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Folder Title:
Forest Conference-Federal Advisory Committee Act (FACA) [1]

Stack:	Row:	Section:	Shelf:	Position:
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FACA ISSUE

MARK GAERTY USOA

720-773

8/12 "has cleared USOA"

"sent to GSA"

Todd Campbell

VP's Office

Bob Damus

OMB Counsel

James Dean - GSA

~~AM~~

8/27

Katie, FYI

Michael D

File w/ Forest Plan
filer -- "FACA INFO"

Michael:

Two items FYI:

1) ~~The final FACA charters have been signed and are in the process of being sent to the Hill for information, and the Federal Register for publication.~~

2) Also, I have been selected to fill the position of the Executive Director, REO, pending OPM approval. I think the regional directors in Portland and Seattle will be informed of this today.

Please let me know if you would like any additional information or if I can help you in any way.

Don Kunkles
208-3019



United States Office of Forestry and Economic Development

333 S.W. First Avenue, P.O. Box 3623, Portland, Oregon 97208-3623



August 10, 1994



Memorandum

To: Katie McGinty
Mike Davis

From: Tom Tuchmann 

Subject: Approval of FACA Charters for the Northwest Forest Plan



The charters for the Intergovernmental Advisory Committee and the Provincial Advisory Committees have been working their way through the approval process. They have been approved by Interior and reviewed by Agriculture. After our conversation on Monday, we worked the process a little and now understand that GSA has since reviewed and sent the charters to OMB. After OMB approval, they will go to back to GSA for final transmittal to Agriculture. OMB expects to approve the charters and send them to GSA later this week or early next week.



While it looks like the charters will finally be approved, we are now concerned about the next step in the process. The region will be submitting nominations from the States, Tribes and Counties for membership on the Intergovernmental Advisory Committee. These nominations will require approval from the Secretary of Agriculture. We are hopeful that the approval process can be expedited in the Department. The regional federal agencies are in danger of losing their tenuous connection with their state, tribal and private partners. It is **imperative** that the charters and member nominations gain approval as soon as possible.



Attached is a proposed memo from you to OMB and Agriculture that emphasizes how important it is to move on this as quickly as possible.

Attachment (1)

DRAFT

Memorandum

To: Alice Rivlin
Secretary Mike Espy

From: Katie McGinty

Subject: Approval of FACA Charters to Implement the Northwest Forest Plan

We understand that charters to establish advisory committees in the Pacific Northwest will be approved by OMB in the next few days. After approval, the region will be submitting nominations for state, tribal, and county membership on the Intergovernmental Advisory Committee to the Secretary of Agriculture for approval.

It is critical that these committees be up and running as soon as possible in order to regain the momentum for following through on the President's commitments.

Anything you can do to expedite the approval process will be greatly appreciated.

cc:
Jim Lyons
Jim Pipkin
Tom Tuchmann
Steve Mertens (OMB)



United States Office of Forestry and Economic Development

333 S.W. First Avenue, P.O. Box 3623, Portland, Oregon 97208-3623

PARTNERSHIP UPDATE

August 5, 1994

To Whom It May Concern:

I am writing to you because you care about our natural resources, you care about locally-based partnerships, and you care that these partnerships could be affected by the Federal Advisory Committee Act (FACA).

As you may know, FACA requires that groups assembled to provide policy advice to the Federal Government must have balanced memberships and be open to the public, ensuring that special interests do not exert undue influence on federal decision-makers.

The Federal Government has been working hard in the last several months to move new local partnerships forward, and to allow the federal resource agencies to continue to participate in the partnerships. That participation became questionable several months ago.

As Director of the Office of Forestry and Economic Development, the office set up by the Administration to coordinate implementation of the President's Forest Plan, I am committed to finding a way to help all of our partnerships move forward.

As part of this effort, I met with some of you recently on this issue in Redding, California. Things have been moving fast since then on FACA and partnerships, so I am taking this opportunity to both recap my understanding of the meeting and bring you up to date on our progress.

Keep in mind, as we strive for resolution of this issue, that there are two types of partnerships affected by FACA: (1) Partnerships built around the Adaptive Management Areas proposed in the President's Forest Plan; and (2) partnerships coming together in local areas not built around an Adaptive Management Area. Our challenge is to help both types of partnerships move forward.

Options Proposed by the Federal Government

Option One: Charter AMA Committees

Establish formal advisory committees to provide opportunity for public input and advice to decision-making. Under this option, the Adaptive Management Areas set up in the President's Forest Plan would have federally "chartered" groups running them -- in other words, the locally-based partnerships would become federal advisory committees, and would therefore need to follow federal regulations (advertise their meetings, keep minutes). Partnerships that are not built around Adaptive Management Areas would not be covered in this option.

Option Two: Partnerships operate as subgroups of Provincial Teams

The Forest Plan established a network of provinces around the region. Those provinces would be coordinated by new interagency provincial teams. If provincial teams are chartered as advisory committees, they could outline objectives for subgroups to accomplish, and the subgroups could provide analysis to the provincial teams. Clarification would be needed as to what kind of groups could be considered subgroups to the Province Teams.

A group of partnerships have put forward some excellent suggestions on the provincial subgroup proposal, which we are considering.

Option Three: Contract Preparation of the AMA Plan.

The Forest Plan requires that the AMAs prepare plans for their areas. Under this option, the provincial teams would contract with someone to prepare the AMA plan. The contract specifications would require significant partnership participation during plan preparation. Obviously, this option would not cover the partnerships that aren't involved in the AMAs.

Option Four: General public involvement.

There are a variety of public involvement techniques that can be useful in a manner consistent with FACA. The federal agencies would prepare an AMA plan and manage the AMA areas. They would involve the public earlier and more frequently than in the past. Representatives of non-federal governments could participate in public meetings or meet with federal employees/managers one-on-one. Spontaneous public groups could form and function autonomously in providing input to federal decisions. This option should be used in conjunction with parts of the other options in order to turn the process into a collaborative one.

It is important to note that none of these options could be used in a vacuum. In most areas, several options will be used, helping the AMA groups as well as the other partnerships.

Other Partnership Suggestions

We are reviewing the suggestions that came from the partnerships. Here are a few of the highlights.

Option One: States or communities form groups and invite the federal government to participate, but not as key "leaders" of the groups. This proposal allows groups to find a balance with federal attendance, but not be part of the decision-making process.

Option Two: Have Office of Management and Budget and General Services Administration issue rules on the interpretation of FACA to say that any group can request regular meetings with agencies. The rules would be published in the federal register and take effect that way. Would that allow the process to be exempt from FACA?

Option Three: Have the Justice Department clearly distinguish what is informational and what is decisional, and give out clear guidelines so people who aren't making decisions can keep meeting as "information only" groups. Caveat: If this means agency folks can't do anything at the "informational" meetings but sit there (they can't participate), partnerships don't want this option. Agencies have to be able to participate. All but one of the partnerships at our recent meeting (Quincy Library Group) say federal partners are a must in the process.

Where We Go From Here

We are working on a strategy that allows the partnerships to continue in a way that fulfills the promises of the Forest Plan -- allowing for a new kind of public involvement in this region.

We are not limited to only the options listed. Others may be added or changes made to the existing options. We do hope, however, to soon have a set of options and have federal agency contacts in the communities reaching out to partnerships for review of the options.

Most importantly, I wanted to let you know we are making progress. I know these have been frustrating times, and I appreciate your willingness to work with us to find a solution. We remain deeply committed to making partnerships work.

Please let us know if there are other options you would like us to consider. As always, please feel free to contact me or Lauri Hennessey of my staff (503-326-6251) if you have further questions on this very important issue.



E. Thomas Tuchmann
Director



United States Office of Forestry and Economic Development

333 S.W. First Avenue, P.O. Box 3623, Portland, Oregon 97208-3623



Memorandum

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Mike Davis

From: Tom Tuchmann 

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Anything you can do to expedite the approval process will be greatly appreciated.

cc:
Jim Lyons
Jim Pipkin
Tom Tuchmann
Steve Mertens (OMB)

THE WHITE HOUSE

WASHINGTON

MEMORANDUM TO: Mark Gaede
Rita Morgan
Jim Pipkin
Anne Shields
Peter Coppelman
Ellen Athas
Tom Tuchmann
Elaine Zielinski
Christine Walsh
Peter Hamm
Susan Yonz-Shepard

FR: Will Stelle *WSE*

RE: FACA Loose Ends

DATE: 8 July 1994

I would like to close out the remaining FACA-related issues promptly by proposing the following specific actions. We will hold off on setting an actual time for announcing our actions on FACA until we are closer to clearance by the Departments, GSA and OMB.

1. Final Charters for the RIEC and PIEC

Rita and Mark, will you take responsibility for completing the final charters and then sending them through the necessary Secretarial approval process at USDA immediately.

Jim, would you ensure that Secretarial approval process at the Interior Department is also completed.

TIMING: By COB Thursday, July 14th.

2. ROD amendment.

where? I would like to call a meeting for Monday, July 11th at 2:30 to discuss the issue of the need to amend the ROD given the decisions on the FACA chartering for the PIECs and the RIEC. Mark, Mike Gippert, Jim Pipkin, Peter and Ellen should plan to attend. The meeting should last for no more than one hour at most.

3. FACA public announcements.

CoB Wed. July 13

Tom Tuchmann will coordinate with the REO and the RIEC the preparation of the relevant documents and charts describing what we are doing with the FACA organizational issues. These will need to be reviewed by DOJ, so we will need a couple of days lead time before the actual announcements. Also, Tom and Lauri will coordinate the actual announcement logistics.

TIMING: Documents for review by COB Wednesday, July 13th.

4. FACA and the AMAs. COB wed 7/13

Tom Tuchmann, working with the REO and the RIEC, will polish the AMA options paper that the REO prepared for purposes of describing the various approaches to involving the public in forest management in the AMAs as contemplated by the ROD. This document will also be part of the package released at the time of announcement.

5. Congressional Notifications and Briefings:

Peter Hamm and Susan Yonz-Shepard should coordinate setting up a briefing for interested Congressional staff (if they judge it necessary).

cc. K. McGinty
C. Zoi

THE WHITE HOUSE

WASHINGTON

To Mr. Dan

MEMORANDUM TO: Kim Schnoor
Jim Lyons
Mark Gaede

FR: Will Stelle *WS*
Office on Environmental Policy

RE: Forest Plan and FACA Charters

DATE: 26 July 1994

I am writing to inquire about the status of the USDA approval of the two packages of advisory committee charters developed for implementing the President's forest plan. We are preparing to clear those charters through OMB and the Administration, but they must first receive the approval of the Secretary. The Secretary of the Interior has cleared them.

In the face of pending litigation over the President's forest plan on FACA related issues, the Interagency Steering Committee developed two packages of FACA charters to ensure that the procedures used to implement the plan meet FACA requirements. It is these two packages that are circulating. We are anxious to publish them as soon as possible because we have put a hold on certain relating implementation activities pending their issuance.

Please do what you can to speed the clearance within USDA, and give me a call when they are cleared.

Many thanks.

cc. K. McGinty
T. Campbell



U.S. Department of Justice
Civil Division

Attorney-Client Memorandum
Privileged and Confidential

Washington, D.C. 20530

JUN 1 1994

MEMORANDUM

TO: Bowman Cutter
Deputy Assistant to the President
National Economic Council
The White House

Kathleen McGinty
Director
Office of Environmental Policy
The White House

FROM: Frank W. Hunger
Assistant Attorney General
Civil Division

SUBJECT: Applicability of Federal Advisory Committee Act (FACA)
to Community Economic Revitalization Teams (CERTs)

DRAFT

SUMMARY

This memorandum addresses the legal vulnerabilities of the Community Economic Revitalization Teams (CERTs) under the Federal Advisory Committee Act (FACA) and discusses what may be done to reduce the litigation risks.

There are three basic options. First, the CERTs could proceed to operate as they do now, without modification of their existing activities. This would entail a substantial, though by no means certain, risk of liability under FACA. Second, the CERTs' activities could be curtailed in ways that would reduce their chances of being construed as advisory committees subject to FACA. Third, the CERTs could be chartered and operated as FACA advisory committees. This would minimize their potential exposure under FACA, but at the cost of disrupting, and possibly undermining, their continued functioning.

FACTUAL BACKGROUND

As you know, the CERTs were created to implement the Economic Adjustment Initiative under President Clinton's Forest Plan. That Plan is intended to alleviate the impasse over
DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: MW DATE: 2/15/15

2011-07-06-1

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management of federal forest lands in the Pacific Northwest habitat of the northern spotted owl. A federal court recently determined that the Plan was developed in violation of FACA by the Forest Ecosystem Management Assessment Team (FEMAT), but declined to enjoin its implementation. Northwest Forest Resource Council v. Espy, No. 93-1621 (D.D.C. March 21, 1994). However, four new cases have been filed by plaintiffs seeking to enjoin the Plan based, in part, on the Court's previous holding that the FEMAT violated FACA.¹ Plaintiffs also allege that the Regional Interagency Executive Committee (RIEC) and Provincial Teams formed to implement the ecosystem management aspect of the Plan are violating FACA, and they have filed a motion for a temporary restraining order to prevent the RIEC from holding one of its regularly scheduled meetings.² That meeting has been canceled, and steps are being taken to charter the RIEC and Provincial Teams as advisory committees under FACA ~~in order to meet these claims.~~ JP

The part of the Forest Plan known as the Economic Adjustment Initiative, which will assist communities adjusting to the impact of declining timber sales, is not yet under direct attack. However, it is vulnerable to the same types of FACA claims currently being made in regard to the FEMAT, RIEC, and Provincial Teams. We anticipate that the CERTs will at some point come under judicial scrutiny as well. In that event, there is substantial risk that a court will find that the CERTs are operating in violation of FACA and enjoin their activities, thereby derailing a critical component of the Forest Plan. The CERTs' potential FACA problems thus need to be addressed as soon as possible. J

Our review of the CERTs' activities is based upon documents which define and describe their responsibilities, and telephone interviews with the two Regional CERT co-chairmen and the three State CERT chairpersons.³ In brief, the CERTs consist of one

¹ These four cases are presently assigned to the same judge in the District of Columbia who decided the FEMAT case. The government will be filing a motion to transfer them to the Western District of Washington, where the challenge to timber sales in the spotted owl habitat was originally brought.

² A hearing on this motion is scheduled for June 2, 1994.

³ The primary documents reviewed were the Interagency Memorandum Of Understanding For Economic Adjustment And Community Assistance (MOU), the Multi Agency Command Final Working Strategy for the Forest Plan Economic Adjustment Initiative (November 30, 1993), and the Northwest Economic Adjustment Initiative

(continued...)

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Regional CERT and three State CERTs in Oregon, Washington, and California, all containing federal, state, and local officials. The Regional CERT seeks to promote a fair and equitable distribution of funds by monitoring the funding process and delivering information on available resources. The State CERTs do not operate identically, but all three are intended to serve in large part as a forum for their nonfederal members to "provide information to facilitate the evaluation and consideration of applications and proposals by Federal members." Implementation Plan at 4. In providing such information, the nonfederal members are not permitted to give advice in their capacity as State CERT members, but may do so "acting within their local capacity." *Id.* at 3 n.2. The federal members of the State CERTs may consider the input of any nonfederal individual. *Id.* at 4. All of the CERTs operate more or less openly, often meeting with groups in particular localities, but they do not regularly publicize their meetings.

DISCUSSION

FACA defines an "advisory committee" to include "any committee . . . or similar group . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for . . . one or more agencies or officers of the Federal Government." 5 U.S.C. App. 2 § 3(2). Unless such a committee is composed entirely of full-time federal officers or employees, *see id.*, it must file a detailed charter, *id.* § 9(c), give advance notice in the Federal Register of any meetings, *id.* § 10(a)(2), hold all meetings in public, *id.* § 10(a)(1), keep detailed minutes of each meeting, *id.* § 10(c), make its records available to the public, *id.* § 10(b), be "fairly balanced in terms of the points of view represented," *id.* § 5(b)(2), and "not be inappropriately influenced by the appointing authority or by any special interest." *Id.* § 5(b)(3).

The D.C. Circuit has stated that, "[i]n 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." Association of American Physicians and Surgeons, Inc. v. Clinton, 997 F.2d 898, 914 (D.C. Cir. 1993).

³(...continued)

Implementation Plan (December 10, 1993). The Regional-CERT co-chairmen interviewed were Scott Duff and Bob Rheiner. The State-CERT chairpersons interviewed were Terry Gorton (California), Bill Scott (Oregon), and Karin Berkholtz (Washington). Peter Yu, Director to the White House National Economic Council, was also consulted.

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By these criteria, the Regional and State CERTs unquestionably "implicate" FACA. They possess the organization, formality, and continuity normally associated with advisory committees. Together with the Multi-Agency Command (MAC), the CERTs comprise a highly organized structure, their membership is rigidly defined in the Interagency Memorandum Of Understanding For Economic Adjustment And Community Assistance (MOU), and an Implementation Plan sets forth their specific purposes. And because they include non-federal employees, the CERTs do not fall within the statutory exception for committees with all-federal members.

Nevertheless, under the plain language of the statute, the CERTs are not "advisory committees" unless they have been "established or utilized . . . in the interest of obtaining advice or recommendations" for federal decisionmakers. 5 U.S.C. App. 2 § 3(2). There are four problem areas where the CERTs are rendering such advice, or may be perceived as doing so.

First, as stated in the Implementation Plan, "[b]oth the federal and nonfederal members of the State CERTs may identify and highlight programmatic requirements or provisions that inhibit the effectiveness of existing federal, state and local programs, and suggest improvements in existing processes." Plan at 3. The State CERTs "will address a wide range of possible improvements to federal practices, policies and regulations." *Id.* at 5 n.6. If the suggested improvements cannot be acted on by the federal members of the State CERTs, they are passed on to the Regional CERT, and then on to the MAC if necessary.

Second, the State CERTs are expected to provide feedback to the Provincial Teams on the economic impact of proposed watershed restoration projects. This should not be a problem once the Provincial Teams have been chartered as FACA advisory committees.⁴ However, it is uncertain when that will occur.

Third, the Implementation Plan, which guides the CERTs' activities, was developed by the CERTs themselves as a

⁴ Once the Provincial Teams are chartered as advisory committees, any recommendations they receive from the CERTs on watershed restoration proposals would not constitute direct advice to the President or any federal agency. The CERTs therefore could make such recommendations without violating FACA, since FACA only applies to groups directly "established or utilized" by the President or any agency "in the interest of obtaining advice or recommendations." 5 U.S.C. App. 2 § 3(2). See National Anti-Hunger Coalition v. Executive Committee, 557 F. Supp. 524, 529 (D.D.C. 1983).

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recommendation to the MAC. The MAC adopted the CERTs' draft plan without change on January 7, 1994.

Finally, as stated in the Multi Agency Command Final Working Strategy (November 30, 1993), the State CERTs are to "[p]rovide state and local perspective on project proposals and applications to federal officials." Strategy at 5. The Regional and State CERT Chairpersons assure us that the CERTs are simply a forum for the exchange of information and that nonfederal CERT members do not give advice to the federal officials during the meetings. However, the line between information and advice is quite thin and easily crossed, especially where limited economic development funds are at stake. The submission of prioritized lists of proposed projects to the CERTs is an example of information that could easily be construed as advice. Further, the fact that nonfederal CERT members are permitted to make recommendations "acting within their local capacity," Implementation Plan at 3 n.2, creates the potential for blurring of roles and accusations of subterfuge.

We have identified three basic options to address the potential FACA liability raised by these activities:

Option 1 -- No action

The first option is to allow the CERTs to proceed without any change in guidance. This would pose a substantial risk of liability under FACA, given the CERTs' clearly, if narrowly defined, advisory roles. The risk seems especially pronounced in light of the recent holding in the FEMAT case that "there is nothing in the statutory language or case law to support the [government's] assertion that FACA should not apply to 'advisory committees' consisting only of technicians who supply the decision-makers with data." Northwest Forest Resource Council v. Espy, No. 93-1621 (D.D.C. 1994). If mere communication of technical data is enough to bring a committee within FACA, then so will the presentation of "state and local perspective on project proposals."

Nevertheless, there is legal authority to support an argument that the CERTs, even as presently operating, are not

⁵ Taken literally, the above-quoted statement is incorrect, since FACA applies only to committees which render "advice or recommendations". 5 U.S.C. App. 2 § 3(2). To the extent that a committee provides data or information and not advice, it is not an "advisory committee" under FACA. However, as noted above, the distinction between information and advice can be murky, and the Northwest Forest decision appears to favor a broad reading of "advice or recommendations."

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subject to FACA. GSA's interpretive regulations list examples of advisory groups that are not covered by FACA, one of which arguably applies here. Specifically, the regulations exempt "[a]ny 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." 42 C.F.R. § 101-6.1004(g). This interpretation has been cited with approval by two district courts. See Natural Resources Defense Council v. E.P.A., 806 F. Supp. 275, 276 (D.D.C. 1992); HLI Lordship Industries, Inc. v. Committee For Purchase From The Blind, 615 F. Supp. 970, 978 (E.D. Va. 1985).

Notwithstanding the several ways in which the CERTs might be construed as rendering advice, they could be characterized as having been "established to perform primarily operational as opposed to advisory functions."⁶ However, given the paucity of case-law applying this "operational functions" exception, to proceed in reliance upon it would be a relatively high-risk approach.

Option 2 -- Give guidance to the CERTs

The second option is to take various steps short of chartering to reduce the chances that a court may find the CERTs to be advisory committees under FACA. The CERTs could be instructed to restrict their activities in the following ways: (1) do not make recommendations on any matter, including "process improvements"; (2) do not provide feedback to the Provincial Teams on watershed restoration proposals; (3) do not receive advice on individual proposals and projects, except from non-CERT members at open, publicized CERT meetings; (4) do not accept prioritized lists of proposals, except from non-CERT members at open, publicized CERT meetings.

Adoption of the latter two suggestions would help to forestall accusations that CERT members are evading FACA in their non-CERT roles. Although the non-federal members would still be able to provide information on individual projects to the federal

⁶ See Natural Resources, 806 F. Supp. at 277 (committee which included state governors was not subject to FACA where "they act operationally as independent chief executives in partnership with the federal agency"); HLI Lordship, 615 F. Supp. at 978 (committee was not subject to FACA where "its advisory capacity is secondary to its operational activities"). These cases suggest that such "operational" functions may be performed by non-federal personnel, but the matter has never been specifically addressed.

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members, they should be instructed to avoid giving any information that could be construed as advice.

Any guidelines adopted should be contained in a new implementation plan issued by the MAC without the CERTs' input, to supplant the current implementation plan developed by the CERTs.

Option 3 -- Charter the CERTs under FACA

The third option is to charter the CERTs and operate them as FACA advisory committees. This would minimize the risks of litigation, though it would not eliminate them. Regardless of how the CERT committees are constituted, the government would be vulnerable to suit on the ground that they were not "fairly balanced." 5 U.S.C. App. 2 § 5(b)(2).

Discussions with the CERT chairpersons reveal several practical concerns with this approach. First, it is feared that chartering, by requiring the presentation of opposing points of view, would transform what is presently a collegial process based on trust into a politicized, adversarial one. Second, the state governments' lead role on the state CERTs has given them a major stake in the process, which they would no longer have if they were just another non-federal party. Not only is the states' active participation essential to the success of the economic initiative, they are also absorbing substantial administrative costs which the federal government would otherwise have to bear. Third, the delay caused by chartering may result in the loss of Department of Interior funds which need to be allocated by June 30.

no
change
technical
change

does this
role
have to
change?

* * *

Please feel free to call the staff people responsible for this matter, Elizabeth Pugh (514-3178) or Eric Goulian (514-4686), if you have any questions or concerns.



U.S. Department of Justice

Environment and Natural Resources Division

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

June 1, 1994

Mark C. Rutzick, Esq.
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland OR 97204-2089

Dear Mr. Rutzick:

This letter will provide the point-by-point clarification requested by you in your letter to me of May 26, 1994, and respond to your later letter to Wells Burgess, dated May 31, 1994. I first address the eight points in the May 26 letter.

1. Attached is the memorandum from the three assistant secretaries entitled "Federal Advisory Committee Act (FACA) Compliance Concerning Implementation Activities for the President's Northwest Forest Plan." This memorandum provides the guidance referred to in my letter of May 25, 1994.

2. The precautions referred to in the memorandum, dated April 29, were intended to take effect upon issuance of the memorandum. The affected government officials have received the April 29 memorandum and are complying with its provisions.

3. The directions from the three assistant secretaries do address the manner in which meetings applicable to the President's Forest Plan are to be conducted until the government's reconsideration of the application of FACA to the implementation of the Forest Plan is completed.

4. The phrase in my previous letter "until the FACA issues have been resolved" refers to an on-going reconsideration by federal officials of the the application of FACA to the implementation of the Forest Plan. We anticipate prompt completion of that reconsideration.

5. The reference to a "Regional Executive Office" should have been to the "Regional Ecosystem Office."

6. We are moving as expeditiously as possible to respond to your document request. Within two weeks we will either

provide you with the documents requested or provide a progress report on our consideration of your request.

7. The statement that future documents will be handled "in full accordance with applicable laws, including FACA" means that the question of how documents will be handled is part of the ongoing reconsideration of the application of FACA to the implementation of the Forest Plan.

8. As indicated, the government is reconsidering how to implement the Forest Plan in light of FACA. We appreciate and will consider your views regarding participation by the Northwest Forest Resource Council.

In your May 31, 1994 letter to Wells Burgess you specifically ask "what 'this time' is during which no meetings will include non-Federal participants." Once again, "this time" refers to the period during which the federal government is reconsidering the application of FACA to the implementation of the Forest Plan. The federal agencies will not schedule another meeting of the RIEC or province teams with non-federal participants until that reconsideration is complete. We will notify you of its completion, and in addition, provide you with advance notice before any meeting of the RIEC or province teams that includes non-federal officials.

I trust that this letter will result in cancellation of the TRO hearing, the exclusive focus of which was the June 2-3 meeting of the RIEC which will not take place. Please notify us by noon today, Pacific time, of how you plan to proceed as to the temporary restraining order.

Sincerely,



Peter D. Coppelman
Deputy Assistant Attorney
General
Environment and Natural
Resources Division

April 29, 1994

Memorandum

To: Chief, Forest Service
Acting Director, Bureau of Land Management
Director, Fish and Wildlife Service
Acting Deputy Commissioner, Bureau of Indian Affairs

From: Assistant Secretary of Agriculture, Natural Resources and Environment
Assistant Secretary of the Interior, Land and Minerals Management
Assistant Secretary of the Interior, Indian Affairs

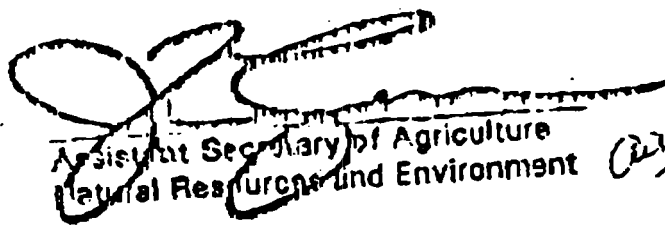
Subject: Federal Advisory Committee Act (FACA) Compliance Concerning
Implementation Activities for the President's Northwest Forest Plan

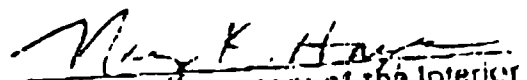
In view of the recent court decision, NRFC v. Espy, which determined that the process for preparation of the Forest Ecosystem Management Assessment Team (FEMAT) report for the President's Forest Plan violated the requirements of FACA, special precautions must be exercised to ensure that all current actions and future activities related to implementation of the Forest Plan fully comply with FACA requirements. Consistent with Judge Jackson's decision in the above case, the Record of Decision (ROD) for the Forest Plan issued on April 13, 1994, requires that "all non-federal participation in the forest management process will accord with the strictures of the Act." Failure to comply with FACA during implementation of the Forest Plan potentially places the entire plan at legal risk.

