December 2, 2003

Via Federal Express

Mike Leavitt
Administrator
U. S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C.  20460

Re: Request to Stop Using Illegal Chemical Industry Advisory Committee Without Complying With the Federal Advisory Committee Act

Dear Administrator Leavitt:

On behalf of Washington Toxics Coalition, Northwest Coalition for Alternatives to Pesticides, Center for Biological Diversity, Natural Resources Defense Council, and Defenders of Wildlife, we request that you remedy ongoing violations of the Federal Advisory Committee Act (“FACA”), 5 U.S.C. App. 2, arising from the Environmental Protection Agency’s (“EPA’s”) use of an illegal chemical industry advisory committee. For several years and increasingly in recent months, EPA has used a task force comprised of 14 agro-chemical companies as a preferred source of advice in developing policies addressing the impacts of pesticides on endangered species. EPA regularly meets behind closed doors with this committee of chemical industry representatives, exchanging information and listening to proposals for weakening Endangered Species Act requirements that apply to EPA’s authorization of pesticide uses. None of these meetings are open to the public. Nor is the public given an opportunity to comment on or critique the advice rendered by this chemical industry task force.

EPA is in blatant violation of FACA by obtaining one-sided advice on issues of critical importance to the protection of endangered species and the environment. EPA has been found by a federal court to be out of compliance with the Endangered Species Act in its registration of many pesticides for use in the range of threatened and endangered salmon and steelhead. Other lawsuits are seeking to compel EPA to bring its pesticide registrations into compliance with the ESA with respect to listed species, such as sea turtles, piping plovers, and red-legged frogs. This illegal advisory committee is urging EPA to create loopholes that will allow it to circumvent its ESA duties in the future, rather than bring its pesticide authorizations into full compliance with that Act. Heeding this advice and regular counsel, EPA is embarking on a rulemaking to exempt
itself from some ESA requirements and to avoid implementing protections for endangered species.

By this letter, we ask that EPA immediately stop using this chemical industry advisory committee as a preferred source of advice on ESA policy matters. If EPA continues to give special access and privileges to this chemical industry committee without complying with FACA, we will have no choice but to initiate litigation to stop this abuse of the public trust.

A. EPA is Using the FIFRA Endangered Species Task Force as an Illegal Advisory Committee on Pesticide-ESA Policies

In 2000, EPA issued a notice announcing the formation of a chemical industry task force called the “FIFRA (Federal Insecticide, Fungicide, and Rodenticide Act) Endangered Species Task Force.” This task force is referred to by the acronym “FESTF.” EPA defined mandates for FESTF in the 2000 pesticide registration notice. Specifically, the task force has been organized to develop data on the impacts of pesticides on threatened and endangered species that can be used in EPA registration decisions. Pesticide Registration Notice 2000-2 (April 17, 2000).

EPA has committed to provide guidance and assistance to FESTF. Id. at 2. In keeping with this commitment, EPA has established an ongoing relationship with FESTF in which EPA representatives attend meetings and workshops at which FESTF presents its viewpoints. A core group of individuals from FESTF and EPA meet periodically in what are called “critical interaction meetings.” These meetings give FESTF a forum for communicating its positions on endangered species data and protection strategies. FESTF has also established subcommittees and EPA has assigned liaisons to meet with those subcommittees. In addition, FESTF has conducted workshops on endangered species data and protection issues that EPA representatives have attended. Through these various avenues, EPA has met regularly with FESTF representatives to discuss methods and data for assessing impacts of pesticides on endangered species and species protection alternatives.

FESTF’s activities encompass extensive policy advocacy. For example, FESTF has lobbied for EPA to be designated the “expert agency” for determining the impacts of pesticides on endangered species, and to exclude the Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) from the ESA compliance process. Similarly, FESTF has supported a specific risk assessment process that uses FESTF’s database and assumptions and methods that are less precautionary than those supported by the expert fish and wildlife agencies and the environmental community. As FESTF explains, it has “developed a program by which FIFRA and ESA requirements will be met by pesticide registrants with minimal impact on the pesticide user community while still providing the necessary species benefits.” FESTF Overview (March 10, 2003) (emphasis added). In addition, FESTF has urged EPA to adopt
special opportunities for input from registrants and pesticides users in developing endangered species protections that would not be available to the public.

