Testimony of James D. Ogsbury
Executive Director, Western Governors' Association

Before the
United States House of Representatives
Committee on Oversight and Government Reform
and the
Speaker's Task Force on Intergovernmental Affairs

Oversight Hearing on Federalism Implications of Treating States as Stakeholders

February 27, 2018

Chairman Gowdy, Ranking Member Cummings, Task Force Chairman Bishop, and members of the Committee and Task Force, Western Governors appreciate the opportunity to provide written testimony on matters involving the relationship between states and the federal government. These remarks are presented by the Western Governors' Association (WGA), an independent, bipartisan organization representing the Governors of 19 western states and three U.S. territories in the Pacific.

We are encouraged that the Committee and the Task Force are focusing on the critical issue of the state-federal relationship. This is a high priority for Western Governors, as reflected by their adoption of WGA Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*. This resolution articulates the Governors' vision for a more efficient and effective partnership between the federal government and the states. It is appended to this testimony for inclusion in the hearing record.

States Are NOT Stakeholders

"States, tribes, local governments, groups and organizations, and *other stakeholders* …" This phrase (and multiple variants thereof) often appears in legislation and throughout federal proclamations: notices of rulemakings, requests for comments, departmental orders, and all types of policy statements. The idea that it communicates (i.e. that states stand in the same relation to the federal government as any other organized group) has taken firm hold in various theaters of the federal executive and legislative branches of government. This widespread notion, however, is legally incorrect and contrary to our fundamental principles of governance.

States are not stakeholders. Rather, they are a sovereign level of United States government. States not only created the federal government, but they reserved to themselves the greater measure of authority over public affairs. This reservation of power is memorialized in the Tenth Amendment of the U.S. Constitution, which reads 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."

Under the American construct of federalism, the powers of the federal government are narrow and defined, while those of the states are vast and innumerable. Nevertheless, the balance of power envisioned by the Founding Fathers has, over generations, been turned on its head. The outsized role of the federal government is reflected in the enormity of its budget, the scale of its workforce and the scope of its regulatory reach.

As the chief elected officials of sovereignties, Western Governors expect to engage with federal officials as co-regulators. They are fiercely committed to working with federal offices as authentic partners in the formulation and execution of public policy. They understand that Governors – who exercise authority closer to the governed – have specialized knowledge of their states' environments, legal frameworks, culture, and economies that is essential to informed national decision-making. A *bona fide* partnership between state and federal authorities will result in more efficient, cost-effective, and legally defensible decision-making. It will result in better public policy.

A Complex Relationship

The relationship between state and federal governments manifests itself in various, legally distinct contexts. Thoughtful consideration of improvements to the relationship must account for its various incarnations.

Certain areas of responsibility (e.g. national defense, production of currency) are exclusively within the federal purview. Other areas (e.g. groundwater and wildlife management) are the province of state government. There are instances of shared authority (e.g. the adjudication of federal water rights under state law), and cases where federal authority is delegated to the states (e.g. Clean Water Act and Clean Air Act implementation). There are other situations where the relationship is predicated on historical obligations (e.g. Payments-in-Lieu-of-Taxes) or wholly voluntary collaborations (e.g. Memoranda of Understanding, conservation joint ventures). These different "flavors" of the state-federal relationship are explained more fully in the attached resolution.

Congress has, through various statutes, expressly recognized states' unique status as sovereignties with their own inherent authority. In other instances, Congress has specifically designated states as co-regulators with federally-delegated authority, and has directed federal agencies to consult with states accordingly.

The intersection of federal and state authority is especially complex with respect to the management of natural resources. On the one hand, such managerial authority is mostly vested in the states. States are the principal authority for the allocation and management of natural resources within their borders. They exercise inherent police power in the management of wildlife resources and possess plenary authority over groundwater resources.

On the other hand, the federal government is by far the largest single landowner in the West. In fact, 47 percent of the 11 westernmost continental states is federally owned, as is 61 percent of the State of Alaska. In contrast, the federal government owns only four percent of lands in the other states. It is incumbent upon federal land managers to administer their holdings according to the laws of the states in which they reside. Accordingly, it is especially important that federal and state officials work collaboratively and constructively in resource management to deliver the best possible results for their common constituents.

