May 1, 1992

MEMORANDUM FOR: Mary Ann Fish
Director, White House Liaison

FROM: Barbara S. Fredericks
Assistant General Counsel
for Administration

SUBJECT: Status of Member of Fisheries Management Councils and District Export Councils

We have reviewed the status of members of the Fisheries Management Councils and the District Export Councils in relation to whether they are"public officials" as defined in 18 U.S.C. S 219(c. A review of the circumstances of each council's functions reveals that the members of the Fisheries Management Councils are public officials as defined in that statute, but the members of the District Export Councils are not.

Background

Section 219 prohibits a public officials from acting as an agent of a foreign principal required to register under the foreign Agents Registration Act of 1938, as amended.1/ Violation of this prescription subjects the individual to criminal penalties of fine, imprisonment for up to two years, or both.2/ In the case of the employment of an agent of a foreign principal as a special Government employee, the head of the employing agency many certify to the Attorney General that the employment of such an individual is required in the national interest.3/ Filing such a certification with the Attorney General will exempt that individual from the strictures of the statute.

"Public official" is defined as:
(1) any person,
(2) acting for or on behalf of the United States, or any department, agency, or branch of Government thereof,
(3) in any official function
(4) under or by authority of any such department, agency, or branch of Government.4/

1/22 U.S. C S611, et seq.
2/Failure to register as required by the Foreign Agents Registration Act also subjects an individual to criminal penalty. 22 U.S. C. S 618.
3/18 U.S.C. S 219(b).
4/18 U.S.C. S 219(c).

The Department of Justice, has interpreted this definition to include "(M)embers of advisory committees governed by the Federal Advisory Committee Act (FACA) . . . . "5/ They refined the statutory definition set forth above by noting that generally:

> FACA provides that advisory committees are established or utilized 'in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.' 5 U.S.C. app. S 3(2). Pursuant to FACA, a designated federal officials calls all meetings of an advisory committee whenever he determines it to be in the public interest. Id. S10(e), (f). Members of advisory committees subject to FACA thus perform their official advisory duties 'for' the Government and 'under' a government agency, within the meaning of section 219.6/ 'Representative' members of FACA committees . . .are also ' public officials(s)' within the meaning of section 219.7/

Discussion

Fisheries Management Councils (FMCC)

Eight FMCs were established by section 302 of the Magnuson Fishery Conservation and Management Act, as amended, for the purposes of advising, preparing, and submitting to the Secretary of Commerce fishery management plans regarding their respective regional fisheries.9/ Voting members of the FMCs are: (1) the principal State officials with marine fishery management responsibility, (2) the Regional Director of the National Marine Fisheries Service for the geographic area concerned, and (3) individuals appointed by the Secretary of Commerce.10/

Although FMCs are not subject to the FACA,11/it appears that members of FMCs are public officials within the meaning of 18 U.S.C. S 219. The members act on behalf of the Department, and perform officials functions for the Department, under the authority of both the statute and the Secretary.

FMCs have been previously administratively determined to perform an official function. Despite the Magnuson Act's specific exemption of the FMCs from the FACA, NOAA General Counsel has opined that "[c]ouncils are Federal instrumentalities created by statute to fulfill a Federal function, and are funded by Federal appropriations."12/ In 1977, the Department of Justice

---

5/Memorandum to the Honorable John P. Schmitz, Deputy Counsel to the President, from Douglas R. Cox, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, dated April 29, 1991 (hereinafter referred to as OLC Opinion).
6/OLC Opinion at 2 (Footnotes omitted). The opinion does observe that such conclusion "is consistent with the judicials construction of the similar definition of 'public officials' in the federal bribery statute. 18 U.S.C. S 201(). On which section 229 was modeled." OLC Opinion at 2. ".2 (citing 130 Cong. Rec. 1295 (1984); Dixon v. United States, 465 U.S: 482, 496 1984)).
7/OLC Opinion, at 3.
8/Pub. L. 94-265, Title III, S 302 (Apr. L3, 1976), 90 Stat. 347 (codified at 16 U.S.C. S 1852).
9/16 U.S.C. S 1852(h)
10/16 U.S.C. S 1852 (b)
11/ 16 U.S.C. S 1852(i)(1).
12/Fisheries Management Council Handbook (March 1985), at I-8 (citing NOAA/GC

Opinion, dated Oct. 3, 1978). The Department of Justice concurred in this opinion on August 21, 1979. Scc FMC Handbook at II-B 13.

