UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE 1001 Connecticut Avenue, N.W., Suite 1250 Washington, D.C. 20036	)	
CONSUMER ALERT 1001 Connecticut Avenue, N.W., Suite 1128 Washington, D.C. 20036	)	
REPRESENTATIVE JO ANN EMERSON 132 Cannon House Office Building Washington, D.C. 20515	)	
HEARTLAND INSTITUTE 19 South LaSalle, Suite 903 Chicago, IL 60603	)	
SENATOR JAMES M. INHOFE 453 Russell Senate Office Building Washington, D.C. 20510	)	C.A. No. 00- 02383 (RMU)
REPRESENTATIVE JOSEPH KNOLLENBERG 2349 Rayburn House Office Building Washington, D.C. 20515	)	
60 PLUS ASSOCIATION 1655 North Fort Meyer Drive, Suite 355 Arlington, VA 22209	)	
DAVID E. WOJICK, Ph.D., P.E. 391 Flickertail Lane Star Tannery, VA 22654	)	
Plaintiffs,	)	
vs.	)	
WILLIAM JEFFERSON CLINTON As Chairman, National Science and Technology Council Old Executive (Eisenhower) Office Building 17th Street and Pennsylvania Avenue, N.W. Washington, DC 20502	)	

NEAL F. LANE)
Director,)
White House Office of Science)
and Technology Policy)
Old Executive (Eisenhower) Office Building)
17th Street and Pennsylvania Avenue, N.W.)
Washington, D.C. 20502)
)
Defendants.)

COMPLAINT FOR DECLARATIVE RELIEF

Plaintiffs Competitive Enterprise Institute (CEI), Consumer Alert, Representative Jo Ann Emerson, Heartland Institute, Senator James Inhofe, Representative Joseph Knollenberg, 60 Plus Association and David Wojick, Ph.D., P.E., allege:

Parties

1. Plaintiff CEI is a public policy institute dedicated in significant portion to educating the public on the science, economics and policies surrounding the theory of catastrophic "global warming." Through its participation in the Cooler Heads Coalition Plaintiff requested to participate in the process at issue as a reviewer, which request was denied. Plaintiff resides and is incorporated in the District of Columbia.
2. Plaintiff Consumer Alert is a public policy institute dedicated in significant portion to educating the public on the science, economics and policies surrounding the theory of catastrophic "global warming." Through its participation in the Cooler Heads Coalition Plaintiff requested to participate in the process at issue as a reviewer, which request was denied. Plaintiff resides and is incorporated in the District of Columbia.

3. Plaintiff Emerson is a United States Representative, for the 8th District of the State of Missouri in the United States Congress, in which lawmaking and oversight capacity she also serves on the Committee on Appropriations establishing and overseeing appropriate use of federal resources, and having taken a particular and active interest in the Federal Government's expenditures in relation to the theory of catastrophic "global warming", including authoring a spending limitation specifically addressing the report at issue in this matter. Plaintiff performs these official functions in and working out of her congressional office in Washington, D.C.
4. Plaintiff Heartland Institute ("Heartland") is a public policy institute dedicated in significant part, through its own activities and participation in the Cooler Heads Coalition, to educating the public on the science, economics and policies surrounding the theory of catastrophic "global warming." Through that Coalition Plaintiff requested to participate in the process at issue as a reviewer, which request was denied. Plaintiff resides and is incorporated in the State of Illinois.
5. Plaintiff Inhofe is a United States Senator representing the State of Oklahoma in the United States Senate, in which lawmaking and oversight capacity he also serves on the Committee on Environment and Public Works, establishing and providing oversight for the nation's environment policies and regulators. On that Committee Senator Inhofe also serves as Chairman of the Subcommittee on Clean Air, Wetlands, Private Property and Nuclear Safety, which is that panel to which any National Assessment as that at issue in this matter is particularly directed as the principal locus of origin for whatever legislation may arise out of or as a result

of any such Assessment. Plaintiff performs these official functions in and working out of his Senate office in Washington, D.C.

6. Plaintiff Knollenberg is a United States Representative, for the 11th District of the State of Michigan in the United States Congress, in which lawmaking and oversight capacity he also serves on the Committee on Appropriations establishing and overseeing appropriate use of federal resources, and having taken a particular and active interest in the Federal Government's expenditures in relation to the theory of catastrophic "global warming", including authoring the "Knollenberg Provision", a spending limitation on such activities. Plaintiff performs these official functions in and working out of his congressional office in Washington, D.C.
7. Plaintiff 60 Plus Association ("60 Plus") is a public policy organization dedicated to advocating the interests of senior citizens including, through its own activities and participation in the Cooler Heads Coalition, educating the public on the science, economics and policies surrounding the theory of catastrophic "global warming." Through that Coalition Plaintiff requested to participate in the process at issue as a reviewer, which request was denied. Plaintiff resides and is incorporated in the State of Virginia.
8. Plaintiff David E. Wojick, Ph.D., P.E., is a professional journalist and policy analyst specializing in climate change science and policy, in both capacities performing detailed analysis and commentary on the document and process at issue in this matter, including as an official technical reviewer. Plaintiff resides in the State of Virginia.

