

Federal Advisory Committee Act

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The views expressed are those of the author alone, not necessarily those of the Office of the General Counsel, U.S. Department of Agriculture, or the Federal Government.

Overview

Decisions on the expenditure of Federal moneys and decisions on Federal policies, programs, plans, and projects must be made by Federal officials. U.S. Const. Art. II. In general, Federal officers may delegate decisions to other Federal officers, but not to non-Federal persons; however, it is not unconstitutional to obtain advice or recommendations on decisions from non-Federal persons. See generally 16 C.J.S. §215, Constitutional Law.

The Federal Advisory Committee Act (FACA) regulates the way Federal officials obtain advice and recommendations from non-Federal persons, by regulating the formation and operation of advisory committees. "Advisory committee" is defined in FACA §3 to include any committee or similar group (1) established by statute or organization plan, or (2) established or utilized in the interest of obtaining advice or recommendations for the President or one or more Federal agencies and not composed wholly of full-time (and, since 1997, permanent part-time) Federal officers or employees.

Among the requirements of FACA are that new advisory committees be established only after public notice and upon a determination that establishment is in the public interest (§9(a)); that each advisory committee have a clearly defined purpose and that its membership be fairly balanced in terms of the points of view represented and the functions to be performed (§5); that the status of and need for each committee be subject to periodic review (§7, §14); and that meetings of advisory committees be open to public observation, subject to the same exemptions as in the Government in the Sunshine Act (§10).

The principal functions of guiding and coordinating the administration of FACA (which FACA originally vested in the President and the Director of the Office of Management and Budget), were transferred to the General Services Administration by Executive Order 12,024 of December 1, 1977, reprinted at 5 U.S.C. App. 2 note. GSA has issued regulations for agencies on management of advisory committees, 41 CFR §§101-6.1001 to 101-6.1035 (1990).

According to GSA, there were 1,236 advisory committees in existence at the beginning of 1993, but only 1,007 by the end of 1994. "Advisory committees play important roles in providing Federal officials with access to objective and up-to-date insights on a broad range of topics. Through committee contributions, the Executive Branch benefits from the knowledge and expertise of the Nation's citizens. The public, in return, receives an opportunity to actively participate in the Government's decision-making processes." GSA, Twenty-Third Annual Report

For further reading

- J. O'Reilly, *Advisers and Secrets: The Role of Agency Confidentiality in the Federal Management Secretariat, Application of the Federal Advisory Committee Act (FACA) to Intergovernmental Contacts*, 4 pages (undated). "Agencies having specific questions or concerns regarding advisory committees may contact GSA's Committee Management Secretariat at 202-273-3556."
- D. Marblestone, *The Coverage of the Federal Advisory Committee Act*, 35 *Fed.B.J.* 119 (1976).

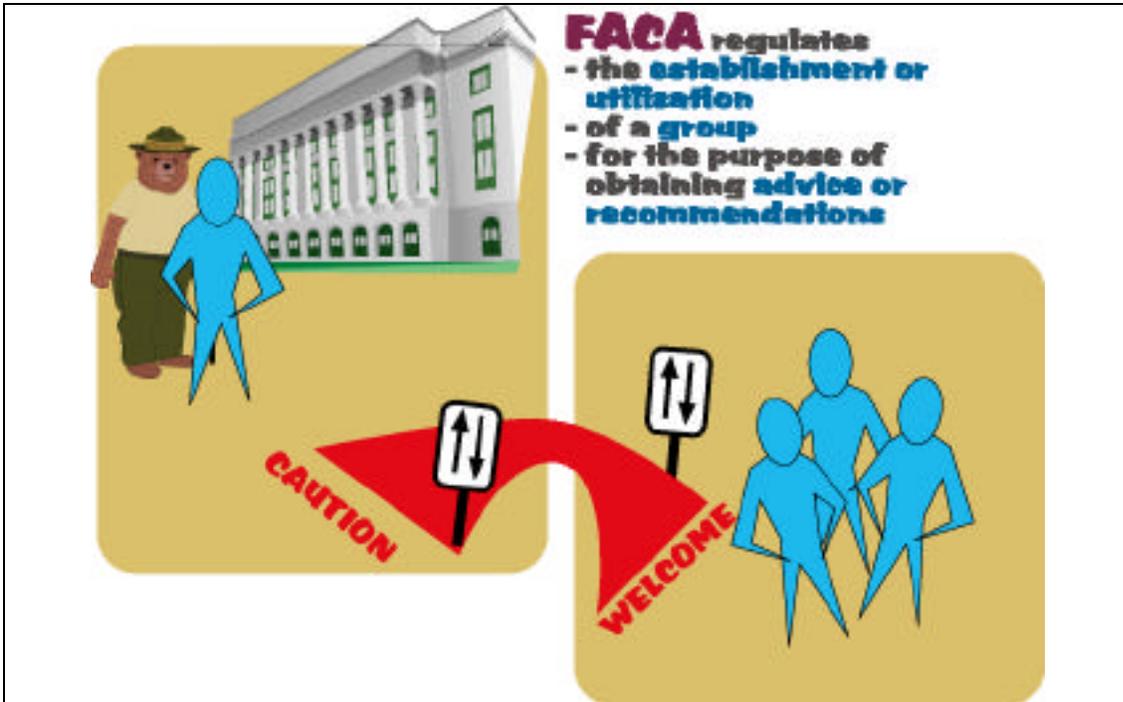
- M. Cardozo, *The Federal Advisory Committee Act in Operation*, Report to the Administrative Conference of the United States, 1980 ACUS 313, reprinted in 33 *Admin.L.Rev.* 1 (1981).
- B. Murphy, *Implementation of the Federal Advisory Committee Act — An Overview*, 9 *Government Publications Rev.* 3 (1982).
- R. Wegman, *The Utilization and Management of Federal Advisory Committees* (Kettering Foundation, 1983).
- D. Norris-York, *The Federal Advisory Committee Act: Barrier or Boon to Effective Natural Resource Management?* *Environmental L.* 26: 419-446 (1996).
- D. Morris, *Alabama-Tombigbee Rivers Coalition v. Department of Interior* : Giving Sabers to a “Toothless Tiger,” the Federal Advisory Committee Act, *Environmental L.* 26: 393-417 (1996).
- Steven P. Croley, *Practical Guidance on the Applicability of the Federal Advisory Committee Act*, 10 *Admin. L.J.* 111-178 (1996). “With these general guideposts in mind, agencies will be better able to anticipate whether their conduct will trigger the Act. Ultimately, however, that determination will in practice prove to be a context-specific one, depending among other things on the motives and intentions of both agency personnel and the outsiders involved. Agencies should recognize that courts have taken a pragmatic approach to questions concerning the FACA’s applicability, emphasizing the Act’s underlying goal of preventing hidden special-interest access to agencies. To the extent that agencies’ public-participation initiatives are open and inclusive, agencies will likely avoid FACA litigation in any event.”

