The Federal Advisory Committee Act: An Obstacle to Ecosystem Management by Federal Agencies

Sheila Lynch
THE FEDERAL ADVISORY COMMITTEE ACT: AN OBSTACLE TO ECOSYSTEM MANAGEMENT BY FEDERAL AGENCIES?

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Abstract: Ecosystem management, the new guiding concept for federal land management, requires collaboration and information sharing across ownership boundaries, facilitation of changes in social values, and adaptation to new scientific and social information. Particularly in the western states, the federal land management agencies have been involved to varying degrees in innovative collaborative processes with the goal of implementing ecosystem management. However, the Federal Advisory Committee Act (FACA), which places numerous procedural requirements on certain federal interactions with non-federal parties, has been cited as an obstacle to federal participation in these efforts. This Comment presents an analytic framework for determining when FACA applies and recommends strategies for overcoming this perceived obstacle to ecosystem management.

In 1972, the Federal Advisory Committee Act (FACA) was enacted to combat the secrecy, wastefulness, and unbalanced representation typical of many committees advising the federal government on national policies. FACA requires groups it defines as advisory committees to follow certain procedures. In the summer of 1994, the fear of potential FACA violations caused the U.S. Forest Service (USFS) and Bureau of Land Management (BLM) to curtail their involvement in a Southern Oregon initiative heralded as one of the leading efforts to improve and coordinate land management with increased public participation. The federal land management agencies repeatedly have cited FACA as a stumbling block in their efforts to implement ecosystem management.

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1. Pub. L. No. 92-463, 86 Stat. 770 (codified as amended at 5 U.S.C. app. (1994)). 2 U.S.C.A. § 1534(b), enacted in 1995, exempts meetings between state, local, tribal, and federal government employees from FACA, where "such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration."


This Comment addresses whether FACA applies to various federal ecosystem management efforts and suggests potential remedies for its resulting chilling effect. First, the Comment describes the concept of ecosystem management and some of the collaborative groups organized to implement it. Second, it reviews FACA case law and discusses whether courts are likely to find that various collaborative efforts fit within the scope of the statute. Third, the Comment discusses some of the problems likely to arise if ecosystem management groups are required to comply with FACA. Finally, it suggests ways in which the statute or agency regulations and guidelines might be changed to further the goals of FACA in the ecosystem management context, while reducing the uncertainty and other obstacles presented by FACA, its implementing regulations, and relevant case law.

I. ECOSYSTEM MANAGEMENT AS THE NEW PARADIGM FOR LAND MANAGEMENT

A. Defining Ecosystem Management

Despite the growing acceptance of the ecosystem approach to land management, the term "ecosystem management" has been defined differently according to discipline and perspective. Many commentators agree that in addition to the scientific basis, there are social and economic elements to the concept. While disagreement exists regarding the relative importance of these components, there appears to be a consensus that ecological considerations are the foundation.


6. Id. at 29–31. See also Margaret A. Moote et al., University of Arizona, Principles of Ecosystem Management 1 (1994); Keystone Center, National Ecosystem Management Forum Meeting Summary 6 (Nov. 16–17, 1993).

7. See Grumbine, supra note 5, at 28; Keystone Center, supra note 6, at 6.

8. Grumbine, supra note 5, at 32; GAO Report, supra note 4, at 6 ("The practical starting point for ecosystem management will have to be to maintain or restore the minimum level of ecosystem health necessary to meet existing legal requirements.").
At the core is the idea that land and wildlife managers should manage ecosystems, not just individual species. An ecosystem is defined as "[a] community of organisms, interacting with one another, plus the environment in which they live and with which they also interact." Ecosystems may be identified at a variety of scales, from small plots of land to entire continents. Most conservation biologists advocate a land management focus on large-scale ecosystems, and ecosystem management efforts to date have been conducted on a large scale.

The federal land system contains only some parts of large-scale ecosystems, the result of ownership and management designations based on politics rather than biology. As a result, ecosystem management proponents advise extending ecosystem protection across ownership and jurisdictional boundaries. Financial and political considerations make it highly unlikely that the federal government will acquire the land needed to protect large-scale ecosystems. Therefore, most agree that ecosystem management requires some form of coordinated management of public and private lands within ecosystems. Land management along ecosystem boundaries, rather than ownership and jurisdictional boundaries, requires new institutions and forms of communication to coordinate management practices, facilitate an exchange of ecological and social information among landowners, and accommodate and account for changes in social values.

11. GAO Report, supra note 4, at 21-22.
14. GAO Report, supra note 4, at 57.
16. Errol E. Meidinger, Organizational and Legal Challenges for Ecosystem Management 1-2, in Creating a Forestry for the 21st Century: The Science of Ecosystem Management (Jerry F. Franklin & Kathryn A. Kohm eds., forthcoming 1996); M.A. Shannon & C. Anderson, Institutional Strategies for Landscape Management, in Washington Forest Landscape Management Project—Progress Report 146 (Washington Dep't of Natural Resources, Washington Dep't of Fish & Wildlife, and U.S. Forest Service, Andrew B. Carey & Catherine Elliot eds., 1994) ("As is the case in all aspects related to what can be broadly termed ecosystem management, the capacity for cross-jurisdictional
Ecosystem management, according to most analysts, also includes an economic component. One leading commentator contends that one such component is "Humans Embedded in Nature." This human factor has prompted many proponents of ecosystem management to call for the development of sustainable economies within ecological constraints.

Collaboration among those with an interest in an ecosystem is an important element of ecosystem management. Collaborative groups can increase information exchange between landowners and managers, facilitate management across jurisdictional boundaries, and support management practices likely to reduce or change the economic uses of natural resources. Federal sources, including the recent General Accounting Office report on ecosystem management, recognize a need for building collaborative frameworks among federal agencies, other government entities, and private landowners.

B. Adoption of the Concept of Ecosystem Management by Federal Agencies

In the 1990s, federal policy has begun to shift toward ecosystem management of federal lands. Since 1992, all four of the federal land management agencies (USFS, BLM, National Park Service, and U.S. Fish and Wildlife Service) have announced their intent to adopt an ecosystem approach to management of the lands in their jurisdictions.

In directing the Secretaries of Agriculture and the Interior to issue a record of decision on management of Pacific Northwest forests, coordination is the major potential barrier in developing a landscape management approach.


17. Grumbine, supra note 5, at 31.

18. Participants in the 1993 Keystone Center National Ecosystem Management Forum defined the goal of ecosystem management as "preserving, restoring or, where those are not possible, simulating ecosystem integrity as defined by composition, structure and function that also maintains the possibility of sustainable societies and economies." Keystone Center, supra note 6, at 9 (emphasis added).

