Received(Date): 29 JUL 2002 13:49:49
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To: Timothy E. Flanigan (CN=Timothy E. Flanigan/OU=WHO/O=EOP@EOP [WHO]), Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]), David S. Addington (CN=David S. Addington/OU=OVP/O=EOP@EOP [OVP])
Cc: "Salmons, David B" <David.B.Salmons@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) ("Salmons, David B" <David.B.Salmons@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) [UNKNOWN]), "Jordan, Bill" <Bill.Jordan@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) ("Jordan, Bill" <Bill.Jordan@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) [UNKNOWN]), "McCallum, Robert" <Robert.McCallum@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) ("McCallum, Robert" <Robert.McCallum@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) [UNKNOWN]), "Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) ("Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) [UNKNOWN]), "Kneedler, Edwin S" <Edwin.S.Kneedler@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) ("Kneedler, Edwin S" <Edwin.S.Kneedler@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) [UNKNOWN]), "Katsas, Gregory" <Gregory.Katsas@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) ("Katsas, Gregory" <Gregory.Katsas@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) [UNKNOWN]), "Klitenic, Jason" <Jason.Klitenic@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) ("Klitenic, Jason" <Jason.Klitenic@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) [UNKNOWN]), "Clement, Paul D" <Paul.D.Clement@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) ("Clement, Paul D" <Paul.D.Clement@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) [UNKNOWN])
Subject: : FW: Activity in Case 1-01-01530-EGS JUDICAL WATCH, INC., et al v.NATIONAL ENERGY POLICY DEVELOPMENT GROUP et al "Response to...
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P_MBE39003_WHO.TXT_2.txt

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CREATION DATE/TIME:29-JUL-2002 13:49:49.00
SUBJECT:: FW: Activity in Case 1-01-01530-EGS JUDICAL WATCH, INC., et al v. NATIONAL ENERGY POLICY DEVELOPMENT GROUP et al "Response to...
TO:Timothy E. Flanigan (CN=Timothy E. Flanigan/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
TO:David S. Addington (CN=David S. Addington/OU=OVP/O=EOP@EOP [OVP])
READ:UNKNOWN
CC:"Salmons, David B" <David.B.Salmons@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) ("Salmons, David B" <David.B.Salmons@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) [UNKNOWN])
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CC:"Jordan, Bill" <Bill.Jordan@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) ("Jordan, Bill" <Bill.Jordan@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) [UNKNOWN])
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CC:"Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) ("Whelan, M Edward III" <M.Edward.Whelan@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) [UNKNOWN])
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CC:"Katsas, Gregory" <Gregory.Katsas@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) ("Katsas, Gregory" <Gregory.Katsas@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) [UNKNOWN])
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CC:"Clement, Paul D" <Paul.D.Clement@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) ("Clement, Paul D" <Paul.D.Clement@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) [UNKNOWN])
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Attached is the Brief we filed today on the discovery plan on the NEPDG
case. Thank you all for your input.

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-----Original Message-----
From: Paisner, Jennifer
Sent: Monday, July 29, 2002 1:27 PM
To: Weismann, Anne; Millet, Thomas; Coffin, Shannen; Blackwell,
Craig
Subject: FW: Activity in Case 1-01-01530-EGS JUDICAL WATCH, INC.,
et al v. NATIONAL ENERGY POLICY DEVELOPMENT GROUP et al "Response to Doc...

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From:
/DDV=dcd_ElectronicFiling@dcd.uscourts.gov/DDT=RFC-822/O=INETGW/P=GOV+DOJ/A
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[mailto:/DDV=dcd_ElectronicFiling@dcd.uscourts.gov/DDT=RFC-822/O=INETGW/P=G
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Sent: Monday, July 29, 2002 11:34 AM
Subject: Activity in Case 1-01-01530-EGS JUDICAL WATCH, INC., et al
v. NATIONAL ENERGY POLICY DEVELOPMENT GROUP et al "Response to Doc...

