

# **EPA's ACTION DEVELOPMENT PROCESS**

## **Guidance on Executive Order 13132: Federalism**

**November 2008**

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## **List of Acronyms or Abbreviations in this Guidance**

<b>Big 10</b>	The ten largest national representative organizations for State and local governments, including those commonly called the "Big 7," plus two other organizations with whom OMB has asked agencies to consult. EPA also includes the Environmental Council of the States (ECOS) in this list, although consultation with this organization alone does not constitute compliance with the EO since it is not comprised of elected officials. The organizations and their contacts are listed in Attachment C.
<b>EO</b>	Executive Order. When used alone, it refers to EO 13132.
<b>FI</b>	Federalism implications. Under EO 13132, these are "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."
<b>OCIR</b>	EPA Office of Congressional and Intergovernmental Relations
<b>OGC</b>	EPA Office of General Counsel
<b>OMB</b>	Office of Management and Budget
<b>OPEI</b>	EPA Office of Policy, Economics and Innovation
<b>ORC</b>	EPA Office of Regional Counsel
<b>Order</b>	Executive Order 13132
<b>RNOs</b>	Representative National Organizations
<b>SLEOs</b>	State and Local Elected Representatives
<b>S/L</b>	State and local

## **How this Guidance Applies to You**

This guidance is for EPA managers and staff who are planning or developing actions such as regulations, policies, legislative proposals, adjudications, and waivers. It summarizes the provisions of Executive Order 13132, "Federalism."

The guidance also provides the parameters of EPA's policy on consulting with State and local governments under this Executive Order. For some actions, including those which may not have federalism implications (FI), EPA policy is broader than the Executive Order, reflecting EPA's commitment to early and meaningful intergovernmental consultation.

Even if you believe your action will have either no effects or minimal effects on State and local governments, you still need to read further. A short introduction to the Executive Order follows. Then, a table directs you to the part of the guidance that applies to your action.

## Introduction to Executive Order 13132

President Clinton issued Executive Order 13132, "Federalism," on August 4, 1999<sup>1</sup>. It became effective on November 2, 1999. The Executive Order ("EO" or "Order") stresses consultation with State and local ("S/L") governments and more sensitivity to their concerns. It also sets up a specific process for agencies to follow as they develop and implement actions that affect S/L governments. EO 13132 revokes Executive Order 12875, "Enhancing the Intergovernmental Partnership," and all previous Executive Orders on Federalism. The full text of the Order is attached at the end of this guidance.

### What is "Federalism?"

"Federalism is rooted in the belief that issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people." [Sec.2.(a)]. The EO lists nine principles that convey the "spirit" of the Order. These principles guide agencies in formulating and implementing **"policies that have federalism implications" (FI)**.

### What actions are subject to the Order?

EO 13132 generally applies to policies that have FI, which refers to regulations, legislative comments or proposed legislation, and other policy statements that have "substantial direct effects" on:

- (1) the States (the definition of "States" includes local governments);<sup>2</sup>
- (2) the relationship between the national government and the States; or
- (3) the distribution of power and responsibilities among the various levels of government.

The EO also applies to adjudications that preempt S/L law. An adjudication is the Agency's process for formulating an order. An order is final agency action that is not a rulemaking, such as a permit, administrative order, license, registration, or determination of applicability.

### What should I do if my action is subject to the Order?

What you should do depends on the type of action you have. In general, EO 13132 puts a strong emphasis on consulting with S/L officials, which are defined as **"elected officials or their representative national organizations."** Of course, you should continue to work with your professional S/L government counterparts, but consulting them alone will

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<sup>1</sup>64 FR 43255 (August 10, 1999).

<sup>2</sup>The definition of States does not include Tribal governments. Tribal governments are addressed by EO 13175.

not satisfy the requirements of EO 13132.

OMB has specifically designated nine national organizations as being representative of S/L officials for purposes of complying with the consultation requirements of the Order. It is EPA's policy that you also consult with a tenth organization – the Environmental Council of the States (ECOS) – if your action triggers the Order's requirements. However, consultation with ECOS alone does not constitute compliance with the EO since it is not comprised of elected officials. The Big 10 organizations offer the largest constituencies of elected and senior appointed officials in State and local government<sup>3</sup>. Attachment C includes addresses and websites for the Big 10 organizations.

The following table tells you where to continue reading, based on the type of action you have:

<b>If your action is a ....</b>	<b>Then go here for more information about whether the Order applies and what to do...</b>	
Regulation (or "rule")	Part 1	(page 7)
Legislative comments or proposed legislation	Part 2	(page 26)
Policy statement, guidance document, interpretive rule, or similar action	Part 3	(page 26)
Adjudication that preempts S/L law (such as a permit, registration, license, determination of applicability, etc.)	Part 4	(page 28)
S/L government request to waive some or all of the statutory or regulatory requirements that apply to it.	Part 5	(page 31)

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<sup>3</sup> The Big 10 include the National Governors' Association, National Conference of State Legislatures, U.S. Conference of Mayors, National League of Cities, Council of State Governments, International City/County Management Association, and National Association of Counties, plus the National Association of Towns and Townships, County Executives of America, and the Environmental Council of the States.

# Part 1 - Regulations (or "Rules")

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## 1.1 How will I know if my rule is subject to the Order?

EO 13132 applies to rules with Federalism implications. As noted previously, this means a rule that has substantial direct effects on:

- (1) the States (the definition of "States" includes local governments);
- (2) the relationship between the national government and the States; or
- (3) the distribution of power and responsibilities among the various levels of government.

Part 1.2 of this guidance, below, will help you identify several thresholds for determining whether your rule has FI (that is, *substantial direct effects*...). Later, part 1.5 of the guidance shows the steps in EPA's regulatory process where you determine FI. But, in short, work closely with your program office's Regulatory Steering Committee Representative or your Region's Regulatory Contact, and the attorney assigned to your rule from the Office of General Counsel (OGC). Or, if you are in a Region, work with your Regional Regulatory Contact and the attorney assigned to your rule by the Office of Regional Counsel (ORC). As you develop the rule and make preliminary regulatory decisions, continue to work with these contacts to review and revise, if necessary, your Federalism determination. If you determine your rule has FI, you should inform OCIR and Regulatory Steering Committee Representatives.<sup>4</sup>

## 1.2 What are the thresholds for determining if my rule has FI?

In most cases, EPA rules would have FI because they:

- impose substantial compliance costs, unless they are expressly required by statute or there are federal funds available to cover the S/L compliance costs; and
- preempt S/L law.

Even if your rule is not one of these two types, you still may determine that it meets the definition for FI. That is, the rule has "substantial direct effects" on S/L governments, even though these effects are unrelated to compliance costs or preemption.

OGC has created helpful flowcharts summarizing the EO's thresholds and requirements. These flowcharts are in Attachment B of this guidance.

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<sup>4</sup>To see the list of Regulatory Steering Committee Representatives or Regional Regulatory Contacts, go to "Intranet.epa.gov/adplibrary" and click on "Reg Steering Committee."

The threshold for each type of FI follows in paragraphs A, B, and C.

## **A. Substantial compliance costs**

As described below, there are two ways an EPA rule can be deemed to have FI due to substantial compliance costs.

### **1. Annual State/local expenditures of \$25 million or more**

If your rule contains a federal intergovernmental mandate— i.e., it is likely to result in the expenditure by State and/or local, governments in the aggregate of \$25 million or more in any one year -- **then EPA may conclude the rule has FI, unless:**

- the rule is expressly required by statute without the use of any discretion by EPA, or
- federal funds are available to cover the S/L governments' compliance costs for the rule.

The term, “required by statute,” is a narrow test; such rules are very rare. We interpret this to mean “specifically and explicitly compelled by statute without the use of any discretion by EPA.” While our rules are authorized by statute, most provide the Administrator with some discretion regarding content.

### **2. Impact on small governments**

If the impact of your rule on small governments is likely to equal or exceed 1% of their annual revenues, then as a policy matter, **EPA may conclude the rule also has FI, unless:**

- the rule is expressly required by statute without the use of any discretion by EPA; or,
- federal funds are available to cover the S/L governments' compliance costs for the rule.

EPA's National Center for Environmental Economics has developed technical guidance for economists on how to conduct the 1% test. See Attachment A.

## **B. Preemption of S/L law**

Generally, preemption is the doctrine that holds that certain matters are of such a national character that federal laws take precedence over S/L laws. When preemption occurs, an S/L government may not pass a law that is inconsistent with the federal law. There are three types of preemption:

- **Express preemption:** occurs when Congress' intent to preempt S/L law is stated expressly in the Federal statute.
- **Field preemption:** occurs when Congress' creation of a pervasive system of Federal regulation makes reasonable the inference that Congress left no room for S/L governments to supplement it, or where an act of Congress touches a field in which the Federal interest is so dominant that the federal system is assumed to preclude enforcement of S/L laws on the same subject.
- **Conflict preemption:** occurs when Federal and S/L law are in direct conflict or where S/L law stands as an obstacle to the achievement of Federal objectives.

In general, minor amendments to an existing preemptive program probably will not have FI. On the other hand, a significant new preemptive program may create FI.

Consult with your OGC workgroup representative and your Regulatory Steering Committee Representative or Regional Regulatory Contact to determine whether your rule preempts S/L law and has FI.

### **C. General FI (not addressed in A. or B. above)**

We expect that the vast majority of rules determined to have FI will be rules that either have substantial compliance costs or that preempt S/L law. However, as stated earlier, there may be some rules that do not meet either of these thresholds yet you still determine have FI. This determination requires a judgment call.

As with preemptive rules in general, minor amendments to an existing program probably will not have Federalism implications. On the other hand, a significant new program may have Federalism implications. Consult with the attorney assigned to your rule and your Regulatory Steering Committee Representative or Regional Regulatory Contact (RRC).

## **1.3 What do I do if my rule has FI ?**

### **A. All rules with FI**

If you determine that your rule has FI under any of the three thresholds that are summarized above in part 1.2, then the following general policymaking criteria apply to your rule:

- With respect to Federal statutes and regulations administered by the States, grant the States the maximum administrative discretion possible;

- Encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States;
- Where possible, defer to the States to establish standards;
- In determining whether to establish uniform national standards, consult with appropriate S/L elected officials or their representative national organizations as to the need for national standards and any alternatives that would limit the scope of national standards or otherwise preserve State prerogatives and authority; and
- Where national standards are required by Federal statutes, consult with appropriate S/L elected officials or their representative national organizations, prior to proposal, in developing those standards.
- If you are limiting the policy discretion of S/L governments in formulating or implementing the policy, then:
  - Carefully assess the necessity for such action. To the extent practicable, consult with S/L elected officials or their representative national organizations before implementing such action;
  - Only take the action if there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance; and
  - If you are uncertain as to whether national action is authorized or appropriate, consult with S/L elected officials or their representative national organizations to determine whether Federal objectives can be attained by other means.

Finally, if your rule has substantial compliance costs or preemption, go to the next paragraph (1.3 B). If your rule doesn't have substantial compliance costs or preemption, then under EPA policy you should consult to the extent practicable with either elected officials or other representatives of S/L governments (such as your professional counterparts). At a minimum, you should consult with the Big 10. The Big 10 offers the largest constituencies of elected and senior appointed officials in S/L government and are considered "representative national organizations" for purposes of the EO 13132. (The exception is ECOS, which is not comprised of elected officials.) As with all rules, discuss Federalism in your preamble.

