



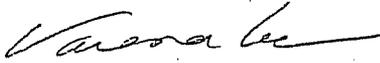
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460

OFFICE OF THE ADMINISTRATOR
SCIENCE ADVISORY BOARD

May 3, 2005

MEMORANDUM

SUBJECT: Federal Advisory Committee Act (FACA) Policies

FROM: Vanessa T. Vu, Ph.D. 
Director
Science Advisory Board Staff Office

TO: Clean Air Scientific Advisory Committee (CASAC)
Dr. Rogene Henderson, Chair
Dr. Ellis Cowling
Dr. James D. Crapo
Dr. Frederick J. Miller
Mr. Richard L. Poirot
Dr. Frank Speizer
Dr. Barbara Zielinska

Let me begin by thanking all of you, and your colleagues who currently serve or have previously served on the Clean Air Scientific Advisory Committee (CASAC) and its panels and subcommittees. CASAC has provided significant advice and recommendations that are vital for EPA science, research and regulatory decisions concerning criteria air pollutants. Certain questions from you and members of the CASAC Particulate Matter (PM) Review Panel over the past month have indicated to me that our office has not fully communicated to you regarding recent developments concerning Federal Advisory Committee management, policies and procedures. The CASAC PM review panel was formed in 1999, before my tenure as Director of the SAB Staff Office, and well before the recent developments that have affected policies and procedures for federal advisory committees. Therefore, I would like to take this opportunity to provide you with an update about EPA and SAB Staff Office policies for Federal advisory committees.

As you know, CASAC was mandated by an Act of Congress as part of the Clean Air Act Amendments of 1977, and also is subject to requirements of the Federal Advisory Committee Act (FACA). The U.S. General Services Administration (GSA) administers FACA for the entire Federal Government. Within EPA, the Office of Cooperative Environmental Management has policy oversight for all of the Agency's twenty-four chartered FACA committees. The Science Advisory Board Staff Office provides management oversight to the Science Advisory Board

(SAB), CASAC, and Advisory Council on Clean Air Compliance Analysis (Council). The SAB Staff Office is also responsible for ensuring that the SAB, CASAC, and the Council follow applicable GSA and EPA policies.

Several events have necessitated refinements to EPA and the SAB Staff Office policies regarding FACA, ethics, and advisory panel formation. These include U.S. General Accountability Office (GAO) reports released in 2001 (*EPA's Science Advisory Board Panels: Improved Policies and Procedures Needed to Ensure Independence and Balance*) and 2004 (*Additional Guidance Could Help Agencies Better Ensure Independence and Balance*). In 2001, GSA published the Federal Advisory Committee Management Final Rule (41CFR 101-6 and 102-3). In response to this rule, EPA's Office of Cooperative Environmental Management (OCEM) issued an internal guidance to EPA offices regarding FACA committee management (*EPA's Federal Advisory Committee Handbook*) in 2003.

In parallel, the SAB Staff Office has developed its own guidance to establish uniform administrative procedures consistent with GSA and EPA guidance on FACA, and in response to the recommendations of GAO. These include: 1) *Overview of the Panel Formation Process at the Environmental Protection Agency Science Advisory Board* (2002); 2) *Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency* (2002); and 3) *Advisory Committee Meetings and Report Development: Process for Public Involvement* (2004). All of these documents are available on the SAB Web site at: <http://www.epa.gov/sab>. Please find enclosed two additional documents which are not available on the Web site: the current CASAC charter which was filed with Congress (Attachment 1), as well as a document developed by EPA's Office of General Counsel entitled, *Background Information for EPA Federal Advisory Committees* (Attachment 2).

I trust that the above descriptions and accompanying material will address any concerns regarding FACA processes and procedures. For your information, the White House Office of Management and Budget (OMB) recently issued its *Final Information Quality Bulletin for Peer Review in 2004* (http://www.whitehouse.gov/omb/inforeg/peer2004/peer_bulletin.pdf). I will keep you informed of new developments as they occur. Again, thank you for your valuable public service to EPA.