Strengthening the State-Federal Relationship and Consultation

WGA commends the attention of the Committee and Task Force to the attached resolution for specific recommendations to improve the state-federal relationship. For example, the resolution addresses the issue of federal preemption and notes that, in the absence of Constitutional delegation of authority to the federal government, state authority should be presumed sovereign.

With respect to the delegation of authority to states for the administration of federal programs, the resolution provides that when a state (which should be respected and regarded as a co-regulator) 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. Federal agencies should grant states the maximum administrative discretion possible, and federal oversight of states should not unnecessarily intrude on that discretion.

The resolution further identifies opportunities for positive engagement between Governors and federal officials. It calls for robust application of a revised and enforceable executive order on federalism. Moreover, it offers specific suggestions for the involvement of states in the development and implementation of federal land use plans.

An improved state-federal relationship depends on improved communication. Accordingly, the resolution's provisions on consultation are especially salient to the subject of this hearing, and they are presented here for consideration by the Committee and Task Force.

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.

Federal agencies should rely on 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 Science Advisory Board of the Environmental Protection Agency and related issue panels) advising federal agencies on scientific, technological, social and economic issues that inform federal regulatory processes.

Federal agencies must 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). 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.

Western Governors can conceive of no legitimate reason they could not or should not be consulted at the earliest stages of policy ideation. An interactive, relational model of cooperative policy development would yield great dividends for our shared constituents. Adoption of such a model, however, is only possible upon embrace of states as partners and rejection of the notion that states are stakeholders.

The Promise of Restored Partnership

Governors are eager to work with the federal government as authentic partners. They hope to engage with federal agencies at the earliest stages of federal decision-making and program development. A decision-making paradigm that applies local knowledge, expertise, resources, and competencies will result in efficiencies, cost-savings, and legally sound (and defensible) policy.

Western Governors are not the only group to recognize the importance of strengthening the relationship between federal, state, and local governments. In coordination with other state and local groups, they have developed a common set of Principles to Clarify and Strengthen the State-Federal Relationship. In addition to WGA, adopters of these principles include the Conference of Western Attorneys General, Council of State Governments – West, Western Interstate Region of the National Association of Counties, Pacific NorthWest Economic Region, Western States Air Resources Council, and Western States Water Council.

As Governors pursue efforts to realign the state-federal relationship, they would appreciate the opportunity to consult with Congress on the development and use of precise legislative language that recognizes the sovereignty of states and helps restore their status as a co-equal level of government. They also request your vigilance to protect against the undue transfer of financial burdens to states and localities. A common goal should be to maximize the return that Americans receive on the investment of their limited tax dollars.

Western Governors appreciate the interest of the Committee and the Task Force in improving the state-federal relationship. They are interested in working with you to effect meaningful and enduring improvements and assisting you in creating a legacy of which you can jointly be proud. Western Governors look forward to helping you realize a historic opportunity to develop a more functional policy-making paradigm that promises untold benefits for generations to come.

Western Governors' Association
Policy Resolution 2017-01

Building a Stronger State-Federal Relationship

A. PREAMBLE

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

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

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

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

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

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

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

B. BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. GOVERNORS' POLICY STATEMENT

1. Review of the Federal-State-Local Relationship

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

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

2. Avoiding Preemption of States

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

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

i. Accommodate state actions taken before its enactment;

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

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

3. Defining Meaningful State-Federal Consultation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

vii. Federal government monitoring should be outcome-oriented.

viii. Federal reporting requirements should be minimized.

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

D. GOVERNORS' MANAGEMENT DIRECTIVE

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

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

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.

SIGNATORIES

Principles to Clarify and Strengthen the State-Federal Relationship

Western Governors' Association (*December 2016*)
Conference of Western Attorneys General (*December 2016*)
Council of State Governments – West (*December 2016*)
National Association of Counties – Western Interstate Region (*December 2016*)
Pacific NorthWest Economic Region (*December 2016*)
Western States Air Resources Council (*August 2017*)
Western States Water Council (*August 2017*)

Principles to Clarify and Strengthen the State-Federal Relationship

A. **Fundamental Federalism Principles**

1. The structure of government established by the United States Constitution is premised upon a system of checks and balances.