Statutes

- Federal Advisory Committee Act, 5 U.S.C. App. 2 (1993), enacted October 6, 1972, Pub. L No. 92-463, 86 Stat. 770.
- Title 7, Chapter 55A, Department of Agriculture Advisory Committees (sometimes referred to as the “USDA Advisory Committee Act”), 7 U.S.C. §§2281-2286.
- National Forest Management Act §14(b), 16 U.S.C. §1612(b) (“In providing for public participation in the planning for and management of the National Forest System, the Secretary, pursuant to the Federal Advisory Committee Act ... and other applicable law, shall establish and consult such advisory boards as he deems necessary to secure full information and advice on the execution of his responsibilities. The membership of such boards shall be representative of a cross section of groups interested in the planning for and management of the National Forest System and the various types of use and enjoyment of the lands thereof.”).
- Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, P.L. 103-354, §246(f) (3), 108 Stat. 3225, October 13, 1994, amending the Food Security Act of 1985, 16 U.S.C. §3861: “(e) FACA REQUIREMENTS.—The committees established under section 1261 shall be exempt from the Federal Advisory Committee Act (5 U.S.C. App.).” “Section 1261” refers to a section, codified at 16 U.S.C. §3861, which establishes State technical committees for the NRCS. These State technical committees, which are comprised of Federal and State employees as well as agricultural producers and other private individuals, are exempt from FACA.
- Unfunded Mandates Reform Act of 1995, 2 U.S.C. §1534, Pub.L. 104-4, Title II, §204, 109 Stat. 65-66 (FACA does not apply to meetings “exclusively between Federal officers of State, local, and Tribal Governments (or their designated employees with authority to act on their behalf) acting in their official capacities” when those meetings “are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to Public Law that explicitly or inherently share intergovernmental responsibilities or administration”). Appendix 2.
- Federal Advisory Committee Act Amendments of 1997, Pub.L. 105-153, 111 Stat. 2691, amends FACA §3(2), *inter alia* by excluding from FACA committees comprised entirely of full-time as well as permanent part-time officers or employees of the Federal Government). Appendix 3.

Executive Order, Regulations, and Policy

- Executive Order 12838, 58 Fed.Reg. 8207, February 12, 1993, “Termination and Limitation of Federal Advisory Committees” (one-third of all non-statutory advisory committees to be abolished in fiscal year 1993; no new advisory committees to be created without a finding of “compelling considerations” and OMB approval; agencies to make a detailed recommendation for continuation or termination of statute-required advisory committees).
- General Services Administration, Federal Advisory Committee Management Regulations, 41 CFR §§101-6.1001 to 101-6.1035 (1990).
- USDA Departmental Regulation 1041-1, Advisory Committee Management, November 13, 1989 (“This regulation provides procedures for the establishment, operation, duration, and accessibility to the public of advisory committees under the jurisdiction of the Department.”).
- 36 C.F.R. Part 216, Involving The Public in the Formulation of Forest Service Directives, 36 C.F.R. §216.1 Purpose, “This part establishes procedures to ensure that Federal, State, and local governments and the public have adequate notice and opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs.”
- 36 C.F.R. §219.5(b), “In appointing team members, the responsible line officer shall determine and consider the qualifications of each team member on the basis of the complexity of the issues and concerns to be addressed through the plan. *** The [interdisciplinary] team may consist of whatever combination of Forest Service staff and other Federal Government personnel is necessary to achieve an interdisciplinary approach. The team is encouraged to consult other persons when required specialized knowledge does not exist within the team itself.”
- Forest Service Manual, FSM 1350, Committee Management.
 - 1350.3 - Policy
 - 1. Maintain a minimum number of advisory committees. Consider alternatives for obtaining advice and public participation.
 - 2. The function of advisory committees shall be advisory only. Final decisions rest with the Forest Service.
- Forest Service Handbook, FSH 12.1.
 - Interdisciplinary Team Selection. The disciplines and skills of this group must be appropriate to the scope of the action and the issues identified. The team will consist of whatever combination of Forest Service staff and other Federal Government personnel is necessary to provide the necessary analytical skills. Limit the team to a manageable number of persons. Others may aid or support the interdisciplinary team as determined to be necessary by the responsible official. This participation must be consistent with the Federal Advisory Committee Act of 1972 (5 U.S.C. App., USDA Departmental Regulation 1041-1, 11/15/89).
- Forest Service memorandum from Chief to all employees, October 2, 1995, “Subject: Recent Federal Advisory Committee Act Interpretations.” Appendix 1.