## **B. Rules with FI and substantial compliance costs or preemption**

The following are additional requirements that apply if your rule has FI because of substantial compliance costs not expressly required by statute or covered by federal

funds, or if your rule preempts S/L law and has FI<sup>5</sup>. For any such rule, the EO, Administration policy, and EPA policy direct you as follows:

- Consult with S/L elected officials or their Big 10 representative organizations
- Your consultation should be "meaningful and timely." Generally, we interpret "meaningful and timely" to mean that consultation should begin as early as possible and continue as you develop the proposed rule. This helps to ensure that S/L elected officials or their representative national organizations are given an opportunity to consider and comment on your proposed approach for the issues that are of concern to them. That is why it is important to identify, as soon as possible, any Federalism effects your action may have. If EPA substantially changes its selected approach on these issues after the proposed rule's comment period, you should let those you consulted know about the change and why you made it, as appropriate.
- In a separately identified portion of the preamble to the regulation, provide a "Federalism Summary Impact Statement", which consists of: (1) a description of the extent of the Agency's prior consultation with S/L elected officials or their representative national organizations, (2) a summary of the nature of their concerns and the Agency's position supporting the need to issue the regulation, and (3) a statement of the extent to which the concerns of S/L elected officials or their representative national organizations have been addressed.
- If your draft final rule is subject to OMB review under EO 12866, you must include in the package you send to OMB a **Federalism Certification Form** signed by EPA's **Designated Federalism Official** (the AA for the Office of Policy, Economics and Innovation) that EPA has met the requirements of the Order in a meaningful and timely manner in promulgating the rule.

**Process for Federalism certification:** For Tier 1 & 2 rules, OPEI's Regulatory Management Division (RMD) will generate the Federalism Certification Form in preparation for the Final Agency Review meeting and coordinate signature by the Designated Federalism Official. For Tier 3 rules, the Regulatory Steering Committee Representative or Regional Regulatory Contact will send the rule and an unsigned certification form to RMD when the rule is ready for certification and submission to OMB.

When submitting a draft final regulation to OMB for review, you must provide a copy of any formal policy-related correspondence from S/L elected officials or their representative national organizations, and must, upon request, make available a copy of any other written communications submitted to the agency by

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<sup>5</sup> Preemption may cause the FI, or be in addition to any FI the rule otherwise has.

S/L elected officials or their representative national organizations.

The table in part 1.5 of this guidance shows where each of these requirements fits within EPA's process for developing regulations.

## **1.4 What do I do if my rule does *not* have FI?**

The answer to this question depends on whether your rule has any adverse impacts on S/L governments that are above a minimal level.

### **A. No FI, but your rule has more than minimal adverse impacts on S/L governments**

Even if your rule does not have FI, if it has any adverse impact on S/L governments above a minimal level, then you are subject to EPA's consultation requirements. In the spirit of EO 13132, it is EPA's policy to promote communications between EPA and S/L governments and solicit input from S/L government representatives when developing a regulation that will have any adverse impact above a minimal level on S/L governments. This internal policy is broader than EO 13132. It is EPA policy that, at a minimum, you:

- consult early, to the extent practicable given the nature and the timing of the action, with appropriate S/L government representatives. These can be elected officials, their representative national organizations, or your professional counterparts; and,
- discuss briefly in the preamble to your rule why the Order did not apply, any consultation that occurred, the nature of S/L government concerns, and how you addressed those concerns or why EPA decided not to implement the changes suggested.

### **B. No FI, and your rule does not have more than minimal adverse impacts on S/L governments**

There are no special requirements or policies that apply to your rule, other than to discuss briefly in the preamble to your rule why the Order did *not* apply. Also, follow the steps that part 1.5 below identifies as applying to all rules.

## **1.5 What steps do I need to follow for my rule?**

**EPA's existing rulemaking process** will serve as the vehicle for identifying Federalism impacts and complying with the Order.<sup>6</sup>

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<sup>6</sup>If you're not familiar with EPA's rulemaking process, you can refer to the 2008 Action Development Process Guidance. The 2008 guidance is posted on the Intranet at "[intranet.epa.gov/adplibrary](http://intranet.epa.gov/adplibrary)". Click on "Action Development Process." Alternatively, you can call your Regulatory Steering Committee Representative, Regional Regulatory Contact, or OPEI's Regulatory Management Division, 202-564-5480, for information.

The table that follows (pages 12-18) shows you where in EPA's regulatory process you comply with the Order's requirements and EPA policy. The table includes all the requirements discussed up to this point in this guidance.

## Table for Rules: What To Do for Federalism at each Step in EPA’s Regulatory Process

### How to use this table

△ After you determine whether your rule has FI, it will fall into one of the five categories below. Pick the category that fits your rule. Look for that category, or the word “all,” in the table on the next page to see the Federalism procedures that apply to your rule at each step of EPA’s regulatory process.

Category	Description	Where it was discussed in guidance
<b>A</b>	<b>Federalism implications/cost impacts.</b> Rule has FI because it is likely to result in expenditures by State and/or local governments, in the aggregate, of \$25 million or more in any one year, or it might impact small governments (populations of 50,000 or less) at 1% or more of their revenues and the rule is not specifically and explicitly compelled by statute without the use of any discretion by EPA and federal funds are not available to cover the S/L governments’ compliance costs for the rule.	Part 1.2A (Thresholds) Part 1.3A & B (Requirements)
<b>B</b>	<b>Federalism implications/preemption.</b> Rule has FI either because of, or in addition to, the rule’s preemption of S/L law.	Part 1.2B (Thresholds) Part 1.3A & B (Requirements)
<b>C</b>	<b>Federalism implications/general.</b> Rule has FI because it meets the general definition of FI in the Order, but not because of cost impacts with preemption.	Part 1.2C (Thresholds) Part 1.3A (Requirements)
<b>D</b>	<b>No Federalism implications/more than minimal impacts.</b> Rule doesn’t have FI, but has some adverse impact above the minimal level on S/L governments.	Part 1.4A
<b>E</b>	<b>No Federalism implications/only minimal impacts.</b> Rule doesn’t have FI, and has <u>no</u> adverse impacts that are above a minimal level on S/L governments.	Part 1.4B

**Important abbreviations in this Table**

**DFO** = EPA’s Designated Federalism Official (the AA for the Office of Policy, Economics and Innovation)

**SLEO/RNOs** = “State and local [elected] officials,” which the Order defines and limits to **state and local government elected officials** *or* their **representative national organizations**. For purposes of this EO, representative national organizations refers to the Big 10. Attachment C of this guidance includes a contact list.

**SLG Reps** = State and local government representatives. We are using this term to refer to non-elected representatives of State and local governments, such as our professional counterparts.

Regulatory Development Step...	Category to which it applies.....	Prior to proposal, the following Federalism activities apply.	If you have a Final Rule, the following Federalism activities apply.
<b>Tiering</b>	All	This first step of the rulemaking process begins with filling out an "Action Information Form" (also called the "Tiering Form"). The form will prompt you to identify if your rule will have <b>any</b> adverse effect on S/L governments, including preempting S/L law to any degree. Fill out the form as well as you can at this early stage.	N/A
<b>Workgroup convenes to develop proposal</b> (This applies to any workgroup, whether it's a formal Tier 1 or 2 workgroup or an informal Tier 3 workgroup).	All	Consult with your program’s Regulatory Steering Committee Representative <i>and</i> the attorney assigned to your rule, and OCIR about Federalism. As the workgroup plans and develops the rule, begin to determine whether the Order applies to your rule and advise OGC/ORC about <b>any</b> adverse effects you think the rule may have on S/L governments. Inform OCIR and your Regulatory Steering Committee Representative as soon as possible if you determine your rule has FI.	N/A

Regulatory Development Step...	Category to which it applies.....	Prior to proposal, the following Federalism activities apply.	If you have a Final Rule, the following Federalism activities apply.
<p><b>Analytic Blueprint</b> if your rule is Tier 1 or 2, or your office develops a Blueprint -- OR -- <b>"State/local Consultation Plan"</b> if your rule is Tier 3 and your office doesn't use a Blueprint.</p>	A, B, C	<p>Write down how you will consult with SLEO/RNOs. Put this in your Analytic Blueprint or in a document titled "State/local Consultation Plan." Part 1.7 has guidance on consultation.</p> <p><b>Complete the Blueprint or State/local Consultation Plan as soon as possible after Tiering the action.</b> This advance planning is critical to allocate resources for your rule and to develop a realistic timeline for completing it. Begin consulting as soon as possible.</p>	N/A
	D, E	<p>If your rule has an Analytic Blueprint, you are encouraged to address S/L government consultation. You don't have to develop an ABP for Tier 3 rules, but a "State/local Consultation Plan" is encouraged.</p>	N/A
<b>Consultation</b>	A, B	<p>Review the Federalism policymaking criteria in part 1.3A of this guidance. Consult with SLEO/RNOs. At a minimum it is the Administration's policy to consult with the nine national organizations and ECOS, often referred to as the Big 10. The Big 10 offers the largest constituencies of elected and senior appointed S/L government officials and are considered "representative national organizations" for purposes of the Federalism EO. See Attachment C of this guidance for the list of contact persons.</p> <p>Your consultation should be "meaningful and timely." Generally, we interpret "meaningful and timely" to mean that consultation should begin as early as possible and continue as you develop the proposed rule to ensure S/L elected officials or their representative national organizations are given an opportunity to consider and comment on our proposed approach for the issues that are of concern to them. That is why it is important to identify, as soon as possible, any Federalism effects your action may have. If EPA substantially changes its selected approach on these issues after the proposed rule's comment period, you should let those you consulted know about the change and why we made it, as appropriate.</p>	

Regulatory Development Step...	Category to which it applies.....	Prior to proposal, the following Federalism activities apply.	If you have a Final Rule, the following Federalism activities apply.
	C	Review the Federalism policymaking criteria in part 1.3A of this guidance. Consult to the extent practicable with SLEO/RNOs or SLG reps [EPA policy]. At a minimum, you should consult with the Big 10. See Attachment C of this guidance for the list of contacts.	
	D	<b>Consult</b> early, to the extent practicable given the nature and the timing of the action, with appropriate SLG reps. These can be elected officials, their representative national organizations, <i>or</i> your professional counterparts.	
	E	This step does not apply to your rule.	
<b>Drafting Preamble - Federalism Discussion</b>	A, B	After consulting with SLEO/RNOs, OMB “strongly recommends” that you develop a preliminary “Federalism summary impact statement”(FSIS) to include in a separately identified portion of the preamble. The FSIS should have the following: (1) A description of the extent of the Agency’s prior consultation with SLEO/RNOs; (2) A summary of the nature of their concerns; (3) The Agency’s position supporting the need to issue the rule; and (4) A statement of the extent to which the concerns of SLEO/RNOs elected officials have been met.	Finalize the FSIS you developed for your proposed rule, addressing each of the four points.
	C, D, E	EPA policy: briefly summarize whether the EO applies, any consultation that occurred, the nature of S/L government concerns, and how you addressed them.	

Regulatory Development Step...	Category to which it applies.....	Prior to proposal, the following Federalism activities apply.	If you have a Final Rule, the following Federalism activities apply.
<b>Final Agency Review</b> OR other closure process for Tier 3 rules	A, B	In the preamble you send to your workgroup, include the FSIS you developed. If OCIR requests, you should also send them the rule for review prior to signature.	In the preamble you send to your workgroup, include the FSIS you developed. If OCIR requests, you must also send them the rule for review prior to signature. If you know your rule must go to OMB for review under EO 12866, you must get a Federalism Certification Form signed by EPA's Designated Federalism Official. See the following step concerning OMB review.
	C, D, E	In the preamble you send to your workgroup, include a discussion of Federalism. If OCIR requests, you must also send them the rule for review prior to signature.	
<b>For Rules that will have OMB Review under EO 12866: Federalism Certification and Submission Requirements</b>	A, B	N/A. No Federalism certification is required for proposed rules, and no Federalism-specific submission requirements apply.	You must include a Federalism Certification Form signed by EPA's Designated Federalism Official (the AA for OPEI) in the package that you send to OMB for review. For Tier 1 & 2 rules, OPEI's Regulatory Management Division (RMD) will generate the Federalism Certification Form in preparation for the Final Agency Review meeting. RMD will coordinate signature by the Designated Federalism Official. For Tier 3 rules, the Regulatory Steering Committee Representative or Regional Regulatory Contact will send the rule and an unsigned certification form to RMD when the rule is ready for certification and submission to OMB. You must also give OMB a copy of any formal policy-related correspondence from SLEO/RNO officials and, on request, a copy of any other written communications sent to EPA by SLEO/RNO officials.