- Discovery Plan Objections Filing_final.pdf - tmp.htm
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. NATIONAL ENERGY POLICY DEVELOPMENT GROUP, et al., Defendants.	C.A. No. 01-1530 (EGS)
SIERRA CLUB, Plaintiff, v. VICE PRESIDENT RICHARD CHENEY, in his official capacity, et al., Defendants.	C.A. No. 02-631 (EGS)

DEFENDANTS' OBJECTIONS TO
PLAINTIFFS' PROPOSED DISCOVERY PLAN

INTRODUCTION

As the Court knows, it is defendants' position that discovery is inappropriate in this case, especially in light of the strong potential for intrusion into the effective functioning of the Presidency and Vice Presidency. The Court's July 11 Order, however, significantly limits any potential discovery issues. In its Order, the Court held that plaintiffs' claim that defendants violated the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. § 2, can proceed, if at all,

under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, or the mandamus statute, 28 U.S.C. § 1361. See Judicial Watch, Inc. v. National Energy Policy Dev. Group, Civ. No. 01-1530, slip op. at 42, 51 (July 11, 2002) ("Mem."). That ruling has important implications for discovery in this case. It is well settled that a court's review under the APA is confined to the administrative record compiled by the agency. That is, there is no discovery under the APA (or under the mandamus statute, where mandamus is used as a substitute for APA review). For this and other reasons set forth below, defendants object to plaintiffs' proposed discovery plan.[1]

Moreover, this case can be resolved far short of the wide-ranging inquiries plaintiffs have proposed into the conduct of the NEPDG in carrying out its Presidentially-assigned mission (inquiries, we note, that would severely intrude into the functioning of the Presidency and Vice Presidency). Specifically, in its opinion, the Court identified as one of the central questions posed in this case: "were any non-governmental individuals members of the NEPDG and its alleged sub-groups?" See, e.g., Mem. at 54. This question, which potentially is dispositive, can,

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[1]While, given the posture of this case after the Court's July 11, 2002 Order, plaintiffs' claims should be resolved on the basis of an administrative record, defendants do not concede there was agency action, and preserve and reiterate their arguments regarding the inappropriateness of discovery in other respects as well (because plaintiffs' proposed discovery has not been approved by the Court, defendants are not submitting specific objections to plaintiffs' proposed requests). For the same reason that the application of the FACA to the activities of the National Energy Policy Development Group ("NEPDG") raises constitutional concerns, see Association of American Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 908 (D.C. Cir. 1993), permitting discovery into the questions posed by plaintiffs in their discovery plan – such as from whom the President receives advice, how he chooses to receive that advice and what that advice is – would impermissibly intrude on the effective functioning of the Presidency and Vice Presidency, especially the President's authority to obtain advice in confidence from his hand-picked advisers. See id. at 908 (application of FACA to health care task force "clearly would interfere with the President's capacity to solicit direct advice on any subject related to his duties from a group of private citizens, separate from or together with his closest governmental associates").

and should, be resolved on the basis of the administrative record, before permitting inquiry into any of the other issues raised by this case. If the record demonstrates the answer to this question is "no," then the Court can grant summary judgment for the defendants.

Accordingly, defendants submit that further proceedings should be conducted in a manner that respects established principles under the APA and is least likely to intrude into constitutionally protected areas of inquiry. This Court's holding that plaintiffs' cause of action arises under the APA (or mandamus) makes that approach possible. In order to accomplish this objective, defendants thus propose the following.

First, defendants will file an administrative record which will address the question of membership. Defendants will then move for summary judgment on the basis of that record, as is routinely done in administrative law cases. As the Court has recognized, if neither the NEPDG nor any alleged subgroups included non-government members, defendants would be entitled to prevail on statutory grounds. See Mem. at 54; 5 U.S.C. app. § 3(2). The Court thus, at the very least, should resolve this critical statutory issue before proceeding to the types of inquiries suggested by plaintiffs (see also Mem. at 70), which, by virtue of their breadth, pose a far greater threat of constitutionally impermissible intrusion into the effective functioning of the Presidency and the Vice Presidency. Moreover, this limited approach is consistent with this Court's view of constitutional avoidance. As this Court stated, "It is entirely possible that defendants will prevail on summary judgment on statutory grounds after proving that no private individuals participated as members of the advisory committee at issue . . . thus rendering defendants' constitutional

concerns inapplicable." Mem. at 54.[2]