19. See, e.g., Moote et al., supra note 6, at 1; GAO Report, supra note 4, at 70–71 (citing Department of Interior comments on the report: "Just as interagency collaboration is important, finding ways to increase voluntary cooperation with state, tribal, and local governments, as well as nongovernmental organizations and the public, is key to effective ecosystem management."). However, there is disagreement as to who should be represented in such efforts; whether local interests alone should be represented or whether a broader range of interests should be included. See, e.g., Keystone Center, supra note 6, at 5.

20. GAO Report, supra note 4, at 57.

21. Id. at 4.
President Bill Clinton required adoption of an ecosystem management approach.\textsuperscript{22}

\textbf{C. Collaborative Ecosystem Management Groups}

Ecosystem management efforts to date have involved a variety of collaborative, multi-interest groups with varying levels of federal participation. Most groups have at least a core of federal officials, environmental advocates, and representatives of resource extraction industries, who make decisions by consensus.\textsuperscript{23}

Both federal and state agencies show increasing interest in the use of such groups in resource agency decisionmaking. For instance, the federal management plan for the Pacific Northwest forests has created Adaptive Management Areas (AMAs) whose mandate includes innovation in collaborative efforts across political jurisdictions and ownership boundaries.\textsuperscript{24} Similarly, Washington State’s Department of Natural Resources has produced a study on landscape management, which includes a section on collaborative, consensual decision-making.\textsuperscript{25}

The following sections describe models of ecosystem management groups that are loosely based on characteristics of existing groups. The analytic categories used correspond to issues raised by FACA case law.\textsuperscript{26}


\textsuperscript{24} \textit{Record of Decision}, supra note 22, at D–4 to D–5 (discussing social objectives of Adaptive Management Areas, and noting that the AMAs “should provide opportunities for land managing and regulatory agencies, other government entities, nongovernmental organizations, local groups, landowners, communities, and citizens to work together to develop innovative management approaches”).

\textsuperscript{25} Shannon & Anderson, supra note 16, at 152–56.

\textsuperscript{26} \textit{See infra} part II.B.
I. Formation of Ecosystem Management Groups

Ecosystem management groups that have been studied suggest three models of formation. The "independent" model is formed outside of the auspices of federal agencies but with their participation either during or after formation. Such groups develop their own statements of purpose and have self-selecting memberships.

The "collaborative" model is suggested by groups initially proposed by non-federal parties, but organized with relatively extensive federal involvement in the form of initial approval, funding, and administrative support.

A third model of formation may arise under the federal Forest Plan for the Pacific Northwest. Under the Forest Plan, the federal agencies might choose to create and use citizen advisory groups as part of the AMA strategy. In some areas, where the capacity for self-organization does

27. The independent model is based on various characteristics of the Applegate Partnership, as described in Lynch, supra note 4, at 2–11; Washington State's Timber, Fish & Wildlife Agreement, as described in Lynch, supra note 23; and the Yakima Resource Management Cooperative, as described in Wondolleck & Yaffee, supra note 23. The Applegate Partnership was formed through the efforts of a local environmentalist and a member of an aerial forestry foundation, who brought together representatives from environmental groups, industry groups, local government, the Forest Service and the Bureau of Land Management. Lynch, supra note 4, at 3–4. An initial group wrote a vision statement and created the Applegate Partnership's Board. Id. The Timber Fish & Wildlife agreement (TFW) was formed through the joint efforts of environmentalists, industry, Native American tribes, and the Washington Department of Natural Resources (DNR). Lynch, supra note 23, at 2. Finally, the Yakima Resource Management Cooperative in Eastern Washington was formed by the parties to the TFW agreement and included the Forest Service. Wondolleck & Yaffee, supra note 23, at 8–1.

28. See, e.g., Wondolleck & Yaffee, supra note 23, at 8–2; Lynch, supra note 4, at 3–4. For instance, the Cooperative Monitoring, Evaluation, and Research Committee, part of the organization created to administer Washington State's Timber, Fish & Wildlife agreement, must always have members from environmental groups, industry, Native American tribes, and state agencies. See Lynch, supra note 23, at 2–3.

29. The "collaborative" model is based on various characteristics of the Negrito Ecosystem Project in New Mexico (NEP) and to some extent the Blue Mountains Natural Resources Institute (BMNRI). See Wondolleck & Yaffee, supra note 23, at 2–1 to 2–5, 4–1 to 4–5. The NEP was formed when members of a local conservation group approached the Forest Service about doing ecosystem management. The Forest Supervisor approved the idea, and a group including Forest Service staff, an environmentalist, a timber company representative, a county extension agent, and a grazing permittee began to meet. The BMNRI was formed when local citizens who were unsatisfied with the extent to which research at the Forest Service's Pacific Northwest Research Station (PNW) addressed local concerns proposed a new conduit for public input on research. The BMNRI is a Forest Service research, development, and application program and is administratively located in PNW.

30. Under the plan for management of federal forest lands in the Pacific Northwest, the Adaptive Management Areas are mandated to encourage participation of those who express an interest in the AMAs. Experimentation with the forms that such participation might take is encouraged. Record of

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not exist, ecosystem management groups might be federally initiated. Federal agencies might provide meeting space and funding, and play a prominent role in the initial organization of such groups.

2. *Operation of Ecosystem Management Groups*

The operation of ecosystem management groups may be broken down into two components for the purpose of analysis under FACA. First, the level of control and management by the federal government is important. Second, the types of activities carried out by the group are critical.

Ecosystem management groups evince a range of federal control and involvement in their management. For the purpose of this paper, two models will be used. “Independent groups” operate independently of federal agencies, but have federal agency members. These groups run their own meetings, receive funding from multiple sources, and set their own agendas. While they may propose actions or policies to federal or other government agencies, their emphasis is the management of the entire ecosystem. Other groups, labeled “collaborative groups” for purposes of this Comment, tend to be administratively located within agencies, receive most of their funding from agencies, and have a focus on federal policies and activities.

A feature that most ecosystem management groups share, regardless of whether they are similar to the independent or collaborative models described above, is that federal and non-federal group members share responsibility for defining the goals and purpose of the group. In

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decision, supra note 22, at D-5 to D-6. Currently, federal efforts to work collaboratively with others in the AMAs is being hindered by concerns about FACA violation. See, e.g., Vanderwood & Antypas, supra note 4, at 8; Lynch, supra note 4, at 16–17.

31. See infra notes 89–97 and accompanying text.

32. See infra notes 101–10 and accompanying text.

33. It is conceivable that groups that are independently formed may be collaboratively operated, and vice versa. Therefore, it should not be assumed that a group whose formation resembles the independent model of formation will necessarily be operated in a way that resembles the independent model of operation.

34. For examples of groups resembling this model, see Wondolleck & Yaffee, supra note 23, at 8-1 to 8-5; Lynch, supra note 4; Lynch, supra note 23.

35. Lynch, supra note 4, at 2, 9–10; Wondolleck & Yaffee, supra note 23, at 8-2 to 8-3.

36. This model is based loosely on characteristics of the Negrito Ecosystem Project and the Blue Mountains Natural Resources Institute. See Wondolleck & Yaffee, supra note 23, at 2-1 to 2-5, 4-2 to 4-5. Both of these groups are administered and heavily funded by the Forest Service.

