

Sample Federal Advisory Committee Act Complaint

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATURAL RESOURCES DEFENSE COUNCIL,
1200 New York Ave., N.W.
Suite 400
Washington, DC 20005,
and
TRI-VALLEY CARES,
2582 Old 1st Street,
Livermore, CA 94550-3835,
Plaintiffs,
v.
BILL RICHARDSON,
Secretary, The Department of Energy
1000 Independence Ave., S.W.
Washington, D.C. 20585,
and
DEPARTMENT OF ENERGY
1000 Independence Ave., S.W.
Washington, D.C. 20585,
Defendants.

C.A. No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This case challenges the Department of Energy’s ongoing violations of the Federal Advisory Committee Act, 5 U.S.C. App. II (1972) (“FACA”), as amended, with respect to advisory committees which have provided DOE with recommendations concerning a multi-billion dollar National Ignition Facility (“NIF”) under construction in Livermore, California.

Jurisdiction

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

Parties

3. Plaintiff Natural Resources Defense Council, Inc., (“NRDC”) is a non-profit organization with over 400,000 members dedicated to the protection of the environment. It brings this action on its own behalf, and on behalf of its members.

4. NRDC works on a number of environmental issues, including issues related to the proliferation and hazards of nuclear weapons. In particular, for decades NRDC’s Nuclear Program has engaged in public education and advocacy concerning DOE’s nuclear weapons programs, including, in recent years, issues related to the NIF. NRDC has submitted comments to DOE concerning the NIF, has

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used its newsletters, website, and other publications to inform its members about the NIF, and has undertaken litigation concerning the NIF. When permitted by DOE, NRDC has also closely monitored, and participated in, DOE's outside reviews of the NIF.

5. NRDC members live in the vicinity of the NIF in Livermore, California.

6. Defendants' violations of FACA injure NRDC and its members. By failing to conduct open meetings and make advisory committee materials publicly available in the manner required by FACA, defendants are violating NRDC's statutory right to obtain information concerning these committees and their recommendations, and to disseminate that information to its members and the public, as well as to present information to DOE advisory committees and to DOE.

7. In addition, because these advisory committees and their recommendations are playing an important role in the decision-making concerning whether to continue funding constructing, and subsequently operating the NIF, the health and safety of NRDC members living near the NIF is threatened by DOE's unlawful use of these committees. For example, DOE may use radioactive or other hazardous materials in NIF experiments, or may conduct radiation effects tests at NIF. DOE's use of illegal advisory committees and their recommendations therefore threatens NRDC members who live in the vicinity of the NIF with releases of radioactive tritium, uranium, and plutonium, and other highly toxic materials such as beryllium and lithium hydride.

8. These FACA violations also injure NRDC and its members because continued funding, construction, and subsequent operation of the NIF—which DOE's illegal advisory committees directly influence—could increase the risks of nuclear arms proliferation and destabilize the current nuclear test moratorium among the major nuclear weapon powers. Completion and operation of the NIF increases the risk that certain nuclear-capable countries—such as India, Pakistan, Japan and Germany—will use the data and analysis generated by unclassified and partly classified NIF experiments to advance their fundamental understanding of nuclear weapons physics, and hence their abilities to design thermonuclear weapons and possibly even confirm their performance without conducting nuclear test explosions. Completion and operation of the NIF also increases the risks that additional countries, such as Russia and China, may revert to testing nuclear weapons to insure that any improvements the NIF permits in U.S. nuclear weapons are matched by improvements in these countries' own weapons. In addition, DOE's FACA violations injure NRDC and its members because the escalating funding demands of the NIF project—now totaling some \$4 billion dollars—and its inadequately reviewed scientific and technical problems, have undermined the confidence of the U.S. Senate in the nation's Stockpile Stewardship Program, and hence have diminished the prospects for Senate ratification of the Comprehensive Test Ban Treaty, a long standing priority of NRDC and its members. Thus, DOE's FACA violations harm NRDC and its members by furthering actions that could destabilize the existing nuclear test moratorium and spread nuclear weapons knowledge to additional countries, thereby increasing the risks of nuclear war.

9. Plaintiff Tri-Valley CAREs ("TVC") is a non-profit organization which has been involved in numerous advocacy activities concerning the NIF. Founded in 1983, TVC undertakes projects that increase public knowledge of the relationship between peace and environmental issues, including public education regarding potential impacts from the production, treatment, storage and disposal of hazardous and radioactive waste. A Livermore community-based organization, TVC's members reside, own property, work, recreate and attend public meetings near Lawrence Livermore National Laboratory ("Livermore"), where the NIF is being constructed. TVC members have participated in many administrative, legal and grassroots efforts involving the DOE's nuclear weapons complex, including the plans for the NIF at Livermore, and have devoted substantial resources advocating for Livermore to be converted from military to civilian research and uses. When permitted by DOE, TVC has also closely monitored, and participated in, DOE's outside reviews of the NIF. TVC brings this action on its own behalf and on behalf of its more than 2,600 members.

