

## **Chronology of GAO's Efforts to Obtain NEPDG Documents from the Office of the Vice President, April 19, 2001 to August 25, 2003**

On April 19, 2001, Representatives John D. Dingell and Henry A. Waxman, Ranking Members of the House Committee on Energy and Commerce and the House Committee on Government Reform, respectively, sent a letter to the General Accounting Office (GAO) to obtain certain factual information regarding the process by which the the National Energy Policy Development Group (NEPDG), a task force chaired by the Vice President and charged by the President with recommending a national energy policy, was carrying out its work.

Also on April 19, 2001, Representatives Dingell and Waxman sent a separate letter to the Executive Director of the NEPDG, requesting certain information related to the applicability of the Federal Advisory Committee Act (FACA) to the NEPDG.

On May 7, 2001, a GAO Assistant Director called the Deputy Counsel to the President, GAO's White House contact on previous matters, to discuss GAO's investigation as it applied to the Vice President in his capacity as Chair of the NEPDG. The GAO Assistant Director asked the President's Deputy Counsel about how best to proceed with GAO's request and how to arrange an initial meeting. The Deputy Counsel indicated he would contact the Vice President's Counsel.

On May 8, 2001, the Vice President's Counsel called the GAO Assistant Director and discussed GAO's information needs. The Vice President's Counsel asked the Assistant Director to fax a copy of the Congressional request letter that GAO had received, or portions of it, so that he would have a sense of the area of focus in order to ensure that appropriate personnel attended the initial meeting with GAO. As requested, the GAO Assistant Director faxed a description of the information needed, based on the Congressional request letter, to the Vice President's Counsel. The Assistant Director's fax also noted that GAO would need to schedule an initial meeting and to interview knowledgeable officials.

On May 10, 11, 14, 15, and 17, 2001, GAO officials attempted to talk with the Vice President's Counsel to arrange an initial meeting.

On May 16, 2001, the Vice President, in his capacity as Chair of the NEPDG, submitted to the President a report entitled *National Energy Policy*, recommending adoption of the national energy policy that had been developed by the NEPDG.

Also on May 16, 2001, the Vice President's Counsel sent a letter to the GAO General Counsel asking that the Comptroller General examine whether GAO's inquiry was appropriate, in compliance with the law and a productive use of resources. The letter also asked for a statement of GAO's legal authority to conduct its inquiry. Finally, "[a]s a matter of comity," the Vice President's Counsel enclosed a copy of a May 4, 2001 letter he had sent to Representatives Dingell and Waxman and the Chairmen of the two respective House committees on which they were Ranking Members, purporting to respond to the FACA-related April 19, 2001 letter from Representatives Dingell and Waxman to the

NEPDG Executive Director. An attachment to the Vice President's Counsel's May 4 letter, prepared by the NEPDG Executive Director, stated among other things that the NEPDG support staff had met with non-government personnel but that "such meetings [did] not involve deliberations or any effort to achieve consensus on advice or recommendations. These meetings . . . were simply forums to collect individual views rather than to bring a collective judgment to bear." The GAO General Counsel did not receive the Vice President's Counsel's May 16 letter (enclosing the May 4 letter) until May 21.

On May 17, 2001, the Vice President's Counsel left a voicemail message with a GAO Associate General Counsel indicating that he was not authorized to set up a meeting to discuss NEPDG activities. He stated that on May 16, he had sent a letter to the GAO General Counsel that was "self-explanatory."

Also on May 17, 2001, a GAO Director wrote to the Secretary of Energy, the Secretary of the Interior and the Administrator of the Environmental Protection Agency, all in their capacities as members of the NEPDG. The GAO Director explained that GAO was investigating the process by which the President's national energy policy had been developed and that GAO needed to obtain information concerning NEPDG membership, information presented to the NEPDG by non-government personnel, NEPDG cost information, and related data.

