



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON D.C. 20548

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April 20, 1981

The Honorable Richard L. Ottinger  
Chairman, Subcommittee on  
Energy Conservation and Power  
Committee on Energy and Commerce  
House of Representatives

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HSE07005

Dear Mr. Chairman:

This refers to your letter of March 4, 1981, requesting an opinion on the [legality of the establishment and operation of the Energy Policy Task Force] (EPTF), an advisory committee of the Department of Energy (DOE). You expressed concern that not all requirements of section 17 of the Federal Energy Administration Act of 1974, the Federal Advisory Committee Act and DOE regulations had been followed in relation to the EPTF Charter filing requirements and the composition of its membership.

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Due to the urgency of your request, there was insufficient time to obtain an official response from DOE. The information contained herein was developed through interviews with Office of Management and Budget (OMB), DOE, and General Services Administration (GSA) officials concerned with the formation of the EPTF, memoranda and other materials supplied by DOE, including the DOE Secretary's letter to you dated March 20, 1981.

Establishment of EPTF

Section 17 of the Federal Energy Act of 1974, Pub. L. No. 93-275, approved May 7, 1974, 88 Stat. 96, 110, 15 U.S.C. § 776 (1976), set forth procedures for the Administrator of the Federal Energy Administration, the predecessor of the Department of Energy, to establish advisory committees. Subsection (d), 15 U.S.C. § 776 (d), provides that unless inconsistent with this section, the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App I (1976), will also apply to DOE's advisory committees. For the reasons discussed below, we conclude that some of FACA's provisions governing the establishment of advisory committees were not complied with.

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Section 9(a) of the FACA prohibits establishment of an advisory committee unless there has been a formal determination by the head of the involved agency, after consultation with the Director of the OMB, that the proposed committee is "in the public interest in connection with the performance of duties imposed on that agency by law." A "timely" Federal Register notice of that determination is also required. 5 U.S.C. Appendix I, § 9(a) (1976). (Executive Order No. 12024, December 1, 1977, 42 Fed. Reg. 61445, under authority of Reorganization Plan No. 1 of 1977 (42 Fed. Reg. 56101, October 21, 1977), transferred advisory committee act oversight functions from OMB to GSA.)

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The required determination and request for concurrence was sent in a letter from the Secretary of DOE to the Acting Administrator of GSA on February 9, 1981, after reviews by the DOE Offices of General Counsel and Committee Management found that it contained the necessary findings. Enclosed with the letter was a copy of the proposed EPTF Charter and a proposed Notice of Determination to Establish the Task Force.

The FACA, as modified by Executive Order 12024, requires GSA approval of an agency determination of need for an advisory committee. In this connection, section 6(a) of OMB Circular A-63, Revised (1974), requires that the GSA Committee Management Secretariat be "\*\*\*satisfied that establishment of the advisory committee would be in accord with the Act\*\*," before the agency head can publicly certify that the "\*\*\*committee is in the public interest." This certification is then required by the Circular to be published in the Federal Register with a description of the nature and purpose of the proposed committee at least 15 days prior to the filing of the Committee's Charter. A shorter period between the notice and filing is permitted "\*\*\*for good cause\*\*." DOE requested a waiver of the 15 day period for EPTF.

Following review of the proposal for creation of the EPTF, GSA requested the Energy and Science Division of OMB to conduct a "substantive review" of it. Our interviews with GSA and OMB officials indicate that OMB reviews of advisory committee proposals have been routinely sought even though responsibility has been transferred to GSA. GSA's review of the EPTF was made following the recent release of OMB Bulletin 81-8, ordering a 5 percent reduction in expenditures for consultants and advisory committees. Additional caution by GSA in concurring in establishment of the EPTF may have been prompted by that bulletin. According to an OMB official, work on revising the Federal Budget prevented OMB from completing consideration of the EPTF proposal until after the February 19 meeting of the Task Force.