9. Defendant William Jefferson Clinton is a citizen of the State of New York residing in Washington, D.C., who serves as Chairman of the National Science and Technology Council ("NSTC"), operating under the White House Office of Science and Technology Policy ("OSTP") and which has under its authority the Committee on Environment and Natural Resources ("CENR"). Collectively and pursuant to statutory authority, under the direction of Defendant Clinton these Executive offices combined to direct the National Science Foundation ("NSF") to charter a "National Assessment on Climate Change Synthesis Team" ("NAST") as a Federal Advisory Committee under the Federal Advisory Committee Act, directing an effort statutorily dedicated in part to studying the state of the science and its uncertainties surrounding the theory of "global warming" or "climate change," and implementing portions of the Global Change Research Act of 1990 ("GCRA")(15 U.S.C. 2921 *et seq*.), for the purpose of producing a National Assessment on Climate Change ("NACC"). As such Defendant is ultimately responsible for the production of the document and process at issue in this matter.
10. Defendant Lane serves as Director of the White House Office of Science and Technology Policy ("OSTP"), which has under its authority the National Science and Technology Council ("NSTC"), which oversees the Committee on Environment and Natural Resources ("CENR"). Collectively and pursuant to statutory authority, under Defendant's leadership these Executive offices have combined to charter a "National Assessment on Climate Change Synthesis Team" ("NAST") as a Federal Advisory Committee under the Federal Advisory Committee Act, directing an effort statutorily dedicated in part to studying the

state of the science and its uncertainties surrounding the theory of "global warming" or "climate change," and implementing portions of the Global Change Research Act of 1990 ("GCRA")(15 U.S.C. 2921 *et seq.*), for the purpose of producing a National Assessment on Climate Change ("NACC"). As such, Defendant played a determinative role in the process and production of the document and at issue in this matter.

Jurisdiction and Venue

11. Paragraphs 1 through 10 are incorporated herein.
12. Jurisdiction over this matter is proper under 28 U.S.C. 1331, as Plaintiffs assert claims arising under the laws of the United States.
13. Venue is proper in this district pursuant to the provisions of 28 U.S.C. 1391(e)(3) as this is a civil action in which the Defendant is an agency or employee of the United States acting in its official capacity, Plaintiffs reside in the district and no real property is involved.

Count One – Violations of FACA

14. Paragraphs 1 through 13 are incorporated herein.
15. Pursuant to 5 U.S.C. App. Section 10, the Federal Advisory Committee Act ("FACA"), and toward producing a "National Assessment on Climate Change" ("Assessment"), Defendants have chartered, and on more than one occasion renewed the charter for, a "National Assessment on Climate Change Synthesis Team" as a Federal Advisory Committee, at the request of the National Science and Technology Council ("NSTC"), the Committee on Environment and Natural Resources ("CENR") and the Office of Science and Technology Policy. By so

doing Defendants thereby acknowledged that FACA governs their proceedings and subjected the process to such applicable rules as set forth in the statute.

16. FACA is a "sunshine" statute enacted to promote openness and accountability, requiring public accessibility to the process and information via, *inter alia*, open meetings, formal requirements to close meetings, and participation by a designated federal official as a requirement for all meetings. See, *e.g.*, *Association of American Physicians and Surgeons, Inc. v. Hillary Rodham Clinton, et al.*, 997 F.2d 898 (DDC 1994); see also *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989).

17. In pursuit of its goals of openness and accountability, FACA also requires that "[d]etailed minutes of each meeting of the advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued or approved by the advisory committee." 5 U.S.C. App. 10(c). The docket pertaining to the matter at issue is housed by and within the National Science Foundation (NSF).

a) <u>Proceeding Without the Required Accountable Official</u>

18. In pursuit of its goals of openness and accountability, FACA provides in pertinent part that "[t]here shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee.…No advisory committee shall conduct any meeting in the absence of that officer or employee." 5 U.S.C. App. 10(e).

19. It is well established that the requirement "there shall be designated" a DFO clearly intends that an officially designated federal officer shall serve the prescribed function as a condition precedent to any meeting officially taking place, not merely that there be "a federal employee" among the attendees at any given meeting.

20. Dr. Robert W. Corell, Assistant Director of the Office for Geosciences, National Science Foundation, at all times relevant to the actions complained of herein served in the capacity as Designated Federal Officer for the matter in question.

21. According to the official docket for the process at issue Dr. Corell is not listed as attending any portion of the April 1999, June 1999 or July 1999 meetings of the NAST. Additionally, the documents showing registration indicate Dr. Corell registered to attend only for the first of four meeting days. Dr. Corell is listed in similar documents as attending "all or part" of the August and November 1998 NAST meetings.

22. Thus, Defendants thus conducted approximately half of NAST's FACA work to date in the absence of the Designated Federal Officer statutorily required to provide accountability.

23. On or about May 12, 2000, June 14, 2000 and August 11, 2000, through their Cooler Heads Coalition Plaintiffs CEI, Consumer Alert, Heartland and 60 Plus notified Defendants (via NAST) of this statutory violation and requested that Defendants undertake steps to remedy such violation or otherwise address those infractions which have already occurred, in addition to refraining from

recommitting the above acts and/or omissions, for reasons including those cited, herein. (See, *e.g.*, Attachment A, Plaintiffs' Official NAST Comments).

24. Additionally, Plaintiff Wojick, attending the June 1999 and July 1999 NAST meetings, on both occasions requested copies of the draft reports and supporting documents then being considered, but was told by contracted personnel running the meetings each time that in the absence of Dr. Corell that those materials would not be provided without Dr. Corell's consent, despite FACA expressly providing for such availability.

25. For those reasons, on or about April 1999, and continuing to the present, Defendants through NAST have wrongfully and unlawfully been in violation of the Federal Advisory Committee Act, 5 U.S.C App. @ 10(e), for unlawfully conducting the NAST process through holding, and producing a product from, meetings conducted in whole or in part in the absence of a Designated Federal Officer, including but not necessarily limited to advisory committee meetings occurring in April 1999, June 1999, and July 1999.

26. By continuing with production of such an unlawful and, as it only partially addresses that which Congress mandated (see Count Two, *infra*), inexplicably hurried product Defendants knowingly remain in violation of FACA at present and in releasing any further product purporting to be that of a legitimate and lawful FACA process pursuant to the Global Change Research Act of 1990.