Defendants note that the Court already has before it a record on the membership issue, at least with respect to NEPDG. That is, the Court and the plaintiffs already have the Presidential Memorandum establishing the NEPDG (which designates the membership), the NEPDG's public report (which was submitted to the President by the NEPDG as constituted by the President), and the Office of the Vice President's response to plaintiff Judicial Watch's request for permission to attend NEPDG meetings. As explained in more detail below, however, defendants are prepared to supplement this record with a declaration specifically explaining the basis for the determination that the NEPDG is not required to comply with FACA, i.e., NEPDG's membership. Defendants also are prepared to submit an administrative record (including with appropriate declarations) on the issue of membership with respect to any alleged subgroups, now that the issue has been raised here.

Second, the Court should establish a schedule for briefing summary judgment on the membership issue once the record is filed by defendants. As noted above, if the record demonstrates that no non-government individuals were members of the NEPDG or any alleged sub-groups, then summary judgment should be granted for defendants. See, e.g., Mem. at 54. And the Court's stated goal of having a "tightly reined" process to decide the issues in this case, see Mem. at 74, will be accomplished.

ARGUMENT

REVIEW SHOULD BE ON THE RECORD, AND LIMITED AT THIS STAGE TO THE THRESHOLD, AND POTENTIALLY DISPOSITIVE, ISSUE OF MEMBERSHIP

[2]Ultimately, the burden of persuasion is, of course, upon the plaintiffs to prove that FACA applies to the NEPDG.

A. Review Of Any Factual And Legal Issues In this Case Should Be On the Basis of the Administrative Record

The Court has held that FACA provides no private right of action and that plaintiffs' claim that defendants violated FACA can proceed, if at all, under the APA, or, potentially, under the mandamus statute. See Mem. at 42, 51. This holding has important consequences for this case and effectively determines the course by which any factual issues should be resolved.

In APA challenges to agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973); Nat'l Law Ctr. v. United States Dep't of Vet. Affairs, 736 F. Supp. 1148, 1152 (D.D.C. 1990) ("It is settled that a court's review . . . is confined to the administrative record compiled by the agency"); James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1096 (D.C. Cir. 1996) ("Generally speaking, district courts reviewing agency action under the APA's arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions."). Plaintiffs challenging agency action are not ordinarily entitled to discovery. Marshall County Health Care Auth. v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993); Nat'l Treasury Employees Union v. Seidman, 786 F. Supp. 1041, 1046 (D.D.C. 1992) ("discovery is inappropriate in cases under the APA").[3]

In this case, the scope of judicial review is defined by 5 U.S.C. § 706's test for action that

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[3]The D.C. Circuit's decision in Association of American Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898 (D.C. Cir. 1993), does not alter this conclusion. As this Court has indicated, AAPS did not address the source of judicial review available to a party claiming violations of FACA. Mem. at 26. Instead, it "assumed that FACA provided a cause of action." Id. Therefore, the restraints on discovery applicable in an APA action were not applied in that action. However, after this Court's decision that FACA does not apply a private right of action, id. at 25-26, plaintiffs are constrained by the APA remedy that they seek.

is arbitrary or capricious or otherwise contrary to law.[4] Under this test, the Court's review is not de novo. Camp v. Pitts, 411 U.S. at 142; Commercial Drapery Contractors, Inc. v, United States, 133 F. 3d 1, 7 (D.C. Cir. 1998). Where, however, the articulated decision may be less than clearly based upon the record, a remand or supplementation of the record may be appropriate, such as through affidavits. Camp, 411 U.S. at 142; Esch v. Yeutter, 876 F.2d 976, 991 (D. C. Cir. 1989).

Here, there is a record before the Court, consisting of the President's memo creating the NEPDG and establishing its membership, the letter from the Office of the Vice President denying plaintiff Judicial Watch's request for documents and documenting the rationale that the FACA does not apply because its members were federal employees, and the final Report, which was submitted by the NEPDG as constituted by the President and thereby confirms, in the performance of the NEPDG's final function, that the members were those designated by the President. The only record before the Court on the question of membership thus fully supports defendant's position here. It therefore warrants summary judgment in defendants' favor.

