).

Potential for Regulatory and/or Legislative Reform

Regulatory reform addressing the application of FOIA's deliberative process exemption to communications between federal agencies and states is particularly difficult, primarily due to the following factors: (i) FOIA does not directly address the issue and would not be easily amended; (ii) the deliberative process exemption is rooted in judicial doctrine which cannot, itself, be amended through any political or administrative process; (iii) the judicial doctrine conflicts with other opinions that call for exemptions to be interpreted narrowly; and (iv) agencies have adopted their own, non-uniform rules and policies to comport with the most narrow readings of the exemption. The issue could potentially be addressed by, among other solutions:

- 1) Amending FOIA to include states and state agencies in the definition of "agency" so that they can be involved in "intra-agency" communications when consulting a federal agency.
- 2) An Executive Order directing federal agencies openly communicate with states and disclose any requested documents that were involved in an agencies' deliberative processes.