2. The Constitution created a federal government of supreme, but limited and enumerated, powers. The sovereign powers not granted to the federal government are reserved to the people or to the states, unless prohibited to the states by the Constitution. The constitutional relationship among sovereign governments, state and federal, is memorialized in the Tenth Amendment to the Constitution. Under this Constitutional framework, states also confer governmental powers to counties and local governments.

3. Our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires.

4. Effective public policy is achieved when there is competition among the several states in the fashioning of different approaches to public policy issues. The search for enlightened public policy is advanced when individual states and local governments are free to experiment with a variety of approaches to public issues. One-size-fits-all national approaches to public policy problems can inhibit the creation of effective solutions to those problems.

5. In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual states. Uncertainties regarding the legitimate authority of the federal government should generally be resolved in favor of state and local authority and regulation.

6. To the extent permitted by law, federal executive departments and agencies should not construe, in regulations and otherwise, a federal statute to preempt state or local authority unless the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of state or local authority, or when the exercise of state or local authority directly conflicts with the exercise of federal authority under the relevant federal statute or U.S. Constitution.

7. When an executive department or agency proposes to act through adjudication or regulatory action to preempt state or local authority, the department or agency must provide all affected states and local governments notice and an opportunity for

appropriate participation in the proceedings [as outlined in B(2)].

8. With respect to federal statutes and regulations administered by states and local governments, the federal government should grant states and local governments the maximum administrative discretion possible. Any federal oversight of such state and local administration should not unnecessarily intrude on state and local discretion or create undue burdens on state and local resources.

B. Actions by Federal Agencies That Should Be Covered by Federalism Executive Order / Consultation

1. Actions having federalism implications include federal regulations, proposed federal legislation, policies, rules, guidances, directives, programs, reviews, budget proposals, budget processes and strategic planning efforts that have substantial direct effects on the states and/or local governments or on their relationship with the federal government, or the distribution of power and responsibilities, between the federal government and the states and local governments.

2. "Consultation" -- Each federal executive department / agency should be required to have a clear, consistent and accountable process (see Section C below) to provide states and localities with early, meaningful and substantive input in the development of regulatory policies that have federalism implications.

3. Independent regulatory agencies should be required to comply with the same federalism-related requirements that other executive departments and agencies are required to follow.

C. Federalism Review Process

1. The head of each federal executive department and agency should be required to designate an official responsible for ensuring that the federalism consultation process is executed appropriately and completely.

    a. Regulatory actions [see B(1)] with federalism implications should trigger preparation of a federalism assessment. Such assessments should be considered in all decisions involved in promulgating and implementing the policy.

    b. Each federalism assessment should accompany any submission concerning the policy that is made to the Office of Management and Budget pursuant to Executive Order No. 12291 or OMB Circular No. A19, and:

i. contain the designated official's certification that the policy has been assessed in light of the principles, criteria and requirements contained in this document;

ii. identify any provision or element of the policy that is inconsistent with the principles, criteria, and requirements stated in this document;

iii. specifically identify the extent to which the policy imposes additional costs or burdens on state or local governments, including the likely source of funding for the state and local governments and the ability of the states and impacted local governments to fulfill the purposes of the policy; and

iv. specifically identify the extent to which the policy would affect impacted governments' abilities to discharge traditional state and local governmental functions, or other aspects of state sovereignty and local government authority.

2. No executive department or agency should promulgate any regulation that is not authorized by federal statute. Where regulations are appropriate, authorized and Constitutional, but have federalism implications or impose substantial direct compliance costs on states or localities, the executive department or agency must:

   a. Ensure that new funds sufficient to pay the direct costs incurred by the state or local government in complying with the regulation are provided by the federal government to the impacted state and local governments for the duration of the impact; and

   b. Prior to the formal promulgation of the regulation:

      i. in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provide to the Director of the Office of Management and Budget a description of the extent of the executive department / agency's prior consultation with representatives of affected states and local governments, a summary of the nature of their concerns, and the executive department / agency's position supporting the need to issue the regulation; and

      ii. makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by states or local governments.

