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July 10, 1997

Mr. Vincent Vukelich
Committee Management Secretariat
General Services Administration
Office of Governmentwide Policy
Room 5228--MC, 1800 F Street, N.W.
Washington, D.C. 20405

Dear Mr. Vukelich:

The State of Alaska is keenly interested in efforts to refine regulations at 41 CFR Part 101-6 which address federal advisory committee management under the Federal Advisory Committee Act (FACA). We welcome this opportunity to share our views as you evaluate revisions.

The June 10, 1997 Federal Register notice acknowledges there "may ... be a perception among some groups that the broad scope of FACA actually hinders public involvement in Federal decision making." Indeed, there are instances in Alaska where the stringent and perhaps overzealous application of FACA principles has stifled sound decision making by preventing an open and collaborative public process. The 1995 statutory changes allowing collaboration with state, local and tribal officials has been most useful; however more refinement is necessary.

Federal Solicitors in Alaska routinely advise federal managers to avoid consensus based discussions that involve a range of interests, resulting in an overly cautious approach toward collaborative efforts, which are often the most productive and successful. Even if the state offers to convene an open stakeholders forum including non-governmental organizations, federal managers are leery of participating. Fortunately in Alaska, we have the FACA chartered *Alaska Land Managers Forum*, but this one entity cannot possibly cover all the land and resource issues crossing landownership jurisdictions in Alaska.

The State of Alaska recognizes the basic intent and value of the Federal Advisory Committee Act, although its implementation should be clarified to avoid self defeating results. As you may be aware, the Western Governor's Association (WGA) adopted a policy resolution on June 24, 1997, concerning implementation of FACA. The State of Alaska supports the recommendations in this policy, including the following key points summarized here from the WGA Resolution:

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- Limit the definition of an advisory committee that is “utilized” by federal agencies to those advisory bodies over which the agency has strict management or control. Other groups with which federal agencies participate must have balanced representation and must operate in an open and accountable manner without being subject to the formal application of FACA.
- Whenever possible federal agencies should work with existing groups which operate in a consensus based, problem-solving format.
- The process for formally establishing advisory committees should be decentralized to allow greater flexibility. Formal approval should be delegated to the federal agency heads. Approval of FACA groups should also be allowed by the agency regional director to address regional and local issues.
- Upon establishment, the notice in the Federal Register should provide for alternate meeting notice mechanisms in the affected area besides publication in the Federal Register, or perhaps in addition to the Federal Register if sufficient lead time is anticipated to accommodate FR publication.

Attached is the full text of the Western Governor’s Association’s Policy Resolution 97-014. If you have questions about the application of FACA in Alaska, please call me at 907-269-7477 or Raga Elim in the Governor’s Washington D.C. office at 202-624-5858. Thank you for your consideration of these comments and recommendations.

Sincerely,



Sally Gibert
State CSU Coordinator

cc: John Katz, Governor’s Office, Washington, D.C.
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William Hensley, Commissioner, Dept of Commerce and Economic Development
Deborah Williams, Special Assistant in Alaska to the Secretary of the Interior
Robert Barbee, Regional Director, National Park Service
Dave Allen, Regional Director, U.S. Fish and Wildlife Service
Phil Janek, Regional Forester, US Forest Service
Tom Allen, State Director, Bureau of Land Management

Western Governors' Association June 24, 1997
Policy Resolution 97 - 014 Medora, North Dakota

