



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

FEB 04 1994

MEMORANDUM FOR: The Chairman
Commissioner Rogers
Commissioner Remick
Commissioner de Planque

FROM: William C. Parler
General Counsel

SUBJECT: IMPLICATIONS OF THE FEDERAL ADVISORY COMMITTEE
ACT FOR AGREEMENT STATE PARTICIPATION IN
COMMISSION ACTIVITIES

FOUO-1111111111

Over the past several months, the Commission has expressed interest in the implications of the Federal Advisory Committee Act (FACA) for the early involvement of the Agreement States in NRC decisionmaking. The most recent Commission action in this regard was the Staff Requirements Memorandum of January 25, 1993 on the status of the NRC Agreements States Program,¹ in which the Commission requested that the staff explore methods, including a review of any similar efforts undertaken by the Environmental Protection Agency (EPA), by which the Agreement States could be consulted on matters such as the development of rules and policy without the need to establish formal advisory committees under FACA. I have prepared this memorandum to clearly indicate those areas of Agreement State involvement where the requirements of FACA would be invoked and those areas where FACA does not apply. I have also included a brief analysis of the options that might be pursued to provide for early Agreement State participation for those actions that do have FACA implications. I would anticipate that these options will be more fully explored, with our full

¹ Other examples include a September 30, 1993 SRM on SECY-93-244, in which the Commission requested that the staff promptly inform the Commission if FACA created any problems or potential problems for early Agreement State involvement in the implementation of the Medical Use Regulatory Program. In a January 10, 1994 Commission briefing on the status of the Agreement States program, Commissioner de Planque recommended that the staff ascertain how the EPA addresses FACA issues in its relationship with State governments. Commissioner Rogers, in his comments on CR-93-187, a letter from Chairman Selin to Robert R. Kulikowski, Chairperson of the Organization of Agreement States, recommended that the Office of General Counsel expeditiously provide the Commission with the options that might be available for involving the Agreement States in staff deliberations while they are still in the creative stage.

9404070047 940330
PDR STPRG ESQGEN
PDR

cooperation and assistance, in the staff response to the January 25 SRM. I have also attached a November 19, 1993 memorandum on FACA from my office to the staff which was prepared in response to a previous Commission SRM on the medical use regulatory program.

BASIC REQUIREMENTS OF FACA

FACA governs the formation and operation of advisory committees by Federal agencies. The term "advisory committee" may be defined generally to include any committee or similar group (1) established or utilized² in the interest of obtaining advice or recommendations for the President or one or more Federal agencies and (2) which is not composed wholly of full-time Federal officials and employees. Guidance and coordination on the administration of FACA are provided by the General Services Administration (GSA) and GSA has promulgated regulations on the application of FACA at 41 C.F.R. Section 101-6.1001 et seq.. The Commission's regulations on the implementation of FACA are set forth in 10 CFR Part 7 of the Commission's regulations.

If FACA does apply to a group, it must be chartered before it can begin operating. This means drafting a charter for the group and submitting the charter for review to the General Services Administration's Committee Management Secretariat and the Office of Management and Budget. Other FACA requirements include balanced membership, notice and openness of meetings, keeping of minutes, and availability to the public of copies of documents the group receives or issues.

FACA IMPLICATIONS FOR SPECIFIC TYPES OF NRC ACTIONS

Whenever an NRC official establishes a committee, panel, task force, or any other group not composed entirely of full-time Federal employees to provide consensus advice or recommendations on issues or policies that fall within the scope of the official's responsibilities, it is likely that the group is engaging in the type of activities which could be subject to FACA. Agreement State representatives are not full-time Federal employees and consequently, their membership on an NRC-initiated committee could trigger the requirements of FACA. Although FACA and the GSA implementing regulations provide for some groups to be excepted from the requirements of the Act, there is no general exception from the requirements of FACA on the basis that the only outside parties are State governments. In this context, the formation by

² According to the GSA guidelines, a committee does not fall within the "utilized" portion of the FACA definition until, through institutional arrangements, the government adopts the committee as a "preferred source [of] advice." 41 C.F.R. Section 101-6.1003. However, there is little guidance on what constitutes a "preferred source of advice" or "institutional arrangements."

NRC of a committee composed of NRC employees and Agreement State employees to develop a recommended course of action for NRC consideration would be subject to FACA. For example, if the Working Group on the development of the compatibility policy or the Programmatic Assessment Group to review the NRC Agreement State Program included a representative from the Agreement States as a member, FACA would apply.

However, there are still possibilities for obtaining Agreement State viewpoints without establishing an advisory committee under FACA. I have included these possibilities in the examples provided below of opportunities for early Agreement State involvement that would fall outside of FACA. These examples do not require formal advisory committees under FACA either because no "group" is involved, or because the committee or group was not established by the Commission, or because the group was not intended to provide group advice or recommendations as opposed to individual opinions, or because the group was only intended to exchange information as opposed to the formulation of advice or recommendations. These examples are as follows--