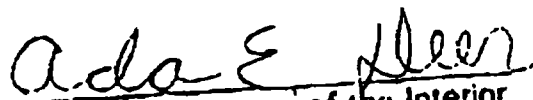
One key implementation objective for ecosystem-based management set forth in the forest plan is to have all involved federal agencies working together as one government. Another is to have full participation of all non-federal governmental interests (the states, tribes, and local governments) in long-term forest management in the region. To achieve these objectives, an interagency approach has been established utilizing committees, working groups, and teams both at the regional and field levels. While input and participation of all involved shareholders, both federal and non-federal, are important to successful implementation of ecosystem-based management, the activities and processes carried out by all components of this new interagency, inter-governmental approach must comply with requirements of FACA.

Full compliance must begin immediately. We realize that this may create special challenges concerning the participation of states and tribes. Attorneys at the Interior Department Solicitor's Office and the Agriculture Department's Office of the General Counsel are available to expedite compliance with this directive. Over the next several weeks, we will be examining options that might enable us to achieve our objectives of partnership and collaboration envisioned in the Forest Plan, while still complying with FACA. However, in the short term, until the FACA issues have been resolved it will be necessary to avoid a consensus-type decision-making or advisory process that involves non-federal officials. It will still be possible to obtain the views of states, tribes, and local governments through individual meetings, open hearings, and written submissions.

To expedite implementation of this directive, copies of this memorandum have been provided directly to the Regional Foresters of the Forest Service (Regions 5 and 6); the State Directors, Bureau of Land Management (Oregon/Washington and California); the Portland Area Director, Bureau of Indian Affairs; the Director of the U.S. Office of Forestry and Economic Development, Portland, Oregon; and the acting Director of the Regional Ecosystem Office.


Assistant Secretary of Agriculture
Natural Resources and Environment


Assistant Secretary of the Interior
Land and Minerals Management


Assistant Secretary of the Interior
Indian Affairs

cc: Administrator, Environmental Protection Agency
Assistant Secretary of the Interior, Fish and Wildlife and Parks
Under Secretary of Commerce for Oceans and Atmosphere
Director, White House Office on Environmental Policy
Regional Director, National Marine Fisheries Service, Seattle, WA
Regional Administrator, Environmental Protection Agency, Seattle, WA
Regional Director, U.S. Fish and Wildlife Service, Portland, OR
USDA, Office of General Counsel, Washington, DC and Portland, OR
USDOl, Office of the Solicitor, Washington, DC
USDOl Regional Solicitor, Portland, OR

WILL STELLE
FOR REVIEW
AT 1:58 PM
FACA

TO: Will Stelle
White House Office of Environmental Policy

FROM: Peter D. Coppelman
Deputy Assistant Attorney General
Environment & Natural Resources Division
Department of Justice

DATE: June 3, 1994

RE: Application of FACA's Fairly Balanced Requirement to
the Advisory Committee to the Regional Interagency
Executive Committee (RIEC)

Introduction

The federal government is proceeding with a decision to charter an intergovernmental advisory committee to the Regional Interagency Executive Committee (RIEC) that is restricted to federal, state, and tribal governments. The draft charter for the advisory committee carefully describes functions for the committee that justify this limited membership. That approach may be sufficient to withstand the judicial challenge that is certain to come. But I believe this issue deserves careful scrutiny.

The lawsuits brought by the Northwest Forest Resource Council (NFRF), currently pending before Judge Jackson of the District Court for the District of Columbia, contend that the Regional Interagency Executive Committee (RIEC), established by the President's Plan, does not comply with the strictures of the Federal Advisory Committee Act (FACA). See e.g. NFRF v. Dombeck, Complaint at ¶ 54. Recently NFRF sought a Temporary Restraining Order which, although ultimately withdrawn by NFRF, forced the cancellation of the RIEC meeting scheduled for June 2 and 3. Obtaining a FACA charter for an advisory committee to the RIEC will reduce the litigation risk for the President's Plan; however, considerable litigation risk still exists, in my view, if the advisory committee is limited to federal, state, and tribal governmental entities. This memorandum evaluates that risk. I do not conclude that the advisory committee must, as a matter of law, be expanded beyond governmental entities, but I do

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DATE: *2/5/18*

2012-0744-8

believe that the possibility of expanding the proposed committee merits careful consideration.

FACA requires that a chartered executive committee "be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." FACA § 5(b)(2). NFRC's complaint alleges the RIEC is not fairly balanced as there are "no representatives of local businesses, local governments, local communities and local citizens." Complaint at ¶ 54. Given the aggressive litigation strategy NFRC has pursued, I would expect that if the federal government proceeds to charter an advisory committee to the RIEC that has only governmental members, NFRC will immediately be back in Judge Jackson's court seeking preliminary injunctive relief seeking to enjoin the RIEC from meeting until its membership is "fairly balanced" or perhaps even demanding a position on the RIEC. Even if NFRC does not seek preliminary relief, its complaints squarely raise the issue of whether the RIEC is fairly balanced. As we shall see, what Judge Jackson has already said about balance in NFRC v. Espy (the FACA FEMAT case) gives rise to concern.

Discussion

Unfortunately, the case law is muddled so that our litigation risk on the balance issue is difficult to predict. The "fairly balanced" requirement has prompted numerous lawsuits. Resolution of those suits has generally centered on jurisdictional defenses raised by the government. As a result, there is little substantive guidance as to what constitutes a "fairly balanced" committee.¹

Until recently the courts have generally declined to involve themselves in questions of an advisory committee's balance, because to do so would require the courts to "supervise the membership...of federal advisory committees on a continual basis and to alter the composition of the committees according to

¹ One of the few issues that seems well settled is that FACA does not confer a right for any particular group to be represented on an advisory committee. See National Treasury Employees Union v. Reagan, No. 88-186, memorandum order at 8-9 Feb. 25, 1988) (the "fairly balanced" requirement does not entitle every interested or affected group to representation on an advisory committee); National Association of People with AIDS v. Reagan, No. 87-2777, memorandum opinion at 11 (Dec. 16, 1987) (same). The D.C. Circuit addressed this question in dicta and found that "to be sure, [FACA] confers no cognizable personal right to an advisory committee appointment." National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1074, n.2 (D.C. Cir. 1983).

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[the courts'] subjective determination as to fair balance." Metcalf v. National Petroleum Council, 553 F.2d 176 (D.C. Cir. 1977). As a result, the courts have dismissed cases on the grounds that the Plaintiffs have not suffered an injury in fact;² that Plaintiff's injuries were not redressable by the court;³ and that the "fairly balanced" standard is not justiciable (that is, subject to judicial review).⁴ Nonetheless, despite this track record, we cannot be confident of a favorable decision in NFRC's actions.

Recent decisions--particularly Judge Jackson's handling of the FEMAT litigation--cast substantial doubt upon whether those jurisdictional defenses will prevail in our situation. The D.C. Circuit has suggested that entities directly affected by the committee's work have standing.⁵ It will be very difficult to argue that NFRC is not directly affected by the RIEC's work. Moreover, in the FEMAT litigation Judge Jackson rejected the government's standing argument, concluding that NFRC had standing a fortiori. Northwest Forest Resource Council v. Espy, slip op. at 3 (citing Public Citizen v. Department of Justice, 491 U.S. 440, 448-51 (1988)).⁶

² See, e.g., Metcalf, 553 F.2d at 186-187 (denying standing on the grounds the plaintiff's allegation of injury from higher petroleum prices as a result of recommendations made by an allegedly unbalanced National Petroleum Council was "speculative and conjectural in the purest sense.")

³ See, e.g., Physician's Education Network, Inc. v. Dep't of Health, Education and Welfare, 653 F.2d 621 (D.C. Cir. 1981) (per curiam) (injury not redressable because it would result from an Act of Congress, a third party not before the court).

⁴ See, e.g., Public Citizen v. Department of Health and Human Services, 795 F. Supp. 1212 (D.D.C. 1992) (reviewing previous cases and concluding that no meaningful standard existed for the court to determine what viewpoints must be present for the committee to be fairly balanced); Public Citizen v. Nat'l Advisory Committee on Microbiological Criteria for Foods, 886 F.2d 419 (D.C. Cir. 1989) (Silberman, J., concurring).

⁵ See e.g. National Anti-Hunger Coalition, 711 F.2d at 1074 n.2. (dicta); but see Microbiological Criteria, 886 F.2d at 427 (Silberman J., concurring) (concluding that National Anti-Hunger is not valid precedent on the issue of standing).

⁶ In Public Citizen the Supreme Court ruled that an agency's refusal to permit a party to scrutinize an advisory committee's work "to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue." Id. at 449.

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Judge Jackson is not likely to be any more receptive to an argument that the "fairly balanced" requirement is not justiciable. He ignored this argument in the FEMAT litigation, stating in a footnote that his disposition of the case on the merits made it unnecessary to address the issue of justiciability. NFRC, slip op. at 3, n.2. Nonetheless, he found it "undisputed" that "FEMAT made no attempt to fairly balance its membership as required by section 5(b)(2)." Id. at 11. This finding seems to have resulted from his determination that the composition of FEMAT suggested "that the vast majority [of the FEMAT members] were pro-'ecosystem management,' having minimal sympathy for the forest products industry." Id. at 10. Thus, if presented with the question of whether the RIEC is fairly balanced, Judge Jackson would seem likely to reach the merits.

If Judge Jackson were to reach the merits, our position has vulnerabilities. Reviewing courts that have reached the merits have generally examined whether the committee is fairly balanced relative to its functions. Nat'l Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control, 557 F. Supp. 524, 528 (D.D.C. 1983), aff'd, 711 F.2d 1071 (D.C. Cir. 1983), j'ment amended, 566 F. Supp. 1515 (D.D.C. 1983); Microbiological Criteria, 886 F.2d at 423 (Friedman, J., concurring). Given that one of the functions of the RIEC is to coordinate amendment of the land management plans (ROD at 11), Judge Jackson could well find that the RIEC is not fairly balanced. NFRC argued in its Memorandum in Support of Plaintiffs' Motion for a TRO, at p. 2, that the state and tribal members of the RIEC have an interest in keeping timber production from federal forests at a minimum:

"Th[e] violation of FACA is especially grave since the appointed non-federal members, from the states and the tribes, have a direct economic stake in the RIEC's work: the value of the timber they own and sell will increase when federal timber subject to RIEC's decisions is restricted. This is a classic conflict of interest FACA was designed to avoid." (Emphasis in original)

NFRC would allege with respect to the proposed intergovernmental advisory committee that no non-governmental entity with an interest in maximizing timber production from the federal forests is represented. In addition Judge Jackson's comment in the FEMAT litigation that FEMAT's members seemed to have little sympathy for the timber industry suggests a receptivity to an argument by NFRC that the timber industry needs to be included in the RIEC advisory committee.

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Conclusion

Any litigation, whether the government ultimately prevails or not, raises concerns about the President's plan. Thus it is incumbent upon the government to examine possible means to reduce the risk of litigation occurring. One method of doing that would be to expand the membership of the proposed advisory committee to the RIEC to include representatives from industry groups, as well as from environmental groups and other non-governmental entities. I know that there are countervailing arguments, including: (1) expanding the advisory committee is a slippery slope with innumerable possible groups demanding a seat at the table; (2) an advisory committee with representation from other interest groups will turn into a debating society unable to reach consensus on anything; (3) the governmental entities now at the table will respond to what they see as diluted representation by sending lower level personnel.

I do not view any of these arguments as dispositive. A selection of other interest groups could be named to the advisory committee, as long as the selection is reasonable; adding 5-10 more members to the committee would not necessarily result in gridlock; and whatever may be lost in terms of high-level intergovernmental representation may be outweighed by wider public participation. In any event, I believe that the issue of balance should be carefully considered before a final decision is made on the composition of the advisory committee.

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U.S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

May 25, 1994

ED 12516;
FACA

Mark C. Rutzick, Esq.
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204-2089

Re: Northwest Forest Resource Council v. Dombeck
(D.D.C.); Northwest Forest Resource Council v.
Thomas (D.D.C.).

Dear Mr. Rutzick:

By letter of May 19, 1994, to Secretaries Babbitt and Espy, you raise concerns about the opportunities for your client to exercise its "rights" under the Federal Advisory Committee Act ("FACA") as to the Regional Interagency Executive Committee ("RIEC") and Province Teams. First, you have requested an assurance that all future meetings of these groups will comply with FACA. Second, you have requested all minutes, documents, agendas, advice provided and lists of members for all past and future meetings of these groups. Because this matter is in litigation, I have been asked to respond to your concerns.

Following the decision by Judge Jackson in Northwest Forest Resource Council v. Espy, both the Departments of Agriculture and the Interior have taken steps to ensure full compliance with the Federal Advisory Committee Act. Three Assistant Secretaries of Agriculture and the Interior have directed that special precautions be exercised to ensure that all current actions and future activities related to implementation of the Forest Plan fully comply with FACA. The Assistant Secretaries have instructed the RIEC and Province Teams to avoid a consensus-type decisionmaking or advisory process that involves non-federal officials, until the FACA issues have been resolved. The Regional Executive Office assures that any meetings convened on the Forest Plan during this interim period will either be limited to federal employees or, if open to non-federal participants, will be open to any and all interested persons to speak and present evidence.

You have requested various documents for all past and future meetings of the RIEC and Province Teams. With respect to past documents, we are in the process of collecting them and will respond to your request after we have received and reviewed the documents. As to all documents relating to future meetings, they will be handled in full accordance with the applicable laws, including FACA.

Finally, we invite your client to avail itself of all the opportunities for public comment on any aspect of the implementation of the President's Northwest Forest Plan.

Sincerely,

A handwritten signature in black ink, appearing to read 'Peter D. Coppelman', followed by a long horizontal line extending to the right.

Peter D. Coppelman
Deputy Assistant Attorney
General
Environment and Natural
Resources Division

FOURTH
PLAN

FARA
←

RIEC/PROVINCE BANKS

1. NARROW RIEL OPTION

2. PROVINCE TEAM CHARTER (COMMENTS TO GARDE
BY FRIDAY COB)

WENDY
URGENT
TO
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FRIDAY

3. SUBMITTING TO BOTH: CAN TRY FOR
CONVINCE AS NON-CHARTERED (PICKIN/GARDE
TO DOI/USDA LEGAL

4. PROCESS FOR AMENDING ROD] FRIDAY PERRY/
DOI

5. OUTREACH ON NARROW CHARTER

6. CERT DIRECTIVE NOT TO MEET

7. DIRECTIVE ON REGIONAL IMPLEMENTATION

THE WHITE HOUSE

WASHINGTON

MEMORANDUM TO: Rita Morgan

FR: Will Stelle

RE: Comments on FACA Forest Plan Charter

DATE: 31 May 1994

I have several comments.

1a. The statement of purpose mixes in a confusing way the purpose of the RIEC and the Advisory Committee. Brake out the two separately, with the purpose statement directed to the purpose of the Advisory Committee.

The purpose of the Advisory Committee is to provide advice and recommendations to the RIEC on the implementation of the Record of Decision. It's purpose is also to serve as a mechanism for improved coordination of forest management activities among Federal agencies and between the Federal government and state, tribal and local authorities.

1b. This entire section is disjointed and needs work. I do not understand the basic point of the section, but assume that it is to present the public interest rationale for the Advisory Committee. But the section reads as a series of largely unconnected sentences that do not, as a whole, hang together.

I believe that the basic argument is as follows:

1. The ROD calls for an innovated "ecosystem management" approach to forest management.
2. This ecosystem approach depends on vastly improved coordination among Federal agencies. The function of the RIEC is to generate that improved ongoing coordination.
3. Ecosystem management also calls for improved coordination and collaboration between the Federal government and state, local and tribal governments, who are also engaged in extensive forest management activities on non-Federal lands.
4. Successful ecosystem management will turn, in part, on improved conduits for advice and coordination. This Advisory Committee, comprised of representatives of the relevant sovereigns, will serve as such a conduit.

2b. Improve the reference to the MOU. What happens if the agreement is extended? Spell it out here.

Duties:

The duty of the Advisory Committee is to provide advice and recommendations to the Regional Interagency Executive Committee, not just to "federal Officials".

Other Random Comments:

1. What about authorizing the Advisory Committee to establish such ad hoc working groups as it may decide from time to time and comprised of knowledgeable people from the industry, environmental, labor, and community groups.

2. What about spelling out the decisionmaking processes for the Advisory Committee?

**DEPARTMENT OF AGRICULTURE
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20250-1400**

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Number of pages (including this page):

Date: May 27, 1994

From: Rita Morgan
AttorneyPhone: (202) 720-3564
Fax: (202) 720-5837

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Wells Burgess, Ellen Athas	DOJ 272-6815	[017]
Elizabeth Pugh	DOJ 616-8202 or 8460	
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Todd Campbell		
Ann Shields	DOI 208-5584	[033]
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Karen Mouritsen, Kris Clark	DOI-Sol 219-1792	[052]
Bob Moll, Debra Hecox	DOI-Sol 219-1790	[055]
Susan Shepard, John Stephens	FS-WO 205-1758	[027]
Nancy Graybeal	FS-Ptld 503-326-7577	[044]
Regional Ecosystem Office	REO 503-326-6265	
Tom Tuchmann	OFED 503-326-6254	[049]
~~Will Stelle~~	OEP 456-2710	[048]
Bob Perciasepe	EPA 260-5711	
Doug Hall		
Kate Kimbell		

Message:

Attached is the latest draft of the RIEC FACA charter as discussed on today's conference call. Please fax comments to me by 12:00 EDT on Tuesday, May 31.

*through improved coordination
among federal agencies*

1 PURPOSE

- a This regulation establishes the Advisory Committee to the Regional Interagency Executive Committee Advisory Committee (Advisory Committee). The purpose of the Regional Interagency Executive Committee, consisting of the Pacific Northwest Federal agency heads of the Forest Service, Bureau of Land Management, Fish and Wildlife Service, National Marine fisheries Service, Bureau of Indian Affairs, and Environmental Protection Agency, is to ensure the successful ~~coordination~~ of the implementation of the Record of Decision (ROD) for the Range of the Northern Spotted Owl. The purpose of the Advisory Committee is to advise Federal officials on interagency implementation of the Record of Decision (ROD) for the Range of the Northern Spotted Owl.

- b This Advisory Committee is in the public interest in connection with the duties and responsibilities of the United States Department of Agriculture and the Department of the Interior ~~in~~ ^{for} establishing and executing a comprehensive ecosystem management approach as envisioned under the ROD. The Federal government,

expanded reference

for the management of BLM and FS forest lands within the Range of the NSO

*and to
served as a
mechanism for
improved
coordination
of forest management
activities
with the BLM,
Fish and
Wildlife
Department*

2

State and local governments, and tribal governments engage in land management activities and in regulation of the land management activities of others. The land management agencies of the Federal government, the Forest Service and the Bureau of Land Management, are required by law to coordinate land management planning with state and local governments and tribal governments. 16 U.S.C. 1604(a); 43 U.S.C. 1712(b); {other BLM statutes as applicable}. Since ecosystems have a geography of their own that does not respect political boundaries, it is necessary to combine the advice and recommendations of the government entities encompassed by the ecosystem in order to achieve an ecosystem management approach. The Advisory Committee will provide advice regarding a comprehensive ecosystem management strategy for more than 24 million acres of Federal land administered by the Forest Service and the Bureau of Land Management.

THIS PARAGRAPH IS VERY
DISTORTED

2 SPECIAL INSTRUCTIONS

- a This regulation will expire two years from the date of issuance.
- b The Advisory Committee will terminate on the date of the expiration of the Memorandum of Understanding for

REFERRING TO
WHAT?

IMPROVE
REF 2, NUL

Forest Ecosystem Management, unless the agreement is ³ extended, with

*IN
WITH
CASE*

3 OFFICERS AND MEMBERSHIP

a The Advisory Committee will consist of no more than 20 members. Members will include:

- 1 One individual representing the State of Washington;
- 2 One individual representing the State of Oregon;
- 3 One individual representing the State of California;
- 4 Three individuals representing tribal governments;
- 5 One individual representing the Bureau of Land Management;
- 6 One individual representing the Bureau of Indian Affairs;
- 7 One individual representing the Environmental Protection Agency;

4

- 8 One individual representing the Fish and Wildlife Service;
- 9 One individual representing the Forest Service;
- 10 One individual representing the National Park Service;
- 11 One individual representing the National Marine Fisheries Service;
- 12 One individual representing the Soil Conservation Service;
- 13 One individuals ^{affected} representing [^] counties in Washington;
- 14 One individuals ^{affected} representing [^] counties in Oregon;
- 15 One individuals representing affected counties in California; and
- 16 An individual ² ^o in research from the Forest Service, the Environmental Protection Agency, and the Department of the Interior.

5

- ~~Chairperson~~ 1
- b The ~~Chairperson~~ Advisory Committee will elect a committee chairperson from among its members. A representative of the Forest Service will serve as the Executive Secretary. The Forest Service representative will serve as the designated Federal official under sections 10(e) and (f) of the Federal Advisory Committee Act, 5 U.S.C. App.
- c Appointments to the Advisory Committee will be made jointly by the Secretary of Agriculture and the Secretary of the Interior.
- d Equal opportunity practices in line with USDA policies will be followed in all appointments to the Advisory Committee. To ensure that the recommendations of the Advisory Committee have taken into account the needs of the diverse groups served by the Departments, membership should include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

DUTIES

- a The Advisory Committee will provide advice and recommendations to the ~~Federal Officials~~ on the coordinated implementation of the ROD, including advice
- RIEL

on measures to sustain old growth ecosystems and measures to ensure a predictable and sustainable level of timber and other products and services from the Federal lands in the range of the Northern Spotted Owl.

ESTIMATED ANNUAL OPERATING COSTS

- a Members service without pay, but with reimbursement of travel and per diem for attendance at Advisory Committee meetings called by the Chairperson. Such expenses will be submitted on vouchers signed by the Forest Service representative.
- b Annual operating costs are estimated to be ??? and ??? staff years of support.

NUMBER OF FREQUENCY OF MEETINGS

- a The Advisory Committee will meet as often as is necessary to complete its business.
- b 15 members of the Advisory Committee shall constitute a quorum.
- c Meetings will be open to the public.

REPORTS/SUPPORT

- a The Advisory Committee reports to the Secretary of Agriculture and the Secretary of the Interior through the Regional Forester and the { insert whomever at Interior}.
- b Support for the Advisory Committee will be provided by the Forest Service for the life of this charter.

**DEPARTMENT OF AGRICULTURE
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20250-1400**

FDNR (K)
FRA

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From: Michael J. Gippert **Phone:** (202) 720-2063
Deputy Assistant General Counsel **Fax:** (202) 690-2730
Natural Resources Division

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Owen Schmidt, Val Black, Jeff Handy	OGC-Ptld	503-326-3807	[011]
Owen Schmidt, Plan Support Group		503-326-6590	[056]
Jack Gipsman, Bob Simmons	OGC-SF	415-744-3170	[012]
Peter Coppelman	DOJ	514-0557	[043]
Wells Burgess, Ellen Athas	DOJ	272-6815	[017]
Steve Odell	DOJ	724-5836	[019]
Elizabeth Pugh, Eric Goulian	DOJ	616-8202 or 8460	
Tom Lee	AUSA-Ptld	503-727-1117	
Ann Shields	DOI	208-5584	[033]
Jim Pipkin	DOI	219-1220	
Karen Mouritsen, Kris Clark	DOI-Sol	219-1792	[052]
Bob Baum, Pete Raynor, David Gayer	DOI-Sol	208-3877	[054]
Debra Hecox	DOI-Sol	219-1790	[055]
Roger Nesbit, Ron Swan, Diane Hoobler	DOI-R Sol	503-231-2166	[051]
Gray Reynolds, Susan Shepard	FS-WO	205-1758	[027]
Jim Sanders	FS-WO	205-0885	
Nancy Graybeal, John Lowe	FS-Ptld	503-326-7577	[044]
Joyce Muraoka	FS R-5	415-705-1109	
Sue Zike	FS R-6	503-326-7742	[058]
Regional Ecosystem Office	REO	503-326-6265	
Tom Tuchmann	OFED	503-326-6254	[049]
Will Stelle	OEP	456-2710	[048]
Todd Campbell		456-6429	

Rita Morgan

OGC-USDA 720-5837

Subject:

Amendment of April 13, 1994 ROD for
FACA Charters and Interagency
Coordination/Committees/Task Groups

This summary of procedures for amending NFMA Forest Plans is a follow up to yesterday's meeting. It appears there will be a need to amend the April 13, 1994 ROD, Attachment A, E-15 to E-17, in light of the FACA Charters and the task groups to be created.

Amendments of Forest Plans are either significant changes in the Forest Plan or non-significant changes. See 16 USC 1604(f)(4) and 36 CFR 219.8(f) regional guide amendments and 36 CFR 219.10(e) and (f) copies attached. The criteria for determining significance of the change is set forth in Forest Service Handbook, FSH 1909.12, 5.32 (53 Fed. Reg. 26836, July 15, 1988) (copy attached). An administrative record must be made of the determination and notice by publication (36 CFR 217.5) is required if the amendment is subject to administrative appeal. In this case the amendment will probably be executed by the Secretaries or Assistant Secretaries and no administrative appeal is available. It would nevertheless be advisable to publish notice of the amendment in the Federal Register and possibly local newspapers within the range of the northern spotted owl. A copy of the amendment must also be sent to those on the Regional Guide and Forest Plan mailing lists. Under NFMA a non-significant amendment is effective upon notice. 16 USC 1604(f)(4).

NEPA compliance will also be necessary for the decision to amend the ROD. The Forest Service NEPA Procedures, FSH 1909.15, 18 (57 Fed. Reg. 43180, 43199-200, September, 18, 1992) (copy attached) establish documentation requirements for changes to decisions. The change to Interagency Coordination would not seem to trigger a supplement to the February SFEIS, but simply some record that there are no environmental consequences arising from the changes. See also, 40 CFR 1502.9, CEQ NEPA Regulations.

While it may be urged that no amendments are needed, the risk is that plaintiffs will assert that the ROD, Attachment A, E-15 to E-17, is not being followed. With the pending litigation challenging the implementation structure it is prudent to amend the ROD.

