



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

November 19, 1993

MEMORANDUM FOR: Carl J. Paperiello, Director
Division of Industrial and
Medical Nuclear Safety
Office of Nuclear Material Safety
and Safeguards

FROM: Martin G. Malsch
Deputy General Counsel for
Licensing and Regulation

SUBJECT: AGREEMENT STATE PARTICIPATION AND THE
FEDERAL ADVISORY COMMITTEE ACT

This is in response to your memorandum of October 29, 1993, regarding the participation of Agreement State representatives in NRC regulatory issues that affect the States. Specifically, you asked whether such participation can be facilitated within the current framework of the Federal Advisory Committee Act (FACA) and what steps may be necessary to enable Agreement State and NRC representatives to consult without forming formal advisory committees.

Whenever an NRC official establishes a committee, panel, task force, or any other group not composed entirely of full-time Federal employees to provide advice or recommendations on issues or policies that fall within the scope of the official's responsibilities, it is likely that the group is subject to the FACA. Since Agreement State representatives are not full-time Federal employees, inviting them to work with NRC employees to develop a position on issues or policies that fall under NRC responsibilities requires an examination of the applicability of the FACA to interactions between NRC staff and outside parties.

FACA implications of such interactions were addressed most recently in a September 1993 memorandum from the General Counsel to the Executive Director for Operations (copy attached). This memorandum provides guidelines that capture the salient regulatory exceptions to the application of the Act, and they should help the staff to determine how they can structure meetings with Agreement State representatives without implicating the FACA. (There is no general exception for groups based on the fact that all the outside parties are Agreement State representatives.)

Meetings aside, it is generally possible to solicit individual written opinions of outside parties without implicating the FACA,

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even if the outside parties are asked to comment on a draft document we provide for their review. In addition, recent case law indicates that it is permissible for an outside group that is not established by a Federal agency to provide advice to the agency. Thus, FACA may not be implicated if the Agreement States themselves set up a group consisting of non-Federal employees for the purpose of having the group provide advice or recommendations to the NRC.¹ GSA regulations indicate, however, that this falls outside of the FACA only if the Federal agency does not use the group as a preferred source of advice.

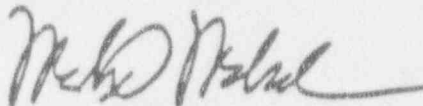
If the FACA does apply to a group, it must be chartered before it can begin operating. Initially, this means drafting a charter for the group and submitting the charter for review to the General Services Administration's Committee Management Secretariat and the Office of Management and Budget. John Hoyle, NRC's Committee Management Officer, can provide guidance to the staff with regard to preparation of the necessary documents and other administrative steps that must be taken. Once in operation, the group must comply with the FACA requirements regarding notice and openness of meetings, keeping of minutes and availability to the public of copies of documents the group receives or issues.

Congressional action would be required to enable NRC employees and outside parties to work together without forming a formal advisory committee when their interactions are of the type that normally fall under FACA. Such Congressional action would most appropriately be in the guise of an amendment of either the FACA or the Atomic Energy Act. GSA's Committee Management Secretariat has informally advised us that there have been some instances in which the Congress has expressly provided that a particular committee is not subject to the FACA. However, such statutory exceptions are few in number,² even though many agencies have asserted that it is inappropriate to apply the FACA to a particular committee. Should the Commission decide that an effort should be made to obtain a statutory exemption in order to

¹In the case of Agreement States, a similar result might also be achieved under GSA regulations, though the route might have to be a bit more circuitous. Under those regulations, FACA does not apply to any State or local group "established to advise or make recommendations to State or local officials or agencies." 41 C.F.R. 101-6.1004(f).

²There have also been some instances in which the Congress has provided a statutory waiver of one or more FACA requirements, such as rechartering or keeping minutes, without exempting the committee from the entire Act.

facilitate the participation of Agreement State representatives in NRC working groups, we will, of course, be happy to prepare a legislative package for submission to the Congress.



Martin G. Malsch
Deputy General Counsel for
Licensing and Regulation

Attachment:
Sept. 22, 1993 Memorandum
from W. Parler, General Counsel
to J. Taylor, EDO

ATTACHMENT

September 22, 1993 Memorandum
from William Parler, General Counsel to James Taylor, EDO