Tic-FACA-Toe

	Establishment or Utilization	Group	Advice or Recommendation
Establishment or Utilization	Contractor Pre-established group	X	X
Group	X	All Federal Individuals Unfunded Mandates Act	X
Advice or Recommendation	X	X	Data, Facts Evidence Analysis 'Operational' 'Red-Green'

SELECT CASES

What is a group?

Lombardo v. Handler, 397 F. Supp. 792 (D. D.C. 1975), aff'd. 546 F.2d 1043 (D.C. Cir. 1976), cert. denied 431 U.S. 932, 97 S.Ct. 2639, 53 L.Ed.2d 248 (1977) (no FACA violation where EPA contracted with the National Academy of Sciences to convene panel of experts; Academy is not a Federal agency and its committee on motor vehicle emissions was not established by statute or established or utilized by EPA; groups providing advice to Federal agencies by contract are not covered by FACA; EPA is utilizing the Academy, not its committee).

Association of Am. Physicians & Surgeons v. Clinton, 813 F.Supp. 82 (D.D.C.), reversed and remanded, 997 F.2d 898 (D.C. Cir. 1993) (President's Task Force on National Health Care Reform is not an advisory committee where Mrs. Clinton was a "special government employee" rather than a private citizen; on the other hand, an "interdepartmental working group" composed of Federal employees, "special government employees" employed for a limited duration, and "consultants" who attend meetings on an intermittent basis — may be an advisory committee and the case is remanded to the District Court for additional findings; "In order to implicate FACA, the President, or his subordinates, must create an advisory group that has, in large measure, an organized structure, a fixed membership, and a specific purpose.").

Alabama-Tombigbee Rivers v. Dept. of Interior, 26 F.3d 1103, 1105 (11th Cir. 1994) (report from panel of 9 scientists, including Federal and non-Federal biologists, violates FACA; FWS is enjoined from using the report).

It appears from the record that the government originally intended for the scientists on the "panel" to conduct independent evaluations and file, individual reports. However, shortly before the "panel" was to convene to relay their individual reports, FWS substantially changed the structure of the "panel." The modified structure was for the scientists to meet and compile a single collective report.

Northwest Forest Resource Council v. Espy, 846 F.Supp. 1009, (D.D.C. 1994) (FEMAT violates FACA; no injunction).

By any fair interpretation of the facts and certainly by a literal reading of the statutory definition, FEMAT was an "advisory committee" within the contemplation of FACA in form and function, unless elsewhere excepted in the statute. It was a consultative assembly of knowledgeable persons for a specific purpose; calling it a "team" does not alter its nature. It was both "established" and "utilized" by the President for his guidance in devising a forest management policy. And it did render him "advice" and "recommendations" which he accepted and followed.

Elsewhere in the statute, however, conclaves identical to FEMAT are excluded from the status of being "advisory committees," and exempted from any obligations as such, if, but only if, they are "composed wholly of full-time officers or employees of the Federal Government." 5 U.S.C.App. 2 § 3(2)(iii) (emphasis added). In other words, FACA does not apply if all of the people assembled to advise the President are already in government service.

California Forestry Ass'n. v. U.S. Forest Service, 102 F.3d 609, 611 (D.C. Cir. 1996) (Sierra Nevada Ecosystem Project (SNEP) violates FACA):

After receiving the two letters the Forest Service formed SNEP, consisting of a Steering Committee and a Science Team. The six-member Steering Committee was composed of two Forest Service officials, one representative from the National Park Service and three non-governmental individuals. The Steering Committee selected the leader of the Science Team and, together with the leader, appointed the other eighteen members of the Science Team. The Science Team was comprised of a mix of individuals from federal agencies, state universities and one private university.

Tucson Rod and Gun Club v. McGee, 25 F.Supp.2d 1025, 1029-30 (D. Ariz. 1998) (FACA does not apply to government contractors):

Count Seven-Plaintiff alleges that decisions to contract with experts violated the Federal Advisory Committee Act

In Count Seven, Plaintiff alleges that Defendants violated the Federal Advisory Committee Act ("FACA"), 5 U.S.C.App. 2, by contracting with various experts for reports on the safety of the Club. These experts included Glen Shumsky, and a team of experts, Ken Buster, Brian Danielson, and Richard Whiting. Again, however, Plaintiff failed to exhaust its administrative remedies as to this claim by not raising the issue in the administrative appeal.