D. Increasing Flexibility for State and Local Waivers

1. Agencies should review the processes under which states and local governments apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

2. Each agency should, to the extent practicable and permitted by law, favorably consider any application by a state or local government for a waiver of statutory or regulatory requirements in connection with any program administered by that agency. In general, federal agencies should operate with a general view toward increasing opportunities for utilizing flexible policy approaches at the state or local level in cases in which the proposed waiver is consistent with applicable federal policy objectives and is otherwise appropriate.

3. Each agency should, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency. If the application for a waiver is not granted, the agency should provide the applicant with timely written notice of the decision and the reasons for the application's rejection.

4. This process would apply only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

States Are Not Stakeholders – Legal Primer

Some truths are so basic that, like the air around us, they are easily overlooked.

- Justice O'Connor (on State sovereignty in *New York v. U.S.*, 505 U.S. 144, 187 (1992)).

States are sovereigns.

- U.S.C.A. Const. Amend. 10.
- The U.S. Supreme Court has recognized that the States entered the federal system with their sovereignty intact. *Blatchford v. Native Vill. Of Noatak*, 501 U.S. 775, 779 (1991).

The U.S. Supreme Court and Congress recognize that States are entitled to the degree of respect due a co-equal governmental institution.

- See, e.g. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002); *Alden v. Maine*, 527 U.S. 706, 750 (1999); *Printz v. U.S.*, 521 U.S. 898, 928 (1997); *New York v. U.S.*, 505 U.S. 144, 156-57 (1992); federal agency enabling acts; Unfunded Mandates Reform Act, 2 U.S.C. § 1501 *et. seq.* (Guidelines and Instructions for Implementing Section 204, *State, Local, and Tribal Government Input*); *Federalism*, E.O. 13132.

Congress has, through various statutes, expressly recognized States' unique status as sovereignties with their own inherent authority – as well as instances in which States serve as co-regulators with federally-delegated authority – and has directed federal agencies to consult with States accordingly.

- As recognized by the U.S. Supreme Court, Congress directs federal agencies to defer to State authority in areas such as: land and water use and zoning, education, domestic relations, criminal law, property law, local government, taxation, and fish and game.
- Congress directs federal agencies to co-regulate with the States under statutes such as: Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act, and Comprehensive Environmental Response, Compensation, and Liability Act.

Because States are sovereign, the U.S. Supreme Court provides the States with unique consideration for the purposes of invoking federal court jurisdiction. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (finding states are not "normal litigants.").

Federal agencies are directed by Executive Order 13132, *Federalism* to adhere to fundamental federalism principles and develop an accountable process to ensure meaningful and timely input from States when formulating policies that have federalism implications.

Will litigation be the ultimate form of State involvement over federal regulatory policies?

Proper agency consultation with states produces more informed, effective, and durable administrative rules, regulations, and policies.

FEDERAL-STATE RELATIONSHIP: AUTHORITY FRAMEWORK[1]

SCENARIO I	**Federal Authority Exclusively**
Explanation	There are powers that are specifically enumerated by the U.S. Constitution as exclusively the purview of the federal government.[2]
Some Examples	National defense, interstate commerce, border control.
SCENARIO II	**State Primacy Rules**
Explanation	All powers not specifically delegated to the federal government by the U.S. Constitution are reserved for the states, allowing state legal authority to overrule federal intrusion.
Some Examples	Groundwater,[3] water allocations/management, wildlife management (outside ESA context)[4] and natural resource management under state "trust" authorities.[5]

[2] U.S. Constitution Article VI (Supremacy Clause), Article I (Congressional) Section 8; Article II, Section 1 (Executive Branch), Article III, Section 2 (Judicial Branch). State law can be preempted two ways: 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, state law is preempted to the extent it *actually* conflicts with federal law.

[3] Congress recognized states as the sole authority over groundwater in the Desert Land Act of 1877. The U.S. Supreme Court has repeatedly emphasized the exclusive nature of state authority over water management, including in *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142 (1935).

[4] See AFWA's 2014 report: "Wildlife Management Authority, the State Agencys' Perspective."