The GSA Committee Management Secretariat advised the DOE Deputy Advisory Committee Management Officer by telephone on February 27, 1981, that GSA concurrence had been granted "as of February 19," with termination for the EPTF set at June 30, 1981, instead of the two-year period requested. Waiver of the 15-day waiting period between publication of the Notice of Intent to Establish and the Charter filing was granted. However, the record indicates that both officials concluded that February 19 could not be used as the effective date of the Charter or in the establishment notice "since the Committee is not officially established until the Charter is filed." It was not until March 5 that the determination notice was published. 46 Fed. Reg. 15310. The EPTF charter was filed with the congressional oversight committees and the Library of Congress on the following day.

Technically then, the EPTF was not legally established on the date of its first meeting. Although the Secretary of DOE had made the necessary determination, consultation with GSA had not been completed, and no determination notice had been published. 5 U.S.C. App. I, § 9(a)(2). Additionally, at the time of the February 19 meeting, the Charter had not been filed "with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction" of DOE as required by section 9(c)(2) of the FACA. We understand that the DOE Office of General Counsel informed the Secretary that although the first EPTF meeting could be considered to violate the FACA, he felt that there had been substantial compliance with the law and that any postponement of the meeting could prevent the Department from making the deadline for submission of a National Energy Policy Plan, with respect to which the EPTF was to advise DOE.

Facing what they believed to be a choice between responding to an urgent need to develop a comprehensive energy plan for the new Administration within the time period promised, which would be two months after the deadline imposed by the DOE Organization Act, DOE officials concluded that the FACA violations constituted "harmless error" and opted to proceed with the EPTF meeting according to the schedule announced in the Federal Register on February 11. 46 Fed. Reg. 11858.

Although the FACA and OMB Circular A-63 were not complied with, we think that DOE officials acted in good faith in attempting to follow the approval and filing procedures for establishing an advisory committee and, in fact, addressed most of the concerns that motivated the Congress to establish these requirements. The delay in concurrence by OMB had not been anticipated. Our study of the legislative history of the FACA showed that the requirement for approval by the agency head, after consultation with OMB, was developed to limit the growing number of advisory committees. Since the coordination and approval functions, although late, were duly performed by both GSA and OMB, with a final decision made to authorize the creation of EPTF, the responsible officials had made the determination that this additional advisory committee was necessary.

There were, however, some more significant FACA provisions which were also not complied with. The requirement that the public be given notice of the creation and objectives of the advisory committee was met only minimally. The first notice appeared in the Federal Register just eight days before EPTF's first meeting. It provided only a broad description of the purpose for the Task Force without reference to the National Energy Policy Plan. The tentative agenda for the meeting, however, clearly stated that the meeting would be open for the public and written and oral statements would be accepted.

The public did not have access to the advisory committee's charter or membership lists before the meeting, nor was Congress adequately informed so that it could perform its oversight functions before the February 19 meeting. However, as letters from the National Wildlife Federation and other groups demonstrate, at least some of the public was able to challenge the selection of members for the EPTF by the time of the first meeting.

#### EPTF Charter and the National Energy Plan

Section 9(c) of FACA requires that before an advisory committee meets, a charter describing, among other things, the committee's objectives and scope of activity must be filed. EPTF's charter does not appear to reflect its duties adequately since no mention is made of the National Energy Policy Plan, even though the imminence of the Plan's due date was cited by DOE in justification for proceeding with the February 19 meeting, and, as discussed below, the sole function of the EPTF seems to be to develop a proposed plan.

Section 801 of the Department of Energy Organization Act, Pub. L. No. 95-91, approved August 4, 1977, 91 Stat. 565, 610, 42 U.S.C. § 7321 (Supp. III 1979), requires the President to prepare and submit a National Energy Policy Plan to Congress "not later than April 1, 1979, and biennially thereafter" which is to "consider and establish energy production, utilization, and conservation objectives \*\*\* necessary to satisfy projected energy needs of the United States \*\*\*."

EPTF's Charter describes the committee's objectives, scope, activities and duties as follows:

"The DOE Energy Policy Task Force provides the Secretary of Energy with advice and recommendations on the broad range of policy and programmatic issues in energy. The functions of the Task Force will be fourfold. First, the Task Force, individually and collectively, will identify and select critical national energy problems and issues. Second, the Task Force will suggest changes in energy policies and programs to address those issues and problems. Third, the Task Force will assess both the relative importance of particular energy policy or program initiatives and the feasibility of forming the national consensus necessary to their implementation. Fourth, the Task Force will examine for reasonableness both mature policy proposals and the analyses and assumptions on which they are based."