In early June 2001, GAO staff held initial meetings with staff from the Department of Energy (DOE), Department of the Interior (DOI) and Environmental Protection Agency (EPA), to begin obtaining the previously requested information about meetings attended by the heads of those agencies in their capacities as NEPDG members and other information.

On June 1, 2001, the GAO General Counsel sent a letter to the Vice President's Counsel, in response to his May 16 letter, explaining that GAO's review and request for NEPDG information were appropriate and authorized under 31 U.S.C. §§ 712, 716 and 717.

On June 7, 2001, the Vice President's Counsel wrote to the GAO General Counsel, arguing that GAO lacked authority to obtain the requested NEPDG information under 31 U.S.C. § 717 because the words "existing law" in that provision (which requires the Comptroller General to "evaluate the results of a program or activity the Government carries out under existing law") allegedly do not include the United States Constitution. The Vice President's Counsel also asserted that 31 U.S.C. § 712 (which requires the Comptroller General to investigate, among other things, "all matters related to the receipt, disbursement, and use of public money") only entitles GAO to obtain financial cost information. Pursuant to that argument, the Vice President's Counsel indicated that the Office of the Vice President would search only for documents reflecting direct and indirect costs incurred by the NEPDG.

On June 21, 2001, the Vice President's Counsel forwarded 77 pages of miscellaneous documents purporting to be responsive to the GAO request regarding direct and indirect costs incurred by the NEPDG. The materials were virtually impossible to analyze, as

they consisted, for example, of pages with dollar amounts but no indication of the nature or the purpose of the expenditure. Nor did the materials reflect any apparent expenses in connection with the work of the six assigned NEPDG support staff.

On June 22, 2001, GAO sent a letter to the Vice President's Counsel further explaining GAO's broad authority to review activities of the NEPDG pursuant to 31 U.S.C. §§ 712 and 717.

On June 29, 2001, the GAO General Counsel called the Vice President's Counsel to try to arrange a meeting to discuss GAO's information requests. Later that day, at the request of the Vice President's Counsel, a Special Counsel in the Office of Legal Counsel at the Department of Justice (DOJ) returned the GAO General Counsel's call. The GAO General Counsel emphasized that GAO was trying to be accommodating, was not interested in records reflecting deliberative processes, was flexible in how information could be provided, and already had reduced the scope of its review. The DOJ Special Counsel continued to assert that GAO had no authority to conduct the review.

On July 3, 2001, the GAO General Counsel called the Vice President's Counsel to try to set up a meeting to address how to proceed, and was directed to call the DOJ Special Counsel in the future.

On July 9, 2001, a meeting was held with the Deputy White House Counsel, the DOJ Special Counsel, the GAO General Counsel and four other GAO officials, at DOJ headquarters. The Deputy White House Counsel and the DOJ Special Counsel questioned which statutory program GAO was reviewing and the purpose of the inquiry. At the end of the meeting, the Deputy White House Counsel agreed to determine if any information would be provided to GAO, and agreed to call GAO by close of business on July 10.

On July 12, 2001, the GAO General Counsel called the Deputy White House Counsel to see if a decision had been reached on whether the NEPDG would be providing information to GAO. The GAO General Counsel was informed that no decision had been reached.

On July 17, 2001, the GAO General Counsel again called the Deputy White House Counsel to ask whether any information would be forthcoming. The GAO General Counsel noted that other members of the NEPDG had provided GAO with information. The Deputy White House Counsel indicated that nothing would be forthcoming from the Vice President's Office or the NEPDG staff.

On July 18, 2001, pursuant to 31 U.S.C. § 716(b), the Comptroller General issued a letter to the Vice President in his capacity as Chair of the NEPDG. The letter requested the following records:

- “1. Your counsel identified nine meetings conducted by the National Energy Policy Development Group (NEPDG) in his May 4, 2001, letter to the Chairmen and Ranking Minority Members of the House Committee on Energy and

Commerce and the House Committee on Government Reform (hereinafter May 4 letter). We request records providing the names of the attendees for each meeting, their titles, and the office represented.