We ask that the Solicitor's Office advise of the Bureau of Land Management procedures applicable to amendments to the ROD. Please fax us comments or questions.

Attachments

16 § 1604

CONSERVATION Ch. 36

Ch. 36 FOR

developed in accordance with this subchapter, the management of such unit may continue under existing land and resource management plans.

(d) Public participation in management plans; availability of plans; public meetings

The Secretary shall provide for public participation in the development, review, and revision of land management plans including, but not limited to, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions.

(e) Required assurances

In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans—

(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C.A. §§ 528-531], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and

(2) determine forest management systems, harvesting levels, and procedures in the light of all of the uses set forth in subsection (c) (1) of this section, the definition of the terms "multiple use" and "sustained yield" as provided in the Multiple-Use Sustained-Yield Act of 1960, and the availability of lands and their suitability for resource management.

(f) Required provisions

Plans developed in accordance with this section shall—

(1) form one integrated plan for each unit of the National Forest System, incorporating in one document or one set of documents, available to the public at convenient locations, all of the features required by this section;

(2) be embodied in appropriate written material, including maps and other descriptive documents, reflecting proposed and possible actions, including the planned timber sale program and the proportion of probable methods of timber harvest within the unit necessary to fulfill the plan;

(3) be prepared by an interdisciplinary team. Each team shall prepare its plan based on inventories of the applicable resources of the forest;

(4) be amended in any manner whatsoever after final adoption after public notice, and, if such amendment would result in a significant change in such plan, in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section; and

(5) be revised (A) from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen

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years, and (B) in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section.

(g) Promulgation of regulations for development and revision of plans;
environmental considerations; resource management guidelines;
guidelines for land management plans

As soon as practicable, but not later than two years after October 22, 1976, the Secretary shall in accordance with the procedures set forth in section 553 of Title 5 promulgate regulations, under the principles of the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C.A. §§ 528-531], that set out the process for the development and revision of the land management plans, and the guidelines and standards prescribed by this subsection. The regulations shall include, but not be limited to—

(1) specifying procedures to insure that land management plans are prepared in accordance with the National Environmental Policy Act of 1969 [42 U.S.C.A. § 4321 et seq.], including, but not limited to, direction on when and for what plans an environmental impact statement required under section 102(2)(C) of that Act [42 U.S.C.A. § 4332(2)(C)] shall be prepared;

(2) specifying guidelines which—

(A) require the identification of the suitability of lands for resource management;

(B) provide for obtaining inventory data on the various renewable resources, and soil and water, including pertinent maps, graphic material, and explanatory aids; and

(C) provide for methods to identify special conditions or situations involving hazards to the various resources and their relationship to alternative activities;

(3) specifying guidelines for land management plans developed to achieve the goals of the Program which—

(A) insure consideration of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish;

(B) provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives, and within the multiple-use objectives of a land management plan adopted pursuant to this section, provide, where appropriate, to the degree practicable, for steps to be taken to preserve the diversity of tree species similar to that existing in the region controlled by the plan;

(C) insure research on and (based on continuous monitoring and assessment in the field) evaluation of the effects of each management system to the end that it will not produce substantial and permanent impairment of the productivity of the land;

(D) permit increases in harvest levels based on intensified management practices, such as reforestation, thinning, and tree

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cation of the notice of availability of the draft environmental impact statement in the *FEDERAL REGISTER*, the statement and the proposed guide shall be available for public comment for at least 3 months at convenient locations in the vicinity of the lands covered by the guide. During this period, and in accordance with the provisions in § 219.6, the Regional Forester or his designee shall publicize and hold public participation activities as deemed necessary for adequate public input.

(d) *Guide approval*. The Chief shall review the proposed guide and the final environmental impact statement and either approve or disapprove the guide.

(1) *Approval*. The Chief shall prepare a concise public record of decision which documents approval and accompanies the regional guide and the final environmental impact statement. The record or decision shall be prepared according to NEPA procedures (40 CFR 1505.2). The approved regional guide shall not become effective until at least 30 days after publication of the notice of availability of the final environmental impact statement in the *FEDERAL REGISTER*.

(2) *Disapproval*. The Chief shall return the regional guide and final environmental impact statement to the Regional Forester with a written statement of the reasons for disapproval. The Chief may also specify a course of action to be undertaken by the Regional Forester in order to remedy deficiencies, errors, or omissions in the regional guide or environmental impact statement.

(e) *Public appeal of approval decisions*. The provisions of 36 CFR part 211, subpart B apply to any administrative appeal of the Chief's decision to approve a regional guide. Decisions to disapprove a guide and other decisions made during the regional planning process prior to issuance of a record of decision approving the guide are not subject to administrative appeal.

(f) *Amendment*. The Regional Forester may amend the regional guide. The Regional Forester shall determine whether the proposed amendment would result in a significant change in

the guide. If the change resulting from the proposed amendment is determined to be significant, the Regional Forester shall follow the same procedure for amendment as that required for development and approval of a regional guide. If the change resulting from the amendment is determined not to be significant for the purposes of the planning process, the Regional Forester may implement the amendment following appropriate public notification and satisfactory completion of NEPA procedures.

(g) *Planning records*. The Regional Forester shall develop and maintain planning records that document decisions and activities that result from the process of developing a regional guide and the accomplishment of legal and administrative planning requirements. These records include at least the draft environmental impact statement, final environmental impact statement, regional guide, record of decision, a work plan to guide and manage planning, the procedures used in completing each action, and the results of these actions.

§ 219.9 Regional guide content.

(a) The regional guide shall contain—

(1) A summary of the analysis of the regional management situation, including a brief description of the existing management situation and the major issues and management concerns which need to be addressed at the regional level to facilitate forest planning;

(2) A description of management direction including programs, goals, and objectives;

(3) A display of tentative resource objectives for each forest planning area from the current RPA Program;

(4) New or significantly changed regional management standards and guidelines necessary to address major regional issues and management concerns identified in paragraph (a)(1) of this section;

(5) Specific standards and guidelines for the following—

(1) Prescribing appropriate harvest cutting methods to be used within the region according to geographic areas,

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impact statement in the FEDERAL REGISTER, to comply with 16 U.S.C. 1604(d) and 1604(j).

(2) *Disapproval.* The Regional Forester shall return the plan and final environmental impact statement to the Forest Supervisor with a written statement of the reasons for disapproval. The Regional Forester may also specify a course of action to be undertaken by the Forest Supervisor in order to remedy deficiencies, errors, or omissions in the plan or environmental impact statement.

(d) *Public appeal of approval decision.* The provisions of 36 CFR part 211, subpart B apply to any administrative appeal of the Regional Forester's decision to approve a forest plan. Decisions to disapprove a plan and other decisions made during the forest planning process prior to the issuance of a record of decision approving the plan are not subject to administrative appeal.

(e) *Plan implementation.* As soon as practicable after approval of the plan, the Forest Supervisor shall ensure that, subject to valid existing rights, all outstanding and future permits, contracts, cooperative agreements, and other instruments for occupancy and use of affected lands are consistent with the plan. Subsequent administrative activities affecting such lands, including budget proposals, shall be based on the plan. The Forest Supervisor may change proposed implementation schedules to reflect differences between proposed annual budgets and appropriated funds. Such scheduled changes shall be considered an amendment to the forest plan, but shall not be considered a significant amendment, or require the preparation of an environmental impact statement, unless the changes significantly alter the long-term relationship between levels of multiple-use goods and services projected under planned budget proposals as compared to those projected under actual appropriations.

(f) *Amendment.* The Forest Supervisor may amend the forest plan. Based on an analysis of the objectives, guidelines, and other contents of the forest plan, the Forest Supervisor shall determine whether a proposed amendment would result in a significant

change in the plan. If the change resulting from the proposed amendment is determined to be significant, the Forest Supervisor shall follow the same procedure as that required for development and approval of a forest plan. If the change resulting from the amendment is determined not to be significant for the purposes of the planning process, the Forest Supervisor may implement the amendment following appropriate public notification and satisfactory completion of NEPA procedures.

(g) *Revision.* A forest plan shall ordinarily be revised on a 10-year cycle or at least every 15 years. It also may be revised whenever the Forest Supervisor determines that conditions or demands in the area covered by the plan have changed significantly or when changes in RPA policies, goals, or objectives would have a significant effect on forest level programs. In the monitoring and evaluation process, the interdisciplinary team may recommend a revision of the forest plan at any time. Revisions are not effective until considered and approved in accordance with the requirements for the development and approval of a forest plan. The Forest Supervisor shall review the conditions on the land covered by the plan at least every 5 years to determine whether conditions or demands of the public have change significantly.

(h) *Planning records.* The Forest Supervisor and interdisciplinary team shall develop and maintain planning records that document the decisions and activities that result from the process of developing a forest plan. Records that support analytical conclusions made and alternatives considered by the team and approved by the Forest Supervisor throughout the planning process shall be maintained. Such supporting records provide the basis for the development of the forest plan and associated documents required by NEPA procedures.

§ 219.11 Forest plan content.

The forest plan shall contain the following:

(a) A brief summary of the analysis of the management situation, includ-

5.2—PROPOSED ACTIONS.

Management prescriptions, including standards and guidelines, and the schedule of management practices provide information and direction needed to achieve the desired future condition of the forest as expressed by the goals and objectives of the forest plan. Proposed management practices are identified following review of this management direction. In addition, actions may be proposed by others outside the Forest Service. The following specifies the process for analysis and evaluation to select, approve, or reject proposed actions.

5.3—ANALYSIS AND EVALUATION.

The purpose of analysis and evaluation is to make site specific decisions based on Forest Plan direction. The analysis process includes an assimilation of management direction, current issues, and site-specific data to make site specific decisions on land management. The analysis assists in determining costs, schedules, and direct, indirect, and cumulative effects of related management practices. An interdisciplinary process must be used to address a single practice or multiple practices within a given area. The responsible official determines the scope and geographic area of analysis required to reach a well-reasoned decision on proposed actions. Consider the following steps in identifying the scope and area involved in analysis:

1. Review data and information used in development of the forest plan;
2. Consider the land management decisions to be made in any given geographic area for the plan period;
3. Conduct scoping and determine issues, concerns, and other information about the area and the possible decisions to be made;
4. Determine the extent of the geographic area requiring analysis based on identified issues, concerns, and resource opportunities;
5. Determine the requirements for NEPA compliance, including the range of alternative actions, the potential for cumulative effects, and the possibility of connected and cumulative actions; and
6. Ensure that proposed management practices and actions are analyzed through an integrated approach to resource management.

5.31—Findings. The analysis provides information to evaluate proposed management practices and actions, whether Forest Service or non-Forest Service proposals, to determine findings for NFMA, to ensure compliance with NEPA, and to meet other appropriate laws and regulations. Review of the findings is essential in making a well-reasoned decision.

5.31a—National Forest Management Act Findings. The National Forest Management Act and implementing regulations require specific findings to be made when implementing the forest plan. In deciding on proposed management practices, the following findings must be made and documented.

1. **Consistency.** All resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands are to be consistent with the forest plan (16 U.S.C. 1604(i)). The forest plan guides all natural resource management activities (36 CFR 219.1(b)). All administrative activities affecting the National Forest must be based on the forest plan (36 CFR 219.10(e)). Thus, all management practices and activities must be consistent with the forest plan. If a proposed project or alternative action is not consistent with the forest plan, there are three options available for consideration:

- a. Modify the proposal to make it consistent with the forest plan;
- b. Reject the proposal; or
- c. Amend the plan to permit the proposal. Follow the direction in 5.32 below to amend the forest plan.

2. **Suitability for Timber Production.** No timber harvesting, other than salvage sales or sales to protect other multiple-use values, shall occur on lands not suited for timber production (16 U.S.C. 1604(k) and 36 CFR 219.27(c)(1)). When timber harvest is proposed and the land has been determined to be suitable, a finding to that effect must be made. If the land is determined not suited for timber production and timber harvesting is proposed, a finding must ensure that harvesting is necessary to protect other multiple use values or activities. The finding should reference the appropriate management direction found in the forest plan, planning records, or environmental documents.

3. **Clearcutting and Even-aged Management.** When a timber is to be harvested using an even-aged management system, a determination that the system is appropriate to meet the objectives and requirements of the forest plan must be made (16 U.S.C. 1604(g)(3)(F)(i) and (ii)). In addition, where clearcutting is to be used, it must be determined to be the optimum method. Reference should be made to the discussions of even-aged management contained in the forest plan, planning records, or environmental documents.

4. **Vegetative Manipulation.** All proposals that involve vegetative manipulation of tree cover for any purpose must comply with the seven requirements found at 36 CFR 219.27(b).

Reference the discussion or management direction found in the forest plan, planning records, or environmental documents.

5.31b—National Environmental Policy Act Compliance. The analysis of a management practice or action must comply with Forest Service environmental policies and procedures (FSM 1950 and FSH 1908.15). Insure that adequate consideration has been given to:

1. Scope of the action (including interconnected actions);
2. A reasonable range of alternative actions (including necessary mitigation); and
3. Site specific environmental effects (including direct, indirect, and cumulative effects).

5.32—Process to Amend the Forest Plan. The following actions must be taken when a proposal is not consistent with the forest plan and the proposal is to be considered further for implementation.

1. Prepare a proposed amendment to the forest plan.
2. Make a determination of the significance of the change to the forest plan under 16 U.S.C. 1604(f)(4), 36 CFR 219.10(f), and FSM 1922.5. It is important to distinguish between significance of the change to a forest plan and significance of the environmental impacts of the proposed action as defined by Council on Environmental Quality regulations found at 40 CFR 1500 to 1508.

3. The following factors are to be used when determining whether a proposed change to a forest plan is significant or not significant, based on NFMA planning requirements. Other factors may also be considered, depending on the circumstances.

a. **Timing.** Identify when the change is to take place. Determine whether the change is necessary during or after the plan period (the first decade) or whether the change is to take place after the next scheduled revision of the forest plan. In most cases, the later the change, the less likely it is to be significant for the current forest plan. If the change is to take place outside the plan period, forest plan amendment is not required.

b. **Location and Size.** Determine the location and size of the area involved in the change. Define the relationship of the affected area to the overall planning area. In most cases, the smaller the area affected, the less likely the change is to be a significant change in the forest plan.

c. **Goals, Objectives, and Outputs.** Determine whether the change alters long-term relationships between the

levels of goods and services projected by the forest plan. Consider whether an increase in one type of output would trigger an increase or decrease in another. Determine whether there is a demand for goods or services not discussed in the forest plan. In most cases, changes in outputs are not likely to be a significant change in the forest plan unless the change would forego the opportunity to achieve an output in later years.

d. Management Prescription.

Determine whether the change in a management prescription is only for a specific situation or whether it would apply to future decisions throughout the planning area. Determine whether or not the change alters the desired future condition of the land and resources or the anticipated goods and services to be produced.

4. If the amendment is determined not to be a significant change to the forest plan, the Forest Supervisor may implement the amendment following appropriate public notification and satisfactory compliance with Forest Service environmental policies and procedures for the project or action.

5. If the change to the forest plan is determined to be significant, follow the required 10 step planning process found at 36 CFR 219.12. Preparation of an environmental impact statement (EIS) is mandatory (16 U.S.C. 1604(f)(4), 36 CFR 219.10(f), and 36 CFR 219.12). The Forest Supervisor shall determine the issues, concerns, and opportunities to be addressed in the amendment and will normally concentrate on those issues that have generated the need for change.

5.4—DECISION AND

DOCUMENTATION. The analysis and evaluation of management practices and actions provide information and findings for reaching a well reasoned decision. Decisions made following analysis must be documented to: provide a public record; facilitate public notification; explain the rationale for selection of an action; and document the findings addressed above at 5.31. The process depicted in exhibit 1 is not precise in either the order or timing of events it predicts. Discretion must be used in determining consistency with and the need to change the forest plan. The following is required.

1. In order to assure the responsible official and the public that all actions are consistent with the forest plan, a finding of consistency must be a part of each decision document. The finding must indicate consistency with the general management requirements of the forest plan (36 CFR 2319.2), as well as indicating consistency with the specific standards and guidelines. This finding

need not be lengthy or detailed, but should briefly state why the proposed action is consistent with the particular management direction or requirements of law or regulation. The finding should include appropriate references to the pages in the forest plan, planning records, or environmental documents used in making the consistency determination. This finding is an appealable decision (36 CFR 211.18).

2. In the case of a change to the forest plan that is determined not to be significant, the Forest Supervisor documents the decision in the appropriate document and at the same time, if the activity is approved, amends the forest plan and implements the project or activity following appropriate public notification. Once the amendment is approved, permanently attach a copy of the amendment to all reference copies (36 CFR 219.8(i)(3)) of the forest plan. This finding is an appealable decision (36 CFR 211.18).

3. In the case of a change to the forest plan that is determined to be significant, follow the same procedure required for development of a forest plan (36 CFR 219.10(f)). Prepare a record of decision that accompanies the final environmental impact statement and address both the project and the change to be made to the forest plan. The decision is appealable (36 CFR 211.18) once the Regional Forester has signed the record of decision. When 45 days have elapsed since signing the record of decision, the forest plan is amended and the project or activity may be implemented.

4. Instructions for documentation necessary to comply with Forest Service environmental policies and procedures are found in FSM 1950 and FSH 1909.13.

5.5—**BUDGET DEVELOPMENT.** The selected projects and actions are the basis for program budget development. Policy contained in FSM 1930.3 requires that budget proposals be consistent with long-range direction provided by, among others, the forest plan. Follow procedures established in FSH 1909.13. The Program Development and Budgeting Handbook, for budget development.

5.6—**PROJECT DESIGN.** Project design is a process for developing detailed project plans, specifications, instructions, and cost estimates for selected actions. During field work for project design, mitigating measures directed by environmental analysis must be incorporated.

5.7—**PROJECT EXECUTION AND ADMINISTRATION.** Administer project execution to ensure that projects are completed as designed. Document any changes made during execution to

ensure there is a complete project history. Use monitoring and evaluation techniques described in chapter 6 to provide feedback on forest plan implementation.

Chapter 6—Forest Plan Monitoring and Evaluation Process

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 - 6.33 New Assumptions, Coefficients or External Changes

Monitoring and evaluation are separate, sequential activities that provide information to determine whether programs and projects are meeting forest plan direction.

Monitoring collects information, on a sample basis, from sources specified in the forest plan. Evaluation of monitoring results is used to determine the effectiveness of the forest plan and the need to either change the plan through amendment or revision or to continue with the plan. This chapter establishes procedural guidance for monitoring and evaluating forest plans. Overall direction is found in FSM 1922.7 and 36 CFR 219.12(k).

6.02—**Objectives.** The overall objective of monitoring and evaluating forest plans is to determine whether programs and projects are meeting forest plan direction. Within this broad objective, specific goals are to:

1. Ensure that forest plan goals and objectives are being achieved and management prescriptions are being implemented as directed.

2. Determine if the costs of implementing the plan and the management effects are occurring as predicted.

6.03—Policy

1. Ensure that the intensity of monitoring is commensurate with the risks, costs, and values involved in meeting plan objectives through resource management.

additional mitigation measures that may be required, such as measures common to all alternatives.

Express the effects in terms of changes that would occur in the physical (land, water, air), biological (plants and animals), economic (money passing through society), and social (the way people live) components of the human environment. Consider the magnitude, duration, and significance of the changes. See section 61 for a more specific list of environmental factors.

When analysis and disclosure of social and/or economic impacts are important to a reasoned decision, follow the direction in FPM 1970 and FSH 1909.17. Also consider unquantifiable environmental amenities and values. For all alternatives, be sure to consider the environmental effects on the following:

1. Consumers, civil rights, minority groups, and women (FSM 1730).
2. Prime farmland, rangeland and forest land (Department Regulation 9500-3, sec. 65.2).
3. Flood plains (sec. 66.3) and Wetlands (sec. 66.4).
4. Threatened and endangered species (FSM 2670).
5. Cultural resources (FSM 2360).

15.1 Cumulative Effects (sec. 05)

Individual actions when considered alone may not have a significant impact on the quality of the human environment. Groups of actions, when added together, may have collective or cumulative impacts which are significant. Cumulative effects which occur must be considered and analyzed without regard to land ownership boundaries. Consideration must be given to the incremental effects of past, present, and reasonably foreseeable related future actions of the Forest Service, as well as those of other agencies and individuals.

16 Evaluate Alternatives and Identify Preferred Alternative(s)

Compare alternatives on the basis of their effects on the human (physical, biological, social, and economic) environment. Although the ID Team or analyst(s) may make a recommendation based on the results of the interdisciplinary analysis, the responsible official identifies the preferred alternative(s) for an EIS.

17 Determine Type of Environmental Document Needed

The significance of environmental effects of a proposed action determines whether an EIS (sec. 05) must be prepared.

If the proposed action may have significant environmental effects,

prepare an EIS in accordance with direction in chapter 20.

The CEQ regulations provide the following direction on whether to prepare an EIS:

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section prepare an environmental assessment (§ 1506.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1506.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7). If the agency will prepare an environmental impact statement, (40 CFR 1501.4)

18 Correction, Supplementation, or Revision of Environmental Documents and Reconsideration of Decisions to Take Action

18.03 Policy

Review the environmental documentation of actions that are awaiting implementation and those of ongoing programs or projects at least every 3 to 5 years to determine if the environmental analysis and documentation should be corrected, supplemented, or revised.

After a decision to implement a proposed action has been made and when the consideration of new information leads to the supplementation or revision of environmental documents, a new decision based on the supplemented or revised environmental documents must be consistent with the scope of the new environmental analysis.

18.1 Review and Documentation of New Information Received After a Decision Has Been Made

If new information or changed circumstances relating to the environmental impacts of a proposed action come to the attention of the responsible official after a decision has been made and prior to completion of the approved program or project, the responsible official must review the information carefully to determine its importance.

If, after an interdisciplinary review and consideration of new information

within the context of the overall program or project, the responsible official determines that a correction, supplement, or revision to an environmental document is not necessary, implementation should continue. Document the results of the interdisciplinary review in the appropriate program or project file.

If the responsible official determines that a correction, supplement, or revision to an environmental document is necessary, follow the relevant direction in section 18.2.

18.2 Reconsideration of Decisions Based on an Environmental Impact Statement

1. *Correction.* Use errata sheets to make simple corrections.

2. *Supplement.* (c) Agencies-

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council. (40 CFR 1502.9(c))

3. *Revision.* (a) * * * If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion * * * (40 CFR 1502.9(a))

If the responsible official determines, based on evaluations described in section 18.1, that a supplement to or revision of an EIS is appropriate, issue a notice of intent to supplement or revise an EIS.

Distribute any corrections, supplements, and revisions to all holders of the subject EIS.

After completion of the final supplement or final EIS, issue a new record of decision consistent with the scope of the supplement or revision. Follow the instructions in Chapter 20.

18.3 Reconsideration of Decisions Categorically Excluded from Environmental Documentation

Take no further action if an interdisciplinary review of the new information shows that the proposed action still fits within the identified category in section 31 and no extraordinary circumstances exist. For decisions for which a project or case file and decision memo have been prepared, document the review in the project or case file. For decisions for which a decision memo was not prepared, no documentation of the review is necessary.

If the new information or changed circumstances require a new or changed decision that can be categorically excluded from documentation, follow the instructions in Chapter 30.

If the new information indicates that extraordinary circumstances are now present and the proposed action may have a significant impact on the human environment, file a notice of intent to prepare an EIS. Follow the instructions in Chapter 20.

If the new information indicates that extraordinary circumstances are now present but the significance of the impacts on the human environment are uncertain, prepare an EA. Follow the instructions in Chapter 40.

18.4 Reconsideration of Decisions Based on an Environmental Assessment and Finding of No Significant Impact

Revise an EA if the interdisciplinary review of new information or changed circumstances indicates that changes in the EA are needed to address environmental concerns that have a bearing on the action or its impacts.

Upon completion of the revised EA, prepare a new finding of no significant impact (FONSI) which addresses the effects of the action. Reconsider the original decision and, based upon the EA and FONSI, issue a new decision notice or document that the original decision is to remain in effect and unchanged. A new decision notice may address all or a portion of the original decision. Follow the instructions in Chapter 40.

If, based on the revised EA, the proposed action may have a significant effect, issue a notice of intent to prepare an EIS. Follow the instructions in Chapter 20.

Chapter 20—Environmental Impact Statements and Related Documents

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 - 23.4 Extending the Comment Period on a Draft Environmental Impact Statement
- 24 Requirements Specific to a Final Environmental Impact Statement
 - 24.1 Use of Comments on a Draft Environmental Impact Statement in a Final Environmental Impact Statement
 - 24.2 Filing and Distributing a Final Environmental Impact Statement
 - 24.3 Review of Other Agency Environmental Impact Statements
 - 24.31 Referrals to Council on Environmental Quality
 - 24.4 Review of Forest Service Legislative or Service-Wide Environmental Impact Statements
- 25 Other Planning and Preparation Requirements for Environmental Impact Statements
 - 25.1 Consultation Requirements
 - 25.2 Elimination of Duplication With State and Local Procedures
 - 25.3 Combining Documents to Eliminate Duplication
 - 25.4 Federal Agencies With Legal Jurisdiction or Special Expertise
- 26 Responsibilities When Applicants and Contractors Are Involved
- 27 Documentation of Decisions
 - 27.1 Timing of a Decision
 - 27.2 Record of Decision
 - 27.21 Format and Content
- 28 Notice and Distribution of the Record of Decision

Chapter 20—Environmental Impact Statements and Related Documents

For ease of reference and use, portions of the relevant CEQ regulations are set out in boldface type throughout the text of this chapter.

20.6 Classes of Actions requiring Environmental Impact Statements

Classes of actions that require preparation of environmental impact statements are listed below.

The requirements for classes 2, 3, and 4 may be met by the appropriate use of program environmental impact statements and tiered site-specific environmental documents or by the preparation of site-specific environmental impact statements.

1. *Class 1: Proposed actions for which an environmental impact statement is required by law or regulation.* Examples include:

a. Revising a land and resource management plan required by the National Forest Management Act (36 CFR 218.10).

b. Proposing that Congress enact legislation to designate a wilderness or a wild and scenic river (40 CFR 1506.8).

2. *Class 2: Proposed to carry out or to approve aerial application of chemical pesticides on an operational basis.* Examples include:

a. Applying chemical insecticides by helicopter on an area infested with spruce budworm to prevent serious resource loss.

b. Authorizing the application of herbicides by helicopter on a major utility corridor to control unwanted vegetation.

c. Applying herbicides by fixed-wing aircraft on an area to release trees from competing vegetation.

3. *Class 3: Proposals that would substantially alter the undeveloped character of an inventoried roadless area of 8,000 acres or more (FSH 1902.12).* Examples include:

a. Constructing roads and harvesting timber in a 56,000-acre inventoried roadless area where the proposed road and harvest units impact 3,000 acres in only one part of the roadless area.

b. Constructing or reconstructing water reservoir facilities in a 5,000-acre unroaded area where flow regimens may be substantially altered.

c. Approving a plan of operations for a mine which would cause considerable surface disturbances over 700 acres in a 10,000-acre roadless area.