Regulatory Development Step...	Category to which it applies.....	Prior to proposal, the following Federalism activities apply.	If you have a Final Rule, the following Federalism activities apply.
	C, D, E	These categories don't need Federalism certification, and no Federalism-specific submission requirements apply.	
<b>Action Memo</b> Applies to rules for the Administrator's signature	All	Summarize your consultation, and give an assessment of any reactions you received about your rule or the adequacy of your consultation on the proposed rule from S/L governments, OMB, or OCIR.	Same as proposal. If EPA's Federalism Official certified your final rule, for category A or B rules that OMB reviewed under EO 12866, state that too.
<b>Workgroup Reconvenes after Proposal</b> This applies to a formal Tier 1 or 2 workgroup, or an informal Tier 3 workgroup.	All	N/A	If EPA substantially changes its <b>selected</b> approach on these issues after the proposed rule comment period, you should explain these changes in the preamble to the final rule.

## 1.6 What help and participation can I expect from OCIR as I develop my rule?

OCIR is EPA's principal point of contact for Congress, States and local governments. It is also the coordination point for other EPA offices and officials to interact with these entities. OCIR staff can help you assess issues of concern to other government entities, identify interested government officials, suggest ways for achieving their education and involvement, tailor information about rules for S/L government audiences, and develop and implement consultation plans. OCIR also can provide information about the various national associations representing S/L elected officials and governments, their membership and how to contact them. **Make sure you contact OCIR, through your Regulatory Steering Committee representative, regarding your plans to consult with elected S/L officials pursuant to the EO.**

As part of EPA's Regulatory Steering Committee, OCIR will be reviewing Tiering forms, Regulatory Agenda entries, and other reports to identify rules in which they want to participate. You are encouraged to contact OCIR about any help they can give you as you plan or conduct your consultation.<sup>7</sup>

It's important that you give OCIR timely information they may request, such as drafts of consultation plans or draft Federalism Summary Impact Statements, and that you carefully consider and respond, as appropriate, to their comments at the earliest stages of rulemaking. Here's a summary of the stages in the rulemaking process where you will interact with OCIR:

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<sup>7</sup> OCIR's Regulatory Steering Committee Representative is available to assist with your outreach to EPA's intergovernmental partners. To see an updated list of Regulatory Steering Committee Representatives or Regional Regulatory Contacts, go to "[intranet.epa.gov/adplibrary](http://intranet.epa.gov/adplibrary)" and click on "Regulatory Steering Committee."

Step	OCIR Participation on Rules
Tiering ...	OCIR may participate on your workgroup either as an active member or through a “side agreement” that asks the lead office to forward its consultation plan to OCIR. OCIR should participate in all rules that have FI. If you can’t make an FI determination at the tiering stage, and for many rules you won’t be able to, <b>inform OCIR’s Regulatory Steering Committee Representative as soon as you determine your rule has FI.</b>
Analytic Blueprint/- Consultation Plan	OCIR may review your consultation plan and give you comments.
Final Agency Review (Tier 1 and 2 rules only)	If OCIR participates on your Tier 1 or Tier 2 workgroup, they will participate in Final Agency Review of your rule. Like all participating offices, OCIR will be asked to concur, concur with comment, or non-concur on the draft rule and preamble. If they non-concur, you should include their comments in the Action Memo you send the Administrator or the memo you send to your AA requesting his/her signature on your rule.
OMB Review under EO 12866	Under EO 13132, EPA’s Designated Federalism Official [the AA for OPEI] must certify each final rule with FI that will be reviewed by OMB. OPEI will notify OCIR whenever a rule is certified.

## 1.7 About consulting with S/L elected officials...

EO 13132 is not meant to replace one type of outreach or interaction with another. Rather, it puts a strong emphasis on engaging elected officials or their representative national organizations. To this end, most existing techniques and practices are still useful. And, as stated earlier, you should continue to work with your S/L professional counterparts. But the challenge here is expanding the venues to encourage and highlight involvement by elected officials.

## **Why consult?**

Consulting with officials from other levels of government:

- informs EPA about potential impacts on S/L governments and, therefore, helps us develop regulations that will work better in the field. This is particularly important because S/L governments carry out most of the day-to-day administration of many national environmental programs. Local governments often both manage environmental activities and operate regulated entities, such as waste and drinking water treatment facilities.
- can also help EPA develop proposed regulations that reflect approaches used in existing S/L government programs, taking advantage of existing mechanisms and lessons learned.

## **How much consultation is enough?**

EPA's general policy is that the amount and type of intergovernmental outreach and consultation for a rule should be commensurate with its estimated impacts on S/L governments, its complexity, and the level of interest in the issues involved. This policy focuses the most extensive outreach and intensive consultation efforts on those regulations of greatest interest to, and potential effect on, S/L governments.

Recognizing that S/Ls are often in a better position than EPA to identify the potential political and resource implications of regulations EPA is considering, you are strongly encouraged to consult with potentially affected S/L leaders or their national organizations before deciding how much consultation would be appropriate and before preparing a final consultation plan. Consultation is especially important at key points in the process, such as just prior to options selection. OCIR can help you to determine appropriate levels of consultation.

For rules with FI as defined under the Order, at a minimum you should consult, to the extent practicable, with each of the relevant representative national organizations in the Big 10. You should also inform OCIR of any contacts you have with these organizations. See Attachment C for White House direction on consultation and a list of contacts for the Big 10.

## **How do I communicate with elected officials?**

You should carefully consider what information to prepare and send to S/L government stakeholders. Information can serve two purposes: to promote understanding of what EPA is planning and why; and, to foster participation of these officials in the rulemaking process.

The Agency has a number of routine means to alert the public – including elected officials – that EPA is developing regulations. **EPA's Action Initiation List**, a web-based roster of regulatory actions that are entering the beginning stages of development, is made available to the public each month. <http://www.epa.gov/regulations/documents/ail-epa> Twice a year, EPA publishes the *Unified Agenda of Regulatory and Deregulatory Actions*, which describes EPA's planned rulemakings, indicates which rules are likely to have FI, and gives schedules for proposed and final rules.

In general, you will need to design information specifically for S/Ls needs and interests. You can begin your consultations with limited, preliminary information and provide more data as it becomes available. S/L government officials suggest that materials designed for them should be in plain language and, to the extent such information is available:

- Describe clearly the problem the rule is intended to address
- Explain the basis for determining there is a problem
- Indicate whether the problem is regional or national in scope
- Explain how the rule will improve on present conditions
- Identify who will benefit from the rule
- Identify what facilities or operations will be subject to the requirements
- Explain whether and how the benefits of the rule can be measured
- Identify who will be required to pay for the rule
- Provide cost information, such as cost per unit of compliance, cost to various sizes of governments, and cost versus benefits to be achieved
- Explain any flexibility in the rule that would allow for adjustments to local conditions or circumstances.

Some of this information will not be available until later in the development of a proposed rule. You can, however, begin your consultations with less than complete information and provide updates as more information becomes available.

Be sure to involve your OGC workgroup member when discussing these approaches in your outreach and consultation plans. You will need to be aware of any legal requirements, e.g., the Paperwork Reduction Act, that may apply to your approach and ensure your outreach and consultation activities are consistent with the law.

### **What types of consultation should I consider?**

EPA officials can meet with external parties throughout the regulation development process. You should explore a variety of approaches for involving S/L government officials in developing a regulation – including one-on-one discussions, public meetings, and interest group forums.

Be sure to involve your OGC workgroup member when discussing these approaches in your outreach and consultation plans. You will need to be aware of any legal requirements that

may constrain your approach and ensure your outreach and consultation activities are consistent with the law.

### **Does the Federal Advisory Committee Act (FACA) apply to consultations with S/L government representatives?**

Under UMRA’s FACA exemption, FACA does not apply to meetings that are “exclusively between federal officials and elected officials of S/L governments (or their designated employees authorized to act on their behalf) acting in their official capacities [if the] meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities.” [UMRA 204(b)].

OMB has construed this UMRA exemption broadly and has applied it to the Order: “This exemption applies to meetings between Federal officials and employees and State, local, or tribal government, acting through their elected officers, officials, employees, and Washington representatives, at which views, information, or advice are exchanged concerning the implementation of intergovernmental responsibilities or administration, including those that arise explicitly or implicitly under statute, regulation, or Executive Order. The scope of meetings covered by the exemption should be construed broadly to include any meetings called for any purpose relating to intergovernmental responsibilities or administration. Such meetings include, but are not limited to, meetings called for the purpose of seeking consensus; exchanging views, information, advice, and/or recommendations; or facilitating any other interaction relating to intergovernmental responsibilities or administration.”<sup>8</sup>

### **Do I need to keep records of Federalism consultations?**

Yes. You should keep good records of all consultation activities that you undertake related to the Order, and place them in the docket at the conclusion of the rulemaking. This helps to readily document compliance in the event of questions, either from EPA’s Designated Federalism Official, OCIR, or from OMB.

### **What issues are most likely to be of interest to elected officials?**

These are typical interests elected officials have expressed to EPA. They are concerned about rules that:

- Require money in the budget for program implementation;
- Require the S/L government to comply as a regulated party;
- May interfere with long standing divisions of responsibilities between levels of government;

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<sup>8</sup>OMB’s Guidance on Implementing Federalism, p.6. Available on the intranet at “intranet.epa.gov/adplibrary”. Click “Statutes and Executive Orders”.

- Appear to direct one single method of accomplishing a particular environmental objective;
- Impact industry or employment in the state or locality;
- Impact land use in the state or locality; and
- Raise controversial issues

### **What should be in a consultation plan?**

The consultation plan will serve as the road map for implementing your outreach activities. See Attachment E for suggestions and recommendations in developing your plan.

### **Other sources of help**

**Rulewriters.** Contact your office’s Regulatory Steering Committee representative or Regional Regulatory Contact. You may also contact OPEI’s Regulatory Management Division (RMD), (202) 564-5480, for general information about the EO 13132 and for help integrating consultation efforts into the regulatory development process. RMD supports the Agency’s Designated Federalism Official and submits packages to OMB under the Order. Finally, OCIR has ongoing involvement with the Big 10 and other officials. They can help you throughout the consultation process, from planning to implementation.

**Attorneys.** If you have questions, contact OGC’s Cross-Cutting Issues Law Office at (202) 564-7622 and ask to speak to the lead attorney for Federalism.

## **1.8 How will EPA ensure compliance with the Order?**

OPEI will gather the following information as we prepare EPA’s semi-annual Regulatory Agenda:

1. A listing of all rules that will have **any** adverse effect on S/L governments above a minimal level;
2. A listing of all rules under development with FI;
3. The status of Federalism consultation plans (e.g., under development, consulting with OCIR, etc.); and
4. Any reported problems in carrying out the consultation plan that may affect the Designated Federalism Official’s ability to certify that EPA has met the requirements of the order in a meaningful and timely manner.

OPEI will provide reports and a summary of any issues and recommended actions to the Designated Federalism Official, who has principal responsibility for EPA’s implementation of the Order.

