IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

CODY T. KNAPP
Federal Programs Branch, Civil Division
U.S. Department of Justice
1100 L Street NW
Washington, DC 20005
Tel.: (202) 532-5663
E-mail: cody.t.knapp@usdoj.gov
Counsel for Defendants

WESTERN ORGANIZATION OF RESOURCE COUNCILS, *Plaintiff,* vs. DAVID G. HUIZENGA, in his official capacity as Acting Secretary of Energy*; UNITED STATES DEPARTMENT OF ENERGY, *Defendants*.	Case No. 4:20-cv-98-BMM **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

* Because Dan Brouillette is no longer the Secretary of Energy, David G. Huizenga, the Acting Secretary of Energy, is automatically substituted as a defendant pursuant to Federal Rule of Civil Procedure 25(d).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

FEDERAL REGULATIONS

RULES

OTHER AUTHORITIES

INTRODUCTION

As Defendants explained in their opening brief, Section 10 of the Federal Advisory Committee Act ("FACA") requires public access to advisory committee meetings during which the committee deliberates about its advice to the government, thus ensuring that any recommendations provided to the government are known to the public and open to its scrutiny. Importantly, though, FACA does not require public access to every meeting held and every document created in support of an advisory committee's mission. Because the meetings and records that Plaintiff seeks to access fall outside of FACA's scope, Plaintiff cannot prevail in this litigation.

First, the complaint does not raise a plausible claim for access to the meetings and records of NCC, Inc. (also referred to as "the Corporation"). NCC, Inc. is not an advisory committee because it is not amenable to strict management by agency officials. Nor is it true that NCC, Inc.'s support for the National Coal Council ("Council") renders all of its meetings and records—whether transmitted or not—"prepared for" the Council such that

they must be made public. At best, the complaint shows that the Corporation was established by private actors as a secondary consequence of Defendants' decision to charter the Council, and that it provides support for the Council's work. Such private action, undertaken outside the government's purview, does not spawn new obligations for the government under FACA.

Likewise, the complaint fails to make out a plausible claim relating to Council subcommittees. Plaintiff surmises that the Council's advice to Defendants stems from recommendations prepared by subcommittees and objects that Council deliberations as to those recommendations are not sufficiently spirited. In the absence of contentious Council discussions, Plaintiff insists that the Council is a meaningless pass-through, forwarding subcommittee recommendations to Defendants without any further deliberation. But Plaintiff overstates the applicable standard, which exempts subcommittees from FACA whenever, as here their recommendations will be presented to the full committee and offered up for public comment. Moreover, Plaintiff

cites no case where a court has found subcommittee materials and proceedings to be covered by FACA due to a lack of deliberation. Nothing in the complaint compels this Court to become the first.

Finally, Plaintiff cannot obtain the remaining relief sought in the complaint for access to Council meetings and records unassociated with either the Council's subcommittees or NCC, Inc. As Defendants pointed out in their brief in support of dismissal, the complaint does not plausibly allege that Defendants denied Plaintiff access to any other meetings and records. Moreover, Plaintiff now concedes that it is not seeking such relief at this time. Thus, those claims for relief should be dismissed as well.

ARGUMENT

I. Plaintiff's Arguments for Access to the Meetings and Records of NCC, Inc. Should Be Rejected.

A. NCC, Inc. Is Not Itself a Federal Advisory Committee.

In its Opposition, Plaintiff gives primary focus to its claims regarding NCC, Inc., continuing to paint the Corporation as a shadowy source of support for the Council's work. Plaintiff's principal argument is that Defendants must open all NCC, Inc. meetings and disclose all documents created by the

Corporation because, in addition to the Council, the Corporation constitutes a second, stand-alone advisory committee. That argument is fatally flawed.

