

**Before the
Office of Science and Technology Policy**

**FACA REFORM AND INTERACTIVE PUBLIC DOCKETS:
REVITALIZING AGENCY USE OF SCIENCE**

In the Matter of)
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Executive Office of the President;)
Transparency and Open Government)
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FACA REFORM AND INTERACTIVE PUBLIC DOCKETS: REVITALIZING AGENCY USE OF SCIENCE

In their May 21, 2009 *Federal Register* notice, the White House Office of Science and Technology Policy (OSTP) recognized the potential for agencies to make better use of federal advisory committees to improve quality of science and for new, collaborative and transparent participatory processes.

Specifically, in response to President Obama's Memorandum on Transparency and Open Government, the OSTP requested comments on how to implement the President's goals including collaboration that "harnesses innovative tools, methods, and systems to promote cooperation across all levels of Government and with the private sector."¹ These comments will discuss two mechanisms for achieving the President's goals discussed in the Memorandum. The CRE-recommended mechanisms are:

- ▶ Administratively reforming agency use of the FACA process to provide additional mechanisms for enhancing the transparency of committee operations; and
- ▶ Participating in Interactive Public Dockets (IPDs).

I. FACA Reform

One of the issues on which OSTP specifically asked for comment, was "How might federal advisory committees, rulemaking, or electronic rulemaking be better used to improve decisionmaking?"

This analysis by the Center for Regulatory Effectiveness (CRE) will examine some of the systemic problems experienced by FACA committees and provide a case example of the problems associated with the Marine Protected Areas Federal Advisory Committee (MPAFAC). The analysis will conclude with two recommendations, consistent with the Presidential Memorandum, for reforming the FACA process: 1) allowing public comment on committee agendas; and 2) requiring committees to publicly post their screening process for evaluating potential committee members and ensuring balance.

CRE's Extensive FACA Experience

CRE is a regulatory watchdog dedicated to improving the federal rulemaking process. As part of this effort, CRE created the FACA Under Fire website² "which is intended to be a forum for protecting the Federal Advisory Committee Act and FACA committees." CRE has participated in a wide range of FACA committee processes including committees sponsored by USGS, EPA, NOAA, and NHTSA. A member of CRE's Board of Advisors currently serves on a FACA committee.

¹ 74 Fed. Reg. 23901, May 21, 2009.

² <http://www.thecre.com/faca/>.

FACA Committees: Promise

There are about 1,000 FACA committees government-wide at any given time.³ In response to the numerous committees and other bodies advising the Executive Branch, Congress enacted the Federal Advisory Committee Act (FACA) in 1972 “to ensure that advice by the various advisory committees formed over the years is objective and accessible to the public.”⁴ In passing the legislation, Congress recognized that advisory committees are a “useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.”

While Congress appreciated the potential benefit from the use of advisory committees, they also recognized a number of potential pitfalls that required both legislation and the need for ongoing supervision by OMB, GSA and Congress. Such supervision is needed to ensure that the committees operate according to law and in the public interest so as to allow agencies to take advantage of the deep and diverse expertise the public can provide to the government.

In addition to 1972 statute, there are several “good FACA” laws that govern the advisory committee process. These legal authorities include:

Executive Order 12838 “Termination and Limitation of Federal Advisory Committees.”⁵ In addition to reducing the number of FACA committees by at least one-third and requiring agencies to provide justification for the remaining committees, this EO formalized a major role for OMB in managing FACA committees. Specifically, the Order:

1. Requires OMB approval of any new FACA committee not required by statute and states that such approval should be “granted only sparingly” and when necessitated by compelling interest.
2. Provides OMB the authority to issue “detailed instructions” on implementing the Order.

OMB Circular A-135 “Management of Federal Advisory Committees.”⁶ This Circular details actions required of agencies with respect to FACA committees including submitting to OMB and GSA annually, “performance measures used to evaluate each committee's progress in achieving its stated goals or mission.” The Circular also sets specific responsibilities for OMB and GSA in overseeing FACA committees.