FESTF has became one of the most vocal and persistent advocates for a new model of self-consultation that would eliminate expert agency oversight and involvement in the ESA Section 7 process for numerous pesticide uses. In January 2003, EPA published an advance notice of proposed rulemaking ("ANPR") to allow EPA to engage in self-consultation with respect to "not likely to adversely affect" determinations. Under current regulations, FWS and NMFS must concur in any "not likely to adversely affect" determination before it is final and definitive. Under a self-consultation scheme, EPA would make such determinations unilaterally, eliminating any expert agency oversight. The ANPR also discusses deferring to or utilizing EPA’s risk assessments for ESA consultation purposes.

The purported rationale for such an approach is that EPA already assesses the impacts of pesticides on species as part of the FIFRA process. However, EPA’s risk assessments are outdated and based on science that conflicts with the current and emerging scientific literature. For example, EPA bases its assessments on lethal doses, but the scientific literature documents significant and numerous sublethal effects at a fraction of the lethal dose. Similarly, EPA’s assessments focus on a single pesticide on a crop-by-crop basis. EPA never assesses the combined impacts of numerous pesticides used on a crop or the cumulative effects of multiple applications of the same pesticides in the impacted area. EPA also lacks credible methods for assessing the migration and impacts of pesticides in the urban environment where runoff patterns have been drastically altered by storm drain systems and urbanization. In addition, EPA rarely assesses the impacts of inert ingredients and other additives to pesticide products. Both FWS and NMFS have criticized EPA’s methods, questioning their soundness and adequacy for these and other reasons.

FESTF has submitted written comments on EPA’s ANPR forcefully endorsing the relaxation of ESA consultation requirements and the oversight role of FWS and NMFS as the expert fish and wildlife agencies. While those comments are in the public docket on the rulemaking, FESTF has repeated its views in its many secret, behind-the-scenes meetings that are neither recorded in the rulemaking docket nor made public through EPA oversight of FESTF as a federal advisory committee.

B. The Federal Advisory Committee Act Applies to EPA’s Use of FESTF

FACA applies to task forces and other groups that are “established or utilized” by one or more agencies in the interest of obtaining advice or recommendations. 5 U.S.C. App. 2, § 3(2). By name, FESTF is a task force. Moreover, EPA is giving FESTF preferred access to EPA representatives on pesticide issues of critical importance to endangered species. Its ongoing
meetings and informational exchanges with FESTF allow industry representatives opportunities to provide advice to EPA that are unavailable to environmental representatives. Accordingly, FESTF is an advisory committee under FACA if it is established or utilized by EPA. Id.

FESTF was created through a give-and-take process between the agro-chemical companies and EPA. Through this process, EPA charged FESTF with addressing ESA data requirements as a task force given an insider status and role. While FESTF established a cost-sharing arrangement for data generated for submission to EPA pursuant to FIFRA, 7 U.S.C. § 136a(c)(2)(B), EPA gave FESTF far greater authority to provide recommendations and shape ESA compliance protocols and data requirements.

Without EPA’s imprimatur, FESTF would have no reason to exist and no ability to carry out its functions. FESTF has received a special status through EPA’s pesticide registration notice establishing tasks and issues for which EPA will turn to FESTF. EPA has expended federal funds to establish and perpetuate its ongoing and insider relationship with FESTF. Because FESTF depends upon EPA for recognition of its purview, access to EPA staff, and critical interaction meetings, FESTF is “amenable to ‘strict management by agency officials,’” which the courts have held sufficient to create an advisory committee under FACA. Aluminum Co. of America v. NMFS, 92 F.3d 902, 905 (9th Cir. 1996); Food Chemical News v. Young, 900 F.2d 328, 332-33 (D.C. Cir. 1990). Not only did EPA have a hand in establishing FESTF as an advisory committee, but it is also utilizing FESTF in the same manner as a formally established and recognized advisory committee. See Public Citizen v. Department of Justice, 491 U.S. 440, 2569-72 (1989) (construing “utilized” to encompass those groups organized by or closely tied to the federal government and/or used in the same manner as government-formed advisory committees). For its part, FESTF has used its EPA-recognized special status to obtain access to EPA resources and decisionmakers. It has obtained preferred access to EPA and has presented its recommendations as the views of an official agency task force. Through this relationship, FESTF is both closely tied to and permeated by EPA. Id. at 2571.

Indeed, FESTF is precisely the type of industry-dominated advisory committee that FACA sought to prevent. FACA’s legislative history elucidates Congress’ concerns with “a pernicious species of so-called ‘advisory’ bodies: those dominated by industry leaders and the like with substantial parochial interest in the outcome of the matter under discussion, usually some onerous regulation or policy proposal.” Natural Resources Defense Council v. Herrington, 637 F. Supp. 116, 120 (D.D.C. 1986).

