

Glen Canyon Dam Adaptive Management Work Group
Agenda Item Information
March 7-8, 2006

Agenda Item

New Business: Ethics Language and Clarification from DOI Ethics Office

Action Requested

- √ Information item only; we will answer questions but no action is requested.
- Feedback requested from AMWG members.
- Motion requested: motion language as follows:

Presenter

Michael Gabaldón, Secretary's Designee

Previous Action Taken

- √ **By AMWG:**
At the last AMWG meeting in August 2005, Michael Gabaldón presented the new ethics language that is to be added to the AMWG Charter in June 2006. Because of the vagueness of that language, he asked the members to review it and provide comments and questions to Linda Whetton by December 31, 2005, so they could be forwarded to the Department for clarification.
- By TWG:**
- By an Ad Hoc Group:**
- Other:**

Relevant Science

- √ There has been no relevant research or monitoring on this subject.
- The following describes the relevant research or monitoring on this subject:

Background Information

- √ I have attached the background information to be included in the AMWG packet that is distributed 30 days before the meeting, and posted on the website.

The following language will be incorporated in the next iteration of the AMWG Charter, which is scheduled to be renewed June 2006:

“No Council or subcommittee member shall participate in any specific party matter including a lease, license, permit, contract, claim, agreement, or related litigation with the Department in which the member has a direct financial interest.”

Attached is a partial list of questions and answers. If additional answers are received by the time of the AMWG meeting, they will be distributed at that time.

From: <Hale_Hawbecker@ios.doi.gov>
To: <Sharon_Norman@ios.doi.gov>
Date: 7/27/2005 2:15:51 PM
Subject: Re: Ethics questions from BOR

Answers for BOR.

I am happy to discuss this further with each or any of you. Here is my analysis and attempt to answer the ethics questions you had.

Q1. [REDACTED] is a private consultant and serves on the Glen Canyon Dam Technical Work Group, a subcommittee of the Glen Canyon Dam Adaptive Management Work Group. He also provides advice to his representative on the parent committee (AMWG). As such, he is involved in all the budget discussions relative to work that will be funded by the Adaptive Management Program, work which may be performed by his consulting firm at a later date. Should he recuse himself from those budget discussions?

A1. The answer is no, he should not recuse himself from general budget discussions. He should recuse himself from discussions regarding specific contracts that his firm is attempting to get, if such discussions occur (highly unlikely).

First and most important, none of the members of the Glen Canyon Dam Adaptive Management Work Group or its subcommittees are federal employees. These volunteers serve as uncompensated representatives of various stakeholder interests to advise the Department regarding the planning and management of public lands. It is legally required and operationally important to have a diverse committee composed of representatives of varied interests in a given subject matter. One of the purposes of a Federal advisory committee is to reach a consensus among representatives of varied views. To this end, the United States Office of Government Ethics (OGE) recognizes that representative members of Federal advisory committees are NOT subject to the conflict of interest laws. Unlike special Government employees (SGEs) and other Federal employees, representatives are not expected to render disinterested advice to the Government. Rather, they are expected to represent a particular bias. OGE Informal Advisory Letter 93 x 14.

However it may be desirable to impose certain narrow ethics restrictions on advisory committee members who serve as representatives. The Department has done precisely this in Bureau of Land Management (BLM) regulations for advisory committees, which impose conflict of interest requirements on NWRAC advisory committee members. The language states that:

No advisory council members, including members of the resource advisory councils, and no members of subgroups of such advisory committees, shall participate in any matter in which the members have a direct interest.

43 C.F.R. 1784.2-2.

Remembering that representative advisory committee members are not subject to conflict of interest laws and that it is in the Government's interest to have a diverse body of members with various viewpoints participate in the committee's work, the BLM regulation must be read narrowly. First, the best reading of the term "matter" in the regulation, consistent with how the general conflict of interest restrictions are interpreted, encompasses only "specific party matters" in which the member has a direct financial interest. 43 C.F.R. 1784.2-3(c) clarifies this by describing the types of interests that should be disclosed, e.g., A. . . leases, licenses, permits, contracts, or claims and related litigation. "(See also, Preamble to the BLM rule at 60 Fed. Reg. 9912: "This provision simply requires disclosure of interests by advisory committee members, and prohibits them from participating in specific matters in which they have such interests.). This reflects the Department's concern that members not participate in specific party matter discussions that directly affect their own financial interests.