³ <http://fido.gov/facadatabase/>.

⁴ http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_OVERVIEW&contentId=9673.

⁵ <http://www.archives.gov/federal-register/executive-orders/pdf/12838.pdf>.

⁶ <http://www.whitehouse.gov/omb/circulars/a135/a135.html>.

GSA's FACA Final Rule.⁷ The regulation provides extensive information on how committees are to comply with various aspects of the law including having a plan that will ensure that selection of committee members results in a “fairly balanced membership” and that there is public access to participation in committee processes.

FACA Committee: Shortfalls

A lack of balance in composition and transparency in operation has been the theme repeated in multiple GAO reports, including several published in the years subsequent to GSA's 2001 FACA Final Rule.

An April 2004 GAO made explicit the fundamental requirement for FACA committees, “To be effective, these advisory committees must be—and, just as importantly, be perceived as being—independent and balanced.” GAO further explained that “FACA requires that committees be fairly balanced both in terms of the points of view represented and the functions to be performed. ... In addition to the legal requirement for balance, it is important that committees are perceived as being balanced in order to be credible and effective.”⁸

GAO expanded in detail on what it means for a committee to have a balanced membership.

“Assessing the points of view of individual members is fundamental to ensuring that committees as a whole are, and are perceived as being, fairly balanced in terms of points of view because agencies must first know whether the members have particular viewpoints or whether they may have—or may reasonably be perceived as having—certain biases. ... Even when a legal conflict of interest does not exist, a committee member may be so closely aligned with a point of view or an organization that his or her ability to provide objective and impartial advice is impaired or appears to be impaired. Such circumstances in which a person's impartiality may be called into question, sometimes referred to as an “apparent conflict of interest” and a “perceived conflict of interest,” are important for agencies to be aware of because the perception of bias that can harm the reputation of advisory committees is independent of the legal definition of a conflict of interest. ... When agencies are unaware of the viewpoints and biases of its members, they cannot adequately ensure that the committees are, and are perceived as being, balanced as a whole.”⁹

Thus, GAO has highlighted that committees must be balanced and, moreover, must be perceived as such. The study explains that achieving balance means that the specific viewpoints and biases of members need to be taken into account, even if they do not constitute a conflict of interest. A basic requirement,

⁷ http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/FACAFinalRule_R2E-cNZ_0Z5RDZ-i34K-pR.pdf

⁸ GAO, “FEDERAL ADVISORY COMMITTEES Additional Guidance Could Help Agencies Better Ensure Independence and Balance,” GAO-04-328, April 2004, p. 5.

⁹ Ibid., p. 30.

therefore, in determining committee membership is for agencies to be aware of and take into account the views and biases of committee members.

Based on interviews with agencies, GAO noted that “officials most commonly related ‘points of view’ to demographic factors, such as race, gender, or geographic locations—that is, defining a balance of points of view in terms of demographic diversity.” In response, GAO explained that,

“While important, these criteria alone do not provide a robust understanding of the points of view and potential biases the members may bring to the committee vis-à-vis the specific matters the committees will address. That is, these approaches may achieve demographic diversity, but they cannot ensure an appropriate balance of viewpoints relative to the matters being considered by the committees.”¹⁰

In further exploring how to obtain balance on FACA committees, GAO examined how agencies currently obtain information about committee candidates and the shortcomings of the approach.