Senator Charles Percy, one of FACA’s original sponsors, underscored the dangers of industry-dominated advisory committees:
Viewed in its worst light, the federal advisory committee can be a convenient nesting place for special interests seeking to change or preserve a policy for their own ends. Such committees, stacked with giants in their respective fields, can overwhelm a federal decisionmaker, or at least make him wary of upsetting the status quo.

118 Cong. Rec. 30,276 (1972); see also 118 Cong. Rec. S14,654-55 (1972) (Senator Roth) (noting that FACA “addresses itself to the danger of private interests exercising unfair influence on governmental decisions through membership in advisory committees”). Certainly, by giving an industry task force a direct, but secretive, channel for presenting its views, EPA is allowing the type of stacked advisory process FACA sought to eradicate.

C. EPA’s Use of FESTF Violates FACA’s Requirements.

FACA regulates the federal agencies’ use of advisory committees to obtain advice and recommendations. FACA mandates that federal advisory committees be established and utilized in an accountable, open, and fair manner. Specifically, to ensure accountability of both the committees and the agencies that use them, FACA establishes uniform standards in the form of charter, detailed minutes, and federal official oversight requirements. FACA also mandates adherence to open government principles by requiring open meetings, publicly available records, and a right for public presentation of perspectives to the committee. Finally, to promote fairness and integrity in the advisory committee process, FACA prohibits skewed and unfair domination.

FACA’s balanced representation mandate requires that federal agencies “shall . . . require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.” 5 U.S.C. App. § 5(b)(2). To further strengthen this requirement, FACA also mandates safeguards that ensure that advisory committee recommendations will not be “inappropriately influenced by . . . any special interest, but will instead be the result of the advisory committee’s independent judgment . . . .” Id. § 5(b)(3).

As the House Report emphasized:

One of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns. Testimony received at hearings before the Legal and Monetary Affairs Subcommittee pointed out the danger of allowing special interest groups to exercise undue influence upon the Government through the dominance of advisory committees which deal with matters in which they have vested interests . . . [T]he lack of balanced representation of different points of view and the
heavy representation of parties whose private interests could influence their [advisory committee] recommendations would be prohibited by the provisions contained in [the bill].


The House Report on FACA provided the following example of an advisory committee that would violate FACA’s balance mandates:

When [an advisory committee] met with government officials to consider a proposed national industrial wastes inventory questionnaire, only representatives of industry were present. No representatives of conservation, environmental, clean water, consumer, or other public interest groups were present. This lack of balanced representation of different points of view and the heavy representation of parties whose private interests could influence their recommendations should be prohibited by the provisions contained in [FACA].


By its plain terms, the type of balance required under FACA is determined by the functions the committee is to perform. In applying FACA’s balance requirement, the courts have upheld private sector domination of advisory committees only where the committees’ functions are so narrow that a broader array of interests need not be represented. However, where a committee’s functions extend to policy matters, industry domination runs afoul of FACA.

The seminal case – National Anti-Hunger Coalition v. Executive Committee of the President’s Private Sector Survey on Cost Control, 711 F.2d 1071 (D.C. Cir. 1983) – illustrates this dichotomy between narrow, technical recommendations, on the one hand, and broader policy advice, on the other. In the initial round of litigation, the D.C. Circuit held that the Grace Commission (as this advisory committee was known) could be comprised entirely of corporate executives where its sole task was to apply private sector expertise to government programs, rather than to make substantive policy recommendations. Id. at 1074. Where the committee’s goal is so narrow and explicit, a committee comprised of a discrete group of experts in a narrow field is not necessarily imbalanced. 557 F. Supp. 524, 528 (D.D.C. 1983). However, when it became clear that the Grace Commission had exceeded its articulated functions and subsequently recommended cutbacks in the food stamp and school lunch programs, Judge Gesell declared the committee imbalanced because it lacked representation of poor people who depended on such federal food programs and would be directly affected by adoption of those recommendations. 566 F. Supp. 1515, 1517 (D.D.C. 1983).
In several other key FACA cases upholding the composition of advisory committees with narrow, technical mandates, the courts have distinguished such technical advice from broader policy recommendations that call for representation from beyond the private sector. The importance of the advisory committee’s function when determining balance is evident from Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods, 886 F.2d 419 (D.C. Cir. 1989). Although the panel issued three separate opinions, the two judges who reached the merits distinguished between advisory committees created to perform a specific, narrow function and those making broad policy decisions, but disagreed as to how to characterize the advisory committee at issue. Judge Friedman found that because the Committee’s function of developing microbiological criteria for foods involved “highly technical and scientific studies and recommendations,” the Committee’s membership was fairly balanced without extensive consumer representation. Id. at 423. However, he distinguished the committee at issue from the one dealing with waste inventories discussed in the legislative history “where the only individuals who met with government officials were representatives of industry.” Id. at 425. Judge Edwards agreed that if the Committee was charged with a “primarily technical or scientific” function, consumer interests could be excluded. Id. at 436. However, because the Committee was charged with recommending regulations, Judge Edwards characterized the Committee’s task as involving “complex policy choices, not merely – or even primarily – technical determinations.” Id. In his view, such a committee charged with making recommendations about a broad range of products affecting consumers and the public health presents “precisely the type of situation” in which Congress saw a need for independent public interest representation.

