



Department of Energy

West Valley Demonstration Project
10282 Rock Springs Road
West Valley, NY 14171-9799

August 22, 2007

Mr. Raymond C. Vaughan
West Valley Citizens Task Force
c/o The Logue Group
P.O. Box 270270
West Hartford, CT 06127-0270

Subject: Applicability of the Federal Advisory Committee Act to the Core Team

Dear Mr. Vaughan:

During the regular monthly meeting of the Citizens Task Force (CTF) on July 25, 2007, you inquired as to the applicability of the Federal Advisory Committee Act (FACA), 5 U.S.C. App., to the Core Team meetings. I stated that FACA would not apply to the Core Team meetings and, in response to your request, committed to provide a brief analysis supporting my conclusion. In that regard, I hope you find the discussion below helpful.

Core Team Membership and Function

The Core Team consists of representatives from the Department of Energy (DOE), Environmental Protection Agency (EPA), Nuclear Regulatory Commission (NRC), New York State Energy and Research Development Authority (NYSERDA), New York State Department of Environmental Conservation (NYSDEC), and New York State Department of Health (NYSDOH), and is tasked with sharing technical information and advice regarding issues identified in the Preliminary Draft Environmental Impact Statement for Decommissioning and/or Long-Term Stewardship at the West Valley Demonstration Project and Western New York Service Center (Decommissioning EIS). Members of the Core Team meet approximately once a month at various locations across the region.

The Federal Advisory Committee Act

FACA applies when non-Federal persons participate in an advisory committee established or utilized by the Federal government to provide policy advice. 5 U.S.C. App. § 3(2). An advisory committee is defined as any committee, board, commission, council, conference, panel, task force, or other similar group which is established by statute, or is established or utilized by the Federal government. *Id.* Case law has determined "utilize" to mean actual management or control of the group by the Federal government. Washington Legal Found. v. United States Sentencing Comm'n, 17 F.3d 1446, 1450 (D.C. Cir. 1994). FACA imposes a number of requirements on advisory committees established or utilized by the President or Federal agencies. The requirements for advisory committees include a charter that must be filed with the head of the agency and the standing committees of the Senate and House of Representatives that



have legislative jurisdiction over the Department, public notice of meetings in the Federal Register, meetings open to the public, and the preparation of detailed minutes of each meeting. 5 U.S.C. App. §§ 9 & 10.

The Supreme Court, however, has rejected a rigid application of FACA and its procedural and organizational requirements because such interpretation would “cover every formal and informal consultation between the president or an Executive agency and a group rendering advice.” Public Citizen v. United States Department of Justice, 491 U.S. 440, 453 (1989). Accordingly, certain groups or committees are exempt from the provisions of FACA. 5 U.S.C. App. § 4; 41 C.F.R. § 102-3.40. For example, FACA does not apply when:

- (1) meetings are held exclusively between Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities; and
- (2) such meetings are solely for the purpose of exchanging information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.

2 U.S.C. § 1534(b); *see also* 41 C.F.R. §102-3.40.

This particular exemption from FACA was established as part of the Unfunded Mandates Reform Act (UMRA) of 1995. 2 U.S.C. § 1534. The UMRA guidelines issued by the Office of Management and Budget (OMB) explain that “the scope of meetings covered by this exemption should be construed broadly to include any meetings called for any purpose relating to intergovernmental responsibilities or administration. Such meetings include, but are not limited to, meetings called for the purpose of seeking consensus; exchanging views, information, advice, and/or recommendations; or facilitating any other interaction relating to intergovernmental responsibilities or administration.” 60 Fed. Reg. 50,651, 50,653 (1995).

Congress specifically recognized that “an important part of efforts to improve the Federal regulatory process entails improved communications with State, local, and tribal governments. Accordingly, this legislation will require Federal agencies to establish effective mechanisms for soliciting and integrating the input of such interests into the Federal decision-making process.” H.R. Conf. Rep. 104-76 at 40 (March 13, 1995)

Congress acknowledged that “FACA has been the source of some confusion regarding the extent to which elected officials of State, local, and tribal governments, or their designated employees with authority to act on their behalf, may meet with Federal agency representatives to discuss regulatory and other issues involving areas of shared responsibility. Section 204(b) clarifies Congressional intent with respect to these interactions by providing an exemption from FACA

Mr. Raymond C. Vaughan

- 3 -

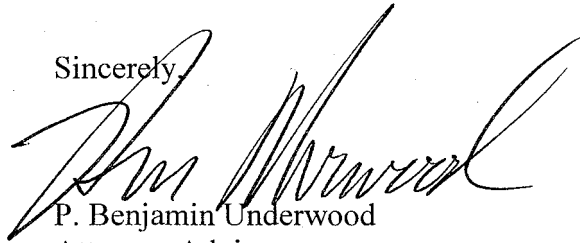
August 22, 2007

for the exchange of official views regarding the implementation of public laws requiring shared intergovernmental responsibilities or administration.” Id.

Each month, the CTF is briefed on the status of the discussions within the Core Team by DOE and NYSERDA representatives. Additionally, other agencies participating in the Core Team occasionally send representatives to the monthly CTF meeting to respond to specific questions. Fundamentally, however, the decision to keep the actual Core Team meetings closed to the public is consistent with FACA, the Congressional intent for open and frank preliminary discussions amongst governmental agencies and is designed to enhance the quality of the technical analysis that will appear in future decision-making processes for public review and comment.

I hope you have found this brief analysis helpful and please feel free to contact me if I can be of further assistance.

Sincerely,



P. Benjamin Underwood

Attorney Advisor

West Valley Demonstration Project

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