Plaintiff acknowledges that not every entity involved in advising the executive branch is covered by FACA. *See* Plaintiff's Opposition ("Pl.'s Opp.") at 14. Nevertheless, it claims that NCC, Inc. is one such covered entity because its Articles of Incorporation make it possible for Defendants to exert influence over the Corporation.[1] *Id.* at 14–15. Given this potential, Plaintiff argues that NCC, Inc. is "amenable to strict management by agency officials," and so qualifies as an entity that Defendants "utilize" to obtain advice. *Id.* at 14. (quoting *Aluminum Co. of Am. v. Nat'l Marine Fisheries Serv.*, 92 F.3d 902, 905 (9th Cir. 1996)); *see also* 5 U.S.C. App. 2 § 3(2)(C) (defining a covered advisory committee as one "established or utilized by" an agency "in the interest of obtaining advice or recommendations").

[1] At times, Plaintiff appears to merge the distinct tests for advisory committees "established" by the government and those "utilized" by it. *See, e.g.*, Pl.'s Opp. at 14–15 (stating that NCC, Inc. depends on the Secretary of Energy for its very existence and that its authority emanates from Defendants). Still, Plaintiff does not argue that Defendants established NCC, Inc., perhaps for the good reason that it is clearly false, as Defendants did not charter the Corporation.

Plaintiff's utilization argument does not hold water because it gives an unduly lax meaning to the phrase "amenable to strict management by agency officials." The Ninth Circuit adopted that test directly from the Supreme Court's decision in *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 457–58 (1989). *See Aluminum Co. of Am.*, 92 F.3d at 905. There, the Court repeatedly cautioned against an overly broad application of FACA. *Public Citizen*, 491 U.S. at 462, 464. Heeding that caution, numerous courts since have found that an alleged advisory committee is only "amenable to strict management by agency officials" if it is shown to be subject to the actual management and control of a federal agency. *See, e.g.*, *Town of Marshfield v. FAA*, 552 F.3d 1, 6 (1st Cir. 2008); *Byrd v. EPA*, 174 F.3d 239, 246 (D.C. Cir. 1999); *Miccosukee Tribe of Indians of Fla. v. United States*, 420 F. Supp. 2d 1324, 1342 (S.D. Fla. 2006). Though the Ninth Circuit has not had the occasion to further expound upon the meaning of "amenable to strict management by agency officials," there is little doubt that it would join this consensus: The Circuit has already emphasized that courts give significant weight to how the government treats an alleged advisory committee, rather than simply

considering how the alleged committee views itself. *See Aluminum Co. of Am.*, 92 F.3d at 905 ("[I]t is a rare case when a court holds that a particular group is a FACA advisory committee over the objection of the executive branch." (quoting *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 914 (D.C. Cir. 1993))). Moreover, FACA's implementing regulations, which Plaintiff does not address, incorporate this stringent standard. *See* 41 C.F.R. § 102-3.40(d) ("The following are examples of committees or groups that are not covered by [FACA] or this Federal Advisory Committee Management part: . . . . Any committee or group created by non–Federal entities (such as a contractor or private organization), provided that these committees or groups are not *actually managed or controlled* by the executive branch." (emphasis added)).

Given the weight of authority, Plaintiff must allege facts showing that Defendants exercise something approaching actual—not potential—control of NCC, Inc. in order to show that the Corporation is "utilized" for purposes of FACA. But Plaintiff's complaint, like its Opposition, demonstrates only potential agency influence over NCC, Inc., not actual control. This is fatal to

Plaintiff's argument that NCC, Inc. is an advisory committee that must open its meetings and publish its records.

B. NCC, Inc.'s Support for the Council Does Not Render Its Meetings and Records Subject to Disclosure.

Plaintiff's fall-back argument—that even if NCC, Inc. is not an advisory committee in its own right, all of its meetings and records are still subject to disclosure—should also be rejected. Again relying on NCC, Inc.'s Articles of Incorporation, Plaintiff claims that the Corporation exists "solely to enable and assist the Council." Pl.'s Opp. at 18. Given the supporting role that NCC, Inc. plays, Plaintiff contends that all Corporation records are, "*a fortiori*," documents prepared for the Council and thus subject to disclosure.[2] *Id.*

