

*White Paper*<sup>1</sup>  
Using Expert Meetings for Species Status Assessments  
Under the Endangered Species Act  
U.S. Fish and Wildlife Service  
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## Introduction

The U.S. Fish and Wildlife Service (Service) is developing new processes for conducting Species Status Assessments (SSA)<sup>2</sup> under the Endangered Species Act (ESA). Using outside expert scientists early in the status review process is one new approach we plan to use, when appropriate, in order to compile and analyze our best available scientific information.<sup>3</sup> This white paper explains the process of meeting with experts in a way that ensures compliance with the applicable portions of the Federal Advisory Committee Act and the Administrative Procedure Act.

We often assess species that have very limited applicable information available in the published literature. Often the best available information about what a species needs to maintain viability is only accessible from the knowledge and experience of species biologists and other scientific experts. As a result, in some instances it is critical that we use these experts to ensure we apply the best available information in our decision-making. One of the best ways to elicit expert input is through open dialogue in structured, small group meetings. Groups of experts can build on each other's knowledge and perspectives to create an atmosphere of discovery that provides the best foundation for scientific analysis. It is this solid foundation of biological science that we are seeking in our new SSA process.

## FACA

The Federal Advisory Committee Act<sup>4</sup> (FACA) was enacted in 1972 to ensure that advice to the Executive Branch of the Federal government by advisory committees is transparent and accessible to the public. The FACA formalized a process for establishing, operating, overseeing, and terminating these advisory bodies. The purpose was to curtail biased, special-interest access to Federal agency decision makers and reduce unnecessary working groups and related expenses.

Recovery teams appointed for the development and implementation of recovery plans for listed species under the ESA are not subject to FACA.<sup>5</sup> However, other groups of experts used for ESA-related purposes are not specifically exempted from FACA. The scientific experts providing biological information for the SSA will not act as an advisory committee such that we

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<sup>1</sup> Contact Nathan Allan (512-490-0057, x237) for comments or questions on this White Paper.

<sup>2</sup> Service, see <https://sites.google.com/a/fws.gov/ssa/home> for latest on SSA Framework.

<sup>3</sup> Information standard under the Endangered Species Act of 1973, Sections 4(b)(1)(A), 4(b)(2), 7(a)(2).

<sup>4</sup> For more information about the FACA, see [www.gsa.gov/faca](http://www.gsa.gov/faca).

<sup>5</sup> ESA, Section 4(f)(2).

would be required to follow FACA's procedural mandates. As such it is important that we structure and conduct SSA-related meetings in such a way as to avoid inadvertently forming, utilizing or even appearing to form or utilize a Federal advisory committee.

The General Services Administration (GSA) is responsible for overseeing FACA rules and regulations. In 2001, GSA developed regulations in which it describes types of groups to which the FACA does not apply, including the following two groups:

(1) “(e) *Groups assembled to provide individual advice.* Any group that meets with a Federal official(s), including a public meeting, where advice is sought from the attendees on an individual basis and not from the group as a whole;”<sup>6</sup> and

(2) “(f) *Groups assembled to exchange facts or information.* Any group that meets with a Federal official(s) for the purpose of exchanging facts or information.”<sup>7</sup>

SSA expert meetings should meet both of these criteria: The primary purpose of the meetings will be to exchange facts and information and, to the extent any advice may be sought on biological questions<sup>8</sup>, that advice will only be sought on an individual basis, *not* from the group as a whole.

## APA

The Administrative Procedure Act<sup>9</sup> (APA) of 1946 governs the process by which Federal agencies develop and issue regulations. It includes requirements for publishing notices of proposed and final rulemaking in the Federal Register and provides opportunities for the public to comment on notices of proposed rulemaking. In addition to setting forth rulemaking procedures, the APA addresses other agency actions such as issuance of policy statements, licenses, and permits. It also provides standards for judicial review if a person has been adversely affected or aggrieved by an agency action.<sup>10</sup>

Some activities under the ESA are rulemaking actions (such as listing, critical habitat designation, and special rules); however, all ESA activities involve Federal agency decision-making where it is important to maintain open, public records to document the decision-making process. For rule-making actions, information used in the agency decision must be available for public review and comment. And, for all ESA-related decisions (including section 7

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<sup>6</sup> General Services Administration, Federal Advisory Committee Management, Final Rule. 66 Federal Register 37728, July 19, 2001 (online at <http://www.gsa.gov/portal/content/104034>); p. 37735, § 102–3.40 item (e). Regulations at 41 CFR 102-3.

<sup>7</sup> *Ibid*; p. 37735, § 102–3.40 item (f).