“2. In the May 4 letter, your counsel indicated that six professional staff, referred to as the group support staff, were assigned to the Office of the Vice President to provide support to the NEPDG. We request records providing their names, titles, the office each individual represented, the date on which each individual began working for such office, and the responsibilities of the group support staff.

“3. In the May 4 letter, your counsel indicated that various members of the group support staff met with many individuals to gather information relevant to the NEPDG work. We request records providing the following information with regard to each of these meetings: (a) the date and location, (b) any person present, including his or her name, title, and office or clients represented, (c) the purpose and agenda, (d) any information presented, (e) minutes or notes, and (f) how members of the NEPDG, group support staff, or others determined who would be invited to the meetings.

“4. We request records providing the following information with regard to any meetings the Vice President as chair of the NEPDG had with individuals to gather information relevant to the NEPDG: (a) the date and location, (b) any person present, including his or her name, title, and office or clients represented, (c) the purpose and agenda, (d) any information presented, (e) minutes or notes, and (f) how the Vice President or others determined who would be invited to the meetings.

“5. We request any records containing information about the direct and indirect costs incurred in the development of the National Energy Policy. To date, we have been given 77 pages of miscellaneous records purporting to relate to these direct and indirect costs. Because the relevance of many of these records is unclear, we continue to request all records responsive to our request, including any records that clarify the nature and purpose of the costs.”

On July 30, 2001, the Comptroller General placed a call to the Vice President to discuss the outstanding access issues and to try to find a solution to the impasse. The Comptroller General was unsuccessful in his attempt to reach the Vice President.

On July 31, 2001, the Counsel to the Vice President returned the call from the Comptroller General. In the interest of comity and out of respect for the Vice President, the Comptroller General offered to eliminate GAO's requests for notes and minutes of meetings that the Vice President or the NEPDG staff had with non-government personnel on NEPDG matters, as well as for copies of materials or other information which had been presented at such meetings. The Counsel to the Vice President indicated that he would advise the Vice President of GAO's offer to reduce the scope of its request and it was agreed that the GAO General Counsel would call the Vice President's Counsel the following day to discuss matters further.

On August 1, 2001, the GAO General Counsel and the Counsel to the Vice President spoke by telephone regarding the Comptroller General's demand letter of July 18, 2001 and the Comptroller General's July 31 offer to reduce the scope of information requested in the July 18 letter. The GAO General Counsel reiterated the Comptroller General's proffered accommodation, but the Counsel to the Vice President again asserted that GAO had no authority to perform its review. No accommodation was reached.

On August 2, 2001, the Vice President sent a memorandum to the Senate and the House of Representatives to inform them of what he alleged were "actions undertaken by an agent of the Congress, the Comptroller General, which exceeded his lawful authority and which if given effect, would unconstitutionally interfere with the functioning of the executive branch." In particular, the Vice President asserted that compliance with GAO's requests would interfere with the effective functioning of the executive branch by compromising "the confidentiality of communications among a President, a Vice President, the President's other senior advisers and others." Copies of the Vice President's memoranda were sent to the Comptroller General, but they did not describe the records being withheld from GAO, as required by 31 U.S.C. § 716(b).

On August 6, 2001, GAO issued a public statement clarifying that, contrary to the Vice President's statements, GAO was not interested in reviewing communications involving the President, Vice President, the President's senior advisers or others, nor in obtaining the Vice President's schedule. The statement reiterated that GAO was only seeking limited, purely factual information.

On August 17, 2001, pursuant to 31 U.S.C. § 716(b), the Comptroller General issued a statutory report to the Congress, the President, the Vice President, the Director of the Office of Management and Budget (OMB) and the Attorney General. The report advised that the Vice President, as Chair of the NEPDG, had not provided GAO with access to certain requested records. The letter also underscored that GAO was scaling back the requested records to exclude minutes, notes and information presented by members of the public. Finally, the letter emphasized GAO's flexibility in the manner in which the requested information could be provided, detailed GAO's attempts to obtain the requested information, and outlined GAO's legal authority to obtain access to the information.

