

**TO: MEMBERS OF THE INVESTIGATIONS & OVERSIGHT
SUBCOMMITTEE**

FROM: SUBCOMMITTEE MAJORITY STAFF

**SUBJECT: MEETING TO AUTHORIZE A SUBPOENA FOR RECORDS RELATING
TO SECRETARY BODMAN'S DECISION TO CANCEL THE
FUTUREGEN PROJECT AND INITIATE AN ALTERNATIVE
FUTUREGEN PROGRAM**

DATE: JUNE 26, 2008

Summary

Since April 2, the Committee has been attempting to obtain documents from the Department of Energy (DOE) to help it understand Secretary Bodman's surprise announcement that the FutureGen initiative to demonstrate the viability of a zero-emission, coal-fired integrated gasification combined cycle (IGCC) plant that incorporated carbon capture and sequestration (CCS) technology. The Committee is the authorizing committee for fossil energy research and development programs.

President Bush has been promoting the FutureGen project to the energy and utility industries since 2003 as a way to use coal resources without polluting the environment. The Department had signed a cooperative agreement in January with the FutureGen Industrial Alliance under which the Alliance was to select a site, and the Department would share the costs of the construction of that plant. Foreign countries also signed up to participate. The Alliance announced the selection of a site in Mattoon, Illinois, in December, over two sites in Texas and one other in Illinois. Suddenly, in January, Secretary Bodman unexpectedly announced an end to the Alliance's project and a new "restructured" FutureGen that would add CCS technology to a number of commercial IGCC plants. The announcement was so unexpected that the DOE official charged with promoting the project to foreign countries was making a presentation in Saudi Arabia while the Secretary was announcing its demise.

The Department has not claimed any privilege, but it also has not delivered all of the responsive documents, despite numerous phone calls and meetings with staff and the notice of a subpoena meeting on June 19, which was postponed until today. In the meantime, the Department is moving forward with the new FutureGen. Just yesterday, it issued its final Funding Opportunity Announcement (FOA) to invest in multiple, commercial-scale IGCC or other clean coal power plants with CCS technology under the Department's restructured FutureGen program. Even though the new program is a completely different approach than the one funded by Congress, DOE has not submitted a reprogramming request to either the appropriating or authorizing committees.

Earlier today, attorneys from the White House Counsel's office and the Department of Energy met with bipartisan Committee staff, briefed staff on two of the documents and provided a number of documents for staff to review and take notes. No privilege was claimed for those

documents. The strategic plan for the new FutureGen promised to the Committee by Deputy Secretary at the April 15 hearing was not included in those documents. The DOE attorney said that it would be provided to the Committee, but not before the scheduled subpoena meeting. Further discussion with DOE Congressional staff, however, resulted in the delivery of that document to the Committee offices shortly after noon today.

Of the other documents reviewed, three are essential to the Committee's continuing legislative and oversight responsibilities, and we recommend a subpoena be authorized for the following documents:

1. Document entitled "Talking Points for Secretary Bodman FutureGen Meeting with NEC Principals December 14, 2007."
2. Document entitled "Memorandum for NEC Principals from JK to NEC Principals," with the subject line of "FutureGen project".
3. Chain of e-mails dated November 6, 2007, between Charles Blahous and Bud Albright and included in a document entitled "080404 FOIA Request-Revision 1."

Background

On January 30, 2008, Secretary Bodman announced that the Department of Energy (DOE) was withdrawing its support for the FutureGen project it had entered into with an alliance of power companies. This \$1.8 billion (in as-spent dollars) project was to be replaced by a restructured FutureGen program of investments in carbon capture and sequestration technology that would be tested on a number of commercial, coal-fired integrated gasification combined cycle (IGCC) plants. FutureGen is part of the fossil energy research and development portfolio at DOE which is authorized by this Committee. Neither the decision to terminate the original project nor the decision to embark on an alternative path was ever discussed with this Committee.

On April 2, in an attempt to understand why the Secretary cancelled the FutureGen project, Energy and Environment Subcommittee Chairman Nick Lampson wrote to Secretary Bodman seeking all records that informed the Secretary's decision or represented his actions in this matter. At that time, the goal was to make a fairly narrow document request so that a full response could be produced promptly and inform the Subcommittee members at an April 17 hearing on FutureGen. Now, 12 weeks later, the Department has still refused to deliver all responsive documents.

