

US. Department of Energy  
Washington, D.C.

ORDER

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DOE 2030.3

9-29-89

SUBJECT: FEDERALISM GUIDELINES

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1. PURPOSE. To establish guidelines for Department of Energy (DOE) compliance with Executive Order 12612, "Federalism."
2. REFERENCES.
  - a. Executive Order (EO) 12612 of 10-28-87, which is designed to ensure adequate consideration and respect for the institutional interests of States and their subdivisions when an agency is formulating or implementing proposed policies that have federalism implications, including legislation, regulations, and any other policy statement or action.
  - b. EO 12291 of 2-17-81, which establishes procedures for Office of Management and Budget (OMB) review of Federal agency regulations.
  - c. Regulatory Flexibility Act (5 U.S.C. 601 et seq.), which establishes procedures and requirements for regulatory analysis.
  - d. OMB Circular A-19, which establishes procedures for agency-proposed legislation submitted to OMB for review.
  - e. DOE 1321.1B, DEPARTMENTAL DIRECTIVES SYSTEM, delineates responsibilities and procedures for DOE Directives.
  - f. DOE 1325.1A, CORRESPONDENCE MANUAL, details the system for preparing and controlling DOE correspondence.
3. DEFINITIONS.
  - a. Federalism Implications. Any proposed Federal, National Government, or Departmental policy, regulation, or legislation which would have a substantial direct effect on States, on the relationship between the National Government and the States, and on the distribution of power and responsibilities among the various levels of government.
  - b. Federalism Assessment. An evaluation of the likely effects, possible options, and rationale to be prepared for and used by a decision maker prior to implementation.

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DISTRIBUTION:  
All Departmental Elements

INITIATED BY:  
Office of General Counsel

#### 4. RESPONSIBILITIES.

- a. Heads of Departmental Elements. In formulating and Implementing any proposed policy, the heads of all Departmental Elements, through the appropriate policy level official authorized to take the proposed action, shall be responsible for:
  - (1) Thorough review of EO 12612.
  - (2) Review of proposed legislation, regulations, and other policies for possible federalism implications.
  - (3) Modifying, when possible, proposed legislation, regulations, and other policies that have federalism implications, in compliance with the principles, criteria, and requirements of sections 2 through 5 of EO 12612.
  - (4) Requesting the Deputy General Counsel for Environment, Conservation, and Legislation (GC-10) to determine when a policy that possibly has federalism implications requires a federalism assessment.
  - (5) Coordinating with the Assistant Secretary for Congressional and Intergovernmental Affairs (CP) to obtain assistance for consultation, to the extent practicable, with States to avoid conflict between State law and Federally protected interests within DOE's regulatory responsibility.
  - (6) When required, performing federalism assessments as described in paragraph 7 of this Order.
  - (7) Including statements of determination regarding federalism implications (including negative findings when indicated), as appropriate, in the text of or in documents accompanying the regulation, proposed legislation, or other policy.
- b. The General Counsel (GC-1) thru the Deputy General Counsel for Environment, Conservation, and Legislation (GC-10).
  - (1) Coordinates implementation of EO 12612.
  - (2) Resolves questions of interpretation of EO 12612.
  - (3) Reviews any proposed legislation, regulation, or other policy that has federalism implications to determine the need for a federalism assessment and for further modification to comply with the principles, criteria, and requirements of the order.
  - (4) Reviews and certifies adequacy of completed federalism assessments.

## 5. CRITERIA FOR DETERMINING WHETHER POLICIES HAVE FEDERALISM IMPLICATIONS.

- a. EO 12612, like EO 12291 and the Regulatory Flexibility Act, contains criteria for determining whether an action is subject to its substantive requirements. In general, States are the preferred authorities for developing and managing programs and otherwise ensuring their citizens' general welfare, according to their own conditions and needs. State policymaking discretion should be limited only where absolutely necessary. Similarly, intrusive, Federal oversight of State administration is neither necessary nor desirable. Specifically, under section 3(d)(1) of EO 12612, Federal agencies must encourage States to develop their own policies to achieve program objectives, refrain to the extent possible from imposing uniform national standards, and when national standards are required, consult with States in developing those standards.
- b. EO 12612 defines policies that have federalism implications as those which "have substantial direct effects on the State, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." These words should be interpreted in light of the following criteria:
  - (1) Substantial Direct Effect on States. The effect on a State appears to be of considerable importance and to be materially related to the State's authority to carry out traditional functions and responsibilities without regard to Federal law. Tying the availability of highway funds to implementation of a federally-imposed speed limit would have such an effect. (Interference in traditional police power to set speed limits.) Requiring accounting of expenditures of Federal highway funds would probably not have such an effect.
  - (2) Substantial Direct Effect on the Relationship Between the National Government and the States. Any policy that appears to change significantly the relative roles of the Federal and State government in a particular program context, lead to Federal control over traditional State responsibilities, or decrease the ability of States to make policy decisions with respect to their own functions, has a substantial effect. A budgetary change taken alone will not ordinarily have such an effect. However, a budgetary proposal which also changes the future roles and responsibilities of State governments would be substantial and direct regardless of the size of budgetary effects.
  - (3) Substantial Direct Effect on the Distribution of Power and Responsibilities Among the Various Levels of Government. This threshold criterion would be met by proposed policies which appear to change the locus of administration or policymaking for a function among levels of government. For example, requiring or prohibiting State use of local agencies to administer a program would be significant.

