



EXECUTIVE ORDER D 2011-005

Establishing a Policy to Enhance the Relationship between State and Local Government

Frequently Asked Questions

General Applicability

1. Does the Executive Order D 2011-005 (EO-5) apply to agency actions other than rulemakings?

EO-5 applies only to state agency rulemakings that impose a mandate on local governments and to state agency waivers of statutory or regulatory requirements where such waivers are permitted by law.

2. What is considered a “local government”?

For purposes of EO-5, “local government” means a county, city and county, city, town, service authority, school district, local improvement district, law enforcement authority, city or county housing authority, or water, sanitation, fire protection, metropolitan, irrigation, drainage, or other special district, or any other kind of municipal, quasi-municipal, or public corporation organized pursuant to law.

3. What is considered a “mandate”?

For purposes of EO-5, §29-1-304.5 C.R.S. governs what may be considered a mandate.

Per §29-1-304.5(3)(d), C.R.S., “state mandate” is defined as:

Any legal requirement established by statutory provision or administrative rule or regulation which requires any local government to undertake a specific activity or to provide a specific service which satisfies minimum state standards, including but not limited to:

- (I) Program mandates which result from orders or conditions specified by the state as to what activity shall be performed, the quality of the program, or the quantity of services to be provided; and
- (II) Procedural mandates which regulate and direct the behavior of any local government in providing programs or services, including, but not limited to, reporting, fiscal, personnel, planning and evaluation, record-keeping, and performance requirements.

From this definition, §29-1-304.5(2) C.R.S. excludes certain categories of mandates. Of particular importance are the kinds of mandates encapsulated in EO-5's Types 1 and 2 mandates. Specifically, a "new mandate or increase in the level of service for an existing mandate beyond the existing level of service which is the result of (1) any requirement of federal law, (2) any requirement of a final state or federal court order, or (3) any requirement of state law" is excluded from what may be considered a mandate under EO-5. Additionally, a "new mandate or increase in the level of service required as a result of an 'optional' federal program that the state has chosen to participate in" is excluded from what may be considered a mandate under EO-5.

4. If compliance with the rule or regulation creating a mandate is optional for local government, or if any direct costs to comply with the mandate by local government are funded by state government, is the regulation still considered a "mandate" for which compliance with the EO-5 is required?

Yes. EO-5 directs state agencies to reach out to local governments early in the rulemaking process, to involve interested local governments in the development of any proposed rule and in the rulemaking hearing. This coordination and collaboration with local governments remains an important goal of EO-5, even if local governments have the ability to opt out of complying with the mandate or do not have to incur the direct costs to comply with the mandate.

5. The Guidance talks about an "agency point of contact" contacting designated local government. Who is the "agency point of contact"?

Each state department is to select an individual to be the single point of contact for all initial inquiries from local governments regarding proposed or on-going rulemaking proceedings. (This individual is known as the Communication Coordinator and is designated by the Executive Director). Although this state department point of contact may refer the local government to a specific contact within the rulemaking agency (This individual is known as the Rule Administrator) for a response to the local government's inquiry, the department point of contact should have general information regarding the status of all proposed rulemakings within the department to assist local governments. This Communication Coordinator (as well as the Rule Administrator) will also have

access to the EO5 listserve (along with others within the state agencies) for purposes of sending out notices.

6. Are state agencies required to comply with the EO-5 Guidance for rulemakings that are underway at the time EO-5 becomes effective?

State agencies should comply as much as possible with the Guidance for rulemakings that are underway at the time EO-5 becomes effective. This would include, to the extent reasonable, notifying local governments of the rulemaking, asking local governments to submit the \ Local Government Questionnaire, and providing a report to OSPB prior to the rulemaking hearing. State agencies should also submit documentation of the extent to which they were able to comply with the EO-5 to the OSPB prior to the rulemaking hearing.

7. Are state agencies responsible for complying with the EO-5 Guidance for alternative rule proposals submitted by either local governments or other stakeholders during the rulemaking process?

No. The OSPB report generated by the Salesforce system will indicate whether local governments submitted alternative rule proposals. State agencies should be prepared to provide detail on the alternative proposals submitted upon request from OSPB.

Phase 1 – Rule Conception

1. When must a state agency contact local governments about a rulemaking?

If a state agency determines that the proposed rule may impose a mandate on local governments, the local governments must be notified via the Salesforce system. This communication should be sent to local governments as soon as possible after the state agency first decides to consider going forward with a rule so that the local governments have an opportunity to provide relevant information to the state agency and to participate in any stakeholder process in the development of the draft rule. Although the Guidance does not establish a specific time when the Invitation to Participate must be sent, because the state agency will need to demonstrate to the Office of State Planning and Budget (OSPB) that local governments had sufficient opportunity to participate in the rulemaking process, early notification is advised.

2. To whom at the local government does Invitation to Participate need to be sent?

The Invitation to Participate should be sent to appropriate local government stakeholders in the Salesforce system developed through the EO5 process.

3. How will the Invitation to Participate be sent to all the local governments, and how will the forms be sent back to the state agencies once the local governments fill them out?

These forms can be filled out on-line and can be sent and returned on-line. The state agency sending out and receiving these forms will have access to all on-line forms associated with the individual rulemaking, including forms returned by local governments.