Even assuming exhaustion is not necessary, the Court finds that this Count should be dismissed as to the report by Glen Shumsky because FACA does not apply to government contractors. See H.R. Conf. Rep. No. 1403 (1972), reprinted in 1972 U.S.C.C.A.N. 3508, 3509; H.R.Rep. No. 1017 (1972), reprinted in 1972 U.S.C.C.A.N. 3491, 3494.

Furthermore, even if there was a technical violation of FACA in the report prepared by Buster, Whiting and Danielson, the use of that report should not be enjoined. The report has already been completed, and Plaintiff has had, and will continue to

have, the opportunity to present further information prior to the final agency decision. *See Seattle Audubon Soc'y v. Lyons*, 871 F.Supp. 1291, 1309 (W.D.Wash. 1994), *aff'd sub nom. Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996) (FACA can and should be enforced by injunctive relief while a committee is still functioning, but once it has served its purpose, courts do not generally invalidate the agency action notwithstanding earlier FACA violations).

Accordingly, Count Seven must be dismissed.

What does it mean to establish or utilize?

Lombardo v. Handler, 397 F. Supp. 792 (D. D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied* 431 U.S. 932, 97 S.Ct. 2639, 53 L.Ed.2d 248 (1977) (no FACA violation where EPA contracted with the National Academy of Sciences to convene panel of experts; Academy is not a Federal agency and its committee on motor vehicle emissions was not established by statute or established or utilized by EPA; groups providing advice to Federal agencies by contract are not covered by FACA; EPA is utilizing the Academy, not its committee).

Natural Resources Defense Council v. Herrington, 637 F.Supp. 116 (D.C. D.C. 1986) (panel of scientist-executives convened by the Secretary of the Department of Energy to study safety of a government-owned nuclear reactor in operation in state of Washington in light of nuclear disaster at a similar power station in the Soviet Union was not an "advisory committee" where panel members had not been asked to comment upon nuclear power generally or manner of its regulation, but merely to examine whether government ought to allow a single reactor to continue in operation; panel members would work independently and report alone).

Public Citizen v. U.S. Dept. of Justice, 109 S. Ct. 2558, 491 U.S. 440, 105 L.Ed.2d 377 (1989), case below *Washington Legal Foundation v. U.S. Dept. of Justice*, 691 F.Supp. 483 (D.D.C. 1988) (FACA did not apply to the 'special advisory relationship' between the President and the American Bar Association Standing Committee on Federal Judiciary on matters of judicial nomination; the ABA group was not a 'utilized' committee within the meaning intended by Congress and thus the ABA committee did not fall under the statutory definition of "advisory committee").

Food Chemical News v. Young, 900 F.2d 328 (D.C. Cir. 1990), *cert. denied* 111 S.Ct. 132, 112 L.Ed.2d 99 (group of experts assembled by private scientific organization pursuant to its contract with Food and Drug Administration to provide counsel on food safety and quality issues was not an "advisory committee" subject to requirements of FACA; panel was established and utilized by the private organization, not by FDA, and organization was private contractor that did not have quasi-public status).

California Forestry Ass'n. v. U.S. Forest Service, 102 F.3d 609, 612-13 (D.C. Cir. 1996) (Sierra Nevada Ecosystem Project (SNEP) violates FACA) (Forest Service "utilized" SNEP report even though Congress was "primary" intended user). "In light of our holding that the Forest Service 'established' SNEP 'in the interest of obtaining advice or recommendations,'" 5 U.S.C. app. 2 §3(2), we do not reach either CFA's alternative argument relying on the 'utilized' language of the statute or the district court's rejection of that argument."

What is advice or recommendations?

Consumers Union of U.S., Inc. v. Department of Health, Ed. and Welfare, 409 F.Supp. 473 (D.C. D.C. 1976), *aff'd* 551 F.2d 466, 179 U.S.App.D.C. 280 (organization representing cosmetics industry is not an advisory committee where organization merely presented industry-sponsored proposal to FDA seeking its advice and comments regarding voluntary cosmetics testing program).

National Anti-Hunger Coalition v. Executive Committee of President's Private Sector Survey on Cost Control, 557 F.Supp. 524 (D.C. D.C. 1983), *aff'd*, 711 F.2d 1071, 229 U.S.App.D.C. 143 (task forces co-chaired by members of Executive Committee of Private Sector Survey established by the President to give advice on cost-effective management of Federal programs were not advisory committees where they merely provided information and recommendations for consideration to an Executive Committee, which is a FACA