4. *Class 4: Other proposals to take major Federal actions that may significantly affect the quality of the human environment.* Examples include:

a. Approving the use of 1,500 acres of National Forest System land to construct and operate an all-season recreation resort complex.

b. Authorizing the Bureau of Land Management to offer the sale of leases for oil and natural gas resources from

EXECUTIVE OFFICE OF THE PRESIDENT

26-May-1994 07:27pm

FACA

TO: STELLE_W
FROM: Todd J. Campbell

SUBJECT: Re: FACA and the CERTS

Message Creation Date was at 26-MAY-1994 19:27:00

Todd's Reply: I have received a draft and suggested changes. Let me know if you still need a copy. Thanks.

Reply Separator

Subject: FACA and the CERTS
Author: STELLE_W@A1@CD at CCGATE
Date: 5/26/94 2:01 PM

From our last meeting on this subject I understood that the Justice Department was preparing an options paper on the issues relating to FACA compliance and the CERTS. I have not seen or heard of any progress on this, and so am inquiring on the status of that effort.

On the forest side, we are proceeding apace to prepare a charter for the RIEC and the provincial planning teams, and will likely be prepared to submit something for formal sign-off to GSA and OMB next week (I hope).

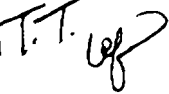
I think it will be important for you to review the proposed charter and purpose statement to ensure that it is compatible with the efforts on the CERT side. I will make sure you get copies.

I tried to EMail Steve Neuwirth, but failed to do so, and so would request that you apprise him of these developments as well.

ws.

To: Will Stelle, Jim Pipkin and Mark Gaede

From: Tom Tuchmann

T.T. 



Subject: Draft FACA Paper, Definition of Balance of Interests

I spoke to both of you regarding my perspective on how we should define balance. I won't be able to participate in the discussions, but wanted to offer my perspective and rationale for how this will look. I've asked Lisa Freedman to participate in my absence in these discussions; she can be reached at (503) 326-6246.

It seems we need to define balance in broader terms than just "government entities whose rights, jurisdictions, authorities, or constituents may be affected by decisions made regarding implementation of the President's Forest Plan." While Indian Tribes, Governors and Association of Counties from WA, OR, and CA have a unique role, we also need to include a variety of interest groups who have been left out of the process with little real opportunity for input. Rather than be limited to input at the Provincial level, they need and want input at the Regional level, where macro, strategic decisions are made.

Potential participants should include representatives from the following groups:

- Government (local, state, tribes, and school boards)
- Environmentalists (Wilderness Society, Sierra Club, ONRC)
- Conservationists (American Forestry Assoc, Trout Unlimited)
- "Big" timber industry
- "Small" timber industry
- Fishing interests
- Community activists
- Labor
- Recreationists
- Mining
- Grazing
- School boards
- Other "public" citizens (teachers, non-timber business, lawyers, etc)

The Executives could ask associations who represent these groups to form a consortium, of sorts, to recommend who should be RIEC representatives. We wouldn't need one from each individual interest group, but they would need to decide among themselves who will represent their perspective.

We recognize this will change the dynamics of the Committee, and will make decision-making more difficult at first, but will provide well-rounded advice to the regional executives.

If the interest groups should continue to disagree, at least they would have been heard before decisions are made. After the RIEC learns to operate with a broader group of interests, and the interests with each other, the process will hopefully smooth out and provide the opportunity for a wide range of interests to have a voice, which is what they've been promised for years. This has been the case on the economic side.

- 4th 1. Chartering will be a problem because
- ① time delay
 - ② disrupting the relationship

- Stank 2. a. California will politicize this if it looks like we are "federalizing" the process.
- b. If CA blows up, then it will knock up into Oregon
- c. Recommendations
- Recommendation #1 is double
 - #2 " double
 - Recommendation #3 is OK of the future on Pg 7 on ^{inform/}
 -

- Hammer 3. #3 is flawed because the public meeting requirement doesn't give the notice of the CRET itself, and because the public meeting exception to ESEA

- Campbell 4. The key distinction between charter and non-charter is the information + advice distinction that is losing its meaning. The incoherence of chartering is poles in comparison to the incoherence of losing a lawsuit, Antiquating the entire CRET to depositions etc.

5. Nurse groups should be chartered. When he presented this to Custer, he said charter them. Option 2 is not legally viable.

c. The payments don't look well for option 2, and we should assume that the profit and loss

Do not allow a political

7. Option 2 is double, but it is not a good idea.

8. In an environment in which Tucker, is option 2 a likely result? The answer is that as related to this case, Tucker has already ruled that impression.

9. Photon 2 is red from a hot



U.S. Department of Justice

Civil Division

DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: MDATE: 2/15/8Attorney-Client Memorandum
Privileged and Confidential

612 0769-f

Washington, D.C. 20530

JUN 1 1994

MEMORANDUM

DRAFT

TO: Bowman Cutter
Deputy Assistant to the President
National Economic Council
The White House

Kathleen McGinty
Director
Office of Environmental Policy
The White House

FROM: Frank W. Hunger
Assistant Attorney General
Civil Division

SUBJECT: Applicability of Federal Advisory Committee Act (FACA)
to Community Economic Revitalization Teams (CERTs)

SUMMARY

This memorandum addresses the legal vulnerabilities of the Community Economic Revitalization Teams (CERTs) under the Federal Advisory Committee Act (FACA) and discusses what may be done to reduce the litigation risks.

There are three basic options. First, the CERTs could proceed to operate as they do now, without modification of their existing activities. This would entail a substantial, though by no means certain, risk of liability under FACA. Second, the CERTs' activities could be curtailed in ways that would reduce their chances of being construed as advisory committees subject to FACA. Third, the CERTs could be chartered and operated as FACA advisory committees. This would minimize their potential exposure under FACA, but at the cost of disrupting, and possibly undermining, their continued functioning.

FACTUAL BACKGROUND

As you know, the CERTs were created to implement the Economic Adjustment Initiative under President Clinton's Forest Plan. That Plan is intended to alleviate the impasse over

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management of federal forest lands in the Pacific Northwest habitat of the northern spotted owl. A federal court recently determined that the Plan was developed in violation of FACA by the Forest Ecosystem Management Assessment Team (FEMAT), but declined to enjoin its implementation. Northwest Forest Resource Council v. Espy, No. 93-1621 (D.D.C. March 21, 1994). However, four new cases have been filed by plaintiffs seeking to enjoin the Plan based, in part, on the Court's previous holding that the FEMAT violated FACA.¹ Plaintiffs also allege that the Regional Interagency Executive Committee (RIEC) and Provincial Teams formed to implement the ecosystem management aspect of the Plan are violating FACA, and they have filed a motion for a temporary restraining order to prevent the RIEC from holding one of its regularly scheduled meetings.² That meeting has been canceled, and steps are being taken to charter the RIEC and Provincial Teams as advisory committees under FACA ~~in order to meet these claims~~. JP

The part of the Forest Plan known as the Economic Adjustment Initiative, which will assist communities adjusting to the impact of declining timber sales, is not yet under direct attack. However, it is vulnerable to the same types of FACA claims currently being made in regard to the FEMAT, RIEC, and Provincial Teams. We anticipate that the CERTs will at some point come under judicial scrutiny as well. In that event, there is substantial risk that a court will find that the CERTs are operating in violation of FACA and enjoin their activities, thereby derailing a critical component of the Forest Plan. The CERTs' potential FACA problems thus need to be addressed as soon as possible.

Our review of the CERTs' activities is based upon documents which define and describe their responsibilities, and telephone interviews with the two Regional CERT co-chairmen and the three State CERT chairpersons.³ In brief, the CERTs consist of one

¹ These four cases are presently assigned to the same judge in the District of Columbia who decided the FEMAT case. The government will be filing a motion to transfer them to the Western District of Washington, where the challenge to timber sales in the spotted owl habitat was originally brought.

² A hearing on this motion is scheduled for June 2, 1994.

³ The primary documents reviewed were the Interagency Memorandum Of Understanding For Economic Adjustment And Community Assistance (MOU), the Multi Agency Command Final Working Strategy for the Forest Plan Economic Adjustment Initiative (November 30, 1993), and the Northwest Economic Adjustment Initiative

(continued...)

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Regional CERT and three State CERTs in Oregon, Washington, and California, all containing federal, state, and local officials. The Regional CERT seeks to promote a fair and equitable distribution of funds by monitoring the funding process and delivering information on available resources. The State CERTs do not operate identically, but all three are intended to serve in large part as a forum for their nonfederal members to "provide information to facilitate the evaluation and consideration of applications and proposals by Federal members." Implementation Plan at 4. In providing such information, the nonfederal members are not permitted to give advice in their capacity as State CERT members, but may do so "acting within their local capacity." *Id.* at 3 n.2. The federal members of the State CERTs may consider the input of any nonfederal individual. *Id.* at 4. All of the CERTs operate more or less openly, often meeting with groups in particular localities, but they do not regularly publicize their meetings.

DISCUSSION

FACA defines an "advisory committee" to include "any committee . . . or similar group . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for . . . one or more agencies or officers of the Federal Government." 5 U.S.C. App. 2 § 3(2). Unless such a committee is composed entirely of full-time federal officers or employees, *see id.*, it must file a detailed charter, *id.* § 9(c), give advance notice in the Federal Register of any meetings, *id.* § 10(a)(2), hold all meetings in public, *id.* § 10(a)(1), keep detailed minutes of each meeting, *id.* § 10(c), make its records available to the public, *id.* § 10(b), be "fairly balanced in terms of the points of view represented," *id.* § 5(b)(2), and "not be inappropriately influenced by the appointing authority or by any special interest." *Id.* § 5(b)(3).

The D.C. Circuit has stated that, "[i]n 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." Association of American Physicians and Surgeons, Inc. v. Clinton, 997 F.2d 898, 914 (D.C. Cir. 1993).

³(...continued)

Implementation Plan (December 10, 1993). The Regional-CERT co-chairmen interviewed were Scott Duff and Bob Rheiner. The State-CERT chairpersons interviewed were Terry Gorton (California), Bill Scott (Oregon), and Karin Berkholtz (Washington). Peter Yu, Director to the White House National Economic Council, was also consulted.

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By these criteria, the Regional and State CERTs unquestionably "implicate" FACA. They possess the organization, formality, and continuity normally associated with advisory committees. Together with the Multi-Agency Command (MAC), the CERTs comprise a highly organized structure, their membership is rigidly defined in the Interagency Memorandum Of Understanding For Economic Adjustment And Community Assistance (MOU), and an Implementation Plan sets forth their specific purposes. And because they include non-federal employees, the CERTs do not fall within the statutory exception for committees with all-federal members.

Nevertheless, under the plain language of the statute, the CERTs are not "advisory committees" unless they have been "established or utilized . . . in the interest of obtaining advice or recommendations" for federal decisionmakers. 5 U.S.C. App. 2 § 3(2). There are four problem areas where the CERTs are rendering such advice, or may be perceived as doing so.

First, as stated in the Implementation Plan, "[b]oth the federal and nonfederal members of the State CERTs may identify and highlight programmatic requirements or provisions that inhibit the effectiveness of existing federal, state and local programs, and suggest improvements in existing processes." Plan at 3. The State CERTs "will address a wide range of possible improvements to federal practices, policies and regulations." *Id.* at 5 n.6. If the suggested improvements cannot be acted on by the federal members of the State CERTs, they are passed on to the Regional CERT, and then on to the MAC if necessary.

Second, the State CERTs are expected to provide feedback to the Provincial Teams on the economic impact of proposed watershed restoration projects. This should not be a problem once the Provincial Teams have been chartered as FACA advisory committees.⁴ However, it is uncertain when that will occur.

Third, the Implementation Plan, which guides the CERTs' activities, was developed by the CERTs themselves as a

⁴ Once the Provincial Teams are chartered as advisory committees, any recommendations they receive from the CERTs on watershed restoration proposals would not constitute direct advice to the President or any federal agency. The CERTs therefore could make such recommendations without violating FACA, since FACA only applies to groups directly "established or utilized" by the President or any agency "in the interest of obtaining advice or recommendations." 5 U.S.C. App. 2 § 3(2). See National Anti-Hunger Coalition v. Executive Committee, 557 F. Supp. 524, 529 (D.D.C. 1983).

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recommendation to the MAC. The MAC adopted the CERTs' draft plan without change on January 7, 1994.

Finally, as stated in the Multi Agency Command Final Working Strategy (November 30, 1993), the State CERTs are to "[p]rovide state and local perspective on project proposals and applications to federal officials." Strategy at 5. The Regional and State CERT Chairpersons assure us that the CERTs are simply a forum for the exchange of information and that nonfederal CERT members do not give advice to the federal officials during the meetings. However, the line between information and advice is quite thin and easily crossed, especially where limited economic development funds are at stake. The submission of prioritized lists of proposed projects to the CERTs is an example of information that could easily be construed as advice. Further, the fact that nonfederal CERT members are permitted to make recommendations "acting within their local capacity," Implementation Plan at 3 n.2, creates the potential for blurring of roles and accusations of subterfuge.

We have identified three basic options to address the potential FACA liability raised by these activities:

Option 1 -- No action

The first option is to allow the CERTs to proceed without any change in guidance. This would pose a substantial risk of liability under FACA, given the CERTs' clearly, if narrowly defined, advisory roles. The risk seems especially pronounced in light of the recent holding in the FEMAT case that "there is nothing in the statutory language or case law to support the [government's] assertion that FACA should not apply to 'advisory committees' consisting only of technicians who supply the decision-makers with data." Northwest Forest Resource Council v. Espy, No. 93-1621 (D.D.C. 1994). If mere communication of technical data is enough to bring a committee within FACA, then so will the presentation of "state and local perspective on project proposals."⁵

Nevertheless, there is legal authority to support an argument that the CERTs, even as presently operating, are not

⁵ Taken literally, the above-quoted statement is incorrect, since FACA applies only to committees which render "advice or recommendations". 5 U.S.C. App. 2 § 3(2). To the extent that a committee provides data or information and not advice, it is not an "advisory committee" under FACA. However, as noted above, the distinction between information and advice can be murky, and the Northwest Forest decision appears to favor a broad reading of "advice or recommendations."

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subject to FACA. GSA's interpretive regulations list examples of advisory groups that are not covered by FACA, one of which arguably applies here. Specifically, the regulations exempt "[a]ny 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." 42 C.F.R. § 101-6.1004(g). This interpretation has been cited with approval by two district courts. See Natural Resources Defense Council v. E.P.A., 806 F. Supp. 275, 276 (D.D.C. 1992); HLI Lordship Industries, Inc. v. Committee For Purchase From The Blind, 615 F. Supp. 970, 978 (E.D. Va. 1985).

Notwithstanding the several ways in which the CERTs might be construed as rendering advice, they could be characterized as having been "established to perform primarily operational as opposed to advisory functions."⁶ However, given the paucity of case-law applying this "operational functions" exception, to proceed in reliance upon it would be a relatively high-risk approach.

Option 2 -- Give guidance to the CERTs

The second option is to take various steps short of chartering to reduce the chances that a court may find the CERTs to be advisory committees under FACA. The CERTs could be instructed to restrict their activities in the following ways: (1) do not make recommendations on any matter, including "process improvements"; (2) do not provide feedback to the Provincial Teams on watershed restoration proposals; (3) do not receive advice on individual proposals and projects, except from non-CERT members at open, publicized CERT meetings; (4) do not accept prioritized lists of proposals, except from non-CERT members at open, publicized CERT meetings.

Adoption of the latter two suggestions would help to forestall accusations that CERT members are evading FACA in their non-CERT roles. Although the non-federal members would still be able to provide information on individual projects to the federal

⁶ See Natural Resources, 806 F. Supp. at 277 (committee which included state governors was not subject to FACA where "they act operationally as independent chief executives in partnership with the federal agency"); HLI Lordship, 615 F. Supp. at 978 (committee was not subject to FACA where "its advisory capacity is secondary to its operational activities"). These cases suggest that such "operational" functions may be performed by non-federal personnel, but the matter has never been specifically addressed.

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members, they should be instructed to avoid giving any information that could be construed as advice.

Any guidelines adopted should be contained in a new implementation plan issued by the MAC without the CERTs' input, to supplant the current implementation plan developed by the CERTs.

Option 3 -- Charter the CERTs under FACA

The third option is to charter the CERTs and operate them as FACA advisory committees. This would minimize the risks of litigation, though it would not eliminate them. Regardless of how the CERT committees are constituted, the government would be vulnerable to suit on the ground that they were not "fairly balanced." 5 U.S.C. App. 2 § 5(b)(2).

Discussions with the CERT chairpersons reveal several practical concerns with this approach. First, it is feared that chartering, by requiring the presentation of opposing points of view, would transform what is presently a collegial process based on trust into a politicized, adversarial one. Second, the state governments' lead role on the state CERTs has given them a major stake in the process, which they would no longer have if they were just another non-federal party. Not only is the states' active participation essential to the success of the economic initiative, they are also absorbing substantial administrative costs which the federal government would otherwise have to bear. Third, the delay caused by chartering may result in the loss of Department of Interior funds which need to be allocated by June 30.

* * *

Please feel free to call the staff people responsible for this matter, Elizabeth Pugh (514-3178) or Eric Goulian (514-4686), if you have any questions or concerns.

FACA + FOREST PLAN

NAME	AGENCY	PHONE	FAX
Ruth Saunders	OMB	395-3446	395-4941
Wilma Lewis	DOI	208-4722	219-1790
WILL STOLTZ	WH/BSF	456-6224	456-2710
ELLEN ATHAS	DOJ/ENRD	272-8236	272-6815
Elizabeth Pugh	DOJ/civil	514-3178	616-8202
Eric Goulia	DOJ/Civil	514-4686	616-8202
Nancy Graybeal	USFS	503-326-3669	
Elaine Zielinski	DOI/BLM	503-280-7024	503-280-7390
Christine Walsh	REO/FS	503-326-6275	6282
Debra Hecox	DOI/SOL	208-5216	219-1790
Bob MOLL	DOI/SOL	208-5216	219-1790
Anne SHIELDS	DOI/SOL	208-4423	208-5594
Mark Gaede	USDA/NRE	720-7173	720-4623
M. Gippert	USDA/OFC	720-2063	690-2730
B. Lutken	USDA/OCC	720-3351	720-8666
Jim Perry	USDA-OGC	720-7121	690-2730
Rita Morgan	USDA-OAC	720-3564	720-5837
Jon Stephens	USDA-FS	205-0948	
Jim Sanders	USDA-FS	(202) 205-1772	205-0885
Peter Copperman	DOJ-ENR	(202) 514-8046	514-0557
TOM TUCHMANN	OFED	(503) 326-6248	326-6254
JIM PIPKIN	Interior	(202) 208-4123	(202) 219-1220
Todd Campbell	OUP	202-456-7082	202-456-6489
DAVID COTTINGHAM	DOI	202/208-4811	371-2815
Karen Mounitzen	DOI-SOL	202-208-4444	219-1792
Owen Schmidt	USDA/OAC	503-326-3115	503-326-3807

(over)

RUTH SAUNDERS
Wilma C. Furs

OMB
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May 20, 1994

Confidential

Note to: Katie ✓
Will

From : George T. Frampton, Jr.

(Through: Jim Pipkin)

I wanted you to know that the proposal to charter the RIEC as a FACA committee gives me a great deal of heartburn.

RIEC is charged with executing the President's forest plan. This is quintessentially a federal management function: making decisions about the management of federal resources pursuant to federal legal mandates and a federal planning guide. Such a responsibility cannot and should not be turned over to a "balanced" group representing a broad range of private interests, which inevitably will become little more than a discussion group.

The regional players may be comfortable in advancing this approach because they would just as soon see the RIEC emasculated, with the end result that the agencies' regional directors will continue to manage their own individual kingdoms on a business-as-usual basis. This is exactly what we are trying to change.

A symptom of this thinking is reflected in Tom Tuchman's telling Jim that "they" are about to advertise the REO Executive position as a GS-15, when in fact all the agency heads (Jack Thomas, Dombeck, Mollie Beattie) and relevant Assistant Secretaries have agreed that it should be an SES position, we have created the position, and are about to advertise it in the next 48 hours.

I think we should pursue one or both alternatives of (a) a legislative exemption for state and local government officials and tribes to meet with federal officials without triggering FACA (which would help us in Florida and elsewhere), and (b) chartering a FACA Advisory Committee to the RIEC, but leave the RIEC as a federal entity. A third alternative, which I'd favor over chartering the RIEC, is to continue to have it operate with advice from various outsiders through public meetings and individual contacts, but not to charter it. This approach is consistent with the existing MOU and would certainly get us going for the next six months.

I'd be happy to discuss these issues this afternoon or over the weekend if you want. I'll also be in town on Monday afternoon; Tuesday through Saturday I'm visiting parks from Indiana to Colorado to Montana.

Will -
Get me know.

Thanks!

DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: MT

DATE: 2/15/95

202-0765-6

May 20, 1994

Confidential

Note to: Katie
Will ✓

From : George T. Frampton, Jr. *George*

(Through: Jim Pipkin)

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DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: *M* DATE: *2/15/15*

2012-0769-6

Thanks





United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, D.C. 20240

MAY 13 1994

Memorandum

To: Assistant Secretary for Fish and Wildlife and Parks
Assistant Secretary - Land and Minerals Management
Assistant Secretary for Natural Resources and
Environment, Department of Agriculture

From: Director, U.S. Fish and Wildlife Service
Director, Bureau of Land Management
Chief, Forest Service

Subject: Regional Ecosystem Office -- Executive Director
Position

Mike Jensen

As you are aware, several multi-agency groups and organizations are being established as part of the strategy to implement the President's Forest Plan in the Pacific Northwest. One such group is the Regional Interagency Executive Council (RIEC) which will be comprised of our top regional executives as well as those of various other land managing and environmental agencies. As the senior regional entity to assure successful implementation of the Standards and Guidelines, it is extremely important to us that the RIEC be well informed and supported in its policy and planning decisions. The Regional Ecosystem Office (REO) is being established for this purpose, and will provide the staff support, interagency issue resolution, and advice and recommendations so critical to the RIEC decision-making. For this reason, we would like to express our support for the REO and encourage the initiation of recruitment for the position of its Executive Director. We also recommend that this position be established as part of the career Senior Executive Service.

We believe that a well directed and competently staffed REO is a necessary and important component of the Forest Plan implementation strategy. In addition to providing human resources, as appropriate, to staff the office, we are also committed to contributing financial resources to fund the Executive Director position.

We are prepared to discuss staffing of and funding for the REO at your convenience. The quality and timeliness of its recommendations are important not only to the RIEC, but to us as well in exercising our decision-making authority as land managing agencies.



United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, D.C. 20240

MAY 13 1994

Memorandum

To: Chairperson, Executive Resources Board

From: Assistant Secretary for Fish and Wildlife and Parks

Subject: Request to Establish and Recruit for a New SES Position

As you are aware, the Forest Plan will be implemented by various new and existing organizational entities. The Regional Ecosystem Office (REO) is being established in Portland, Oregon to serve as a focal point for scientific and technical expertise in support of the Forest Plan implementation. I am requesting that a new position, Executive Director of the REO, be established in the Senior Executive Service (SES).

The REO staff will be comprised of employees detailed from various agencies. The position of Executive Director should be established as SES-Career Reserved and administratively located in the National Biological Survey for purposes of recruitment. (The administrative location will depend on the selectee and/or the agency to which the SES FTE/slot is assigned.) Recruitment should be extended to all qualified Federal employees and initiated as soon as possible.

The position description and executive qualifications requirements are attached. Your earliest consideration of this request will be appreciated. There is some urgency in filling this position and establishing the REO since it is a key part of the Forest Plan implementation strategy.

Attachments

Approved:


Chairperson, Executive Resources Board

5/13/94
Date

EXECUTIVE QUALIFICATIONS STANDARD

Executive Director Regional Ecosystem Office

The President has proposed a comprehensive Forest Plan for a Sustainable Economy and a Sustainable Environment (Forest Plan) to alleviate the impasse over management of federal forest lands in the Pacific Northwest within the range of the northern spotted owl. The Regional Ecosystem Office (REO) reports to the Regional Interagency Executive Committee (RIEC) and is responsible for providing a focal point for scientific and technical expertise in support of implementation of the Forest Plan, evaluating modifications arising from the adaptive management process, coordinating the formulation and implementation of data standards, and, as appropriate, conducting self-initiated natural resource reviews in support of Forest Plan implementation. As a multi-agency, interdisciplinary staff, the REO provides advice and recommendations to the RIEC to facilitate sound decision-making. The Executive Director provides overall direction for all REO activities.

Qualifications Required

General:

As a basic requirement, applicants must have a Bachelor's or higher degree from an accredited college or university with a major in business, public administration, or the biological or physical sciences. As an alternative, applicants may have 4 years of successful experience and/or education that demonstrates an understanding of the fundamental principles and techniques of the occupations equivalent to that which would have been acquired through a 4-year course of study.

Specialized:

In addition, applicants must possess three years of progressively responsible experience in program management and analysis demonstrating an indepth knowledge of natural resource issues and ability to provide leadership and direction for programs of national scope and significance. Candidates meeting these basic qualifications will be rated and evaluated against the following criteria.

Technical (Mandatory):

1. Current knowledge of natural resource legislation, with emphasis on such statutes as the National Environmental Policy Act, National Forest Management Act, Federal Lands Policy and Management Act, Oregon and California Lands Act, and the Endangered Species Act, and related forest ecosystem issues.

2. Ability to plan, implement, direct, and coordinate complex and diversified scientific research projects and reviews.

Managerial (Mandatory):

1. Demonstrated ability to manage (i.e., plan, direct, budget for) a complex program or project. Considerations include: long- and short-term planning; coordinating policy and program issues with other agencies and organizations; ensuring timely accomplishment of tasks; developing complex program implementation strategies; and directing the work of a diverse, multi-agency, interdisciplinary, staff including scientists.
2. Demonstrated skill in communicating effectively orally and in writing with high-level officials in other governmental and nongovernmental organizations.
3. Demonstrated ability to negotiate and resolve complicated issues in confrontational situations.