4. What should the state agency do with the forms returned by the local governments?

Because all forms are returned to the state agency on-line, the state agency only needs to maintain them on this web-site until later in the process when the state agency will generate a report for OSPB (see below). The state agency should engage those local governments that have indicated an interest in the rulemaking and involve them in the stakeholder process.

5. What should the state agency do if the local government disagrees with the state agency's classification of the mandate?

No formal action is required; however, the state agency should engage the local government to determine why the local government disagrees with the state agency's determination, and to involve the local government in the rulemaking development and process.

Phase 2 – Rule Development with Stakeholders

1. If the proposed rule might impact both local governments and others, such as private industry, does the state agency need to engage the local governments separately, or can the state agency conduct one stakeholder process that includes all interested participants?

The state agency is not required to conduct a separate stakeholder process for only local governments; however, the state agency may meet separately with any interested stakeholder following its existing processes. State agencies should document summaries of all communications with local governments, be they combined stakeholder meetings, individual meetings, telephone conversations, email exchanges, etc. This documentation will be submitted to the OSPB prior to the final adoption of the rules.

2. The Local Government Input Questionnaire asks local governments to indicate what the costs of the rule could be for the local government, and whether the local government will need to hire additional personnel. Can the state agency explore the potential beneficial impacts on local governments from going forward with the proposed rule?

Yes. The state agency should continue to identify and analyze all impacts to all stakeholders if the proposed rule is adopted.

Phase 3 – Rule Draft

1. When should the Local Government Input Questionnaire be sent to local governments?

The Local Government Input Questionnaire, along with a copy of the proposed rule must be sent to the local governments who have indicated an interest in the rulemaking proceeding no later than at the time the rule is published by the Secretary of State.

2. How much time should the state agency give local governments to fill out and return the Local Government Input Questionnaire?

The state agency has the discretion to decide when the questionnaire must be returned. This may depend on when the rulemaking hearing is scheduled. The state agency should give the local governments' sufficient time to prepare and send a response, keeping in mind the need to submit the required information to the OSPB for its review and potential recommendation before the rule is adopted. Identifying the time frame for response needs to be included in the description of the rule.

Phase 4 – OSPB Review

1. When does the state agency need to submit documentation to the OSPB?

The state agency must submit the OSPB EO5 Report that details the communication and the feedback from the returned Local Government Questionnaires to OSPB for OSPB review and potential recommendation. The report can be automatically generated and emailed to OSPB via the Salesforce system. This submittal must occur before the rule is adopted, which in most cases would be prior to the start of the actual rulemaking hearing. OSPB can take up to 7 business days to review the material and make its recommendation; therefore agencies are encouraged to submit the required documents to OSPB at least 2 weeks before the scheduled rulemaking hearing. Agencies are also encouraged to submit documentation as soon as possible to OSPB where the agency has classified the mandate at

3 or 4, or where there are significant issues raised by local governments in the pre-hearing process to enable a full review by OSPB prior to the hearing.

2. What will be the OSPB process during its review?

Where needed by the OSPB or where requested by the state agency, the OSPB will engage the state agency to better understand the authority for, and the purpose and intent of the proposed rule, the stakeholder process and any alternatives to going forward with the proposed rule. The OSPB may also discuss the proposed rule with the local governments and with other stakeholders involved in the rulemaking process.

OSPB will take up to two weeks to review the report. The agency may request that OSPB take less time in reviewing the report.

After completing its review, OSPB will respond to the agency with any questions or concerns. Upon completion of its review, OSPB will email the agency informing the agency to proceed with the rule making process.

Mandates

1. Why does the guidance identify four types of mandates? What is the difference?

EO-5 is designed to strengthen the relationship between state and local governments by recognizing and minimizing the burden that local governments bear because of an increasing number of state regulatory requirements. EO-5 directs state agencies to develop stronger communication and collaboration between the state and local government when state regulations are developed. State agencies are directed to maximize local flexibility and to minimize excessive interference, oversight and unnecessary regulations from state government for local governments where possible.

There are, however, areas where the state agency has little, if any, flexibility in adopting regulations. Agencies derive their authority from state statute. This authority may include specific mandates for the agency, and may closely prescribe the flexibility the state agency has in adopting regulations. This authority may also refer to mandates established under federal law to guide the state agency in its rulemaking. State authority may also be specifically directed by court order, or by the terms imposed by the federal government for programs the state elects to participate in. The four types of mandates identified in the EO-5 Guidance are intended to reflect the levels of flexibility the state agency may have in adopting regulations. Where the mandate is created by state or federal law, by court order, or by the required terms of a federal program the state is participating in, the mandate is not “created” by the state agency, and the state agency may proceed with the rulemaking, so long

as the agency demonstrates to the OSPB that sufficient outreach and local government opportunities for participation in the rulemaking process have occurred. Where, however, the state agency has flexibility to determine whether a mandate may be imposed on local government, or what level or type of mandate may be imposed, the OSPB will review the proposed rule, and will make a recommendation whether the rulemaking proceeding should continue.

2. How should a state agency categorize a mandate where it is required by state or federal law, but there is some limited flexibility in what regulation the state agency adopts?

The on-line forms allow state agencies to select more than one type of mandate. If the state agency selects more than one type of mandate, it should explain why it did so, and what it believes is the level of flexibility it has in imposing mandates on local governments. As the stakeholder process proceeds, the state agency needs to clarify to local governments and all stakeholders the limits of its flexibility to consider alternatives to the rule, and the state agency should give particular consideration to those allowable alternatives that impose the least burden on local governments.