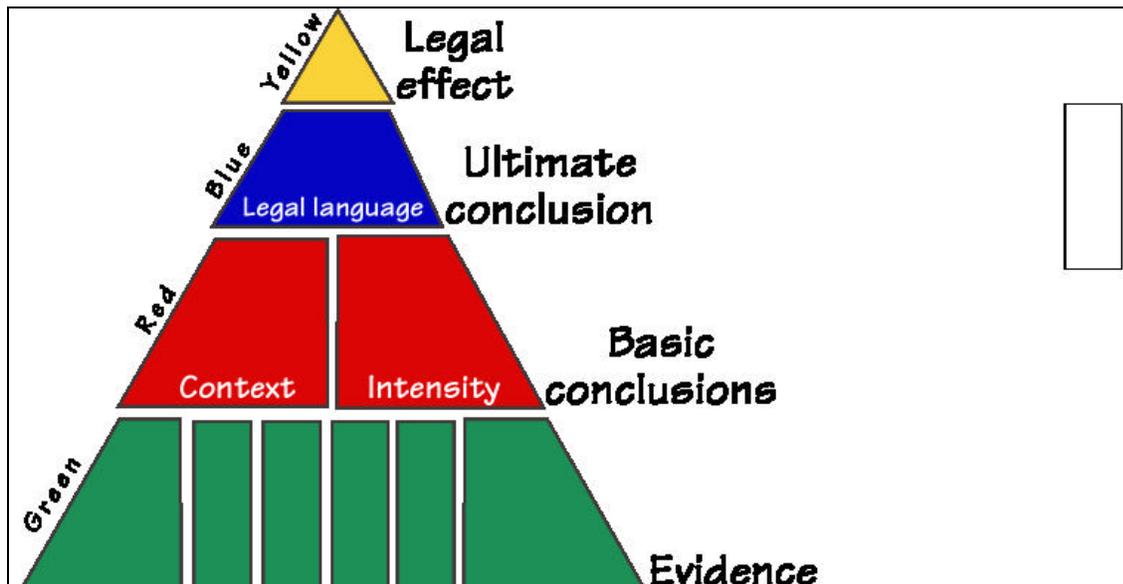
advisory committee, notwithstanding that the task forces were intimately involved in gathering information about Federal programs and formulation of possible recommendation for consideration by the Committee). *HLL Lordship Industries, Inc. v. Committee for Purchase from the Blind & Other Severely Handicapped*, 615 F.Supp. 970 (D.C. Va. 1985) (National Industries for the Severely Handicapped did not constitute an advisory committee where its advisory capacity to the Committee for Purchase From the Blind and Other Severely Handicapped was secondary to its operational activities).

Alabama-Tombigbee Rivers v. Dept. of Interior, 26 F.3d 1103, 1105 (11th Cir. 1994) (report from panel of 9 scientists including Federal and non-Federal biologists violates FACA and FWS is enjoined from using the report) (panel recommended listing the Alabama sturgeon as an endangered species).

Northwest Forest Resource Council v. Espy, 846 F.Supp. 1009, 1013 (D.D.C. 1994) (Forest Ecosystem Management Assessment Team violated FACA, FEMAT recommended Option 9):

The defendants next argue that FEMAT was not an "advisory committee" because it made only a "technical assessment" of various management options, but did not provide "policy advice." The Court finds, however, that FEMAT absolutely did render policy advice to the President. FEMAT's mandate was to develop and analyze the effects of alternative ecosystem management policy options for presentation to the Administration, and it did so. The Administration considered, so far as is shown, only the work of FEMAT in selecting a policy to implement, and chose one of the options FEMAT proposed. FEMAT directly influenced the President's ultimate policy decision.

Moreover, there is nothing in the statutory language or case law to support the defendants' assertion that FACA should not apply to "advisory committees" consisting only of technicians who supply the decision-makers with data. To the contrary, several courts have applied FACA in just such circumstances. See *Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*, 886 F.2d 419 (D.C.Cir. 1989) (FACA applied to committee to develop microbiological criteria by which the safety and wholesomeness of food could be assessed); *National Nutritional Foods Ass'n v. Califano*, 603 F.2d 327 (2d Cir. 1979) (single meeting of five experts in the field of obesity research was subject to FACA).



Mountain States Legal Foundation v. Glickman, 922 F.Supp. 628, (D. D.C. 1995) (court upholds FS choice of Alternative 9A for Kootenai NF, Upper Yaak River Area).

In deciding whether to overturn agency action, this court must apply the standard set forth in 5 U.S.C. §706(2) (A) ("The reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376, 109 S.Ct. 1851, 1859, 104 L.Ed.2d 377 (1989); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414-415, 91 S.Ct. 814, 822-23, 28 L.Ed.2d 136 (1971). Because this case involves resolution of primarily factual issues which

require substantial agency expertise, the court must “defer to the informed decision of the responsible federal agencies.” *Id.* at 376-377, 109 S.Ct. at 1861 (citations omitted).

In determining whether agency action is arbitrary and capricious, “a reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . The agency must articulate a rational connection between the facts found and the choice made. While we may not supply a reasoned basis for the agency’s action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency’s path may be reasonably discerned.” *Bowman Transport, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-286, 95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1975) (quoting *Volpe*, 401 U.S. at 414-15, 91 S.Ct. at 822-23). (Citations omitted).

This standard affords great deference to agency decisions and presumes that agency action is valid. *Motor Vehicle Mfrs. v. Ruckelshaus*, 719 F.2d 1159, 1164 (D.C. Cir. 1983). District courts have also held that the Forest Service has wide discretion to weigh and decide the proper uses within any area of the National Forests. See *Big Hole Ranchers v. U.S. Forest Service*, 686 F.Supp. 256, 264 (D. Mont. 1988); *National Wildlife Federation v. U.S. Forest Service*, 592 F.Supp. 931, 938 (D. Ore. 1984); *Sierra Club v. Hardin*, 325 F.Supp. 99, 123 (D. Alaska 1971).