POSITION DESCRIPTION (Please Read Instructions on the Back)

1 Agency Position No.

2 Reason for Submission		3 Service		4 Employing Office Location		5 Duty Station		6 CPM Certification No.	
☐ Redescription	☒ New	☒ Hdqtrs.	☐ Field	Washington, D.C.		Portland, Oregon			
☐ Reestablishment	☐ Other			7 Fair Labor Standards Act		8 Financial Statements Required		9 Subject to IA Action	
Explanation (Show any positions replaced)				☒ Exempt	☐ Nonexempt	☒ Executive Personnel Financial Disclosure	☐ Employment and Financial Interests	☐ Yes	☒ No

10 Position Status		11 Position Is:		12 Sensitivity		13 Competitive Level Code		14 Agency Use	
☐ Competitive	☐ Excepted (Specify in Remarks)	☐ Supervisory	☒ Managerial	☐ 1-Non-Sensitive	☒ 3-Critical Sensitive				
☐ SES (Gen.)	☒ SES (CRI)	☐ Neither		☐ 2-Noncritical Sensitive	☐ 4-Special Sensitive				

15 Classified/Graded by	Official Title of Position	Pay Plan	Occupational Code	Grade	Initials	Date
a U.S. Office of Personnel Management						
b Department, Agency or Establishment						
c Second Level Review	Executive Director,	ES	340	00		
d First Level Review	Regional Ecosystem Office					
e Recommended by Supervisor or Initiating Office						

16 Organizational Title of Position (if different from official title)	17 Name of Employee (if vacant, specify)

18 Department, Agency, or Establishment		19 Third Subdivision	
Department of the Interior			
20 First Subdivision		21 Fourth Subdivision	
National Biological Survey			
22 Second Subdivision		23 Fifth Subdivision	
Office of the Director			

24 Employee Review—This is an accurate description of the major duties and responsibilities of my position.	Signature of Employee (optional)

25 Supervisory Certification: I certify that this is an accurate statement of the major duties and responsibilities of this position and its organizational relationships, and that the position is necessary to carry out Government functions for which I am responsible. This certification is made with the knowledge that this information is to be used for statutory purposes relating to appointment and payment of public funds, and that false or misleading statements may constitute violations of such statutes or their implementing regulations.

26 Typed Name and Title of Immediate Supervisor	27 Typed Name and Title of Higher-Level Supervisor or Manager (optional)
Director, National Biological Survey	George T. Frampton, Jr. Assistant Secy. for Fish & Wildlife & Parks
Signature	Signature
	George T. Frampton Jr. 5/16/94

28 Classification/Job Grading Certification: I certify that this position has been classified/graded as required by Title 5, U.S. Code, in conformance with standards published by the U.S. Office of Personnel Management or, if no published standards apply, in conformity with the most applicable published standards.	29 Position Classification Standards Used in Classifying (Optional)

30 Director of Personnel		Information for Employees: The standards, and information on their application, are available in the personnel office. The classification of the position may be reviewed and corrected by the agency or the U.S. Office of Personnel Management. Information on classification/job grading appeals, and complaints on exemption from FLSA, is available from the personnel office or the U.S. Office of Personnel Management.	
Signature	Date		

31 Position Review	Initials	Date	Initials	Date	Initials	Date	Initials	Date	Initials	Date
a Employee (optional)										
b Supervisor										
c Classifier										
32 Remarks										

**EXECUTIVE DIRECTOR
REGIONAL ECOSYSTEM OFFICE**

INTRODUCTION

The Secretaries of Interior and Agriculture have proposed a comprehensive Forest Plan for a Sustainable Economy and a Sustainable Environment (Forest Plan) to alleviate the impasse over management of federal forest lands in the Pacific Northwest within the range of the northern spotted owl. The Forest Plan fulfills the President's request for a "balanced and comprehensive strategy for the conservation and management of forest ecosystems, while maximizing economic and social benefits from the forests." By taking an innovative approach based on ecosystem and watershed management, the Forest Plan transcends traditional administrative boundaries. Successful implementation will require unprecedented interagency cooperation, coordination, and collaboration, both in the long term and in the short term.

The Forest Plan will be implemented by an Interagency Steering Committee (ISC) located in Washington, D.C., a Regional Interagency Executive Committee (REIC) consisting of representatives of the agencies signatory to the Memorandum of Understanding for Forest Ecosystem Management (MOU), the Regional Ecosystem Office (REO), the Research and Monitoring Committee, provincial teams, and adaptive management area groups. Individual land management and consultation agencies will exercise the decision-making authorities vested in them by statute.

The REO's responsibilities include, but are not limited to, the following: providing a focal point for scientific and technical expertise in support of implementation of the Forest Plan; evaluating modifications arising from the adaptive management process; coordinating the formulation and implementation of data standards; and, as appropriate, conducting self-initiated natural resource reviews in support of Forest Plan implementation. As a multi-agency, interdisciplinary staff, the REO provides advice and recommendations to the REIC to facilitate sound decision-making.

MAJOR DUTIES AND RESPONSIBILITIES

As Executive Director, the incumbent provides overall direction for all REO activities. The incumbent supports line management and consultation agencies in implementation of a prototypical ecosystem management effort. The incumbent is expected to develop a collaborative and cooperative working relationship with the member agencies of the REIC.

Assists the REIC in the review and comment on all proposed amendments to forest or district plans that would modify the land allocations, standards, and guidelines established by the Record of

Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl (Record of Decision).

Provides leadership in designing complex strategies to implement the Forest Plan, the interagency MOU, and RIEC policy direction to maximize conservation and management of forest ecosystems for ecological, economic and social benefits. Negotiates and resolves complicated issues in confrontational situations. Interprets RIEC policy, the MOU, the Record of Decision, and the Standards and Guidelines (Attachment A to the Record of Decision) to accommodate current and changing situations, and, absent applicable policy guidelines, develops policy and designs strategies sufficient to continue and further implementation of the Forest Plan in a manner consistent with overall RIEC guidance.

Where standards and guidelines specify review or approval by the REO, the incumbent reviews, exempts from review, or designs and coordinates a review process in order to provide recommendations to the RIEC. Initiates reviews when deemed appropriate, and provides independent recommendations to the RIEC.

In cooperation with the RIEC, coordinates and directs multiple natural resource projects throughout the region covered by the Forest Plan.

Is responsible for development, evaluation, and resolution of consistency and implementation issues with respect to specific topics including, but not limited to, the following:

- Geographic Information Systems (GIS);
- prototype watershed analyses;
- restoration and reforestation programs;
- support of agency efforts to meet obligations of the Endangered Species Act (e.g., Section 7 consultations, preparation of recovery plans, etc.);
- adaptive management guidelines;
- monitoring;
- research; and
- refining definition of reserve boundaries.

Keeps the RIEC, conservation and user groups, and Congressional interests routinely informed of progress through face-to-face briefings. Provides written reports to the Chairperson of the RIEC on progress in implementing the Forest Plan.

Ensures that the myriad programs, measures, and studies called for in the Forest Plan are developed and completed in a timely and consistent manner and coordinated fully with all affected parties.

Collaborates with senior officials of Federal and State agencies, representatives of Governors' offices and tribal governments, conservation and user groups, and Congressional staff members to express RIEC policy and negotiate firm cooperative positions and

programs that will further the objectives of the Forest Plan. Coordinates REO efforts with the White House Office of Forestry and Economic Development. Attends high-level conferences and meetings to discuss policy and procedural matters, technical ecosystem matters and economic aspects of watershed and ecosystem management.

Makes presentations to and participates in meetings of technical societies, recreation organizations, civic groups, timber associations, conservation groups, and the general public. Responds to press inquiries, as appropriate.

Manages the many contracts, reimbursable agreements, and cooperative agreements necessary to implement the Forest Plan.

Provides broad direction to the REO staff and sets priorities for accomplishment of assigned tasks. Ensures timely completion of tasks. In cooperation with the RIEC, the incumbent is responsible for selecting and evaluating the interagency staff. Fosters a working environment that encourages the agency representatives in the REO to work collaboratively as a self-directed team.

Manages the financial resources of the office. Develops, presents, and defends the office budget.

SUPERVISION RECEIVED

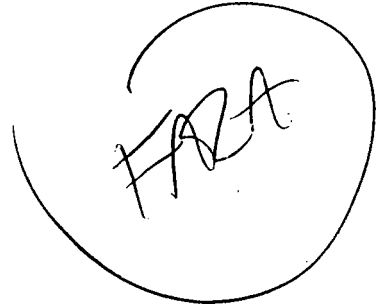
The above duties are performed within the overall framework of policies and procedures determined by the Chairperson of the RIEC. Performance is evaluated by the Chairperson of the RIEC with subsequent review by the ISC member Assistant Secretary (or equivalent) of the organization to which this SES position is assigned.

**U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
GENERAL LITIGATION SECTION
601 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004**

**FAX NUMBER (202) 272-6815, 5775
CONFIRMATION NUMBER (202) 272-8056**

MEMORANDUM

To: Ellen Athas
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Wells Burgess
Kristina Clark (202) 219-1792
William Cohen
Peter Coppelman (202) 514-0557
David Cottingham (202) 208-5048
Lisa Freedman (503) 326-6254
Mark Gaede (202) 720-4732
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Todd Campbell (202) 456-6429



DATE: May 19, 1994

NUMBER OF PAGES TO BE TRANSMITTED (including cover) 4

FROM: Ellen Athas

MESSAGE: **URGENT INFORMATION REGARDING FACA:** Please read the attached letter as soon as possible. It underscores the importance of addressing this situation immediately.

Mark C. Rutzick

Attorney at Law
500 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204-2089

(503) 499-4572
Fax (503) 295-0915

May 19, 1994

The Honorable Bruce Babbitt
Secretary of the Interior
U.S. Department of the Interior
18th and C Streets, N.W.
Washington, D.C. 20240

The Honorable Mike Espy
Secretary of Agriculture
U.S. Department of Agriculture
14th Street and Independence Ave., S.W.
Washington, D.C. 20250

Dear Secretary Babbitt and Secretary Espy:

I am writing on behalf of each of the plaintiffs in the newly-filed cases captioned *Northwest Forest Resource Council v. Dombeck*, No. 94-1031 TPJ (D.D.C.) and *Northwest Forest Resource Council v. Thomas*, No. 94-1032 TPJ (D.D.C.) (both filed May 11, 1994).

The purpose of this letter is to request the opportunity to exercise the rights provided to these plaintiffs under the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2, in relation to the establishment and operation of advisory committees created in the Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within The Range of the Northern Spotted Owl ("Record of Decision"). These advisory committees are known as the Regional Interagency Executive Committee ("RIEC") and Province Teams. These committees were established and are utilized in the interest of providing advice or recommendations to federal agencies, and are not composed wholly of full-time federal officers or employees. Thus, the committees are subject to FACA.

We request that you take the following steps required by FACA: provide specific authorization by the President or publish a finding in the Federal Register that establishing these committees is in the public interest; file a charter for each of these committees; publish timely advance notice in the Federal Register of each meeting of

The Honorable Bruce Babbitt
The Honorable Mike Espy
May 19, 1994
Page 2

21810-00.032\1RLBABB\OLN

each committee; open each committee meeting to the public; allow plaintiffs to attend, appear before or file statements with these committees; provide plaintiffs in advance of each meeting a copy of all documents which are made available to or prepared by each committee; keep accurate minutes of each meeting of each committee, certified by the head of the committee, that contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached and copies of all reports received, issued or approved by each committee; assure that the membership of each committee is fairly balanced, including representation by local industries, local governments, local communities and local citizens; and assure that the advice and recommendations of each committee are not inappropriately influenced by any special interest or the appointing authority.

These requirements should not be foreign to you. In *Northwest Forest Resource Council v. Espy*, No. 93-1621 TPJ (D.D.C. March 21, 1994) the United States District Court for the District of Columbia informed you that you had violated each of these legal requirements of FACA with regard to the establishment and operation of the Forest Ecosystem Management Assessment Team, on whose report your Record of Decision relies. We find it inexplicable that you could respond to Judge Jackson's opinion in *Northwest Forest Resource Council v. Espy* by perpetuating ongoing violations of FACA in the Record of Decision. These issues are raised in the two newly-filed cases referenced above.

We understand that the RIEC has been in operation for some time, and is next scheduled to meet on June 2, 1994. We request the opportunity to exercise all the rights described above in connection with this meeting. We strongly urge you not to conduct this meeting in violation of FACA.

We further request all minutes of past meetings of RIEC, all documents which were made available to or prepared for RIEC, all agendas for its meetings, copies of any advice or recommendations it gave, and a list of all members of the committee, with professional affiliations, who actually attended and participated in meetings. We request similar information for any past meetings of any Province Teams. We similarly request all the rights described above for all future meetings of all these committees.

As you may know, in *Northwest Forest Resource Council v. Espy* the Government argued to the court that a citizen seeking to pursue a legal claim under FACA must assert his rights during the operation of the illegal committee. The Government's position appears to offer a further reason for asserting our rights at this time, and also requires us to pursue our claims further to seek judicial assistance in remedying the violations of FACA outlined above if voluntary compliance is not forthcoming promptly.

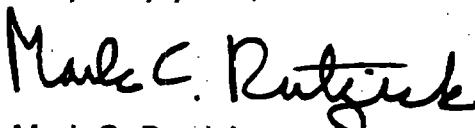
The Honorable Bruce Babbitt
The Honorable Mike Espy
May 19, 1994
Page 3

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We believe we are being harmed irreparably by the conduct of meetings of the RIEC and the Province Teams in violation of FACA. If we do not receive immediate assurances that all future meetings of these committees will be conducted in compliance with FACA, we will have no choice but to seek judicial assistance to secure our rights under this statute.

We look forward to hearing from you to assure us that all future meetings of these committees will be conducted in compliance with FACA, and that you will provide us with the information on past meetings requested above. If no response is received by May 25, 1994 we will assume you do not intend to remedy these violations of law and be compelled to seek the assistance of the court to secure the rights provided to us under FACA.

Very truly yours,


Mark C. Rutzick
SPA

cc: Wells Burgess
Department of Justice
James S. Gilliland
General Counsel, Department of Agriculture
John D. Leshy
Solicitor, Department of the Interior

MCR:cp

Will

Signed Memoranda of Understanding -- Distribution List

Tom Collier, Interior

Bob Nash, Agriculture

Jonathan Silver, Commerce

Rob Portman, Labor

Bruce Katz, HUD

David Gardiner, EPA

T.J. Glauthier, OMB

Katie Broeren, SBA

Doug Hall, Commerce

Sylvia Mathews, NEC

Bruce Reed, DPC

Kathy Zoi, OEP

THE WHITE HOUSE

WASHINGTON

September 30, 1993

MEMORANDUM FOR DISTRIBUTION

FROM:

Peter Yu 

SUBJECT:

Signed Memoranda of Understanding

Thank you very much for your recent assistance in securing signature of the memoranda of understanding arising out of the President's Forest Plan and the Northwest Economic Adjustment Initiative. Attached please find signed copies for your files. The third memorandum (which involves state and local officials) is circulating for signature in the Northwest.

Now the important work begins. I understand that Agriculture has begun to draft the Strategic Plan required by the memoranda and that Bob Nash will soon convene the first meeting of the Multi-Agency Command.

Thank you again for your assistance.

MEMORANDUM OF UNDERSTANDING
FOR FOREST ECOSYSTEM MANAGEMENT

I. PARTIES

This is an understanding among five parties:

The Director of the White House Office on Environmental Policy
The Secretary of the Interior
The Secretary of Agriculture
The Administrator of the Environmental Protection Agency
The Under Secretary of Commerce for Oceans and Atmosphere

II. BACKGROUND

The President has proposed a comprehensive plan to alleviate the impasse over management of federal forest lands in the Pacific Northwest within the range of the northern spotted owl. The plan fulfills the President's request for "a balanced and comprehensive strategy for the conservation and management of forest ecosystems, while maximizing economic and social benefits from the forests." By taking an innovative approach based on ecosystem and watershed management, the plan transcends traditional administrative boundaries. Successful implementation will require unprecedented interagency cooperation, coordination, and collaboration, both in the long-term and in the short-term.

The report of the Agency Coordination team established by the President following the April 2, 1993 Forest Conference presents a mechanism to achieve better coordination and cooperation among the federal agencies that are involved in forest management issues. It concluded that "bold changes are required" in how agencies relate to one another and to the states, tribes, private landowners, and communities and people in the region.

III. PURPOSE

The purpose of this Memorandum of Understanding is to establish a framework for cooperative planning, improved decision making, and coordinated implementation of the forest ecosystem management component of the President's *Forest Plan for a Sustainable Economy and a Sustainable Environment* which is designed to resolve northwest forest issues within the range of the northern spotted owl.

Signatories to this Memorandum of Understanding agree to:

- develop a cohesive vision and shared sense of mission for the management of federal forest lands which balances multiple objectives;
- improve their ability to adapt to change, such as new scientific understanding or changing societal values, in a cohesive manner;
- cultivate greater trust, coordination, and cooperation among federal agencies, within individual agencies, and between federal agencies and non-federal interests;
- address inconsistencies among statutory mandates;
- improve integrated application of agency budgets to maximize efficient use of funds for overlapping or related efforts;
- improve the sharing of information and the pooling of agencies' technology and expertise;
- coordinate ecosystem management activities in concert with federal, state and local programs for economic, labor, and community assistance.

IV. STRUCTURE

The following interagency groups are established to develop, monitor, and oversee the implementation of the comprehensive forest management strategy for federal forests within the range of the northern spotted owl. They will support the development and implementation of land and resource management plans. This agreement does not substitute for or alter the line authority of individual agencies.

- A. Interagency Steering Committee: The Interagency Steering Committee will establish overall policies governing the prompt, coordinated and effective implementation of the President's forest management plan by all relevant federal agencies and address and resolve issues referred to it by the Regional Executive Committee, described below. The Committee will be located in Washington, D.C. The signatories will appoint representatives to this Committee which will be chaired by the Director of the White House Office on Environmental Policy or her/his designee. A White House appointed representative of the ISC will serve as interagency coordinator to provide general oversight and guidance of regional activities.

- B. Regional Interagency Executive Committee (RIEC): This group will consist of regional representatives of the agencies signatory to this M.O.U. The chairmanship of the RIEC will alternate between the Regional Forester and State Director of the Bureau of Land Management. In appropriate situations this core group will consult with other federal and state agencies and tribes. The Regional Interagency Executive Committee will serve as the senior regional entity to assure the prompt, coordinated and successful implementation of the President's forest management plan at the regional level. It will serve as the principal conduit for communications between the Interagency Steering Committee and the region. It will be responsible for implementing the directives of the Interagency Steering Committee, reporting regularly on implementation progress, and referring issues relating to the policies or procedures for implementing the plan to the Interagency Steering Committee.

The RIEC will appoint an interim interagency implementation team to oversee and initiate actions during the interim period moving toward to full implementation of the new forest management strategy.

The Regional Interagency Executive Committee will work together with the Multi-Agency Command group (MAC) of the Northwest Economic Adjustment Initiative to develop criteria and priorities for restoration projects or other ecosystem investment opportunities.

The Regional Interagency Executive Committee will be accountable to the Interagency Steering Committee for establishment and oversight of the Regional Ecosystem Office, Research and Monitoring Committee and Provincial Teams. The Regional Interagency Executive Committee will also make recommendations for minimizing planning redundancies.

1. Regional Ecosystem Office: This office will provide a focal point for scientific and technical expertise in support of implementation of the forest management plan. It will also be responsible for evaluation of major modifications arising from the adaptive management process and will coordinate the formulation and implementation of data standards. This office will report to the Regional Interagency Executive Committee and will be responsible for development, evaluation, and resolution of consistency and implementation issues with respect to specific topics including, but not limited to, the following:

- Geographic Information Systems
- Prototype watershed analyses
- Restoration and reforestation guidelines
- Support of agency efforts to meet obligations of Endangered Species Act (e.g. Section 7 consultations, preparation of recovery plans)

- Adaptive management guidelines
- Monitoring
- Research
- Refining definition of reserve boundaries

Agencies will detail staff to the Regional Ecosystem Office as appropriate.

2. Research and Monitoring Committee: This committee, composed of research scientists and managers from a variety of disciplines will provide advice to the Regional Interagency Executive Committee on implementation of the forest plan including adaptive management areas and watershed assessments. The Research and Monitoring Committee will review and evaluate ongoing research, develop a research plan to address critical natural resource commodity and non-commodity questions, and address biological, social, economic, and adaptive management research questions. It will also develop scientifically credible, cost-efficient monitoring plans. The Research and Monitoring Committee will report to the Regional Interagency Executive Committee.
3. Provincial Teams: These teams will consist of representatives of federal agencies, states, tribes, and others. The Interagency Steering Committee and the Regional Interagency Executive Committee will determine the appropriate role for these teams at the level of physiographic provinces, adaptive management areas or particular watersheds.

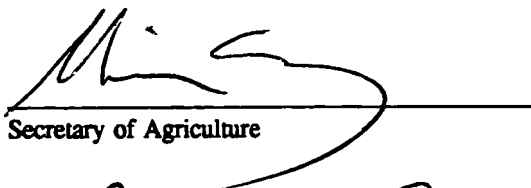
V. TERMS

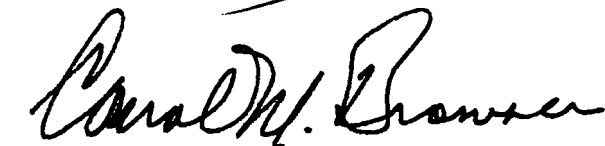
The term of this agreement is five years from the date of execution, after which time the parties may extend the agreement.

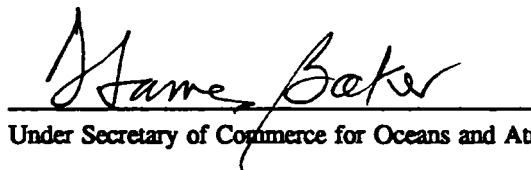
AGREED:


Director, White House Office on Environmental Policy


Secretary of the Interior


Secretary of Agriculture


Administrator, Environmental Protection Agency


Under Secretary of Commerce for Oceans and Atmosphere

INTERAGENCY MEMORANDUM OF UNDERSTANDING FOR ECONOMIC ADJUSTMENT AND COMMUNITY ASSISTANCE

I. PARTIES

This is an agreement among eleven parties:

- the Secretary of the Interior;
- the Secretary of Agriculture;
- the Secretary of Commerce;
- the Secretary of Labor;
- the Secretary of Housing and Urban Development;
- the Administrator of the Environmental Protection Agency;
- the Deputy Director of the Office of Management and Budget;
- the Administrator of the Small Business Administration;
- the Assistant to the President for Economic Policy;
- the Assistant to the President for Domestic Policy; and
- the Director of the Office on Environmental Policy;

II. PURPOSE

The purpose of this Memorandum is to improve interagency cooperation in order to enhance the delivery, tracking, and evaluation of economic adjustment assistance to workers, families, businesses, and communities affected by the President's Forest Plan for the Pacific Northwest and northern California. This memorandum establishes the principles that will guide the parties' cooperation in this undertaking, sets forth the objectives of this collaborative effort, and outlines the responsibilities of the parties. It also defines the structure of federal coordination, which is designed to work closely with state and local governments, Tribal Nations, and others, in order to make the best use of federal resources. This memorandum complements the Memorandum of Understanding for Forest Ecosystem Management.

III. STRUCTURE

A. *Equal Status:* The parties are equal members of this cooperative relationship.

B. *Multi-Agency Command:* Each of the parties shall, within 7 days of the signing of this Memorandum, designate one individual (the Secretary of Agriculture and the Secretary of the Interior may each designate one or two individuals) to serve as the liaison with the other parties and to report directly to the appropriate party. These individuals shall comprise the Multi-Agency Command (MAC). The Secretary of Agriculture shall designate one of the representatives to serve as Chair of the MAC.

The MAC, under the guidance of the parties, shall have oversight and policymaking authority and

responsibilities as consistent with the authority delegated by each party.

C. *Regional Community Economic Revitalization Team:* The Secretaries and the Administrators shall, within 14 days of signing this Memorandum, each designate one or more representatives to participate in the Regional Community Economic Revitalization Team (Regional CERT), which will be based in the affected region. The Regional CERT shall also include two representatives each from Oregon, Washington, and California. One of those two representatives shall be designated by the Governor, and the second representative shall be designated by the nonfederal members of the State CERT. The Secretary of Agriculture and the Secretary of the Interior shall designate two of the federal representatives to serve as Co-chairs of the Regional CERT.

The Regional Community Economic Revitalization Team, under the guidance of the Multi-Agency Command and the parties, shall have decision authority as consistent with federal law and the Strategic Plan described in Part IV, and subject to the limitations set forth in Part V. However, nothing in this Memorandum shall be construed to expand or diminish the authority of federal, state, or local officials participating in the Regional CERT. Matters unsettled or disputed within the Regional CERT shall be forwarded to the MAC for resolution.

D. *State Community Economic Revitalization Team:* The parties and the Governors of Oregon, Washington, and California shall establish State Community Economic Revitalization Teams (State CERTs). Each State CERT should include representatives of each federal agency with program responsibility, representatives of state government appointed by the Governor, and representatives of local government appointed by the Governor with the approval of local governmental organizations. The Chair of each State CERT shall be selected by its nonfederal members.

The State CERTs shall have daily authority to implement the Strategic and Implementation Plans as consistent with federal and state law. However, nothing in this Memorandum shall be construed to expand or diminish the authority of federal, state, or local officials participating in the State CERTs. Matters unsettled or disputed within a State CERT shall be forwarded to the Regional CERT for resolution.

E. *Memorandum of Understanding with the States:* The Multi-Agency Command shall, within 14 days of the signing of this Memorandum, enter into a Memorandum of Understanding with the Governors of Oregon, Washington, and California, and representatives of affected communities in the region. That Federal-State Memorandum shall complement this Interagency Memorandum and set forth in greater detail the responsibilities of the Regional CERT, the State CERTs, relevant state and local governments, and other parties, as well as the relationships between state and local representatives.

IV. RESPONSIBILITIES OF THE PARTIES

In the development and execution of economic adjustment activities, state and local governments, Tribal Nations, and others shall play a critical role in determining how best to meet the needs of the affected communities. Federal officials should resolve interagency differences, coordinate interagency activity, and remove any unnecessary regulatory impediments to economic adjustment and assistance.

A. Development of Strategic Plan

Working with state and local officials, representatives of the Tribal Nations, and other persons the parties deem appropriate, the Multi-Agency Command shall prepare a Strategic Plan for Economic Adjustment and submit that plan to the parties and the Governors of Oregon, Washington, and California within 45 days of the signing of this Memorandum. The Plan, which shall be consistent with the limitations set forth in Part V, shall address a three-year period and include:

- a detailed statement of the goals of the Plan;
- a streamlined process for the delivery of economic assistance and services;
- a detailed description of authority delegated to federal officials in the region;
- quantifiable benchmarks of progress, such as new family-wage jobs created, numbers of dislocated workers retrained, numbers of community facilities funded, and capital investment levels, and related timetables; and
- a detailed description of the relationship among the federal, state, and local parties.

The parties and the Governors of Oregon, Washington, and California shall approve the Plan within 15 days of its submission.

B. Development of Implementation Plan

Working with representatives of the State CERTs, the Tribal Nations and other persons the parties deem appropriate, the Regional CERT shall prepare an Implementation Plan and submit that plan to the MAC and the Governors of Oregon, Washington, and California within 45 days of the approval of the Strategic Plan. The Implementation Plan shall address a three-year period and include:

- a detailed plan for integrating and implementing the relevant programs and services of the Departments of Labor, Commerce, Interior, Agriculture, Housing and Urban Development, the Small Business Administration, and the Environmental Protection Agency;

- a detailed plan for a clearinghouse of services for state and local officials, individuals, and firms;
- a detailed and comprehensive list of temporary and permanent legislative and regulatory provisions necessary for the prompt and efficient delivery of assistance to affected communities and individuals;
- a plan for a uniform system for reporting to the MAC;
- dates for the final submission of projects, with deadlines for approval;
- limits on administrative expenses and overhead for services provided to workers, businesses, and communities; and
- a detailed plan and timetable for the actual receipt of assistance by affected communities and individuals.