## Part 2 - Legislative Comments or Proposed Legislation

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### 2.1 How does the Order apply to proposed legislation or legislative comments submitted by EPA?

The Order defines, “**policies that have federalism implications**” as including *legislative comments or proposed legislation* 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.

Accordingly, if EPA is submitting official agency legislative comments or proposed legislation to Congress or OMB, and the comments or proposed legislation have FI, the general policymaking criteria provided in Section 3 of the Order would apply (see part 1.3 of this guidance for a list of those criteria).

In addition, Section 5 of EO 13132 contains “Special Requirements for Legislative Proposals.” It says that *agencies shall not submit to the Congress* legislation that would:

- directly regulate the States in ways that would interfere with functions essential to the States’ separate existence or be inconsistent with the fundamental Federalism principles;
- attach to Federal grants conditions that are not reasonably related to the purpose of the grant; or
- otherwise preempt State law, unless such preemption is consistent with the Federalism policies in the Order, and unless a clearly legitimate national purpose, consistent with the Order’s Federalism policymaking criteria cannot otherwise be met.

EPA is interpreting these provisions as applying to proposed legislation or legislative comments *that are official Agency positions with Administration clearance*. At EPA, OCIR is the Agency’s principal point of contact with Congress, and has responsibility for developing and implementing the legislative agenda of the Agency.

Legislative comments or proposals that would fall within the scope of the Order are typically those on which OCIR has worked with all Agency offices to develop and/or draft, has worked with other departments and agencies within the Executive Branch to obtain Administration-wide concurrence and clearance through OMB, and has communicated to Congress.

As an example, if a Congressman or Senator has draft legislation he or she is planning to introduce, and sends a letter to the Administrator or an Assistant Administrator asking for *the Agency’s position* on that legislation, our legislative comments on that bill potentially would be subject to the requirements of Sections 3 and 5 of the Order. Similarly, if a Congressman or Senator asks EPA to submit draft legislation to him or her for

consideration, this potentially would be subject to the Order.

As with draft final rules that are subject to OMB review under EO 12866, when OCIR transmits to OMB for clearance any proposed legislation that has FI, OCIR must include a Federalism Certification Form signed by EPA's Designated Federalism Official that states EPA has met the requirements of the Order. In this case, the certification would be stating we have met the "Special Requirements for Legislative Proposals" contained in the Order.

Within EPA, the responsibility for determining whether there are FI and following the Order's requirements falls on the office that has the lead for drafting the substance of the draft legislation or legislative comments. The lead office should work closely with its OGC or ORC attorneys.

## **2.2 Does the Order apply when EPA provides comments to another agency on its draft legislation or provides technical assistance to congressional staff?**

No. Responding to another agency's request for comments on its draft legislation or testimony would *not* be subject to the Order, as these are *not* comments *submitted by EPA* to Congress. The duty to determine whether there are any FI for the draft bill or legislative comments falls upon the agency that is submitting the bill or comments.

Similarly, responding to a Hill staffer's request for technical assistance on how to craft or word a bill would *not* be subject to the Order, as EPA is merely responding to the request for technical assistance, not submitting to Congress draft legislation or official agency legislative comments.

## Part 3 - Other Policy Statements or Actions

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### 3.1 Are EPA's policy statements, guidance documents, and similar actions covered by EO 13132?

EO 13132 applies to regulatory policies that have FI, which includes policies, guidelines, guidance, and interpretive documents (“guidance documents”). In general, EPA’s guidance documents **do not establish legally binding requirements**, and thus, they probably will *not* have FI. If the guidance document doesn’t establish any legally binding requirements, then it won’t 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.” Nonetheless, EPA’s internal policy on consultation with S/L governments may apply to your guidance document. See part 3.3 below.

### 3.2 What consultation should take place if my policy statement, guidance document, or similar action contains legally binding requirements?

Regardless of what it is called, if your document **does establish legally binding requirements**, you must determine in consultation with your program’s Regulatory Steering Committee Representative and the OGC workgroup member whether your document has FI. Guidance documents that establish legally binding requirements are subject to the same FI analysis and consultation provisions that rules are subject to, as discussed in part 1 of this guidance. As with rules, the only clear-cut thresholds for FI are cost impacts on S/L governments (that is, whether your action either imposes \$25 million or more in costs on State and/or local governments in any one year, or will impact small governments at or above 1% of their revenues).<sup>9</sup> As a reminder, applying the threshold for preemption and FI should be done with assistance from OGC.

### 3.3 An important note about EPA’s internal policy on consulting with S/L governments on certain documents...

As noted in 3.1, EPA’s guidance documents generally do not establish legally binding requirements and will not have FI. However, some guidance documents, while not

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<sup>9</sup> In general, grant guidelines do not have FI under the substantial cost threshold (see part 1.2A) because conditions of federal assistance are excluded from the definition of federal intergovernmental mandate under Section 421(5) of UMRA. But you still need to determine whether your guideline meets any of the thresholds for determining FI (see part 1.2 B and C).

establishing legally binding requirements or FI, still may address matters *likely to be of significant interest* to S/L governments. While many EPA guidance documents are of *some* interest to S/L governments, we refer here to non-binding guidance documents or policy statements that may result in a higher level of interest to S/L governments because, for example, they announce for the first time how EPA is planning to address a significant environmental problem nationally and S/L governments may view our plan as having significant implications for them. Determining if your guidance document meets this threshold is a judgment call you should make in conjunction with your Regulatory Steering Committee Representative or Regional Regulatory Contact.

***If your guidance document is likely to be of significant interest to S/L governments...***

Even if your guidance document is exempt from EO 13132 because it doesn't have FI, in the spirit of EO 13132, and consistent with EPA's objective of promoting communication between EPA and S/L governments, EPA's policy is to solicit input from S/L officials on those guidance documents that are *likely to be of significant interest* to S/L governments. If you determine your guidance document meets this threshold, then EPA's policy is to:

- **Consult** early, to the extent practicable, given the nature and the timing of the action, with appropriate S/L government representatives. These can be elected officials, their representative national organizations, **or**, your professional counterparts. At a minimum, notify each of the Big 10 organizations (see part 1.7 of this guidance) and consult with them if they so desire; and
- **Discuss** briefly in your document any consultation that occurred, the nature of S/L government representatives' concerns, and how you addressed those concerns or why EPA decided not to implement suggested changes.

## Part 4 - Adjudications

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### **How will I know if my adjudication is subject to the Order?**

Section 4 of the Order establishes requirements for adjudications *that preempt S/L law*. An adjudication is any agency's process for formulating an order. An order is the whole or part of a final agency action that is *not* a rulemaking, whether affirmative, negative, injunctive, or declaratory in form. Examples of some EPA orders are applicability determinations, administrative orders, permits, licenses, and registrations.

In general, EPA's adjudications do not preempt S/L law. To the extent the S/L law is preempted, it is the statute or regulation that affects the preemption. Thus, the requirements of Section 4 of the Order generally do not apply to EPA's adjudications. If you have questions about the applicability of Section 4 to your adjudication, consult with the attorney assigned to your action.

## Part 5 - Waivers

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### What does the Order require for waivers?

Section 5 of EO 13132 contains requirements that apply to applications submitted to EPA by S/L governments seeking to waive some or all of the statutory or regulatory requirements that apply to them. These are the same requirements that previously were contained in EO 12875.

Specifically, if the authorizing statute gives EPA discretion to waive some or all of the statutory or regulatory requirements as applied to S/L governments, EO 13132 requires EPA, to the extent practicable and permitted by law, to:

- Consider any application by a S/L government for a waiver of statutory or regulatory requirements with a general view toward increasing flexible policy approaches at the S/L level, to the extent that the proposed waiver is consistent with applicable Federal policy objectives and is otherwise appropriate;
- Issue a decision within 120 days of receipt of a complete waiver application; and
- Provide timely written notice of the decision and rationale in the event that EPA denies any such waiver application.

## **Attachments**

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- Attachment A – Guidance for Implementing the Federalism “1% Test”
- Attachment B – OGC Flowcharts Summarizing EO 13132's Requirements
- Attachment C – White House Letter on Consultation and List of "Representative National Organizations" Contacts
- Attachment D – More Forums for Contacting Elected Officials
- Attachment E – Building a Consultation Plan: Key Elements
- Attachment F – Federalism Executive Order

## - Attachment A -

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### **Guidance for Implementing the Federalism "1% Test"**

#### **Introduction**

EPA's Guidance on Executive Order 13132, "Federalism", identifies various triggers for determining Federalism implications:

“...[I]f the impact of your rule on small governments is likely to equal or exceed 1% of their revenues, then as a policy matter, EPA will conclude the rule also has Federalism implications...”

This document serves as a starting point in the implementation of the Federalism 1% test by providing Agency analysts a consistent framework for carrying out this analytical test. In order to provide meaningful advice to analysts, this document incorporates a number of working assumptions. As the Agency gains experience applying the Federalism 1% test, the approach presented here will be revisited and revised if necessary.

#### **Applying the Federalism 1% Test**

Before presenting guidance on implementing this test, at least one caveat is in order. The language contained in the Federalism Guidance suggests an “aggregate” test – the analyst should calculate total annualized costs as a percent of total revenues for the local governments that must conform to the rule. The “aggregate” test does not consider any information on the distribution of impacts among the small governments. The impacts may be very small for a majority of the small governments, but hit a number (probably the smallest of the small due to economies of scale) of small governments very hard without triggering Federalism implications. No single test can capture all situations of concern. Therefore, the analyst is encouraged to develop information that will signal other possible scenarios that may provide enough concern to warrant consultation with representatives of small governments.

The following questions outline the steps analysts will need to take as they apply the Federalism 1% test.

### ***1. Will any small governments be subject to the rule's requirements?***

The default definition of small government is a government of a city, county, town, village, school district or special district which serves a population of less than 50,000. This is the same definition used by the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (RFA/SBREFA), and similar to the definition of small government in the Unfunded Mandates Reform Act (UMRA).<sup>10</sup>

If no small governments are subject to the rule's requirements, then the Federalism 1% test is not applicable. If there are only a few (less than 50) local governments affected by this rule, then a 1% test is not applicable. Rather, the program office should consult with a meaningful segment of these governments directly in the course of developing the rule.

### ***2. What are the total annualized compliance costs of all small governments subject to the rule's requirements?***

This cost estimate should be an aggregate measure of the annualized direct compliance costs faced by all small governments subject to the rule's requirements. In many cases, this cost estimate may already be contained in the economic impact analysis done for the rule. To the extent possible, the small government cost estimate should be based on the same assumptions (e.g., concerning a baseline, a discount rate, etc.) made in the rule's economic analysis. If there is some reason why those assumptions should be different within this analysis, the analyst should highlight the assumptions that are different and provide a detailed description of why different assumptions were made. The rulewriter then should consult with his/her program's Regulatory Steering Committee (RSC) representative or Regional Regulation Contact (RRC) and the attorney assigned to the rule. EPA's Guidelines for Preparing Economic Analysis specifies the basic, broad principles that all EPA economic analyses should embody.

In most cases, it will be necessary to use a range to represent plausible estimates of annualized direct compliance costs. This range will reflect different assumptions about the extent of the environmental problem, the ease or difficulty of achieving meaningful reductions in pollution, the costs of abatement equipment, the interest rate, the growth in population, etc. EPA's Guidelines for Preparing Economic Analysis discusses these uncertainty drivers and how best to incorporate them into analyses. The Guidelines also stress the importance of incorporating all plausible estimates. In general, the analyst will not be able to conduct appropriate Monte Carlo analyses without additional information about the underlying statistical distributions of these uncertainty drivers. Therefore, the analyst must take great care explaining and selecting ranges that capture both high and low reasonable bounds.

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<sup>10</sup>UMRA also includes tribal governments in its definition of small government.

