The Secretary of Energy
Washington, DC 20585

January 14, 2008

The President
The White House
Washington, DC 20500

Dear Mr. President:

This letter is to reply to an alleged violation of the Antideficiency Act, as required by section 145.8 of Office of Management and Budget (OMB) Circular A-11 (2007).

The violation of section 1341 is alleged by the Government Accountability Office (GAO) to have occurred in accounts 89-0228-0-1-276 Departmental Administration, 89-0222-0-1-251 Science, and 89-0224-0-1-999 Energy Supply and Conservation, in the total amount of $503,000. The violation is alleged to have occurred from March of 2006 until February of 2007 for FY 2006 and FY 2007 in connection with the Loan Guarantee Program authorized under Title XVII of the Energy Policy Act of 2005.

The alleged violation turns solely on a disputed question of law. The Department's Office of the General Counsel has thoroughly examined the matter, and in the enclosure to this letter has set forth the Department's legal conclusions regarding the GAO's legal position.

Because no violation of statute occurred here, no disciplinary actions have been taken, and no further steps are needed on the part of the Department.

To comply with OMB Circular A-11, identical letters are also being submitted to the President of the Senate and the Speaker of the House of Representatives as well as the Comptroller General.

Respectfully,

Samuel W. Bodman

Enclosure

Printed on recycled paper

The Secretary of Energy
Washington, D.C. 20585

January 14, 2008

The Honorable Richard B. Cheney
President of the Senate
Washington, DC 20510

Dear Mr. President:

This letter is to reply to an alleged violation of the Antideficiency Act, as required by section 145.8 of Office of Management and Budget Circular A-11 (2007).

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If you have any questions regarding this issue, please contact me or Ms. Lisa E. Epifani, Assistant Secretary for Congressional and Intergovernmental Affairs, at (202) 586-5440.

Sincerely,

Sam

Samuel W. Bodman

Enclosure

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The Secretary of Energy
Washington, D.C. 20585

January 14, 2008

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515

Dear Madam Speaker:

This letter is to reply to an alleged violation of the Antideficiency Act, as required by section 145.8 of Office of Management and Budget Circular A-11 (2007).

The violation of section 1341 is alleged by the Government Accountability Office (GAO) to have occurred in accounts 89-0228-0-1-276 Departmental Administration, 89-0222-0-1-251 Science, and 89-0224-0-1-999 Energy Supply and Conservation, in the total amount of $503,000. The violation is alleged to have occurred from March of 2006 until February of 2007 for FY 2006 and FY 2007 in connection with the Loan Guarantee Program authorized under Title XVII of the Energy Policy Act of 2005.

The alleged violation turns solely on a disputed question of law. The Department's Office of the General Counsel has thoroughly examined the matter, and in the enclosure to this letter has set forth the Department's legal conclusions regarding the GAO's legal position.

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Samuel W. Bodman

Enclosure

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Department of Energy's Response to the Government Accountability Office Review of the Loan Guarantee Program under Title XVII of the Energy Policy Act of 2005
December 31, 2007

The Department of Energy's Office of the General Counsel was asked to review a letter opinion issued by the General Counsel of the Government Accountability Office (GAO) on April 20, 2007 (B-308715) (GAO Letter) on the Loan Guarantee Program (LGP) authorized by Title XVII of the Energy Policy Act of 2005, Pub. L. No. 109-58 (EPAct). In the letter, GAO concludes that the Department of Energy (DOE or Department) has authority to issue loan guarantees notwithstanding certain requirements specified in the Federal Credit Reform Act of 1990 (FCRA), and that the Department violated the Antideficiency Act when it engaged in preparatory activities to implement the LGP prior to enactment of the Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5 (Revised CR). The purpose of this memorandum is to respond to the conclusion in the GAO Letter regarding an alleged violation of the Antideficiency Act, as is called for by Office of Management and Budget Circular A-11, § 145.8 (2007).

Background

Title XVII of EPAct allows for either direct appropriations for the cost (as defined by FCRA) of a loan guarantee,[1] or receipt of payment in full from the borrower for the cost of a loan guarantee.[2] It also requires the Department to charge fees to the borrowers in order to cover the administrative costs of the LGP,[3] but makes availability of those funds dependent on further action in an appropriations act.[4] There also exists an earlier general limitation on the Department's use of funds appropriated in an Energy and Water Development Appropriations Act to "implement or finance" any price support or loan guarantee program.[5] The Department in early 2006, following enactment of EPAct late in FY 2005 and in anticipation of receiving appropriations for the administrative costs of the LGP, detailed a small number of employees to the Office of the Chief Financial Officer and began work reviewing the operational requirements of other federal loan guarantee programs and work on guidelines necessary to begin preparations for later implementation of the LGP. Additionally, the Department carried out planning activities related to the structure of the actual LGP office.

