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June 2, 2021

MEMORANDUM

TO: Fish and Wildlife Committee Members

FROM: Patty O'Toole, John Shurts, Andrea Goodwin

SUBJECT: Overview of the Federal Advisory Committee Act and its relevance to the work of the Council

BACKGROUND:

Presenter: Patty O'Toole, John Shurts

Summary: At the June Council meeting John Shurts (General Counsel) will describe the Council's unique relationship to with 1972 Federal Advisory Committee Act (FACA).

Relevance: This relationship guides Council establishment of various advisory committees and workgroups including the recently established Strategy Performance Indicator workgroup.

Workplan: Program Performance A. 3.

Background:

At the June Council meeting John Shurts will describe the Council's unique relationship with the 1972 Federal Advisory Committee Act (FACA). FACA is "designed to assure that Congress and the public is kept informed of the number, purpose, membership, activities, and cost of advisory committees." The Council although a non-federal entity, is subject to FACA via the Northwest Power Act (NPA) and may be the only non-federal entity with this unique relationship. The Northwest Power Act states that for matters relating to the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Council, **advisory committees**, disclosure of information, judicial review of Council functions and actions under this Act, **and related matters, the**

Federal laws applicable to such matters in the case of the Bonneville Power Administration shall apply to the Council to the extent appropriate.

As the Council develops various workgroups or advisory groups to fulfill its mandates under the NPA, the Council must consider FACA and its requirements just as federal agencies do. As an example, the staff considered FACA during the scoping process for the Strategy Performance Indicator workgroup and the workgroup statement of purpose.

Staff will describe FACA, its relationship to the Northwest Power Act and the Council, examples of Council advisory committees, workgroups and how we view the Council as an entity participating in federal FACA-guided advisory committees.

More Info:

[Attachment 1: The Council and the Federal Advisory Committee Act \(FACA\)](#)

Attachment 1.

The Council and the Federal Advisory Committee Act (FACA)

Northwest Power Act of 1980: federal laws that apply to the Council: relating to “advisory committees” (FACA)

4(a)(4) For the purpose of providing a uniform system of laws, in addition to this Act, **applicable to the Council relating to** the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Council, **advisory committees**, disclosure of information, judicial review of Council functions and actions under this Act, **and related matters, the Federal laws applicable to such matters in the case of the Bonneville Power Administration shall apply to the Council to the extent appropriate.**

Northwest Power Act: required and additional advisory committees:

4(c)(11) The Council shall establish a voluntary scientific and statistical advisory committee to assist in the development, collection, and evaluation of such statistical, biological, economic, social, environmental, and other scientific information as is relevant to the Council's development and amendment of a regional conservation and electric power plan.

4(c)(12) The Council may establish such other voluntary advisory committees as it determines are necessary or appropriate to assist it in carrying out its functions and responsibilities under this Act.

4(c)(13) The Council shall ensure that the membership for any advisory committee established or formed pursuant to this section shall, to the extent feasible, include representatives of, and seek the advice of, the Federal, and the various regional, State, local, and Indian Tribal Governments, consumer groups, and customers.

Federal Advisory Committee Act (FACA)

- originally adopted in 1972
- included in 5 US Code, but as an appendix, not as a numbered section
<https://www.law.cornell.edu/uscode/text/5a/compiledact-92-463>
- FACA itself directly amended in 1976, 1980, 1982, 1997, 2010 – these amendments don't change much from our perspective; some “amendments” from outside FACA are relevant (see below)

FACA Section 9: Establishment and Purpose

No advisory committee shall be established unless such establishment is—

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator, with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

When do you have an “advisory” committee subject to FACA?

FACA Section 3: Definitions

(2) The term “advisory committee” means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as “committee”), which is—

- established by statute or reorganization plan
- established or utilized by the President
- established or utilized by one or more agencies

in the interest of obtaining advice or recommendations for ... one or more agencies or officers of the Federal Government,

Except that such term excludes:

- (i) **any committee that is composed wholly of full-time [or permanent part-time] officers or employees of the Federal Government, and**
- (ii) **any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.**

FACA Management Regulations 41 C.F.R. §§102-3.10, -3.25, -3.40

FACA is “designed to assure that Congress and the public is kept informed of the number, purpose, membership, activities, and cost of advisory committees.”

“*Advisory committee* subject to the Act, except as specifically exempted by the Act or by other statutes ... means [1] any committee, board, commission, council, conference, panel, task force, or other similar group, [2] which is established by statute, or established or utilized by ... an agency official, [3] for the purpose of obtaining advice or recommendations ... [4] on issues or policies within the scope of an agency official's responsibilities.”

The following are examples of committees or groups that are not covered by the Act:

(h) Intragovernmental committees. Any committee composed wholly of full-time or permanent part-time officers or employees of the Federal Government.

What does it mean if you have an “advisory committee” subject to FACA? FACA Sections 8-11, 14

- advisory committees must be established by the agency in a formal decision
- charter required
 - committee's official designation
 - objectives and the scope of its activity; description of duties
 - period of time necessary for the committee to carry out its purposes
 - agency or official to whom the committee reports
 - agency responsible for providing the necessary support for the committee
 - estimated annual operating costs in dollars and people-time for such committee
 - estimated number and frequency of committee meetings
 - date charter is filed, and committee's termination date
- charters must be for no more than two years; then committee needs to be reauthorized
- agency must designate an employee to be the “advisory committee management officer” to supervise the establishment, procedures, and accomplishments of the committee and maintain the committee records; designated employee of agency must chair or at least attend every committee meeting
- agency chooses committee members; membership must be “fairly balanced” in terms of the points of view represented and the functions to be performed
- each advisory committee meeting shall be open to the public.
- agency must publish public notice of every meeting that ensures that all interested persons are notified of such meeting prior thereto
- interested persons shall be permitted to attend, appear before, or file statements with any advisory committee
- records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection
- detailed minutes of each meeting of each advisory committee shall be kept and be made publicly available; shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee; transcripts shall also be made available if requested

Northwest Power Act of 1980: Section 4(a)(4): federal laws on advisory committees apply to Council

4(a)(4) For the purpose of providing a uniform system of laws, in addition to this Act, **applicable to the Council relating to** the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Council, **advisory committees**, disclosure of information, judicial review of Council functions and actions under this Act, **and related matters, the Federal laws applicable to such matters in the case of the Bonneville Power Administration shall apply to the Council to the extent appropriate.**

Implications?