37. See, e.g., Wondolleck & Yaffee, supra note 23, at 2-2, 4-3, 8-2; Lynch, supra note 4, at 4–7.
addition, both categories of members decide which issues should be addressed or which projects should be undertaken. With respect to the activities of ecosystem management groups, two issues are of concern. First, many groups deal with ecosystems owned by several entities. Second, while some groups do give advice directly, several carry out a wide range of functions including projects on private land, public education, research, data gathering, and monitoring.

II. THE FEDERAL ADVISORY COMMITTEE ACT

Congress enacted FACA in 1972 to deal with several concerns about federal use of advisory committees. Senate hearings revealed that advisory committees continued to absorb revenue for redundant or obsolete purposes despite regulation by the executive branch. In addition, the hearings showed that advisory committees, contrary to the public access requirements of Executive Order 11007, often “met in secret . . . [and] charged exorbitant fees for their minutes, if they kept any at all.” A 1970 House Report set forth twenty recommendations for management of advisory committees. Many of these were incorporated into a bill that, with some modification, became law as FACA in 1972.

38. See, e.g., Wondolleck & Yaffee, supra note 23, at 2-2, 4-3.
39. See, e.g., Lynch, supra note 4, at 2; Wondolleck & Yaffee, supra note 23, at 8-1.
40. For example, BMNRI carries out demonstration projects, offers publications, organizes meetings and workshops, and carries out applied research. Wondolleck & Yaffee, supra note 23, at 2-1 to 2-2. The Yakima Resource Management Cooperative has developed a watershed remediation plan, published a public education pamphlet, and jointly funded research projects. Id. at 8-2 to 8-3. The Applegate Partnership has sponsored and organized demonstration projects, organized and obtained funding for watershed restoration projects, and publishes a newsletter. Lynch, supra note 4, at 9-10.
42. 3 C.F.R. 573 (1959–1963). This Executive Order was a pre-FACA attempt to increase government control over advisory committees and to limit their membership. Levine, supra note 2, at 220–21.
43. William H. Rodgers, Jr., Environmental Law § 1.7, at 77 (2d ed. 1994). A pre-FACA advisory committee that exemplifies some of the problems FACA was intended to solve was the National Industrial Pollution Control Council. See William H. Rodgers, Jr., The National Industrial Pollution Control Council: Advise or Collude?, 13 B.C. Indus. & Com. L. Rev. 719 (1972).
45. Levine, supra note 2, at 222–25.
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A. FACA Provisions

FACA addresses the problems of advisory committees in two ways. It controls the creation, membership, and jurisdiction of the committees, and it creates procedural requirements intended to increase openness and federal control of committee proceedings.46

FACA’s controls on the federal creation and continued existence of advisory committees are aimed at reducing redundancy, wastefulness, and representative imbalance on advisory committees. Federal officials must determine whether a proposed committee’s work could be done by an already established committee.47 Statutory guidelines require federal proponents to provide a clearly defined purpose for a proposed advisory committee, require that committee membership be “fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee,”48 and assure that the advice given the committee will not be “inappropriately influenced” by special interests.49

A new advisory committee may not meet until it files a charter with either with the Administrator of General Services in the case of presidential committees, or with the appropriate administrative agency head and standing congressional committees.50 A charter must include the committee’s purpose and scope of activity, the period of time necessary for it to carry out its purpose, the agency or official to whom it reports, and a description of its duties.51 If an advisory committee is not renewed by a federal official and its life span is not determined by statute, the committee is automatically terminated two years after its establishment.52

FACA’s procedural requirements provide for public notice and access, and for increased federal supervision. Committee meetings must be open

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47. Federal Advisory Committee Act, 5 U.S.C. app. § 5(b)-(c) (1994). The requirements in § 5(b) apparently apply only where federal actors are considering the establishment of an advisory committee. These requirements apply to the standing committees of Congress through § 5(b) and are extended to other federal officials through § 5(c) “to the extent they are applicable.”
50. FACA, 5 U.S.C. app. § 9(c) (1994). This requirement apparently applies to both federally created and federally utilized committees. See Food Chem. News, Inc. v. Davis, 378 F. Supp. 1048 (D.D.C. 1974) (holding that utilized advisory committee was required to have charter and otherwise be established by utilizing agency).
51. FACA, 5 U.S.C. app. § 9(c).
to the public\textsuperscript{53} and advertised in the Federal Register.\textsuperscript{54} Minutes and other committee documents must be made available to the public for inspection or copying.\textsuperscript{55} Advisory committees may meet only at the call of, or with the approval of, a designated federal officer,\textsuperscript{56} and there must be a designated federal officer present at every meeting.\textsuperscript{57} In addition, meeting agendas must be approved by the designated federal officer.\textsuperscript{58}

B. FACA Case law

Most FACA litigation concerns whether particular groups fit the definition of an advisory committee.\textsuperscript{59} For ecosystem management groups, this is the crucial issue, because an affirmative answer triggers the panoply of FACA requirements.

1. Statutory Definition of Advisory Committee

Under FACA, a committee is an advisory committee if it is "established or utilized" by the President or an executive agency.\textsuperscript{60} Most

\begin{itemize}
\item \textsuperscript{53} FACA, 5 U.S.C. app. § 10(a)(1) (1994). Exceptions are specified in § 10(d).
\item \textsuperscript{54} FACA, 5 U.S.C. app. § 10(a)(2) (1994).
\item \textsuperscript{55} FACA, 5 U.S.C. app. § 10(b) (1994).
\item \textsuperscript{56} FACA, 5 U.S.C. app. § 10(f) (1994).
\item \textsuperscript{57} FACA, 5 U.S.C. app. § 10(e) (1994).
\item \textsuperscript{58} FACA, 5 U.S.C. app. § 10(f).
\item \textsuperscript{60} FACA, 5 U.S.C. app. § 3(2) (1994). The section provides:
\begin{quote}
for the purpose of this Act-
\begin{itemize}
\item (2) 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 (hereafter in this paragraph referred to as "committee"), which is -
\begin{itemize}
\item (A) established by statute or reorganization plan, or
\item (B) established or utilized by the President, or
\item (C) established or utilized by one or more agencies,
\end{itemize}
\end{itemize}
in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . . .
\end{quote}

It should be noted that all of FACA’s requirements may not apply to all utilized committees, at least under the pre-1989 definition of utilized. See Center for Auto Safety v. Cox, 580 F.2d 689, 694 (D.C. Cir. 1978).
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courts have analyzed the terms "established" and "utilized" separately.\textsuperscript{61} Under this analysis, groups established without government involvement, but later utilized by the government, may fall within the definition of an advisory committee. General Services Administration (GSA) regulations implementing FACA distinguish between establishment and utilization,\textsuperscript{62} but recent case law has modified this distinction.\textsuperscript{63}

2. The Definition of "Established"

The GSA regulations set out four ways to establish an advisory committee: by Congress through statutory mandate; by the President through an Executive Order; or by an agency under either specific statutory authorization or general agency authority.\textsuperscript{64}

a. Establishment by Statute

Courts have interpreted establishment by statute narrowly.\textsuperscript{65} An advisory committee must have been expressly created by statute.\textsuperscript{66} A but-


\textsuperscript{62} 41 C.F.R. § 101-6.1003 (1994) (defining "utilized" to include "a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice"). Establishment of an advisory committee is addressed by 41 C.F.R. § 101-6.1005 discussing authorities for establishing an advisory committee, and 41 C.F.R. § 101-6.1007, detailing complicated procedures which a creating governmental authority must comply with to establish an advisory committee.