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[1] EPAct § 1702(b)(1).
[2] EPAct § 1702(b)(2).
[3] EPAct § 1702(h)(1).
[4] EPAct § 1702(h)(2)(B).
[5] *See* Energy and Water Development Appropriations Act, 1993, Pub. L. No. 102-377, tit. III, § 301, 106 Stat. 1315, 1338-39 (1992). While this particular section was enacted as permanent law by the inclusion of words of futurity, the provision had been carried in Energy and Water Development Appropriations Acts as an annual provision starting in FY1980. *See* Energy and Water Development Appropriations Act, 1980, Pub. L. No. 96-69, tit. I, § 101, 93 Stat. 437, 441 (1979). Similar provisions also appeared in prior Department of the Interior and Related Agencies Appropriations Acts that funded certain activities of the Energy Research and Development Administration. *See, e.g.*, Department of the Interior and Related Agencies Appropriation Act, 1978, Pub. L. No. 95-74, 91 Stat. 285, 300 (1977); Department of the Interior and Related Agencies Appropriation Act, 1979, Pub. L. No. 95-465, 92 Stat. 1279, 1296 (1978).

In late 2006, after the Department had finalized guidelines for the LGP and had issued a solicitation thereunder, the GAO conducted a review of the activities carried out in anticipation of implementation of the LGP. GAO's positions arising from its review have been contradictory. While noting that a GAO legal review was underway, GAO in its February 28, 2007 letter to Chairman Visclosky of the House Committee on Appropriations, Subcommittee on Energy and Water Development, took the Department to task for not having gone far enough to implement the LGP – in particular, for not having adopted regulations and not having taken other actions to implement the Title XVII LGP. In fact, GAO issued five recommendations for further action in carrying out the Title XVII LGP.[6] GAO testimony developed in conjunction with the February 28, 2007 letter similarly criticized as excessively tentative the steps the Department had taken up to that time,[7] stating that "DOE has not completed key steps to ensure that the program will be well managed and accomplish its objectives[.]"[8] Statements offered by the GAO, even after the GAO Letter of April 20, 2007 (which asserted that DOE already had done too much and thus had violated the Antideficiency Act), continued in this vein, reemphasizing GAO's recommendation that the Department do more to carry out the program,[9] but, paradoxically, then proceeding also to restate the GAO Letter's conclusion that the Department lacked the authority to carry out the program in the first place, and should not have begun work at all.[10] In short, GAO has opined that DOE had been legally derelict by both doing too much and too little at the same time on the same matter. We find GAO's contradictory pronouncements on the LGP confusing at best.

GAO's Legal Arguments

In brief, the GAO Letter advances two arguments. First, the GAO Letter asserts that, as a later enactment of law Section 1702(b)(2) of EPAct is "clearly inconsistent with FCRA." Therefore, section 1702(b)(2) of EPAct constituted authority for the Department to issue loan guarantees without regard to the provisions of FCRA, which require prior authorization in an appropriations act before an agency may make otherwise authorized loan guarantees. The second argument is that the Department violated the Antideficiency Act because it expended funds prematurely in violation of the prohibition contained in section 301 of the Energy and Water Development Appropriations Act, 1993, that forbids using funds appropriated in an Energy and Water Development Appropriations Act to "implement or finance" a loan guarantee program before "specific provision" has been made for the program in an appropriations act.[11] The particular expenditures faulted by the GAO Letter were those associated with preliminary organizational activities and preparation of guidelines done by the Department to enable implementation of the LGP

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[6] Letter from James C. Cosgrove and Robert E. Martin, U.S. Gov't Accountability Office, to Peter J. Visclosky, Chairman, Subcommittee on Energy and Water Development, House Committee on Appropriations, GAO-07-339R (Washington, D.C., Feb. 28, 2007), at 5.

[7] *Id.* at 18, 26, 27, 29, 30.

[8] *Id.* at 18.