On April 11, 2008, the Department delivered approximately 2.5 inches of documents that represented the first response to the Subcommittee's request. In that response were memoranda prepared for the Secretary for his conversations with Members and Senators interested in the FutureGen project. Also included were Powerpoint slides prepared in January 2008 for the Secretary to lay out the alternative FutureGen program. Missing in that delivery were any documents that went to or from the Secretary regarding actual decisions on the project or how to revamp the program.

On April 15, the Energy and Environment Subcommittee held a hearing on the FutureGen Project. At that hearing, Undersecretary of Energy Clarence (Bud) Albright promised Chairman Gordon and the Committee that the Department would provide a list of documents which were not being provided and a copy of the strategic plan for the reformulated FutureGen program. These promises were included as requests in subsequent Committee communications with the Department (dated April 17 and May 7, 2008).

It took another ten weeks for DOE to deliver five more packets of materials in response to the original April 2 letter—totaling approximately 1.5 inches in height. **(Does this include the last delivery?)** These productions occurred on May 1, May 12, May 23, June 13 and June 20. No records to or from the Secretary concerning the decision to abandon the original FutureGen or adopt a revised FutureGen have been discovered in these documents. According to DOE counsel and staff, no such decision documents exist. According to DOE, the Secretary allegedly made all decisions on this \$1.8 billion project and program that involved some of the largest energy and utility companies in the country based solely on oral briefings.

However, DOE's counsel initially claimed that there is a class of Departmental records "that, while associated with some Secretarial involvement, also implicate executive branch prerogatives." (Letter from Eric Fygi to Chairman Lampson dated April 11, 2008) In a later letter, DOE claimed that responsive documents not produced "include some in which interests of the Executive Office of the President are present." (Letter from Eric Fygi to Chairmen Gordon, Lampson and Miller and Ranking Members Hall, Inglis and Sensenbrenner dated June 13, 2008) Neither the Department nor the White House have made a claim of executive privilege, but these documents have not been provided to the Committee. DOE counsel sent these documents to White House counsel over the same period of time that other documents were coming to the Committee.

Subpoena Notice and Committee's Attempts at Accommodation

On June 12, after numerous letters, meetings and phone calls to DOE failed to result in a schedule for producing the responsive documents, the Investigations and Oversight Subcommittee scheduled a meeting to consider a subpoena for the production of the requested documents.

In an attempt to resolve the dispute without the issuance of a subpoena, on June 18, on the Committee's initiative, staff met with attorneys from the White House and DOE. Prior to that meeting, the White House counsel had not yet reviewed the disputed documents. At the meeting, the White House counsel committed to such a review and promised a final decision on those records by close-of-business on Tuesday, June 24. They were then to deliver to the Committee those materials that they found should be released. For some other materials, Committee staff would be allowed to review them and take notes or be briefed on the contents by White House staff. Some documents might fall into a final category and be completely withheld. The Committee retained its right to subpoena any documents that it believed were necessary to its work.

Based on that agreement, the subpoena meeting was postponed to Thursday, June 26. On Tuesday afternoon, having heard nothing from the Department, Committee staff contacted DOE

Congressional to ask the status of this review. At 5 p.m., an agreement was made through DOE Congressional that the White House staff would bring the documents to the Committee offices on Wednesday at 3 p.m. for production, review and/or briefings. However, at 11 a.m. on Wednesday, DOE said it had neglected to confirm this schedule with White House counsel and now could not meet before Thursday morning, the day of the subpoena meeting despite the Committee staff's offer to meet at any time between 1 and 7 p.m. In its continuing effort at accommodation, Committee staff also proposed 7 a.m. or 8 a.m. on Thursday, and the meeting was set for 8 a.m.

At today's meeting, attorneys from the White House Counsel's office provided a briefing on two documents and allowed staff to review and take notes on a group of other documents. Of those documents, the staff determined that three were essential for the Committee legislative and investigative responsibilities. Staff also worked with DOE Congressional staff to encourage the production of the strategic plan. That document was delivered to the Committee shortly after noon today.