[2] Plaintiff claims that Defendants have waived any reply to this argument by not anticipating it in their brief in support of dismissal, *see* Pl.'s Opp. at 22, but that is not so. In moving to dismiss, Defendants emphasized the factual deficiencies in the complaint and rejected the notion that NCC, Inc.'s support for the Council rendered Corporation documents subject to disclosure. *See* Defendant's Brief at 3, 31–32. Defendants were not required to identify and respond to alternative theories of liability couched as bare legal conclusions in the complaint. *See* Federal Rule of Civil Procedure 12(h)(1) (cataloguing the defenses waived when not raised in an opening brief). In any case, Plaintiff's argument that all NCC, Inc. records necessarily are Council records cannot save its open-meetings claim from dismissal.

Plaintiff's argument proves too much. First, it would negate the well-established exception to FACA's disclosure requirement for subcommittees that exist to support federal advisory committees. *See* 41 C.F.R. § 102-3.35(a). Further, it would contradict a line of decisions holding that FACA does not apply to groups that serve staff functions for an advisory committee. *See Nat'l Anti-Hunger Coal. v. Exec. Comm. of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 529 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983) ("Congress did not contemplate that interested parties like the plaintiffs should have access to every paper through which recommendations are evolved, have a hearing at every step of the information-gathering and preliminary decision-making process, and interject themselves into the necessary underlying staff work so essential to the formulation of ultimate policy recommendations."); *see also Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 464 F. Supp. 3d 247, 261 (D.D.C. 2020) (same). This Court should not adopt such a disruptive legal interpretation of FACA.

Plaintiff next asserts that it has adequately alleged the actual provision of substantive and financial documents to the Council by NCC, Inc. *See* Pl.'s

Opp. at 20. Defendants disagree. Though the complaint alleges that Council reports depend on the work of Council subcommittees, Compl. ¶ 66–67, it contains no similarly direct allegation of NCC, Inc.'s substantive involvement in the preparation of the Council's reports. Plaintiff's Opposition may claim that the same is true of NCC, Inc., *see* Pl.'s Opp. at 20, but this allegation should be added to the complaint by amendment, not argument. And while somewhat stronger, Plaintiff's allegation on information and belief that NCC, Inc. has disseminated reports on its finances at Council meetings is similarly insufficient. Such information-and-belief pleading is inappropriate where detailed public records of those meetings, including meeting agendas, transcripts, and minutes, already exist, and Plaintiff cites no support for its allegation within them.[3]

[3] In *Soo Park v. Thompson*, on which Plaintiff relies, the Ninth Circuit found that a plaintiff could allege a civil conspiracy on information and belief and withstand a motion to dismiss. 851 F.3d 910, 928–29 (9th Cir. 2017). Critical to the court's holding, however, were the complaint's detailed allegations related to earlier criminal proceedings, which on their own suggested an agreement to engage in illegal conduct. *Id.* Considering the "entire factual context," the court found the plaintiff's claims were nudged "across the line from conceivable to plausible." *Id.* at 928 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009)). This case is unlike *Soo Park* because Plaintiff pleads on information and belief without explaining how its beliefs square with the entire factual context, particularly the publicly available records of the very meetings to which Plaintiff refers.

II. FACA Does Not Require the Disclosure of Council Subcommittees' Meetings and Records.

Plaintiff's argument regarding Council subcommittees fares no better. Plaintiff acknowledges the insufficiency of its unremarkable allegation that the Council, like many advisory committees, relies on subcommittees to support its mission: As Plaintiff concedes, such supportive subcommittees are, as a general matter, exempt from FACA's transparency requirements. *See* Pl.'s Opp. at 24–25; *see also* 41 C.F.R. § 102-3.35(a). This is because FACA applies to committees that advise agencies, not committees that advise committees. *See Nat'l Anti-Hunger Coal.*, 557 F. Supp. at 529 ("The Act does not cover groups performing staff functions … .").