27. Wherefore, Plaintiffs demand judgment against Defendants that any document purporting to represent a "draft" or "final" "National Assessment on Climate Change" is unlawful and not permissible for any official purposes.

b) Unlawfully Closed Meetings

28. Paragraphs 1 through 27 are incorporated herein.

29. Also in pursuit of its goals of openness and accountability, FACA requires that "[e]ach advisory committee meeting shall be open to the public" (5 U.S.C. App. 10(a)(1)), and "[I]nterested persons shall be permitted to attend, appear before, or file statements with any advisory committee… (5 U.S.C. App. 10(a)(3)), except:

> "…where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code." 5 U.S.C. App. 10(d).[1]

30. According to the official docket, instead of complying with the requirement of obtaining written permission to close any such meeting from "the President, or the head of the agency to which the advisory committee reports" (here, NSF), the very Designated Federal Officer required by Congress and assigned in the instant matter in part to ensure compliance with applicable laws, and ensure some accountability, took it upon himself to partially close NAST's August 1998, November 1998 and April 1999 meetings, each time inserting in the docket a letter asserting that on his directive portions of each meeting would be closed.

[1] 5 U.S.C. 552(b)(c) sets forth ten circumstances under which an agency may properly close a meeting which otherwise must be open pursuant to Title 5, and through incorporation by reference Title 5 Appendix.

31. It was precisely the avoidance of such actions that Congress sought in enacting the requirement that any such person seeking to close a meeting or portions thereof obtain permission from a superior not directly involved in the process, "the President, or the head of the agency to which the advisory committee reports." See, *e.g.*, *Nader v. Dunlop*, 370 F.Supp. 177 (DDC 1973); *Washington Legal Foundation v. American Bar Association Standing Committee*, 648 F.Supp. 1353 (DDC 1986).
32. Thus, according to the official docket for the process at issue, on or about August 1998, and continuing to the present, Defendants have wrongfully and unlawfully been in violation of FACA, 5 U.S.C App. @ 10(d), and the Administrative Procedure Act, 5 U.S.C. 552(b), as applicable, for unlawfully closing advisory committee meetings, in August 1998, November 1998, and April 1999.
33. On or about May 12, 2000, and at other times between that date and the present, Plaintiffs CEI, Consumer Alert, Heartland and 60 Plus informed Defendants, via NAST, of such violations and requested that Defendant remedy these violations and refrain from committing the above acts and/or omissions, for reasons including those cited, herein. (See, *e.g.*, Attachment A).
34. On or about June 14, 2000 Plaintiffs CEI, Consumer Alert, Heartland and 60 Plus, and on August 11, 2000, Plaintiffs CEI, Consumer Alert, Emerson and Knollenberg repeated this information provided to Defendants and requested Defendants extend the public comment period for the document at issue until the violations of law complained of, herein, were remedied, in order to facilitate substantive review and comment, and avert the appearance of politics

impermissibly infecting a purportedly scientific process. The August 11, 2000 submission served as these parties' joint formal comments to Defendant on the draft document in question. (See Attachment A).

35. Wherefore, Plaintiffs demand judgment against Defendants that any document purporting to represent a "draft" or "final" "National Assessment on Climate Change" is unlawful and not permissible for any official purposes.

Count Two - Violation of USGCRA of 1990

36. Paragraphs 1 through 35 are incorporated herein.

37. Pursuant to and/or under the auspices of the Global Change Research Act of 1990, 15 U.S.C. 2921, *et seq*., Defendants through NAST are assigned the responsibility of producing an Assessment, as that which is at issue in this Complaint purports to be, as follows:

"On a periodic basis (not less frequently than every 4 years), the Council, through the Committee, shall prepare and submit to the President and the Congress an assessment which –

(1) integrates, evaluates, and interprets the findings of the [USGCR] Program and discusses the scientific uncertainties associated with such findings;

(2) analyzes the effects of global change on the natural environment, agriculture, energy production and use, land and water resources, transportation, human health and welfare, human social systems, and biological diversity; and

(3) analyzes current trends in global change both human-inducted (sic) and natural, and projects major trends for the subsequent 25 to 100 years." (15 U.S.C. 2934).

38. That 1990 requirement notwithstanding, the document at issue in this Complaint, the "First National Assessment on Climate Change," is a recent undertaking, is incomplete, and is nonetheless inexplicably being rushed, as described herein.

39. The statutorily established timetable for producing an Assessment no later than 1994, 1998, and 2002 notwithstanding, and with the 10th anniversary of this mandate having arrived with Defendants having to date failed to produce any such required report until the present rush to release the product in question, this process has been denigrated to an apparent hurry to release an incomplete product which also steps outside of its statutory authority and the body's expertise, in October 2000.

40. Defendants' surge to release a partial, and partially unauthorized, report also comes despite requests of lawmakers and outside interests concerned with the issues at hand, to withhold releasing a report admittedly failing to address all of those required areas, yet including work outside the scope of the authority granted by 15 U.S.C. 2936 and lacking particular required scientific foundations which have yet to be completed, in violation of several laws and public policy.

a) <u>Failure to Report on Issue Areas Required by Congress</u>

41. Specifically, and as set forth, *infra*, this Assessment expressly does not attempt to provide that which Congress directed -- in the affirmative, not in the alternative -- "shall" be included in any such report. Specifically, despite that they "shall" produce a report comprehensively addressing the enumerated subject areas, Defendants' "Draft First National Assessment on Climate Change" admitted that the report only partly addressed that which Congress required by 15 U.S.C. 2936 be included in any report. In so doing Defendants also effectively, if inexplicably, intimate that the current document is being hurried; to wit "[t]his first Assessment could not[sic] attempt to be comprehensive… Future assessments should consider

other potentially important issues, such as Energy, Transportation, Urban Areas and Wildlife." (See http://www.gcrio.org/nationalassessment/overvpdf/01 Intro.pdf).

42. Those excluded areas are nonetheless specifically enumerated as required by 15 U.S.C. 2936 to be covered in any Assessment.

b) Work on Areas Outside NAST's Scope of Authority

43. Moreover, according to the official docket for the process at issue, on or about January 8, 1998, and continuing to the present, Defendants, through the White House OSTP, directed NAST to wrongfully and unlawfully expend and oversee the expenditure of specifically dedicated federal resources on the pursuit of questions outside the scope of the applicable statutory authority, 15 U.S.C. 2936, for the purpose of inclusion in its "National Assessment". This occurred through a January 8, 1998 letter from Dr. John H. Gibbons, then-Director of OSTP/ Assistant to the President for Science and Technology, to Dr. Robert Corell, the then-NAST DFO.