Attachments:

1. CASAC Charter
2. Background Information for EPA Federal Advisory Committees

cc: CASAC Ozone Review Panel

CASAC Particulate Matter (PM) Review Panel

CASAC Ambient Air Monitoring & Methods (AAMM) Subcommittee

Mr. Fred Butterfield, CASAC DFO

Ms. Marilyn Kuray, OGC FACA Attorney

Mr. Daniel Fort, SAB Ethics and FACA Policy Officer

Dr. Anthony Maciorowski, SAB Associate Director for Science

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY CHARTER

CLEAN AIR SCIENTIFIC ADVISORY COMMITTEE

1. Committee's Official Designation (Title):
Clean Air Scientific Advisory Committee**2. Authority:**

This charter renews the Clean Air Scientific Advisory Committee (CASAC) in accordance with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App.2 § 9 (c). CASAC is in the public interest and supports the U.S. Environmental Protection Agency (EPA or Agency) in performing its duties and responsibilities. EPA was specifically directed by § 109 of the Clean Air Act, which was enacted on August 7, 1977 (Act), (42 U.S.C. 7409), to establish this committee. The charter has been renewed every two years, with the last renewal on August 17, 2001.

3. Objectives and Scope of Activities:

CASAC will provide advice, information and recommendations on the scientific and technical aspects of issues related to the criteria for air quality standards, research related to air quality, sources of air pollution, and the strategies to attain and maintain air quality standards and to prevent significant deterioration of air quality.

The major objectives are to:

- a. At five-year intervals, complete a review of the criteria published under § 108 of the Clean Air Act and the national primary and secondary ambient air quality standards and recommend to the Administrator any new national ambient air quality standards or revision of existing criteria and standards as may be appropriate
- b. Advise the Administrator of areas where additional knowledge is required concerning the adequacy and basis of existing, new, or revised national ambient air quality standards
- c. Describe the research efforts necessary to provide the additional information described in paragraph b above
- d. Advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity
- e. Advise the Administrator of any adverse public health, welfare, social, economic, or energy effects that may result from various strategies for attainment and maintenance of national ambient air quality standards

4. **Description of Committees Duties:**

The duties of CASAC are solely advisory in nature.

5. **Official(s) to Whom the Committee Reports:**

The Committee will submit advice and recommendations and report to the EPA Administrator.

6. **Agency Responsible for Providing the Necessary Support:**

EPA will be responsible for financial and administrative support. Within EPA, this support will be provided by the EPA Science Advisory Board Staff Office, Office of the Administrator.

7. **Estimated Annual Operating Costs and Work Years:**

The estimated annual operating cost of the CASAC is \$509,000, which includes 3.0 work-years of support.

8. **Estimated Number and Frequency of Meetings:**

The committee expects to meet approximately three (3) to six (6) times a year. Meetings may occur approximately once every two (2) to four (4) months or as needed and approved by the Designated Federal Officer (DFO). EPA may pay travel and per diem expenses when determined necessary and appropriate. A full-time or permanent part-time employee of the Agency will be appointed as the (DFO). The DFO or a designee will be present at all meetings and each meeting will be conducted in accordance with an agenda approved in advance by the DFO. The DFO is authorized to adjourn any meeting when he or she determines it is in the public interest to do so.

As required by FACA, CASAC will hold open meetings unless the EPA Administrator determines that a meeting or a portion of a meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Interested persons may attend meetings, appear before the committee, or file comments with CASAC.

9. **Duration and Termination:**

CASAC will be needed on a continuing basis. This charter will be in effect for two years from the date it is filed with Congress. After this two-year period, the charter may be renewed in accordance with Section 14 of FACA (5 U.S.C. App.2 § 14).

10. **Member Composition:**

CASAC will be composed of seven (7) members. The Administrator will appoint a Chairperson and six members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies. Members shall be persons who have demonstrated high levels of competence, knowledge, and expertise in the scientific/technical fields relevant to air pollution and air quality issues. Most members will serve as Special Government Employees (SGE).

11. Subgroups:

EPA, or CASAC with the Agency's approval, may form subcommittees or workgroups for any purpose consistent with this charter. Such subcommittees or workgroups may not work independently of the chartered committee and must report their recommendations and advice to the CASAC for full deliberation and discussion. Subcommittees or workgroups have no authority to make decisions on behalf of the chartered committee, nor can they report directly to the EPA.

