

## LEGAL ISSUES IN COLLABORATIVE PROCESSES

### I. INTRODUCTION

- One of the first things that an agency should do in assessing the potential of collaboration is to *review the relevant legal authorities to determine how they apply to the situation.*
- The *laws do not prevent collaborative planning* but do provide interesting challenges, many which revolve around process and procedures. There are numerous situations in which agencies have interpreted legal authorities very broadly and in a way that facilitates collaboration.
- Courts also have been more impressive in directing agencies to involve the public in their decisions through collaborative channels than in hindering collaborative partnerships.

**II. FEDERAL ADVISORY COMMITTEE ACT (FACA):** Because the EM approach depends on the input and participation of a wide range of individuals and interests other than the federal government, *one of the primary legal authorities that is often cited by agencies as a stumbling block for collaborative process is the Federal Advisory Committee Act (FACA).*

### A. FACA overview

- FACA was designed to regulate inappropriate relationships between federal officials and constituent groups.
- FACA *defines an advisory committee* as “any committee, board, commission, council, conference, panel, task force, or other similar groups, or any subcommittee or other subgroup thereof which is –
  - a. established by statute or reorganization plan, or
  - b. established or utilized by the President, or
  - c. established or utilized by one or more agenciesin the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.
- Anyone that works with the public needs to know where to obtain accurate information about the law and its rules. They need practical advice about how to go about establishing a FACA committee or whether the interaction they are going to be doing with the public is subject to FACA.

## B. Negative effects of FACA on collaboration

- FACA imposes *lengthy chartering processes* – committees have to include a full balanced set of stakeholders, have a clearly defined purpose, and be deemed official by an lengthy chartering process. To apply to a charter, an agency must list all members of the committee, describe the committee’s duties and the length of time it will function, and estimate the number and frequency of meetings and annual operating costs.
- FACA imposes *substantial procedural requirements* – Each meeting must be open to the public and detailed minutes must be kept. The record, minutes, and other documents must be available for public use. Notice about each meeting must be published in the Federal Register and other means.
- Under FACA, each committee *terminates within two years* after the charter is filed unless action is taken to renew the group, which involves filing a new charter. This two year life span does not allow for complex and evolving environmental problems to be identified, analyzed, and resolved.
- Agency employees sometimes choose *not to interact with interest groups out of confusion over what FACA requires and a fear of being sued for violating the law*. The original law was vague on when FACA applied to collaborative groups and left much interpretation up to the agency.
- There is a tendency for officials to accept input but *not to encourage the constructive dialogue* that can lead to collaborative solutions. Agency officials often fail to establish the type of interactions with and among community members that leads to the consensus-building that is critical to the EM approach.

## B. Positive effects of FACA on collaboration

- Federal advisory committee process gives stakeholders *some assurance that there is a formal mechanism by which their advice will reach the decision-maker* because under FACA, there is a formal provision in the charter that the Secretary will receive their decision and the stakeholders will hear some response. If can provide a mechanism for communication between the decision-maker and stakeholders (as well as an open process and equal representation) without FACA, can be confident in the process without concern about FACA.
- FACA also mandates public meetings so that all recommendations are formulated in an *open process, which gives people confidence that they not sitting at the table while other interests are cutting a deal* outside of the group.
- FACA is very useful in instructing anyone in putting together a committee. You want to balanced participation, you want to make certain that people have access to information, you want the necessary parties can come and participate, and you want the process of the group to be organized. That just *adds credibility and trust*.

- Some compensation may be provided through the chartering agency for committee members.