The MAC and the Governors of Oregon, Washington, and California shall approve the Implementation Plan within 15 days of its submission.

C. *Execution*

The parties shall make available the resources (including adequate personnel and support services) necessary to execute the Implementation Plan, including the financial resources set forth in Part V, and subject to the conditions set forth in Part V.

Working with state and local officials and other persons the parties deem appropriate, the State and Regional CERTs shall implement the three-year Implementation Plan as consistent with federal and state law.

As set forth in the Memorandum of Understanding for Forest Ecosystem Management, the Regional Executive Committee (REC) established for purposes of federal land management shall have the ultimate authority for the implementation of the watershed restoration projects and attendant "jobs in the woods" efforts, except where Federal law vests such decisions in the States or elsewhere (e.g., the Clean Water Act). The Regional CERT and the REC shall work together to prepare a plan for implementing those projects that will promote (i) creation of family-wage jobs, a preference for displaced timber workers, integration with job training and placement programs, and minimal administrative overhead; and (ii) integration of these employment criteria with environmental criteria.

The Multi-Agency Command, working with appropriate local and state officials, shall review and evaluate both the Strategic Plan and the structure set forth in this Memorandum, determine whether the Plan and structure are appropriate for the continued delivery of economic adjustment assistance to the region, and develop and propose any revisions to the structure the MAC deems

necessary. The MAC shall submit a report on these issues within six months of the approval of the Strategic Plan.

V. FINANCIAL COMMITMENTS

The parties agree to make available the following financial resources under the following specified conditions:

The Department of Labor (DOL): Subject to sufficient appropriations by Congress, DOL agrees to make available, out of Job Training Partnership Act (JTPA) funds reserved by the Secretary pursuant to Title III, twelve million dollars (\$12 million) per year, for the three-year period beginning July 1, 1993, to support the purposes set forth in Part II of this Memorandum. Such funds shall be available subject to the following conditions:

1. That each State involved, namely Oregon, Washington, and California, certifies that formula funds made available to the State pursuant to Title III of JTPA for each year of the three-year period are not and will not be available for the purposes described in Part II of this Memorandum, and that the State is utilizing and will continue to utilize, to the maximum extent possible, JTPA Title III formula funds for such purposes;
2. That the final decision regarding the award of any of the Secretary of Labor's reserve funds made available under Title III of JTPA shall be made by the Secretary pursuant to the applicable law; and
3. That, if a sufficient number of meritorious proposals are not submitted by the named States by at least three months prior to the end of each program year (June 30) for each of the three years for which the \$12 million commitment is made, there will be no obligation to commit the balance of the \$12 million to any or all of the named States for the purposes described in Part II of this Memorandum.

The Department of Agriculture: The Department of Agriculture agrees to provide assistance through both the US Forest Service (USFS) and the Rural Development Administration (RDA).

The Rural Development Administration: RDA agrees to request appropriations and/or reprogramming in the following amounts in the following programs. All eligibility criteria under current regulations governing these programs must be met in order to obtain financial assistance.

The continued funding at the program levels indicated below and for FY1995 and FY1996 is subject to sufficient Congressional appropriations for those Fiscal Years. For all listed programs, with the exception of the Rural Business Enterprise Grant (RBEG) Program, one-half of unobligated funds available to the region will revert to the Agency's National Office Reserve in April with the balance of unobligated funds reverting to the Agency's National Office Reserve in August. Unobligated RBEG Program funds will revert to the Agency's National Office

Reserve in July.

1. The Business and Industry Program (B&I) provides guarantees for loans to improve, develop, or finance business or industrial activity, and to improve the economic and environmental climate in rural communities. This type of assistance is available to businesses located in areas outside the boundary of a city of 50,000 or more and its immediate adjacent urbanized area. For FY1994–FY1996, a total of \$35.3 million each year will be made available.
2. The Community Facilities (CF) Program provides financial assistance to construct, extend, or otherwise improve community facilities providing essential services in rural areas and towns with a population of less than 20,000. For FY1994–FY1996, a total of \$41.6 million each year will be made available.
3. The Intermediary Relending Program (IRP) provides direct loans to nonprofit organizations to establish revolving loan funds. The funds then provide loans for businesses and community development projects not within the outer boundary of any city having a population of 25,000 or more. For FY1994–FY1996, a total of \$16.0 million each year will be made available.
4. The Rural Business Enterprise Grant (RBEG) program supports public and nonprofit organizations that provide technical assistance to new and growing businesses, that fund revolving loan funds for such businesses, or that develop industrial park sites. The program assists business enterprises located in areas outside the boundary of a city of 50,000 or more and its immediately adjacent urbanized area. For FY1994–FY1996, a total of \$4.1 million each year will be made available.
5. The Water and Waste Disposal (WWD) Loan and Grant Program provides financial assistance for the development of water and waste disposal including solid waste disposal and storm drainage systems in rural areas and towns with a population of less than 10,000. For FY1994–FY1996, a total of \$87.0 million each year will be made available.

The Forest Service: USFS agrees to request appropriations and/or reprogramming in the following amounts in the following programs:

1. Under Subtitle G of the 1990 Farm Bill (Rural Revitalization Through Forestry), the Rural Community Assistance program supports rural development, economic recovery, and studies designed to help diversify economic conditions in these communities. USFS will make available through reprogramming and redirection an additional thirteen million dollars (\$13 million) in FY1994, and an additional ten million (\$10 million) each year in FY1995 and FY1996, for these programs.
2. The Old Growth Diversification program funds projects designed to improve

markets for value-added wood products. USFS will make available through reprogramming and redirection an additional three million dollars (\$3 million) each year for FY1994-FY1996 for this program.

3. The Forest Stewardship Program and Stewardship Incentive Program provide technical and financial assistance to private non-industrial landowners. USFS will make available through reprogramming and redirection an additional four million dollars (\$4 million) each year for FY1994-FY1996 for this program.

4. USFS agrees to make available through reprogramming and redirection an additional sixteen million dollars (\$16 million) per year for FY1994-FY1998. These funds would support watershed restoration and "jobs in the woods" in the Pacific Northwest and northern California.

The Department of the Interior: The Department of the Interior agrees to request appropriations and/or reprogramming of thirty million dollars (\$30 million) each year for FY1994-FY1998. These funds would support watershed restoration and "jobs in the woods" in the Pacific Northwest and northern California.

The Department of Commerce: Subject to sufficient appropriations by Congress, the Department of Commerce agrees to make available an additional \$15 million in FY1994. These funds would support increased activity by the Economic Development Administration (such as planning, technical assistance, lending, and grantmaking) in the affected region. In the event that such appropriations are not available, and in FY1995 and FY1996, the Department of Commerce will make available an additional \$3 million (over normal annual expenditures) to be used for capacity-building (planning and technical assistance).

The Environmental Protection Agency: The Environmental Protection Agency agrees to request appropriations and/or reprogramming of five million dollars (\$5 million) each year for FY1994-FY1998. These funds would support watershed restoration as authorized under Section 318 of the Clean Water Act and ecological risk assessment research in the Pacific Northwest and northern California.

VI. REPORTS

Every six months, the Multi-Agency Command shall promptly prepare and file with the parties and the Governors of the three States an evaluation report which

- assesses the progress made in the preceding period toward the goals and objectives identified in the Strategic Plan; and
- suggests any adjustments or amendments in the cooperative relationship that the MAC considers desirable.

VII. LIABILITY

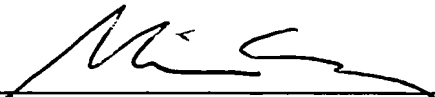
This is not a legally binding or enforceable agreement. The matters covered in this memorandum are intended only to improve the internal management of the Executive Branch and are not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

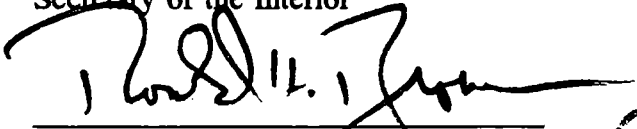
VIII. TERMS

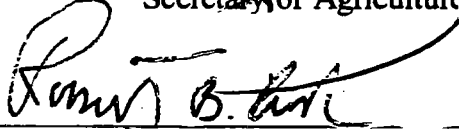
The term of this agreement is forty months from the date of execution. At that time, the parties may, by unanimous action, extend this agreement for any additional period. This agreement may be amended by unanimous consent of the parties. Any party may terminate its participation in this agreement without cause.

AGREED:

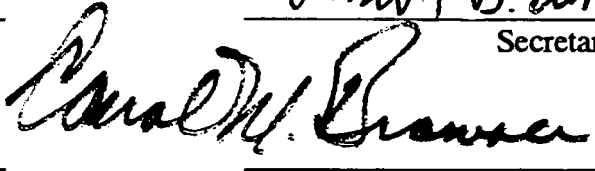

Secretary of the Interior


Secretary of Agriculture


Secretary of Commerce

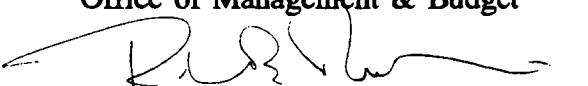

Secretary of Labor


Secretary of Housing & Urban Development

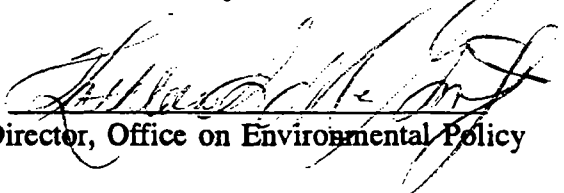

Administrator, Environmental Protection Agency


Deputy Director
Office of Management & Budget


Administrator, Small Business Administration


Assistant to the President for Economic Policy


Assistant to the President for Domestic Policy


Director, Office on Environmental Policy

FACA - ALTERNATIVES

I. Charter RIEC and 12 province teams

Question: Will it work?

Concerns: (1) Will we get into a battle on "balance" and have to put on the RIEC representatives of industry, environmentalists, and other users of the forests? Or can we keep it a "government-only" group?

(2) Cost (\$335,000 per year).

(3) Will publication of meeting notices in Federal Register result in protests and other disruptions?

(4) Will the record-keeping requirements and the need to make all documents available to the public make it difficult for the groups to function quickly and efficiently?

II. Federal employees only on teams (for now) AND

- (1) Schedule periodic public meetings,
- (2) Conduct individual consultations with States and Tribes, and
- (3) Tell the States and Tribes that we will join them in supporting an amendment of FACA to make clear that FACA does not apply to inter-governmental consultations (States, local governments, Tribes) and that as soon as that can be accomplished, we will welcome them back to the table.

<u>NAME</u>	<u>ORG</u>	<u>#</u>	<u>FAX</u>
PETER YU	NEC	456-2882	456-2223
...	D.T	514-2701	514-0557
WM EPSTEIN	WH/OER	456-6224	456-62710
Jim PIPKIN	INTERIOR	208-4123	219-1220
Mike Gygax	OGC/USDA	720-2063	690-2730
William Lewis	DOE/SOL	208-4722	219-1790
Ken Cohen	OGC/USDA	720-5565	
Anne SHIELDS	DOI/SOL	208-4423	
BONNIE LUKEN	OGC/USDA	720-3315	720-8666
Peter Coppenbarger	DOS	514-8046	514-0557

Dave Anderson

Lead of Federal programs of Civil Division

THE WHITE HOUSE
WASHINGTON

FDA

MEMORANDUM TO: Mark Gaede Tom Tuchmann
Mike Gippert Regional Officials
Jim Pipkin
Don Knowles
Don Barry
Ann Shields
Peter Yu
Todd Campbell
Karl Stauber
Peter Coppelman
Ellen Athas

FR: Will Stelle *WGS*

RE: Meeting to Discuss FACA Compliance Issues and
the President's Forest Plan

DATE: 16 May 1994

In order to clarify the issues relating to FACA compliance and the President's northwest forest initiative, I am scheduling a meeting of relevant Washington and regional officials for Thursday, May 19th in the Truman Room of the White House Conference Center at 726 Jackson Place, from 2:00 to 4:00.

cc. K. McGinty
S. Neuwirth

*Well -
What about
WH Counsel??*



U.S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

FAX NUMBER (202) 514-0557
(FTS) 368-0557

CONFIRMATION NUMBER (202) 514-2701
(FTS) 368-2701

FROM: Peter Coppelman

NO. OF PAGES:
(INCLUDING
COVER PAGE)

5

TO:

Will Stelle

TELEPHONE NO:

456-6224

FAX NO:

456-2710

MESSAGE:

FILE
DOUGLAS
FAC

PLEASE NOTIFY SENDER IMMEDIATELY IF YOU HAVE ANY PROBLEMS
RECEIVING THESE PAGES.

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General Services Administration
Office of Administration
Washington, DC 20405

March 21, 1994

MEMORANDUM FOR COMMITTEE MANAGEMENT OFFICERS

FROM:

JAMES L. DEAN, DIRECTOR
COMMITTEE MANAGEMENT SECRETARIAT

SUBJECT:

Application of the Federal Advisory Committee
Act (FACA) to Intergovernmental Contacts

This memorandum provides guidance regarding the applicability of the Federal Advisory Committee Act (FACA) to contacts between the Federal Government, and State, local, and tribal governments. We are providing this information to you as requested by the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB).

While FACA's scope encompasses many contacts between Federal officials and individuals who are not full-time employees of the Executive Branch, it does not extend to all such interactions. Circumstances will require the application of the Act in some situations; however, there are many instances where it will not be necessary to establish advisory committees. In determining the applicability of the Act to your specific needs, you should consult GSA's regulations located at 41 CFR Part 101-6 and your agency's Office of General Counsel. Some of the most frequently raised questions involving contacts with individuals who are not full-time employees of the Federal Government are discussed in this memorandum.

I. BACKGROUND

President Clinton recently announced several initiatives to promote more effective intergovernmental cooperation in the development and implementation of Federal regulatory actions. These efforts are the result of recommendations issued as part of the National Performance Review lead by Vice President Gore, as well as the Administration's commitment to streamline the Executive Branch's regulatory review process and encourage more direct interaction with entities affected by Federal policies.

Executive Order 12866

Executive Order 12866 of September 30, 1993, entitled "Regulatory Planning and Review," encourages agencies to seek to "harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions." Each agency is directed to "explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking." No specific approach for the accomplishment of

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these goals is required, but the directive states it should be an "effective process" dictated by the order and magnitude of the issues involved.

Executive Order 12875

Executive Order 12875 of October 26, 1993, entitled "Enhancing the Intergovernmental Partnership," was issued to reduce the imposition of nonstatutory unfunded mandates upon State, local, and tribal governments. The Order directs each agency to establish a meaningful and timely mechanism for consultation with these affected parties in the development of regulatory proposals containing significant nonstatutory unfunded mandates.

On January 11, 1994, the Administrator of OIRA issued detailed guidance covering the scope, nature, and timing of intergovernmental contacts incident to the implementation of E.O. 12875. While agencies have been given broad latitude to determine which combination of tools to employ in accomplishing the President's goals, including the use of negotiated rulemaking advisory committees, they are required to integrate their activities into the ongoing regulatory process defined by E.O. 12866.

II. INTERACTIONS SUBJECT TO FACA

The use of Federal advisory committees, subject to FACA, in accomplishing the goals outlined by E.O. 12866 and E.O. 12875 is one option in developing an effective process for facilitating intergovernmental coordination. While the Administration encourages the appropriate use of advisory committees to accomplish rulemaking, the establishment of new advisory committees is subject to review by OMB under the terms of Executive Order 12838 of February 10, 1993, entitled "Termination and Limitation of Federal Advisory Committees," and GSA as required by the Act.

The following situations will require agencies to comply with FACA and E.O. 12838: — FACA Excl. Comm

(A) Negotiated Rulemaking Committees. The use of advisory committees to accomplish rulemaking in selected circumstances has been effectively employed by several agencies, including the Department of Transportation and the Environmental Protection Agency. Advisory committees may be used to accomplish rulemaking where there is a clear need to obtain advice and recommendations while developing a Federal regulatory or other position in a relatively short timeframe. Such committees are subject to FACA as required by the Negotiated Rulemaking Act.

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FBI
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THX

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(B) Use of Existing Advisory Committees. As part of its overall regulatory strategy, agencies may require supplemental advice and recommendations to support ongoing activities. In such cases, the membership and/or structure of existing advisory committees may be expanded or modified to obtain additional information. While consultation with GSA is required to amend the charter of an existing FACA committee, the additional review requirements of E.O. 12838 do not apply if the scope of the original committee is not significantly altered.

Regulations promulgated by GSA provide substantial flexibility in addressing the operating requirements of existing advisory committees, including subgroups created to achieve their goals. For example, section 101-6.1004 provides a detailed listing of committee meetings or groups which are not covered by FACA and/or other regulatory requirements.

✓ (C) General FACA Coverage. In determining coverage under FACA, agencies must continue to apply a "totality of circumstances" analysis against the functions to be performed by an individual or group providing advice or recommendations. Since the Act's scope is quite broad and based upon the functions to be performed, various factors such as the desire for consensus, frequency of meetings, or rotation of membership individually may not determine coverage. Accordingly, the application of FACA to specific circumstances should be reviewed with GSA, and the agency's Committee Management Officer and Office of General Counsel.

III. INTERACTIONS NOT SUBJECT TO FACA

As part of the regulatory process, agencies may receive unsolicited requests from pre-existing external organizations, including industry associations or associations of State, local, or tribal officials, to express their views. Conversely, the Government may seek to obtain information from such groups to achieve maximum participation in the decisionmaking process. There are several avenues for obtaining advice and recommendations from such groups which are not subject to FACA. The extent to which these types of interactions are not subject to the Act have been addressed in GSA's governmentwide regulations implementing FACA and recent Court decisions, and are summarized below.

(A) Meetings With Pre-Existing External Groups. From time-to-time agencies may receive unsolicited requests from pre-existing external groups to provide their views on pending actions. Such meetings, whose primary purpose is to present to the Government the views of the group on a particular matter are not subject to FACA. Similarly, the Executive Branch may under certain circumstances initiate meetings with pre-existing external groups for the purpose of obtaining views and information without applying the Act.

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Exempting such meetings with pre-existing external groups from FACA assumes that the Government has not encouraged, promoted, funded, or otherwise controlled the creation and/or activities of the group being consulted. Accordingly, such interactions may be subject to FACA if these factors are present, even though the group existed previously.

(B) Meetings with Individuals. A meeting between an individual and Federal official(s) is not covered by FACA [see 41 CFR 101-6.1004(h)].

✓ (C) Meetings with a Group of Individuals. Meetings with a group of individuals for the purpose of obtaining individual opinions, rather than advice or recommendations as a group, are not covered by FACA [see 41 CFR 101-6.1004(i)]. However, such a group may be covered by the Act if it is relied upon as a de facto advisory committee over a period of time, e.g. if the agency asks the group to prepare advice or recommendations, or its activities for all intents and purposes assume the appearance of an advisory committee as defined by the Act.

For example, as part of the regulatory process, an agency may choose to use a series of "focus groups," "forums," or "roundtables" to obtain the views of individual attendees. Such mechanisms serve as useful conduits for obtaining a broad range of information required to achieve a complete regulatory analysis. Typically, this approach involves a series of sessions structured to obtain information from individuals, and attendees are rotated to provide a diversity of viewpoints.

(D) 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. Such meetings are frequently used by many agencies as a means of collecting a wide range of opinions in a short period of time. Often public meetings, "hearings," or "town meetings" are widely advertised and include invitations for both oral and written input into an agency's decisionmaking process.

IV. SUMMARY AND CONCLUSION

Establishing an effective and meaningful intergovernmental dialogue as part of the Administration's efforts to reduce nonstatutory unfunded mandates and streamline the regulatory review process will require the use of several approaches, including advisory committees. Agencies having specific questions or concerns regarding advisory committees may contact GSA's Committee Management Secretariat at (202) 273-3556.

cc: Office of Information and Regulatory Affairs
Office of Management and Budget (OIRA/OMB)

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

06-May-1994 11:39am

TO: William W. Stelle

FROM: Peter M. Yu
 National Economic Council

CC: Kathleen A. McGinty

SUBJECT: RE: FACA Compliance

I just received your message. My complaint was, and remains, two-fold.

First, OEP did not ask Ag/Interior counsel to consult NEC/WH Counsel on this. This was error because NEC and White House Counsel created this structure with FACA in mind.

Second, the Ag/Interior opinion is extremely irresponsible as a legal matter. It was based on extremely incomplete and undocumented information--to such an extent that neither the designers nor the implementers of the system were consulted. They wrote:

"We understand this group is intended to function similar to the REIC. Our advice and recommendations...are therefore applicable to this group."

I do not know from where they received this information, but it is patently false. This irresponsible ruling has caused substantial concern in the field, and I consider that a direct consequence of the failure of Ag/Interior to consult with (or be advised to consult with) NEC or White House Counsel.

I ask that you call me regarding this matter as soon as possible.

THE WHITE HOUSE

WASHINGTON

MEMORANDUM TO: Todd Campbell
Steve Neuwirth

FR: Will Stelle *WStelle*

RE: FACA and the Forest Plan

DATE: 4 May 1994

Peter Yu and I spoke this morning about the FACA compliance memorandum that Interior and Ag issued (attached). Peter expressed dismay that it opined on issues relating to the CERT and R-CERT, and he also said that the opinion was not consistent with a ruling from White House Counsel. I am therefore writing for your review and guidance.

I had originally asked the General Counsel and Solicitor to review Forest Plan implementation issues and FACA to ensure that, in response to the Jackson ruling, we were in full compliance with FACA. A copy of that original request is also attached.

The two departments issued this opinion, and are now working to reconfigure some of the regional arrangements to ensure that we are in compliance. This is not easy, to say the least.

Peter expressed some real concern that it was causing problems with the economic assistance arrangements, which would parallel some genuine difficulties we are facing on the forest plan side of the equation.

I wanted to flag this general issue for your attention and request any guidance if adjustments need to be made.

cc. K. McGinty
Peter Yu

THE WHITE HOUSE

WASHINGTON

MEMORANDUM TO: John Leshy
Jim Gilliland

FR: Will Stelle *WJS*

RE: FACA and Forest Plan Implementation

DATE: 16 March 94

As we near the final decisions on the President's forest plan, we need a focused review of the degree to which the implementation regimes anticipated for the plan may cause FACA type problems.

I would like to request that you designate someone in your offices to undertake a specific review of the FACA issues raised by plan implementation, and that they provide to me a memorandum on the subject by next Wednesday, March 27th. We have already raised this issue with David Gayer and Mike Gippert of your staffs, and it may be that they are already pursuing it. I believe the following issues ought to be addressed:

a. Does the implementation plan for the President's plan raise potentially serious FACA issues?

b. Are there techniques for structuring the desired involvement of state, local and other officials in the plan implementation without running afoul of FACA? If so, please provide recommendations.

c. Are there unavoidable FACA problems with the current implementation scheme that cannot be avoided through restructuring proposals that retain the spirit of the implementation plan. If so, please identify them.

For information on the implementation regimes, Tom Tuchmann, Jim Pipkin, David Cottingham, Mark Gaede and the Regional Executives of the FS, BLM, and FWS would all be good sources.

Thank you for your assistance on this.

cc. K. McGinty
Todd Cambell
T. Tuchmann
Jim Pipkin
David Cottingham
Mark Gaede
P. Coppelman

FAX TRANSMITTAL		# of pages > 1 2
To: <u>Stelle</u>	From: <u>Jim Lyons</u>	
Dept. Agency: <u>WA</u>	Phone #	
Fax # <u>456-2710</u>	Fax #	
NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION		

Copy to KLR
+
File FACA

April 29, 1994

Memorandum

To: Chief, Forest Service
Acting Director, Bureau of Land Management
Director, Fish and Wildlife Service
Acting Deputy Commissioner, Bureau of Indian Affairs

From: Assistant Secretary of Agriculture, Natural Resources and Environment
Assistant Secretary of the Interior, Land and Minerals Management
Assistant Secretary of the Interior, Indian Affairs

Subject: Federal Advisory Committee Act (FACA) Compliance Concerning
Implementation Activities for the President's Northwest Forest Plan

In view of the recent court decision, NREC v. Espy, which determined that the process for preparation of the Forest Ecosystem Management Assessment Team (FEMAT) report for the President's Forest Plan violated the requirements of FACA, special precautions must be exercised to ensure that all current actions and future activities related to implementation of the Forest Plan fully comply with FACA requirements. Consistent with Judge Jackson's decision in the above case, the Record of Decision (ROD) for the Forest Plan issued on April 13, 1994, requires that "all non-federal participation in the forest management process will accord with the strictures of the Act." Failure to comply with FACA during implementation of the Forest Plan potentially places the entire plan at legal risk.

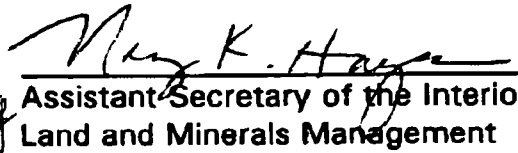
One key implementation objective for ecosystem-based management set forth in the forest plan is to have all involved federal agencies working together as one government. Another is to have full participation of all non-federal governmental interests (the states, tribes, and local governments) in long-term forest management in the region. To achieve these objectives, an interagency approach has been established utilizing committees, working groups, and teams both at the regional and field levels. While input and participation of all involved shareholders, both federal and non-federal, are important to successful implementation of ecosystem-based management, the activities and processes carried out by all components of this new interagency, inter-governmental approach must comply with requirements of FACA.

Full compliance must begin immediately. We realize that this may create special challenges concerning the participation of states and tribes. Attorneys at the Interior Department Solicitor's Office and the Agriculture Department's Office of the General Counsel are available to expedite compliance with this directive. Over the next several weeks, we will be examining options that might enable us to achieve our objectives of partnership and collaboration envisioned in the Forest Plan, while still complying with FACA. However, in the short term, until the FACA issues have been resolved it will be necessary to avoid a consensus-type decision-making or advisory process that involves non-federal officials. It will still be possible to obtain the views of states, tribes, and local governments through individual meetings, open hearings, and written submissions.

To expedite implementation of this directive, copies of this memorandum have been provided directly to the Regional Foresters of the Forest Service (Regions 5 and 6); the State Directors, Bureau of Land Management (Oregon/Washington and California); the Portland Area Director, Bureau of Indian Affairs; the Director of the U.S. Office of Forestry and Economic Development, Portland, Oregon; and the acting Director of the Regional Ecosystem Office.



