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United States Government Accountability Office
Washington, DC 20548

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December 10, 2007

The Honorable David R. Hill
General Counsel
Department of Energy

Dear Mr. Hill:

At the request of the Senate Energy and Natural Resources Committee, the House Energy and Commerce Committee, and that committee's Subcommittee on Oversight and Investigations, GAO is currently reviewing factual, legal, and policy issues related to the Department of Energy's management alternatives for its inventory of excess depleted uranium hexafluoride tails—so-called "DUF6." As you know, DUF6 has historically been regarded as a liability. Consequently, we understand DOE has planned to convert the tails to a more stable form suitable for long-term storage, in preparation for future beneficial reuse or permanent disposal. However, recent increases in the price of natural uranium may have enhanced the economic feasibility of two management alternatives: (1) sale or other disposition of a portion of the tails "as is," in their current depleted form; or (2) sale or other disposition of a portion of the tails after they have been re-enriched to an assay equivalent to that of natural or low-enriched uranium. The purpose of this letter is to obtain DOE's views of its legal authority to implement these alternatives.

As discussed at a November 8, 2007 meeting with a number of DOE attorneys, possible authority for the Department to carry out these alternatives might derive from Section 3112 of the USEC Privatization Act, Section 314 of the 2006 Energy and Water Development Appropriations Act, and/or various provisions of the Atomic Energy Act. We would appreciate responses to the following questions (draft provided to DOE on October 31) regarding the Department's position on its authority for DUF6 activities under these or other laws. For each question, please identify and provide copies of any agency orders, guidelines, memoranda, correspondence, contracts, agreements, or other documents pertaining to the Department's response.

Applicability of USEC Privatization Act

1. A May 10, 2005 Action Memorandum for the DOE Deputy Secretary from the Administrator and Chief Executive Officer of the Bonneville Power

Administration and the DOE Principal Deputy Assistant Secretary for Environmental Management, regarding the Uranium Tails Pilot Project involving BPA, DOE's Office of Environmental Management, and Energy Northwest, states at page 2 that § 3112 of the USEC Privatization Act, 42 U.S.C. § 2297h-10, "does not apply to the transfers of . . . depleted uranium (tails)." A copy of this May 10, 2005 Memorandum ("BPA Action Memorandum") is enclosed, together with other contemporaneous DOE correspondence provided for context.

Please explain the basis of DOE's conclusion that § 3112 does not apply to transfers of depleted uranium. Does this represent DOE's current position? Would DOE's position change if the tails were re-enriched to natural or low-enriched levels? In determining whether transfers of depleted uranium are subject to § 3112, what, if any, significance should be attached to the fact that § 3113(a) contemplates depleted uranium sometimes constituting a waste and sometimes not constituting a waste?

2. Assuming that the phrase "any uranium" in § 3112(a) includes re-enriched DUF6, does DOE believe such materials are included in the DOE "stockpile" referenced in §§ 3112(c) and 3112(d)? If so, is there any reason why DOE transfers of re-enriched DUF6 to USEC or others could not meet the conditions of either §§ 3112(c) or 3112(d)?

Applicability of Section 314 of the 2006 Energy and Water Development Appropriations Act

3. At our November 8, 2007 meeting, DOE stated that Section 314 of the 2006 Energy and Water Development Appropriations Act is not permanent legislation and remains in force only because of the effect of Continuing Resolutions. Please confirm that this is DOE's position and briefly explain the basis for this position (*e.g.*, lack of so-called "words of futurity").

4. As long as Section 314 remains in force, does DOE believe this provision—which authorizes DOE to "barter, transfer or sell uranium . . . and to use any proceeds, without fiscal year limitation, to remediate uranium inventories" held by DOE—authorizes the Department to sell DUF6 and use the sale proceeds for re-enrichment, interpreting "remediation" as including re-enrichment?

Applicability of the Atomic Energy Act

AEA legal classification of DUF6

5. Section 11 of the Atomic Energy Act ("AEA"), 42 U.S.C. § 2014, classifies nuclear material in several ways, including as "source material" and "special nuclear material." How does DOE classify depleted DUF6 and re-enriched DUF6 under the AEA? Does the legal classification of re-enriched DUF6 depend on the ultimate assay of the tails?

AEA authority to transfer or dispose of DUF6 "as is"

6. The May 10, 2005 BPA Action Memorandum noted above states at page 2 that § 161m of the Atomic Energy Act, 42 U.S.C. § 2201(m), authorized DOE to transfer its depleted DUF6 to Energy Northwest as is, without enrichment. Please explain the basis of this conclusion. Does this represent DOE's current position?

7. Does DOE believe that AEA § 63, 42 U.S.C. § 2093, authorizes transfer of its depleted DUF6? What is the interplay, if any, between AEA §§ 63 and 161m? (Section 63 authorizes DOE to "distribute source material within the United States to qualified applicants," while § 161m authorizes DOE to "sell, lease, or otherwise make available . . . source or byproduct material.")

8. Does DOE believe that AEA § 161j, 42 U.S.C. § 2201(j), regarding the disposition of surplus radioactive materials, provides authority for DOE to transfer depleted DUF6 as is?

9. In DOE's view, what provision of law authorizes it to convert its DUF6 tails to U3O8 and to provide for their sale or disposal? Please explain.

AEA authority to re-enrich and transfer DUF6

10. Does DOE believe that AEA §§ 41, 161u, or any other AEA provision authorizes re-enrichment of DUF6 at the Paducah Gaseous Diffusion Plant? At any other enrichment facility that may come online in the future?

11. Does DOE believe AEA § 53 authorizes sale or transfer of its DUF6 re-enriched to natural or low-enriched levels? Please explain.

Additional Questions

12. Are there any other legal authorities DOE believes authorize it to sell, transfer, or otherwise dispose of its depleted DUF6 as is, or to re-enrich the DUF6 and sell or otherwise dispose of the resulting product?

13. As discussed at our November 8 meeting, an official at the Portsmouth and Paducah Project Office has asserted that 41 C.F.R. § 102-38.295, implementing the Federal Property and Administrative Services Act, authorizes DOE to retain proceeds from the sale of DUF6. Does DOE agree? Please explain.

14. Does DOE have any legal or other duty to ensure the continued existence of a domestic uranium enrichment capacity? For example, does DOE believe such a duty is created by USEC Privatization Act § 3112(d), which requires DOE, before it sells or transfers natural or low-enriched uranium from its stockpile, to consider the impact of these transactions on the domestic uranium mining, conversion, and enrichment industries?

Please provide DOE's responses to these questions no later than December 31, 2007, so that we may provide a timely response to the Congress. If you have any questions, please contact Assistant General Counsel Karen Keegan at (202) 512-8240.

Sincerely,

Susan D. Sawtelle
Managing Associate General Counsel

Enclosure

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