In July and August 2001, GAO received the remaining NEPDG-related information it had requested from DOE, DOI and EPA. This information included, for example: (a) for DOE, the dates, times, locations and attendees of 7 meetings between the Secretary and non-government officials and the dates, times and locations of 7 internal NEPDG meetings attended by the Secretary or his staff; (b) for DOI, copies of information provided by non-government personnel regarding NEPDG matters and the dates and other information for 8 internal NEPDG meetings attended by the Secretary; and (c) for EPA, copies of information provided by non-government personnel regarding NEPDG matters and the dates and times of 8 internal NEPDG meetings attended by the Administrator or her staff.

On September 6, 2001, 20 days after issuance of the August 17 statutory report, the Vice President's Counsel faxed to GAO a list containing the names of the NEPDG support staff, but failed to provide the remaining GAO-requested information. Accordingly, pursuant to 31 U.S.C. § 716(b)(2)(A), which authorizes GAO to file suit to obtain requested records not produced within 20 days after issuance of a statutory report, GAO became statutorily authorized to file suit as of September 6. The only impediment to GAO's authority would have arisen if the President or the Director of OMB had certified to GAO and the Congress, pursuant to 31 U.S.C. § 716(d)(1)(C), that disclosure of the requested information "reasonably could be expected to impair substantially the operations of the Government" and that information could be withheld under either 5 U.S.C. § 552(b)(5) (certain deliberative process documents) or (b)(7) (certain law enforcement documents). Neither the President nor the OMB Director chose to make such a certification, however. Nor did the President seek to protect the NEPDG information by claiming that it was subject to executive privilege.

On September 7, 2001, in response to press inquiries, GAO provided a public statement noting that it had received a limited amount of information from the Vice President's Office on September 6 and that it had not received a statutory certification for the remainder of the information. GAO stated that it was finalizing discussions with key Congressional leaders and preparing for possible litigation.

On September 28, 2001, in response to press inquiries, GAO provided a public statement that it remained concerned about the Vice President's failure to provide the requested information, but that the matter was not a current priority given the current national focus on combating terrorism and enhancing homeland security in the wake of the tragic events of September 11, 2001. GAO stated that it would determine whether and when to proceed to court in due course.

On October 15, 2001, the GAO General Counsel called the Vice President's Counsel to advise him that GAO now intended, after having deferred pursuit of its information requests in deference to the events of September 11 and the federal government's response thereto, to begin interviewing members of the NEPDG support staff identified to GAO in the Vice President's Office's September 6 communication. The Vice President's Counsel asserted that because GAO had issued a statutory report pursuant to 31 U.S.C. § 716, GAO allegedly had no legal authority to continue pursuit of its information requests administratively but could do so only by filing suit in federal court. The GAO General Counsel disagreed with this argument and noted that GAO's efforts to interview the NEPDG staff were an additional attempt to reach an accommodation regarding the NEPDG information and thereby avoid the necessity of litigation.

On October 16, 2001, pursuant to the GAO General Counsel's October 15 phone call with the Vice President's Counsel, a GAO Assistant Director placed a call to the NEPDG Executive Director. The GAO Assistant Director explained that she would like to arrange for a meeting or other method of contact with the NEPDG support staff so that GAO could obtain needed followup information concerning cost-related documents previously submitted as well as information responsive to GAO's remaining requests.

The GAO Assistant Director was referred to the Vice President's Counsel, who directed the Assistant Director to confer with the GAO General Counsel.

On January 9, 2002, in response to press inquiries, the Comptroller General provided a public statement indicating that he would make a decision within one month whether GAO would file suit in order to obtain access to the remaining NEPDG information.