“Agencies typically rely on two sources to collect data about committee members who were appointed as special government employees: curricula vitae (CV) or résumés and the OGE form 450, the confidential financial disclosure form. Agencies generally collect CVs or résumés that may provide some information pertinent to assessing points of view, such as professional affiliations and published articles. Some agencies may also perform Internet searches for background information on candidates. However, these sources vary in content and reliability and may not be sufficient to consistently provide the information needed to assess for points of view.”¹¹

In evaluating the viewpoints of candidates for FACA committees, GAO explained that it is important to consider such information as “previous public statements or positions on the matter being reviewed, including statements in articles, testimony, or speech,” “research conducted on the matter” and “sources of funding for research or other activities.” As GAO states, “Additional information about the candidates’ viewpoints and potential biases would better ensure that the committees are, and are perceived as being, fairly balanced in terms of points of view— and that no one interest or viewpoint dominates.”¹²

Obtaining additional information about candidate viewpoints is one factor identified by GAO as being important to improving the screening process and promoting public confidence in FACA committees. GAO identified three types of information, including screening processes, that agencies need to make public as prerequisites for ensuring that FACA committees are developed and maintained through a

¹⁰ Ibid., p. 40.

¹¹ Ibid., p. 31.

¹² Ibid., p. 40.

transparent process. The importance of transparency cannot be underestimated, particularly in an Administration committed to rectifying the politicization of federal science. As GAO explained,

“In light of recent controversies surrounding the perceived politicization of federal advisory committees, we identified several other measures to improve transparency in the federal advisory committee system. Although none of these measures can ensure that committee members are independent and that committees are balanced, we believe each of these alternatives has the potential to increase public understanding of the process of appointing advisory committee members and make more transparent the operations of federal advisory committees.

In the interest of transparency, agencies could make public the following information about each of their advisory committees:

- *The committee formation process: how members are identified and screened, and how committees are assessed for balance.*
- *Whether members are appointed as special government employees and are speaking as independent experts, or whether members are appointed as representatives and speaking as stakeholders.*
- *Whether committees arrive at decisions through a voting process or by consensus.”¹³*

GAO also recommended specific mechanisms that could be used to provide the public with the above information in order to provide for and promote transparency. They advise that the information be:

- *written in the committee’s charter;*
- *posted on the GSA on-line database;*
- *posted on the agency or committee’s Web site;*
- *announced at committee meetings; or*
- *identified on committee work products (reports, studies, or recommendations).”*

GAO made clear that transparency in the process for selecting committee members and in the committee’s operation is absolutely essential for ensuring committee integrity.

¹³ Ibid., p. 47.

“We believe it is in the best interest of both the public and the government to disclose more information about the formation and operation of the advisory committees—for example, how the members are identified and screened.... In light of recent concerns about biases and conflicts of interest, adopting more clearly defined procedures to screen and appoint committee members and to increase transparency in the advisory committee process would constitute important steps toward protecting the integrity of the federal advisory committee system and maintaining public confidence in the work of federal advisory committees.”¹⁴

In 2008 testimony before Congress, GAO provided follow-up information on their 2004 report. Disappointingly, GAO found that many of the same balance and transparency problems that they identified four years earlier, still existed. As GAO explained,

“However, current data on appointments indicate that some agencies may continue to inappropriately use representatives rather than special government employees on some committees. Further, GSA said it agrees with GAO’s other recommendations, including those relating to committee balance and measures that would promote greater transparency in the federal advisory committee process, but has not issued guidance in these areas as recommended, because of limitations in its authority to require agencies to comply with its guidance.”¹⁵

In recognition of agency resistance to FACA reform and limitations on GSA’s authority, GAO suggested that legislative fixes be considered. Instead of legislation, CRE believes that:

- 1) Non-politicized science and balance and transparency imperatives can be achieved by expanding the public’s ability to act as watchdogs in FACA proceedings; and
- 2) As recommended below, an expanded watchdog role can be achieved through White House action under existing legislative authority and consistent with the transparency and openness goals enunciated in the President’s Memorandum.

Case Study: NOAA’s Marine Protected Area Federal Advisory Committee

There have been long-standing complaints voiced regarding transparency by NOAA in matters regarding Marine Protected Areas (MPAs). For example, in late 2006, the Alliance of Communities for Sustainable Fisheries wrote to NOAA,

¹⁴ Ibid., pp. 51-52.