Whether any particular group giving advice or recommendations constitutes a “federal advisory committee” depends on the facts:

More likely to come under FACA	Less likely to come under FACA
Group gives advice to Federal officials	Group gives advice to State and local officials
Group has formal structure; meets on scheduled basis; scheduled agenda	Group has no formal structure, meets ad hoc; meetings are unstructured with no formal agenda
Group is selected by Federal agency or Federal official	Group is selected by non-Federal contractor without Federal control
Group is “established or utilized” directly by Federal agency or Federal officials to obtain advice or recommendations	Group is managed by a non-Federal contractor, which transmits group recommendations to Federal officials
Group participates in consensus-type decisionmaking with Federal agency or Federal official	Group provides information for consideration by Federal agency or Federal official
Group has specific purpose, deals with particular subject	Group is general, deals with wide-ranging subjects or general matters
Group is collaborative	Individuals work separately
Group provides advice, wishes to influence Government policy or decision	Group provides information only, has no selfish advantage to be gained
Inter-Disciplinary Teams with non-Federal members	Inter-disciplinary Teams with only Federal employee members
Group answers the question, What temperature should the stream be?	Group answers the question, What temperature is the stream?

GSA provides the following guidance in their March 21, 1994, memo on interactions between groups and Federal agencies:

Subject to FACA	Not subject to FACA
Negotiated rulemaking committees: “Such committees are subject to FACA as required by the Negotiated Rulemaking Act.”	Meetings with pre-existing external groups. FACA does not apply when a group makes an unsolicited request to provide their views to a Federal agency; an agency may initiate the meeting when “the Government has not encouraged, promoted, funded, or otherwise controlled the creation and/or activities of the group being consulted.”
Existing Advisory Committees. “Regulations promulgated by GSA provide substantial flexibility in addressing the operating requirements of existing advisory committees, including subgroups...”	Meetings with individuals.
Specific circumstances. Agencies should apply a “totality of circumstances” analysis, such as “desire for consensus, frequency of meetings, or rotation of membership.:	Meetings with a group of individuals. FACA does not apply if the purpose is to obtain individuals opinions rather than the advisory recommendation as a group; examples include focus groups, forums, or roundtables to obtain the views of individual attendees. “However, such a group may be covered by the Act if it is relied upon as a de facto advisory committee...”
	Public meetings. “Public or ‘town’ meetings which are open to all interested parties for the purpose of exchanging views and information are not subject to FACA.”

Interior’s Solicitor and Agriculture’s General Counsel provide the following guidance in their April 14, 1994, memo on groups described in the Final Supplemental EIS on Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl:

Group subject to FACA	Group not subject to FACA
<p>Regional Interagency Executive Committee (RIEC) Federal decisionmakers to meet with representatives from States and Tribes “to develop consensus recommendations” in a “collaborative process.” Okay to accept information from non-Federal individuals in writing, to meet in groups for purpose of obtaining advice from individuals, to hold public hearings, and to meet with a group (but not recurrently) at the group’s request.</p>	<p>Multi-Agency Command (MAC) Staffed only by Federal employees; not subject to FACA “unless it convenes a meeting or meetings with non-federal persons to obtain consensus advice.”</p>
<p>Provincial Interagency Executive Committees (PIEC) FACA applies when “a group of federal, state, and local government officials, and members of the public will develop consensus advice and recommendations for federal agency decision makers on managing the federal lands.:</p>	<p>Regional Ecosystem Office (REO) Staffed only by Federal employees; not subject to FACA “unless it convenes a meeting or meetings with non-federal persons to obtain consensus advice.”</p>
<p>Adaptive Management Area Teams (AMAT) FACA applies because of Federal/non-Federal membership; furthermore “all federal management decisions must be made by the particular Federal official with the delegated authority to make the decision.” Suggestion that AMATs could be organized as working groups under Advisory Committees, providing advice and recommendations to Advisory Committees not directly to Federal decisionmakers.</p>	<p>Research and Monitoring Committee (RMC) Staffed only by Federal employees; not subject to FACA “unless it convenes a meeting or meetings with non-federal persons to obtain consensus advice.”</p>
<p>Watershed Analysis Groups/Late Successional Reserve Assessment Teams. Similar to AMATs.</p>	
<p>Regional Community Economic Revitalization Team (R-CERT) Similar to RIEC.</p>	
<p>State Community Economic Revitalization Team (State-CERT) Similar to AMATs</p>	

APPENDIX 1

United States
Department of
Agriculture

Forest
Service

Washington
Office

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Washington, DC 20090-6090

File Code: 1620/1300
Route To : 1000/1600

Date: October 2, 1995

Subject: Recent Federal Advisory Committee Act Interpretations

To: All Employees

The Forest Service has a long-standing tradition of providing opportunities for State, local, tribal, and private stakeholders to share with us their values and opinions. Efforts to inform and involve the public have yielded substantial benefits for everyone involved. However, employees and members of the public continue to raise questions about the applicability of the Federal Advisory Committee Act (FACA) to external relations.

Recently, we have been meeting with the USDA Office of the General Counsel, USDA Office of White House Liaison, General Services Administration, and Department of Justice to make sure we are in compliance with FACA while being responsive to our stakeholders. In light of these discussions, I have decided to update my policy letters of July 12, 1994, and January 17, 1995. This letter replaces my two previous letters. However, the public participation principles described in the July 12, 1994, letter hold. We can do no less to keep the best external relations possible. For ease of reference, I reiterate them here:

Make It Timely. The process allows enough time for the public to participate fully, with enough advance notice for all activities and crucial points in the process.

Make Your Process "Free." The public is able to participate at minimum cost and commitment of time, while meeting your public involvement objectives.