[4] 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.*" Public trust doctrine is a common-law concept concerning public rights to lands and water to be held "in trust" by states for certain public uses. This is the basis of states' so-called "trust" authority over natural resources and wildlife. The manner in which states hold title to such lands and water is described in the U.S. Supreme Court case *Illinois Central Railroad vs. Illinois*. In the wildlife context, this is further articulated through the North American Model of Wildlife Conservation

[5] Per the 10th Amendment, state authority dominates in the pre-listing conservation context.

[4]Ibid.

SCENARIO III	**Shared State-Federal Authority**
Explanation	Where state and/or federal authority can apply, given a particular fact pattern.[6] Risk of federal preemption of state law is a concern with this scenario.
Some Examples	Water (e.g. federal water rights adjudicated through state water courts), wildlife (ESA-triggered and in wilderness and National Wildlife Refuges), land management (especially under landscape-based planning models), planning and siting of linear facilities.
SCENARIO IV	**State Authority "Delegated" from Federal Agencies via Federal Statute**
Explanation	Where a statutory regime contemplates establishment of federal standards, with delegated authority (permissive) available to states that wish to implement those standards.[7]
Some Examples	CAA, CWA, EPCRA, FIFRA, OPCA, RCRA, SDWA, SMCRA, TSCA.[8]
SCENARIO V	**Other Opportunities for State Engagement / State Rights Afforded by Statute / EO**
Explanation	Where the federal government has a statutory, historical or "moral" obligation to states.

[6] The federal government has authority to regulate federal property under Article IV of the Constitution. However, that authority 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 state policy. This is discussed in detail in U.S. Supreme Court case, *Kleppe v. New Mexico*. On the other hand, federal authority can extend to state public trust lands adjacent to so called "special use" federal property (e.g. designated wilderness areas) when state uses interfere with the federal property. This concept is discussed in U.S. Supreme Court cases, *Camfield v. United States* and *United States v. Alford*.

[7] There are requirements that federal facilities and activities comply with state environmental laws, The CWA, CAA, RCRA, SDWA, TSCA and CERCLA all include provisions that require implementation activities involved to be subject to, and comply with, all federal, state, interstate and local requirements.

[8] See ECOS, "State Delegation of Environmental Acts," (Feb. 2016) for lists of states accepting delegation under various federal environmental statutes. According to ECOS, states implement 96.5% of federal programs that can be delegated to states. States conduct over 90% of environmental inspections, enforcement, environmental data collection.

Some Examples	PILT/SRS, mineral royalties, unfunded mandates, required regulatory review, cost-benefit and economic impacts analyses, federalism reviews, NEPA cooperating agency status, ESA cooperating agency (Section 7) and Section 6 cooperative agreements and "maximum extent practicable" clause (Section 6).
SCENARIO VI	**Voluntary Federal-State Collaboration Models**
Explanation	Where state(s) and federal governments enter wholly voluntary collaborative relationships.
Some Examples	WGA Chair initiatives, conservation joint ventures[9], collaboratives.

[9] AFWA 2014 report: "Wildlife Management Authority, the State Agencys' Perspective," pages 26-27

Asked and Answered: Issues Raised Regarding State-Federal Consultation

This document identifies issues which have, in the past, frequently arisen in the context of state consultation during the federal administrative rulemaking process, as well as analyses of the legal foundations and legitimacy of each such issue.

Description of Issue:	Legal Analysis:	Relevant Legal Authorities:
Non-Legislative Rulemaking: Federal agencies often categorize their proposed rules and regulations as "non-legislative," which are not subject to the requirements of the Administrative Procedure Act (APA) for notice-and-comment rulemaking. This practice precludes transparency in the rulemaking process, as well as the opportunity for the "public" (in which agencies include state governments) to provide input to the agency in the development and adoption of rules.	1) All agency rules intended to be legally binding (on the agency and/or the public) must be promulgated through procedures for notice-and-comment rulemaking. 2) "Rules which do not merely interpret existing law or announce tentative policy positions, but which establish new policy positions that the agency treats as binding must comply with the APA's notice-and-comment requirements, regardless of how they initially are labeled." (OMB Good Guidance Bulletin). For detailed analysis, see WGA Memorandum: *Non-Legislative Rulemaking to Circumvent Basic Procedural Requirements.*	Administrative Procedure Act, Section 553 (5 U.S.C. § 553) *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007) E.O. 12866, *Regulatory Planning and Review* (58 Fed. Reg. 51735; Oct. 4, 1993)
***Ex Parte* Communications:** Agencies have expressed that general agency policy restricting "*ex parte*" communications with non-agency officials prohibits	1) There is no statutory authority, including the APA, which prohibits federal agencies from communicating	*Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981)