No mention is made of the Plan required by section 801.

It is thus not clear from the Charter precisely what role EPTF will play in the drafting of the National Energy Policy Plan. Nonetheless, when DOE asked GSA to waive the 15 day advance notice period, its rationale was its need to seek "advice immediately from a group of experts concerned with energy production, utilization and conservation" for use in drafting the National Energy Policy Plan. Further, we were informally advised that when GSA and OMB approved the Task Force, they limited its life to June 30 in the belief that its functions relative to preparation of DOE's contribution to the Plan would then be complete.

The DOE Organization Act requires that in developing the Plan, the President must consult with "consumers, small business, and a wide range of other interests, including those of individual citizens who have no financial interests in the energy industry." Apparently pursuant to this requirement, the EPTF was to hold a series of public meetings in a number of cities beginning in early March (later postponed to April).

We have also been advised the EPTF will actually prepare a draft of the National Energy Policy Plan for the Secretary's approval. It certainly appears that the evident haste in establishing the EPTF was connected with attempts to begin the Plan drafting process which was already behind the statutory deadline. (By letters of February 4, 1981, the Secretary of DOE informed the Congress that the April 1 statutory deadline would not be met but promised to have the Plan ready by about June 1, 1981.)

Accordingly, we believe that EPTF's charter does not describe in sufficient detail its objectives and scope of activity or its duties as required by section 9(c)(B) and (F) of FACA. Further, if EPTF's actual role in drafting the Plan gives it more than solely advisory functions, its charter should have so stated, citing the authority given for those functions. Section 9(c)(F). Unless provided by statute or presidential directive, advisory committees may be utilized solely for advisory functions, 5 U.S.C. App. I § 9(b). While it appears that under 15 U.S.C. § 776(a), DOE may be able to use an advisory committee to perform some operational tasks, EPTF's charter explicitly states that it has only advisory functions.

#### Balance in EPTF Membership

One of the primary concerns of Congress in enacting FACA generally and the more specific provisions of section 17 of the Federal Energy Act of 1974, 15 U.S.C. § 776, supra., was to assure that advisory committee membership would not be dominated by any particular interest. The Congress wished to limit, as far as possible, advisory committee bias in the reports such committees furnish to the President or to the sponsoring agency.

As noted above, we do not have a clear idea of the extent of EPTF's involvement in preparing a draft National Energy Policy Plan for the Secretary's (and then the President's) approval. Since that Plan is intended to address the interests of all citizens, it seems to us that the more involvement EPTF has in preparing a draft of the Plan, the more care is needed in selecting the committee's membership. Before turning our attention to the apparent imbalance in EPTF's membership, we will discuss the two statutory provisions requiring balance.

The provisions of 5 U.S.C. App. I §§ 5(b) and (c) require "the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee" and that "the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest."

The House Government Operations Committee's report on H.R. 4383, 92d Cong., which later was enacted as the FACA, stressed this point:

"Particularly important among the guidelines are [1] the requirement contained in § 4(b)(2) that 'the membership of an advisory committee be fairly balanced in terms of the points of view represented and functions to be performed' and [2] the requirement contained in § 4(b)(3) that in creating an advisory committee the creating authority should include 'appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest.'" H.R. Rep. No. 92-1017, 92d Cong. 2d Sess. 6 (1972).

Advisory committees were seen as wielding great influence and the Congress found that without the "balance" requirements and provisions to guarantee public access to meetings and committee records, they could become havens for special interests. The House report stated:

"One of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns. Testimony received at hearings before the Legal and Monetary Affairs Subcommittee pointed out the danger of allowing special interest groups to exercise undue influence upon the Government through the dominance of advisory committees which deal with matters in which they have vested interests." id.