Despite their access to thousands of pages of documents produced in related FOIA litigation, plaintiffs have proffered no evidence to demonstrate that the NEPDG's composition was any different from that directed by the President. Nevertheless, defendants will submit a declaration further addressing this issue to provide a fuller statement of the facts which supported the decision, as memorialized in the Vice President's letter, that the FACA did not apply to the NEPDG because its members were federal employees. Similar declarations will also be filed

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[4] The arbitrary or capricious test applies because this is not formal rulemaking or adjudication or a failure to act. 5 U.S.C. § 706.

concerning the alleged subgroups. At that point, the Court would have before it a more than sufficient administrative record upon which to decide this case.

As in any other APA record review case, plaintiffs would be able to justify going beyond that record only upon a "'strong showing of bad faith or improper behavior' or when the record is so bare that it prevents effective judicial review." Commercial Drapery, supra at 7, quoting Citizens to Preserve Overton Park, 401 U.S. 402, 420 (1971). Thus, plaintiffs could proffer whatever evidence they currently possess to the contrary, and the Court could determine whether that evidence is sufficiently compelling to require a further response from defendants.[5]

B. Plaintiffs' Mandamus Claims Do Not Expand the Scope of Review

With respect to plaintiffs' potential mandamus claim, see Mem. at 51, review under the mandamus statute – even if it existed in a case such as this one – should, at the very least, be no broader than review under the APA. As the Court has recognized, both the APA and the mandamus statute would be used for the same purpose: to remedy an alleged violation of FACA. Where it is available at all, mandamus is only available as an avenue of extraordinary relief, see, e.g., Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996); in cases where the "plaintiff has a clear right to relief," Swan v. Clinton, 100 F.3d 973, 977 n.1 (D.C. Cir. 1996); see also Power v. Barnhart, 292 F.3d 781, 784 (D.C. Cir. 2002) (reaffirming that mandamus is only available where plaintiff's right to relief is "clear and indisputable"); Appalachian States Low-Level Radioactive Waste Comm'n v. O'Leary, 93 F.3d 103, 112 n.9 (3d Cir. 1996) (indicating that standard for issuing mandamus is more stringent than review under Chevron); and only

[5] In contrast, plaintiffs' plan would allow for the discovery of materials outside the record with no initial showing of need and based solely on the bare, unsubstantiated allegations of the complaint.

where a party "has exhausted all other avenues of relief. . . ." Heckler v. Ringer, 466 U.S. 602, 612 (1984). The requirements of clarity and exhaustion should bar discovery here insofar as mandamus is concerned, especially at this stage of the case. APA review should necessarily proceed first. If the administrative record does not contain evidence that plaintiffs are entitled to relief, and if plaintiffs do not come forward with new and material evidence on the membership issue, then there is no basis for mandamus review. Plaintiffs cannot be allowed to conduct a fishing expedition for some shred of evidence to rebut the administrative record. Consequently, review on the administrative record will necessarily be adequate to address plaintiffs' mandamus claims.

Indeed, it is counterintuitive to conclude that the "extraordinary remedy" of mandamus would entitle plaintiffs to *broader* review than they would receive under the APA. The D.C. Circuit has repeatedly indicated that requests for mandatory injunctive relief against federal officers should be analyzed as requests for mandamus. See, e.g., Swan, 100 F.3d at 976 n.1; National Wildlife Fed'n v. United States, 626 F.2d 917, 918 n.1 (D.C. Cir. 1980). Since review of a request for injunctive relief under the APA would be limited to the administrative record, a litigant should not be able to circumvent that limitation simply by asking for a writ of mandamus. If anything, mandamus here would require a standard of review *more* deferential to defendants, given the "separation of powers concerns" raised by plaintiffs' claim against the Vice President himself. See Mem. at 54 (recognizing these concerns).