44. Specifically, and in violation of GRCA, on behalf of Defendants Mr. Gibbons requested NAST report on the following areas outside the scope of the authority provided by GCRA of 1990, in pertinent part:

"What natural resource planning and management options make most sense in the face of future uncertainty?…How can we improve criteria for land acquisition?"

45. There is absolutely no authority in 15 U.S.C. 2936 to pursue such non-scientific issue areas. Such request merely represents an attempt to misuse a purportedly scientific mandate and panel to obtain unauthorized, not-requested and non-

scientific policy recommendations in the context of a report that Defendants desired would provide some guise of justification for achieving the desired policy ends.

46. Upon reviewing the document which Defendants produced and released in "draft" form on June 12, 2000, Plaintiffs allege that it incorporates such extra-legal opinions and conclusions and is replete with references to or work in pursuit of these matters outside the scope of Defendants' authority under 15 U.S.C. 2936, inappropriately representing the expenditure of funds specifically dedicated for enumerated issue areas and scientific purposes instead to efforts which are fairly characterized as "political," certainly not appropriate for a "scientific" panel, and unquestionably outside the scope of NAST's statutorily authorized mission.

47. All evidence available to Plaintiffs also indicates that the product that Defendants are in the process of releasing as "final" contains the same unauthorized policy conclusions and recommendations as those found in the draft "Assessment".

48. Exacerbating this circumstance and as detailed in Count Three, *infra*, Defendants are proceeding without having even completed let alone considered the required underlying science. (See Attachment B hereto, "'Attachment 1,' Neal Lane June 30, 2000 letter to Science Committee Chairman James Sensenbrenner").

49. On or about May 12, 2000, and at other times between that date and the present, Plaintiffs CEI, Consumer Alert, Heartland and 60 Plus requested (through NSF) that Defendants refrain from committing the above acts and/or omissions, for reasons including those cited, herein (see, *e.g.,* Attachment A).

50. On or about June 14, 2000 Plaintiffs CEI, Consumer Alert, Heartland and 60 Plus, and on August 11, 2000, Plaintiffs CEI, Consumer Alert, Emerson and Knollenberg requested Defendants, via NAST, extend the public comment period for the document at issue until the violations of law complained of, herein, were remedied, in order to facilitate substantive review and comment, and avert the further appearance of politics impermissibly infecting a purportedly scientific process, particularly in a purportedly "final" document. The August 11, 2000 submission served as the joint formal comments to Defendants on the draft document in question submitted by those parties. (See Attachment A).

51. Wherefore, given the violations alleged in both (a) and (b) of Count Two, Plaintiffs demand judgment against Defendants that any document purporting to represent a "draft" or "final" "National Assessment on Climate Change" is unlawful and not permissible for any official purposes.

Count Three – Violation of Public Law 106-74

52. Paragraphs 1 through 51 are incorporated herein.

53. Plaintiff Emerson successfully promoted Congress's attaching a restriction prohibiting relevant Executive and Independent agencies from expending appropriated monies upon the matter at issue, consistent with the plain requirements of the GCRA of 1990, through language in the conference report accompanying Public Law 106-74, prohibiting release in the absence of NAST satisfying certain conditions precedent, as follow:

"None of the funds made available in this Act may be used to publish or issue an assessment required under section 106 of the Global Change Research Act of 1990 unless (1) the supporting research has been subjected to peer review and, if not otherwise publicly available, posted electronically for public comment prior to

use in the assessment; and (2) the draft assessment has been published in the Federal Register for a 60 day public comment period."[2]

54. Defendants did not perform the conditions precedent cited in that language, and instead have produced and continue to produce an incomplete report knowingly and expressly in advance of the completion of, and therefore without the benefit of, the supporting science which not only is substantively required, but which Congress mandated be performed and subject to peer review prior to releasing any such assessment.[3]

55. Concerned that Defendants' activities indicated a failure to comply with these conditions consistent with GCRA of 1990 and emphasizing the specific direction that Congress provided Defendants in Public Law 106-74, on or about June 9, 2000 Plaintiffs Emerson and Knollenberg, and on or about June 7, June 28, and July 20 2000, Chairman James Sensenbrenner of the U.S. House of Representatives' Committee on Science, and Chairman Ken Calvert of that Committee's Subcommittee on Energy and Environment, reminded Defendants (via OSTP/NAST) of these conditions precedent, noting Defendants' apparent

[2] House Report 106-379, the conference report accompanying H.R. 2684, Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2000 (Pub.L. 106-74), p. 137. This is "evergreen" language given that these conditions precedent clearly establish congressional interest not in activities of any fiscal year but in the process and ultimate product, making clear that certain illusory avenues Defendants have sought to create to avoid first conducting the underlying science are not in fact available.

[3] Despite that Defendants "shall" produce a report comprehensively addressing the enumerated subject areas, Defendants' "Draft First National Assessment on Climate Change" admits that "[t]his first Assessment could not attempt to be comprehensive… Future assessments should consider other potentially important issues, such as Energy, Transportation, Urban Areas and Wildlife." See http://www.gcrio.org/nationalassessment/overvpdf/01Intro.pdf).

failure to comply with such conditions and seeking assurance that such circumstances would be remedied.[4]

56. Also pursuant to GCRA of 1990 and specific direction provided Defendants by Congress in Public Law 106-74, all of those cited parties made clear to Defendants their concern that Defendants should withhold their anticipated (October) release of the document at issue in this matter, informing Defendants that such measured proceeding would facilitate consideration and inclusion of the relevant, requisite scientific work presumably underlying the document's conclusions – the "regional and sectoral analyses," given that the document's two principal analyses are "Regions," and "Sectors" – such science which Defendants admit are expected to be complete imminently though not in time to facilitate an October document release. (See Attachment B).