\textsuperscript{63} \textit{See infra} notes 83–102 and accompanying text.

\textsuperscript{64} 41 C.F.R. § 101-6.1005 (1994). Because no ecosystem management groups have been formed by executive order, this method of formation is not discussed in this Comment. In addition, there is currently no statute dealing expressly with ecosystem management. However, there has been interest expressed in Congress in enacting legislation regarding ecosystem management. \textit{See}, e.g., S. 2385, 103d Cong., 2d Sess. (1994); S. 93, 104th Cong., 1st Sess. (1995). Therefore, establishment by statute is discussed in light of the possibility that such a statute may be passed in the near future. Establishment by an agency is relevant to current ecosystem management groups.

\textsuperscript{65} \textit{See Rodgers, \textit{Environmental Law}, supra} note 43, at 83.

\textsuperscript{66} Public Citizen Health Res. Group v. National Capital Med. Found., Civ. No. 82-0009, 1983 WL 29917 (D.D.C. Oct. 28, 1983) (holding that Professional Standards Review Act, which required Secretary of Health and Human Services to enter into agreement with organization to be designated as Professional Standards Review Organization for particular geographic area, presupposed existence of qualified organizations and therefore did not "establish" such organizations); Lombardo v. Handler, 397 F. Supp. 792, 796 (D.D.C. 1975) (holding that committee was not established by Clean Air Act Amendments of 1970, 42 U.S.C. § 1857f-1 (1970), which directed EPA to enter into arrangements with National Academy of Sciences to undertake a study, but never directly mentioned
for causation relationship between the statute and the formation of a committee is insufficient to find establishment. One court has stated that where a statute gives an agency the option of convening panels or contracting with appropriate groups to produce guidelines, panels so created are established by the agency and not by the statute.

b. Establishment by an Agency

Case law regarding agency establishment deals with two scenarios. In some cases, the group in question directly advises an agency. In other cases, advisory groups are separated from the agency by intermediary groups. Courts find establishment by an agency to be a fairly straightforward issue when a group directly advises an agency. In one such case, the Secretary of the Interior directed the U.S. Fish and Wildlife Service to organize a scientific advisory panel to assess the status of a potentially endangered species. In another case, a court found that a group was not established by an agency where the agency did not fund the group, set its agenda, or appoint its members.

Cases involving intermediary groups and subgroups present more complicated analysis. In Lombardo v. Handler, the court noted that Congress had expressed an intent to restrict FACA to committees "directly" established by the federal government. The court relied on documentation apparently indicating that the proposal to create the committee in question had originated in the National Academy of Sciences (NAS), and that the Environmental Protection Agency (EPA), the relevant agency, was not particularly concerned with the internal


67. Lombardo, 397 F. Supp. at 796.


69. See Rodgers, Environmental Law, supra note 43, at 84-85, for a discussion of "the subgroup problem."

70. Alabama-Tombigbee Rivers Coalition v. Department of Interior, 26 F.3d 1103, 1104-05 (11th Cir. 1994).


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organization of the contractor performing the study for the NAS. It found that the committee was not established by the EPA. 73

Similarly, in Food Chemical News, Inc. v. Young, 74 the District of Columbia Court of Appeals rejected the argument that the Food & Drug Administration (FDA) established an advisory panel under a research contract requiring its formation. The court was influenced by the fact that the Federation of American Societies for Experimental Biology (FASEB), the organization that contracted with the FDA, proposed the panel and selected its members. FASEB also set the panel’s agenda, scheduled its meetings, and was responsible for reviewing its work. 75

3. The Definition of “Utilize”

The definition of “utilize” has been perhaps the most perplexing aspect of FACA litigation. A 1989 U.S. Supreme Court case has substantially affected the analysis of this issue and has added to the confusion regarding the application of FACA. 76

Under the GSA regulations, a committee is “utilized” when it is:

a committee or other group . . . with an established existence outside the agency seeking its advice which the . . . agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations . . . in the same manner as that individual would obtain advice or recommendations from an established advisory committee. 77

Case law prior to 1989 is in accord with this common sense definition, focusing on the group’s role in the creation of federal policy. Courts held that groups not established by the federal government were utilized by agencies that solicited their views on proposed regulations or amendments to regulations. 78 In one case, the District Court of the

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73. Id.
75. Id. at 333.
District of Columbia held that a committee is utilized when an agency head discloses proposed regulations to obtain its advice and recommendations. In another case, the District of Columbia Court of Appeals rejected an argument that an independent, pre-existing group, which reviewed and commented on drafts of proposed federal highway regulations, was not an advisory committee, stating instead that regardless of whether an agency creates an advisory committee or makes use of a pre-existing group, the committee must comply with FACA.

In Public Citizen v. Department of Justice, the U.S. Supreme Court set forth a narrow interpretation of "utilized." The Court stated that Congress used the term only to insure a broad interpretation of "established," covering groups formed for government agencies by "quasi-public" entities such as the National Academy of Sciences as well as groups formed by agencies themselves. In addition, the Court suggested that groups closely tied to the federal government or amenable to strict agency management are among the groups Congress intended FACA to cover.

The Court narrowly interpreted "utilize" in part because the application of FACA to the facts of the case was a potential infringement on executive powers. The group in question—the American Bar Association's Standing Committee on Federal Judiciary—advised the President through the Department of Justice on potential nominees for federal judgeships. To avoid the constitutional question, the Court adopted an interpretation of "utilize" that did not cover the ABA committee.

Since Public Citizen, a few courts have interpreted the meaning of "established or utilized" where groups were not clearly established by the

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Tobacco, and Firearms utilized groups of industry representatives with whom it met to obtain "preliminary views" respecting proposed amendments to regulations dealing with labeling and advertising of certain alcoholic beverages).

