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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

B-287944

August 17, 2001

The Vice President of the
United States

Dear Mr. Vice President:

Pursuant to 31 U.S.C. § 716(b), I am submitting this report because the Vice President, as Chair of the National Energy Policy Development Group (NEPDG), has not provided the General Accounting Office (GAO) with access to certain records relating to the process by which the National Energy Policy was developed. I requested these records in writing on July 18, 2001, in accordance with section 716. Despite repeated attempts, we have been unable to resolve this dispute.

The Vice President and his representatives have asserted that GAO lacks the statutory authority to examine the activities of the NEPDG, recognizing only GAO's authority to audit its financial transactions. They have also asserted that our examination would unconstitutionally interfere with the functioning of the executive branch. In addition to the arguments previously advanced by the Vice President's representatives and addressed in our June 22 letter to the Counsel to the Vice President (see Enclosure 1), the Vice President's August 2 letter to the Congress asserts that the study is not authorized by statute because GAO is limited to looking at the "results" of programs and that GAO does not have a right of access to documents because the Vice President is not included under the term "agency" used in GAO's statute.

As discussed below, we strongly disagree with the Vice President's positions. Disclosing the records we are seeking would not reveal communications between the President and his advisers and would not unconstitutionally interfere with the functioning of the executive branch. Furthermore, GAO has ample authority to conduct this review, and this authority has been recognized by various presidential administrations for many years. Finally, neither the plain meaning of the statute nor the legislative history supports the Vice President's interpretation of the terms "results" and "agency."

The GAO as an institution, and the Comptroller General as an officer of the legislative branch, assist the Congress in exercising its responsibilities under the Constitution to oversee, investigate, and legislate. In order to help members of Congress carry out their role and evaluate the process used to develop the National Energy Policy, GAO needs selected factual and non-deliberative records that the Vice President, as Chair of the NEPDG, or others representing the Group, are in a position to provide GAO. The records we are requesting will

assist the review of how the NEPDG spent public funds, how it carried out its activities, and whether applicable law was followed.¹ Descriptions of the records we are requesting, our efforts to obtain them, and our statutory authorities are summarized below.

Description of Records Requested

In May 2001, the Comptroller General authorized this GAO study based on a request from Representatives John D. Dingell and Henry A. Waxman, Ranking Minority Members of the House Committee on Energy and Commerce and the House Committee on Government Reform, respectively. Our study is narrowly focused to answer the question, “What process did the NEPDG use to develop the National Energy Policy?” To answer that question, we have requested documents that provide the following information:

- Who was present at each of the group meetings conducted by the NEPDG?
- What are the names of the professional staff assigned to provide support to NEPDG?
- Who did each of the members of the NEPDG (including the Vice President as Chair) and its support staff meet with to gather information for the National Energy Policy, including the date, subject, and location of the meetings?
- What direct and indirect costs were incurred in developing the National Energy Policy?

In communications with the Vice President’s Counsel prior to the August 2 letter, we offered to eliminate our earlier request for minutes and notes and for the information presented by members of the public. Even though we are legally entitled to this information, as a matter of comity, we are scaling back the records we are requesting to exclude these two items of information.² Furthermore, we have repeatedly emphasized that we are flexible in how information is provided to GAO. Despite these and other efforts on our part to resolve the impasse, the Vice President’s representatives have shown no interest in reaching any accommodation.

¹ For example, the information on who was present at each of the group meetings conducted by the NEPDG can be used to confirm that only full-time officers or employees of the federal government attended the meetings and thus rule out the possibility that the Federal Advisory Committee Act (FACA) is applicable to meetings of the group. FACA exempts from its provisions those committees composed wholly of full-time federal officers or employees. Similarly, information on whom individual NEPDG members and staff met with and the dates and subjects of the meetings would be relevant in confirming that meetings with members of the public did not trigger FACA. 5 U.S.C. app. 2 (2000).

² These items of information are described in paragraph 3(d) and (e), and paragraph 4(d) and (e) of our letter of July 18, 2001.

Efforts to Obtain Records

GAO began its efforts to conduct this review on May 7 by following our standard practice of calling a designated contact to set up an initial meeting with NEPDG staff. (See Enclosure 2 for a chronology of our efforts to obtain the records.) Numerous phone calls did not produce a meeting date. Instead, on May 16, the Vice President's Counsel sent GAO a letter questioning the appropriateness of GAO's review, expressing reluctance to supply the information requested and asking for a statement of GAO's legal authority to conduct the review. We responded on June 1 that the request was consistent with our authorities and asked for access to records containing the information requested.