In order to apply the Federalism 1% test, the midpoint or “best” estimate of that range should be used. A qualitative or quantitative description of the uncertainty surrounding the midpoint or “best” estimate should accompany the results of the test. Finally, if a non-trivial portion of the range exceeds 1% of revenues, then the analyst should discuss these findings with their RSC/RRC and attorney assigned to the rule before presenting the findings to the appropriate decision maker.

Note that, consistent with the guidance for RFA/SBREFA, the Federalism 1% test will not consider the indirect impacts of a rule on small governments (e.g., social service costs rising due to a plant closure in a community). These types of impacts should be explored in the full economic analysis of a rule but are not considered when determining whether a rule will impose substantial compliance costs on small governments for purposes of Federalism, and thus be deemed by EPA as having Federalism implications.

***3. What are the total annual revenues of all small governments subject to the rule’s requirements?***

Data on “general revenue” can be found in the Census of Governments from the U.S. Census Bureau. General revenue is made up of intergovernmental revenue plus revenue from their own sources and excludes utility, liquor store and employee retirement revenue.

It is important that the analyst include all the revenues (and costs) from the same set of communities – those that must comply with the rule. For example, demonstrating compliance with a rule (e.g., monitoring) can be costly, even if abatement activities are not needed. In these situations, the analyst should include these costs in the direct cost totals and also include the revenue of these small governments in the revenue totals. The analyst cannot count the revenues of one set of governments and the costs faced by a different set.

In situations where the number of governments that must comply with this rule is unknown, then a range of revenue estimates reflecting this uncertainty should be quantified.

***4. Is the ratio of small governments’ costs to revenues equal to or greater than 1%?***

The statement contained in the Federalism Guidance can be rephrased as follows:

<p>If <math>\frac{\text{total annualized compliance costs of all small governments subject to the rule’s requirements}}{\text{total annual revenues of all small governments subject to the rule’s requirements}}</math></p>	$\geq 1\%$ ,	<p>then EPA concludes that the rule has Federalism implications.</p>
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## - Attachment B -

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### OGC Flowcharts Summarizing EO 13132's Requirements

These flowcharts summarize the Federalism Executive Order. The section citations in the flowchart (for example, Section 5) refer to the text of the Executive Order, not to this guidance.

#### OGC Flowcharts For EPA Actions

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To determine . . .	See Flowchart
if you have a rule with FI based on substantial compliance costs	1-A
if you have a rule with FI that preempts S/L law	1-B
if you have a rule with FI that doesn't meet either of the above thresholds	1-C
the requirements that apply to "policies with FI"	1-D
the requirements that apply to legislative comments or proposed legislation	2
if you have a policy statement, guidance document or similar action with FI	3
the requirements that apply to requests from S/L governments to waive some or all statutory or regulatory requirements	4

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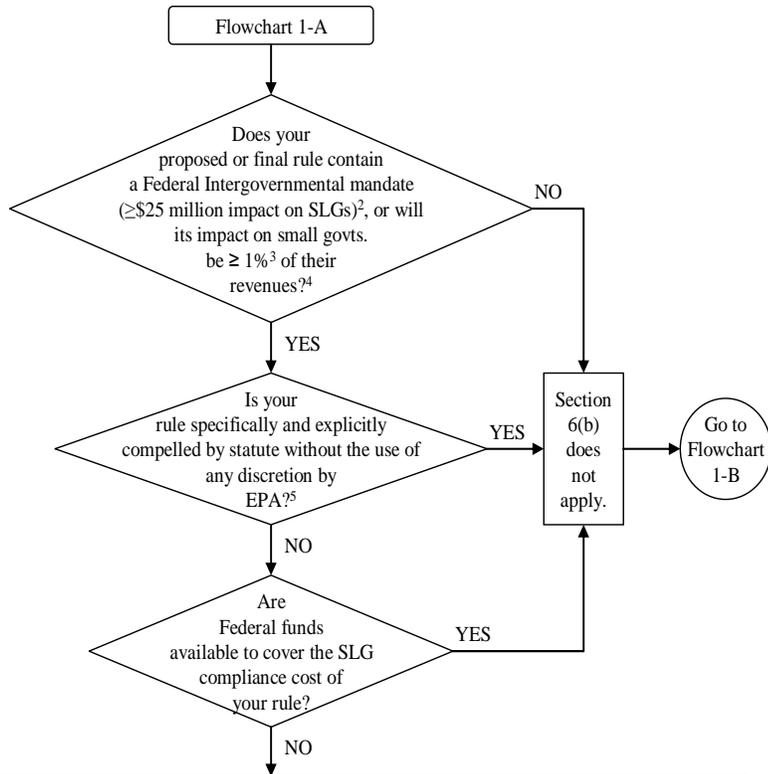
#### Important abbreviations in flowcharts

**DFO** = EPA's Designated Federalism Official (the AA for the Office of Policy, Economics and Innovation).

**SLEO/RNOs** = "State and local [elected] officials," which the Order defines as **state and local government elected officials** or their **representative national organizations**. For purposes of this EO, representative national organizations refers to the Big10. Attachment C of this guidance includes a contact list.

**SLG Reps** = State and local government representatives. We are using this term to refer to non-elected representatives of State and local governments, such as our professional counterparts.

**Flowchart 1-A**  
**To Determine If You Have a Rule with Federalism Implications**  
**(FI)<sup>1</sup>**

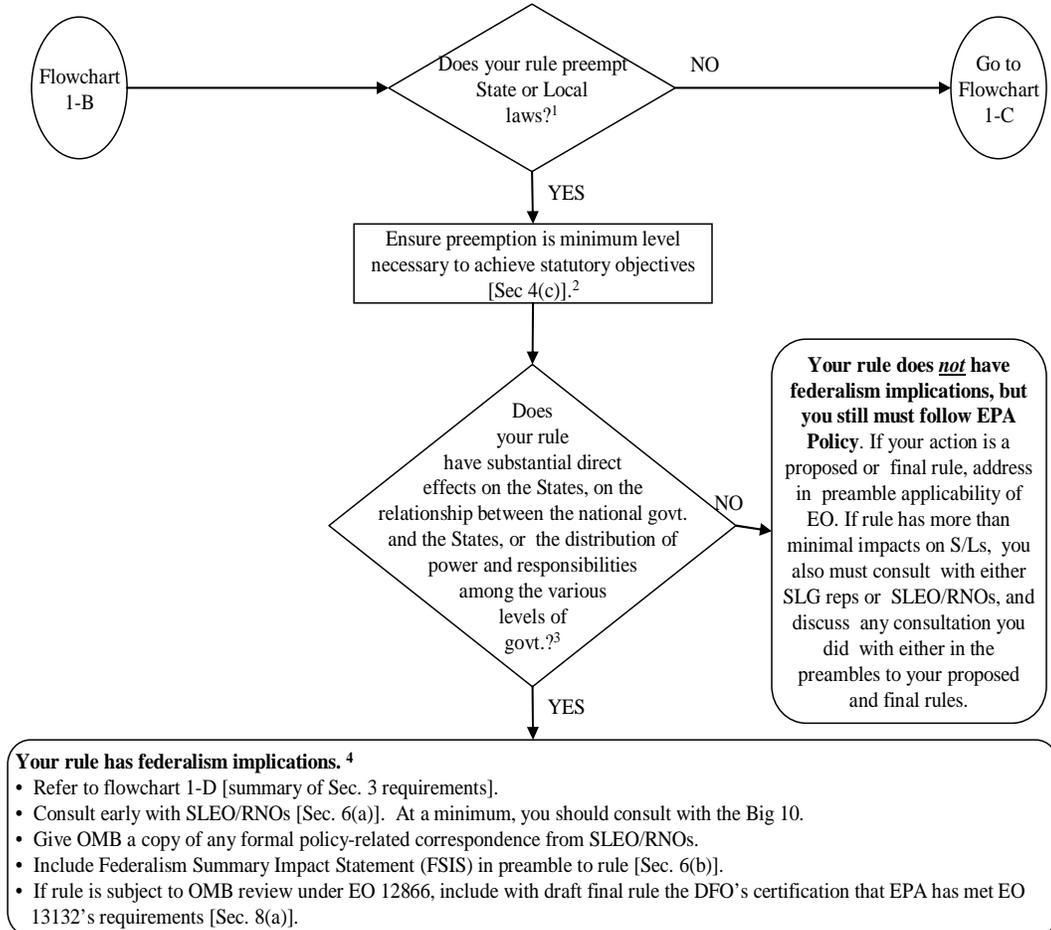


**Your rule has federalism implications.**

- Refer to flowchart 1-D [summary of Sec. 3 requirements].
- Consult early with SLEO/RNOs [Sec. 6(a)]. At a minimum, you should consult with the Big 10.
- Give OMB a copy of any formal policy-related correspondence from SLEO/RNOs.
- Include Federalism Summary Impact Statement (FSIS) in preamble to rule [Sec. 6(b)].
- If rule is subject to OMB review under EO 12866, include with draft final rule the DFO's certification that EPA has met EO 13132's requirements [Sec. 8(a)].

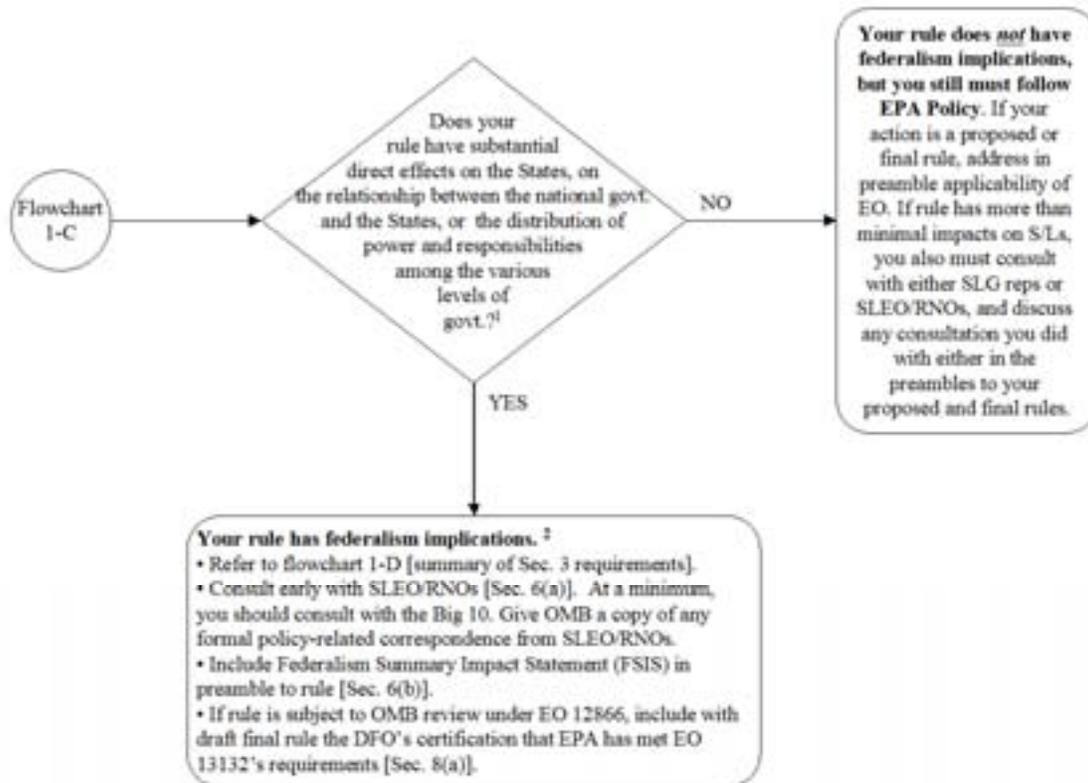
1. Section 1(a) of EO 13132 defines "federalism implications" as "substantial direct effects on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."
2. If your rule contains a Federal intergovernmental mandate that may result in expenditures of \$25 million or more in any one year by State and/or local governments, we consider it to have federalism implications and to impose substantial direct compliance costs under Section 6(b) of the Order.
3. For guidance on the >1% threshold for impacts on small governments, see attachment A of EPA Federalism guidance.
4. We interpret "required by Statute" in Section 6(b) of the Order to mean "specifically and explicitly compelled by statute without the use of any discretion by EPA." This is intended to be a very narrow test. While our rules generally are authorized by statute, most are not specifically and explicitly compelled by statute without the use of any discretion by EPA. Examples of rules that are "require by statute" include: if the statute says, "Use Form X," and the rule says "Use form X" and does not impose any other requirements; or if the statute says, "Set the emission limit at 100 ppm," and rule does only that.