80. Cox, 580 F.2d at 693–94.
82. Rodgers, Environmental Law, supra note 43, at 83. See also Palladino, supra note 76, at 239–50.
83. 491 U.S. at 462.
84. Id.
85. Id. at 457.
86. Id. at 465–66.
87. Id. at 443–45.
88. Id. at 465–67.
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federal government. These cases have established two points. First, utilization of a pre-established group by a federal agency is likely to be analyzed in terms of control and management by the agency. Second, the participation of federal employees in a group is insufficient by itself to render the group an advisory committee.

In *Food Chemical News, Inc. v. Young*,99 an expert panel assembled by the Federation of American Societies for Experimental Biology (FASEB) under a contract with the FDA was alleged to be an advisory committee.90 The court of appeals reversed the district court’s holding that the expert panel was an advisory committee, noting that *Public Citizen* was decided while *Young* was on appeal.91 Focusing on the language of *Public Citizen* that groups “closely tied to the Federal Government” are covered by FACA, the court held that the FDA did not utilize the panel because FASEB managed it, and it was therefore not amenable to any management by the FDA or any semiprivate entity the Federal Government helped create.92

In *Washington Legal Foundation v. United States Sentencing Commission*,93 the court also focused on the group’s ties to the federal government. In holding that the U.S. Sentencing Commission’s Advisory Working Group on Environmental Sanctions was not utilized by the Department of Justice (DOJ), the court stated that utilization requires actual management or control of a committee by an agency.94 The court acknowledged the influence exerted by DOJ on the group through its representatives in the group and on the Sentencing Commission, but concluded that such influence was not equivalent to control.95 The fact

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90. It was determined initially that FASEB was not an advisory committee because it fell within the exclusion for government contractors. *Id.* at 331.
91. *Id.* at 329.
92. *Id.* at 332–33 (citing *Public Citizen*, 491 U.S. at 457, 462).
94. *Id.* at 1450. Between *Food Chem. News, Inc. v. Young* and *Washington Legal Foundation*, there may be a conflict regarding whether actual control is required or potential control is sufficient. The *Young* court stated that a committee may be an advisory committee where it is “amenable” to agency control, 900 F.2d at 333, while the *Washington Legal Foundation* court found that “something along the lines of actual management or control” is necessary, 17 F.3d at 1450. Because the *Washington Legal Foundation* court cited *Young* as authority on this point, it apparently did not mean to hold differently. However, the language in these cases could lead to two possible interpretations.
that the Commission, rather than DOJ, managed the group and was the intended recipient of its recommendations indicated that the group was not controlled by DOJ. 96

While an argument might be made that the analysis in Washington Legal Foundation and Food Chemical News should be confined to cases involving intermediary groups, the Court of Appeals for the District of Columbia has suggested that this reasoning applies even in cases where there is a direct relationship between the relevant agency and the group in question. 97

The District of Columbia courts have held in two cases that agency employee participation in a group is insufficient by itself to make that group an advisory committee. In Washington Legal Foundation, as stated above, the court distinguished between the influence that such members might exert on the group and the level of control required for utilization. 98 In Center for Auto Safety v. Federal Highway Administration, 99 which did not involve an intermediary group, the plaintiffs urged the court to distinguish Public Citizen because that case did not involve federal participation on the committee, whereas in the plaintiff’s case, Federal Highway Administration (FHWA) officials did participate. The court declined to do so, stating that possible abuses resulting from intergroup membership alone did not justify an exemption from Public Citizen. 100

4. Advice on a Policy Issue

The GSA regulations state that an advisory committee subject to FACA is one established or utilized by a federal entity "for the purpose of obtaining advice or recommendations on issues or policies which are within the scope of [its] responsibilities." 101 Some cases have exempted groups from FACA because they were not advising the federal government. For instance, an industry committee that met with federal

96. Washington Legal Foundation, 17 F.3d at 1451.
97. Sofamor Danek Group, Inc. v. Gaus, 61 F.3d 929, 936 (D.C. Cir. 1995) (citing Young, 900 F.2d 328; Public Citizen v. United States Dep’t of Justice, 491 U.S. 440, 461–62 (1989); Washington Legal Foundation, 17 F.3d at 1450, in the context of a group that was created and arguably managed by the Research Agency of the Department of Health and Human Services.)
98. Washington Legal Foundation, 17 F.3d at 1450–51.
100. Id. at *6–7. The court also noted that any AASHTO recommendations to the FHWA must go through administrative rulemaking procedures, preventing a “rubber-stamp” by the agency. Id. at *7.
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officials to obtain input on a proposal considered by the committee was exempt. Similarly, a panel was exempted because its advice was directed to physicians, educators, and the public rather than to a federal agency. One court also considered the possibility of applying FACA to some, but not all contacts between a group that was deemed to be utilized by an agency when its advice was specifically solicited on proposed regulations.

The function of a group may be "operational," rather than advising. In Natural Resources Defense Council v. Environmental Protection Agency, the court held that the Governors' Forum on Environmental Management, advising the EPA on the ability of states to carry out their responsibilities under the Safe Drinking Water Act (SDWA), was not covered by FACA. The court characterized the forum as a partnership acting in an operational capacity rather than as a group of advisors. In part, this view was based on the need for action at both the state and federal levels to implement the SDWA. The court also noted that the forum received no federal funds, had no fixed membership, and had no specific plans for future proceedings, and that federalism and separation of powers concerns would arise if FACA were applied to groups of elected state officials. An important qualifier with respect to the characterization of groups as operational is that their functions must be "specifically provided by law, such as making or implementing Government decisions or policy."

105. 41 C.F.R. § 101-6.1004 (1994) exempts committees "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."
106. 806 F. Supp. 275 (D.D.C. 1992). See also Public Citizen v. Commission on the Bicentennial, 622 F. Supp. 753 (D.D.C. 1985) (holding that committee whose statutory duties included planning and developing bicentennial activities, encouraging state, local and private involvement, and coordinating activities throughout the states was primarily an operational committee)
108. Id. at 277-78.
109. Id. at 278. In 1995, Congress exempted meetings between federal and state, local, and tribal government officials from FACA. See supra note 1.
III. APPLICATION OF FACA CASE LAW TO ECOSYSTEM MANAGEMENT GROUPS

The holding in *Northwest Forest Resources Council v. Espy* that the President’s Forest Ecosystem Management Assessment Team (FEMAT) was an advisory committee subject to and in violation of FACA brought the statute to the attention of the federal land management agencies. Despite the fact that FEMAT fit much more clearly into the definition of an advisory committee than any ecosystem management group, and that challengers of FEMAT were denied injunctive relief, *Espy* sent shockwaves through the agencies’ collaborative efforts.

A. Problems with Applying FACA to Ecosystem Management Groups

Compliance with FACA poses problems for ecosystem management groups for several reasons. Therefore, the uncertainty that currently surrounds FACA’s definition of an advisory committee is a stumbling block for federal ecosystem management efforts.