¹⁵ GAO, “FEDERAL ADVISORY COMMITTEE ACT Issues Related to the Independence and Balance of Advisory Committees,” GAO-08-611T, April 2, 2008.

“The use of an MPA workgroup would be appropriate to evaluate the utility of MPAs if the workgroup process was fairly constituted and science-based. Any recommendations that came out of the workgroup would be forwarded to the Pacific Council for their consideration. However, it is the perception of the fishing community that the MBNMS current workgroup is seriously flawed as a public/science- based process.”¹⁶

Thus, it is essential that the MPAFAC ensure, in actuality and perception, transparency and balance in its operations. The need of transparency and balance is further highlighted by an apparent case of agency misuse of the FACA process with respect to the MPA advisory committee. The committee’s Charter charges the body with providing “advice and recommendations on how to fulfil responsibilities under Section 4 of the Executive Order [13158]....”¹⁷ The Charter also explains that the “MPAFAC will deliberate on materials submitted by scientific, or other working groups in a FACA-compliant meeting before providing the Committee’s recommendations to the Secretary of Commerce and the Secretary of Interior.”

EO 13158 establishes a process for “strengthening and expanding” the national system of Marine Protected Areas. Section 4 of the Order calls for agencies, headed by the Department of Commerce and the Department of the Interior, in consultation with other Departments including State and Defense, to “develop a national system of MPAs.”

Section 4 of the Order stresses the science-based expertise role of the MPAFAC, “In carrying out the requirements of this section, the Department of Commerce and the Department of the Interior shall seek the expert advice and recommendations of non-Federal scientists, resource managers, and other interested persons and organizations through a Marine Protected Area Federal Advisory Committee.”

Despite the Committee’s charge to provide “expert advice and recommendations” based on submissions of science and related groups, the MPAFCA seems to have been used, in part, as a public relations-related mechanism.

Of particular concern was NOAA’s use of a MPAFAC committee meeting as a platform for a “ceremony” announcing the initial sites included in the National System of Marine Protected Areas without:

- Providing the Committee with the comments received on the nominated MPA sites;
- Requesting the Committee opine on the comments; and/or
- Requesting the Committee opine on the nominations.

¹⁶ <http://thecre.com/pdf/OZ%20Monterey%202006.doc>.

¹⁷ http://mpa.gov/pdf/fac/final_mpa_fac_charter111906.pdf.

According to the meeting minutes, a NOAA official, “presented the nomination process and the initial National System, explaining that a goal of the National System is to be diverse in terms of geographic region, ecosystem type, level of government, and conservation goals.”¹⁸ Although the Committee had comments on the system, questions remain.

- If the MPAFAC was being presented a discussion of the National System nomination process, why were they not asked to opine on it prior to announcing the site selections?
- If NOAA did not want to seek the Committee’s advice on the site selection process or on the specific nominations, why did the agency have their “ceremony” at the FACA committee’s meeting?

By announcing the National System site selections at the MPAFAC meeting without soliciting the group’s advice on the process, NOAA gives the impression that they were seeking to capitalize on the advisory committee’s stature without subjecting the process to the committee’s scrutiny and guidance.

Even with only the limited presentation made by NOAA, the MPAFCA expressed concerns regarding NOAA’s work. For example, the minutes record that “FAC members noted that it would be useful to also run the statistics of the initial system without including” a large Marine National Monument since “the size of this site greatly skews the data.” One Committee member “noted the need to clearly define the concepts and levels of protection.” Another member “agreed, suggesting that messages could emphasize the majority of MPA area in the U.S. as allowing for multiple uses, rather than describing the area that is ‘no take.’”

Thus, the Committee members had valuable insights into the development of the National System including key issues related to Data Quality and to ocean zoning. Since, however, the Committee was not asked by NOAA to opine on the issue, the Committee’s views did not become part of their recommendations document.