57. On or about June 30, 2000 Defendants, via OSTP/NAST, drafted a response to Chairman Sensenbrenner, evasively failing to specifically address the concerns raised by these Members, and with which evasions Chairmen Sensenbrenner and Calvert specifically took issue and/or disputed in the July 20, 2000 letter,

[4] June 7, 2000 Letter from Chairman of the House of Representatives' Committee on Science, James Sensenbrenner, to Neal Lane on June 7, 2000, citing the conditions precedent and requesting Defendants "confirm that such a public review process also includes the regional and sectoral analyses mentioned in your testimony and that are used for the Synthesis Report. We request this because it is our understanding that the statutory authority for these regional and sectoral analyses and accompanying reports is the same as the statutory authority for the Synthesis Report – namely, section 106 of the Global Change Research Act of 1990." As that letter initially identified, and a subsequent June 28, 2000 letter from Chairman Sensenbrenner to Mr. Lane affirmed, notwithstanding certain evasions and evasive responses Defendants' process clearly failed to meet this condition precedent of completing the applicable science prior to releasing a report under the auspices of the FACA-chartered body.

reiterating their request for compliance with the law's requirements. This request, too, was to no avail.

58. Given Defendants' failure to publish the relevant information in the Federal Register as required, their apparent refusal to wait for completion of the underlying science, their response to the relevant oversight chairmen, and statements made at subsequent public meetings arising from the matter at issue, Plaintiffs reasonably believe Defendants have ignored or rejected the requests of Plaintiffs and the relevant oversight Chairmen and are proceeding apace in order to produce some document in time for the apparently desired October 2000 release in continuing violation of Public Law 104-76 and GCRA of 1990 (15 U.S.C. 2936).

59. Defendants do so through knowingly and admittedly continuing a process of issuing a "final" Assessment without having complied with Congress's direction as to an open and universally and easily accessible process or completed, received or incorporated the underlying science styled as "regional and sectoral analyses,"[5] while also admitting that the requisite scientific foundation will be completed any month, making an October release substantively inexplicable.

60. Therefore, on or about June 9, 2000, and continuing until present and in spite of being informed of legal and procedural deficiencies by Plaintiffs and substantive deficiencies in violation of Congress's intent by Plaintiffs Emerson and Knollenberg and relevant oversight chairmen in the U.S. House of Representatives, Defendants have wrongfully and unlawfully released a formal

work from this process, including a "draft" form to national media outlets on or about June 9, 2000, available for limited public review and comment on June 12, 2000, and presently preparing to release in it "final" though clearly incomplete form, and without the benefit of the relevant supporting science.

61. Wherefore, Plaintiffs demand judgment against Defendants that any document purporting to represent a "draft" or "final" "National Assessment on Climate Change" is unlawful and not permissible for any official purposes.

Intended Uses for Defendants' Assessment

62. These factors detailed, *supra*, comments made by participating scientists to press outlets (*see, e.g.*, June 12, 2000 *New York Times*), comments of federal scientists asked by the U.S. Department of Energy to review the document and obtained under the Freedom of Information Act (5 U.S.C. 552 *et seq*.) by Plaintiffs CEI, Consumer Alert, Heartland and 60 Plus (see Plaintiffs' NAST Comments, Attachment A, pp. 5-6) and other actions, circumstances and factors as cited herein, make clear that considerations and purposes other than those set forth in relevant statutory mandates and warranted as a matter of public policy played a formative role in the timing and content of the document at issue.

63. Congress directed this already-delayed Assessment serve as a report to the Executive Branch for purposes of establishing Executive policies to the extent permissible and negotiating U.S. commitments with foreign nations. As such, it is

[5] See Attachment B. This despite that the two principal sections of Defendants' assessment are "Regions," and "Sections." (see http://www.gcrio.org/nationalassessment/overvpdf/1Intro.pdf).

highly inappropriate to utilize a knowingly incomplete, yet unlawfully expanded, report lacking the required underlying science.

64. Nonetheless, Defendants plan to participate in the Sixth Conference of the Parties ("COP-6") of the United Nations Framework Convention on Climate Change ("UNFCCC"), negotiations in the Hague, Netherlands, November 13-24, 2000, presumably using this flawed and unlawful product as a basis for negotiations and U.S. commitments. Defendants cannot characterize this Assessment as indispensable or even necessary as all proceedings to date have occurred without one such Assessment having been produced.

65. Congress also directed this already-delayed Assessment serve as a report to Congress, which by most estimates will have adjourned *sine die* by the time Defendants release their final product in October, and will remain out of session until the following January. Defendants are already on record as asserting via OSTP and NAST that the underlying science -- the regional and sectoral analyses – should be complete by "Winter TBD", and thus could be considered and incorporated in the Assessment as Congress intended (see Attachment B), and still be presented to a sitting Congress at effectively the same date.

66. This is true because Congress when out of session or in its final days of the current (106^{th}) Congress of course can not do anything with the hurried, partial product which according to Defendants' own correspondence will likely have the benefit of the required science by the time the next Congress convenes, a mere three months off. Despite this clear inability to excuse forcing an incomplete,

October release, Defendants insist any postponement even of a few weeks is simply beyond consideration.