- c. Hypothetical Applications. The applicability of the requirements, for federalism assessment, to several hypothetical situations would be as follows:
- (1) An agency implementing a formula grant program may consider requiring that all States create a separate agency to administer the program. Imposing such a requirement would be a violation of EO 12612, absent a Federal statute requiring such action. It would, however, be reasonable to require that States maintain clear lines of control and accountability for services under the program, provided that the State were given flexibility in how to organize such an effort.
  - (2) A proposed policy would change the allocation formula of grant funds among the State. Some States would lose and others would gain several million dollars. Such a policy does not have a significant federalism effect because it does not have a substantial direct effect on a State's sovereign authority or responsibilities (fiscal issues of this nature are seldom federalism problems); nor does it change the roles and responsibilities of Federal and State governments, intrude on State policy or administration, or otherwise meet the criteria of the order. Therefore, the final policy decision may be made without regard to specific requirements of the order.
  - (3) Non-Germane Grant Condition. Any legislative proposal that imposes a grant condition not directly related to the purpose of the grant program has federalism implications and would be Inconsistent with EO 12612.
- d. Preemption. Section 4 of EO 12612 imposes special requirements to limit unnecessary preemption of State law. The order permits agencies to preempt State law by regulation or otherwise only when a statute is expressly preemptive; when there is firm and palpable evidence compelling the conclusion that Congress intended preemption; or when exercise of State authority directly conflicts with exercise of Federal authority. Preemption is to be minimized to the extent permitted by law. To the extent practicable, agencies must consult with States to avoid conflicts between State and Federal authority.
- e. Should the proposed action satisfy the criteria in paragraphs 5.a, 5.b, and 5.d. of this Order, the matter should be referred to GC-10 for a determination of the need for a federalism assessment.

## 6. REQUIREMENTS FOR PROPOSED ACTION.

### a. Legislation.

(1) DOE will refrain from drafting legislation that would interfere with functions essential to the States separate and independent existence or operate to displace the States freedom in areas of traditional governmental function (section 5(a) of EO 12612). Legislative proposals will require that such proposals include an entry for "Federalism Implications," stating whether the proposed legislation has or might have sufficient federalism implications. A full federalism assessment should be completed and attached to proposed legislation if sufficient federalism implications exist. This assessment will be transmitted to the Office of Management and Budget (OMB) with the OMB Circular A-19 submission. Accompanying transmittals will include federalism comments, as appropriate.

(2) Because EO 12612 specifically covers legislative comments, all bill reports (or comments on other agencies' bill reports) prepared by DOE will consider federalism issues. A bill's consistency or inconsistency with the principles, criteria, and requirements of the order should be discussed in the report (under the entry "Federalism Effects"). This does not mean that any particular formula must be used in letters to Congress or OMB, but that substantive points appropriate to the issue and context must be discussed.

(3) Federalism assessments will not need to be completed for comments on legislation for another agency. However, the originating office will consider federalism implications when preparing testimony regarding DOE's views on legislation. The federalism implications that have been identified should be included when appropriate.

b. Regulations and Rulemakings. The regulatory development, review, and publication process will be modified to include a section on "Federalism Effects" in each memorandum to the Secretary and Federal Register rulemaking notices (including but not limited to notice of substantive regulations, interpretative rules, and interpretations and procedures). If there is no federalism implication present, this will be briefly stated. If there are federalism implications, but GC-10 determines that a federal assessment is not warranted, then the preamble of a proposed or final rule will discuss those implications and the reasons for that determination. If the rule also meets the criteria of EO 12291 or the Regulatory Flexibility Act for preparation of an analysis document, a single document meeting the requirements of that order and that act, as well as EO 12612, may be prepared. DOE would only do a Federalism Assessment if the regulation is developed in-house. DOE will consider discussion of federalism implications in comments on other agencies rules.

c. Policy Actions.

