

Basics of FACA

- The 1972 Federal Advisory Committee Act (FACA) was passed to ensure citizen involvement in federal decisions is equitable, that no one individual or group has undue influence.
- A major problem FACA was created to address was “agency capture” by special interest groups, especially by corporate interests regulated by the agency or that benefitted from agency action.
- Title 5 United States Code Appendix (5 U.S.C. App.).
- FACA establishes the guidelines under which federal advisory committees must operate.

FACA Mythology

- FACA has gotten a reputation as a legal hurdle to any and all collaborative efforts in public lands management.
- “Meeting with one interest will violate FACA” is a favorite myth for some. Some special interests use FACA as a threat to prevent an agency from ever meeting with people who disagree with that interest; although, that special interest group never has a problem with the agency meeting exclusively with them.
- For some, FACA provides a convenient excuse not to venture beyond the standard and “comfortable” APA/NEPA notice-and-comment procedures of public participation.
- For others, FACA remains just an “unknown possibility” that could hinder collaboration.
- If FACA does apply, “the procedures under it are just too difficult to deal with and should be avoided at all costs.”

FACA Issues

- Some see collaboration as a way for an agency to sidestep or avoid its normal legal duties and responsibilities under the laws and regulations.
- A few have tried to use collaboration in this way, and such efforts are both illegal and not true collaboration.
- True collaboration will supplement and strengthen decisions made in compliance with all legal requirements.
- FACA can help make collaboration and legal duties work together, but FACA is NOT required for successful collaboration, unless very limited triggers are met.

FACA is Actually a RARE Monster!

- While there have been a small number of lawsuits that successfully found violations of FACA, most lawsuits under FACA were won by the federal agency that had been sued.
- Even then, lawsuits under FACA are rare; they are nothing close to the litigation filed under NEPA or the Endangered Species Act.
- Supreme Court holdings on FACA make it clear that it should be a rare limit to collaboration.

So, when does FACA apply?

- A federal agency must comply with FACA when it:
 - (1) establishes, utilizes, controls, or manages
 - (2) a group with non-federal members that
 - (3) provides the agency with consensus advice or recommendations.
- Only groups that meet **all three** of these legal elements are subject to FACA.

What does “Utilize” actually mean?

- Under FACA, the term “utilize” does not have its ordinary meaning. Legalese actually limits its real-world application. Some think that the usual meaning of “utilize” as “to put to use” means that an agency cannot use or participate in anything a non-federal group does without violating FACA.
- Instead, FACA’s regulations provide that an agency “utilizes” a group only when it exercises actual management or control over a group’s operations.

“Utilize”

- “*Utilized* for the purposes of the Act, does not have its ordinary meaning. A committee that is not established by the Federal Government is utilized within the meaning of the Act when the President or a Federal office or agency exercises actual management or control over its operation.” 41 C.F.R § 102-3.25.
- The Supreme Court held that “utilized by” applies only to groups organized by or closely tied to the federal government, thus having quasi-public status. *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989).

What does this mean to my group?

- Basically, unless the federal agency initially established or totally controls the collaborative group at issue, then FACA is NOT involved.
- “Controls” means things like setting meetings and agendas, deciding membership, providing all funding, and controlling all aspects of the group’s operations, without input from others in the group.
- The agency’s helping set up the group or being a PART of the group’s leadership or management does not mean that the collaborative group falls under FACA. The agency must control the group almost exclusively.

What if the agency DOES control the group?

- Even if the agency does control the group and all of its activities, it STILL does NOT come under FACA unless the group gives the agency consensus advice.
- So long as the members of the group give the agency advice individually, even if the advice from different members all agrees or is all the same, FACA is not implicated.

So, how about some examples?

- An environmental NGO started the group and runs the meetings. Our agency is one member of the group and sometimes helps set the agenda for meetings. Does FACA apply? NO!
- A timber group set up the collaborative but the agency provides meeting space for all meetings. Otherwise, the agency does not control the group and participates as a single member. Does FACA apply? NO!
- The agency set up the group, sets agendas, and limits membership to those we want, but we get advice from the members separately and not collectively. Does FACA apply? NO!