Plaintiffs here seek to mandamus, not an agency official, but the Vice President of the United States – one of only two constitutional executive officers of the United States. Moreover, the subject of the mandamus claim is not an agency action, but the composition of the NEPDG, a

group whose membership was defined and limited by, and whose role was prescribed in, a written Memorandum from the President. Containing review to the administrative record is especially compelling in this case as the record contains the President's Memorandum embodying his choices regarding the structure, composition, and role of the group, as well as the group's submission in response to the President's directive. Albeit in a slightly different context, the court in AAPS recognized that, "[s]ince form is a factor," the government has a great deal of control over whether a particular group it establishes is subject to FACA. AAPS, 997 F.2d at 914. Consequently, as AAPS recognized, "it is a rare case when a court holds that a particular group is a FACA advisory committee over the objections of the Executive Branch." Id. This is not that "rare case." The record here makes it clear that the President defined and limited membership in the NEPDG in the written Memorandum establishing the group, and his choices regarding the structure, composition, and function of the group – and the response of that group, which consisted of officials at the highest level of the government and in direct proximity to the President – are entitled to the utmost deference.[6]

Finally, allowing discovery to proceed against the Vice President would effectively decide the thorny constitutional issue of whether mandamus is precluded in this case, especially since the Vice President is not subject to the APA. The serious constitutional implications of permitting such a mandamus claim against the Vice President to proceed should therefore, at a

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[6] Some courts have indicated that "independent fact finding under mandamus is appropriate *in some circumstances*, even where agency action is under review," and that such independent fact finding can occur based on an administrative record. See, Conservation Law Foundation of New England, Inc v. Clark, 590 F. Supp. 1467 (D.C. Mass. 1984). See also Commonwealth of Pennsylvania v. Nat'l Assoc. of Flood Insurers, 520 F.2d 11, 26-27 (3rd Cir. 1975). For the reasons explained above, however, such independent fact finding would be highly inappropriate in this case.

minimum, compel the conclusion that independent fact finding apart from the proffered administrative record is inappropriate.

C. Record Review Should Be Limited at this Stage to the Membership Issue

As this Court's recent opinion held, "a court should not pass on any constitutional questions that are not necessary to determine the outcome of the case or controversy before it." Mem. at 53. By limiting the issue on summary judgment at this point to the inquiry of membership of NEPDG and its alleged subgroups, this Court can avoid any unnecessary inquiry into the internal workings of the NEPDG or its individual members and their supporting staff in carrying out the NEPDG's Presidentially-assigned mission (an inquiry defendants oppose, and one that is unwarranted and unnecessary to resolving this case on statutory grounds). Defendants anticipate the membership issue can be resolved expeditiously. This approach is appropriate for two principal reasons.

First, the Court has recognized that defendants "may prevail on summary judgment on statutory grounds" (see Mem. at 75) if the record demonstrates "no private individuals participated as members of the advisory committee at issue." See id. at 54. In that event, there will be no "need . . . to address the constitutionality of applying FACA." See id. at 75. Similarly, as to any alleged subgroup, the absence of any non-federal member would be dispositive.

Second, requiring defendants to submit a factual record addressing their constitutional defense (which might require supplementation through appropriate declarations) would itself raise "constitutional issues." See Mem. at 75. For example, as the Court has suggested, some of the information relevant to defendants' constitutional defense is likely to encompass documents

and other information subject to the constitutional privilege for presidential communications. See Mem. at 68-70 (discussing In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997)).

But even more significantly, requiring defendants to submit a record on the constitutional issues now (i.e., before the applicability of FACA is resolved), would force defendants to disclose – potentially unnecessarily – much of the same information plaintiffs seek on the merits (the very information defendants contend they cannot, consistent with the Constitution, be compelled to disclose). Indeed, plaintiffs seek through discovery far more than they would ever be entitled to under the FACA. FACA provides for notice of meetings, that such meetings be open, and that records of the advisory committee be publicly available to the extent not exempt from disclosure. Plaintiff, however, seeks through discovery information about communications between individual NEPDG members outside the context of meetings, between members and agency personnel, and between members and outside individuals.

Accordingly, defendants respectfully submit that, so long as the case may be resolved on statutory grounds, the Court, as a matter of law, comity and efficiency, should minimize the requirement that the Executive Branch disclose information it contends is constitutionally protected from disclosure. See Mem. at 52 (acknowledging the "seriousness" of the constitutional issues). Defendants' proposal that review be limited to the membership issue accomplishes that objective without sacrificing this Court's fact-finding mission.