On June 7, the Vice President's Counsel again questioned GAO's authority to conduct this review, and in our June 22 reply we explained our statutory authorities in detail. We also repeated our request for information relevant to our study. Subsequent to our June 22 letter, GAO officials have engaged in numerous conversations with the Vice President's representatives. However, in these conversations, the Vice President's representatives have focused entirely on their view that GAO lacks authority to conduct this review, rather than on reaching an accommodation.

On July 18, 2001, the Comptroller General issued a letter to the Vice President in his capacity as Chair of the NEPDG, under 31 U.S.C. § 716(b), requesting access to certain records relating to our study, restating our authority for inspecting the records, and the reason for our inspection.³ The Vice President did not respond to GAO with a description of the records withheld and the reasons for withholding them as required by the statute. Instead, he sent letters to the House of Representatives and the Senate on August 2, 2001, to inform them of GAO's actions and to serve as a response to GAO's July 18 letter. In these letters, he asserted that I "exceeded" my "lawful authority" by undertaking this study. He also refused to acknowledge GAO's basic statutory authorities and asserts that if the "Comptroller General's misconstruction of the statutes" were to prevail, "his conduct would unconstitutionally interfere with the functioning of the Executive Branch."

³ When records are not made available to GAO within a reasonable time, the provisions of 31 U.S.C. § 716(b) establish mechanisms for resolution of GAO access-to-records problems. Section 716(b)(1) provides that when GAO is not given access to records within a reasonable time, the Comptroller General may make a written request for such records to the agency head. The official then has 20 days to respond and the response is required to describe the record withheld and the reason the record is being withheld. If GAO is not given an opportunity to inspect the record during this time period, the Comptroller General may file a report to the President, the Congress, and other executive branch officials. Twenty days after filing the report, the Comptroller General may bring a civil action in the district court of the United States for the District of Columbia to require the official involved to produce the withheld records.

As this letter makes clear, as Comptroller General of the United States, I have broad discretion to conduct audits, investigations, and examinations of executive branch activities either at the request of Congress or on my own authority. Furthermore, we do not agree that disclosure of the limited factual and non-deliberative information we are seeking, such as the names of participants at meetings, would “unconstitutionally interfere with the functioning of the executive branch.” In support of this proposition, the Vice President’s August 2 letter states that “preservation of the ability of the executive branch to function effectively requires respecting the confidentiality of communications among a President, a Vice President, the President’s other senior advisers and others.” However, as we have made clear in several discussions with the Vice President’s representatives, we are not asking for any communications involving the President, the Vice President, or the President’s senior advisers. We are simply asking for facts that the Vice President, as Chair of the NEPDG, or others representing the group, would be in a position to provide to GAO. These include the names of attendees, dates and locations, and the subjects of the meetings.

The Vice President has also expressed concern regarding certain requests for his personal schedule. We understand and appreciate the Vice President’s concerns regarding release of his personal schedule. As a result, we have made clear to the Vice President’s representatives that we are not seeking a copy of his calendar or information on meetings held other than in his capacity as Chair of the NEPDG. As we have emphasized, we are seeking certain factual information on meetings the Vice President held in his capacity as Chair of the Group.

Although the Vice President did not use the term “Executive Privilege” in his August 2 letter, his assertion that providing these facts would unconstitutionally interfere with the executive branch and his focus on confidentiality of communications use the same language and reasoning as assertions of Executive Privilege.⁴ In our view, the information that GAO seeks is not protected by Executive Privilege. As noted above, the information we are seeking is factual and non-deliberative in nature. In fact, the Vice President’s Counsel has already informed the House Committee on Energy and Commerce and the House Committee on Government Reform, that the meetings the support staff and other NEPDG members had were to gather information relevant to the NEPDG’s work and were not deliberative in

⁴ The right to invoke Executive Privilege rests with the President, and Presidents have had different procedures for asserting it. President Reagan, for example, required the agency head, if a substantial question was raised, to notify and consult with the Attorney General and the White House Counsel’s Office. The President would decide whether to assert the privilege. President Clinton modified President Reagan’s policy by requiring the agency head to directly notify the White House Counsel. The White House Counsel was to seek an accommodation, and if unsuccessful, to consult with the Attorney General. Again, the President determined whether to invoke the privilege.

nature.⁵ Even where the President has made a formal claim of Executive Privilege, which is not the case here, federal courts have held that the executive and legislative branches have a duty to attempt to reach a mutual accommodation.⁶ As we have stated earlier, the Vice President's representatives have declined to discuss reaching any accommodation.