**Flowchart 1-B**  
**To Determine If You Have a Rule with Federalism Implications (FI)**  
 (continued)



1. The question of whether your rule preempts State or local (S/L) law is a legal question. You should consult the OGC or ORC attorney assigned to your rule for a preemption determination.
2. An action may preempt S/L law in whole (e.g., States may not have any statutes or rules in an area once EPA enacts a rule in that area) or in part (e.g., States may not have any law that is less stringent than the federal law). Preemption may be: (1) express preemption—Congress' intent to preempt S/L law is stated expressly in the federal statute; (2) field preemption—Congress' creation of a pervasive system of federal regulation makes reasonable the inference that Congress left no room for S/L governments to supplement it, or Act of Congress touches a field in which the federal interest is so dominant that the federal system is assumed to preclude enforcement of S/L laws on the same subject; or (3) conflict preemption—federal and S/L law are in direct conflict, or S/L law stands as an obstacle to the achievement of federal objectives.
3. As shown on this flowchart, if the rule preempts S/L law to such a degree that it has federalism implications (i.e., "substantial direct effects..." [see large diamond]), or if the rule otherwise has federalism implications and also preempts S/L law, we must comply with the consultation requirements of Section 6(c). Determining whether the preemption creates federalism implications requires a judgment call. In general, minor amendments to an existing preemptive program probably will not have federalism implications. On the other hand, a significant new preemptive program may have federalism implications. You should consult with OGC/ORC and your program office's Regulatory Steering Committee representative or your Regional Regulatory Contact to determine whether the preemption creates federalism implications.
4. Determining whether a rule may have federalism implications for reasons other than compliance costs or preemption requires a judgment call. As with preemptive rules, in general, minor amendments to an existing program probably will not have federalism implications. On the other hand, a significant new program may have federalism implications. You should consult with OGC/ORC and your program office's Regulatory Steering Committee representative or your Regional Regulatory Contact to determine whether your rule may have federalism implications.

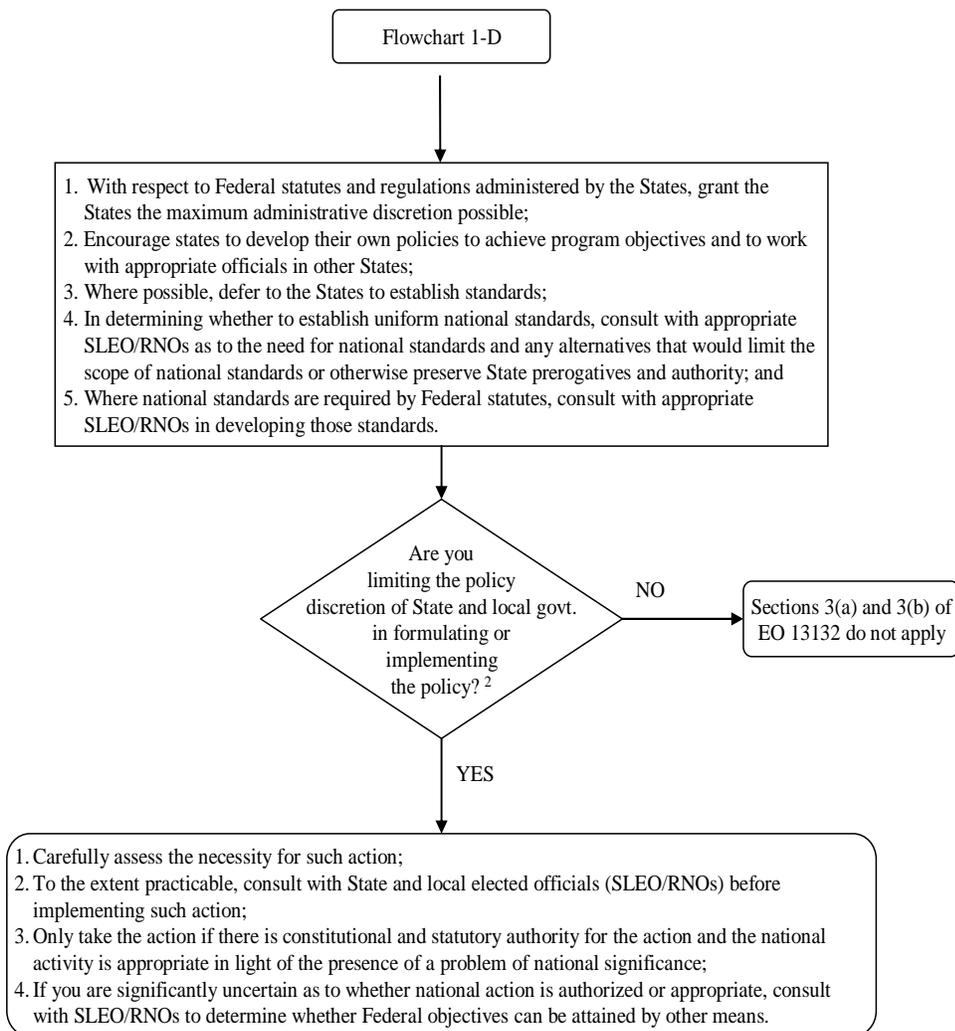
**Flowchart 1-C**  
**To Determine If You Have a Rule with Federalism Implications (FI)**  
 (continued)



1. As shown on this flowchart, if the rule preempts S/L law to such a degree that it has federalism implications (i.e., "substantial direct effects..." [see large diamond]), or if the rule otherwise has federalism implications and also preempts S/L law, we must comply with the consultation requirements of Section 6(c). Determining whether the preemption creates federalism implications requires a judgment call. In general, minor amendments to an existing preemptive program probably will not have federalism implications. On the other hand, a significant new preemptive program may have federalism implications. You should consult with OGC/ORC and your program office's Regulatory Steering Committee representative or your Regional Regulatory Contact to determine whether the preemption creates federalism implications.

2. Determining whether a rule may have federalism implications for reasons other than compliance costs or preemption requires a judgment call. As with preemptive rules, in general, minor amendments to an existing program probably will not have federalism implications. On the other hand, a significant new program may have federalism implications. You should consult with OGC/ORC and your program office's Regulatory Steering Committee representative or your Regional Regulatory Contact to determine whether your rule may have federalism implications.

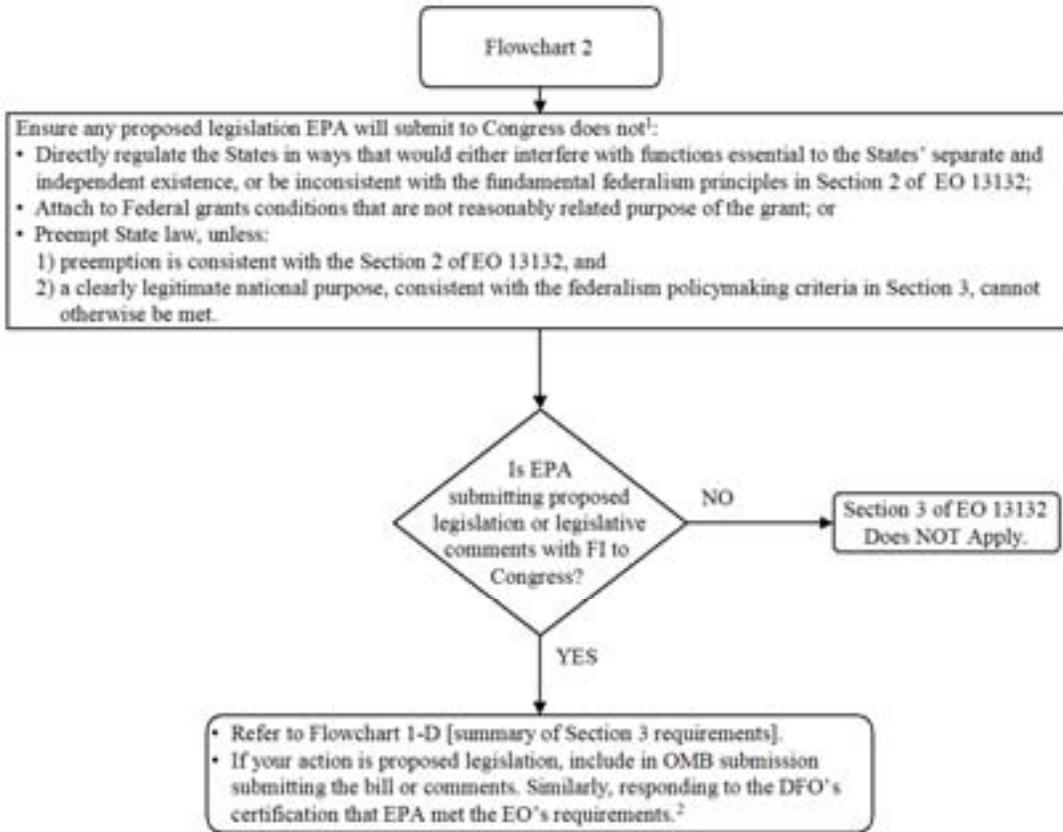
**Flowchart 1-D**  
**To Determine If You Have a Rule with Federalism Implications (FI)**  
 (continued)



1. If you determine that your action has FI from Flowcharts 1-A, 1-B, 1-C, or 2, then the requirements of Section 3 of the Order, which are summarized here, apply. "Policies that have federalism implications (FI)" is broadly defined in the Order to include 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. SLEO/RNOs = "State and local [elected] officials," which the Order defines and limits to state and local government elected officials or their representative national organizations. Representative national organizations for purposes of EO 13132 are the Big 10. The Big 10 offers the largest constituencies of elected and senior appointed officials in State and local government. Attachment C of EPA's interim Federalism guidance includes a contact list. At minimum, you must consult with each of these organizations if your action is a rule with federalism implications.