The Congress showed particular concern over the possibility of biased advisory committees in the FEA and its successor, the DOE. Instead of merely specifying that the FACA should apply to the FEA, which is basically what H.R. 11793, 93d Cong., the House version of the FEA Act of 1974 had done, the Conference Committee accepted the Senate's more specific restrictions. H.R. Rept. No. 93-999, 93d Cong., 2d Sess. 30 (1974). Section 17 of the FEA Act of 1974, 15 U.S.C. § 776, supra, which now governs establishment of DOE advisory committees, directs that each advisory committee be reasonably representative of the various affected interests. Section 17(a) provides:

"Whenever the Administrator shall establish or utilize any board, task force, commission, committee, or similar group, not composed entirely of full-time Government employees, to advise with respect to, or to formulate or carry out, any agreement or plan of action affecting any industry or segment thereof, the Administrator shall endeavor to insure that each such group is reasonably representative of the various points of view and functions of the industry and users affected, including those of residential, commercial, and industrial consumers, and shall include, where appropriate, representation from both State and local government, and from representatives of State regulatory utility commissions, selected after consultation with the respective national associations."

DOE's process for selection of members for the EPTF was marred at the outset by the pressures created by the short time allotted for its creation. It was not until February 4, only 15 days before the EPTF's first meeting, that the first tentative list of proposed members was compiled, and no prospective members were contacted before February 9. As a result, we were informally advised, only cursory attention could be given to the qualifications and characteristics of all the Committee members by reviewing officials. For example, officials in DOE's Office of General Counsel informed us that they had to accept the representations made on submitted lists as to the characteristics of the proposed members. The responsible GSA official said that he could only make a spot check on the membership and that it is the responsibility of the sponsoring agency to assure balance requirements are met.

While DOE representatives said that the list of candidates was compiled from suggestions made from staff throughout DOE, some of the persons named as contributing to the selection process said they that were only consulted after the list of candidates had essentially been compiled. The Director of the Office of Consumer Affairs, DOE, said she did not see the list until February 13. At that time, she informed the Secretary's Office that in her

opinion, the proposed Task Force was illegal because it did not contain any minority members. She submitted a list of minority people with past advisory committee experience. Although none of her suggested members were appointed, a black woman was subsequently added to the EPTF. While we cannot say how much weight others' views were given in the selection process, all of the accepted nominations appear to have been made from within the Secretary's Office or by the Committee Chairman.

Twenty-two persons had been appointed to the EPTF at the time of its first meeting on February 19, 1981. While the DOE press release announcing formation of the Task Force, released on that date, described its members as including "a broad representation from the oil and gas industry, consumer interests, environment and conservation, civic, academic, and public service," the background of its membership appears to be of a considerably narrower composition. Half of its members are chief executives or senior executives of major energy corporations, four are academicians, and three are from state governments, including a State Governor.

We conclude that there is an absence of effective representation from several of the interests specified in the FEA Act. Not only is there an absence of representation from residential and consumer users and of local government, some "functions" of industry, such as gas transmission lines, oil jobbers and service station dealers are also missing. At a minimum, the interests specifically named in 15 U.S.C. § 776 (a) should be represented on DOE's advisory committee.

Further, if EPTF will have a major impact in formulating the National Energy Policy Plan, several groups not represented among current EPTF appointees suggest themselves:

- (1) consumer advocates (the members identified as consumer representatives do not seem to be recognized spokespersons on consumer energy issues. Some appear to be members of research organizations rather than of consumer advocate groups, or representatives of individual consumers.)
- (2) environmentalists (the only representation in this area is again by members of research oriented groups which do not cover the broad spectrum of environmental energy interests such as synthetic fuels, coal, and nuclear energy. Furthermore, the person designated as an environmentalist at the Task Force meeting

denied that he fit this description. DOE, EPTF Meeting Transcript 13 (February 19, 1981)).

- (3) labor
- (4) local governments
- (5) customer owned utility companies
- (6) low-income consumers
- (7) elderly persons
- (8) oil jobbers
- (9) natural gas transmission lines
- (10) independent, small refiners
- (11) rural interests
- (12) independent marketers
- (13) service station dealers.