The information we are seeking is of the type that has been commonly provided to GAO for many years spanning several administrations. Furthermore, in prior GAO reviews of working groups established by the President, we have received information on participation by outside parties. Most recently, GAO reviewed activities of the White House China Trade Relations Working Group, which was established at the request of President Clinton in the exercise of his Constitutional powers. In this review, GAO was provided thousands of documents including copies of e-mails and other information identifying group members' contacts with outside groups and individuals. Previously, at the request of the Republican Ranking Minority Member of the House Committee on Government Operations, GAO reviewed activities of President Clinton's Task Force on Health Care Reform and was provided with an extensive listing of working group participants drawn from the government and from outside organizations. Moreover, some members of the NEPDG have already provided us with information identical in kind to the type of information we are seeking from the Vice President in his capacity as Chair of the NEPDG and from NEPDG staff members. For example, the Secretaries of Energy and Interior and the Administrator of the Environmental Protection Agency, have provided us with information concerning who they met with to develop the National Energy Policy, when the meetings occurred, where they occurred, and what the general topics were.

GAO's Basic Audit Authority

GAO's basic authority stems from the Budget and Accounting Act of 1921, which, as discussed below, provides GAO with broad and comprehensive authority to investigate all matters relating to the use of public money. Succeeding legislation affecting GAO's authority has generally served to emphasize the role of review and analysis by GAO as a means of enhancing congressional oversight over activities of the executive branch.⁷ The

⁵ Letter from David S. Addington, Counsel to the Vice President, to the House Committee on Energy and Commerce and the House Committee on Government Reform (May 4, 2001). The letter enclosed the responses of the Executive Director of the NEPDG to a letter dated April 19, 2001, from the Ranking Minority Members of the two committees.

⁶ See, e.g., United States v. American Telephone and Telegraph Co., 567 F. 2d 121 (D.C. Cir. 1977).

⁷ As the principal legislative history accompanying the General Accounting Office Act of 1980 explains, "With the growth in the number of Federal programs and agencies, the Congress has by necessity become more dependent on GAO assistance in fulfilling its oversight and legislative responsibilities. GAO not only provides Congress with essential information about Federal programs, but also, uniquely, exercises statutory authority to

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GAO, headed by the Comptroller General, is a principal means by which the legislative branch conducts oversight of executive programs and activities.⁸

Notwithstanding the broad authority vested in GAO and the Comptroller General by the Congress, the Vice President's August 2 letter again questioned GAO's basic authority to do this review. However, as we explained in our June 22, 2001, letter to the Counsel to the Vice President, our inquiry is authorized by 31 U.S.C. §§ 712 and 717. Section 712(1) authorizes GAO to investigate "all matters related to the receipt, disbursement, and use of public money," and there is no doubt that public money was used to fund the activities of the NEPDG. The Counsel has asserted that section 712(1) limits GAO's audit authority to financial transactions. As we explained in our June 22 letter, the Counsel's narrow interpretation of section 712 is inconsistent with the language and legislative history of the statute, as well as years of GAO practice. The statute extends GAO's audit authority to "all matters" related to the use of public money, not just costs of activities.

Section 717(b) also clearly authorizes this study. It provides that the Comptroller General "shall evaluate the results of a program or activity the Government carries out under existing law." The Counsel's assertion that the phrase "existing law" is limited to statutes and excludes the Constitution is unsupported. As we explained in our June 22 letter, the Counsel failed to supply any evidence from the statutory language, legislative history, or case law to support the assertion that Congress intended the phrase "existing law" to exclude the Constitution, the highest law of the land.

The Vice President's August 2 letter noted that section 717 authorizes GAO to review the "results" of agency programs and activities and stated that "the Comptroller General is not evaluating the 'results' of the Group's work; he is attempting to inquire into the process by which the results of the Group's work were reached." In effect, the August 2 letter suggests that section 717 does not provide GAO with authority to review the processes an agency follows in establishing or implementing a program or activity. We strongly disagree with this view.

The Presidential Memorandum establishing the NEPDG provided that one of the results of this action would be the gathering of information relevant to a national energy policy. Thus, the meetings that are the focus of our review were the result of a governmental activity—the establishment of the NEPDG. The NEPDG carried out many activities, the results of which are subject to evaluation by GAO under the plain meaning of the statute. However, the Vice President's August 2 letter in effect interprets "results" as being restricted to "end results" or "ultimate results." Under this narrow construction of the statute, GAO would be prohibited

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participate directly in the oversight process as an independent congressional entity." S. Rep. No. 96-570, at 2 (1979), reprinted in 1980 U.S.C.C.A.N. 732, 733.