SPONSORS: Governors Symington and Romer
SUBJECT: Federal Advisory Committee Act

A. BACKGROUND

1. In 1972, Congress passed the Federal Advisory Committee Act (FACA) to regulate the numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the federal government. FACA sets out a series of rigid rules, procedures and requirements that each advisory entity must follow if it is "established" or "utilized" by a federal agency.
2. Although states agree with FACA concepts of open government and public participation, states have found the requirements of FACA to be costly and burdensome. Because states, tribal and local governments have primary, exclusive or concurrent jurisdiction in the implementation of many federal laws or programs, the free flow of communication between states and federal agencies is essential. States have found that this free flow of information is adversely affected by the need to follow FACA procedures when advising or working with federal agencies and officials on the implementation of these laws and programs.
3. Due to these concerns, Congress enacted the Unfunded Mandates Act of 1995, which generally exempted from FACA federal consultations with state, tribal and local elected leaders and their representatives involving intergovernmental responsibilities or administration. Although this has helped address many of the states' concerns with FACA, these are still some problems that need to be addressed and resolved with FACA.
4. A new problem is the application of FACA restrictions to water-shed and community-based collaborative groups. The legal counsel of federal agencies such as the Forest Service have interpreted FACA as forbidding their receipt of consensus advice and recommendations from any group or committee which includes non-federal members unless the group is either chartered under FACA or specifically exempted from the Act. As a result, FACA has created an atmosphere of uncertainty about collaboration among federal officials and community-based groups.

5. Natural resource issues rarely abide by political boundaries, especially in the West where federal, state, local, tribal, and private lands are intermingled and where federal and state governments share jurisdiction over activities on federal lands. The governors have found that good stewardship and the successful implementation of laws and regulations require all affected parties to share in the identification and resolution of problems.

B. GOVERNORS' POLICY STATEMENT

1. The clarification of FACA is fundamental to ensuring the implementation and development of current and future legislation and regulations. It is essential that federal officers and agencies collaborate with state, local, and tribal officials and their representatives in the spirit of the Unfunded Mandates Act of 1995.

2. The governors support "government in the sunshine" and believe the public deserves full access to the decision making process of government. States have a variety of "sunshine" requirements in their statutes and codes of administrative procedures that apply to state-federal negotiations without limiting the quality or quantity of those discussions.

3. The governors urge Congress to amend FACA or the Administrator of the General Services Administration (GSA) to clarify GSA's regulatory definition of an advisory committee that is 'utilized' by federal agencies to comport with the line of legal reasoning set out in the Supreme Court's *Public Citizen v. U.S. Department of Justice* (491 US S.Ct. 2558 (1989)) decision and subsequent decisions of the Court of Appeals for the D.C. Circuit. Only those advisory bodies over which the agency has strict management or control should fall under FACA as being 'utilized' by the federal agency. However, the membership of independent groups that do not fall under the jurisdiction of FACA, but in which federal agencies participate, must be balanced in terms of the points of view represented and the functions to be performed. They must operate in an open and accountable manner without being subject to the formal application of FACA.

Whenever possible federal agencies should work with consensus, problem-solving groups like Endangered Species Act recovery plan implementation and conservation teams and independent water-shed councils and coordinated resource management committees. Federal agencies must collaborate if they are to successfully carry out their responsibilities and to tailor the implementation of their laws and regulations to the on-the-ground circumstances of the area where specific problems occur.

4. Advisory committees that are "established" by federal agencies also need to be addressed in a more flexible manner. While various directives from the Clinton Administration like Executive Order (EO) 12875 have mandated enhanced collaboration with stakeholders, EO 12838 regarding FACA makes collaboration difficult. The EO seeks to reduce the proliferation of advisory committees by requiring their establishment to be approved by the agency head and the director of the Office of Management and Budget. It also limits the creation of new advisory committees to only those instances when such important considerations as national security or public health or safety dictate them. National, regional, and local offices need the help of collaborative, short-term advisory bodies that are not captured by one point of view. This decision making should be decentralized. The Executive Order and FACA should be amended to allow the appropriate level of government to decide whether to establish an advisory committee. Agency heads should be able to establish national advisory committees without the approval of the heads of GSA and OMB. Agency regional directors should be able to establish regional and local advisory groups. Notice of their establishment should be in the Federal Register and provide a notice mechanism for enabling interested parties to be informed of individual meetings without requiring meeting notices to be published in the Federal Register.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. WGA staff is instructed to implement this policy by working with appropriate federal officials and congressional leaders.

Note: This policy resolution was originally adopted by the western governors in 1994 as 94-001. It was modified and readopted in 1997.

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