[9] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 07-798T, OBSERVATIONS ON ACTIONS TO IMPLEMENT THE NEW LOAN GUARANTEE PROGRAM FOR INNOVATIVE TECHNOLOGIES (2007), AT 2-5.

[10] *Id.* at 5.

[11] Codified at 42 U.S.C. § 7278 (hereinafter referred to as "section 301").

during the period after enactment of Title XVII and before the enactment of the Revised CR on February 15, 2007, which specifically provided for, and specifically made appropriations for, implementation of the Title XVII LGP. Absent the prohibition in section 301, the GAO Letter does not contest the propriety of the Department's having used prior appropriation balances to prepare to implement a new statutory program such as that authorized by Title XVII of EPAct. Nonetheless, GAO concluded that the Department's preparatory actions regarding the Title XVII LGP violated the constraint of section 301, and thereby violated the Antideficiency Act, because those actions constituted a forbidden "implementation" of a loan guarantee program.

Title XVII and the Federal Credit Reform Act of 1990

The GAO Letter posits that the loan guarantee authority provided by Title XVII of EPAct trumped the constraints imposed on issuance of loan guarantees contained in FCRA. Under this view, apparently, DOE was enabled to issue guarantees in the absence of the requisite authorization contained in an appropriations act which is the normal requirement under FCRA.[12] GAO's basic reason for this conclusion was a perceived conflict between the loan guarantee authority provided to DOE in Title XVII and FCRA's requirement for legislative action in an appropriations act before issuing loan guarantees otherwise authorized by law. The GAO analysis relied heavily on the observation that EPAct was enacted well after the adoption of FCRA in 1990.

In the preamble to the final rule implementing the Title XVII LGP, the Department explained its understanding of the correct relationship between the Title XVII LGP and the requirements of FCRA:

> DOE reads [Title XVII of EPAct] and FCRA in harmony, which means that while Title XVII authorizes DOE to carry out the loan guarantee program, the Department may not issue any loan guarantees until it has received budget authority or is otherwise provided authority to make guarantees in an appropriations act.
>
> * * *
>
> In enacting Public Law 110-5 [the Revised CR], Congress acted consistently with the Administration's view that authority in appropriations acts is required in advance before a loan guarantee can be issued.[13]

The Department's approach to implementing Title XVII has demonstrated its compatibility with FCRA. The GAO analysis points to no textual antagonism between

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[12] Federal Credit Reform Act of 1990, Pub. L. No. 101-508, tit. XIII, subtitle B, § 13201, 104 Stat. 1388-609,1388-612 (codified as amended at 2 U.S.C. § 661c)(1997)).

[13] 72 Fed. Reg. 60,116, 60,131 (Oct. 23, 2007). Congress again acted consistently with the Administration's view in the Consolidated Appropriations Act, 2008, which was signed into law on December 26, 2007. See H.R. 2764, Division C, Title III (no public law number yet assigned).

the requirements of FCRA and Title XVII. The analysis begins with the correct observation that "[t]he language of section 1702(b) makes clear that Congress contemplated two possible paths for making loan guarantees under title XVII."[14] However, the analysis then confuses alternatives for the source of the payment for the cost of the guarantee (either the taxpayer or the borrower) with a statutory exception (that Title XVII does not contain) from FCRA's explicit requirement that an authorization to make guarantees be contained in an appropriations act. It is not incompatible with FCRA for Title XVII to provide that a borrower, rather than the taxpayers, may pay the cost of a loan guarantee because the respective provisions of both FCRA and EPAct can readily co-exist. Nor does complying with FCRA's requirement of prior authorization in an appropriations act before using the borrower's payment to secure a guarantee "read subsection [1702](b)(2) out of the law[.]"[15]

Accordingly, the Department must read the two statutes in harmony, which is what it has done here. The executive is not in a position to pick and choose among the statutes that guide and authorize its actions. It is a "cardinal rule * * * that repeals by implication are not favored."[16] The Department therefore is and was obliged to comply with both statutes, and the view contained in the GAO Letter that the Department could have issued loan guarantees without observing the requirements of FCRA is in error.

Title XVII and Section 301

Section 301 of the Energy and Water Development Appropriations Act, 1993, provides in relevant part:

> None of the funds made available to the Department of Energy under this Act or subsequent Energy and Water Development Appropriations Acts shall be used to implement or finance authorized price support or loan guarantee programs unless specific provision is made for such programs in an appropriation Act.