Still, Plaintiff hangs its hat on a narrow exception to this general rule: 41 C.F.R. § 102-3.145 provides, in relevant part, that "[i]f a subcommittee['s] … recommendations will be adopted by the parent advisory committee without further deliberations by the parent advisory committee, then the

subcommittee's meetings must be" open to the public and catalogued in detailed minutes.[4] In Plaintiff's view, the complaint states a claim to access subcommittee meetings and records because it contains allegations that the Council adopts all of its subcommittees' recommendations without the "further deliberation" required by FACA's implementing regulations. *See* Pl.'s Opp. at 25.

The problem is that Plaintiff has the standard under 41 C.F.R. § 102-3.145 all wrong. As Plaintiff would have it, the regulatory requirement of "further deliberation" means that Council members must approach subcommittee proposals skeptically, suggest changes to those proposals, or, as Plaintiff might have done, register disapproval of the proposals' substance. *See* Pl.'s Opp. at 25. Anything less, and the Council becomes the sort of "rubber

[4] In its opposition, Plaintiff accepts that the General Services Administration's ("GSA") regulations establish the proper framework governing public access to subcommittee meetings and records. *See* Pl.'s Opp. at 24–25. But it does not argue that Council subcommittees fall within a second exception set out in that regulatory scheme for subcommittees that "make[] recommendations directly to a Federal officer or agency." 41 C.F.R. § 102-3.145. Given this omission, Plaintiff has waived any contention that the complaint pleads such direct recommendation. *See Robinson v. WMC Mortg. Corp.*, 649 F. App'x 636, 638 (9th Cir. 2016) (a plaintiff waives an argument by failing to raise it in response to motion to dismiss).

stamp" that GSA has warned about. *Id.* (quoting *Federal Advisory Committee Management*, 66 Fed. Reg. 37,728, at 37,729 (July 19, 2001)).

But, in fact, "deliberation" requires only that the Council carefully consider the issue before it prior to rendering advice to Defendants. *See Deliberation*, Black's Law Dictionary (11th ed. 2019). And the kind of "rubber stamp" advisory committee that GSA feared is one that "exclud[es] the public from attending any meetings where a subcommittee develops advice or recommendations *that are not expected to be reviewed and considered by the parent advisory committee* before being submitted to a Federal officer or agency," 66 Fed. Reg. at 37,729 (emphasis added), not a committee that merely fails to manufacture dissent among its members. Thus, this Court has found that an advisory committee conducts "further deliberations" when its subcommittees' recommendations are formally presented to the full committee and offered up for public comment. *See W. Org. of Res. Councils v. Bernhardt*, 412 F. Supp. 3d 1227, 1241 (D. Mont. 2019). That is all that FACA requires to

preserve an opportunity for the public to know about the advice being provided to federal agencies and to contribute its views. *See* 66 Fed. Reg. at 37,729 (discussing this purpose).

In this case, there is nothing in the complaint—save mere legal conclusions—to contradict the clear public record of Council deliberation as to each of the reports provided by the Council to Defendants over the time period at issue in the complaint.[5] For each report, the proposed report was (1) shared in advance with Council members and the public, (2) presented and explained to the full Council at an open session, (3) open to public comment, and (4) open to discussion among the Council's members.[6] And, while Plaintiff's Opposition might leave readers with the impression that all Council

[5] The Council's reports are expressly incorporated into the complaint, Compl. ¶ 79 n.18, and this Court may take judicial notice of the fact, reflected in official public records, that the Council held meetings at which those reports were presented and during which the public was invited to offer comments. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (a court may take judicial notice of matters of public record that are not subject to reasonable dispute).