We might point out that the statutory balance requirements do not require that all interests be represented equally or that all interests be represented in any given committee. The determination of whether the standard of balance is met must be made on a case-by-case basis and depends largely on the statute or charter creating the committee. However, we think that the EPTF as presently constituted does not achieve even a minimum balance of interests, as contemplated by the FACA, nor does it even have representation from all the interests specified by the FEA Act. This deficiency might be overcome by changing the Task Force's membership. For example, the Secretary of Energy might immediately appoint additional members to the EPTF to provide for representation by interests now missing from the advisory committee.

Many of the problems encountered in the establishment of the EPTF might have been avoided if recommendations of past GAO reports concerning advisory committees had been followed. For example, in our February 2, 1979 report, "Use, Cost, Purpose, and Makeup of Department of Energy Advisory Committees," EMD 79-17, B-127685, we concluded:

\*\*\*DOE should formalize all its written guidelines to help insure that the criteria are consistently applied. Such criteria and overall

guidelines are needed to insure that committee membership is balanced and at the optimum level necessary to meet the objectives of the committee." EMD 79-17, B-127685 at 2.

In that same report, we criticized existing DOE advisory committee charters as follows:

"The Federal Advisory Committee Act requires that each advisory committee's charter contain the scope and responsibilities of the committee and the time period necessary for it to carry out its purpose. \*\*\*We found that although DOE's advisory committee charters contain general information on the committees' activities, responsibilities, and length of existence, 12 of the 20 charters do not contain specifics on these matters. These specifics are needed so that each committee has a clear understanding of its scope and objectives, which in turn helps to prevent the potential for overlap and duplication among the committees.

"In our previous report, 'Better Evaluations Needed to Weed Out Useless Federal Advisory Committees' (GGD-76-104, April 7, 1977), we recommended that OMB require Federal agency committee charters to be clear and specific in stating their purposes and include specific timespans for committees to accomplish their purposes. \*\*\* (R)esponsibility for these matters has been transferred to GSA. GSA officials told us that they have emphasized the need for committee charters to be clear and specific in their discussions with Federal agencies. However, \*\*\*DOE is still producing charters which are vague and general, reinforcing our belief that formal guidance is needed. \*\*\*Therefore, we reiterate the recommendation contained in our April 7, 1977, report.\*\*\*" Id. at 3.

Furthermore in our recent report, "Conduct of DOE's Gasohol Study Group: Issues and Observations," EMD 80-123, B-200545, September 30, 1980, we found:

"\*\*\* that the process used to select Gasohol Study Group members was highly personalized and non-systematic. Members were selected primarily on the referral of others without detailed knowledge of

their backgrounds or financial interests.\*\*\*"  
EMD 80-125, B-200545 at iii.

In that report we concluded:

"GAO believes problems with the study group member selection process are at the heart of the allegations raised concerning possible conflicts of interest and inadequate qualifications on the part of Gasohol Study Group members.\*\*\*" Id. at v.

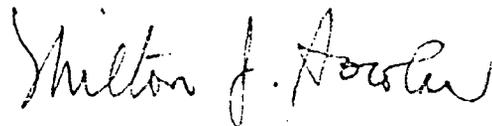
We continue to believe the Secretary should take more care in the selection of advisory committee members and should adopt uniform guidelines to aid in the selection process.

#### Funding of EPTF

As agreed by your staff, in response to your request for us to audit the expenses of the EPTF, we have reviewed expenditure information supplied by DOE and determined that \$1272.25 in direct expenses were incurred in connection with the EPTF Task Force meeting of February 19, 1981. These are the only direct expenses attributable to EPTF to this date. Of this amount, \$519.85 was spent as reimbursement for travel expenses of three task force members. Most of the members did not request reimbursement. The other \$752.40 in expenses were incurred in connection with recording of the meeting transcript. These items were charged to the Office of Secretary's budget for travel, salary and related expenses (budget account no. 89X0232). Since each agency is held responsible by section 5 of FACA for providing support services for each advisory committee established by or reporting to it, the use of these funds for this purpose seems legitimate.

With your permission, we will release this letter to the Secretary of Energy and recommend actions be taken to reconstitute the EPTF so that a more satisfactory balance of energy interests may be represented in its membership. We hope this information will be useful to your subcommittee.

Sincerely yours,



Acting Comptroller General  
of the United States