#### D. Main challenge: Knowing when FACA applies?

- Determining the scope of FACA is of utmost importance due to the past litigations brought against various agencies by plaintiffs claiming FACA violations in an effort to stall or inhibit the implementation of decisions by collaborative groups that they do not agree with. (**FACA Appendix A**)
  - For example, in 1994, uncertainty surrounding the applicability of FACA prompted recommendations from the Justice Department that agency partners (Forest Service and BLM) involved in the Applegate Partnership resign from the board.
- With varying success, several federal ecosystem management efforts have been challenged as violating FACA. These include President Clinton’s Forest Plan for the Pacific Northwest, restoration efforts in South Florida, and federal efforts to protect salmon in the Pacific Northwest. Most of cases were *judged in favor of the agencies and did not uphold the FACA violation* and, in recent years, there *have been less lawsuits* of this kind. This is perhaps because agencies perceive FACA as a problem or because they understand better what they can and cannot do.
  - In the 1989 Supreme Court decision of *Public Citizen v. United States Department of Justice*, the Court concluded that Congress intended to encompass within the phrase “utilized by” only groups “organized by, or closely tied to, the Federal Government, and thus enjoying quasi-public status.” Further decisions of the Court of Appeals for the District of Columbia interpreting *Public Citizen* provided further guidance. In *Washington Legal Foundation v. United States Sentencing Commission* (1994), the court noted that “influence [by an agency over an advisory group] is not control.” Thus, in determining whether a group is subject to FACA, this decision looks not to the amount of influence the group has over the agency but rather to the “quantum of control an agency...[has] over an advisory committee.” In *Food Chemical News v. Young*, the court commented that before an agency can be said to utilize a group as an advisory group, that quantum control must make the group “so closely tied to an agency as to be amenable to strict management by agency officials.” *Public Citizen* and its progeny indicate that courts will determine that advice from an independently established group triggers FACA only if a federal agency exercised extensive control over the group.
- Agencies run the risk of judicial invalidation of any agency decision on advice or recommendations gathered in violation of the Act. However, to date, this *risk has been small* as courts have been reluctant to prohibit agencies from using advice or information provided by advisory councils.
  - For example, in the 1994 case *Northwest Forest Resource Council v. Espy*, a nonprofit organization representing timber and forest product industries asked the court to declare the Forest Ecosystem Management Assessment Team (FEMAT) an advisory committee under FACA and declare FEMAT’s recommendations “null and void” for violating

FACA. The court found that “by any fair interpretation of the facts and certainly by literal reading of the statutory definition,” FEMAT was an advisory committee within the provisions of FACA. The court, however, did not issue an order prohibiting the use of the FEMAT report in the development of the forest management plan because “there is nothing in the report to suggest that the FEMAT Report, or its advice and recommendations to the President, would have in any way been altered had FACA been complied with to the letter.” (Hayes, 2000)

## Strategies

- Four criteria that together are used to determine whether an outside group might qualify
  1. whether the agency appoints members of the group
  2. whether the group receives funding from the agency
  3. whether the agency sets the group’s agenda
  4. whether the group answers directly to the agency
  
- FACA is a perceived barrier due to misconceptions about when the law applies. Agency personnel should *be familiar with new regulations* that clarify when FACA does not apply.
  - In 1995, Congress amended the act to create a FACA exemption (**Unfunded Mandate Reform Act of 1995**) for meetings between federal officials and state, local, and tribal officials for exchanging views, information, or advice related to shared responsibilities. (**FACA Appendix B**)
  
  - In **2001 FACA Final Rule**, General Services Administration clarified that “agencies have broad latitude to consult with the public using many different approaches that are not subject to the Act. Public consultation formats that generally fall outside the scope of the Act include public meetings, information exchange forums, meetings initiated with or by a non-governmental organization, Federal participation on groups that are not established or utilized by the Government, and certain work products generated by contractors as a result of consultation with the public.”
  
  - **GSA FACA Final Rule 2001** is a helpful rule in understanding what the act applies to. Agency personnel need to know what a “utilized” committee is and specifically what group interactions are not covered by the Act. The rule stated that a committee is “utilized within the meaning of the Act when the President or a Federal agency exercises actual management and control over its operation.” This construction would require an agency both to have management of the committee and to exercise control over the committee before the committee can be deemed “utilized.” (See Final Rule 2001 for explanation of the legal authority behind the definition of “utilized”)
  
  - The **FACA Final Rule 2001** contains a set of questions in **Appendix A to Subpart A** that outlines key points and principles regarding whether a committee or a group is actually managed or controlled by the executive branch. It outlines scenarios in the form of questions and then provides guidance according to if the scenarios would be subject to FACA. For example,

**Question(s)**

1. A local citizens group wants to meet with a Federal official(s) to help improve the condition of a forest's trails and quality of concessions. May the Government meet with the group without chartering the group under the Act?
2. May an agency official attend meetings of external groups where advice may be offered to the Government during the course of discussions?
3. May an agency official participate in meetings of groups or organizations as a member without chartering the group under the Act?
4. Is the Act applicable to meetings between agency officials and their contractors, licensees, or other "private sector program partners?"