On January 22, 2002, Senator Carl M. Levin, Armed Services Committee Chairman and Chairman of the investigations subcommittee of Governmental Affairs, Senator Ernest F. Hollings, Commerce Committee Chairman, Senator Byron L. Dorgan, Chairman of the Commerce Committee's consumer affairs subcommittee, and Senator Joseph I. Lieberman, Governmental Affairs Committee Chairman, sent a letter to GAO requesting it to evaluate the process by which the President's national energy policy was developed, by continuing the investigation GAO had begun in April 2001. Among other things, the Senators noted that they needed this information in light of Congress's upcoming consideration of legislation establishing a national energy policy.

On January 24, 2002, in light of the January 22 request by four Senate chairmen urging GAO to pursue its investigation of NEPDG activities, the Comptroller General placed a call to the Vice President to discuss GAO's and the Vice President's respective positions on GAO's outstanding information requests. When the Vice President returned this call, the Comptroller General reaffirmed his willingness to make a reasonable accommodation regarding the requested information, but no accommodation was reached.

Also on January 24, 2002, Representatives Dingell and Waxman sent a letter to GAO urging that it file suit to obtain access to the remaining NEPDG information, in light of the failure of the Vice President to provide the requested information and the increased need for such information in the wake of Enron-related and other developments.

On January 30, 2002, the Comptroller General wrote to the President, the Vice President and certain Chairmen and Ranking Members of the Senate and the House of Representatives. The Comptroller General advised that GAO's numerous attempts to reach a reasoned and reasonable accommodation with the Vice President, as Chair of the NEPDG, regarding access to limited NEPDG information had been rebuffed; that GAO had now exhausted all statutory processes for resolving its access requests out of court; that GAO's only remaining recourse was to file suit or forego further assertion of its access rights; and that for critical reasons of law and policy, GAO was taking the steps necessary to file suit to obtain the information outlined in its August 17, 2001 statutory report.

On February 22, 2002, after exhausting the processes specified GAO's access-to-records statute for resolving access disputes, the Comptroller General filed suit in the U.S. District Court for the District of Columbia against the Vice President, as authorized by 31 U.S.C. § 716(b)(2), to obtain access to the limited factual NEPDG information that GAO had requested. This was the first time that GAO had filed suit against a federal official in connection with a records access issue.

On December 9, 2002, the district court dismissed GAO's suit on technical jurisdictional grounds, without reaching the merits of GAO's authority to audit or evaluate NEPDG activities or to obtain access to NEPDG records. See *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002).

On January 24, 2003, in response to erroneous statements in the district court's December 9 opinion concerning the four Senators who had requested that GAO to pursue its evaluation of NEPDG activities, the Senators wrote to the Comptroller General confirming that they had made their January 22, 2002 request in their capacities as committee chairs. The Senators also confirmed that in making their request, they understood that if GAO were unsuccessful in obtaining the requested information from the Office of the Vice President, GAO would have no direct recourse other than to file suit to carry out the Senators' request.

On February 7, 2003, after bipartisan outreach efforts to the Congress, GAO decided not to appeal the district court's decision. As detailed in the Comptroller General's February 7 statement, although GAO believed the district court's decision was incorrect, continuing to pursue GAO's access request through the courts would have required significant time and resources over several years. In addition, several private litigants are seeking much of the same NEPDG information from OVP that GAO sought, and GAO will obtain those records if these cases are successful. Finally, because the district court's decision in GAO's case did not reach the merits of GAO's audit or access authority, the decision in no way diminishes these authorities or the obligation of agencies to provide GAO with information. The court's decision is confined to the unique circumstances of the NEPDG case and does not preclude GAO from filing suit on a different matter involving different facts in the future.

On August 25, 2003, GAO released its report on the NEPDG's activities, *Energy Task Force: Process Used To Develop the National Energy Policy* (GAO-03-894). The report details, to the extent possible, the process and costs associated with the Group's development of the proposed national energy policy, and explains that the Office of the Vice President's denial of access to NEPDG records, which led GAO to take the unprecedented step of filing suit against a federal official to enforce its access rights, precluded GAO from fully achieving its objectives and substantially limited its analysis. The report further explains that GAO nevertheless gathered and analyzed information made available from other sources to provide as robust an account of the NEPDG effort as possible under the circumstances.