D. Review of the Membership Issue Should be Tied to the Legal Definition of Membership

FACA expressly excludes from the definition of advisory committee (and thus from the coverage of the statute) "any committee that is composed wholly of full-time, or permanent part-

time, officers or employees of the Federal Government." 5 U.S.C. app. § 3(2). As explained above, defendants submit that the record (and review thereof) should be limited to the question of membership (i.e., whether any non-federal individuals were members of the NEPDG or any alleged subgroups). Defendants want to make clear, however, that "membership," for purposes of FACA, is by no means as broad a notion as plaintiffs suggest.

The D.C. Circuit in Association of Am. Physicians and Surgeons v. Clinton, 997 F.2d 898 (D.C. Cir. 1993) ("AAPS"), defined "membership" in an advisory committee: a non-government individual should be considered a member of an advisory committee only if "his involvement and role are functionally indistinguishable from those of the other members. Whether they exercise any supervisory or decisionmaking authority is irrelevant. If a 'consultant' *regularly attends and fully participates* in working group meetings as if he were a 'member,' he should be regarded as a member." AAPS, 997 F.2d at 915 (emphasis added). Consistent with this definition of membership in an advisory committee, the AAPS court stated that "episodic meetings between government officials and a consultant" would not serve to transform the consultant into a member of the advisory committee. Id. "When an advisory committee of wholly government officials brings in a 'consultant' for a one-time meeting, FACA is not triggered because the consultant is not really a member of the advisory committee." Id.

In their proposed discovery, plaintiffs seek information about "meetings" attended by "all . . . persons who participated, in any manner, in the activities of the [NEPDG]," see Interrogatory No. 3, and further define the term "meeting" to include communications between any "two or more persons where [NEPDG] . . . activities were discussed." See Plaintiffs' First Set of Interrogatories at 2. Plaintiffs' notion of membership has no support in the law. The

controlling definition of a FACA "member" as someone who "regularly attends and fully participates" in committee meetings (AAPS, 997 F.2d at 915) would exclude from FACA's scope any individual meetings between individual members of the NEPDG and non-government individuals. Under AAPS, such meetings can never rise to the level of regular attendance and full participation.

Moreover, any such individual meetings would not constitute committee meetings of NEPDG and would fall outside of the scope of FACA coverage. An advisory committee is covered by FACA only "when it is asked to render advice or recommendations, *as a group*, and not as a collection of individuals." AAPS, 997 F.2d at 913 (emphasis in original). It is the collective nature of an advisory committee's deliberations and recommendations that implicates FACA. See id. ("The group's activities are expected to, and appear to, benefit from the interaction among the members both internally and externally."). As such, non-government individuals can be considered "members" of an advisory committee only if they regularly attended and participated in the collective decision-making processes of that advisory committee in a manner that is "functionally indistinguishable" from that of a formally appointed member. In this case, then, any sporadic contacts that may have occurred between individual members of the NEPDG and non-government individuals, outside of the context of NEPDG committee meetings, simply would not implicate FACA, and would therefore be outside the scope of any permissible discovery.[7]

[7] Nor are any such individual meetings, which are not addressed by FACA at all and which would be entirely proper, at all probative of whether a person did assume the role of a full member of the committee. Thus, even if discovery were permitted under either of plaintiffs' claims, plaintiffs' proposals are unjustified, intrusive, and unduly burdensome.

The reason for this rule is simple. As AAPS recognized, extending the definition of membership to include sporadic meetings between government officials and non-government individuals would "achieve the absurd result Public Citizen warned against: reading FACA to cover every instance when the President (or an agency) informally seeks advice from two or more private citizens." Id.; see also Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 452 1989); Nader v. Baroody, 396 F.Supp. 1231, 1233-34 (D.D.C. 1975) (finding FACA inapplicable to episodic meetings between White House officials and various private sector representatives because "the Act was not intended to apply to all amorphous, ad hoc group meetings . . . or in any way to impede casual, informal contacts by the President or his immediate staff with interested segments of the population or restrict his ability to receive unsolicited views on topics useful to him in carrying out his overall executive and political responsibilities"); American Soc'y of Dermatology v. Shalala, 962 F.Supp. 141, 148-49 (D.D.C. 1996), aff'd 116 F.3d 941 (D.C. Cir. 1997) (finding FACA inapplicable to multispecialty physician panels convened by the Health Care Financing Administration, in part because the episodic contacts between government officials and the non-government panelists did not convert the non-government panelists into committee "members").