**Guidance**

A. The answer to questions 1, 2, and 3 is yes, if the agency does not either "establish" or "utilize" (exercise "actual management or control" over) the group. (i) Although there is no precise legal definition of "actual management or control," the following factors may be used by an agency to determine whether or not a group is "utilized" within the meaning of the Act: (a) Does the agency manage or control the group's membership or otherwise determine its composition? (b) Does the agency manage or control the group's agenda? (c) Does the agency fund the group's activities? (ii) Answering "yes" to any or all of questions 1, 2, or 3 does not automatically mean the group is "utilized" within the meaning of the Act. However, an agency may need to reconsider the status of the group under the Act if the relationship in question essentially is indistinguishable from an advisory committee established by the agency.

B. The answer to question 4 is no. Agencies often meet with contractors and licensees, individually and as a group, to discuss specific matters involving a contract's solicitation, issuance, and implementation, or an agency's efforts to ensure compliance with its regulations. Such interactions are not subject to the Act because these groups are not "established" or "utilized" for the purpose of obtaining advice or recommendations.

*See FACA Appendix A to Subpart A for the full list of questions and guiding statements.*

- Agencies should *clarify agency policy* about the scope of FACA groups. Different agencies have different policies, as outlined in **Appendix C**.
- Agencies should consider more extensive use of FACA-chartered advisory committees when seeking to collaborate on a regular and systematic basis.

## Notes from practitioners

### John Hamill (Desert Management Group)

- I have *never seen FACA as a barrier but have heard it used as an excuse* for not doing collaboration. There are ways to work around FACA or work with FACA in order to allow collaborative efforts to move forward. There are many things going on that are questionable in terms of FACA but by in large, these things go forward and if someone gets called for FACA violation, they are willing to take that risk.
- Clearly some things that you cannot do according to FACA but some gray areas still exist. You can either *work around those areas or if you clearly want to address them initiate the process of becoming a FACA group*. It creates a few more hurdles such as meeting announcements but it's not insurmountable.
- Generally *if you have all the right parties at the table and the meeting is open, FACA is not a big issue*.

### Doris Celarier (Forest Service)

- A lot of misinformation and a high anxiety level exists about FACA, which is totally unnecessary. Employees need to understand very specifically what kinds of interactions with the public are perfectly fine without concern for FACA. One thing that happens is that somebody with little understanding about the Act suddenly brings the FACA question to the table and nobody there can say that they are wrong. Everyone gets uptight and it sort of hangs over the discussion. People need to have a better understanding of the situations in which FACA applies and does not apply.
- The FACA process does discourage...you have to almost not be human to not get discouraged.
- In one sense it, FACA is discouraging, but the *discouragement lies largely not in the Act itself but in the way the agency handles the Act through obscure rules and added responsibilities*. The Act itself is not that long or complicated about what you have to do. What has happened is that agencies have been put in charge of organizing the systems for setting up FACA committees and those systems within the agencies can become mind-boggling and discouraging. With each new administration, people want to add more process that is not in the internal directives anywhere – it is just their personal wishes. Some employees have no patience with process so there is a mindset that does not want to do it at all. To prevent duplication and added responsibilities, personnel must work to show administration how their wishes are already handled in some other aspects of the process.

### Su Rolle (Applegate Partnership)

- It seems that most of problems with FACA are *perceptual rather than actual*. There is a great deal of misunderstanding and fear regarding the act.

- In working with the Applegate Partnership, I have tried to frame the solicitation of ideas (which could be construed as advice or recommendations) within a context that individual ideas are being sought (and recorded). In a situation where the group wanted to make consensual recommendations (e.g. via a letter to the agencies), this discussion would be placed as the last agenda item. When the group wants to fully discuss the proposal and make a recommendation, the agency personnel physically leave the meeting. In that way there is no conflict of interest or appearance of using the group for advice.

## E. Other challenges

**Challenge:** Frustration when collaborative groups want to make decisions, not just recommendations.

- *Example:* In the Glen Canyon Adaptive Management program, the group believes that it now manages the dam and so it is a challenge to gently remind them that they are making recommendations to the Secretary and she can accept them or reject them.
- **Strategy:** To subtly remind the group, when federal personnel prepare an agenda, they make sure that if an issue is coming to a conclusion, they remind the groups that the final conclusion would be a recommendation. The agenda shows “Recommendation to the Secretary” and the personnel frequently use the word “recommendation” instead of “decision.”

**Challenge:** Time needed to meet FACA requirements

- *Example:* Other acts that go along with FACA add paperwork and responsibilities. For example, under FOIA, you have to keep records accessible to the public. This means that you have to prepare them in a legible and timely manner and disseminate information about where the records are located.
- **Strategy:** In the Glen Canyon group, they have a management assistant who devotes most of their time to taking care of the details regarding FACA.