- (1) When formulating policy, the originating office must refrain from limiting the policymaking capability of a State. Federal action should only occur when there is a problem of national scope. Constitutional authority must be clear and certain. policy initiatives which are formulated and transmitted throughout the Department in the correspondence system, as defined in DOE 1325.1A, will be reviewed for federalism implications. The most important transmittals are staff papers, Including Action Memorandums.
- (2) Federalism issues in proposed policy initiatives should be flagged and sent along with the package in Its normal decisionmaking channels. The review for federalism implications in policy proposals will be conducted by the appropriate policy level official in the originating office who is authorized to take the action Itself. Questions regarding federalism should be discussed with program counsel. If sufficient implications exist, GC-10 must be consulted. If GC-10 determines that a federalism assessment must be conducted, then, as is the case with legislation and regulation, it is the responsibility of the office originating the proposal.

- d. Other Actions. Policy initiatives that are not legislation, regulation, formulated through the Staff Paper process (e.g., proposed Executive Orders, draft Presidential memoranda, budget decisions, litigation strategy, environmental standards, Departmental directives, grants, security measures), or policy provided through the Departmental Directives Systems, as defined in DOE 1321.1B, will also be subjected to review under EO 12612. Any questions should be discussed with program counsel. Possible federalism Implications must be reviewed by GC-10.

7. FEDERALISM ASSESSMENTS.

- a. Text. Federalism assessments should meet the requirements of section 6(c) of EO 12612. They should state succinctly the likely effects, possible options, and rationale for the conclusion involved. Assessment should point out the probable effects of each option. Quality, not quantity, of analysis is preferred. In such cases, an appendix or attachment can be used if needed to keep the main text short and to the point.

- b. Format. The approach, depth, and use in decision making of an assessment will vary according to circumstances. All federalism assessments will include the following:
- (1) Date;
  - (2) Identity of originating office;
  - (3) Name of contact person and phone number;
  - (4) Summary of the proposed policy, regulation or legislation;
  - (5) Identification of provision or element of the policy which would be in conflict with the principles, criteria, and requirements of the order, with specific references to the sections of the order which would be violated;
  - (6) Discussion section on the likely costs and burdens on a State as a result of implementation, including likely source of fundings and ability of States to fulfill purposes of policy;
  - (7) Identification of extent of impairment of State ability to discharge traditional functions or other aspects of State sovereignty; and
  - (8) Identification and discussion of alternatives.
- c. Use of Federalism Assessments. The Assessment will be attached to all submissions under EO 12291, OMB Circular A-19, staff papers and other appropriate documents for final review by the usual authority (Secretary, Deputy Secretary, Under Secretary, OMB, etc.).

BY ORDER OF THE SECRETARY OF ENERGY:



DONNA R. FITZPATRICK  
Assistant Secretary  
Management and Administration





SAMPLE REGULATORY PREAMBLE LANGUAGE  
FOR POSSIBLE NEGATIVE DETERMINATION

Federalism Impacts.

Executive order 12612 requires that regulations or rules be reviewed for any substantial direct effects on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government. If there are sufficient substantial direct effects, then EO 12612 requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a regulation or a rule.

ALTERNATIVE 1

The principal impacts of today's regulation [rule] will be [ ]. The regulation (rule) is unlikely to have a substantial direct effect on the States, the relationship between the States and Federal government, or distribution the power and responsibilities among various levels of government.

ALTERNATIVE 2

The Department has identified substantial direct effects by today's regulation (rule) on State governments. Those effects include [ ]. To the extent appropriate, the Department has discussed these effects in giving Federal Register notice of today's regulation (rule). However, the Department has concluded that these effects do not have sufficient federalism implications to warrant preparation of a federalism assessment. The reasons for that conclusion are [ ].



U.S. Department of Energy  
Washington, D.C.

PAGE CHANGE

DOE 2030.3 Chg 1  
5-14-92

SUBJECT: FEDERALISM GUIDELINES

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1. PURPOSE. To transmit revised pages to DOE 2030.3, FEDERALISM GUIDELINES, of 9-29-89.
2. EXPLANATION OF CHANGE. To make organizational title editorial revisions to incorporate changes required by SEN-6. No substantive changes have been made.
3. FILING INSTRUCTIONS.
- | a. <u>Remove Page</u> | <u>Dated</u> | <u>Insert Page</u> | <u>Dated</u> |
|-----------------------|--------------|--------------------|--------------|
| 1 and 2               | 9-29-89      | 1 and 2            | 5-14-92      |
| 7 (and 8)             | 9-29-89      | 7 (and 8)          | 5-14-92      |
- b. After these pages have been filed, this transmittal may be discarded.

BY ORDER OF THE SECRETARY OF ENERGY:



DONALD W. PEARMAN, JR.  
Acting Director  
Administration and Human  
Resource Management

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    - d. OMB Circular A-19, which establishes procedures for "agency-proposed legislation submitted to OMB for review.
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Acting Director  
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