The impression that NOAA was using the MPAFCA in a non-substantive manner is heightened by the time line of events regarding the nominations. NOAA announced the list of National System MPA nominations and requested comment on them in a March 6, 2009 *Federal Register* notice.¹⁹ Comments were due April 6, 2009. A week before comments were even due, NOAA’s *Federal Register* notice of the MPAFCA meeting included the statement the meeting would include a “ceremony to announce the first sites accepted into the National System of Marine Protected Areas.”²⁰ NOAA thus gave the impression that the public comments were a mere *pro forma* exercise of no consequence and that the MPAFAC was to serve in a role closer to audience than advisor.

¹⁸ http://mpa.gov/pdf/fac/mpafac_4_09_minutes.pdf.

¹⁹ 74 Fed Reg 9798, March 6, 2009.

²⁰ 74 Fed Reg 14781, April 1, 2009.

Although the Committee did not was not provided with the public comments submitted to the agency, it should be noted that NOAA did respond to public comments in the Federal Register notice which formally announced the National System MPA selections.²¹

Based on GAO's reports and CRE's experience with the MPFCA, we have the following FACA-related recommendations to OSTP:

- ▶ Recommend to OMB that, as part of their "Directive that will instruct executive departments and agencies on specific actions to implement the three principles of transparency, participation, and collaboration"²² that they require:
 1. FACA committee agendas to be published for notice and comment prior to the meeting and that the sponsoring agency (agencies) respond to the comments; and
 2. FACA committees publish on their website, or other prominent location, their process for screening candidates for the committee and their process and criteria for ensuring committee balance.

II. Interactive Public Dockets

The President's Memorandum of Transparency and Open Government stated that agencies "should use innovative tools, methods, and systems to cooperate among themselves, across all levels of Government, and with nonprofit organizations, businesses, and individuals in the private sector." There is no better example of an innovative, collaborative tool that exists to "to improve the quality of decisionmaking and increase opportunities for citizen participation" than the Interactive Public Docket (IPD).

The IPD is an internet-based tool that makes data relevant to regulatory and other federal proceedings available to the public on a continuous basis and also provides the public with the capability to comment on the information, related news, and federal actions on a continuous basis. In essence, in a wired society the generation of information on a regulatory issue does not cease at the end of a public comment period. Moreover, regulatory actions of individual regulatory agencies often converge, are continuously modified as a result of judicial decisions and often lack transparency in their implementation.

Ocean zoning, the protection and locally appropriate use of marine resources, is an example of a broad, cross-cutting issue that involves multiple agencies, stakeholders, and data-intensive analyses. As President Obama recognized in his Memorandum on National Policy for the Oceans, Our Coasts, and the Great Lakes, these water bodies and adjacent areas "provide jobs, food, energy resources, ecological services, recreation, and tourism opportunities, and play critical roles in our Nation's transportation,

²¹ 74 Fed Reg 18551, April 23, 2009.

²² 74 Fed. Reg. 23901, May 21, 2009.

economy, and trade, as well as the global mobility of our Armed Forces and the maintenance of international peace and security.”

In recognition of the importance of ocean zoning, CRE created the NOAA/MMS Interactive Public Docket found at <http://www.thecre.com/creipd/>. The focus of the IPD will be on the regulatory actions of NOAA and MMS to zone oceans for varying levels of economic and conservation activities.

CRE recommends that OSTP:

- ▶ Review the NOAA/MMS IPD; and
- ▶ Recommend that OMB’s Directive encourage agencies to participate in IPDs.

RECOMMENDATIONS

- ▶ OSTP recommend that OMB, as part of their Directive implementing the President’s Memorandum on Transparency and Open Government:
 1. Require that FACA committee agendas be published for notice and comment prior to the meeting and that the sponsoring agency (agencies) respond to the comments;
 2. Require FACA committees to publish on their website, or other prominent location, their process for screening candidates for the committee and their process and criteria for ensuring committee balance; and
 3. Encourage agencies to participate in Interactive Public Dockets, such as the NOAA/MMS IPD found at <http://www.thecre.com/creipd/>, by posting the availability of IPDs on agency websites.