**Challenge:** Formality of FACA

- *Example:* A federal employee serving as a member of the Glen Canyon groups remarked, “Formality hurts us at times because people have a need to represent their interests. It’s like appearing before Congress in that the conversation in the hall is quite different than the conversation to the committee. And, in a more formal setting, people might be less inclined to come to some type of collaborative decision.”
- **Strategy:** The use of smaller ad hoc groups has usually been more successful in terms of reducing formality. A Glen Canyon representative states, “There are fewer people in the room, it’s more laid back, and there are no formal procedures (no motions)...people are just able to talk. With less formality, participants are more open to sharing ideas and truly collaborating. We have found that if you use subgroups to FACA committees, it takes away some of the formality.”

**E. Summary: What agencies can do to advance collaboration in the face of FACA?**

- Train employees involved in ecosystem activities on sensitivity to FACA-related issues and on the content and requirements of the Act.
- Clarify agency policy about concerning scope and balance of FACA groups.
- For managers that actually have to establish a FACA committee, GSA has a 2-day training about how to set up and run a FACA process (on GSA website, click on Trainings).
- Clearly lay out that the purpose of the group is not decision-making but information exchange, including creating visions that may or may not translate into the final decision.
- Clarify that in the early stage of the collaborative process, people will come together to share information but when it goes into the final stage of decision-making, the agency's decision-maker, not the group, will be making the final decision.
- Clarify that the group is not the preferred sources of advice and that the information exchange is open to all comers.
  - For example, one early mistake that Applegate Partnership made was that many field trips and activities were not as obviously open to all as they should have been. Not adequately advertising times for information exchange times, especially regarding timber sales, was also a problem. One group (NDRC) appealed the first timber sale by the Forest Service on the grounds of FACA and the group did not have good documentation to show that the process was open to all, not just those involved in the Partnership.



### III. NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

#### A. Challenges

- NEPA, in becoming the most popular way for agencies to incorporate public input, has tended to lock agencies into one model of participation. Since it involves people very early and very late in the decision-making process, outside groups miss out on opportunities to understand decision-making constraints, share information interactively, and provide creative solutions.
- NEPA sets up a discreet time for public comment. A common concern for agency personnel is if they are allowed to talk to people outside of the time period for public comment under NEPA.
- In some situations in which collaborative decisions had to go through NEPA and were changed, distrust was created.

#### B. Strategies

- Personnel should know that *nothing precludes collaboration along with NEPA and as a step to meet NEPA*.
  - Throughout the NEPA process, BoR is using the two collaborative work groups at Crystal Dam and Flaming Gorge Dam not only for making comments about release decisions but also for helping the Bureau of Reclamation evaluate alternatives within NEPA. The NEPA recommendations and the recommendations of the work group are melded together. The workgroups may start with the NEPA alternatives as they think through their recommendations or the recommendations of the workgroups may be used as a NEPA alternative.
- Personnel involved in the collaborative effort need to *clarify from the beginning that the collaborative decision will have to go through the NEPA process and could be changed*.
- Ways should be found to marry the NEPA process with the more interactive collaborative approached so that the product of the collaborative groups is both well-tested and publicly reviewed.

## **IV. Freedom of Information Act (FOIA)**

### **A. Challenges**

- FOIA raises concerns about whether corporations should share information with public agencies. Not knowing who owns the information and who has control over its distribution can create a disincentive for corporations to participate in collaborative processes.
  - Joint monitoring efforts and data sharing that is common in collaborative processes may be subject to FOIA requests by third parties who might, in turn, use the information gained from public agencies in lawsuits against the corporations.
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## V. TAKE-HOME MESSAGES

- Different laws affect different groups – including ESA, NEPA, EPA or FS regulations, specific state laws and the interaction of federal, state, private jurisdictions.
  - At the start of a collaborative process, the group needs to thoroughly review all laws that effect or constrain the group's decisions. The group may need to engage a federal/state/private solicitor and develop a guidance document to articulate the legal and policy issues that the group will need to address as it moves through the process.
  - Legal issues need to be spelled out clearly, including uncertainties in the laws so that the group understands the boundaries in which it works and prevents frustrations later in the process. Understanding legal issues also reiterates the role of collaborative processes as advisory because in the end, a federal or state agency will have the accountability and liability for making the decisions and taking actions. People often times make recommendations and then get frustrated when their recommendations are not accepted because they don't understand the other factors at play.
  - Keep in mind that collaboration can be done without implicating FACA.
-