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10. Defendants' violations of FACA injure TVC and its members. By failing to conduct open meetings and make advisory committee materials publicly available in the manner required by FACA, defendants are violating TVC's statutory right to obtain information concerning these committees and their recommendations, and to disseminate that information to its members and the public, as well as to present information to DOE advisory committees and to DOE.

11. In addition, because these advisory committees and their recommendations are playing an important role in DOE's decision-making concerning whether to continue construction and subsequently operate the NIF, the health and safety of TVC members living near the NIF is threatened by DOE's unlawful use of these committees. For example, DOE may use radioactive or other hazardous materials in NIF experiments, and may conduct radiation effects tests at NIF. DOE's use of illegal advisory committees and their recommendations therefore threatens TVC members who live in the vicinity of the NIF with releases of radioactive tritium, uranium and plutonium, and other highly toxic materials such as beryllium and lithium hydride.

12. These FACA violations also injure TVC and its members because continued funding, construction and operation of the NIF—which these committees influence—largely undermines TVC's long standing effort to have Livermore reduce its focus on military-related projects in favor of devoting more resources to civilian projects. Without the NIF, Livermore is likely to be far less involved in military programs in the future, and far more involved in civilian-related research and development.

13. On information and belief, because DOE needs an independent review of the NIF in order to assure its continued construction, an injunction which prevents DOE from using recommendations obtained in violation of FACA will cause DOE to establish or utilize a FACA-complying advisory committee to review the NIF. Because NRDC and TVC will then have access to, and the opportunity to participate in, that advisory committee to the full extent permitted by FACA, prohibiting DOE from using certain advisory committee recommendations obtained in violation of FACA will redress injuries NRDC and TVC have suffered from these violations.

14. Defendant Bill Richardson is the Secretary of the Department of Energy, and is ultimately responsible for all decision-making regarding both the NIF and DOE's compliance with FACA.

15. Defendant The Department of Energy is an Executive Branch Department.

Statutory Framework and Facts Giving Rise to Plaintiffs' Claims

A. The Federal Advisory Committee Act

16. FACA imposes requirements on agencies when they establish or utilize any advisory committee, which is defined as a group of individuals, including at least one non-federal employee, which provides collective advice or recommendations to the agency. 5 U.S.C. App. II, § 3(2). When an agency seeks to obtain such advice or recommendations, it must ensure the advisory committee is "in the public interest," 5 U.S.C. App. II, § 9(2), is "fairly balanced in terms of points of view represented and the function to be performed," *id.* § 5(b)(2), and does not contain members with inappropriate special interests. *Id.* at § 5(b)(3). If these criteria are satisfied, the agency must file a charter for the committee. *Id.* at § 9(c).

17. Once an advisory committee is operating, the agency also must comply with requirements designed to ensure public access and participation. Among other requirements, an advisory committee must provide adequate public notice of, and conduct, open meetings, *id.* at § 10(a), and must make transcripts of meetings available to the public. *Id.* at §§ 10(b), 11(a). In addition, all documents made available to, or prepared by, an advisory committee must be publicly accessible. *Id.* at § 10(b). A federal employee must chair, or attend, each advisory committee meeting. *Id.* at § 10(e).

B. The National Ignition Facility

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18. As one component of an overall effort to achieve some of the objectives of nuclear weapons testing without conducting full-scale nuclear tests, the DOE has been constructing the National Ignition Facility (“NIF”) at the Lawrence Livermore National Laboratory (“Livermore”) in Livermore, California. Once completed, scientists using the NIF—which is the size of the Rose Bowl—will attempt to ignite the nuclear fusion process in the laboratory by converging 192 lasers on a small cylindrical target containing a tiny fusion fuel pellet, compressing and heating it until fusion reactions among its atoms emit more nuclear energy than the laser energy on the target, a process called “ignition.”

19. Although a number of scientists and outside organizations raised significant concerns about the NIF, including its cost, its ability to achieve ignition, and its impact on the proliferation of nuclear weapons in other countries, DOE began constructing the NIF in May 1997. At that time DOE estimated that the facility and related research and development would cost \$ 2.2 billion, and that the NIF would be completed in 2003.