Found occasion to review the functions and status of FMCs, albeit in the context of members' personal liability under the Federal Tort Claims Act.13/ In that opinion, OLC viewed the FMCs as "established to execute a Federal function [and] to assist the Secretary of Commerce in his official endeavors."14/ Furthermore, they found that the "Councils come within the concept of an entity which is an integral part' of a Federal agency . . . . They are indispensable [sic] elements in the statutory scheme of the 1976 Act, and are an integral part of the Department of Commerce's statutory mission under that Act."15/ This conclusion was acknowledged in a later OLC review of the status of FMCs, determining that, although they lack independent litigating authority, they belong to any number of categories of Federal agencies.16/

District Export Councils (DECs)

DECs were not established by statute, but have existed through the administrative power of the Department "to serve as communications links between the business community and the Government in helping to carry out national export expansion programs."17/ The role of being a "regional channel of communication" was instrumental in determining that the DECs were not advisory bodies, and that the FACA did not apply to DECs.18/

13/1 O.L.C. 239 (Oct. L4, 1977).
14/1 O.L.C. at 240 (citing 16 U.S.C. SS 1801(a) (6)-(7) and 1853(a)(1)(c)).
15/Id.
16/4B O.L.C. 778, 780 n.2 (Sep. 17 1980).
17/Commerce Department Press Release, dated Sep. 9, 1974. In March 19600 the National Export Expansion Council, was formed by order of Secretary of Commerce Mueller (pursuant to a message to Congress from President Eisenhower) to "discover industry sectors for which exports could be increased, to assist and encourage firms entering the export field, to strengthen contacts with business groups abroad, and to develop a volunteer organization adequate to meet all these goals." By 1973, the National Council established 42 Regional Export Expansion Councils (with nearly 1,800 members). These Regional Councils were the predecessors to the DECs. The District Export Councils Policy and Procedures Manual (Dec. 1, 1987), at p. 2-1. The National Council was disbanded in 1973 with the establishment of the President's Export Council. This office, determined with agreement of Office of Legal Counsel, that because the Regional Export Expansion Councils were established separately from the National Council, they could remain in existence. This office also reasoned that the Regional Councils "do not perform advisory functions (and the FACA] will not apply to [Regional Councils] as long as they are not used to provide advice and recommendations but continue to function as an informational distribution outlet for the Department." Memorandum to the Files from Robert C. Goodwin, Jr. and Wallace E. Brown, dted Dec. 20, 1972.

18/Memorandum Opinion Re: Proposed Executive Order Entitled "Establishing the President's Export Council and for Other Purposes" and a draft Presidential Memorandum Establishing the President's Interagency Committee on Export Expansion, from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Department of Justice, dated Oct. 26 1973.

DECs do possess some Federal ties. DEC members are nominated by the respective District Office Directors of U.S. and Foreign Commercial Service, and are appointed by the Secretary of Commerce. Each District Office Director Serves as the executive secretary for his or her respective district's DEC. Employees from other Federal agencies also sit on the DECs.

On the whole, however, we do not view members of the DECs to be public officials within the meaning of 18 U.S.C. S 219(c) because they do not act for or on behalf of the Department in an official function. Despite limited "federal ties" mentioned above, DECs overwhelmingly perform activities on their own accord, pursuant to their own agenda, with their own assets. They possess no statutory charter, are not subject to the FACA, nor have they been authoritatively considered to be an integral part of the executive branch.