The analysis in the GAO Letter centers on section 301's prohibition of premature agency actions to "implement" a loan guarantee program. As the GAO Letter put it, DOE's "preparatory activities fall squarely within this [cited] definition of 'implement'" because they involved "concrete measures" by which the Department would "ensure the actual fulfillment" of the LGP.[17] The GAO Letter observes that statutory words are to be understood as having their meaning in ordinary usage, and thus it posits that the

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[14] GAO Letter, at 6.
[15] *Id.*
[16] *Morton v. Mancari*, 417 U.S. 535, 549-550 (1974) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)(alteration in original); also citing *Wood v. United States*, 41 U.S. (16 Pet.) 342-343 [sic], 363 (1842), *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186, 193 (1968).
[17] GAO Letter, at 7.

prohibition of section 301 is to be gauged by certain of the dictionary definitions of the word "implement."[18]

It is the case, though, that the term "implement," even in ordinary usage, itself can convey a range of meanings. Other common dictionary definitions include "to fulfill,"[19] "to complete,"[20] and to "pursue to a conclusion or bring to a successful issue,"[21] as well as part of the definition the GAO Letter itself cites but does not quote, "accomplish."[22]

Section 301 does not, however, employ the word "implement" in isolation. Instead, it describes the actions subject to its prohibition as: "[T]o implement or finance authorized price support or loan guarantee programs[.]" Thus, the word "implement" has been used in a context that includes "finance" and "price support" in addition to "loan guarantee." Therefore, in interpreting the word "implement" as it appears in section 301, we are guided by the Supreme Court's admonition that words may have different shades of meaning and should be read in the context in which they appear.[23] Taken in their aggregate, the terms in section 301 are suggestive of financial commitments by the Government to others as the object of section 301's prohibition, even though in isolation the word "implement" is subject to various meanings, even in ordinary usage.

If we read the term "implement" as being linked for meaning in the context of section 301 to "finance," the further question arises whether doing so would deprive the term "implement" of independent meaning within the statute. That is so because of the corollary principle that "[a] statute is to be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous[.]"[24] Understanding whether elements of section 301 might be deemed superfluous under some understandings of its intended reach requires examination of the origins of the particular textual formulation contained in section 301 and the state of the law as it then existed.

In the years before adoption of FCRA in 1990, when an agency was authorized by ordinary legislation to issue loan guarantees, there was no requirement to obtain an appropriation in advance to secure the contingent liability in the event of default. As the Attorney General put it in 1971:

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[18] *Id.* at 6-7.

[19] Implement. Dictionary.com. Dictionary.com Unabridged (v 1.1). Random House, Inc., *at* http://dictionary.reference.com/browse/implement (last visited Dec. 31, 2007).

[20] Oxford English Dictionary, 2nd ed. (1989).

[21] Implement. Dictionary.com. *WordNet 3.0*, Princeton University, *at* http://www.dictionary.reference.com/browse/implement (last visited Dec. 31, 2007).

[22] *See* GAO Letter, at 6.

[23] *See, e.g., Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)("'Discovery' is a word usable in many contexts and with various shades of meaning. Here, however, it does not stand alone, but gathers meaning from the words around it. . . . The maxim . . . that a word is known by the company it keeps . . . is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.").

[24] *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)(quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, at 181-186 (rev. 6th ed. 2000)).

> A series of opinions of the Attorneys General beginning in 1953 has established that a guaranty by an agency of the United States or by a Government corporation contracted pursuant to a congressional grant of authority for constitutional purposes is an obligation fully binding on the United States despite the absence of statutory language expressly pledging "faith" or "credit" to the redemption of the guaranty and despite the possibility that a future appropriation might be necessary to carry out such redemption.[25]

So the federal fisc was implicated by issuance of a loan guarantee under authorizing legislation irrespective of whether future appropriations might be needed to redeem the commitment in the event of a default. Appropriations were not necessary to issue a loan guarantee commitment, and thus "implement" the agency's authorized loan guarantee program. There was no role in the federal budget and appropriations processes to present and obtain approval of the contingent liabilities of loan guarantees.[26]

The other factor that sheds light on the conjunction of "implement" and "finance" in section 301's original antecedent was establishment in 1973 of the Federal Financing Bank.[27] The Bank, a government corporation supervised generally by the Treasury Department, was established to harmonize the terms and conditions of the variety of U.S. Government debt obligations with the array of other agency guarantees and debt obligations regarding their economic terms and the timing of their issuance. The evident object was to create a single market of Federal debt obligations, whether they were Treasury obligations, agency debt issuances, or Federally-guaranteed debt obligations.