The dominant role of federal officials in FACA committees poses problems for groups whose goal is to manage entire ecosystems with combinations of public and private landowners. FACA’s requirements for federal approval of charters and for a designated federal officer who must be present at all meetings, approve meeting agendas, and who may adjourn meetings at her discretion, give extensive control to the federal agency or agencies involved. Such control is problematic where the scope of issues dealt with by the group is broader than federal policy.

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112. FEMAT was created following the 1993 “forest conference” held by President Clinton to address the controversy between environmentalists and the forest products industry regarding the management of federal forests. FEMAT produced a report discussing management alternatives that is the basis of the current Forest Plan. The Northwest Forest Resources Council, a non-profit organization representing the forest products industry, alleged that FEMAT was an advisory committee and therefore its meetings should have been open to the public. *Id.*
116. The paperwork for the Blue Mountain Natural Resources Institute, for example, was delayed in the approval process. Wondolleck & Yaffee, *supra* note 23, at app. D-9; Meidinger, *supra* note 16, at 19.
and where those whose cooperation is essential to the management of the entire ecosystem might resent federal control.\(^\text{117}\)

In addition, the typical advisory committee contemplated by FACA is created to provide advice on a particular policy. Ecosystem management groups, however, tend to be long-running, have broadly stated missions encompassing a variety of policy issues, and have shifting memberships. Rigid charters that may only be amended through cumbersome procedures may be problematic for such groups.\(^\text{118}\)

**B. Models of Ecosystem Management Groups and the Definition of an Advisory Committee**

The following section applies FACA case law to the three models of ecosystem management groups suggested earlier\(^\text{119}\) in order to pinpoint the areas of uncertainty and to suggest possible outcomes. To summarize, ecosystem management groups that fall within the definition of "establishment" by the federal government are far more likely to be considered advisory committees under current case law. Groups that do not fit within this definition are probably not covered by FACA, unless they fit within the narrow definition of "utilize" set forth in the recent line of cases described below. In addition, the functions of ecosystem management groups often involve more than advising, if they involve advising at all. This raises the question of how groups with multiple functions should be treated under FACA, a question that has not been effectively resolved by the courts.

**1. Establishment by Statute**

No federal statute specifically addresses ecosystem management. While some commentators have noted that public land and environmental statutes give the federal land management agencies authority to implement ecosystem management at their discretion,\(^\text{120}\) a tenuous link between activity mandated by statute and the formation of an advisory group is insufficient by itself to create an "established"


\(^{119}\) *See supra* notes 23–30 and accompanying text.

\(^{120}\) *See, e.g.*, Keiter, *supra* note 13, at 303–04.
advisory committee. It is thus apparent that no existing ecosystem management groups have been established by statute.

2. Establishment by an Agency

In the absence of statutory establishment, the question becomes whether a group has been established by an agency. Factors the courts consider include whether an agency originated the proposal to create the committee, concerned itself with the organization of the activity being undertaken, selected the group members, funds the group, or sets the group's agenda. Evidence that these functions were assumed by a non-governmental entity has led courts to find that groups were not established by an agency. Independent ecosystem management groups formed with little agency involvement are unlikely to come under the category of agency established committees. Typically, proposals for establishing such groups come from outside government agencies. While agency representatives may play a part in the creation of these groups, their role is equal to that of non-agency actors. The groups set their own agendas and determine membership according to agreements or bylaws set by the groups themselves or by another group independent of government. They may receive some funding from government agencies, but this appears to be the only factor that might support a finding of agency establishment.

Collaborative groups, which are typically proposed by individuals outside of a federal agency but which tend to be funded by the agency and administratively located within the agency, are more likely to fall within the "established by an agency" category. However, they are distinguishable in some ways from groups that have been determined by the courts to be established by an agency. On one hand, the central role of federal actors in their creation could influence a court to decide that they are advisory committees. In contrast to independent groups, they are typically formed upon approval of federal employees and focus on federal issues.

121. See supra notes 65–68 and accompanying text.
122. See supra notes 72–75 and accompanying text.
123. See supra notes 27–28 and accompanying text.
124. See supra note 28 and accompanying text.
125. See Lynch, supra note 4, at 10.
126. See supra note 29 and accompanying text.
On the other hand, the fact that collaborative groups are proposed by non-federal parties could contribute to a finding against agency establishment.\textsuperscript{127} In addition, in the groups upon which this model is based, the relevant agency did not choose the members of the group; rather, membership was self-selecting.\textsuperscript{128} Finally, federal and non-federal actors share the responsibility for setting the goals and purposes of these groups.\textsuperscript{129} These factors would support a finding that such groups are not established by an agency.

The lack of an intermediate establishing group\textsuperscript{130} may distinguish the collaborative ecosystem management groups from the groups in \textit{Lombardo v. Handler}\textsuperscript{131} and \textit{Food Chemical News, Inc. v. Young}.\textsuperscript{132} A court might be more willing to find FACA establishment where the relevant agency and the group being created, rather than a non-federal intermediary group alone, assumed establishment responsibilities.

AMA groups formed by the Forest Service or BLM under the federal Forest Plan probably would be considered established by an agency.\textsuperscript{133} If agency officials decided to convene a group, chose its members or a method for selecting them, directed it to focus on particular issues or questions, funded it, and provided a meeting place, courts probably would find it to be an advisory committee.

3. \textit{Utilization by an Agency}

The definition of “utilize” may be approached in one of two ways in the ecosystem management context, where separation of powers concerns are unlikely to arise. One approach follows the example of the District of Columbia courts in \textit{Young},\textsuperscript{134} \textit{Washington Legal Foundation v. United States Sentencing Commission},\textsuperscript{135} and \textit{Center for Auto Safety v. Federal Highway Administration},\textsuperscript{136} applying \textit{Public Citizen} to situations

\begin{itemize}
\item \textsuperscript{127} See supra note 29 and accompanying text.
\item \textsuperscript{128} See supra note 29 and accompanying text.
\item \textsuperscript{129} See supra notes 37–38 and accompanying text.
\item \textsuperscript{130} See supra notes 72–75 and accompanying text.
\item \textsuperscript{132} 900 F.2d 328 (D.C. Cir. 1990), cert. denied, 498 U.S. 846 (1990).
\item \textsuperscript{133} See supra note 30 and accompanying text.
\item \textsuperscript{134} 900 F.2d 328.
\item \textsuperscript{135} 17 F.3d 1446 (D.C. Cir. 1994).
\end{itemize}
where no serious constitutional concerns exist. This approach would very likely continue to be followed in the District of Columbia courts and in other circuits, given the fact that the majority of FACA cases have been decided by the District of Columbia courts.

A second approach would confine Public Citizen's narrow interpretation of "utilize" to situations involving potential constitutional violations. However, in light of a footnote in a recent District of Columbia Court of Appeals decision that expressly rejected this argument, it is unlikely that courts in other circuits will accept it. Therefore, the following discussion focuses on the approach taken by Public Citizen and its progeny.