Emphasize Fairness. Participants agree that the process is fair, that all views offered are considered.

Practice Openness. Dialogue is welcomed and facilitated among all interests. Anyone who wishes to participate can. Information to the public (documents, etc.) is accessible to all and is in language that people can understand.

Make Involvement Early and Continuous. The public is involved from beginning to end, and relationships are built over the long term.

Make It Tangible. Results of the public's input are clearly demonstrated, and the public understands how public involvement affected the decision or outcome.

To help clarify if FACA applies to meetings with outside groups, I offer these general guidelines:

Meetings With State, Local, and Tribal Elected Officials--Under Section 204 of the Unfunded Mandates Reform Act (Public Law 104-4), meetings among Forest Service personnel and elected officials of State, local, or tribal governments, or their designees, are not subject to FACA. Such meetings can be held to obtain consensus advice relative to the

implementation of Federal programs, or simply for exchanging information. Section 204 is currently in effect.

Groups Not Controlled by the Federal Government--FACA does not apply to groups established, organized, and managed by entities outside the Federal Government. Examples include businesses, environmental organizations, trade or industry associations, and citizens' groups. You may meet with such groups to hear their opinions, views, and advice; however, no group can become a preferred source of advice for the agency without sparking FACA concerns. Remember, too, that public perception is everything. If people observe you holding repeated private meetings with the same group, they may feel excluded and assume that FACA committee-formation requirements are being violated. If you become aware of members of the public having such feelings, find a way to include those citizens. Every interested party that wishes to be heard, should be heard. Not only will you then receive a broader range of views and opinions, you will minimize any perception of bias or unfairness in your decisionmaking. (See also Enclosure 1.)

Make sure there is sufficient separation between the Federal Government and outside groups. The Federal Government cannot control the group, its organization, or its operations, nor can the Federal Government have someone else establish a group for it. Federal control would be inferred if the Federal Government funds, selects members, or sets the agenda of the group. Federal control could also be inferred if the Federal Government indirectly funds, selects members, or sets the agenda of a group.

Federal employees may attend meetings of groups not controlled by the Federal Government and represent the Forest Service at such meetings, as long as the Federal employees are not in a position to determine, directly or indirectly, the group's activities, and their participation does not create a conflict of interest or violate any other principle of ethical conduct as codified in the Department of Agriculture "Employee Responsibility and Conduct Handbook." However, do not let any group become a preferred source for advice. Remember to practice the public participation principles presented on the previous page.

Groups Controlled Even in Part by the Federal Government--If the Federal Government organizes or controls even in part a group containing private citizens or organizations, there is a high probability that it violates the committee-formation requirements of FACA. Examples of groups not covered by FACA are included in Enclosure 1. The two exemptions most commonly found in the Forest Service are: 1) meetings we hold to obtain the advice from individuals rather than consensus advice or recommendations from groups, and 2) meetings or committees whose function is not advice-giving. Here is further elaboration:

Group is set up to provide advice--If Federal employees seek advice from a group, then that advice must be obtained on an individual basis without group deliberation. Yet, if you are at a meeting and the group chooses to offer consensus advice:

Explain to the group that you convened them to hear individual advice, not a group consensus.

Explain that group advice could prove to be a problem because they are not a chartered advisory group. And if you were to accept their consensus advice, it could be challenged in court and the Forest Service could be enjoined from using the advice-- something no one wants.

There are occasions when, in fact, what you need is an advisory committee.

While Executive Order 12838 limits the number of advisory committees the Department may charter, it does not eliminate them completely. Forward requests for new advisory committees to the Public Affairs Office for review. Any legitimate request will be forwarded to the Secretary and GSA for action. The best way to address concerns about the committee-formation requirements of FACA is to practice good public involvement. Even if you are confident that FACA does not apply, if you are seeking public opinions that will influence your decisions, be sure that it is sought in the most public manner possible and made available to the public as a matter of public record.

We will continue to provide you with updated information regarding compliance with FACA. I believe we are making progress in removing real and perceived barriers to working with our intergovernmental and public partners while complying with the law.

/s/ Joan M. Comanor for

JACK WARD THOMAS
Chief

Enclosure

ENCLOSURE 1

The Code of Federal Regulations addresses FACA in 41 CFR 101. Section 101-6.1004 lists examples of meetings or groups not covered by FACA. Here are the exemptions that would apply most commonly to the Forest Service:

- (a) Any committee composed wholly of full-time [or permanent part-time] officers or employees of the Federal Government;
- (f) Any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies;
- (g) Any committee which is established to perform primarily operational as opposed to advisory functions. Operational functions are those specifically provided by law, such as making or implementing Government decisions or policy. An operational committee may be covered by the Act if it becomes primarily advisory in nature. It is the responsibility of the administering agency to determine whether such a committee is primarily operational. If so, it would not fall under the requirements of the Act and this subpart, but would continue to be regulated under relevant laws, subject to the direction of the President and the review of the appropriate legislative committees;
- (h) Any meeting initiated by the President or one or more Federal

official(s) for the purpose of obtaining advice or recommendations from one individual;

- (i) Any meeting initiated by a Federal official(s) with more than one individual for the purpose of obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations. However, agencies should be aware that such a group would be covered by the Act when an agency accepts the group's deliberations as a source of consensus advice or recommendations;
- (j) Any meeting initiated by a group with the President or one or more Federal official(s) for the purpose of expressing the group's views, provided that the President or Federal official(s) does not use the group recurrently as a preferred source of advice or recommendations;
- (l) Any meeting with a group initiated by the President or one or more Federal official(s) for the purpose of exchanging facts or information.