The Fifth Circuit, in a recent FACA decision, quoted both National Anti-Hunger Coalition and Public Citizen with approval. In Cargill, Inc. v. United States, 173 F.3d 323 (5th Cir. 1999), a committee whose task was to provide scientific peer review on mine regulations did not run afoul of FACA’s fair balance requirement because it was “politically neutral and technocratic” and was “not called upon to make policy decisions.” Id. at 337. The court concluded that a committee with a “narrow, technical mandate” devoid of policy decision-making responsibilities, “does not have to include representatives of those who might be affected by the committee’s work.” Id. at 338.

Because FESTF is indisputably comprised solely of industry representatives, the question is whether the purview of the committee is narrow and technical or broad and policy-oriented. As initially announced in EPA’s pesticide registration notice, FESTF was charged with developing data on endangered species locations and pesticide impacts. While FESTF could be composed entirely of industry representatives if its charge were a narrow, technical mandate, FESTF has described its program as one that seeks to cause “minimal impact on the pesticide user community.” FESTF Overview (March 10, 2003). In other words, it acknowledges a built-
in bias in the way it is carrying out even the technical mandates assigned in the pesticide registration notice.

Over at least the past year, however, FESTF has gone far beyond the technical mission articulated in the pesticide registration notice. It has firmly entered the policy arena. FESTF is now advising EPA to make fundamental policy changes embodying industry perspectives on the most important pesticide-endangered species issues facing EPA today.

Through membership in FESTF, industry representatives are obtaining inside information and opportunities to influence endangered species policies affecting pesticides that are unavailable to environmental and species advocates. Such one-sided input essentially puts a thumb on the scales in favor of pesticide policies that will be deleterious to the environment. As the Eleventh Circuit explained, environmental “matters are so serious and of such great concern to so many with differing interests, it is absolutely necessary that the procedures established by Congress [in FACA] be followed to the letter.” Alabama-Tombigbee Rivers Coalition v. Department of Interior, 26 F.3d 1103, 1107 n.9 (11th Cir. 1994).

The blatant industry influence in the guise of an impartial advisory committee is precisely the type of pernicious harm FACA was designed to prevent. As Senator Lee Metcalf – FACA’s key Senate sponsor – emphasized:

What we are dealing with, in these hearings, goes to the bedrock of Government decision-making. Information is an important commodity in this capitol. Those who get information to policymakers, or get information from them, can benefit their cause, whatever it may be. Outsiders can be adversely and unknowingly affected. And decision-makers who get information from special interest groups who are not subject to rebuttal because opposing interests do not know about meetings – and could not get in the door if they did – may not make tempered judgments. We are looking at two fundamentals, disclosure and counsel, the rights of people to find out what is going on and, if they want, to do something about it.


* * *

For the reasons set forth above, EPA is violating its obligations under the FACA by establishing and utilizing FESTF as an advisory committee without complying with FACA. We ask that EPA immediately stop using FESTF as a preferred source of advice by retracting the authorization given in the 2000 pesticide registration notice and ceasing closed meetings with
FESTF representatives, committees, and workgroups. Alternatively, EPA must charter FESTF, ensure that FESTF meetings with EPA are subject to advance public notice and FACA’s open meeting requirements, provide for representation of environmental perspectives on FESTF; and otherwise bring the agency’s use of FESTF into compliance with FACA. In addition, we ask that EPA provide us with copies of all communications between FESTF and EPA so that the public may be privy to the information and advice exchanged and may submit its own views on the matters addressed. If we do not obtain commitments from EPA to bring its actions into compliance with FACA within 30 days, we will consider pursuing legal action.

Sincerely,

[Signature]

Patti Goldman
Amy Williams-Derry