July 11, 2003

Agency Approval Date

August 6, 2003

Date Filed with Congress

Background Information for EPA Federal Advisory Committees

This document is designed to provide EPA's federal advisory committee members with background information on the Federal Advisory Committee Act (FACA) and related Environmental Protection Agency (EPA) policy. It describes FACA's primary legal requirements and EPA's policy guidelines. Contact your committee's Designated Federal Officer (DFO) for further information.

I. BACKGROUND

The Federal Advisory Committee Act (FACA) was enacted in 1972 to govern the creation, operation and termination of federal advisory committees. It applies to "any committee, board, commission, council, conference, panel, task force, or other similar group or any subcommittee . . . thereof . . . established or utilized by one or more [federal] agencies in the interest of obtaining advice or recommendations" for the agency.¹ FACA sets out the procedures EPA must follow when setting up, managing, running, or terminating an advisory committee. In addition, the General Services Administration (GSA) regulations² and EPA's FACA Handbook provide guidance for advisory committee management.

II. FACA REQUIREMENTS

A. The Charter

For each advisory committee, FACA section 9 requires EPA to file with Congress and the Library of Congress a charter that contains specific information. This information includes "the committee's objectives and the scope of its activity, . . . the . . . official to whom the committee reports, . . . a description of the duties for which the committee is responsible, . . . and the estimated number and frequency of committee meetings." Advisory committees may not "meet or take any action until [the] advisory committee charter has been filed . . ." FACA Section 14 provides that the agency must renew each committee and refile its charter every two years.

B. Balanced Membership

FACA Section 5 requires "the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." The courts have held that a committee can be balanced even if it does not include all viewpoints or interested groups. Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods, 708 F.Supp. 359 (D.D.C. 1988) (holding that the committee

¹ 5 U.S.C. App. 2 § 3. A copy of FACA is attached for your convenience.

² 41 C.F.R. Part 102-3 (GSA Rule). A copy of the regulations is attached for your convenience.

was balanced even though the membership did not include a consumer advocate), aff'd 886 F.2d 419 (D.C.Cir. 1989); National Treasury Employees Union v. Reagan, No. 88-0186, 1988 WL 21700 (D.D.C. Feb. 26, 1988) (holding that the President's Commission on Privatization was balanced even though federal employees had no direct representation on the Commission, despite the fact that the Commission's recommendations could have a direct effect on them).

C. Meeting Notices

FACA section 10 requires EPA to publish a notice of each advisory committee meeting in the Federal Register in a timely manner. Section 102-3.150 of the GSA regulations interpret this to mean the notice "must be published at least 15 days calendar days prior to an advisory committee meeting. The GSA regulations state that the Federal Register notice includes:

- The name of the committee or subcommittee;
- The time, date, place and purpose of the meeting;
- A summary of the agenda or topics the committee will discuss;
- A statement of whether all or part of the meeting is open to the public; and
- If all or part of the meeting is closed, the reason it is closed and the specific exemption that is the basis for the closure.

D. Public Access to Meetings

FACA section 10 provides that "except . . . for reasons of national security, timely notice of each . . . meeting shall be published in the *Federal Register* . . ." Section 10 further provides that meetings of advisory committees to be open to the public unless one of the Government in the Sunshine Act (GISA) exceptions applies.³ The GSA regulations address the location of meetings, stating that committee meetings are to be "held at a reasonable time and in a manner or place reasonably accessible to the public, . . . [and] are readily accessible to and usable by persons with disabilities . . ."⁴

FACA section 10 states that the openness requirements "shall not apply to any portion of an advisory committee meeting where . . . the head of the agency [EPA] . . . determines [in writing] that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code" (the Government in the Sunshine Act). EPA's policy is that the Office of General Counsel reviews and approves all requests for closed meetings.

Section 102-3.160 of the GSA regulations states that "meetings . . . convened solely to discuss administrative matters . . . or to receive administrative information from a Federal officer or agency" "are excluded from the [FACA] procedural requirements . . ."

³ GISA can be found at 5 U.S.C. § 552b(c).

⁴ GSA Rule § 102-140(a).

E. Public Access to Documents

Section 10 of FACA states that “the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared by or for each advisory committee shall be available for public inspection and copying.” This means that if one of the exemptions set out in the Freedom of Information Act (FOIA) applies to a document, the document may be withheld. Note that this requirement applies only to documents provided to the committee. Drafts prepared by individual members working alone or in a work group setting that are not presented to the advisory committee as a whole are not subject to FACA’s document availability requirements.