APPENDIX 2

Unfunded Mandates Reform Act of 1995, P.L. 104-4, 109 Stat. 65

2 U.S.C.A. §1534

(b) Meetings between State, local, tribal and Federal officers

The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to actions in support of intergovernmental communications where

- (1) meetings are held exclusively between Federal officials 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; and
- (2) such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.

APPENDIX 3

Federal Advisory Committee Act Amendments of 1997

FEDERAL ADVISORY COMMITTEE ACT, Amended by Pub. L. 105-153, 111 Stat. 2689
An Act

To amend the Federal Advisory Committee Act to clarify public disclosure requirements that are applicable to the National Academy of Sciences and the National Academy of Public Administration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Advisory Committee Act Amendments of 1997".

SEC. 2. AMENDMENTS TO THE FEDERAL ADVISORY COMMITTEE ACT.

(a) Exclusions From Definition.--Section 3(2) of the Federal Advisory Committee Act (5 U.S.C. App.) is amended in the matter following subparagraph (C), by striking "such term excludes" and all that follows through the period and inserting the following: "such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration."

(b) Requirements Relating to the National Academy of Sciences and the National Academy of Public Administration.--Such Act is further amended by redesignating section 15 as section 16 and inserting after section 14 the following new section:

"Sec. 15. (a) In General.--An agency may not use any advice or recommendation provided by the National Academy of Sciences or National Academy of Public Administration that was developed by use of a committee created by that academy under an agreement with an agency, unless--

"(1) the committee was not subject to any actual management or control by an agency or an officer of the Federal Government;

"(2) in the case of a committee created after the date of the enactment of the Federal Advisory Committee Act Amendments of 1997, the membership of the committee was appointed in accordance with the requirements described in subsection (b)(1); and

"(3) in developing the advice or recommendation, the academy complied with--

"(A) subsection (b)(2) through (6), in the case of any advice or recommendation provided by the National Academy of Sciences; or

"(B) subsection (b)(2) and (5), in the case of any advice or recommendation provided by the National Academy of Public Administration.

"(b) Requirements.--The requirements referred to in subsection (a) are as follows:

"(1) The Academy shall determine and provide public notice of the names and brief biographies of individuals that the Academy appoints or intends to appoint to serve on the committee. The Academy shall determine and provide a reasonable opportunity for the public to comment on such appointments before they are made or, if the Academy determines such prior comment is not practicable, in the period immediately following the appointments. The Academy shall make its best efforts to ensure that (A) no individual appointed to serve on the committee has a conflict of interest that is relevant to the functions to be performed, unless such conflict is promptly and publicly disclosed and the Academy determines that the conflict is unavoidable, (B) the committee membership is fairly balanced as determined by the Academy to be appropriate for the functions to be performed, and (C) the final report of the Academy will be the result of the Academy's independent judgment. The Academy shall require that individuals that the Academy appoints or intends to appoint to serve on the committee inform the Academy of the individual's conflicts of interest that are relevant to the functions to be performed.

"(2) The Academy shall determine and provide public notice of committee meetings that will be open to the public.

"(3) The Academy shall ensure that meetings of the committee to gather data from individuals who are not officials, agents, or employees of the Academy are open to the public, unless the Academy determines that a meeting would disclose matters described in section 552(b) of title 5, United States Code. The Academy shall make available to the public, at reasonable charge if appropriate, written materials presented to the committee by individuals who are not officials, agents, or employees of the Academy, unless the Academy determines that making material available would disclose matters described in that section.

"(4) The Academy shall make available to the public as soon as practicable, at reasonable charge if appropriate, a brief summary of any committee meeting that is not a data gathering meeting, unless the Academy determines that the summary would disclose matters described in section 552(b) of title 5, United States Code. The summary shall identify the committee members present, the topics discussed, materials made available to the committee, and such other matters that the Academy determines should be included.

"(5) The Academy shall make available to the public its final report, at reasonable charge if appropriate, unless the Academy determines that the report would disclose matters described in section 552(b) of title 5, United States Code. If the

Academy determines that the report would disclose matters described in that section, the Academy shall make public an abbreviated version of the report that does not disclose those matters.

“(6) After publication of the final report, the Academy shall make publicly available the names of the principal reviewers who reviewed the report in draft form and who are not officials, agents, or employees of the Academy.

“(c) Regulations.--The Administrator of General Services may issue regulations implementing this section.”.

(c) Effective Date and Application.--

(1) In general.--Except as provided in paragraph (2), this section and the amendments made by this section shall take effect on the date of the enactment of this Act.

(2) Retroactive effect.--Subsection (a) and the amendments made by subsection (a) shall be effective as of October 6, 1972, except that they shall not apply with respect to or otherwise affect any particular advice or recommendations that are subject to any judicial action filed before the date of the enactment of this Act.

SEC. 3. REPORT.

Not later than 1 year after the date of the enactment of this Act, the Administrator of General Services shall submit a report to the Congress on the implementation of and compliance with the amendments made by this Act.

Approved December 17, 1997.

END