

USDA Forest Service Collaborative Planning Activities: Compliance with the Federal Advisory Committee Act (FACA)

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The Federal Advisory Committee Act (FACA)*

What is it?

FACA regulates Federal agency establishment or utilization of a group to obtain consensual advice or recommendations. FACA defines when such a group can be considered an advisory committee and the process necessary for its formation and proper functioning. "Utilizing" a group is not defined in the ordinary way but means "managing" or "controlling" the group.

Why was the law enacted?

FACA was enacted to deal with a perceived lack of accountability and significant costs associated with advisory committees.

Are Federal advisory committees useful to collaborative planning?

Officially chartered advisory committees can be effective tools for involving the public in collaborative planning. Other forms of public participation can be equally effective. FACA regulations (41 C.F.R. Part 102-3), which are devoted to describing in detail how to establish and manage a Federal advisory committee, include a section (41 C.F.R. Section 102-3.40) and appendix (Appendix A, Subpart A) compiling a list of agency interactions with the public that FACA does not cover. Court decisions, especially from the mid 1980s to the present, helped to clarify these interactions.

Examples of Meetings NOT Subject to FACA--

A. When public interaction in collaborative planning is MANAGED OR CONTROLLED by the Forest Service (FS)

1. Meetings with individuals or groups to give individual advice.

FACA does not apply to individuals or representatives of groups who meet with Federal officials (s) to give individual advice.
Reference 41 C.F.R. 102-3.40(e)

2. Meetings with groups to exchange facts or information.

FACA does not apply when a group meets with a Federal official to exchange facts or information.

* This document does not constitute nor substitute for legal guidance or advice. It has been prepared for informational purposes only and summarizes material from existing sources intended for general guidance. Consult your Office of General Council to clarify and confirm this guidance if you have specific questions.

Scenario

The agency holds meetings in Arkansas and surrounding states, inviting interested parties or the general public to explain a proposal to establish an experimental forest. Participants share what they know about the areas identified as prospective sites for the experimental forest and offer their opinions about the pros and cons of the project and of each suggested site. The object is to gather information and assess the opinion of individual segments of the community on the proposal. A facilitator at the meeting records the information, suggestions, and recommendations contributed by each person or group representative. The Agency analyzes and summarizes the input and shares it with the participants. Subsequent meetings may be necessary to obtain feedback on the opinions and ideas offered at the initial meeting.

NOTE: When working with groups that are exchanging facts or information or offering opinions in an FS controlled or managed meeting, structure the discussion in such a way that a participant is given an opportunity to explain his or her point of view and record each opinion or piece of information in a manner that is documented for future reference. For instance –

- The view of group representative or person No. 1 is...
- The view of group representative or person No. 2 is...
- The view of group representative or person No. 3 is...

CAUTION: When the FS works with groups to exchange facts or information or listens to groups' various opinions in an FS controlled or managed meeting, ***FS representatives can not seek agreement or consensus among the participants. Moving to seek consensus or agreement would make the committee subject to FACA.***

3. Meetings with *groups composed wholly of elected officials* from the Federal, State, Tribal, or local governments (or their designated employees with authority to act on their behalf) whose purpose is to *exchange views, information, or advice* related to matters for which Federal, State, Tribal, or local governments have cooperative responsibilities.

Scenario

The ABC Intergovernmental Committee, a group composed of a national forest recreation planner, a City of Smithville council member, the State senator representing Smithville in the State senate, and the local Tribe's elected representative, meet regularly to discuss recreational opportunities on the forest and make recommendations to the forest decision maker. Some limitations apply to the work they can do together.

Reference: Section 102-3.40(g) and guidelines issued by the Office of Management and Budget on section 204(b) of the Unfunded Mandates Reform Act of 1995.

B. When public interaction in collaborative planning is NOT MANAGED OR CONTROLLED by the Forest Service

1. Groups assembled by an agency contractor to provide advice and recommendations: FACA does not apply to a group that an agency contractor has assembled according to contract terms to provide advice and recommendations to the agency on planning. FACA does not apply because the contractor is managing or controlling the group, not the agency.

Scenario

The agency contracts with a university or research institute to assemble a group with the appropriate expertise to make recommendations and give advice concerning the establishment of an experimental forest. The agency does not control or manage the contractor's information, the group's membership, or sources of information except to establish by contractual terms what performance or results will fulfill the contract, including any limitations imposed by the agency. The contractor is the only point of contact with the agency.

Reference: See Appendix A to Subpart A of Part 102-3, Key Point 1, Question and Guidance

2. Groups organized by the public that regularly come to consensus on a position but are not managed or controlled by the agency or any Federal employee

Scenario

*Friends of the Forest, an independent local group, to which an FS employee has been asked to participate but **which is not managed or controlled by the agency** or any Federal employee meets to discuss forest management issues and come to agreement on recommendations to be made to the forest decision-maker. The Friends group sets the agenda, schedules the meetings, decides who to include in the group, and funds the activities of the group.*

Reference: 41 CFR Section 102-3.40(d)

In Summary

For FS collaborative efforts to remain compliant with the FACA and the General Service Administration's current Federal Advisory Committee Management regulation, remember that--

In collaborative efforts, FS Planners may

- Meet with a number of persons or groups collectively to obtain their individual views and opinions
- Share or exchange facts or information with individuals or groups
- Meet with and participate in groups not organized, managed, or controlled by the agency that regularly come to agreement on advice and recommendations they share with the agency (such groups may be organized by the public or may be organized by a contractor)
- Meet with groups made up of elected officials from the Federal, State, Tribal, and local governments (or their designated employees with authority to act on their behalf) to discuss and come to agreement on matters for which they have cooperative responsibilities

In collaborative efforts, FS Planners may NOT

- Solicit consensus, agreement, or a common point of view from the public in a meeting that the agency manages or controls

NOTE: Language Sets Expectations for Public Meetings that the Agency Manages or Controls

Be clear that in public meetings controlled and managed by the agency that the goal of the meeting is to exchange facts or information and listen to opinions. Indicate that the agency cannot ask for agreement or consensus. Keep in mind that the individuals attending a meeting do not constitute a "team."

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Where can I go for more information on FACA as it relates to collaboration planning?

For information on --

Groups not covered by FACA go to

<http://www.gsa.gov/Portal/gsa/ep/programView.do?pageTypeId=8203&ooiid=9761&programPage=%2Fep%2Fprogram%2FgsaDocument.jsp&programId=9150&channelId=-13174>.

Or go to <http://www.gsa.gov>. Click on Policy; then on Management of Federal Advisory Committees; and finally on Legislation and Regulations, Final Rule

In the final rule (41 CFR Parts 102-3), go to sections 102-3.40, especially, (d), (e), (f), and (g) for groups not covered by FACA and Appendix A of Subpart A – Key Points and Principles for examples.

Collaboration and FACA at the Environmental Protection Agency go to

<http://www.epa.gov/innovation/collaboration/facafinal.pdf>.

Establishing Federal Advisory Committees in the Department of Agriculture go to

<http://fsweb.wo.fs.fed.us/pao/faca/>.