Under Public Citizen, as interpreted in Young and Washington Legal Foundation, a group might be utilized by the federal government if it is controlled or managed by a federal agency or quasi-public entity. The court of appeals cases found that the extent of management and control by intermediary groups and the lack of federal involvement indicated the absence of the close ties to the government necessary to constitute utilization.

The definition of "utilize" set forth in the court of appeals cases probably insulates the independent ecosystem management groups. Independent groups assume the same management functions as did the intermediary groups in Washington Legal Foundation and Young and are therefore unlikely to be found to be managed or controlled by agencies. Furthermore, even though the independent groups include agency representatives as participants, the cases have held that this

137. Young and Washington Legal Foundation did not involve presidential advisory committees; thus the constitutional concerns about interference with the powers of the President which were raised in Public Citizen were not present.

138. In Sofamor Danek v. Gaus, 61 F.3d 929, 936 n.6 (D.C. Cir. 1995), the court stated in a footnote that it found unpersuasive the contention of amicus curiae that Public Citizen's narrow definition of utilize should be confined to circumstances raising a constitutional issue, citing Young's application of Public Citizen despite the absence of a constitutional issue.

139. See supra notes 89-97 and accompanying text.

140. See supra notes 89-97 and accompanying text. Note that the District of Columbia Court of Appeals has suggested that the Young and Washington Legal Foundation analysis may be applied to non-federally established groups which interact directly with the federal government rather than through an intermediary group. Sofamor, 61 F.3d at 936.

141. See supra notes 31-34 and accompanying text.

142. See supra note 33 and accompanying text.
alone does not constitute control or by itself bring a group within the purview of FACA.\textsuperscript{143}

In addition, independent groups are clearly not controlled by agencies. Federal agencies involved in independent ecosystem management groups may provide some funding and meeting space, however these functions are shared among group members. Agency participants are involved in setting agendas, defining purpose, and making decisions to the same extent as all other participants. Therefore, agency employees act as members, rather than managers, of these groups.

Assuming that collaborative groups are not established by an agency, it is more difficult to predict whether they would be utilized by agencies under the analysis in \textit{Young} and \textit{Washington Legal Foundation}. In the collaborative groups, federal agencies assume more of a management function, such as providing all or most of the group’s funding, administrative support, and meeting space.\textsuperscript{144}

However, even these groups are not under federal control to the extent that FASEB controlled the advisory group in \textit{Young}.\textsuperscript{145} Responsibility for determining the goals of the group, making funding decisions for specific projects, and setting priorities, for example, is shared between federal and non-federal participants.\textsuperscript{146} Because the courts have not set forth any sort of balancing test or given any other indication of the extent of control and management necessary to bring groups within the purview of FACA, it is difficult to predict the result of applying \textit{Young} and \textit{Washington Legal Foundation} to collaborative groups.

4. \textit{Advice on a Policy Issue}

Most ecosystem management groups, particularly the independent groups, engage in some activities that have nothing to do with federal land management or which could not be described as advising.\textsuperscript{147} Public education efforts or projects conducted on private land may involve input from federal agencies but do not constitute advice to an agency on its

\textsuperscript{143} E.g., \textit{Washington Legal Found. v. United States Sentencing Comm’n}, 17 F.3d 1446, 1451 (D.C. Cir. 1994).

\textsuperscript{144} See supra note 36 and accompanying text.

\textsuperscript{145} See supra notes 89–92 and accompanying text.

\textsuperscript{146} See supra notes 37–38 and accompanying text.

\textsuperscript{147} See supra notes 39–40 and accompanying text.
policies or activities. Such efforts involve advising the public, not federal agencies. In addition, joint efforts to gather data, create a Geographic Information System map of an ecosystem, and monitor the results of projects may be characterized as "operational," to the extent that they are undertaken to implement federal policy.

In Center for Auto Safety v. Cox, the court held that where federal employees were involved in a range of a group's activities, only some of which constituted utilization by the federal government for the procurement of advice, FACA should be applied only to the latter category of activities. This suggests that either the court or the relevant agency could fashion guidelines specifying which of a group's activities triggered FACA's requirements.

IV. RECOMMENDATIONS

Collaborative, multi-interest groups, despite some flaws, represent a promising means for effecting the goals of ecosystem management. They provide an avenue for information exchange, coordinated management, and social and scientific learning that regulation and other institutions do not. In addition, voluntary participation and self-regulation may be more effective at promoting sustainable use of resources than additional federal regulation, if they can be achieved in a way that ensures ecosystem integrity in conjunction with the sustainable economic use of resources.

The federal government, as a major landowner and regulator, has a critical role to play in participating in and guiding ecosystem management efforts. Therefore, it should strive to provide clear, scientifically sound policy guidelines to federal agencies participating in ecosystem management groups and to eliminate obstacles, such as the legal uncertainty created by FACA. One way to minimize the chilling effect that FACA is having on ecosystem management efforts would be

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148. The Applegate Partnership, for example, has conducted a number of projects on private land. See Lynch, supra note 4, at 9.
149. 580 F.2d 689 (D.C. Cir. 1978). The court remanded the case to the district court with instructions to narrowly tailor its order regarding which of the group's meetings were covered by FACA, and which provisions of FACA should be applied. The latter issue is unlikely to arise under current case law, in which groups not subject to any control or management by the federal government are not considered to be advisory committees.
150. Id. at 694-95.
151. See, e.g., Elinor Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action (1990) (discussing successful commons, all which involve self-regulation by users of resources in the commons).
to clarify the factors that contribute to a finding that an advisory committee exists.

Some of the requirements of FACA, such as public accessibility and viewpoint balance,\textsuperscript{152} are likely to further the effectiveness of ecosystem management efforts and should therefore be encouraged by federal policies regarding ecosystem management groups. Other aspects of FACA, such as the level of federal control which it imposes on advisory committees, should be minimized in the ecosystem management context.

\section{A. \textit{The Definition of an Advisory Committee Should Be Clarified}}

This Comment has attempted to explain how the definition of an advisory committee might be applied to ecosystem management groups. However, the case law leaves troublesome issues unresolved. A partial solution to the bind in which FACA has put agency ecosystem management efforts would be the clarification of when FACA applies. Such clarification should be made with the original purposes of the statute in mind: the reduction of wasteful consumption of federal resources by advisory committees, improvement of public access to the federal decision-making process, and the assurance of viewpoint balance in advisory committees.\textsuperscript{153}

Congress or the GSA should clarify the meaning of the term "established." While establishment by an agency is obvious in some cases, the determinative factors are less clear where, as in most ecosystem management groups, federal and non-federal participants share responsibility for the creation of the group. Guidelines indicating which factors are critical and how they should be weighed would be helpful. Given that one purpose of FACA is to reduce waste by federal advisory committees, the definition of "established" should focus on whether the group in question is created using primarily federal resources and is set up as a federal program.