**Flowchart 2**  
**To Determine If You Have a Rule with Federalism Implications (FI)**  
 (continued)



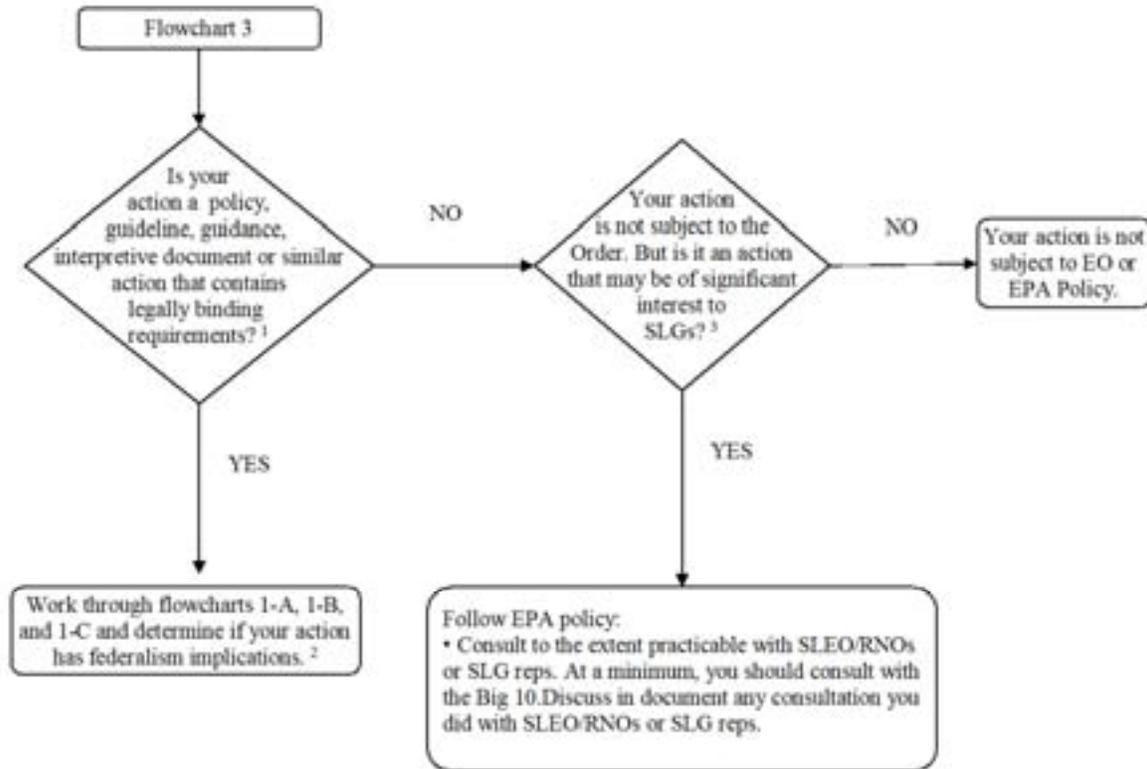
1. Official agency legislative comments or proposed legislation that have federalism implications (i.e., have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government) are subject to Section 3 of the Order (see Flowchart 1-D for summary of requirements). Section 5 also contains specific requirements that pertain to proposed legislation submitted by agencies to Congress (top box to the right).

EPA is interpreting these provisions as applying only to proposed legislation or legislative comments that are official Agency positions with Administration clearance. As an example, if a Congressman or Senator has draft legislation he or she is planning to introduce, and sends a letter to the Administrator or an Assistant Administrator in EPA asking for the Agency's position on that legislation, our submitting proposed legislative comments on that bill potentially would be legislation or legislative subject to the requirements of Section 3 of the Order.

The Order does not apply when you are responding to another agency's request for comments on their draft legislation or testimony, as these are not comments submitted by EPA to Congress. The duty to determine whether there are federalism implications on the draft bill.

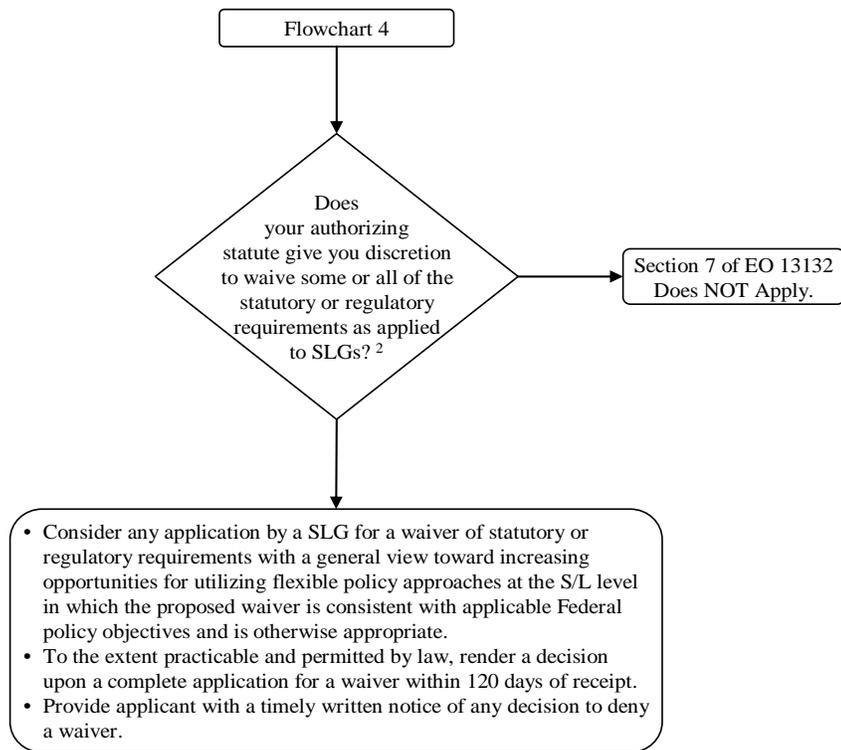
2. EPA's legislative comments don't have to be certified.

**Flowchart 3**  
**To Determine If You Have a Rule with Federalism Implications (FI)**  
 (continued)



1. In general, EPA's policies, guidelines, guidance, interpretive documents, or similar actions ("guidance documents") do not contain legally binding requirements, and thus, they will not have federalism implications. This is because if the guidance document does not contain legally binding requirements, it will not have "substantial direct effects" on: (1) the States (the definition for "States" includes local governments); (2) the relationship between the national government and the States; or (3) the distribution of power and responsibilities among the various levels of government.
2. If your guidance document does contain legally binding requirements, it is subject to the same federalism implications analysis that rules are. Thus, you should refer to flowcharts 1-A, 1-B, and 1-C to make this determination. If you determine that your guidance document does contain legally binding requirements, and has federalism implications, it is subject to the same requirements that rules are.
3. Even if your guidance document does not contain legally binding requirements, if it may be of significant interest to SLGs, it is subject to EPA's internal policy on consultation with State and local governments.

**Flowchart 4**  
**To Determine If You Have a Rule with Federalism Implications (FI)**  
(continued)



1. Section 7 of EO 13132 contains requirements that apply to applications submitted to EPA by State or local governments seeking to waive some or all of the statutory or regulatory requirements that apply to them.

2. *If the authorizing statute gives EPA discretion* to waive some or all of the statutory or regulatory requirements as applied to State or local governments [e.g., Clean Air Act Section 111(d)], you must look to increase opportunities for using flexible policy approaches at the State or local level in which the proposed waiver is consistent with the program administered by EPA. See part 3.3 of EPA's Federalism guidance for details.

**- Attachment C -**

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**White House Letter on Consultation and  
List of "Representative National Organizations" Contacts**

The White House  
Washington

March 9, 2000

Mr. Donald J. Borut  
Chair, Big 7 Organizations  
Executive Director, National League of Cities  
1301 Pennsylvania Ave, NW  
Washington, DC 20004-3043

Dear Don:

Thank you for your January 13 letter making further suggestions concerning the implementation of Executive Order 13132.

We see no problem in having agency Federalism officials begin to notify and provide information to the Federalism contact person at each of the relevant Big 7 organizations, as well as the chair of the Big 7, when the agency identifies Federalism implications in a draft regulation for which consultations have not already occurred. There will, of course, be circumstances when it also would be appropriate for an agency to notify other representative national organizations of State and local elected officials.

Once this notification occurs, we would ask that each Big 7 organization promptly advise the agency's Federalism official whether it intends to provide comments on the Federalism issues presented by the rulemaking and to provide those comments as soon as possible, taking into account the length and complexity of the regulation. In order not to delay the regulatory process unnecessarily, it is the agencies' hope that concerned Big 7 organizations normally will provide those comments within three or four weeks.

The Big 7 organizations may also wish to review the semiannual Unified Agenda of Federal Regulatory and Deregulatory Actions in order to identify regulatory projects that they believe might raise FI. In this way, a concerned Big 7 organization could advise an agency's Federalism official of its potential interest in a particular regulation and facilitate early consultations.

Enclosed is our listing of Federalism officials. Please forward a list of the Federalism contact person for each of the Big 7 organizations at your earliest convenience.

Thank you again for suggestions.

Sincerely,

//// signed 3/9/00 ////

Mickey Ibarra  
Assistant to the President and  
Director of Intergovernmental Affairs

## "Big 10" Organizations

Mr. Raymond Sheppach  
National Governors' Association  
444 North Capitol Street, NW  
Suite 267  
Washington, DC 20001  
fax 202/624-5313  
(staff: Beth Strobridge)

Mr. William Pound  
National Conference of State Legislatures  
444 North Capitol Street, NW  
Suite 515  
Washington, DC 20001  
fax 202/737-1069  
(staff: Tamra Spielvogel)

Mr. Daniel Sprague  
Council of State Governments  
444 North Capitol Street, NW  
Suite 401  
Washington, DC 20001  
fax 202/624-5452  
(staff: Gene Slusher)

Mr. Donald Borut  
National League of Cities  
1301 Pennsylvania Avenue, NW  
Suite 550  
Washington, DC 20004  
fax 202/626-3043  
(staff: Ken Rosenfeld)

Mr. Tom Cochran  
U.S. Conference of Mayors  
1620 Eye Street, NW  
Fourth Floor  
Washington, DC 20006  
fax 202/293-2352  
(staff: Judy Sheahan)

Mr. Larry Naake  
National Association of Counties  
25 Massachusetts Avenue, NW  
Washington, DC 20001  
fax 202/942-4281  
(staff: Julie Uffner)

Mr. Robert O'Neill  
International City/County Management Association  
777 North Capitol Street, NE  
Suite 500  
Washington, DC 20002-4201  
fax 202/962-3500  
(staff: Mosi Kitwana)

Mr. Keith Hite  
National Association of Towns and Townships  
1130 Connecticut Ave, NW  
Suite 300  
Washington, DC 20001  
fax 202/331-1598  
(staff: Andrew Seth)

Mr. Mike Griffin  
County Executives of America  
1100 H Street, NW  
Suite 910  
Washington, DC 20001  
fax 202/737-0556  
(staff: Mike Griffin)

Mr. R. Steven Brown  
Environmental Council of States  
444 North Capitol Street, NW  
Suite 445  
Washington, DC 20001  
fax 202/624-3666  
(staff Lee Garrigan)

## - Attachment D -

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### More Forums for Contacting Elected Officials

The Office of Congressional and Intergovernmental Relations (OCIR) is EPA's principal point of contact for Congress, States and local governments and is the coordination point for other EPA offices and officials to interact with these entities.<sup>11</sup> You are encouraged to contact OCIR as you develop your outreach and consultation plan.

#### **Associations' Sponsored Activities**

National associations of elected officials sponsor many forums, most of which are scheduled months in advance. These include:

- Policy Development Meetings
- National Meetings (in DC and elsewhere)
- Environment/Natural Resource Committee Sessions
- Program to Program Interactions
- Joint Sessions with EPA on Management Issues
- Association public policy research organizations' advisory groups
- Events and committees for stand-alone organizations created by S/L government associations (for example, Public Technology Inc).

National associations also produce publications, newsletters, "issue briefs," regulatory tracking reports, etc., which may be easy forums for communicating with elected officials.

#### **EPA Sponsored Activities**

EPA sponsors activities that can help you develop contacts or "leads" to contacts for consulting with S/L elected officials. Existing FACA committees may be a starting point. Individual members can point you toward potential work group members and resources for distributing information. OCIR can help identify those committees that might be best suited for involvement.

- Joint EPA-State Management Meetings [Such as the Water Directors, NEPPS]
- Work Group Memberships or Adjunct Memberships
- FACA Committees, especially the Local Government Advisory Committee, which is comprised principally of elected officials
- Specific Subject Meetings
- Technical Sessions
- OCIR association outreach meetings (monthly)

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<sup>11</sup>OCIR's Regulatory Steering Committee Representative is available to assist with your outreach to EPA's intergovernmental partners. To see an updated list of Regulatory Steering Committee Representatives or Regional Contacts, go to "intranet.epa.gov/adplibrary" and click on "Reg Steering Committee".