Assistant Secretary of Agriculture
Natural Resources and Environment



Acting Assistant Secretary of the Interior
Land and Minerals Management



Assistant Secretary of the Interior
Indian Affairs

cc: Administrator, Environmental Protection Agency
Assistant Secretary of the Interior, Fish and Wildlife and Parks
Under Secretary of Commerce for Oceans and Atmosphere
Director, White House Office on Environmental Policy
Regional Director, National Marine Fisheries Service, Seattle, WA
Regional Administrator, Environmental Protection Agency, Seattle, WA
Regional Director, U.S. Fish and Wildlife Service, Portland, OR
USDA, Office of General Counsel, Washington, DC and Portland, OR
USDOl, Office of the Solicitor, Washington, DC
USDOl Regional Solicitor, Portland, OR

Alaska Oil and Gas Association

121 West Fireweed Lane, Suite 207
Anchorage, Alaska 99503-2035
Phone: (907) 272-1481 Fax: (907) 279-8114

April 11, 1994

ALASKA

Mr. John Goodin
Wetlands Division (4502F)
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

Alaska Oil and Gas Association Comments on
Alaska Wetlands Initiative Summary Report
Stakeholder Review Draft

Dear Mr. Goodin:

The Alaska Oil and Gas Association (AOGA) appreciates this opportunity to provide written comments on the Stakeholder Review Draft of the Alaska Wetlands Initiative Summary Report (Review Draft) and commends the decision to release it at this time to Stakeholders.

AOGA has been a major participant for many years in the Wetlands debate and has provided constructive input relative to changes in the Section 404 permitting program. We believed that the Alaska Wetlands Initiative represented a timely and important opportunity to address the long standing problems in administering the Section 404 program in Alaska and to address the specific issues related to the potential impacts in the State in implementing the national "no overall net loss of wetlands" policy. Unfortunately, this report offers little in the way of substantive improvements to the process for Alaskans. Our concerns are as follows:

- It is clearly apparent that a number of significant changes have been made between the December 17, 1993 draft Issue Papers and this Summary Report. This is particularly disturbing given the events leading to the decision to issue this draft to stakeholders for comment. The March 18, 1994 letter signed by Alaska Stakeholders regarding actions taken by the National Wildlife Federation expressed serious concerns about the integrity of the Alaska Wetlands Initiative and cautioned that the NWF actions had the potential to prejudice the recommendations coming out of the stakeholder meetings. Based on our review of the March 28, 1994 Draft Summary Report, it appears these concerns are justified.
- A number of important recommendations in the December 17, 1993, draft of the Issue Papers have been withdrawn without explanation. For example, the expansion of the General Permit Program in Alaska (including a GP for North Slope oil and gas activities),

Mr. John Goodin
April 11, 1994
Page 2

which was strongly supported by the majority of Stakeholders and the EPA and Corps representatives, was dropped as an Alaska-specific recommendation; this recommendation should be included in the next draft. Indeed, the Review Draft conflicts with the Clinton Administration's August, 1993 Wetlands Policy in not making substantive recommendations on General Permits and other alternate permit mechanisms.

- Many key points made by AOGA and other stakeholders at the second series of roundtable meetings are not reflected in this version. The strong statement by the majority of Stakeholders at the roundtable meetings (and a consensus at the January 11, 1994 Fairbanks roundtable meeting) that the national policy of "No overall net loss of wetlands" will not work in Alaska is not recorded in the text nor fully reflected in the recommendations.
- Few conclusions are provided, despite feedback from the EPA and Corps representatives in the second session of the Alaska roundtable meetings on crafting appropriate Alaska-specific actions.
- The sections on Alaska Wetlands, Process, Compensatory Mitigation, Alternative Permit Processing Procedures, and the Individual Permit Process do not accurately represent the views of the majority of Stakeholders. Moreover, these sections fail to include important and relevant information that emerged during the Roundtable discussions.
- AOGA's proposal on accelerated rehabilitation of north slope gravel fills has been incorporated into a much broader recommendation for a program that appears to increase the Corps Section 404 jurisdiction on the North Slope. AOGA's members cannot support this proposal. Our offer on accelerated rehabilitation is clear and stands as originally made.
- There are no substantive recommendations included on streamlining the Individual Permit process.
- The Review Draft does not explain how the input from the stakeholders and "commentors" was weighed. It is particularly disturbing that the stakeholder who had inappropriately tried to influence the process by privately offering comments on a confidential draft of this summary report appears to have been instrumental in recruiting the nearly 1,500 comments from the lower 48.
- A recommendation not supported by a majority of the Stakeholders - a Mitigation Banking Pilot Project - has carried through to this draft.

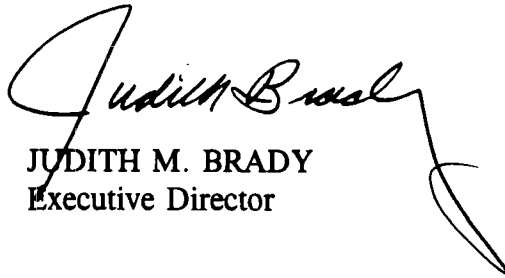
We hope that these sections will be revised to more accurately reflect the views of the Stakeholder majority. AOGA's specific comments on each section are attached.

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Despite our disappointment with this report, AOGA will continue to dedicate substantial time and resources to this issue. In our February 4, 1994 comments on the December 17, 1993 Draft Issue Papers we recommended that the stakeholders be provided the opportunity to discuss the Summary Draft and Final Issue Papers with the Interagency Working Group on Federal Wetlands Policy. Our belief that direct communication with this group is essential has been reinforced based on review of this report, and we respectfully repeat this request.

Again, we appreciate the opportunity to comment. If there are any questions, please contact Marilyn Crockett at 272-1481.

Sincerely,



JUDITH M. BRADY
Executive Director

JMB:ts
Attachment

Mr. John Goodin

April 11, 1994

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cc: Governor Walter J. Hickel
Senator Ted Stevens
Senator Frank Murkowski
Congressman Don Young
Kathleen McGinty, Director, Office of Environmental Policy
Al Ewing, U. S. Environmental Protection Agency
Robert Oja, U. S. Army Corps of Engineers
Walter O. Stieglitz, U. S. Fish and Wildlife Service
Steven Pennoyer, National Marine Fisheries Service
Representative Ramona Barnes, Speaker of the House
Senator Rick Halford, President of the Senate
Representative Gail Phillips, House Majority Leader
Senator Robin Taylor, Senate Majority Leader
Representative Bill Williams, Chair, House Resources Committee
Senator Mike Miller, Chair, Senate Resources Committee
Alaska Stakeholders

ALASKA OIL AND GAS ASSOCIATION (AOGA)
COMMENTS ON ALASKA WETLANDS INITIATIVE
SUMMARY REPORT
STAKEHOLDER REVIEW DRAFT

GENERAL COMMENTS

It is clearly apparent that a number of significant changes have been made between the December 17, 1993 draft Issue Papers and this Summary Report. This is particularly disturbing given the events leading to the decision to issue this draft to stakeholders for comment. The March 18, 1994 letter signed by Alaska Stakeholders regarding actions taken by the National Wildlife Federation expressed serious concerns about the integrity of the Alaska Wetlands Initiative and cautioned that the NWF actions had the potential to prejudice the recommendations coming out of the stakeholder meetings. Based on our review of the March 28, 1994 Draft Summary Report, it appears these concerns are justified.

Further, the Alaska Wetlands Initiative, directed by President Clinton's August 24, 1993 Wetlands Plan, was intended to involve Alaskans in discussions to identify environmentally appropriate solutions to problems with the 404 process in Alaska. Yet, during the second public comment period which ended February 4, 1994, of the 1,900+ comments received, nearly 1,500 comments came from outside of Alaska (including two from Germany), generated for the most part by an "Action Alert" issued by the National Wildlife Federation. This becomes particularly important because many of the recommendations and conclusions found in this March 28 draft are reached "...on the basis of the comment record". For a complete presentation and understanding of the Alaskans' concerns and recommended solutions, it is critical this report be modified to reflect recommendations which are based on the recommendations of non-stakeholder interests from outside of Alaska, and those which are based on Alaska stakeholder comments.

An example of to what degree it appears Stakeholders comments have been ignored appears under the discussion of the mitigation sequence. This section contains a paragraph that is a sobering and disturbing commentary on what the administration believes is the result of the whole Alaska Wetlands Initiative process. During the roundtable meetings, a majority of stakeholders, (including federal agency representatives who participated as stakeholders at the meetings) stated their belief that the mitigation sequence does not function in Alaska and will not function especially in the context of implementing a "no overall net loss of wetlands" policy. Despite these statements, the Administration concludes that "...the mitigation sequence functions in Alaska..." but that "clarification...would be valuable". While such clarification is welcomed by AOGA, this is insufficient to address the concerns we expressed as a result of the experiences of some of AOGA's members in obtaining Section 404 permits.

AOGA is particularly disturbed by the misleading introductory sections on "Alaska Wetlands" (page-3) which actually details lower 48 statistics on wetlands values and functions. That

section downplays the insignificant historic losses of Alaska wetlands and, for example, cites out of context the erroneous figure on Anchorage's wetlands loss. Similarly, Table 1 accompanying the section dealing with the functioning of the Section 404 permitting program in Alaska (page 3-5) implies that the program is functioning well in the State and does not place those statistics in the context of Alaska circumstances. Nor does that introductory discussion reflect Stakeholder and other commentor concerns and experiences with the Section 404 permitting program.

Finally, it is our understanding that this document was prepared without the benefit of the final Issue Papers. This is perplexing and brings into question the value of the time and effort put forth to participate in the two series of roundtable meetings. We question how this report could have been prepared (and subsequently revised prior to distribution to Stakeholders) without the final Issue Papers. Further, having to review this report without the benefit of the final Issue Papers presents an incomplete picture of the overall concerns. We request the Issue Papers be finalized and distributed to Stakeholders as soon as possible.

SPECIFIC COMMENTS

INTRODUCTION: Alaska's Wetlands (pp. 2-3)

This section is misleading and must be revised to reflect the current status of wetlands in the State of Alaska. As currently written, the text describes wetlands uses and values in the Lower 48 states and places undue emphasis on specific industries while ignoring the economic contributions of others. This section must be revised to more accurately describe Alaska wetlands statistics and the Alaskan economy.

The inclusion of statistics regarding wetlands in the Lower 48 is not relevant in this document (and is particularly inappropriate in this section) and should be deleted. In particular, references to the national commercial fish harvest, national revenues from hunting and recreation, and the value of sediment and flood control in flood plains must be deleted. Text regarding the role of wetlands in Alaska would be more appropriate.

Reference to the fact that wetlands account for 74% of the non-mountainous areas in Alaska should be included with the discussion on Alaskan wetlands within conservation units. This is a significant statistic and should be incorporated. Also, private land ownership in the State (exclusive of Native lands) is about 1%; this is an important distinction which should be reflected in this section.

As currently written, the discussion on Alaskan wetlands and their contribution to the State economy is not accurate. The text places undue emphasis on the importance of fishing to the Alaskan economy and fails to mention other industries in Alaska that impact wetlands. For example, revenues from oil and gas exploration and production generate 85% of the State budget but are not even referenced. Notwithstanding the importance of commercial and sport fishing

in Alaska, annual revenues from this industry would have to be increased by forty-fold to match revenues generated by the oil and gas industry for the same time period. This section should be revised to more accurately portray the Alaskan economy and the many industries whose operations may impact wetlands, including but not limited to oil and gas, tourism, hunting, commercial and sport fishing, and recreation.

This is particularly important given the relative economic value of wetland-dependent fisheries. The State Division of Economic Development has stated that the seafood harvest in Alaska has stabilized over the last five years to over 5 billion pounds per year. However, this industry has undergone a dramatic change in recent years with tremendous increases in groundfish harvests, including Alaska pollock, Pacific cod, flatfish, rockfish and sablefish. These fisheries are not wetland-based and are responsible for revenue and jobs. Halibut, herring, shrimp and king crab do not rely on wetlands. In 1987, Alaska accounted for 84% of the world tanner crab harvest, 87% of Pacific halibut, 67% of sablefish, 43% of Pacific cod, 28% of dungeness crab, and 26% of king crab.

References to "a number of threatened and endangered species" using wetlands as "valuable habitat" should also be clarified. The only threatened Alaskan animal dependent on wetlands is the Spectacled Eider. Moreover, rare, threatened or endangered species and their habitats are already protected by comprehensive federal environmental laws and regulations.

The final paragraph in this section must be rewritten to more accurately reflect the wetland loss rate in Alaska. As currently written, this section implies that Alaska is losing wetlands at a rate as high as 50 percent. Alaska has only lost 200,000 acres since 1867. It is important to be consistent when calculating wetlands loss rates. Urban statistics are not directly relevant to statewide analyses and serve only to distort the true picture of wetlands in Alaska. Widely accepted national statistics on wetlands losses, such as those in the report by the U.S. Fish and Wildlife Service (Dahl, 1990) are based upon rates from the 1780's to the 1980's. Those same statistics do not specify changes in loss rates during that time. Those same standards and statistics must be applied in this Review Draft report. We strongly recommend adding text that clearly states that Alaska has lost less than 1% of its historical wetlands base. More than 99% of Alaska's wetlands are undisturbed and likely to remain that way. Even if the current rate of development in Alaska were doubled, the State would still only use 0.0006% of its wetlands annually. These statistics are a more accurate portrayal of wetlands loss rates in Alaska. AOGA recommends inclusion of specific language that states that Alaska has lost less than one half of one percent of its wetlands since 1867.

Finally, despite repeated requests by the Municipality of Anchorage to correct this statement, reference again is made to a 50% historic wetlands loss in Anchorage. This is a distortion of statistics and must be corrected.

INTRODUCTION - The Wetlands Regulatory Program

Due to the prevalence of wetlands in Alaska (as compared to the Lower 48 states), a substantial number of activities which would not require permits in other states do need permits in Alaska. These activities generally receive permits with few delays and are not necessarily a problem, but that volume of permitting actions creates "noise" in any statistical analysis of performance of the Corps' program, including processing time information. Therefore, if there is to be a comparison between Alaska and lower 48 permit statistics, these routine permitting actions should be excluded.

Introduction - The Alaska Wetlands Initiative Process

In order to provide a complete public record of the Alaska Wetlands Initiative process, the last paragraph of this section must include a discussion of the events surrounding the leak of the internal draft of this report to the National Wildlife Federation, which prompted issuance of the March 28 draft to Stakeholders for review. Further, it must also be reflected that the Stakeholder review of the March 28 draft was without the benefit of the final Issue Papers. AOGA requests that the summary document, in particular Table 2 - Key Dates and Actions of the Alaska Wetlands Initiative and accompanying text on pages 5-7, be revised to reflect these events as a matter of fairness and completeness to the Public Record.

As noted in our General Comments, we request clarification be provided with respect to the 1900 comments received on the draft Issue Papers, identifying those that originated outside Alaska and how they were factored into the evaluation relative to Alaskan based commentary and the Alaska stakeholder comments. An explanatory footnote should be inserted in Table 2. We are aware that many of those lower 48 comments may have been generated by the National Wildlife Federation.

The section should also state the report's authorship and the role of the USFWS and NMFS who represented the Federal agency stakeholder.

Response to Issues - I. The Mitigation Sequence (pages 8-10)

This section does not reflect the strong statements by AOGA and a majority of the Stakeholders that compensatory mitigation will not work in Alaska. It was clear from the roundtable process that the overriding concern of the majority of the Stakeholders was how the national goal of "no overall net loss" of wetlands would be implemented in Alaska given the irreconcilable conflict between that goal and the ability of the permit applicant to meet the requirements of the Section 404(b)(1) Guidelines mitigation sequencing. Throughout the original draft Issue Papers, EPA and the Corps stated repeatedly:

Experience has demonstrated that Alaskan climate and geography, among other factors, generally preclude attainment of no net loss of wetlands through

restoration and creation of wetlands. Therefore, identifying and implementing practicable forms of impact avoidance and minimization that work best in Alaska are the primary means by which wetlands losses are reduced.

AOGA strongly recommends that this language be included in this document. This text most accurately represented the views of a majority of the Stakeholders at the public meetings based upon the comment record.

The first sentence in this section is at odds with the statements of the majority of stakeholders, including federal agency representatives who were stakeholders at the meetings, who believed that the mitigation sequence does not function in Alaska and will not function especially in the context of implementing a "no overall net loss of wetlands" policy. While "clarification of how the mitigation sequence applies in Alaska" is welcomed by AOGA, this is insufficient to address the concerns expressed by AOGA as a result of the experiences of some of its members in obtaining Section 404 permits. **AT A MINIMUM, AOGA RECOMMENDS CODIFICATION OF FOOTNOTE 7 OF THE FEBRUARY 1990 MOA AND THE JANUARY 1992 CLARIFICATION MEMORANDUM.**

AOGA concurs with the recommendation that pre-application mitigation efforts will be acknowledged.

Although AOGA is not opposed to advance planning to assess the suitability of land for development, the past history of use of the Advanced Identification process in Alaska has been poor. That process ignored the relative abundance of wetlands within the study area and disregarded the data collected within the oil field regarding wildlife responses to development. Any Advanced ID process must consider all relevant information before decisions are made regarding suitability or unsuitability of an area for placement of fill. Furthermore, the Advanced ID process fails to consider public interest in addition to wetlands values and can be used as a tool to overturn local planning decisions and exclude local input in wetlands planning. Another concern is that planning activities should not be allowed to delay on-going permit reviews and approvals.

II. Compensatory Mitigation (pages 11-12)

AOGA recommends including a stronger endorsement of the Alaska mitigation MOA in this section and more details on how it applies to Alaska and the strong statements of the majority of stakeholders that compensatory mitigation in Alaska is both unwarranted and impractical. In fact, the Corps has clearly acknowledged in permit action Records of Decision that compensatory mitigation is not practical in Alaska.

The rationale for not accepting third party mitigation needs to be explained.

The recommendation for a Mitigation Banking Pilot Project was not endorsed by AOGA or a majority of the Stakeholders and should be dropped. Since it was acknowledged by the Corps and EPA that avoidance and minimization would address wetlands losses in most cases, it is difficult to understand why this recommendation remains. This is especially true since there is a general lack of candidate restoration sites in many parts of Alaska.

Further, many stakeholders supported the view that wetlands already protected by inclusion in refuges, parks and other conservation units, both Federal and State, should be credited against future mitigation needs. The Corps and EPA need to further evaluate this proposal because although inclusion of wetlands in a conservation unit may not result in complete protection, these wetlands receive substantial protection from development.

AOGA endorses the recommendation requiring development of a program to assess the effectiveness of mitigation techniques in Alaska.

The recommendation for development of a comprehensive mitigation strategy for past, current, and future oil and gas development activities on the North Slope appears to significantly expand upon AOGA's proposal for accelerated rehabilitation in the North Slope oil fields and prematurely raises issues of scope that have yet to be formulated in anticipated discussions between AOGA members, the Corps and other agencies.

The recommendation mentions a System-wide mitigation planning concept (SWMP) which was not discussed at the roundtable meetings. The SWMP may represent a mechanism to implement an accelerated rehabilitation program but further discussion is warranted on AOGA's proposal before this vehicle is adopted.

As outlined in our previous comments on the Issue Papers, an accelerated rehabilitation program would involve rehabilitation of gravel fill of unused facilities sooner instead of at final field abandonment, as specified in lease agreements. Accelerated rehabilitation is an ongoing process that could be used as an alternative to any further requirement for compensatory mitigation. This program could supplement avoidance and minimization measures in project planning. The purpose of the program was to provide for additional mitigation of wetlands losses caused by future North Slope oil and gas projects through a program of accelerated rehabilitation supplemented by avoidance and minimization steps. This would replace the current process of protracted permit by permit negotiations with their attendant high transaction costs to address the compensatory mitigation issue.

However, the recommendation as drafted appears to automatically address all North Slope fills. This automatic expansion of regulatory jurisdiction by the Corps to include all fills prior to assertion of Clean Water Act Section 404 jurisdiction in January, 1979, is not justified. We cannot approve of this extension because there are certain sites that may not be appropriate candidates for accelerated rehabilitation. The proposal, as described in our November 24, 1993 comments, was intended to apply to future actions. Any expansion of compensatory mitigation

for past actions, (pre-January, 1979 actions) outside the context of future permitting actions and an agreed accelerated rehabilitation program, has no regulatory or statutory basis. Further, AOGA insists that its members be active participants in formulating an acceptable rehabilitation program -- not in a "consultation" role.

Moreover, AOGA strongly recommends deleting any reference to interim implementation of this policy. Our offer is clear and stands as originally made. AOGA's members will not participate voluntarily in a rehabilitation program prior to formal implementation of an acceptable program.

III - No Overall Net Loss of Wetlands Goal (pages 12-14)

At the Fairbanks roundtable meeting on January 11, 1994 a consensus was reached that the "no net loss" policy could not work in Alaska and the Stakeholders requested that a strong statement reflecting this conclusion be placed in the proceeding's record. A majority (seven out of eight) of the stakeholders came to the same conclusion at the January 4, 1994 Juneau roundtable meeting and made a similar request for the record to clearly reflect this conclusion. This conclusion must be noted in the revised summary document and given serious consideration to revise some of this document's recommendations.

IV - Alternative Permit Processing Procedures (pages 14-15)

AOGA supports efforts by the Corps and EPA to streamline permit processing for applicants. AOGA recommends that Abbreviated Processing Procedures (APP) be developed for routine/minor oil and gas activities.

AOGA also recommended and endorsed the proposal in the draft Issue Papers for a GP for North Slope oil and gas activities along with expansion of the General Permit program in Alaska. Inexplicably, the recommendation for expanding the GP program in the State, including a GP for North Slope oil and gas activities, appears to have been dropped and replaced by a comment that the "continued use of such permitting mechanisms as general permits and abbreviated processing procedures" under certain conditions is appropriate. However, the only two actions proposed are simply a reaffirmation of an APP that is already in place, and publication of cumulative impact evaluations.

This lack of responsiveness to recommendations regarding General Permits (GP's), for example, is particularly disappointing because the increased use of GP's was strongly recommended by a clear majority of Stakeholders (and, indeed, the Clinton Administration's August 1993 Wetlands Policy). The comments on this issue downplay the support for GP's and appear to give greater weight to one particular segment of the commenting parties.

V - Individual Permit Process - (pages 15-16)

AOGA was disappointed that no significant recommendations were made with respect to the improvements in the Individual Permit process. AOGA recommended, for example, that an elevation procedure involving the permit applicant be adopted to provide for expeditious resolution of disagreements relating to proposed permit conditions or requested changes in project design. Guidance to applicants on how to respond to comment letters may be helpful but does not address the transaction difficulties and delays noted in previous comments and testimony by AOGA representatives. Significant revisions to the Individual Permit process are still needed to remove regulatory ambiguities, remove the bureaucratic mechanisms that impede fair and timely dispute resolution, and to address the lack of mandated and clearly defined deadlines for permit processing and approval.

VI. State, Local and Native Roles (pages 17-18)

The comment on "environmental justice" appears out of context and the topic was not discussed at the roundtable meetings or in the draft Issue Papers. No rationale is provided to explain the introduction and relevance of this new issue.

IX. Outreach and Education (pages 21-22)

In general, AOGA supports efforts to educate the public on values of wetlands and will be pleased to provide materials in this regard and participate as appropriate. AOGA encourages the Corps and EPA to develop a balanced program of wetlands education that represents a wide range of stakeholder views.

The comment on the unanimity of support for public outreach is correct but reveals the absence and reluctance elsewhere in this review draft to state or document unanimous or major support for positions on more controversial issues. An example is the omission to report the Stakeholder consensus in one roundtable meeting and a majority position in the others that a "no overall net loss of wetlands" policy in Alaska will not work.



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145-8-2537
514-5089

Will

FyI

Todd

Washington, D.C. 20530

MEMORANDUM FOR THE SOLICITOR GENERAL

APR 25 1994

Re: Northwest Forest Resource Council v. Espy
C.A. No. 93-1621 (D.D.C. Mar. 21, 1994)

FLA

TIME LIMITS

A notice of appeal would be due on May 20, 1994. It is important that a determination be made by that date since the filing of a protective notice will almost certainly trigger a cross-appeal. In addition, our Federal Programs branch desires a determination by May 12, 1994, so as to be able to finalize an attorney's fees agreement prior to a scheduled status conference.

RECOMMENDATIONS

The Environment and Natural Resources Division recommends against appeal.

I recommend against appeal.¹

QUESTIONS PRESENTED

Whether the district court erred in holding that the Forest Ecosystem Management Assessment Team (FEMAT) was an Advisory Committee within the meaning of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2.

STATEMENT

1. The FEMAT was one of three teams convened to assist President Clinton and the Administration in crafting a comprehensive management plan for federal forest lands in the Pacific Northwest and northern California within the range of the northern spotted owl. Under the supervision and direction of a committee of high-level government officials and Presidential advisors, the team performed an assessment of various forest-management options. Based in part on FEMAT's work, the President

¹ We have received no formal recommendations from the Departments of Agriculture and Interior. The Office of the Vice President and the White Counsel recommend against appeal, but would reconsider their recommendation if we received strong recommendations in favor of appeal. Per Todd Campbell, Office of the Vice President, after conferring with Joel Klein.

announced a Forest Plan on July 1. Following the completion of its written report about a week later, FEMAT disbanded and ceased to exist.

2. Plaintiff, a not-for-profit association representing the interests of the timber and other forest products industries, filed suit under the FACA. The FACA establishes uniform standards and procedures for the creation and public operation of committees subject to the Act. 5 U.S.C. App. 2 § 2(b)(4)-(6). Advisory committees subject to the Act must file a charter, hold their meetings in public, make all documentation and records available to the public under the terms of the Freedom of Information Act, and operate within regulatory guidelines promulgated by the General Services Administration. Furthermore, "[t]o the extent * * * applicable," presidential advisory committees must have a "fairly balanced" membership and "inappropriate[] influence[] by the appointing authority" must be avoided. Id. §§ 5(b)(2), 5(c), 7, 9, 10, 11. Advisory committees are broadly defined:

The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is --

- (A) established by statute or reorganization plan, or
 - (B) established or utilized by the President, or
 - (C) established or utilized by one or more agencies,
- 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. 2 § 3(2). However, the FACA explicitly excludes from its scope "any committee which is composed wholly of full-time officers or employees of the Federal Government." Id. § 3(2)(iii),

The government moved to dismiss on grounds of mootness. This motion was denied. The parties then cross-moved for summary judgment. The government advanced two principal arguments. It argued first that FEMAT was "composed wholly of full-time officers or employees of the Federal Government," even though the team included several state university professors who are not government employees in any sense apart from their work on the FEMAT.² Second, it argued that the FEMAT was formed to offer technical advice and was thus not an Advisory Committee.

² Plaintiffs argued that the FEMAT actually included many more outsiders.

The district court rejected both arguments. It concluded that the state university professors did not become full-time federal employees solely by virtue of temporary employment on a federal committee, even if time devoted to the committee far exceeded a forty-hour week for the committee's duration. The court also rejected the contention that the state university professors were federal "officers" by virtue of 5 U.S.C § 3372, which authorizes employees of state governments and universities to perform federal duties in certain circumstances. The court noted that the government had not appointed the professors pursuant to the procedures of that statute. The court further found that the FEMAT rendered policy advice and that, in any event, the FACA does not exclude committees formed to give technical advice.

Although plaintiffs sought far-ranging relief, the court confined its ruling to a declaratory judgment.