20. In 1998, some of these same concerns began to be raised within DOE. While DOE has continued to press forward with construction of the NIF, it now acknowledges that construction of the facility will cost over \$1 billion more than planned at the time the decision to begin construction was made, and will not be completed until the end of fiscal year 2008, five years later than originally planned.

21. In response to these and other related developments, members of Congress asked the General Accounting Office (“GAO”) to undertake a study of the NIF project, and a GAO Report was issued in August 2000. According to that Report, DOE continues to severely underestimate the cost of NIF by more than \$500 million, and has failed to demonstrate where within the DOE budget the additional funds needed to ensure completion of the project will be found. The GAO further found that one of the primary reasons for the NIF management and oversight failures which have led to these major cost overruns and delays is the absence of any effective independent review of the NIF.

22. The GAO Report’s major recommendation is that DOE arrange for an outside scientific and technical review of the technical challenges remaining for the NIF and the relationship of those challenges to the cost and schedule of the project. Although the GAO Report acknowledges that there have been a number of outside reviews which have provided DOE with advice concerning the NIF since construction began, the Report concludes that none of these reviews have been truly independent of DOE or the sponsoring laboratory, and that in some instances DOE has actively sought to dictate the results of such outside reviews. It is for this reason, the GAO Report suggests, that each of these committees has rendered positive recommendations for continuing to proceed with the NIF, despite the persistence of serious scientific, technological and cost issues requiring clarification by a probing, independent review.

C. DOE’s FACA Violations With Regard To Advice And Recommendations Concerning the NIF.

23. In 1992, DOE established a federal advisory committee under FACA (the “DOE-ICFAC”) to review the inertial confinement fusion program of which NIF is a part. Prior to DOE’s decision whether to begin construction of the NIF, in late 1995 the chairman of the DOE-ICFAC reported to DOE that, in the Committee’s view, further research and development work on the NIF ignition target was necessary to increase confidence that NIF would meet its ignition goal.

24. In late 1995, DOE elected to terminate this FACA committee—the last FACA-complying committee asked to review the NIF. Among the reasons cited for this decision was precisely the fact that the DOE-ICFAC had to operate within FACA’s legal constraints.

25. Since that time, DOE has established and utilized several advisory committees to obtain further advice and recommendations concerning the NIF—committees which, although they are

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advisory committees within the meaning of FACA, were formed and have operated in violation of that statute.

26. At DOE's request, in 1996 the National Academy of Sciences' National Research Council formed an Inertial Confinement Fusion Advisory Committee ("NRC-ICF Committee") to evaluate the NIF. Because the NRC-ICF Committee did not comply with FACA, plaintiffs NRDC and TVC, and others, brought suit in this Court, and the Court issued a preliminary injunction against DOE's use of this Committee's Report. The Court subsequently issued a permanent injunction against DOE providing further support to the NRC-ICF Committee. *See NRDC v. Peña*, No. 97-0308 (PLF).

27. Despite this litigation, DOE has continued to obtain advice and recommendations concerning the NIF in violation of FACA. In response to GAO's recommendation that DOE undertake an external, independent review of the NIF, DOE claims that it implemented the recommendation by forming an advisory committee that undertook an independent review of the NIF in August 2000.

28. That advisory committee, known as the "Rebaseline Committee," was established by DOE and contains members who are non-federal employees. As reflected in the Committee's August 2000 Report—"Department of Energy Rebaseline Validation Review of the National Ignition Facility Project" ("Rebaseline Validation Review")—the Committee is providing policy advice to DOE concerning the NIF. For each aspect of the project—including a section on environment, safety and health—the Report provides a host of recommendations to DOE.

29. Although the Rebaseline Committee is clearly subject to FACA's requirements, DOE has not complied with FACA in any fashion with respect to the Rebaseline Validation Review—the meetings were not open to the public, the existence of the Committee was not made public, the required committee materials were not made publicly available, and DOE never filed a charter for the Committee. Although the Review was provided to DOE in August 2000, DOE did not publicly release it until after DOE delivered the Review to Congress, on September 15, 2000. Plaintiffs became aware of the fact that the Rebaseline Committee had members who are not federal employees only a few days before the Rebaseline Validation Review was publicly released.

30. DOE also never made the required findings that the Rebaseline Committee was "in the public interest," was "fairly balanced," and was free of members with inappropriate special interests. *Id.* at §§ 5(b), 9(2). In addition to DOE and DOE-laboratory employees, the Rebaseline Committee included other persons predisposed to support continuation of the NIF Project without conducting a probing review of the facility's underlying scientific and technical problems and their relation to the NIF's ultimate performance and cost.