\textsuperscript{152} While FACA requires that advisory committees have "fairly balanced" membership, FACA, 5 U.S.C. app. § 5(b)(2) (1994), courts have generally deferred to agencies on this issue, many finding the issue nonjusticiable. See, e.g., Doe v. Shalala, 862 F. Supp. 1421 (D. Md. 1994) (holding that alleged violation of FACA's fair balance requirement was nonjusticiable); Public Citizen v. Department of Health & Human Services, 795 F. Supp. 1212 (D.D.C. 1992) (reviewing prior case law and concluding that fair balance provision is non-justiciable). An alternative approach is suggested by National Anti-Hunger Coalition v. Executive Comm., 557 F. Supp. 524, 528 (D.D.C.), \textit{aff'd}, 711 F.2d 1071 (D.C. Cir. 1983), in which a district court grappled with the issue of balanced membership, and noting that the statute does not explain the term, concluded that balance should be assessed in terms of the function to be performed by the committee in question.

\textsuperscript{153} See \textit{supra} part II.A.
The definition of “utilize” should be clarified as well. Prior to *Public Citizen*, this term brought within FACA’s scope groups that advised federal agencies on policy issues on a regular or formalized basis.  

*Public Citizen* shifted the focus away from the function of groups in the federal policymaking process and toward the extent of the institutionalization of the group within that process. It is not clear that this is a useful analysis, assuming that FACA is aimed in part at improving public access and viewpoint balance in groups that advise the government. While federal management and control may be indicators that an agency has formally adopted a particular group as a preferred source of advice, it may not be determinative in all cases. A more useful analysis would focus on the question of whether the group provided advice to the Government on specific policies on a regular and formalized basis. In addition, guidance should be provided regarding which sections of FACA apply to utilized advisory committees. It is possible that the more problematic requirements of FACA might not be applied to utilized ecosystem management groups.

A major issue in the context of ecosystem management groups is whether FACA should be applied to their activities that do not constitute advice-giving. The GSA should address the issue of how FACA applies to these groups. Any efforts to parse ecosystem management efforts into advisory and other activities is certain to be difficult, therefore guidelines addressing this problem are unlikely to completely resolve the issue. One potentially workable solution would be based on the approach taken in *Center for Auto Safety v. Cox*: to require compliance with FACA at group meetings where federal policy is discussed, while exempting other efforts, such as data-gathering sessions and monitoring.

**B. Certain Ecosystem Management Groups Should Be Exempted from FACA and Guidelines Issued to Govern Federal Involvement**

A clarification of when and how FACA applies would reduce the uncertainty currently troubling federal ecosystem management efforts. However, it would not resolve the more fundamental problems with applying FACA to ecosystem management groups that have the goal of co-managing lands within a large ecosystem, engage in multiple activities, and are characterized by voluntary participation. In addition, independent groups likely fall outside of FACA’s reach and therefore federal participation in these groups may be unregulated with respect to

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154. See *supra* notes 78–80 and accompanying text.
public access and viewpoint balance. Therefore, a more complete solution to the problems raised by FACA would involve exempting certain ecosystem management groups from FACA and providing guidelines on the goals of federal participation in such groups and on public access.

1. Groups That Should Be Exempted from FACA

Two categories of ecosystem management groups should be expressly exempted from FACA. First, groups whose goals include co-management of large ecosystems including private as well as public lands should be exempted. Under the case law, it is unlikely that FACA applies to these groups; however, an express exemption would clarify the situation. A second category of groups that might benefit from an exemption is those groups that have federal members who participate in activities in other than discussions of federal policy.

2. Guidelines for Groups Exempted from FACA

Guidance for agencies using ecosystem management groups, in the form of an ecosystem management statute or agency regulations, should consist of two elements. The first element should be a statement of the goals of federal ecosystem management, and a requirement that groups in which agencies are considering active participation have consistent goals. The second element should be a provision mandating public access to the proceedings of ecosystem management groups with federal participants.

The General Accounting Office’s 1994 report on ecosystem management recognized a need for a clear statement of the policy goals of ecosystem management by the Administration, particularly with respect to the priority to be given to ecosystem health where it conflicts with human activities. Such a statement should be provided and incorporated into guidelines governing federal participation in ecosystem management groups. In addition, guidelines should include recommendations regarding the viewpoints that should be represented in effective ecosystem management groups.

155. GAO report, supra note 4, at 63.

156. The question of adequate representation in the context of ecosystem management is debated. See, e.g., Shannon & Anderson, supra note 16, at 153–54. The current ecosystem management groups offer one possibility: most involve environmentalists, industry representatives, Native American tribes, and private landowners in the area. In addition, ecosystem management efforts
Agency officials should be required to submit descriptions of groups they are considering participation in to an interagency individual or panel capable of assessing the likelihood that federal participation in a group will further the goals of ecosystem management set forth above. This requirement would prevent federal-employee time slated for ecosystem management from being spent in activities that do not further federal policy goals. In addition, it would insure viewpoint balance relating to the goals of ecosystem management.

Legislation or agency regulations or guidelines regulating ecosystem management groups exempted from FACA should also include provisions governing public access. By insuring that ecosystem management groups they participate in are open and give effective notice to interested parties, federal agencies would increase the likelihood that those with the range of viewpoints considered important for effective ecosystem management would participate.

The Magnuson Fishery Conservation and Management Act\(^\text{157}\) offers an example of how public access might be incorporated into a provision exempting certain groups from FACA.\(^\text{158}\) Public access provisions should require that groups publish notice in at least local and regional newspapers as well as the Federal Register, be open to participation by other interested parties, and make meeting minutes and other documents available to the public upon request.\(^\text{159}\)

The steps proposed here would accomplish two things. First, they would eliminate the uncertainty regarding the application of FACA which currently pervades federal ecosystem management efforts. Second, they would provide guidance for agencies considering involvement in independent ecosystem management groups, and would insure that such involvement would further the goals of ecosystem management. While the implementation of these steps would not solve all of the problems associated with the application of FACA to ecosystem management, they would contribute toward resolving some troublesome issues.

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should include scientists in their decision-making efforts, and should avoid relegating them to status as mere technical advisors. Where possible, academic or independent scientists would lend such efforts the most credibility.


158. 16 U.S.C. § 1852(j) (1994) (exempting regional fishery management councils from FACA and requiring public notice and access to proceedings).

159. Some groups, such as the Applegate Partnership, have effective outreach through local channels and regular public participation. See Lynch, supra note 4, at 7–8.
VI. CONCLUSION

Current FACA case law has created a great deal of uncertainty as to whether the statute applies to ecosystem management groups. It is unlikely that FACA applies to groups bearing the characteristics of the independent ecosystem group model; however, the statute may apply to other groups. To insure that ecosystem management as contemplated by the federal agencies is given an opportunity to succeed and is challenged only on the basis of flaws which would render it ineffective or environmentally unsound, the federal government should take steps to clarify the applicability of FACA and to provide more useful guidelines for federal use of ecosystem management groups.