WHEREFORE, as a result of Defendants' acts and in the absence of this Court requiring Defendants remedy them and/or declaring any product of such actions unlawful, Plaintiffs have sustained and will continue to sustain injury in that all Plaintiffs will have been denied participation and access to information to which they are entitled under FACA. Barring a declaration that Defendants' actions are unlawful, permitting Plaintiffs to pursue their right to address Defendants' findings on the basis of a complete record, having all required issues addressed and ensuring compliance with Congress's express and implicit intentions:

- Plaintiffs CEI, Consumer Alert, Heartland, 60 Plus and Wojick will not have the congressionally prescribed opportunity to reasonably participate in a lawful process pursuant to Congress's express requirements;
- Plaintiffs CEI, Consumer Alert, Heartland, 60 Plus and Wojick will not have the congressionally prescribed opportunity to reasonably review, understand and comment on a lawfully produced product, and the required basis for that product;
- Plaintiffs will not have the statutorily prescribed opportunity to utilize or work within the context of a lawfully produced product for several years to come, given that this product took approximately 10 years to emerge and as the first such report would serve as the official government position on the relevant topics for a likely period of at least four years, if accepted as lawfully produced;

• Such essentially unrebutted unlawful product will then serve not only as the formal and purportedly consensus "government science" recommendation to congressional policymakers, but as the United States' position in international *fora* in which the Executive Branch claims to Congress it continues to negotiate binding treaty obligations on this precise subject matter including the Sixth Conference of the Parties ("COP-6") of the United Nations Framework Convention on Climate Change ("UNFCCC"), negotiations in the Hague, Netherlands, November 13-24, 2000. Such improper commitments cannot be undone easily, if at all.

• Plaintiffs Emerson, Knollenberg and Inhofe will have their legal interest in maintaining the effectiveness of their votes diminished and thus are specifically harmed by the Executive nullifying their votes, indeed having authored and led Congress, to pass the respective funding restrictions on permissible Executive activities in the context of the theory of "global warming." Congress cannot "unring the bell" of such a flawed, unlawfully produced Assessment, except by the means it has already effected through Public Law 106-74 and which restriction Defendants have ignored. As such, Plaintiffs have been deprived of their rights as elected Members to establish policies, most notably those parameters of permissible activities upon or toward which the Executive may apply appropriated funds. Plaintiffs are thus disadvantaged in their position as policymakers, required to produce policy on the basis of an unlawfully produced, fatally flawed document produced more for some short-term effect other than the longer term, policy purpose which Congress intended;

- Plaintiff Wojick has been and will have been denied the right as a technical reviewer to be provided the underlying science and other information directed by Congress to be made available as part of a lawful process to produce the Assessment.

WHEREFORE, Plaintiffs demand judgment for:

1. Declarative relief that Defendants' actions described herein are unlawful under the Federal Advisory Committee Act, the U.S. Global Change Act of 1990, and Public Law 106-74, as pertinent;

2. Specific declaration of the following actions as unlawful and thus not representing or legitimately serving as or in any formal, official, or legitimate work product:

A) Defendants producing or any party utilizing the product of any Synthesis Team meeting which the Designated Federal Officer did not attend in full, or the product of that portion developed during any meeting the Designated Federal Officer did not attend, in part, in violation of the Federal Advisory Committee Act;

B) Defendants producing or any party utilizing the product of any Synthesis Team meeting which was closed, in any part, not in compliance with the Federal Advisory Committee Act and Administrative Procedure Act;

C) Defendants producing or any party utilizing any draft or final "National Assessment on Climate Change" or any document representing the same conclusions and/or opinions as the document so styled as of this date, for any purpose, until such time as those violations of the Federal Advisory Committee Act enumerated herein are remedied to the satisfaction of this or another Court;

D) Any party dedicating further effort or expense toward or on the basis of such Assessment(s) until the violations of the Federal Advisory Committee Act and Global Change Research Act enumerated herein are remedied to the satisfaction of this or another Court; and

E) Any party releasing any document under such auspices addressing those issues not specifically authorized by the Global Change Research Act of 1990, which provides Defendant the authority under which it claims to release this report, including but not limited to those areas requested of the NAST, USGCRP or related body in the January 8, 1999 letter from John H. Gibbons to Dr. Robert F. Corell, and appended hereto.

3. Costs of this action and other just relief.

_____

Christopher C. Horner
D.C. Bar No. 440107
Sam Kazman
D.C. Bar No. 946376
Ben Lieberman
D.C. Bar No. 450393

1001 Connecticut Avenue, N.W.
Suite 1250
Washington, D.C. 20036
(202) 331-1010
Attorneys for Plaintiffs

October 3, 2000

August 11, 2000

National Assessment Comments
Office of the U.S. Global Change Research Program
400 Virginia Avenue, SW
Suite 750
Washington, DC 20024

BY ELECTRONIC MAIL – to: napubcmt@usgcrp.gov

RE: Comments – Submitted August 11, 2000
Date and Matter Reviewed – Overview Document,
First Draft National Assessment on Climate Change

Dear Sir or Madam,

On behalf of the undersigned members of the Cooler Heads Coalition and additional parties who also associate themselves with these general comments, as indicated below, I respectfully request you include this submission in the formal record and/or docket for the first Draft National Assessment on Climate Change ("National Assessment").

The undersigned have several concerns with the National Assessment released for comment on June 12, 2000. They are principally legal (FACA, GCRA of 1990), and otherwise procedural (as reflected in June 7, June 28 and July 20 letters from the Chairmen of the House of Representatives Committee on Science, and the Subcommittee on Energy and Environment, and comments of reviewers from DOE National Laboratories).

Legal Concerns

FACA Violations

As you are aware the NACC Synthesis Team is a Federal Advisory Committee chartered by the National Science Foundation (NSF) under FACA, at the request of the National Science and Technology Council (NSTC), Committee on Environment and Natural Resources (CERN) and the Office of Science and Technology Policy (OSTP). Given this, and as some of the undersigned informed you in correspondence dated May 12, 2000 and June 14, 2000 we believe the following represent violations of the Federal Advisory Committee Act, 5 U.S.C. App. 10, such that publication of any final Assessment purportedly pursuant to FACA would be unlawful:

* The record reflects that no Designated Federal Officer (DFO) attended the April 1999, June 1999, July 1999 meetings, in violation of 5 U.S.C. App. @10(e). Additionally, it appears the DFO's presence at those portions of the August 1998 and November 1998 meetings, the Minutes for which cite the DFO as attending "all or part," is a legitimate issue of concern (Id.). See particularly that requirement that "No advisory committee shall conduct any meeting in the absence of that officer or employee." It appears no advisory committee meetings, at least during those times when they lacked such an officer, actually "took place." This of course calls into question any product of work so purportedly undertaken.

