



## **Collaborative Activities and the Federal Advisory Committee Act (FACA)<sup>1</sup>**

This document provides key principles and practical advice for determining if a collaborative effort falls under the parameters of the [Federal Advisory Committee Act](#) (FACA, 5 USC App.). Congress passed FACA in 1972 as one of the federal government's Sunshine Laws that ensure agency decisions occur under the daylight of public review. Related laws include the [Freedom of Information Act](#) (FOIA, 5 USC 552) and [Privacy Act](#) (PA, 5 USC 552a).

This document does not constitute—nor substitute for—legal guidance or advice. It has been prepared for informational purposes only. The governing DoD and Army regulations [AR 15-1](#) and DoD Instructions [5105.4](#) (6 Aug 2007) and [5105.18](#) (10 July 2009) limit USACE's participation on committees, even those not subject to FACA. Keep in mind that whether or not FACA applies to a collaborative effort is a legal determination that requires the involvement of USACE counsel. If seeking to create a FACA committee, note that it is generally very difficult to obtain DOD approval for new FACA committees. Committees that are determined to fall within the purview of FACA must comply with all DoD and Army regulations.

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### **How to Ensure that Collaborative Activities do not trigger the Federal Advisory Committee Act:**

- ✦ **Avoid establishing a group and seeking group advice or recommendations:** FACA applies when a federal agency establishes or controls a group including non-government representatives and does so with the purpose of obtaining collective advice or recommendations (41 CFR 102-3.25, definition of *advisory committee*).
- ✦ **Recognize that “utilize” has a special meaning under the FACA law.** “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” (See the FACA regulation definition for an agency “utilizing” a group, 41 CFR 102-3.25 and 41 CFR 102-3.40(d)). A group may be subject to FACA when a federal agency exercises actual management or control such as by selecting the members, setting the procedural rules, dictating the agenda, and providing all the funding for operations. A significant “red flag” is whether the agency picks the participants. For instance, if the agency sends invitations to a series of meetings to a broad number of interest groups asking each to send a representative and also issues public notice of the meetings stating anyone may attend and participate, the series of meetings would not be subject to FACA.
- ✦ **Seek individual perspectives, rather than the collective view of a group.** While this approach can lessen the risk of a FACA violation, it can also diminish the value of collaboration. The most value to the government can sometimes come from groups in which members work together to identify areas of agreement and disagreement. Seeking *information* from individuals about whether consensus exists among the individual participants and why is not the same as seeking *group consensus*. Remember that a group that develops consensus does not trigger FACA coverage unless the group was also established or utilized by the federal agency (Appendix A to Subpart A of 41 CFR 102-3.).

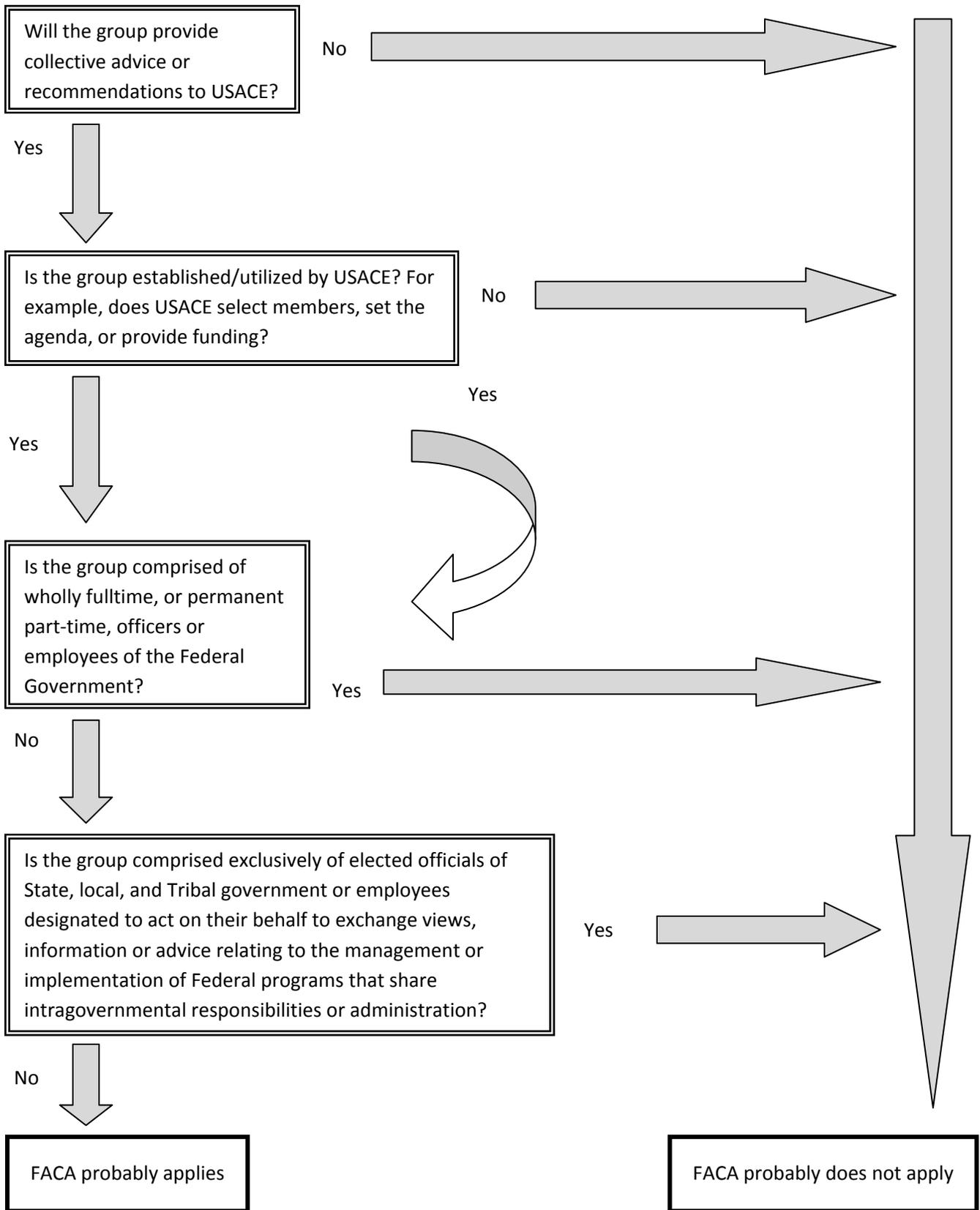
#### Additional tips:

- ✦ **Allow public review and comment on all products:** Establish opportunity for interested parties to add information and offer suggestions, thereby ensuring a public review of all group products prior to any agency decision or utilization of those products.
- ✦ **Make all meeting notes, informational materials, and products publicly available:** Transparency is exceptionally important because it can offset any misperceptions.

#### **Resources and References:**

- Army Regulation [AR 15-1](#)
- DoD Instruction [5105.4](#) and [5105.18](#)

# How to Decide if FACA Might Apply to Your Collaborative Effort:



## **Examples of Collaborations at USACE**

Collaborative processes may or may not be subject to FACA. Following are examples of Agency collaborative processes that are subject to FACA as well as collaborative processes that are not.

### ***Collaborations Subject to FACA***

#### Chief of Engineers Environmental Advisory Board

<http://www.usace.army.mil/CECW/Pages/eab.aspx>

The Environmental Advisory Board (EAB) was created by the Chief of Engineers, Lieutenant General Frederick J. Clarke in 1970, as a means for the Chief to gain outside, expert and independent advice on environmental issues facing the Corps of Engineers. The group's purpose is to advise the Chief of Engineers by providing independent advice and recommendations on matters relating to environmental issues facing the Corps of Engineers. The Board usually meets once or twice a year and the meetings are open to the public in accordance with FACA. The committee has between five and ten members who serve two-year terms and are selected for their expert knowledge and experience in environmental matters. This committee is subject to FACA because:

- it was formed and managed by the Corps;
- it offers group advice to the Corps;
- membership includes private stakeholders

#### Inland Waterways Users Board

<http://www.waterwaysusers.us/>

The IWUB is an advisory board established by Congress to monitor the Inland Waterways Trust Fund and to make recommendations to the Army and to Congress on the priorities and spending from the Inland Waterways Trust Fund for construction and rehabilitation projects on the fuel-taxed system. The Director of Civil Works serves as the IWUB Executive Director and the Assistant Secretary of the Army (Civil Works) serves as an Inter-Agency Observer, along with representatives of the Maritime Administration, NOAA and the Department of Agriculture. The eleven member Board meets 2-3 times a year and represents all geographic areas on the fuel-taxed inland waterways system of the United States. The composition of the Board reflects a balanced industry focus. This committee is subject to FACA because:

- it is jointly managed by the Corps and the Board's (private sector) Chairman;
- it offers group advice to the Secretary of the Army;
- membership includes private stakeholders

### ***Collaborations Not Subject to FACA***

#### Hudson Raritan Estuary Comprehensive Restoration Plan

<http://www.nan.usace.army.mil/harbor/index.php?crp>

<http://www.harborestuary.org/>

The U.S. Army Corps of Engineers and the Port Authority of New York and New Jersey developed the Hudson-Raritan Estuary (HRE) Comprehensive Restoration Plan (CRP) in partnership with the NY/NJ Harbor Estuary Program (HEP). The HEP is a consortium of federal,

state, municipal, non-governmental organizations and other regional stakeholders focused on improving the quality of the harbor estuary. The CRP sets forth a consensus vision, master plan and strategy for future ecosystem restoration in the NY/NJ Harbor. A key regional stakeholder, the Hudson River Foundation, led a collaborative process to obtain input and identify goals by convening 11 workshops. HRF also sponsored a scientific workshop in 2005 that developed the concept of "Target Ecosystem Characteristics (TEC)" for restoration planning. The Corps incorporated the outputs from these workshops and adopted the TEC approach for the CRP.

- This process was not subject to FACA because a non-Federal entity convened the workshops. The Corps did not manage or control these workshops (that is, the Corps did not select the membership, set the charge, or provide funding).

#### Houston-Galveston Navigation Channels Project

<http://www.swg.usace.army.mil/items/hgnc/>

The Corps formed an Interagency Coordination Team for the Houston-Galveston Navigation Channels Project in 1990 in response to substantial conflict and controversy surrounding the release of a draft Environmental Impact Statement (EIS) related to deepening and widening the ship channels. Significant environmental concerns included potential salinity intrusion, erosion, loss of wetlands, and impacts to oyster reefs. The Corps signed an ICT charter with various federal, state, and advisory agencies to determine the necessary studies and develop the study scopes. ICT decisions were based on group consensus. The ICT resulted in a 1995 Final EIS, project authorization in 1996, and project completion in 2004. The Corps leveraged the technical expertise of the resource agencies to establish 4000 acres of wetlands and 172 acres of oyster reef.

- This process was not subject to FACA because all members of the ICT were government agencies.