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Dear Tribal Leader:

I am writing to provide an update on the IHS consultation on the Federal Advisory Committee Act (FACA). In November, 2011, I sent a letter to Tribal leaders to initiate a consultation on how to ensure that IHS advisory workgroups were compliant with the Intergovernmental exemption from FACA. In February, I sent another letter to clarify the Agency's position that we were not trying to limit participation by Tribal employees and technical experts, and that we were simply asking for input on FACA as it applies to IHS advisory groups. After review of the input received to date, I am writing to indicate our conclusions from the discussion of this issue.

One point that clearly needs clarification is the purpose of FACA. As stated in the first letter, any group that has one or more members who are not federal employees and that is established or utilized by a Federal agency to provide consensus advice to the agency must comply with FACA. Compliance with FACA includes following procedures that govern how to constitute, convene and use these advisory committees. FACA compliant groups must provide public notice of meetings in the Federal Register, must make minutes and documents available to the public, and meetings must be open to the public. FACA does not apply to events or meetings where consensus recommendations are not requested, such as listening sessions and workshops at conferences. FACA applies solely to groups that are advisory in nature and are convened to develop a single set of recommendations from the group to the federal government.

However, a federal statute created an "Intergovernmental Exemption" to FACA for meetings "held exclusively between Federal officials and ...elected officers of...tribal governments (or their designated employees with authority to act on their behalf), acting in their official capacities." 2 U.S.C. § 1534(b). The exemption also requires that the "meetings are solely for purposes of exchanging views, information and advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities." The exemption would allow an advisory group, which meets its criteria, to not have to comply with FACA, and therefore would not require public meetings, Federal Register notice, etc. IHS values meetings with Tribal government representatives and on occasion the need for frank and open discussion helps solve challenging issues. The Intergovernmental Exemption allows these IHS advisory groups to meet privately; if the group had to comply with FACA, all discussions would have to be in public, which potentially would limit the discussion. If the Intergovernmental Exemption is not met, then the group must comply with FACA requirements. If a group that does not meet the Intergovernmental Exemption generates consensus recommendations for the federal government but does not meet the requirements of FACA, those recommendations and policies that were developed as a result could be challenged.

It seems that the simple solution to this issue is to identify those groups that advise the IHS by generating consensus recommendations and to ensure that they meet the Intergovernmental

Exemption. When an elected or appointed Tribal governmental representative is a member of an advisory group, then their status as a governmental representative is usually clear. If a Tribe wishes to have an employee or technical staff represent their Tribe as a member of an advisory committee, their status could be made clear through a letter from the Tribe documenting their authority to act on their behalf. IHS has some advisory committees that already have this type of documentation on file.

There have been some instances in which Tribes have complained that particular individuals who gave recommendations at IHS advisory group meetings were not authorized to give those recommendations on behalf of that specific Tribe. While this type of complaint is not common, it is important to ensure that IHS is respectful of a Tribal government's right to self-determination and self-governance and their right to designate someone to act on their behalf. Having documentation for advisory workgroups that makes a member's status as a governmental representative clear can help reduce confusion and can help the workgroup comply with the Intergovernmental Exemption to FACA.

Again, this discussion does not apply to meetings and groups that are convened for purposes other than generation of consensus recommendations. Listening sessions and open meetings where the input of individuals is heard are not subject to FACA, and therefore, documentation of an individual's status is not necessary. However, in practice at listening sessions and other open meetings, Tribal elected and appointed officials are generally allowed to speak before others in the audience, and that seems to be a respectful way to conduct those meetings. IHS usually does not interfere with this type of sequence of speaking because it seems everyone tends to understand that Tribal leadership should be allowed to speak first. As long as groups respect this principle, IHS does not intend to actively facilitate this natural process.

Therefore, the outcome of this consultation on FACA is that, moving forward, IHS advisory groups that are convened for the purpose of generating consensus recommendations must ensure that written documentation is in place to indicate that each member of the advisory group is officially representing a Tribal government. This can be in the form of a letter from the Tribe and will be put on file for the duration of the advisory group. Then, the discussions between the federal government and the members of the advisory group can proceed without concern that their deliberations are not compliant with either the FACA or the Intergovernmental Exemption. IHS staff will request this documentation for IHS advisory groups as we move forward.

Thank you for your input on this important consultation.

Sincerely,

/Yvette Roubideaux/

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Director