⁸ Id. at 1.

from scrutinizing any agency activity except the final program result. Thus, even if GAO were able to identify certain deficiencies in a land management plan, for example, GAO would be prohibited from examining the process used to develop the plan in order to suggest improvements. This would clearly be contrary to the role that Congress has established for GAO.

There is no indication in section 717 or its legislative history that Congress intended to take such a narrow view of GAO's authority. In fact, GAO has long interpreted its audit authority as encompassing reviews of agency processes. This position, which has not been challenged by any prior administration, is reflected in the many congressional requests we receive to review agency processes for a broad variety of activities. Several recent examples include GAO's review of the process the Forest Service used to modify the Tongass National Forest plan,⁹ the process used by NASA to contract for the design and delivery of the international space station propulsion module,¹⁰ and the process used by the Army Corps of Engineers in preparing an environmental impact statement for actions related to the Snake River dams.¹¹

The legislative history of the Legislative Reorganization Act of 1970, which enacted the authority now contained in section 717(b), supports a broad interpretation of GAO's authority. The objective was to enhance GAO's role of review and analysis, as part of a larger effort to fortify congressional oversight by "...mak[ing] more information available to Members and Committees of the Congress, and...provid[ing] them a means of interpreting the information they have."¹² Clearly it would have been contrary to the overall thrust of the Act for Congress to exclude from GAO's purview agency processes and activities that are routinely the subject of congressional oversight.¹³ Accordingly, it is unreasonable to conclude that by using the term "results" in section 717, Congress intended to limit and restrict GAO's review authority to simply reviewing end results. Moreover, in any event,

⁹ Tongass National Forest: Process Used to Modify the Forest Plan, GAO/RCED-00-45 April 17, 2000.

¹⁰ International Space Station Propulsion Module Procurement Process, GAO-01-576R, April 26, 2001.

¹¹ Army Corps of Engineers: An Assessment of the Draft Environmental Impact Statement of the Lower Snake River Dams, GAO/RCED-00-186, July 24, 2000.

¹² H.R. Rep. No. 91-1215, at 12-13, reprinted in 1970 U.S.C.C.A.N. 4417, 4428.

¹³ There is no question that Congress has expansive oversight powers with respect to agency processes and activities. Numerous Supreme Court precedents recognize a broad and encompassing power in Congress to engage in oversight and investigation. Thus, in Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 n. 15 (1975), the Court stated that the scope of Congress' power of inquiry "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."

section 712 grants GAO broad authority to investigate all matters related to the use of public money and necessarily includes the agency processes in implementing programs.¹⁴

While generally asserting that GAO lacks authority to do this review, the Vice President has acknowledged GAO's authority in one area, agreeing that we can look into the direct and indirect expenses of the NEPDG under section 712. To this end, on June 21, his representatives provided us with 77 pages of miscellaneous documents purporting to relate to direct and indirect costs incurred in the development of the National Energy Policy. As we have advised the Vice President's representatives, the submission is incomplete and is not fully responsive. Moreover, it is virtually impossible to analyze the documentation.¹⁵ We cannot do a meaningful review without an explanation of the nature and purposes of these costs and the appropriation that was charged. Thus far, we have sought to obtain adequate, relevant records and explanations without success.

GAO's Statutory Right of Access

The Vice President in his August 2 letter also asserts that the term "agency" in 31 U.S.C. § 716 does not include the Vice President because he is a constitutional officer of the government. However, as noted above, we are requesting records from the Vice President in his capacity as Chair of the NEPDG. The Vice President provides no support for interpreting the term "agency" in Title 31 as excluding the NEPDG. Title 31 defines an "agency" subject to GAO's authority very expansively, to mean a "department, agency, or instrumentality" of the United States government, but not the legislative branch or the Supreme Court. As broadly as the term "agency" is now defined, the statutory language before the codification of Title 31 in 1982 emphasizes its expansiveness. Before the codification, the relevant term was "department or establishment," defined in 31 U.S.C. § 2 (1976) to include "any executive department, independent commission, board, bureau, office, agency, or other establishment of the Government." Given the breadth of the statutory language, the NEPDG as chaired by the Vice President is clearly an agency under Title 31 of the United States Code.

The legislative history of the General Accounting Office Act of 1980, which amended GAO's access statute (now 31 U.S.C. § 716) to authorize GAO to enforce its right of access to agency records, made it abundantly clear that Congress viewed the President and his

¹⁴ See Enclosure 1, pp. 3-5, for a fuller discussion.