DISCUSSION

The FACA by its terms applies broadly to all committees established or utilized to give any type of advice that include even one individual who is not a full-time federal officer or employee. Recognizing the problems generated by a literal application of the statute, the courts have accepted narrowing arguments in some instances. Public Citizen v. Department of Justice, 491 U.S. 440, 446 (1989); Association of Am. Physicians and Surgeons v. Clinton, ("AAPS"), 997 F.2d 898, 908 (D.C. Cir. 1993). Although the briefs below eloquently explained the rationale for adopting an even more limiting construction here, we have always recognized that this case would be extraordinarily difficult to win. The court confined its relief to a declaratory judgment. Environment Division, which is handling the ongoing spotted owl litigation in Washington state, recommends against appeal. I agree that an appeal here would be fruitless and should not be taken.

Our contention that the university professors serving on the FEMAT were full-time government employees is unlikely to be persuasive to any court. The court of appeals will almost certainly conclude that the FACA could be easily circumvented if individuals could become full-time federal officers or employees merely by working intensively for a period of weeks on an advisory committee without severing their full-time employment.³ Moreover, this is not a case in which the outsiders were made "special government employees", a status established by statute which

³ For example, the Chairman of GM and the President of the UAW might perform a great public service by devoting two full months to a committee on industrial reform. Arguably, however, this is precisely the kind of outside involvement in policy-making to which the FACA was directed.

triggers certain ethical requirements. Nor, as the district court observed, were the professors appointed pursuant to 5 U.S.C § 3372. We note that the court of appeals in AAPS showed little enthusiasm for a similar argument advanced in that case. AAPS, 997 F.2d at 915.

The court of appeals is unlikely to disagree with the district court's conclusion that the FEMAT did not give purely technical advice. While many of the precise questions may have been technical, they formed part of an examination of major policy options. Moreover, the district court was correct in concluding that there is no exemption for committees giving technical advice. While this argument may be recast and advanced in another case with more favorable facts, it has minimal chance of success here.

Two further considerations militate against appeal. First, the decision, while unfortunate, does not expand the definition of an advisory committee as previously understood. It thus has little direct bearing on other pending litigation such as the remand in AAPS, which raises very different issues.

Second, while we recognize that this decision will present a complicating factor in the ongoing spotted owl litigation, Environment Division joins us in recommending against appeal. Indeed, there is a real risk that if the government appealed this decision the court of appeals would be sympathetic to a cross-appeal on the issue of relief. Plaintiffs seek, for example, to preclude the government from relying on the work of the FEMAT. Similar relief was ordered in Alabama-Tombigbee Rivers Coalition v. Fish & Wildlife Serv., D. Ct. No. 93-AR-2322-S (N.D. Ala.), appeal pending, No. 94-6089 (11th Cir.), and it appears that we are unlikely to succeed in reversing that order on appeal.

In short, the decision below is extremely frustrating, but there is virtually no chance of improving matters on appeal.

CONCLUSION

For the foregoing reasons, I recommend against appeal.

FRANK W. HUNGER
Assistant Attorney General
Civil Division

By:



Mark I. Levy
Deputy Assistant Attorney General
Civil Division

REGIONAL ECOSYSTEM OFFICE

P.O. Box 3623
PORTLAND, OREGON 97208
503/326-7600

MEMORANDUM

DATE: April 19, 1994

REPLY TO

ATTN OF:

Christine Walsh *CWalsh*

SUBJECT:

GSA FACA Experts

TO:

Will Stelle

The GSA FACA experts whose assistance we need are:

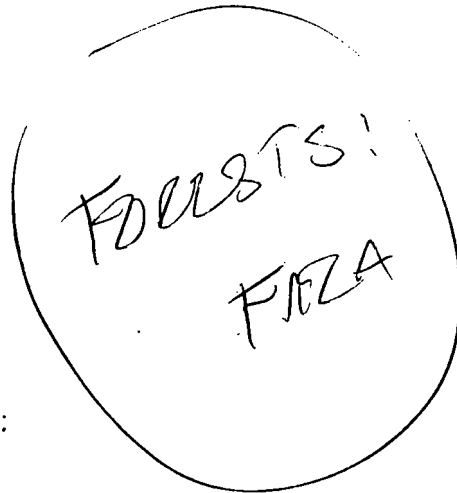
Jim Dean

Chuck Howton

They can be reached at 503-501-4884.

I have spoken with both of them and I also sent them some background material. Their reaction so far has been to "refer" the issue over to OMB - no name given.

I would appreciate your putting in a word with them to make sure they understand we need their help.



**PRESTON
THORGRIMSON
SHIDLER
GATES & ELLIS**

ATTORNEYS AT LAW

INTERAGENCY SEIS

MAR 28 1994

FSEIS - 1129

2085

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Telephone: (503) 228-3200
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March 28, 1994

**Robert T. Jacobs
Interagency FEIS Team
USDA, Forest Service
333 S.W. First
Portland, Oregon 97204**

Re: Final Environmental Impact Statement

Dear Mr. Jacobs:

Enclosed are comments of the Northwest Forest Resource Council, et al. on the Final Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Forest Related Species within the Range of the Northern Spotted Owl.

Please add this comments to the administrative record. Thank you.

Very truly yours,

Mark C. Rutziok
Mark C. Rutziok

**MCR:op
Enclosure**

**COMMENTS OF THE NORTHWEST FOREST RESOURCE COUNCIL ET AL.
ON FINAL ENVIRONMENTAL IMPACT STATEMENT
ON MANAGEMENT OF HABITAT FOR LATE-SUCCESSIONAL
AND OLD-GROWTH FOREST RELATED SPECIES WITHIN THE RANGE
OF THE NORTHERN SPOTTED OWL**

March 28, 1994

Northwest Forest Resource Council et al. ("NFRC")¹ submitted detailed and substantial comments to the Interagency SEIS Team on October 27, 1993, including the identification of several reasonable alternatives that should have been considered in the EIS. NFRC is very disappointed that the FEIS does not reflect any serious consideration of or response to these comments. NFRC will not, therefore, repeat any of those comments at this time.

NFRC wishes to bring to the attention of the Government the decision of the United States District Court for the District of Columbia in *Northwest Forest Resource Council v. Espy*, Civil Action No. 93-1621 (D.D.C. Memorandum and Order, March 21, 1994) (copy attached as Exhibit A) holding that the Forest Ecosystem Management Assessment Team ("FEMAT") acted illegally, in violation of the Federal Advisory Committee Act, by failing to open its meetings, to publish notice of its meetings, to allow the public to participate as required by law, to make its documents available to the public, to keep minutes of its meetings, to operate without any proper appointment, to operate without a charter, to fairly balance its members, to assure

¹The full list of commenters is set forth in the October 27, 1993 letter from John Hampton, Mark Rey and William Dennison to Robert T. Jacobs, and the materials attached thereto.

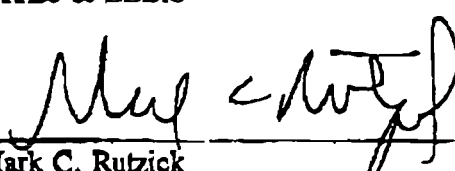
no inappropriate influence on its activities and to comply with the termination provisions of the law. Memorandum and Order at 11-12.²

NFRC believes that the Secretaries of Agriculture and Interior have no lawful rational basis on which they can rely on the illegal FEMAT Report in the selection of a forest management plan. We believe the Secretaries may not lawfully adopt any alternative in the FEIS that is based on the FEMAT Report. As you know, Alternative 9, the preferred alternative, was developed by FEMAT, and its analysis in the FEMAT Report is the foundation of the discussion of the alternative in the FEIS. The development and analysis of Alternative 9 is irrevocably tainted by the illegality of the FEMAT process and report. Adopting Alternative 9 would, in light of the decision in *NFRC v. Espy*, be without observance of procedure required by law, and would be unlawful.

We therefore urge the Secretaries not to adopt Alternative 9, or any other alternative in the FEIS that was developed and analyzed by FEMAT. To do so would only invite legal challenge and ensuing uncertainty that would undermine the objectives of the new plan.

Dated this 28th day of March, 1994.

PRESTON THORGRIMSON SHIDLER
GATES & ELLIS

By: 

Mark C. Rutzick
Of Attorneys for Northwest
Forest Resource Council et al.

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²NFRC incorporates into these comments the entire record in this case, including all pleadings and exhibits, a copy of which is currently in the possession of counsel for the Secretaries of Agriculture and Interior at the Department of Justice in Washington, D.C.

MEMORANDUM

TO: Katie McGinty
Will Stelle

FROM: Todd Campbell *TSC*

DATE: April 4, 1994

RE: Northwest Forest Resource Council vs. Espy

The Department of Justice has asked for our view on whether to appeal the FEMAT case (see attached). It is my opinion that we should not appeal.

Please let me know your opinion on this matter. I would be grateful if you could respond as soon as possible. I am planning to discuss this with the White House Counsel's office on Wednesday, April 6, 1994.

Many thanks.

TJC:aw

Attachment

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST FOREST RESOURCE COUNCIL,)
)
Plaintiff,)
)
v.)
)
ESPY, et al.,)
)
Defendants.)

Civil Action No. 93-1621

FILED

MAR 21 1994

MEMORANDUM AND ORDER

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

In two recent cases six federal justices and judges have written at length on the problem presented in this case, namely, the implications of the constraints placed by the Federal Advisory Committee Act ("FACA" or "the Act"), 5 U.S.C. App. 2 (1968), on the President's ability to solicit and receive collective advice privately and without formality.¹ Their several opinions developed most of the research and reasoning that underlies this decision as well, and it need not, therefore, be reiterated here. Superficially characterized, however, their scholarship in the aggregate has revealed FACA to be an uncomfortably broad statute, dating from 1972, that would, if

¹In Washington Legal Foundation v. U.S. Dept. of Justice, 691 F. Supp. 483 (D.D.C. 1988), aff'd on other grounds sub nom. Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440 (1989), the Supreme Court held that a privately organized and funded committee of the American Bar Association, was not "utilized," in the sense Congress intended in FACA, by the President in making appointments to the federal judiciary.

In 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) ("AAPS"), the D.C. Circuit held that the President's spouse could be deemed a de facto officer or employee of the federal government, thus making FACA inapplicable to a task force otherwise comprised of federal officials advising the President on health care reform.

literally applied, stifle virtually all non-public consultative communication between policy-making federal officials and a group of any two or more other people, any one of whom is not in government service. As a result, the majority opinions in those cases were at pains to elide the literal reading of FACA to avert what those courts believed were surely legislatively unintended consequences on the one hand, or a major constitutional issue on the other.

This case arises upon yet another attempt by the Executive Branch to escape the toils of FACA in formulating the current Administration's policy for the future of over 24 million acres of federally owned forest lands in the states of Oregon and Washington. The plaintiff Northwest Forest Resource Council ("NFRC") is a not-for-profit association incorporated in Oregon representing the interests of the timber and other forest products industries in the two states. Defendants are the U.S. Secretaries of Agriculture and Interior, a group of individuals comprising the object of this suit, an entity known as the Forest Ecosystem Management Assessment Team ("FEMAT"), and FEMAT's chairman, a research wildlife biologist with the U.S. Forest Service.

Plaintiff alleges that, as convened and employed by the President, FEMAT constituted an "advisory committee" within the contemplation of FACA which, if so, then entitled NFRC (and the public generally) to certain rights to be (or to have been) privy to and to have participated in FEMAT's proceedings. Having been denied those rights while FEMAT was engaged in preparing a

document, published in July, 1993, upon which the defendant secretaries will, at the President's direction, in major part rely in establishing and implementing a "Forest Plan," NFRC asks this Court to declare FEMAT to have been an "advisory committee" and accord NFRC as many of those rights as possible nunc pro tunc; to declare FEMAT's proceedings null and void for failure to comply with FACA; and to enjoin defendants from any reliance upon FEMAT's report in managing federal forest lands unless and until FEMAT complies with FACA.

Defendants respond that, for various reasons, FEMAT was never conceived, nor did it function, as an "advisory committee" under FACA, and, were this Court to find it so, then FACA itself must be deemed an unconstitutional invasion of the executive privilege for communications necessary to his exercise of the powers entrusted by the Constitution to the President. See United States v. Nixon, 418 U.S. 683, 705 (1974), and Nixon v. Administrator of General Services, 433 U.S. 425, 449 (1977).

The case is presently before the Court on cross-motions for summary judgment.¹ For the reasons to follow the Court will grant plaintiff's motion for summary judgment in part, deny the

¹Also pending is defendants' motion to dismiss the claims made in certain counts of the amended complaint, on the grounds that plaintiff lacks standing to assert those claims and the non-justiciable character of the relief they seek. The Court concludes that NFRC has standing, a fortiori as the plaintiffs had standing in Public Citizen, see 491 U.S. at 448-51, and that the disposition on the merits herein makes it unnecessary to address the issue of justiciability.

defendants' motion for summary judgment, and grant the relief hereinafter set forth.

I.

The material facts are of record and are not genuinely in dispute. On April 2, 1993, President Clinton, Vice President Gore, and other government officials (including the defendant Secretaries) attended a day-long "forest conference" in Portland, Oregon, to address the long-standing controversy between environmentalists and the forest products industry over the uses to be made of federal forest lands. At the conclusion of the conference, the President announced that the Administration planned to "begin work immediately to craft a balanced, a comprehensive, and a long-term policy" toward forest management. Concurrently (or nearly so) with the President's announcement, Katie McGinty, Director of the White House Office of Environmental Policy, in the Executive Office of the President, established an inter-agency group called the Forest Conference Executive Committee ("Executive Committee") to direct and supervise the work of FEMAT, which was then already in the formative stages. Ms. McGinty chaired the Executive Committee. Other active members of the Executive Committee included Thomas Collier, Chief of Staff of the Interior Department, James Lyons, Assistant Secretary of Agriculture for Natural Resources, and five other sub-Cabinet officials. The Executive Committee instructed FEMAT to identify management alternatives, employing an "ecosystem" approach, to attain the "greatest economic and

social contribution from the forests." Defendant Jack Ward Thomas, a biologist with the U.S. Forest Service, was named the leader of FEMAT and reported weekly on FEMAT's progress to the Executive Committee.

FEMAT was composed of six subteams whose participants admittedly included private contractors paid with federal funds. FEMAT also established 14 advisory subgroups to provide it with biological impact assessments on various forms of plant and animal life. Altogether somewhere between 600 and 700 people contributed in some way to FEMAT's work. The subteams and each of the advisory subgroups eventually had benefit of the services of some non-federal personnel, and although the parties are not in agreement as to which of the 600-700 individuals should be counted as "members" of FEMAT for purposes of FACA, in May, 1993, the Administration released a list of 37 FEMAT participants who defendants are presently willing to acknowledge must be deemed "members." At least five of those people, defendants also concede, were not regular federal employees. They were Norman Kenneth Johnson, Brian Greber, and George Stankey, full-time faculty members at Oregon State University; and Margaret Shannon and Jerry Franklin, both on the faculty of the University of Washington. None of those professors took leaves of absence from their institutions while working for FEMAT; all continued to

receive their full faculty paychecks, and they or their universities were paid varying sums by the federal government.³

On July 1, 1993, President Clinton announced his "Forest Plan for a Sustainable Economy and a Sustainable Environment" ("Forest Plan") which is based in significant part on Option 9, one of the ten forest management "options" presented by FEMAT in its Report. On July 16, 1993, the Forest Service released the FEMAT Report of over 1,000 pages,⁴ and an ensuing "Draft Supplemental Environmental Impact Statement" analyzed only the FEMAT-sanctioned options with Option 9 appearing as the preferred alternative.

The final policy embodied in the Forest Plan is expected by all parties to go into effect on March 31, 1994, pursuant to the order of another district judge. See Seattle Audobon Soc'y v. Moseley, 798 F. Supp. 1484 (W.D. Wash. 1992).

II.

The defendants first argue that FEMAT was simply not an "advisory committee" or not the sort of "advisory committee" with which FACA is concerned. But FACA itself defines an "advisory committee" to which it applies as "any committee, board,

³Defendants estimate the total cost to the government of FEMAT at \$3.1 million, of which approximately \$443,000 (14%) was paid for non-federal contractors' services.

Expenditures were made for office space rental, travel, computers, overtime, and support services, as well as for salaries of replacements for federal employees detailed to FEMAT for extended periods.

⁴The FEMAT Report itself lists 104 names of major contributors to it, 24 of whom were not regular federal employees, although some of the 24 provided only clerical or support services.

commission, council, conference, panel, task force, or other similar group, or any subcommittee or subgroup thereof" that is "established or utilized" by the President or an agency "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. 2 § 3(2).

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(a)(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.

As the Supreme Court observed in Public Citizen, "FACA was enacted to cure specific ills, above all the wasteful expenditure

of public funds for worthless committee meetings and biased proposals." Public Citizen, 491 U.S. at 453. Simply expressed, the counsel of persons who have been "appointed in the civil service," see 5 U.S.C. §§ 2104, 2105, costs the government nothing more in the way of compensation; their conduct is strictly hedged about by statute and rule to protect against temptation to profit financially from the advice they give; and they ostensibly have no parochial interests to serve apart from the general public good.⁵

In attempting to stretch the language of FACA's exception for committees "composed wholly of full-time officers or employees of the federal government" to reach FEMAT, however, the defendants take the concept of being in federal service to a meaningless extreme. They submit that the five outsiders, the professors who contributed to the work of FEMAT (and the only contributors they will concede to have been "members" of it) should still be regarded as "officers or employees of the federal government" within the meaning of the exception, because, as faculty at state universities, they were "state employees," and as such could have been "assigned," under an unrelated statute, 5 U.S.C. § 3372 (1988), to engage in the performance of a federal function had it occurred to anyone that it might be necessary.

⁵Conversely, as another judge has put it, "[b]ecause committees not composed exclusively of federal officers and employees have members who are not required to forswear their private associations and insulate themselves against potential conflicts of interest, FACA requires, as an alternative check, that their deliberations be conducted in the open." AAPS, 997 F.2d at 921-22 (Buckley, J., concurring).

But the presence of state employees on an advisory panel has, notwithstanding 5 U.S.C. §3372, not saved such panels from FACA in the past. See Center for Auto Safety v. Cox, 580 F.2d 689 (D.C. Cir. 1978). Moreover, none of the five professors were ever officially assigned federal duties, and none of the formalities that would be expected to attend such assignments were ever observed. See 5 U.S.C. § 3374.

Even if the Court were to find that the state university professors were "federal employees," they would not qualify as being "full-time" unless, as the defendants propose, they be given credit for full-time work because they each averaged over 40 hours per week for FEMAT during its existence. But the exception for "full-time officers and employees" only supports the purposes of FACA if the term as used in FACA is interpreted as drawing a distinction between regular civil servants and outsiders or hybrids; it clearly has no place in FACA as a wage-and-hour rule. As the AAPS court noted, "FACA would be rather easy to avoid if an agency could simply appoint 10 private citizens as special government employees for two days, and then have the committee receive the section 3(2) exemption as a body composed of full-time government employees." AAPS, 997 F.2d at 915.

The defendants then submit that academics on advisory committees shouldn't count as outsiders, because they do not implicate Congress' underlying concern that advisory committees not be dominated by "industry leaders and the like with

substantial parochial interest in the outcome." Natural Resources Defense Council, Inc. v. Herrington, 637 F. Supp. 116, 120 (D.D.C. 1986). Nowhere, however, does FACA or its history support the proposition that the only special interests with which Congress was concerned were those inspired by mercenary motives. Scholars no less than business people have been known to have personal agendas. And the composition of FEMAT, as a whole -- federal and otherwise -- at least suggests, as plaintiff alleges, that the vast majority of them were pro-"ecosystem management," having minimal sympathy for the forest products industry.

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).

III.

Having concluded that FEMAT was subject to FACA, the Court also finds that FEMAT was convened and did its work in violation of the Act's requirements for the proper conduct of "advisory committee" business. Indeed, it is undisputed that: FEMAT refused to open its meetings to NFRC and the public in violation of section 10(a)(1); FEMAT failed to publish notice of meetings in the Federal Register contrary to section 10(a)(2); FEMAT failed to allow volunteers to attend meetings or otherwise participate in its activities in violation of section 10(a)(3); FEMAT failed to make its records and other documents available for public inspection as prescribed by section 10(b); FEMAT failed to keep detailed minutes of meetings in violation of section 10(c); the establishment of FEMAT was not properly authorized as required by section 9(a); FEMAT failed to file an advisory committee charter in violation of section 9(c); FEMAT made no attempt to fairly balance its membership as required by section 5(b)(2); FEMAT took no special precautions to assure that

its advice and recommendations were not inappropriately influenced by special interests in violation of section 5(b)(3); and FEMAT did not comply with the termination provisions of sections 10(d) and 14.

IV.

The defendants argue that if, as the Court has found, FEMAT was an "advisory committee" under FACA whose advice was integral to the Administration's decision to adopt the Forest Plan, the application of FACA to the FEMAT proceedings would transgress the constitutional doctrine of the separation of powers, thus rendering it inevitable that the Court must declare the statute unconstitutional as applied.

Both the Supreme Court majority in Public Citizen and the D.C. Circuit majority in AAPS were able, by adroit semantics and near-clairvoyant discernment of legislative intent, to avoid that drastic result in the circumstances of those cases, but not, however, without difficulty, and in doing so incurred stern disapprobation from concurring brethren who were less squeamish. In Public Citizen, the Supreme Court employed a narrow construction of the word "utilized" (as in "utilized by the President" in FACA) to avoid the constitutional implications of applying FACA to a privately organized and funded group of "advisors" who had, for years before FACA, been regularly offering its opinions of prospective federal judges to the Department of Justice. Proceeding on an opposite tack, the AAPS court adopted an expansive definition of the term "federal

officer or employee" as used in FACA to embrace the President's spouse de facto to enable the court to avoid a similar constitutional dilemma. Had she not been deemed such, her presence on the Health Care Task Force -- the sole "outsider" -- would have subjected the Task Force to FACA despite its "operational proximity to the President himself." AAPS, 997 F.2d at 909.⁶

This Court has, however, rejected the opportunities offered by defendants to engage in similar creative statutory construction and interpretation, and no others have manifested themselves spontaneously. Nevertheless, the importance of avoiding the constitutional issue to the last, acknowledged by both the Public Citizen and AAPS courts, 491 U.S. at 465-67; 997 F.2d at 912, n. 12, must still be respected if at all possible, and the avenue by which escape lies for this Court is found in the measure of the remedy to be given on the plaintiff's complaint.

FACA itself does not prescribe remedies for violations of its requirements. Thus, the Court must exercise its general equitable powers (while observing its own constitutional limitations) to fashion any relief that would represent an

⁶The Court notes in passing that the decision-making apparatus employed by the President in AAPS is not dissimilar to that involved here. As the Health Care Task Force was to the "working group" in AAPS, so the Executive Committee is to FEMAT in this case, and the AAPS court made clear that the constitutional implications of applying FACA to the "working group," as distinguished from the Task Force, were greatly diminished.

appropriate remedy for plaintiff's injuries caused by the violation of FACA. Franklin v. Gwinnett County Public Schools, ___ U.S. ___, 112 S.Ct. 1028, 1033-35 (1992)

NFRC has prayed for the following relief:

1. a declaratory judgment to the effect that FACA was violated by FEMAT as set out above;
2. an order that defendants make all FEMAT records immediately available to plaintiff, whether or not the documents would be subject to a FOIA exemption;
3. an order directing FEMAT to issue a report summarizing its activities at meetings, as required by section 10(d);
4. an order directing the leader of FEMAT to prepare detailed minutes of each meeting; and
5. an order prohibiting the government from utilizing the FEMAT report as a basis for federal policy or regulations until FEMAT completes an advisory process in compliance with FACA.

No reason is shown not to enter the requested declaratory judgment; indeed, if there is any conclusion inevitable from the foregoing, it is that the declaratory judgment prayed must be given.

As to production of all FEMAT documents, the defendants claim that they have assembled all documents from all 600-plus FEMAT "participants," and that those documents which are not subject to FOIA exemptions are now publicly available. Plaintiff has a separate FOIA request pending. It will fall to any reviewing court to determine the merit of the defendants'

decisions to withhold any documents on FOIA-exemption grounds when administrative appeals are exhausted.

As to plaintiff's request for preparation of a final report and the minutes of meetings, the defendants contend that the FEMAT Report itself satisfies the requirements of section 10(d) and that preparation of some comparable document at this late date would be redundant, superfluous, and overly burdensome; the FEMAT Report constitutes a sufficient "summary of [the committee's] activities and such related matters as would be informative to the public," say defendants, and the Court agrees.

To the extent that plaintiff seeks the minutes of meetings to reveal FEMAT's internal deliberations and decisionmaking processes, there are, as plaintiff itself acknowledges, more effective ways to gather this information. There is, moreover, no evidence that any "minutes," as such, exist.

Finally, plaintiff seeks an order enjoining the Administration from relying upon the FEMAT report to promulgate regulations implementing its Forest Plan. Such an injunction is, of course, the relief of which plaintiff is most desirous. In the Court's opinion, however, such an injunction would exceed the injury presently to be redressed. There is nothing in the record to suggest that the FEMAT Report, or its advice and recommendations to the President, would have in any way been altered had FACA been complied with to the letter. It would, moreover, be premature. At the moment the Forest Plan is merely a plan; it has yet to be translated into action. There will be

time enough when the Forest Plan is implemented to determine if any harm it does to NFRC and its constituents can be traced to FEMAT.

Of greatest significance to the Court in declining to issue the injunction is the affront it would represent to the separation-of-powers principle. The Court is aware of no authority upon which it could confidently rely in concluding that it may forbid the President and his Cabinet to act upon advice that comes to them from any source, however irregular.⁷ There is no "exclusionary rule" applicable to the decisionmaking processes of the President. And it is certainly no less presumptuous than would be a similar instruction from Congress to the President -- as plaintiff deems FACA to be -- as to what he can and cannot consider in executing the duties of his office.

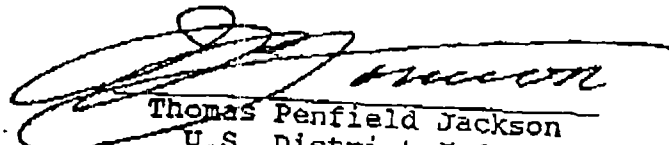
It is sufficient for present purposes, and all that this Court concludes it should award, that plaintiff have the declaratory judgment it has prayed for. The effect and consequences of that judgment will be left to other courts and/or other cases.

It is, therefore, this 21st day of March, 1994,

ORDERED, that defendant's motion for summary judgment is denied, and plaintiff's motion for summary judgment is granted in part; and it is

⁷But see Alabama-Tombigbee Rivers Coalition v. Fish and Wildlife Service, Civil No. 93-AR-2322-S (N.D. Ala.) (December 22, 1993).

FURTHER ORDERED, ADJUDGED and DECREED, that the Forest Ecosystem Management Assessment Team was and is an advisory committee subject to the Federal Advisory Committee Act, 5 U.S.C. App. 2 (1988), and that its proceedings from approximately April 2, 1993, to July 16, 1993, were conducted in violation of the Act.



Thomas Penfield Jackson
U.S. District Judge