



OFFICE OF THE VICE PRESIDENT
WASHINGTON

June 7, 2001

The Honorable Anthony Gamboa
General Counsel
General Accounting Office
441 G Street NW
Washington, D.C. 20548

Dear Mr. Gamboa:

Thank you for your letter dated June 1, 2001 responding to my letter dated May 16, 2001 concerning a General Accounting Office inquiry relating to the National Energy Policy Development Group (NEPDG). While the Comptroller General's decision to seek to initiate an inquiry is disappointing, I appreciate very much that you sought and obtained his review of the decision whether to do so. I appreciate also that your letter of June 1st identified the statutes upon which GAO relies as the legal basis for conducting its inquiry and stated that GAO is "not inquiring into the deliberative process."

Your letter identified three statutes as the legal basis for the GAO inquiry as follows:

... Under 31 U.S.C. §717, GAO is required to evaluate a program or activity when requested by a congressional committee of jurisdiction. As you are aware, the request is from Representative Dingell, Ranking Minority Member of the Committee on Energy and Commerce, and Representative Waxman, Ranking Minority Member of the Committee on Government Reform. We are also conducting the review under 31 U.S.C. §712, which authorizes GAO to investigate all matters related to the use of public money. GAO's broad statutory right of access to records, set out in 31 U.S.C. §716(a), covers the requested information, documents and records supporting our review. . . .

Each of the statutes cited in your letter as authority for the proposed GAO inquiry is discussed below.

* * * * *

1. Section 717 Provides No Legal Basis for the Proposed Inquiry

Section 717(b)(3) of Title 31 requires the Comptroller General to "evaluate the results of a program or activity the Government carries out under existing law" . . . "when a committee of Congress with jurisdiction over the program or activity requests the evaluation." However, Section 717(b)(3) does not apply with regard to the proposed inquiry relating to the NEPDG, for two reasons.

First, the proposed GAO inquiry does not involve evaluation of a program or activity that "the Government carries out under existing law." With regard to the NEPDG, the Vice President and the other officers of the United States who serve on the NEPDG act only in relation to exercise of the authorities committed to the Executive by the Constitution, rather than by statute. These include the President's constitutional authorities to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," to "take Care that the Laws be faithfully executed," and, with respect to Congress, to "recommend to their Consideration such Measures as he shall judge necessary and expedient." Since their actions relate only to the exercise of the President's authorities under the Constitution, and not authorities granted by statute, Section 717(b) does not apply. *See* 12 U.S. Op. Ofc. of Legal Counsel 171 (1988) ("We believe as a matter of statutory construction that the phrase 'program or activity . . . under existing law' must refer only to activities carried out pursuant to statute, and not activities carried out pursuant to the Executive's discharge of its own constitutional responsibilities.")

Secondly, the requests from the two Representatives who serve as the Ranking Minority Members of the Committee on Energy and Commerce and the Committee on Government Reform do not constitute a "request" from "a committee of Congress with jurisdiction over the program or activity." A committee of Congress acts by majority vote or action of the committee chairman pursuant to committee authority. I am not aware that either of the committees mentioned has authorized the committee's ranking minority member to make a request under Section 717(b)(3) for the proposed GAO inquiry relating to the NEPDG. The request of individual Members of Congress does not authorize the Comptroller General to proceed. *See* 2 U.S. Op. Ofc. of Legal Counsel 415 (1978).

2. Section 716 Provides No Legal Basis for the Proposed Inquiry

Section 716(a) provides:

(a) Each agency shall give the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency. The Comptroller General may inspect an agency record to get the information. This subsection does not apply to expenditures made under section 3524 or 3526(e) of this title.

As is clear from viewing subsection 716(a) in the context of the remainder of Section 716, Section 716 does not provide authority for the conduct of an investigation; it provides only the means for conducting an otherwise authorized investigation. *See* 2 U.S. Op. Ofc. of Legal Counsel 415 (1978) (predecessor statute). Even when GAO institutes an otherwise authorized investigation, constitutional and other legal authorities and privileges, such as the constitutionally-based Executive privilege, may apply in particular situations that may arise under Section 716.

3. Section 712 Provides a Legal Basis for Only a Limited Inquiry

Section 712 of Title 31 of the United States Code provides in pertinent part:

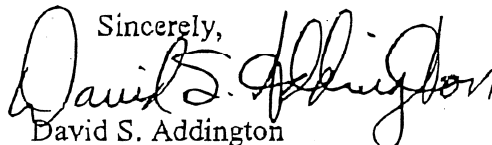
The Comptroller General shall-- (1) investigate all matters related to the receipt, disbursement, and use of public money

The authority of the Comptroller General to conduct an investigation under Section 712(1) is narrowly circumscribed. The subject matter of an investigation under Section 712(1) is limited to "matters related to the receipt, disbursement, and use of public money." This subject matter is substantially narrower than the subject matter of an evaluation under Section 717, which is evaluation of the "results of a program or activity the Government carries out under existing law." When Congress enacted the authority now contained in Section 717, it noted that the authority to review programs and activities was "new," which makes clear that the then-already-existing authority to investigate "receipt, disbursement and use of public money" was narrower and did not extend to evaluating the results of a program or activity. 1970 U.S. Code Cong. & Ad. News 4417, 4433 (provision "assigns to the Comptroller General new statutory authority to review and analyze the results of Government programs and activities."). Constitutional and other legal authorities and privileges, such as the constitutionally-based Executive privilege, may apply in particular situations that may arise in an investigation under Section 712(1).