- o use of an individual hired by the NRC as an expert consultant, or of a State employee working for the NRC on a temporary basis under the Intergovernmental Personnel Act, to provide knowledge of the Agreement State perspective to NRC officials, including NRC working groups;
- o where representatives of Agreement States provide recommendations on an individual basis through presentations at a meeting with NRC officials;
- o where a Task Force established by the Agreement States provides recommendations to the Commission through the submission of a report or through a briefing of NRC officials, for example, the Organization of Agreement States Task Force on the Commission's Compatibility Policy; other examples would include a task force or working group established by the Agreement States or a similar body that includes representatives of the NRC or other Federal agencies as members, such as the proposed working group on data gathering and reporting;
- o meetings of a specified group of participants, including Agreement States, to provide individual viewpoints to NRC officials, for example, the workshops associated with the enhanced participatory rulemaking on site cleanup standards;
- o meetings called by the NRC for the purpose of providing information to the Agreement States, for example, the Agreement States managers meeting or NRC presentations at the All Agreement States annual meeting;

- o comment by individual Agreement States on the early drafts of proposed NRC rules or policies.³

OPTIONS TO RESOLVE FACA ISSUES

The above examples demonstrate that there is a broad range of actions that the Commission can use to solicit Agreement State views at an early stage in the decisionmaking process. However, there may be cases where the most effective way to do this will be through Agreement State participation on an NRC working group or task force intended to develop recommendations for the Commission. The requirements of FACA would apply in these cases. There are several options for addressing the FACA issue in these circumstances--

1. Comply with FACA. The NRC could simply charter the working group as a FACA committee and comply with the other requirements of FACA. The potential drawbacks would be that the chartering process could add several weeks to the process of instituting a working group and there is no guarantee that the charter would be approved given the recent Executive Order⁴ that imposes stricter requirements on the creation of advisory committees. These drawbacks would be exacerbated if a number of committees to address different subjects would eventually need to be chartered. However, once chartered, the impact of FACA requirements such as open meetings would not be burdensome.
2. Charter an umbrella Agreement States Advisory Committee. This advisory committee would be designed to provide the Commission with Agreement State advice generally on a broad range of potential topics. Subcommittees could be established to address specific topics, such as compatibility. It would not be necessary to charter these individual subcommittees so long as they do not provide advice directly to the agency. These subcommittees, like the parent committee, might be required to comply with the FACA requirements such as open meetings.
3. Utilize the good offices of the Advisory Commission on Intergovernmental Relations (ACIR). FACA exempts certain advisory groups from its coverage, such as the ACIR. The ACIR

³ It is not entirely clear to the General Counsel, considering the flexibility demonstrated by these examples, what actual problems for early Agreement State involvement are presented by FACA. In terms of other legal requirements, such as the Administrative Procedure Act and the Freedom of Information Act, there would apparently not be any bar to involving our fellow regulators early in the regulatory process.

⁴ E.O. 12838, 58 FR 8207 (February 12, 1993).

is designed to foster closer working relationships between the Federal government and state governments. Assuming that arrangements could be worked out with ACIR, the Commission could convene a committee of NRC and Agreement State personnel under the auspices of the ACIR to develop recommendations on a particular topic. However, this vehicle should only be used sparingly because it is ancillary to ACIR's primary mission and subject to its other priorities. Accordingly, any NRC plans to involve the Agreement States under the auspices of the ACIR should be reserved for a significant issue.

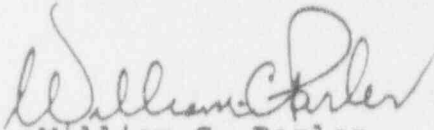
4. Pursue legislation to exempt Agreement States interactions from the coverage of FACA. In this regard, the EPA has also addressed the FACA implications of working closely and freely with State governments. In its report "Strengthening Environmental Management in the United States" (attached), the EPA Task Force to Enhance State Capacity recommended that the EPA propose specific changes to FACA that would recognize the right of States, as delegated managers of EPA programs, to be consulted on matters of policy and management of national environmental programs without the need to charter formal advisory committees. I believe that this need is equally, if not more so, applicable to the NRC Agreement States, our partners in regulation. According to our conversations with EPA personnel, the EPA is looking for an appropriate legislative vehicle to propose these changes. In the interim, the EPA tries to take advantage of FACA exemptions to achieve its goals. I will continue to explore the feasibility of the application of FACA exemptions for working more closely with Agreement States, and developing legislation that would exempt Agreement States from the requirements of FACA, including any cooperative efforts with EPA that might facilitate the enactment of such legislation.

I also would note that the policy that would serve as the basis for this legislation, i.e., the unique status of the Agreement States as co-regulators under Section 274 of the Atomic Energy Act, also provides further assurance and support for providing opportunities for early Agreement State involvement such as those identified on page 3 of this memorandum without concern about FACA implications. There is one Federal district court judicial opinion which could be read to provide some support for the concept that committees composed of State officials which are required to meet with Federal officials regarding programs that are shared by Federal and State governments, such as the Agreement States program, are excepted from FACA requirements.⁵ However, there is no appellate decision of which we are aware on that issue. Furthermore, there is no clear language in FACA to this regard and the legislative history

⁵ See Natural Resources Defense Council vs. Environmental Protection Agency, 806 F. Supp. 275 (D.D.C. 1992).

of FACA indicates that FACA was intended to have broad coverage. This background, coupled with the availability of other mechanisms to involve the Agreement States in NRC's regulatory process at an early stage without invoking FACA, suggests to me that it would not be prudent at this time to rely on the unique status of Agreement States under Section 274 as a basis for a blanket exemption from FACA.

As I noted above, my office will provide whatever assistance is necessary for the staff in respond to the Commission's SRM of January 25, 1994. I hope this memorandum will be a useful starting point for that response.


William C. Parler
General Counsel

Attachments: As stated

cc: EDO
SECY