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.	with non-agency officials at any point during the rulemaking process 2) Many of the federal policies on *ex parte* communication were hastily adopted in response to overly-restrictive federal case law which has been subsequently overturned. 3) Agency policies addressing *ex parte* communications have been adopted as non-legislative rules and, thus, cannot have any binding effect. For detailed analysis, see WGA Memorandum: *Ex Parte Communications Between State and Federal Officials in the Federal Administrative Rulemaking Process.*	*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).
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).	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 inherently share intergovernmental responsibilities or administration."	Federal Advisory Committee Act, 5 U.S.C. App. II §§ 1-15 Unfunded Mandates Reform Act, P.L. 104-4 (1995) Alice M. Rivlin Memorandum (Sep. 21, 1995)

	For detailed analysis, see WGA Memorandum: *FACA Application to WGA Intergovernmental Meetings with Federal Officials.*	
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).	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. 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. For detailed analysis, see WGA Memorandum: *FOIA and the Application of its Deliberative Process Exemption to Communications Between State and Federal Officials.*	Freedom of Information Act, 5 U.S.C. § 552, *et seq.* *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) *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).

Tribal Consultation Model: Most federal agencies have developed and adopted comprehensive policies and rules which prescribe procedures for consulting with federally-recognized Indian tribes throughout the course of an agency's rulemaking process. Although similarly directed to do so by effective Executive Orders, federal agencies have largely failed to adopt similar policies for consulting with state officials.	1) Comprehensive federal agency procedures for tribal consultation have developed over multiple presidential administrations. 2) Federal agencies should afford at least comparable "government-to-government" consultation opportunities to elected state officials in their rulemaking processes. Such consultation should involve early, meaningful, substantive, and ongoing back-and-forth communications between state and federal officials with decision-making authority. For detailed analysis, see WGA Memorandum: *Federal Policies Regarding Tribal Consultation as a Model for State Consultation Regulatory Reform.*	E.O. 13175, *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67249 (Nov. 6, 2000) Presidential Memorandum on Tribal Consultation (Nov. 5, 2009)
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 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.	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. 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.	*California Wilderness Coalition v. Dept. of Energy*, 631 F.3d 1072 (9th Cir. 2011)

	3) Federal agencies should designate agency officials with decision-making authority to conduct consultations with states.	
Federalism Consultation with States (Executive Order 13132): Federal agencies have largely ignored the mandates expressed in E.O. 13132, *Federalism*, 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.	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." 2) OMB guidance expresses that agencies "must include elected State and local government officials or their representative national organizations in the consultation process."	Executive Order 13132, *Federalism*, 64 Fed. Reg. 43255 (Aug. 4, 1999) OMB Guidance for Implementing E.O. 13132, "Federalism" (Oct. 28, 1999)