- non-federal entity subject to FACA – may be the only one!
 - e.g., compare to Columbia River Gorge National Scenic Area Act
- essentially an amendment to FACA

Northwest Power Act Section 4(c): required and additional advisory committees:

4(c)(11) The Council shall establish a voluntary scientific and statistical advisory committee to assist in the development, collection, and evaluation of such statistical, biological, economic, social, environmental, and other scientific information as is relevant to the Council's development and amendment of a regional conservation and electric power plan.

4(c)(12) The Council may establish such other voluntary advisory committees as it determines are necessary or appropriate to assist it in carrying out its functions and responsibilities under this Act.

4(c)(13) The Council shall ensure that the membership for any advisory committee established or formed pursuant to this section shall, to the extent feasible, include representatives of, and seek the advice of, the Federal, and the various regional, State, local, and Indian Tribal Governments, consumer groups, and customers.

Council and FACA advisory committees

Power – e.g., standing advisory committees

- Conservation Resources Advisory Committee
 - Demand Forecasting Advisory Committee
 - Demand Response Advisory Committee
 - Generating Resources Advisory Committee
 - Natural Gas Advisory Committee
 - Resource Adequacy Advisory Committee
 - System Analysis Advisory Committee
 - Regional Technical Forum (RTF)
 - RTF Policy Advisory Committee
- Council has *lots* of experience in identifying, establishing, chartering, organizing, running, exempting, etc. advisory committees under FACA

Why so few with regard to the fish and wildlife work of the Council?

- have had some: e.g., Fish Operations Executive Committee (FOEC) (early 90s); Fish Tagging Forum (2010s); Ocean Forum (original iteration)
 - but comparatively fewer, especially fewer standing committees – why?
- F&W Program development: relationship to federal and state agencies and tribes and their recommendations
 - plus, highly structured, highly open public process with required consultation with specific entities and public engagement
- implementation-related groups that for various reasons fell outside FACA boundaries, such as:
 - relationship to Bonneville in implementation: Bonneville/Council groups (e.g., cost savings group)
 - direct relationship to fish and wildlife agencies and tribes in implementation (e.g., Fish Passage Center Oversight Board)
 - ad hoc or non-advisory information workgroups – (e.g., Artificial Production Review (90s); Regional Coordination Forum (also f&w agencies and tribes); asset management subcommittee; ocean forum (current iteration); informal hatchery workgroup

in most cases, especially of the latter type, make as functionally equivalent to FACA as can - very public & open

- ISRP and project review
 - Northwest Power Act Section 4h10(D)(iii): Panel and Peer Review Group members may be compensated and shall be considered subject to the conflict of interest standards that apply to scientists performing comparable work for the National Academy of Sciences ... All expenses of the Panel and the Peer Review Groups shall be paid by BPA as provided for under paragraph (vii). **Neither the Panel nor the Peer Review Groups shall be deemed advisory committees within the meaning of the Federal Advisory Committee Act.**
- Independent Scientific Advisory Board:
 - ESA Section 4(f)(2) (recovery plans): The Secretary, in implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. **Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.**
 - relevance to ISAB: exempt from FACA
- program performance: Strategy Performance Indicators Workgroup
 - outgrowth of program development workshops
 - fish and wildlife agencies and tribal representatives

What about federal/state/tribal workgroups? Unfunded Mandates Reform Act of 1995: Section 204

(a) In general

Each agency shall, to the extent permitted in law, develop an effective process to permit elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates.

(b) Meetings between State, Local, Tribal and Federal officers

The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to actions in support of intergovernmental communications where—

(1) meetings are held exclusively between Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities; and

(2) such 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 or administration.

FACA Management Regulations 41 C.F.R. §102-3.40

The following are examples of committees or groups that are not covered by the Act or this Federal Advisory Committee Management part:

(g) Intergovernmental committees. Any committee composed wholly of full-time or permanent part-time officers or employees of the Federal Government and elected officers of State, local and tribal governments (or their designated employees with authority to act on their behalf), acting in their official capacities. However, the purpose of such a committee must be solely to exchange views, information, or advice relating to the management or implementation of Federal programs established pursuant to statute, that explicitly or inherently share intergovernmental responsibilities or administration (see guidelines issued by the Office of Management and Budget (OMB) on section 204(b) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1534(b), OMB Memorandum M-95-20, dated September 21, 1995, available from the Committee Management Secretariat (MC), General Services Administration, 1800 F Street, NW., Washington, DC 20405-0002)

Examples:

- ESA implementation structure: RIOG/SCT/etc.
- Current anadromous fish reintroduction forum
- MAFAC CBP is *not* an example – had non-governmental reps

What if Council as an entity is part of that group?

- issue – Council often excluded on FACA rationale
- doesn't make sense to us...

Northwest Power Act of 1980: Section 4(a)(4) federal laws/advisory committees/FACA

For the purpose of providing a uniform system of laws, applicable to the Council relating to advisory committees and related matters, the Federal laws applicable to such matters in the case of the Bonneville Power Administration shall apply to the Council to the extent appropriate.