FOIA Exemption 5 allows EPA to withhold privileged inter- or intra- agency documents, including documents subject to the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. Exemption 5 is not applicable to documents produced by an advisory committee because an advisory committee is not an “agency” for purposes of Exemption 5. However, Exemption 5 may exempt otherwise privileged agency documents shared with the committee.

F. Public Comments and Attendance at Meetings

FACA section 10 provides that “interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to reasonable rules or regulations. . . .” As section 102-3.140 of the GSA rule explains, this requirement applies to “meeting[s] conducted in whole or in part by a teleconference, videoconference, the Internet, or other electronic medium” Section 102-3.160 of the GSA rule further provides that “meetings of two or more advisory committee . . . members convened solely to gather information, conduct research, or analyze relevant issues and facts in preparation for a meeting of the advisory committee or to draft position papers for the deliberation by the advisory committee” [work group meetings] and meetings of two or more advisory committee . . . members convened solely to discuss administrative matters . . . or receive administrative information from the agency” are excluded from the openness requirements of FACA.

G. Minutes

FACA section 10 states “detailed minutes of each meeting of each advisory committee the committee shall be kept and 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.” Section 102-3.165 of the GSA rule states: “[t]he minutes must include:

- (1) The time, date, and place of the advisory committee meeting;

(2) A list of the persons who were present at the meeting, including advisory committee members and staff, agency employees, and members of the public who presented oral or written statements;

(3) An accurate description of each matter discussed and the resolution, if any, made by the advisory committee; and

(4) Copies of each report or other document received, issued, or approved by the advisory committee at the meeting.”

FACA section 10 provides that “[t]he accuracy of all minutes shall be certified to by the chairman of the advisory committee.” Section 102-3.165 of the GSA rule states that “minutes are [to be] certified within 90 calendar days of the meeting”

It is EPA policy to keep detailed minutes of each subcommittee meeting and to have the subcommittee chairperson certify the accuracy of the subcommittee meeting minutes.

H. Designated Federal Officer

FACA section 10 provides that “[t]here shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee.” EPA calls this person the Designated Federal Officer (DFO). Section 10 further provides that “[n]o advisory committee shall conduct any meeting in the absence of that officer or employee.” The GSA rule, section 102-3.120 states that the DFO “must be a full-time or permanent part-time federal employee.”⁵ Under FACA, the DFO calls the meetings, approves the agenda, and adjourns meetings when it is in the public interest to do so. The DFO also ensures that the committee follows all FACA requirements and operates consistently with applicable EPA policy. In many cases, the DFO also performs staff functions for the committee, preparing materials, arranging meetings, and coordinating communication among members.

I. Appointment and Removal of Advisory Committee Members

All advisory committee members serve at the discretion of the EPA Administrator. At EPA the Administrator has delegated to the Deputy Administrator the authority to appoint and dismiss advisory committee members.

II. SUBCOMMITTEES AND WORKING GROUPS

A. Subcommittees

Generally, with EPA’s approval, advisory committees may form subcommittees to gather facts, draft documents, and perform other tasks relating to the committee’s business. It is EPA policy that subcommittees follow all the FACA openness requirements, including balanced membership, publication of meeting notices, public access to meetings, public availability of

⁵ FACA § 10(e); GSA Rule § 102-3.120.

documents, and preparation and certification of meeting minutes. Subcommittees do not provide recommendations to EPA. Rather, they report their findings and recommendations to the chartered advisory committee. The Deputy Administrator appoints subcommittee members.

B. Working Groups

Working groups are informal meetings of two or more advisory committee or subcommittee members (but always fewer than one-half of the committee). Working groups analyze relevant issues and facts, draft proposed position papers, or conduct research for a committee or subcommittee.⁶ Working groups often include individuals who are not members of the chartered committee or subcommittee.