FACA Reality

- In real world settings of collaboration over National Forest plans and projects, it is extremely rare to get into a situation that activates FACA.
- I have seen FACA “accidentally” triggered only once, and that was due to nefarious backstabbing actions taken outside the group by one member.
- I have NEVER seen FACA inadvertently triggered in a collaborative group setting.
- As long as the agency does not establish or totally control the collaborative group, FACA can NEVER be triggered, no matter how otherwise involved the agency is in the group.

Fear the FACA?

- Nonetheless, there are times when you will WANT FACA to apply and no one should fear that possibility.
- The requirements for having and managing a FACA group are not as difficult as many fear.
- In some instances, having a full FACA committee can be much more beneficial than not in a collaborative setting. I have seen FACA groups break through different interests' positions quicker and easier than anything else ever has.
- The Forest Service now has a series of FACA committees that show this reality: RACNAC, CFLRP, Planning Rule, Tongass Amendment.

FACA can Actually Help!

- When dealing with large-scale and/or long-term issues and management problems, a FACA committee can help support wider collaborative efforts.
- Having a FACA committee obviously eliminates any complaints about violating FACA by not having one.
- A FACA committee can eliminate concerns that a certain interest is not being heard.
- Both the public and the courts have found that a FACA committee shows good faith on the part of the agency.
- In my experience, FACA committees break down barriers between rival interests and build trust better than any other mechanism available. The level and depth of work that can then be accomplished is often astonishing.

Things to do to make sure compliance with FACA and assure fair collaboration

- All collaborative group meetings are open to all the public.
- All group meetings have plenty of advance notice.
- All parties are invited to participate in your collaborative, and for those that choose not to participate, they can attend all meetings and still have opportunities to comment and give input.
- A good record is kept of all meetings. Nothing is secret or closed.
- The agency makes clear that it retains all decision-making authority but also gives everyone chances to influence those decisions.
- Make it clear to all that the agency is fully committed to meeting all its normal legal duties and fulfilling all legal requirements in its decision, including use of best available science. Make sure that no one can claim that the collaborative process is being used as a substitute for your legal duties under all laws and regulations. The collaboration must be a way to supplement and make more effective the work under those legal duties.

More Things to Do

- Having outside facilitation, both in the formatting of the collaborative group and its ongoing operations, can often make the difference between success and failure.
- Build collaboration as a way of doing all the agency's business, not just a one-time thing for one decision. Trust built through initial collaborative work can lead to trust being built for other work and even, eventually, a new paradigm for all the work.
- Make the process an ongoing substantive dialogue with all, not just a fancier way of doing "notice and comment." Don't just listen to the public; hear them through a dialogue that will also help them hear you.
- You can still meet one-on-one with people or interest groups, but make sure that the collaborative group is informed of those meetings and what occurred. Make sure such one-on-one meetings are for informational purposes only and not for building toward any form of decision making.

Resources

- There are some great resources out there that clearly and simply go through all you need to know about FACA, when it applies, and how to use it when it does apply.
- “Key Principles and Practical Advice for Complying with the Federal Advisory Committee Act,”
http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5203270.pdf
- PowerPoint on the above article:
http://www.fs.fed.us/emc/nfma/collaborative_processes/documents/PracticalAdviceAboutFACA.pdf

Other Federal Resources:

- BLM's FACA website, an excellent source of FACA information:
http://www.blm.gov/wo/st/en/prog/more/adr/natural_resources/faca.html
- BLM Guide to FACA, an excellent guide:
http://www.blm.gov/style/medialib/blm/wo/Planning_and_Renewable_Resources/adr_conflict_prevention.Par.24269.File.dat/facaguide.pdf
- U.S. Army Corps of Engineers primer:
http://www.iwr.usace.army.mil/Portals/70/docs/cpc/USACE_FACA_guidance.pdf

More Resources

- University of Michigan “Legal Challenges to Collaboration” website, includes good FACA information:

http://www.snre.umich.edu/ecomgt//lessons/stages/organizing_the_process/legal/index.htm

- “The Federal Advisory Committee Act and Public Participation in Environmental Policy”:

<http://www.rff.org/Documents/RFF-DP-99-17.pdf>