31. For example, there were four members of the "Large Optics" subcommittee—who are also members of the full Committee—who ostensibly reviewed the laser science behind the NIF. None of them could be expected to assess the construction and operation of the NIF objectively and without bias. The chairperson of the subcommittee, Michel Andre, is a senior scientist in the French Megajoule laser project, which has extensive contractual relations and joint efforts with the NIF program. If the Committee were to find a fundamental problem with the NIF, then this could negatively impact funding for the French program, and Mr. Andre's career.

32. John Emmett, another member of the Large Optics subcommittee, has been a frequent consultant to the Livermore NIF program, and was formerly the Associate Director for Lasers at Livermore. When Emmett was at Livermore he helped invent the multi-pass optical design concept being utilized on the NIF, creating a natural bias in favor of finding that the NIF will work, and against admitting the possibility of a fundamental problem with the facility's design.

33. Yet another subcommittee member, Dr. Michelle Shinn, works at DOE's Thomas Jefferson Laboratory, whose director, Dr. Hermann Gruner, chairs Livermore's NIF Programs Review Committee, one of the bodies most responsible for failing to exert adequate oversight of the project, and

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has personally lobbied in Washington for full NIF funding. E. Perry Wallerstein, the final member of this critical subcommittee, was formerly an employee of Livermore, and is now a paid consultant to Livermore.

34. Two other subpanels of the Rebaseline Committee—on laser beamline equipment, and assembly, installation, and commissioning—were chaired by subordinates of Dr. Grunder from DOE’s Thomas Jefferson Laboratory, and each of these panels also included a member from the University of Rochester’s Laboratory for Laser Energetics, which is a major subcontractor and scientific collaborator on the NIF Project. The second of these panels also included a private consultant, Damon Giovanielli, who had served a few months earlier as the chair of the Livermore Laboratory’s own “Target Physics Program Review Committee,” which had concluded that, “NIF should be completed to its full 192-beam configuration.”

35. DOE has also failed to comply with FACA with respect to a subcommittee of the Secretary of Energy’s Advisory Board (“SEAB”), called the NIF Task Force. Although the NIF Task Force is a FACA advisory committee, established and utilized by DOE to provide outside advice concerning the NIF, the NIF Task Force has conducted meetings without providing the advance notice required by FACA, and has not made meeting materials available as required by FACA. Plaintiff TVC was forced to file a Freedom of Information Act request to try to obtain DOE documents which had been shared with the NIF Task Force.

36. The NIF Task Force is still preparing its final recommendations for DOE. Nonetheless, on September 7, 2000, the Chairman of the NIF Task Force, in a letter written on SEAB letterhead, wrote directly to the Secretary of Energy that the NIF Task Force has concluded that the NIF should proceed as planned.

37. On September 15, 2000, DOE submitted materials to Congress as part of an effort to ensure that Congress permits DOE to continue construction of the NIF. Among the materials in that submission were the Rebaseline Validation Review and the September 7, 2000 letter from the Chairman of the NIF Task Force. DOE submitted these materials to Congress in an effort to demonstrate that independent reviewers have recommended to the DOE that it should proceed with the NIF.

38. On information and belief, DOE intends to continue to obtain advice and recommendations from advisory committees concerning the NIF, without having those committees comply with FACA.

Plaintiffs’ Claims for Relief **Claim One**

39. By establishing and utilizing the Rebaseline Committee, permitting it to meet and deliberate without complying with FACA, and then obtaining and using the Committee’s Report—the Rebaseline Validation Review—the defendants are violating FACA, and are acting in a manner which is arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act. 5 U.S.C. § 706.

Claim Two

40. By engaging in a pattern and practice of violating FACA, 5 U.S.C. App. II, as amended, DOE has acted, and is acting, in a manner which is arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act. 5 U.S.C. 706.

WHEREFORE, plaintiffs respectfully request that this Court:

- (1) declare that DOE has violated FACA with respect to the Rebaseline Committee and the NIF Task Force;
- (2) declare that DOE is engaged in a pattern and practice of violating FACA;

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- (3) order DOE to publicly release all materials related to the Rebaseline Committee and the NIF Task Force which are covered by Section 10 of FACA, 5 U.S.C. App. II, § 10;
- (4) order DOE to provide written notice to all of the individuals and organizations to whom DOE has provided the Rebaseline Validation Review, explaining that the Rebaseline Committee recommendations were obtained in violation of FACA;
- (5) enjoin DOE from using, or relying upon, the Rebaseline Validation Review;
- (6) enjoin DOE from continuing to engage in a pattern and practice of violating FACA;
- (7) award plaintiffs their costs, attorneys' fees, and other disbursements for this action; and
- (8) grant plaintiffs such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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