[6] *See, e.g.*, Nat'l Coal Council, Webcast on NCC Report "Coal Power: Smart Policies in Support of Stronger, Cleaner Energy": Summary of Meeting (July 16, 2020), https://ncc.energy.gov/ncc/sites/default/files/NCC-Events/2020/NCC%20Summer%2020 20%20Webcast%20on%20Coal%20Power%20Report.pdf; Nat'l Coal Council, Webcast on NCC Report "Coal in a New Carbon Age": Summary of Meeting (May 15, 2019), https://ncc.energy.gov/ncc/sites/default/files/NCC-Events/2019/Summer/NCC%20

votes are unanimous, some members at each of these meetings voted to abstain, thus distancing themselves from the substance of the Council's advice to Defendants. *See, e.g.*, Fall 2018 Webcast "Advancing U.S. Coal Exports": Summary of Meeting, at 7–10 (Oct. 1, 2018). Unless Council members flat out refused to consider the contents of the proposed reports, ignored the presentations given about them, and cast their votes without a thought—and the complaint offers no serious indication that they did—the Council clearly conducted the "further deliberations" required of it.

If Plaintiff seeks greater debate at Council meetings, it is free to contribute—though it has not done so during the period at issue in the complaint—by offering its critiques of proposed reports during each Council meeting's public comment period. With that remedy available to Plaintiff, this Court need not become the first to police the amount of dissent and debate a draft report engenders at full advisory-committee meetings. *Cf. Bern-*

Spring%202019%20Webcast%20Meeting%20Minutes.pdf; Nat'l Coal Council, Fall 2018 Webcast "Advancing U.S. Coal Exports": Summary of Meeting (Oct. 1, 2018), https://ncc.energy.gov/ncc/sites/default/files/NCC-Events/2018/Fall/NCC%20Fall%202018%20Webcast%20Meeting%20Minutes.pdf.

hardt, 412 F. Supp. 3d at 1241 (finding "it would be difficult, and inappropriate, for courts to engage in judicial review of … whether a nebulous level of 'deliberation' occurred"). Instead, the Court should dismiss both of Plaintiff's claims as to the Council's subcommittees.

III. Plaintiff Has Abandoned Any Claims to Access Council Meetings and Records Beyond Those of Council Subcommittees or NCC, Inc.

Finally, Plaintiff does not respond to Defendants' arguments for dismissing its claims as to any meetings and records of the full Council beyond those associated with Council subcommittees or NCC, Inc. Instead, notwithstanding the scope of relief that it requested in the complaint, *see* Compl. ¶ 92 (seeking "all materials prepared for the [Council] … from 2017 to the present in connection with the Council's formal reports"); *id.* ¶ 94 (requesting an injunction to prevent the Council from meeting), Plaintiff now represents that it is not asserting any claims as to additional Council meetings and records "at this stage." Pl.'s Opp. at 12.

Given this representation, and given that the complaint does not appear to allege that Defendants have denied Plaintiff access to any Council meetings or records unassociated with Council subcommittees or NCC, Inc.,

it appears that there is no present case or controversy concerning such meetings and records. Accordingly, the Court should dismiss Plaintiff's now-abandoned claims. *See Montgomery v. Specialized Loan Servicing, LLC*, 772 F. App'x 476, 477 (9th Cir. 2019) (district court properly dismissed claims where plaintiffs failed to respond to arguments raised in defendants' motion to dismiss).

CONCLUSION

For the reasons set forth above, and in Defendants' Motion to Dismiss, the complaint should be dismissed.[7]

Dated: January 25, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Assistant Branch Director

/s/ Cody T. Knapp
CODY T. KNAPP
Trial Attorney
Federal Programs Branch, Civil Division
U.S. Department of Justice

Counsel for Defendants

[7] Because Plaintiff has not pled plausible claims for access to the meetings and records of the Council, its subcommittees, or NCC, Inc., the complaint should be dismissed. But even if some of Plaintiff's claims move forward, they will proceed under the Administrative Procedure Act, which limits this Court's review to the record the agency relied upon for its decision. *See Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697, 703 (9th Cir. 1996). Thus, Plaintiff's suggestion that "discovery and fact finding" may be necessary ahead of any future summary judgment motions, Pl.'s Opp. at 27–28, is unfounded.

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I certify that this brief contains 3,249 words. I relied on the word count function in Microsoft Word, which was used to prepare this document.

/s/ Cody T. Knapp
CODY T. KNAPP