<sup>8</sup> Note at *Ibid*; item (g) also provides a FACA exception for, “(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 employees must be serving in their official governmental capacity representing their respective agency. SSA expert meetings will be seeking professional scientific advice from individuals rather than seeking official positions of governmental agencies. So this exception would **not** likely apply for SSA expert meetings.

<sup>9</sup> Administrative Procedure Act (5 U.S.C. Subchapter II). Available online at: <http://www.archives.gov/federal-register/laws/administrative-procedure/>.

<sup>10</sup> Summary of the APA, online at: <http://www.epa.gov/lawsregs/laws/apa.html>.

consultations, section 10 permits, recovery plans, etc.), the supporting information must be available for judicial review in the administrative record. Therefore, all information gained via SSA expert meetings will be disclosed and available through a public process and also subject to release under the Freedom of Information Act.

## Guiding Principles

The following guiding principles should be followed to make sure SSA expert meetings do not implicate the FACA and conform to the APA, while still promoting professional integrity in the overall process of organizing and carrying out such meetings.

(1) **ROLES.** The Service will clearly explain (verbally and in writing) before, during, and after the meeting the specific roles and expectations of the experts participating in the meeting. Expectations include:

(a) The Service is only seeking the best available scientific information from the experts.

(b) Any advice from experts will be provided on an individual basis and not from the group as a whole. Group debate may be encouraged but a consensus or group advice on issues will not be sought and should not be provided.

(c) The Service is not asking for input on the determinations under the ESA; instead the Service is only seeking expert input on the biological information that Service biologists will use in formulating recommended determinations under the ESA. The Service retains full control over the ESA determination and no pre-decisional assumptions of those determinations will be discussed.

(d) The outcomes of the expert meeting will be one source of information, among other sources, that the Service will use in making recommended determinations under the ESA. Any information used must meet the appropriate ESA standard for the decision at hand for the best available information.

(e) Participants will be asked to share their scientific expertise during the meeting and not to represent any particular position of an agency or other interested party.

(2) **PARTICIPANTS.** Individuals will be invited by the Service to participate in SSA expert meetings based solely on their scientific expertise, rather than as a representative of a particular interested party. A diversity of perspectives and backgrounds that can provide biological information will be sought to participate.

(a) The Service will strive to include interested experts that would like to participate in the SSA expert meetings. However, group dynamics requires that successful meetings include a manageable number of participants. The exact number of participants will depend on the scope of the issue and the ability of the Service to manage the meeting effectively.

(b) Any prospective participant in an expert meeting with a potential conflict of interest (such as a commercial stake) in the ultimate outcome of the ESA decision should either not serve as a participant or fully disclose the potential conflict to the Service and all other participants.

(c) To avoid any perception of potential conflicts, in most cases participants should be scientists from other Federal agencies, State agencies, Tribes, academic institutions, or nongovernmental organizations.

(d) In some instances, the Service may offer to reimburse travel costs of participants (usually only for non-Federal employees; Federal agencies would pay their own travel costs). Whether or not the Service reimburses travel costs is at the Service's discretion and will depend on the availability of funds. Generally if the Service offers to pay travel expenses, the offer should be made to all non-Federal invited participants.

(e) Expert meetings will not be recurring over time and will usually be limited to one meeting, or two or three at most. However, there could be follow-up conference calls or one-on-one communications after the meeting to clarify, for documentation purposes, the information discussed at the meeting. Those meetings should also follow the above principles.

(3) AGENDA. The Service will develop the meeting agenda with input from the participants, if practical, and participate in facilitating the meeting to ensure consistency with the roles and expectations in item 1 (above).

(4) DOCUMENTATION. Information provided through the course of expert meetings will be documented in a written report by the Service for the administrative record for use in agency decision-making. The meeting documentation will not attempt to characterize any group recommendations or advice, but will summarize the biological information gained during the meeting.

(5) SOLICITOR CONSULTATION. If any questions arise about conforming with FACA or APA regulations, be sure to communicate with your Solicitor's Office about the specific facts of a given situation.

## Conclusion

The Service plans to use expert meetings as one way to gather and analyze the best available information in conducting species status assessments under the Endangered Species Act. It is imperative that these expert meetings are planned and carried out in a way that is consistent with the intent of applicable Federal laws, particularly the Federal Advisory Committee Act and the Administrative Procedure Act. To ensure that FACA procedures do not apply, expert meetings will be structured so that their primary purpose is to exchange facts and information. Furthermore, advice sought on biological questions will only be sought on an individual basis, not from the group as a whole. To ensure compliance with the APA, the outcomes of the expert meetings will be documented appropriately so that the information is part of the publicly available administrative record. Using expert meetings is one important way the Service can improve our use of the latest and best scientific information to more effectively implement the ESA.