Second, the use of the term "direct" in the BLM regulation means "certain, not in doubt or contingent on some other factor" while "indirect" means "an interest contingent on another factor or through a third party . . . such as a child, spouse, business partner, or other affiliate." 60 Fed. Reg. 9912. Direct interests do not include those of a member's employer or others with whom he may have a financial relationship. Therefore, the regulations were meant to exclude advisory committee members from participating in discussions regarding specific party matters (leases, licenses, permits, contracts, or claims or litigation) in which they individually or personally have a direct financial interest. This provision was not meant to exclude members from participating in discussions of general applicability, in which members do not have a direct interest, such as those in which their employers or other affiliates may have a financial stake.

Applying these narrow ethics rules to Mr. [REDACTED], we must ask a few questions. First of all, are the budget discussions really "specific party" matters? I would think the answer to this question is no; such discussions are policy discussions that do not focus on specific contracts or grants. Obviously, if Mr. [REDACTED] is the sole owner of a consulting company and the advisory committee is discussing a specific contract that he is attempting to get for his consulting company, he should recuse himself from that particular discussion. He does not need, nor do we want to encourage him, to recuse himself from all general budgetary discussions just because his firm may benefit at some later date. To do this, would shut down the advisory committee process throughout the Federal Government, considering that many committee members render advice on matters to which their employers or themselves stand to benefit indirectly. We must impose rules carefully for advisory committee members, since we know that they come from a variety of interest groups with various biases, all of this a good thing since we are attempting to achieve consensus from a spectrum of interests.

Q2. Are the regulations governing conflict of interest for FACAs different from regulations governing Interior employees? For DOI, direct financial benefit to an employee is not a necessary criterion to demonstrate conflict of interest. All that is required is the appearance of conflict of interest. For example, I worked as an archaeologist for the Bureau of Reclamation in Grand Junction, CO. My wife worked as an archaeologist for a local consulting firm. Whenever that firm bid on a contract issued by my office, I had to formally recuse myself from both the award determination and administration of the contract. This was true even if my wife was not involved in the work accomplished by that contract. The concern was that other competing firms might perceive favoritism in such cases, hence giving the appearance of conflict of interest.

A2. Without discussing the merits of the decision to require you to recuse from those contract matters when you worked for BR, as I discussed above, the rules are very different for FACA representatives than they are for DOI employees. As Federal employees, we are subject to all of the ethics rules, including the "appearance of a lack of impartiality" rule that you eloquently discussed. FACA members (other than those we appoint as SGEs) are simply not subject to these same rules. Remember, these are volunteers, with lives outside of the Federal Government. It is hard enough to get people to volunteer, we don't want to impose strict ethics rules that will render the tasks which they carry out for us impossible.

Q3. The Recovery Implementation Programs (RIPs) are not FACA groups. They are committees that are comprised of multiple-agencies (feds, tribes, and states) and other participants (environmental groups, Interstate Stream commissions, universities) and they do give advice on funding issues. The RIPs are comprised of several layers of hierarchy--the lowest level is Biology Committees which make recommendations on specific scopes of work, the second level is Coordination or Management Committees which approve work plans that are comprised of several Scopes of Work. The people at each level represent organizations that in many cases will receive funding based on their recommendations. The specific questions are:

Qa) Can participants in the various committees make recommendations on certain projects, if the funding will be coming to their organization?

Q3b) Can participants make recommendations on projects if the money will be used to directly support people that work for them or even if the money is to be used to fund their own personal salary? For example, in the RIPs we currently have people that serve on the Biology Committees that make recommendations for projects where the money would be coming to them to support 1) their

organization (e.g., state game and fish agency, USFWS), 2) people that work directly for them, and 3) their own salaries, travel costs, and support to do projects.

Are these practices ethical?

A3. I wonder first of all why the RIPS are not FACA groups. Any panel, task force, subcommittee, council, etc. that gives advice to the Federal Government should be subject to FACA requirements. There are some exceptions for groups composed entirely of Federal, State, local officials in section 201 of UMRA (Unfunded Mandates Reform Act), but you indicate to me that the RIPS are composed of non governmental participants. I would check with the Division of General Law (Tim Murphy), Office of the Solicitor, regarding the applicability of FACA to these groups.

The RIP could impose ad hoc ethics rules to members of the RIP the same as we do to representative members on FACAs. They must be narrow! They could be required to recuse themselves from discussions regarding specific party matters (presumably a project would involve specific parties as you describe it) which directly benefits the RIP member. Remember, they are NOT required to recuse themselves from matters which affect the financial interests of their employers. OGE even permits SGEs serving on FACA committees to participate in particular matters of general applicability, such as the development of general regulations, policies, or standards, where the disqualifying interest arises from the SGE's non- Federal employment or prospective employment. 5 C.F.R. ' 2640.203(g). We should not impose stricter requirements on non employees than we are willing to impose on government employees.

Please call me if you have any questions regarding these matters.

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