- Apparently portions of the August 1998, November 1998 and April 1999 meetings were closed unlawfully. Those documents in the record as of the inspection by a Cooler Heads representative in May did not rise to the level required under the law to lawfully close any meeting or portion thereof. As you are aware there is a requirement under FACA that documents be kept contemporaneously with their production. On this basis it is fair to say that any such meetings and products thereof may not be considered toward the draft Assessment or any further product under the auspices of a FACA chartered committee.

- Significant work performed prior to the FACA charter being obtained appears to have been incorporated into the process as if it were developed under FACA.

- There was no certification of the meeting Minutes as accurate by the "chairman of the advisory committee," per 5 U.S.C. App. @10(c), until the recently released August 1999 Minutes. We note that a statement, though unsatisfactory, claiming to certify the accuracy of the records was as of May, 2000 included in those Minutes prior to the August 1999 meeting. That which is provided is not what the law requires.

Critically, the instant case does not resemble the standard context of FACA violations, whereby the issue is whether FACA's protections should have been invoked. Instead, we are presented with a situation where responsible officials understood FACA governs, sought and renewed a FACA charter, then increasingly ignored the law's requirements. Given this, the FACA violations were prejudicial to a material degree to the process and necessitate effecting a remedy prior to publication of the final Assessment.

Apparent USGCRA Violations

These apparent violations arise particularly out of work requested by the White House in a January 8, 1998 correspondence from Dr. John H. Gibbons, Assistant to the President for Science and Technology. That letter requested work upon the following questions representing areas outside the scope of NAST's authority as set forth in pertinent part at 15 U.S.C. Sections 2922, 2932, 2934, and 2936:

- "What coping options exist that can build resilience to current environmental stresses, and also possibly lessen the impacts of climate change? How can we simultaneously build resilience and flexibility for the various sectors considering both the short and long term implications?
- What natural resource planning and management options make most sense in the face of future uncertainty?
- What choices are available for improving our ability to adapt to climate change and variability and what are the consequences of those choices? How can we improve contingency planning? How can we improve criteria for land acquisition?"

This despite the statutory mandate for the National Assessment's content, found at 15 U.S.C. 2936 and fairly characterized as 1) findings, state of the science and uncertainties, 2) effects, and 3) trends. Due to the length and content of the document and the short time allotted, arising from the clearly political "urgency" this process manifests (a problem expressed by DOE reviewers, as well (see, *infra*), we were unable to go through the Assessment line-by-line. Still, it is fair to cite that the Assessment deviates from its statutory mandate, at the request of a political appointee, in the following ways:

- the document immediately launches into discussion of responses and adaptation;
- the Table of Contents sets the tone for ignorance of the statutory mission, nowhere listing any discussion of uncertainties, and the Executive Summary avoids addressing this major task;
- when uncertainties are alluded to, it is in the "give us more money" vein, as opposed to an expression of the unknown and its importance, or even that there are unknowns;
- regional and sectoral analyses were excluded in the haste to issue a draft which could be completed by the November federal elections.

Incredibly, the Overview document immediately recharacterizes its mission, excluding the statutory mandate in lieu of reciting its own "short list of questions"; this is an admission that the NAST took a grant of authority and spent specifically dedicated money as it (and the White House) saw fit.

Much other language in the Overview is arguably the result of the requested extra-legal work performed at the request of the White House. We believe that any work addressing such White House requests represents an inappropriate expenditure of resources dedicated to pursuing the National Assessment, on activities outside the scope of the USGCRP's statutory authority as set forth in the USGCRA of 1990, and may be declared unlawful if included in the final Assessment. Like the scientists from the National Laboratories asked by DOE to comment on the Draft, given more time we would provide a line-by-line analysis of these violations, but prior requests for an extension of the comment period have to date been denied. The sheer volume and complexity of this draft document, purportedly issued at the time it was for the purpose of eliciting detailed and substantive comment from interested parties, makes such an analysis highly improbable in the time allowed.

The necessity of identifying and so quantifying any such work also militates in favor of a longer period for public inspection and comment. To the extent that NACC content runs afoul of parameters set forth for using appropriated funds, the same assessment applies.

Policy and Process Considerations

Congressional Conditions Precedent to Release Ignored

For reasons cited, *supra*, the extension of the comment period which certain of the undersigned previously requested certainly appears reasonable and, indeed, lacking any substantive reasons in opposition. It would provide NAST time to perform the regional and sectoral analyses that, according to the Congress, are conditions precedent to the release of any National Assessment (even a draft). Indeed, correspondence to relevant NAST/USGCRP officials from the Chairmen of the House of Representatives' Committee on Science and subcommittee on Energy and Environment, dated June 7, June 28, and July 20, 2000, make clear these conditions existed and were not satisfied. These concerns are particularly but in no way solely about the significant number of regional and sectoral analyses upon which any draft Assessment would purportedly be based, although it was issued in advance of the analyses being performed (or "complete"). Those concerns, among others, appear to have been ignored, and were ratified by your release of the draft Assessment on Monday, June 12, 2000. This confirms the appearance, fostered by other evidence, including but not limited to the content of the April and August 1998 meeting minutes, that NAST to some extent actually began with its conclusions, and spent its resources seeking to justify such results. We incorporate by reference the objections stated therein in these comments.

Further, with the 106th Congress expected to adjourn *sine die* at the latest by some time in October, legislative action in response to this first Assessment certainly cannot be the

goal of a planned October release. Lacking statutory authority to address the theory of catastrophic man-made "global warming" through regulations, the Executive Branch also does not appear to be hindered in pursuing rulemakings by granting the requested extension. Even in instances where reasonable minds may disagree on the issue of authority, the typical availability of emergency or interim rulemaking authority eviscerates any possible arguments that any (authorized) regulations are unduly delayed to the detriment of the public or the process. In short, there appears to be neither anything hinging on the date of this report's release in final form in October, nor any detriment from a relatively brief delay.