No Claim of Executive Privilege

The bottom line at this point is that documents are being withheld by the Department without any assertion of a privilege. There have been vague expressions of "executive branch prerogatives" (April 11 Department of Energy letter to Chairman Lampson) or "substantial confidentiality concerns" (April 22 letter to Chairmen Gordon and Lampson and Ranking Member Inglis). In the letter dated June 13, the Department indicated that, "As to responsive documents not yet produced, they present significant executive branch confidentiality interests and they include some in which interests of the Executive Branch of President are present." None of this amounts to a privilege claim.

The restructured FutureGen has been presented as a new \$1.3 billion commitment by the Department of Energy and the American taxpayer. The Congress, which is the appropriating body under the Constitution, has not even been consulted on whether that is how it wants to spend the taxpayers' money. In one of the documents reviewed by staff, DOE stated that before any solicitation for new projects could be released, a reprogramming request would have to be sent to Congress. To our knowledge, that has not been done.

Attachments:

DOE-Committee Communications Chronology
E-Mail from Edith Holleman, Subcommittee Counsel, to DOE on June 19, 2008

CHRONOLOGY OF COMMITTEE REQUESTS FOR FUTUREGEN DOCUMENTS
FROM DEPARTMENT OF ENERGY

- 4/2/08 Chairman Lampson, Energy & Environment Subcommittee, writes to Secretary Bodman requesting all records of "all materials relating to FutureGen that were Prepared for you or involved your review or participation." Due: 4/11/08
- 4/11/08 Initial production of documents produced by DOE. Letter from Eric Fygi, deputy general counsel, states that a number of "responsive documents" have not been produced because they "implicate executive branch prerogatives," but that the Department was willing to work with the Subcommittee to "accommodate" its legislative needs "in a manner that respects the interest of both the executive and legislative branches. Additional responsive documents will be produced "as promptly as possible."
- 4/14/08 Committee staff requested an index of "all of the documents that were withheld" to be produced prior to 4/15 hearing. It was not received.
- 4/15/08 Subcommittee hearing on "The Department of Energy's FutureGen Program." During the hearing, Bud Albright, DOE undersecretary, states that he would provide a "going-forward" or strategic plan (pp. 29 and 31); and that he would work to accommodate the "Subcommittee's legislative needs;" and would specifically say what was being withheld and why.
- 4/17/08 Chairman Lampson, joined by Ranking Member Inglis and Committee Chairman Gordon, sends a second document request letter to Secretary Bodman, asking again for all responsive documents to be produced and, if any are withheld, an index of those documents, by 4/22. They also requested a meeting with DOE staff to discuss any "further accommodations."
- 4/22/08 Letter received from Fygi stating that DOE was not claiming any privileges over its documents; had not determined to withhold any documents so couldn't produce an index; needed to consult "within the executive branch . . . to produce an appropriate accommodation of the Committee's legislative needs with the legally-recognized interests of the executive." Fygi further stated that creating an index would divert effort from "making additional responsive documents available." He also complained about the "short" time frame for production. No additional documents were provided.
- 4/23/08 Counsels Fygi and DeForest meet with Committee staff. They offer no accommodation or access to documents. Fygi stated that there was no more than a single box of documents remaining, but would not provide a timeframe for its delivery, nor a basis for withholding documents.

- 4/30/08 I&O Subcommittee Counsel Holleman calls DOE Counsel Fygi who states that he has a small package of documents to provide, but that other documents had been sent "last night" to Justice Department for review.
- 5/1/08 DOE produces ½ inch of additional documents. Letter from Fygi promises more "as promptly as possible."
- 5/7/08 Committee sends third document request letter to Secretary Bodman; signed by Chairman Gordon, Chairman Lampson, I&O Subcommittee Chairman Brad Miller; Ranking Member Inglis and I&O Ranking Member F. James Sensenbrenner, Jr. Committee reiterates the original request plus documents related to the "New FutureGen Program Plan." Due date: 5/12/08
- 5/12/08 DOE produces another ½ inch of documents.
- 5/23/08 DOE produces another ½ inch of documents; Fygi says "remainder of the responsive internal Departmental documents" will be transmitted in the "near future."
- 6/5/08 I&O Subcommittee staff (Jean also?) have phone conversation with Fygi. Fygi says he sent "White House" documents to the White House "last night." DOE to produce last tranche of documents "next week" because DeForest is on vacation.
- 6/13/08 Final ½ inch of DOE documents delivered reflecting DOE's "best understanding of those prepared for the Secretary or that involved his review or participation in this matter." Fygi states that other responsive documents are not produced because "they present significant executive branch confidentiality interests and they include some in which interests of the Executive Office of the President are present." DOE is "consulting" with the White House, but believes that the "appropriate next step" might be to discuss a "possible accommodation." No documents related to the New FutureGen program are produced, nor is an index of withheld documents.
- 6/12/08 I&O Subcommittee notices a meeting for June 19 to consider a subpoena to compel production of the missing documents.
- 6/16/08 I&O Subcommittee staff has phone conversation with Lisa Epifani, DOE's assistant secretary for Congressional and Intergovernmental Affairs to once again reiterate Committee requests and set up final meeting for bipartisan Committee staff meeting with Epifani, Fygi and representatives of the White House Counsel's office.
- 6/18/08 Committee majority and minority staff met with lawyers from White House Counsel's office and DOE concerning the withheld documents. It was agreed that certain documents would be provided by COB June 20, and that the White