¹⁵ For example, some pages provided are simply numbers or dollar amounts without an indication of the nature or purpose associated with the amount or consist only of a drawing of cell or desk phones. Others have multiple charges for moving phones or other equipment, without identifying whether the moves were for NEPDG staff, and which of the multiple charges are relevant to the moves. In addition, there is nothing that identifies the support staff and the White House Fellow, referred to as the group support staff, assigned to provide support to the NEPDG.

closest advisers as being within GAO's access authority and subject to access enforcement actions. A key purpose of the 1980 Act was to strengthen GAO's ability to obtain access to records in the face of opposition by agencies including the White House. The principal legislative history accompanying the Act¹⁶ chronicled the different access problems GAO had encountered in obtaining records to which it was legally entitled, including "serious access to records difficulties at the White House." These included an audit that required GAO to obtain unemployment estimates from the Council of Economic Advisers.¹⁷

The Senate report accompanying the 1980 Act explicitly recognized that "the President and his principal advisers and assistants" are within the scope of GAO's access rights and enforcement authority.¹⁸ In order to accommodate executive branch concerns about the extent to which GAO could judicially compel disclosure of highly sensitive information, Congress added the "certification" mechanism. This enables the President and the Director of the Office of Management and Budget (OMB) to preclude a suit by the Comptroller General under certain special conditions.¹⁹ As the Senate report explained:

"[W]ith regard to enforcement actions at the Presidential level, certifications provided for under section 102(d)(3) [now section 716(d)(1)(C)] are intended to authorize the President and the Director of the Office of Management and Budget to preclude a suit by the Comptroller General against the President and his principal advisers and assistants, and against those units within the Executive Office of the President whose sole function is to advise and assist the President, for information which would not be available under the Freedom of Information Act."²⁰

¹⁶ S. Rep. No. 96-570, reprinted in 1980 U.S.C.C.A.N. 732.

¹⁷ The Justice Department ultimately conceded that the Council of Economic Advisors was subject to GAO's access authority and provided the records. In this regard, during hearings that predated the 1980 Act, the Deputy Assistant Attorney General of the Office of Legal Counsel testified, "[T]he long and the short of it is that virtually every piece of information that was requested was eventually provided and it was provided because the Attorney General said this is what we think the law requires." GAO Legislation: Hearings before the Subcomm. on Energy, Nuclear Proliferation, and Federal Services of the Senate Comm. on Governmental Affairs, 96th Cong. 78 (1979).

¹⁸ S. Rep. No. 96-570, at 8, reprinted in 1980 U.S.C.C.A.N. at 739.

¹⁹ The certification provision, now contained in 31 U.S.C. § 716(d)(1)(C), precludes a suit by the Comptroller General if the President or Director of OMB certifies that (1) the records could be withheld under either of two Freedom of Information Act exemptions in 5 U.S.C. § 552(b)(5)(deliberative process) and 5 U.S.C. § 552(b)(7)(law enforcement records) and (2) disclosure could reasonably be expected to impair substantially the operation of the government.

²⁰ S. Rep. No. 96-570, at 8, reprinted in 1980 U.S.C.C.A.N. at 739.

Thus, it is clear that Congress crafted the certification provision as a carefully balanced compromise that ensures the President can protect the confidentiality of highly sensitive information, the disclosure of which would substantially impair the operations of government, while affording the Comptroller General the access to information he needs to fulfill his responsibilities under the law. Congress would not have needed to add the certification provision to protect the presidential advisers if their records were not within the scope of GAO's access authority.

Submission of Report

Since GAO has a legal right of access to the requested documents and since full access was not provided within 20 days following our July 18 letter pursuant to 31 U.S.C. §716(b)(1), I now submit this report to you and the other designated officials. Unless an exemption under section 716(d)(1) is invoked, such as certification by the President or Director of OMB, I am authorized to bring a civil action for judicial enforcement of our access request if full and complete access to the records we are requesting is not provided to GAO within 20 days following the filing of this report.

I seek your assistance in resolving this matter in a timely manner. We are hopeful that this pending access problem can be resolved expeditiously, without litigation, and in a manner that will allow us to fulfill our oversight and reporting responsibilities to the Congress. If you or your representatives have any questions or would like to meet to resolve this issue, please contact me at (202) 512-5500 or Anthony Gamboa, General Counsel, at (202) 512-5400.

Thank you for your time and attention to this important matter.

Respectfully yours,

(signed)

David M. Walker
Comptroller General
of the United States

- Enclosure 1 June 22, 2001 letter from the General Counsel of GAO to the Counsel for the Vice President
- Enclosure 2 Chronology of GAO's Attempts to Obtain Information