STATES ARE NOT "STAKEHOLDERS"	WGA POLICY RESO 2017-01	SHARED FEDERALISM PRINCIPLES
States' Status as Sovereign Entities	Sec. (A): "…Constitutional recognition of state sovereignty…" Sec. (B)(1)(b): "…are reserved for the states…"	Sec. (A)(2): "The sovereign powers not granted to the federal government are reserved to the people or to the states…"
States' Status as Co-Regulators and Partners with Federal Agencies	Sec. (B)(1)(d): "…with delegated authority (permissive) available to states that wish to implement those standards." Sec. (C)(4)(a): "Federal agencies should treat states as co-regulators…" Sec. (C)(5)(e): "…opportunities for expanded cooperation, particularly where states are working to help federal partners to improve land management..."	Sec. (A)(8): "With respect to statutes and regulations administered by states and local governments, the federal government should grant states and local governments the maximum administrative discretion possible."
Federalism Impacts (E.O. 13132)	Sec. (C)(5)(a): "Federal agencies are required by [E.O.] 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 [E.O.}..."	Sec. (B)(1): "Actions having federalism implications include…" Sec. (B)(2): "…early, meaningful, and substantive input in the development of regulatory policies that have federalism implications." Sec. (C)(1): "…ensuring that the federalism consultation process is executed appropriately and completely."
Unfunded Mandates (E.O. 12866)	Sec. (C)(5)(f): "The U.S. Congress and federal departments and agencies should avoid the imposition of unfunded federal mandates on states."	Sec. (C)(1)(b): "…pursuant to [E.O.] 12291 or OMB Circular No. A19…"

		Sec. (C)(2)(a): "Ensure that new funds sufficient to pay the direct costs incurred by the state or local government…"

WHAT CONSTITUTES EFFECTIVE CONSULTATION?	WGA POLICY RESO 2017-01	SHARED FEDERALISM PRINCIPLES
Early, Meaningful, Substantive, Ongoing	Sec. (C)(3)(a): "Each executive department and agency should be required to have a clear and accountable process to provide each state…with early, meaningful and substantive input…" Sec. (C)(3)(b)(iii): "…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 their finalization."	Sec. (B)(2): "…early, meaningful, and substantive input in the development of regulatory policies that have federalism implications."
Clear, Consistent, and Accountable Process	Sec. (C)(3)(a): "...clear and accountable process…"	Sec. (B)(2): "…a clear, consistent, and accountable process…"
Encompasses a Broad Range of Federal Actions and Occurs in Various Contexts	Sec. (C)(3)(a): "This includes the development, prioritization, and implementation of federal environmental statutes, policies, rules, programs, reviews, budgets, and strategic planning."	Sec. (B)(1): "Actions having federalism implications include federal regulations, proposed federal legislation, policies, rules, guidances, directives, programs, reviews, budget proposals, budget processes and strategic planning efforts…"

Predicate Involvement / State Data and Expertise	Sec. (C)(3)(b)(i): "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."	None
Supplemental to, but not Satisfied by, Notice-and-Comment Rulemaking	Sec. (C)(3)(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." Sec. (C)(3)(b): "…federal agencies should consult with states in a meaningful way, and on a timely basis."	Sec. (B)(2): "Each federal executive department/agency should be required to have a clear, consistent, and accountable process to provide states and localities with early, meaningful, and substantive input in the development of regulatory policies that have federalism implications."

WHO MUST PARTICIPATE IN THE CONSULTATION PROCESS?	**WGA POLICY RESO 2017-01**	**SHARED FEDERALISM PRINCIPLES**
Governors (or Their Designees) From all Potentially-Affected States	Sec. (C)(3)(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…"	Sec. (A)(7): "…provide all affected states and local governments notice and an opportunity for appropriate participation in the proceedings."

Designated Federal Official with Adequate Decisionmaking Authority	Sec. (C)(3)(a): "…clear and accountable process…"	Sec. (C)(1): "…designate an official responsible for ensuring that the federalism consultation process is executed appropriately and completely."

AGENCY ACCOUNTABILITY / PROCESS ENFORCEABILITY	**WGA POLICY RESO 2017-01**	**SHARED FEDERALISM PRINCIPLES**
Clear and Accountable Process for Agency Determinations of Whether State Consultation is Required	Sec. (C)(5)(a)(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;"	Sec. (C)(1): "…designate an official responsible for ensuring that the federalism consultation process is executed appropriately and completely."
Avenues for Administrative Appeal and/or Judicial Review	Sec. (C)(3)(a): "…accountable process..."	Sec. (B)(2): "…accountable process…"
Review of Agency Consultation Procedures, Implementation, and Effectiveness	Sec. (C)(5)(a): "Governors call on the President to revisit [E.O. 13132]..." Sec. (C)(5)(a)(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."	Sec. (C)(1): "…designate an official responsible for ensuring that the federalism consultation process is executed appropriately and completely."