- Federal Register Announcements and Solicitations
- Publications for Comment, Press Notices
- Presentations, Speeches, Appearances, etc., by the Administrator or Senior Officials
- Grant and Contract Financed Subject Development Efforts
- Open Forums

## **Regional/State Specific Activities**

EPA regions interact routinely with, and do a great deal of outreach to, State and local organizations and elected officials. Generally, for the purposes of EO 13132, these contacts are not usually focused on regulatory and policy development, but on day to day program operations. These interactions, however, do offer: (1) an opportunity for expanding consultation under the Order; and (2) a base to build from to strengthen contacts with State and local contacts.

### **Regionally Sponsored Activities**

- State Director/Mayors' Meetings
- State Commissioners/Directors' Meetings
- Mayors' Forums
- Intergovernmental Forums
- Topical Discussion Sessions
- Regional Administrator Appearances

### **Other Regional Meetings**

There are many regional meetings of associations of elected and appointed officials (e.g. New England Governors, Western Governors, NCSL Southern Legislative Conference, etc). Many of these groups have working environmental and natural resource committees. Again, advance planning offers an opportunity to work with association staffers and officers to include specific issues as meeting topics. Such input can prove particularly valuable when a forthcoming rule is likely to have a significant or "disproportionate" effect on certain regions of the country.

- State/Municipal Leagues, County Associations Meetings
- Regional Elected Official Meetings [Western Governor's Association, etc.]

## **More S/L Government Venues**

- Annual Planning and Community Development Sessions
- Intergovernmental Association Meetings
- Regional Governmental Meetings
- State Agency Strategic Planning Hearings

## - Attachment E -

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### **Building a Consultation Plan: Key Elements**

The Office of Congressional and Intergovernmental Relations (OCIR) is EPA's principal point of contact for Congress, States and local governments and is the coordination point for other EPA offices and officials to interact with these entities. You are encouraged to contact OCIR about your consultation plans.<sup>12</sup>

#### **General Recommendations**

##### **Identify Issues, Interests and Impacts**

- What are the issues?
- What are the critical time lines and events?
- Who is involved?
- Who has an interest?
- Who will be impacted and how?

##### **Involve from the beginning**

- Early consultation is ideal.
- Carefully construct work groups to ensure needed expertise.
- Consider recruiting State and local representatives as participants on work groups, particularly on rules for which states serve as principal implementers. (see ADP guidance)
- Avoid prejudice.
- Consultation schedules should reflect critical and appropriate points for interaction.
- Allow for a full spectrum of opinion and interaction.

##### **Plan Outreach Strategies and Mechanisms**

- The outreach process also requires planning, with strategies as to audience, method of communication and content.

##### **Involve Regional Offices**

- Regional Offices should be actively involved in identifying and working with elected officials from their own States and localities.

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<sup>12</sup>OCIR's Regulatory Steering Committee Representative is available to assist with your outreach to EPA's intergovernmental partners. To see an updated list of Regulatory Steering Committee Representatives or Regional Contacts, go to "intranet.epa.gov/adplibrary" and click on "Reg Steering Committee".

## **Questions to Consider**

### **The Intergovernmental Stakeholders**

- Who are the principal S/L government stakeholders likely to be affected by and interested in this rule?
- Is the rule likely to be of interest to policy-level elected and appointed officials?
- Are there particular elected officials who have expressed interest in the subject area under development?
- Which environmental or technical agencies will administer the rule?
- What other governmental entities will have to take action (e.g., pass legislation, raise funds, be subject to requirements) because of the rule?
- Are any other government agencies (e.g., economic development, transportation, agriculture) likely to be affected or have an interest?

### **Intergovernmental Impacts**

- What is known about costs and other implications of the rule?
- Will the rule impact different government entities to different degrees or in different ways?

### **Unique Impacts**

- Will the rule have disproportionate impacts on any particular region of the country?
- Will the rule affect urban, rural, or other types of communities differently?
- How will outreach and consultation efforts be targeted and tailored in light of these unique or disproportionate impacts?
- Will small or very small communities be affected or be presented with unique compliance issues?
- What steps will be taken to notify small governments of the planned rule and to secure their participation?

### **Major Issues/Areas of Concern**

- What information will S/L government officials need to help them understand the potential implications of the proposed rule and why they should be interested?
- What issues are likely to be of major concern to the various categories of government officials?
- What steps should be taken to identify additional issues?

### **S/L Participants**

- What national associations represent the interests of the various government stakeholders?
- Is there an existing EPA advisory or operations committee that can provide intergovernmental perspectives?
- What other ways can EPA solicit S/L government input?

- How will other individual S/L officials interested in the rule be identified?
- How can Regional offices assist in securing their participation?

### **Outreach/Consultation Activities**

- What outreach and consultation efforts have already been undertaken?
- Are there more categories of potentially interested government stakeholders who have not yet been informed about the proposed rulemaking?
- What is the plan for disseminating information about the rule?
- What kinds of information/briefing materials will be needed? (key issues should be communicated in a way that elicits meaningful feedback from "policy generalists" and/or "political" audiences.)
- How will S/L government officials be involved in resolving issues and areas of concern?
- How and when will S/L officials be informed about the results of cost and other impact analyses?
- Will the Paperwork Reduction Act apply to the outreach/consultation activities?

### **Expertise Needed**

- What kinds of expertise from S/L officials would be especially helpful in designing this regulation or policy?  
Examples include:
  - Experts in particular technologies, industries, or scientific disciplines;
  - Economists, lawyers, or policy analysts specializing in particular areas;
  - Managers with experience in administering comparable programs at another level of government.
  - How can EPA enlist the help of experts at other levels of government?

### **Schedule/Resources**

- What is the schedule for key outreach and consultation activities?
- What resources -- staff, extramural funds, or other resources -- will be needed to carry out the consultation plan?
- What assistance is needed from other EPA offices (e.g., Regions, OCIR, OGC, OPEI?)

## - Attachment F -

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### Presidential Documents

Federal Register  
Vol. 64, No. 153  
Tuesday, August 10, 1999

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Title 3— Executive Order 13132 of August 4, 1999

#### **The President                      Federalism**

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to guarantee the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution, to ensure that the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies, and to further the policies of the Unfunded Mandates Reform Act, it is hereby ordered as follows:

**Section 1. Definitions.** For purposes of this order:

(a) “Policies that have federalism implications” refers to 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

(b) “State” or “States” refer to the States of the United States of America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States.

(c) “Agency” means any authority of the United States that is an “agency” under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) “State and local officials” means elected officials of State and local governments or their representative national organizations.

**Section 2. Fundamental Federalism Principles.** In formulating and implementing policies that have federalism implications, agencies shall be guided by the following fundamental federalism principles:

(a) Federalism is rooted in the belief that issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people.

(b) The people of the States created the national government and delegated to it enumerated governmental powers. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.

(c) The constitutional relationship among sovereign governments, State and national, is inherent in the very structure of the Constitution and is formalized in and protected by the Tenth Amendment to the Constitution.

(d) The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.

(e) The Framers recognized that the States possess unique authorities, qualities, and abilities to meet the needs of the people and should function as laboratories of democracy.

(f) The nature of 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. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues. One-size-fits-all approaches to public policy problems can inhibit the creation of effective solutions to those problems.

(g) Acts of the national government—whether legislative, executive, or judicial in nature—that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.

(h) Policies of the national government should recognize the responsibility of—and should encourage opportunities for—individuals, families, neighborhoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort.

(i) The national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government.

**Section. 3. *Federalism Policymaking Criteria.*** In addition to adhering to the fundamental federalism principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

(a) There shall be strict adherence to constitutional principles. Agencies shall closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and shall carefully assess the necessity for such action. To the extent practicable, State and local officials shall be consulted before any such action is implemented. Executive Order 12372 of July 14, 1982 (“Intergovernmental Review of Federal Programs”) remains in effect for the programs and activities to which it is applicable.

(b) National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance. Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means.

(c) With respect to Federal statutes and regulations administered by the States, the national government shall grant the States the maximum administrative discretion possible. Intrusive Federal oversight of State administration is neither necessary nor desirable.

(d) When undertaking to formulate and implement policies that have federalism implications, agencies shall:

(1) encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States;

(2) where possible, defer to the States to establish standards;

(3) in determining whether to establish uniform national standards, consult with appropriate State and local officials as to the need for national standards and any alternatives that would limit the scope of national standards or otherwise preserve State prerogatives and authority; and

(4) where national standards are required by Federal statutes, consult with appropriate State and local officials in developing those standards.

**Section 4. *Special Requirements for Preemption.*** Agencies, in taking action that preempts State law, shall act in strict accordance with governing law.

(a) Agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.

(b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rulemaking only when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute or there is clear evidence to conclude that the Congress intended the agency to have the authority to preempt State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) When an agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the agency shall consult, to the extent practicable, with appropriate State and local officials in an effort to avoid such a conflict.

(e) When an agency proposes to act through adjudication or rulemaking to preempt State law, the agency shall provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings.

**Section 5. *Special Requirements for Legislative Proposals.*** Agencies shall not submit to the Congress legislation that would:

(a) directly regulate the States in ways that would either interfere with functions essential to the States' separate and independent existence or be inconsistent with the fundamental federalism principles in section 2;

(b) attach to Federal grants conditions that are not reasonably related to the purpose of the grant; or

(c) preempt State law, unless preemption is consistent with the fundamental federalism principles set forth in section 2, and unless a clearly legitimate national purpose, consistent with the federalism policymaking criteria set forth in section 3, cannot otherwise be met.

**Section 6. *Consultation.***

(a) Each agency shall 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. Within 90 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order and that designated official shall submit to the Office of Management and Budget a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the State and local governments in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with State and local officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met; and

© makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by State and local officials.

© To the extent practicable and permitted by law, no agency shall promulgate any regulation that has federalism implications and that preempts State law, unless the agency, prior to the formal promulgation of the regulation,

(b) consulted with State and local officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met; and

(3) makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by State and local officials.

**Section 7. Increasing Flexibility for State and Local Waivers.**

(b) Agencies shall review the processes under which State and local governments apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by a State for a waiver of statutory or regulatory requirements in connection with any program administered by that agency 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.

© Each agency shall, 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 shall provide the applicant with timely written notice of the decision and the reasons therefore.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

**Section 8. Accountability.**

(b) In transmitting any draft final regulation that has federalism implications to the Office of Management and Budget pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has federalism implications to the Office of Management and Budget, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order, the Director of the Office of Management and Budget and the Assistant to the President for Intergovernmental Affairs shall confer with State and local officials to ensure that this order is being properly and effectively implemented.

**Section 9. *Independent Agencies.*** Independent regulatory agencies are encouraged to comply with the provisions of this order.

**Section 10. *General Provisions.***

(a) This order shall supplement but not supersede the requirements contained in Executive Order 12372 (“Intergovernmental Review of Federal Programs”), Executive Order 12866 (“Regulatory Planning and Review”), Executive Order 12988 (“Civil Justice Reform”), and OMB Circular A-19.

(b) Executive Order 12612 (“Federalism”), Executive Order 12875 (“Enhancing the Intergovernmental Partnership”), Executive Order 13083 (“Federalism”), and Executive Order 13095 (“Suspension of Executive Order 13083”) are revoked.

(c) This order shall be effective 90 days after the date of this order. Sec. 11. Judicial Review. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

THE WHITE HOUSE,  
August 4, 1999.

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