Commenting Parties Rushed, Not Given Adequate Time for Substantive Review

Conversely, there appear to be numerous justifications for extending the comment period. We do remain cognizant that the United States Global Change Research Act was enacted in 1990, yet no substantive, formal action was underway pursuant to the Federal Advisory Committee Act (FACA) until 1998. This despite tremendous resources apparently being expended in pursuit of this draft Assessment prior to invoking FACA, which work we believe is easily established as having been incorporated in the recently released product. Once the Committee was chartered, as reflected in Dr. John Gibbons' communication of January 8, 1998 to the first DFO Dr. Robert Corell, a sense of urgency was communicated to the panel by political officials. Further, statements in the record and major media outlets, including but in no way limited to those from certain anonymous if purportedly well placed sources, indicate a perception among involved scientists that political pressures drove the timing and even content of this draft document.

This sense of urgency is reflected in, among other places, comments the Cooler Heads Coalition obtained via the Freedom of Information Act, by reviewing parties from the National Laboratories asked by the Department of Energy to comment on the Draft. In addition to an emphasis on speed overnight mail as opposed to deliberation, the report's emphasis on gloom and doom ("possible calamities") to the detriment of the positive, and rampant criticism of the reliance on two, limited models for the pronouncements made, these comments are exemplified by but in no way limited to:

1) DOE reflecting the (but for political considerations) inexplicable "tight deadline" (John Houghton, 12/02/99 e-mail), "urgent request" and "rigorous timetable", and 6 days to initially review and comment upon a lengthy scientific document (John Houghton letter to reviewers, 12/02/99);

2) "**This review was constrained to be performed within a day and a half. This is not an adequate amount of time to perform the quality of review that should be performed on this size document**" (Ronald N. Kickert, 12/08/99); "**I…understand that there were substantial time and resource limitations (Ed: 10 years???) …that lead to this product being what it is**" (Robert S. Turner); "**During this time, I did not have time to review the two Foundation Document Chapters**" (Kickert, 12/20/99); "**Given the deadline I have been given for these comments, I have not been able to read this chapter in its entirety**" (William T. Pennell).

3) "substantial work to do on the report before it is released" (John Houghton e-mail, 12/13/99), "**UNFORTUNATELY, THIS DOCUMENT IS NOT READY FOR RELEASE WITHOUT MAJOR CHANGES**" (CAPS and bold in original)(Jae Edmonds), "This is not ready to go!" (William M. Putman)

Given the alarming nature of such implications that politics drove the timing, and thus indirectly at a minimum the content, it strikes us that NAST would welcome the opportunity to demonstrate, particularly to involved communities and its funding and oversight panels in Congress that, numerous signals to the contrary, there is no motivation to produce biased "science" or influence elections through production and release of any National Assessment documents.

Finally, the nature of the totality of the apparent violations detailed, *supra*, themselves manifest the inherent unfairness of and extreme manifestation of bias in offering interested parties sixty days to comment on that which is purportedly the work of several years, but in reality nearly a decade. Additionally, making the determinative meeting minutes publicly available on the late date they were inserted into the docket (appx. 6/9/00) heightens the clear picture that inadequate time was offered such parties, with the intent to prejudice their ability to address the draft Assessment just as reviewing scientists claim their ability was prejudiced. This inadequacy, given the context provided, *supra*, only exacerbates the foul odor of politics infecting the scientific process.

Conclusion

That which are outlined above represent serious violations that we believe must in all fairness be remedied, and impressions or signals given that must be evidenced as not accurate, prior to issuing a first National Assessment in final form. We thus strongly criticize NAST/USGCRP refusing all prior requests for extension of the period for comment sufficient to provide the public the opportunity to try and work around these deficiencies, while hopefully NAST would seek to remedy them prior to any attempt to

publish a final version. We would view a failure to provide such an expansion as leaving the product unlawful in numerous ways and fatally flawed for any serious use.

Formal Comments for the Record

First Draft National Assessment on Climate Change
8/11/00
Page Seven of Eleven

Sincerely,
Christopher C. Horner
Counsel, Cooler Heads Coalition
CHorner@cei.org; 202-331-1010; F 202-331-0640
On behalf of the undersigned Cooler Heads Members and Other Undersigned Parties:

Congresswoman Jo Ann Emerson
132 Cannon House Office Building
Washington, D.C. 20515
202-225-4404

Congressman Joseph Knollenberg
2349 Rayburn
Washington, DC 20515-2211
202-225-5802; F 202-226-2356

Myron Ebell
Director, Global Warming Project
Competitive Enterprise Institute
1001 Connecticut Ave, NW
Suite 1250
Washington, DC 20036
202-331-1010; F 202-331-0640

Fran Smith
Executive Director
Consumer Alert
Washington, DC 20036
202-467-5809; F 202-467-5814

Attachment 1

Master Calendar

Regional Analyses	Projected Completion	Sponsor Agency
Pacific NW	November 99	DOC/NOAA*
Alaska	February	DOI*
Mid-Atlantic	March	EPA*
Great Lakes	July	EPA
Southwest and Colorado	July	DOI**
Metro East Coast	Summer TBD	NSF**
Southeast	Summer TBD	NASA
New England	Summer TBD	NSF
Southern Great Plains	Summer TBD	USDA
Central Great Plains	September	DOE
Rocky Mountains/Great Basin	Fall TBD	DOI
California	Winter TBD	NSF
Native Homelands	Winter TBD	NASA
Pacific Islands	Winter TBD	NSF
Gulf Coast	Winter TBD	EPA
Northern Great Plains	TBD	NASA
Sectoral Analyses		
Human Health (Summary)	April	EPA*
Human Health (foundation)	Summer TBD	EPA**
Water Resources	Summer TBD	DOI**
Agriculture	Summer TBD	USDA
Coastal/Marine	Summer TBD	DOC/NOAA
Forests (articles)	Fall	USDA
Synthesis Report	Fall 2000 TBD	NSF**

*Published
**Open for public comment

Attachment "B"