Today, the DECs retain their communication-link role and "collectively serve as a volunteer auxiliary of U.S. and Foreign Commerce Service District Offices to encourage and support export expansion activities in a variety of ways within their respective jurisdictions."19/ The DECs focus on opportunities to promote export awareness at the local level through direct counselling of firms and providing information vial seminars, workshops, training conferences, and courses. They develop relationships

with local financial institutions to promote financing of exports. 20/

Because of their primarily operational (not advisory) role, this office continues to view DECs as not subject to the FACA.21/ DEC activities are not supported by appropriated funds. Rather, each DEC receives funding for its activities through membership fees and other collections for their programs and services. These funds are deposited in local financing institutions.22/ DEC meetings are held at a time and place mutually agreed upon by the chairman and the members and are open to the public. The executive secretary is responsible for recording and preparing summary minutes of each meeting.23/ The policy of the U.S. and Foreign Commercial Service has been that Federal employees, including executive secretaries, may not direct the disbursement of DEC funds or otherwise have any "authority, responsibility, supervision or control "over DEC funds or accounts.24/

19/DEC Handbook, at p. 3-1
20/Id. At p. 4-1
21/See, c.q., memorandum for Brenda Ebeling from Barbara S. Fredericks, Subject: Expenditures by DEC Executive Secretaries and Reimbursement Practices, dated Dec. 7, 1990. "Any committee which is established to perform primarily operational as opposed to advisory functions" is an example of a group not covered by the FACA. The administering Federal agency has the responsibility of determining whether a group is operational or advisory in nature. Furthermore, the nature of such group may change from an operational to an advisory role. 41 C.F.R. S 101-6.1004(g).
22/Id. At n.l.
23/DEC Handbook, at p. 8-1.
24/US@FCS Bulletin No. 87-48 (Jul. 10, 1987). See also memorandum at note 21 supra.

DECs are developing advisory activities, however, by providing industry and perspective views to the President's Export Council,25/ and passing on for the Department's consideration positions on trade legislation issues.26/ If these advisory activities form a significant part of the DECs' present-day activities, DECs could begin to be viewed as advisory committees subject to the FACA, with its members considered to be performing

on official function, and, thereby, acting as public officials. At the present time, however, we have been advised that these advisory activities are of a limited nature.27/

25/The President' Export Counsel (PEC) was established by Executive Order 11753 (Dec. 21, 1973). Sections 3 and 6 of that Executive Order authorized the PEC to establish, with the concurrence of the Secretary of Commerce, subordinate committees, which would be subject to FACA. In 1975, the Internal Revenue Service considered the PEC, "including its subordinate committees," to be part of the executive branch of government for purposes of treating contributions to it as deductible charitable contributions. Memorandum to Karl E. Bakke from Billy M. Hargott, Chief, Individual Income Tax Branch, Internal Revenue Service, dated Jun. 25, 1975. In interpreting that ruling in 1982 and 1984, this office advised that DEC's are "subordinate committees" of the PEC. In light of the history of the DECs, note 17, suppra, this interpretation is incorrect.

26/DEC Handbook, at p. 4-1

27/Telephone conversation on 4/22/92. With Diane Burke, Director of Public and Private Programs, U.S. & Foreign Commercial Service. The DECs may be informally requested to provide input on "emerging export issues," but US&FCS does not encourage DECs to submit formal position papers on trade legislation.

Excerpts from 22 U.S. C. 611

(b) The term "foreign principal" includes-

(1) a government of a foreign country and a foreign political party;

(2) a person outside the United States, unless it is established that such person is an individual and a citizen of an domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and

(3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

(c) Except as provided in subsection (d) hereof, the term "agent of a foreign principal' means-

(1) any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person-

(i) engages within the United States in political activities for or in the interests of such foreign principal;

(ii) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal;

(iii) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or

(iv) within the United States represents the interests of such foreign principal before any agency or officials of the Government of the United States; and

(2) any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this subsection.