* * * * *

Your letter of June 1st submitted five numbered interrogatories that sought information in addition to the information already furnished as a matter of comity with my letter of May 4, 2001, a copy of which I furnished to you with my letter of May 16th. Of the five interrogatories, only interrogatory number 5 ("We are interested in obtaining the direct and indirect costs incurred by both the Vice President and the Group support staff") involves "matters related to the receipt, disbursement, and use of public money." As a matter of comity between the legislative and executive branches, with due regard for the constitutional separation of powers and the rights of Americans to petition their government, and reserving all legal authorities and privileges that may apply, I will promptly seek any information possessed by the Office of the Vice President that is responsive to interrogatory number 5. One document that refers to funding in relation to the NEPDG, a Presidential memorandum dated January 29, 2001, is at hand and is enclosed.

Sincerely,



David S. Addington
Counsel to the Vice President

Enclosure as stated

THE WHITE HOUSE

WASHINGTON

January 29, 2001

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF THE TREASURY
THE SECRETARY OF THE INTERIOR
THE SECRETARY OF AGRICULTURE
THE SECRETARY OF COMMERCE
THE SECRETARY OF TRANSPORTATION
THE SECRETARY OF ENERGY
THE DIRECTOR OF THE FEDERAL EMERGENCY MANAGEMENT
AGENCY
THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION
AGENCY
THE ASSISTANT TO THE PRESIDENT AND DEPUTY CHIEF
OF STAFF FOR POLICY
THE ASSISTANT TO THE PRESIDENT FOR ECONOMIC
POLICY
THE ASSISTANT TO THE PRESIDENT FOR
INTERGOVERNMENTAL AFFAIRS

SUBJECT: National Energy Policy Development Group

One of the greatest challenges facing the private sector and Federal, State, and local governments is ensuring that energy resources are available to meet the needs of our citizens and our economy. To help address this challenge, I am asking the Vice President to lead the development of a national energy policy designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future. Accordingly, I direct as follows:

1. Establishment. There is hereby established within the Executive Office of the President an Energy Policy Development Group, consisting of the following officers of the Federal Government: the Vice President; Secretary of the Treasury, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Transportation, Secretary of Energy, Director of the Federal Emergency Management Agency, Administrator of the Environmental Protection Agency, Assistant to the President and Deputy Chief of Staff for Policy, Assistant to the President for Economic Policy, and Assistant to the President for

Intergovernmental Affairs. The Vice President may also invite the Chairman of the Federal Energy Regulatory Commission to participate. The Vice President may invite the participation of the Secretary of State when the work of the Energy Policy Development Group involves international affairs and, as appropriate, other officers of the Federal Government. The Vice President shall preside at meetings of the Energy Policy Development Group, shall direct its work, and may establish subordinate working groups to assist the Energy Policy Development Group in its work.

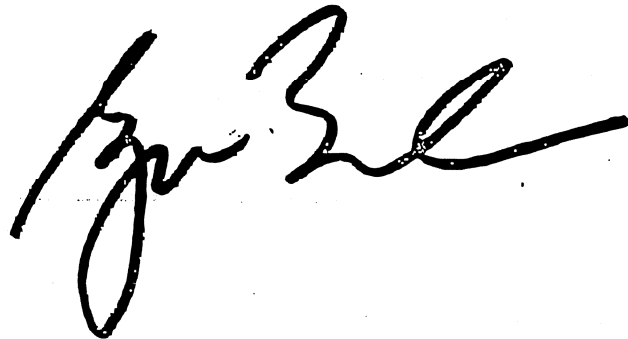
2. Mission. The mission of the Energy Policy Development Group shall be to develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy. In carrying out this mission, the Energy Policy Development Group's functions shall be to gather information, deliberate, and, as specified in this memorandum, make recommendations to the President. Its activities shall not supplant the authority and responsibility of State and local governments for handling energy production, purchase, and distribution difficulties.

3. Reports. The Energy Policy Development Group should submit reports to me as follows: (a) in the near-term, an assessment of the difficulties experienced by the private sector, and State and local governments in ensuring that local and regional energy needs are met, and (b) as soon thereafter as practicable, a report setting forth a recommended national energy policy designed to help the private sector, and as necessary and appropriate State and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy for the future. The recommended national energy policy should take into consideration, among other things, (i) the growing demand for energy, locally, regionally, and nationally, in the United States and in the world, (ii) the potential for local, regional, or national disruptions in energy supplies or distribution, and (iii) the need for responsible policies to protect the environment and promote conservation, and (iv) the need for modernization of energy generation, supply, and transmission infrastructure.

4. Funding. The Department of Energy shall, to the maximum extent permitted by law and consistent with the need for funding determined by the Vice President after consultation with the Secretary of Energy, make funds appropriated to the Department of Energy available to pay the costs of personnel to support the activities of the Energy Policy Development Group. If a situation arises in which Department of Energy appropriations are not available for a category of expenses of the Energy

Policy Development Group, the Vice President or his designee should submit to me a proposal for use, consistent with applicable law, of the minimum necessary portion of any appropriation available to the President to meet the unanticipated need. The Vice President may also obtain, through the Assistant to the President for Economic Policy, such assistance from the National Economic Council staff as the Vice President deems necessary.

5. Termination. The Energy Policy Development Group shall terminate no later than the end of fiscal year 2001.

A large, stylized handwritten signature in black ink, appearing to read 'John R. ...'.

cc: Secretary of State
Chairman, Federal Energy Regulatory Commission