House would have reviewed the documents in its possession by COB on June 24 and have made arrangements for review and briefing of Committee staff.

- 6/24/08 Committee staff agreed to meet with White House and DOE counsel on 6/25/08 at 3 p.m.
- 6/25/08 DOE postponed meeting until 8 a.m. on 6/26/08
- 6/26/08 Committee staff reviewed documents; DOE produced December draft of strategic plan.

Holleman, Edith

From: Epifani, Lisa [Lisa.Epifani@hq.doe.gov]
Sent: Thursday, June 19, 2008 5:51 PM
To: Holleman, Edith
Subject: RE: Recap of yesterday's meeting

Thank you for sending this along Edith.
I have forwarded it to the WH staff that attended yesterday as well as Fygi and Alicia.

Lisa

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From: Holleman, Edith [mailto:Edith.Holleman@mail.house.gov]
Sent: Thursday, June 19, 2008 4:59 PM
To: Epifani, Lisa; Pearson, Dan <Alert>; Hammond, Tom; Forsyth, Bart; Fruci, Jean; Atkins, Chuck; Finkel, Louis
Subject: Recap of yesterday's meeting

Lisa – because I don't have the e-mail addresses of some of the people from the Department who attended yesterday's meeting, I am sending this recap of yesterday's meeting to you and requesting that it be passed on to the relevant staff. I will also Fax a copy to Emmet Flood at the White House.

Based on our meeting yesterday, the Investigations and Oversight Subcommittee postponed its meeting scheduled for today at 2 p.m. to vote on a subpoena to be issued to the Department of Energy concerning documents related to the FutureGen project for one week. It has now been set for Thursday, June 26, at 1 p.m.

Between today and next Thursday, we hope to reach an accommodation with the Energy Department and the White House Counsel's Office that will negate the need for a subpoena vote. It is our understanding that the Department and the White House will take the following steps during that time:

1. By close of business on Friday, June 20, the Department will provide to the Committee additional documents that have been cleared by the White House for release.
2. By close of business on Tuesday, June 24, the White House Counsel's Office will have finished its review of the responsive documents provided to it by the Department of Energy and will have made arrangements with the Committee to: a) produce certain documents; b) provide certain documents for Committee staff review before Thursday, June 26, at 1 p.m.; and/or c) brief Committee staff on the contents of certain responsive documents. It is our expectation that the majority of the documents will fall into categories a) and b). For any documents that the White House or the Department determine to withhold and does not brief the Committee staff on their contents, they will provide an index of those documents and list the privilege under which the documents are withheld.

6/19/2008

3. The Department will provide to the Committee an unredacted copy of the document discussed in the meeting as the "new FutureGen program plan" and referred to as a "strategic plan" for the new FutureGen in the Committee's April 15 hearing. Any proprietary information in that document will be noted on the copy provided to the Committee so that it can be handled appropriately.

It was agreed that the Committee does not give up any of its legislative and/or oversight rights to obtain responsive documents under the rules of the House of Representatives by agreeing to staff reviews and/or briefings concerning any responsive documents.

Any questions you may have should be referred to Dan Pearson, I&O Subcommittee staff director at (202) 225-4494; Edith Holleman, I&O Subcommittee counsel, at (202) 225-8459; and Tom Hammond, I&O minority staff, at (202) 226-2177.