Accordingly, supplemental declarations filed by defendants will be consistent with the controlling definition of a FACA "member" as someone who "regularly attends and fully participates" in committee meetings. See AAPS, 997 F.2d at 915.

Because the APA frames the issues remaining in this case, APA review, limited to the administrative record, should frame the resolution of this case. Nevertheless, if, contrary to defendants' position, the Court should order discovery, that discovery must be "tightly reined," as

this Court has held. Mem. at 74. Accordingly, it should be limited in scope to the issue of membership and further be limited as to form and to respondent.

As to form, discovery should be limited to written interrogatories. Interrogatories are the least intrusive means for providing information. Any such interrogatories ordered by the Court should be narrowly tailored to answer the question of membership without intruding into unnecessary areas of inquiry and without requiring the participation of high-ranking government officials, including the Vice President and his staff and Cabinet members who served on the NEPDG.

Plaintiffs' discovery plan is unreasonably intrusive in the form of discovery proposed. In addition to interrogatories, plaintiffs have proposed broad-ranging document requests. While the overwhelming bulk of these requests do not relate to the membership issue, defendants note that plaintiff Judicial Watch already has received documents (as well as agency declarations) in the related FOIA cases.[8] Plaintiffs should be required to thoroughly examine the documents already in their possession before requesting further documentary evidence, most of which may well be duplicative. Indeed, in light of the extensive document production already provided to Judicial Watch in the FOIA litigation, plaintiffs should be required to justify any document request for agency documents before the Court orders defendants to respond to any discovery requests here.

Additionally, plaintiffs' plans to "notice appropriate depositions" should not be permitted. See Plaintiffs' Proposed Discovery Plan at 3. Any request for depositions plainly is premature at this time. Especially with respect to the high-ranking government officials who were participants

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[8]If the Court believes it would be helpful in fashioning an appropriate discovery plan, defendants can provide the Court with the relevant declarations, which in many cases address issues of membership, filed in the FOIA cases.

in NEPDG, any deposition must await a showing that the information plaintiffs seek cannot reasonably be obtained through interrogatories and document requests. The courts have cautioned that, due to their greater duties and time constraints, agency heads "are generally not subject to depositions unless they have some personal knowledge about the matter and the party seeking the deposition makes a showing that the information cannot be obtained elsewhere." Alexander v. FBI, 186 F.R.D. 1, 4 (D.D.C. 1998); Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985) (holding that "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions"); Peoples v. USDA, 427 F.2d 561, 567 (D.C. Cir. 1970) ("subjecting a cabinet officer to oral deposition is not normally countenanced"); Wirtz v. Local 30, International Union of Operating Engineers, 34 F.R.D. 13, 14 (S.D.N.Y. 1963) (Cabinet members should not be required to give depositions "unless a clear showing is made that such a proceeding is essential to prevent prejudice or injustice to the party who would require it.").

CONCLUSION

For all of the foregoing reasons, plaintiffs' proposed discovery plan should be rejected. Instead, defendants propose that any further proceedings be conducted in the following manner:

First, defendants will file an administrative record for NEPDG and any alleged subgroups on the question of membership. As explained above, this record will consist of the Presidential Memorandum establishing NEPDG, NEPDG's public report, and the Office of the Vice President's response to plaintiff Judicial Watch's request for permission to attend NEPDG meetings. Moreover, at the time defendants file the record, they will also file supplemental declarations specifically addressing the membership issue with respect to NEPDG and any

alleged subgroups.

Second, the Court should establish a schedule for briefing summary judgment on the membership issue once the record is filed by defendants. Defendants anticipate that this entire process – compiling the record, submitting the record, and briefing – can be accomplished expeditiously. Defendants can submit the administrative record, and their summary judgment brief, by September 9, 2002. Once briefing on summary judgment is complete, the Court can decide this potentially dispositive statutory issue.

Dated: July 29, 2002

Respectfully submitted,

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