Working groups are not subject to FACA's notice and open meeting requirements⁷ because they only prepare materials for discussion by the full committee. They do not make recommendations directly to EPA. EPA encourages, but does not require, working groups to hold open meetings and make documents available to the public. If necessary, working groups may meet in closed session to:

- Develop work plans to guide of the advisory committee or subcommittee;
- Gather facts and information for later review by an advisory committee or subcommittee;
- Develop possible recommendations for later review and deliberation by the advisory committee or subcommittee;
- Perform studies for later review by the advisory committee or subcommittee;
- Draft reports for later review and deliberation by the advisory committee or subcommittee; or
- Discuss preliminary findings with EPA officials.

III. INVITATIONAL TRAVEL EXPENSES AND CONSULTANTS

A. Invitational Travel

EPA may pay travel and per diem expenses of advisory committee members by issuing invitational travel orders under 5 U.S.C. §5703. EPA may issue invitational travel orders *only* if the individual will confer on a matter of official business, make a presentation, or provide some other direct, face-to-face service to an Agency official. EPA may issue invitational travel orders to working group participants, advisory committee consultants (appointed as SGEs), or others who are not members of a committee or subcommittee if the individual will provide a service to EPA at the meeting.

EPA may not issue invitational travel orders to an individual attending a meeting only as an observer because that person is *not* providing a direct service to the Agency. Also, EPA may *not* use invitational travel to enable a group of interested stakeholders to meet without EPA.

⁶ GSA Rule §102-3.160(a).

⁷ GSA Rule §102-3.160(a).

B. Consultants

EPA may appoint individuals to serve as staff or consultants to advisory committees and subcommittees. EPA appoints consultants as special government employees (SGEs) who provide technical, scientific, or other support. As SGEs, they are subject to applicable federal ethics laws, including conflict of interest laws.⁸

IV. ANTI-LOBBYING RESTRICTIONS

The law prohibits the use of appropriated funds to lobby Congress.⁹ Funds used to support advisory committees are appropriated funds. It is, therefore, important for all advisory committee members to remember the legal restrictions against "grass roots" lobbying.

Advisory committee members' sole role is providing advice to EPA. Therefore, advisory committee members should *not* lobby Congress *as* advisory committee members or identify themselves as advisory committee members in oral or written communications to Congress. An advisory committee may not use committee funds or committee meetings to develop a strategy for lobbying Congress. EPA employees may not direct or encourage members to contact Congress about pending legislation.

This anti-lobbying restriction does not prevent advisory committee members from communicating with Congress in their *personal* capacities on any matter (including those that concern EPA). Committee members should conduct such communications on their own time without reference to their affiliation with the advisory committee. To avoid the appearance of improper lobbying, a committee member should not contact Congress on the days EPA is paying travel and per diem for performing duties as a member.

V. OTHER ETHICS CONSIDERATIONS

Most EPA advisory committee members serve as representatives and represent the views of a nongovernmental organization or group to which they belong. Representative members are not officers or employees of the Federal Government and, therefore, are not subject to the conflict of interest or other government ethics laws. However, advisory committee members who are special government employees (SGEs) are subject to the federal conflict of interest and

⁸ See EPA Ethics Advisory 97-15. for a full description of ethics requirements applicable to SGEs.

⁹ 18 U.S.C. §1913.

ethics laws.¹⁰ SGEs must have annual ethics training and complete a financial disclosure form each year.

Under EPA policy, representative advisory committee members should not participate *personally* and *substantially* as members in particular matters (such as grants, contracts, licenses, permits, or litigation) to which they or their employers are a party.

VI. BYLAWS

Each advisory committee or subcommittee should have an up-to-date, approved set of bylaws which serve to describe the procedures under which the committee will operate. bylaws should describe:

- The duties of the chairperson,
- How the chairperson will be selected,
- The number of members needed for a quorum,
- How the committee will adopt recommendations (by consensus or majority vote), and
- The procedure for minority reports.

In addition, bylaws for subcommittees should be consistent with the bylaws of the parent committee and reflect EPA's policy that subcommittees follow the FACA and GSA openness requirements:

¹⁰ Members of the following advisory committees are SGEs: the Science Advisory Board (SAB), the Advisory Council on Clean Air Compliance Analysis (Council), the FIFRA Scientific Advisory Panel (FIFRA SAP), the Board of Scientific Counselors (BOSC), the Clean Air Scientific Advisory Committee (CASAC), the National Drinking Water Advisory Council (NDWAC), and the National Environmental Education Advisory Council (NEEAC).