The structure authorized by creation of the Federal Financing Bank therefore enabled agencies having loan guarantee authority effectively to "finance" federally-authorized programs by their commitments to extend guarantees. These guarantees could be packaged in a transaction in which, in substance, the guarantee-issuing agency (by committing to guarantee a loan that on issuance immediately could be made or financed by the Federal Financing Bank) was conducting the financing of the obligation that was being incurred by the borrower – again without available appropriations.[28] In the context of Federal Financing Bank and agency transactions therefore, the words "implement" and "finance" regarding a loan guarantee program would have related, but distinct, meanings. Thus, understanding the word "implement" as being directed to transactions that implicate the federal fisc would not render the word "finance" superfluous in a statutory formulation like section 301.

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[25] 42 Op Att'y Gen. 429 (1971) (principal internal quotation omitted).

[26] *See generally* OFFICE OF THE GENERAL COUNSEL, U.S. GOV'T ACCOUNTABILITY OFFICE, 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, at 11-12 to 11-13 (3d ed. 2006)(hereinafter "Principles of Federal Appropriations Law").

[27] Pub. L. No. 93-224, 87 Stat. 937 (1973)(codified as amended at 12 U.S.C. §§ 2281–2296)(1981)).

[28] As noted above regarding general loan guarantee authority prior to adoption of FCRA in 1990, similarly before the 1985 budget amendments Federal Financing Bank transactions were not subject to the conventional budget and appropriations process. *See generally* PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, at 11-40 to 11-41.

The prohibition containing the precise formulation ultimately adopted in section 301 first appeared in the Department of the Interior and Related Agencies Appropriation Act, 1977,[29] under the head "Energy Research and Development Administration – Operating Expenses, Fossil Fuels." In its entirety that prohibition read as follows:

> Provided further, That none of the funds herein appropriated for expenses related to fossil fuels shall be used to implement or finance authorized price support or loan guarantee programs unless specific provision is made for such programs in future appropriation acts.[30]

The House Appropriations Committee explained the intended reach of the new provision as follows:

> The Committee has included language in the bill that prohibits the Energy Research and Development Administration from entering into loan guarantees or price support commitments. Several proposals pending in the Congress would authorize such programs. Because there is a potential for "backdoor spending" in these proposals, the Committee wants to assure that no commitments are made for such programs until provision is made for them in a subsequent appropriation act.[31]

This explanation in the House Report – which is uncontradicted by any other element of the legislative history – indicates clearly that, as to loan guarantees, the prohibition was directed to "entering into" them because of their "potential for 'backdoor spending.'" And even though the same history indicated the Appropriations Committees' awareness of pending legislation that would authorize new loan guarantee programs, there is no hint in the committee reports that the prohibition was intended to foreclose internal agency preparatory activities that did not themselves obligate the federal fisc to others. Those preparatory activities could only have been conducted pursuant to previously enacted agency appropriations and thus could not have constituted the "backdoor spending" sought by the prohibition to be made subject to the discipline of the appropriations process.

The identically phrased prohibition was included annually in Interior and then Energy and Water appropriation acts from 1977 to 1992, when it was modified by adding words of futurity that obviated the need for annual reenactment. In none of the reports accompanying these reenactments was there any additional description of the provision's intended effect; instead, those reports simply stated that the prohibition was being carried over from prior appropriations acts.[32]

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[29] Pub. L. No. 94-373, 90 Stat. 1043 (1976).

[30] *Id.* at 90 Stat. 1058.

[31] H.R. REP. NO. 94-1218, at 43 (1976) (emphasis supplied).

[32] *See, e.g.*, H.R. REP. NO. 95-392, at 95, 98 (1977); H.R. REP. NO. 96-1093, at 157 (1980); H.R. REP. NO. 102-555, at 147 (1992).

There is no indication in the succession of enactments leading to and including section 301 that Congress intended to alter the scope of the prohibited activity that had been described in connection with the provision's original adoption in 1976. When Congress employs identical distinctive terms in the same or related legislation, there is a strong presumption that Congress intended the term to have the same meaning in each related enactment. As the Supreme Court put it:

> [If] Congress ha[s] * * * defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? * * * [I]t will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary contention.[33]

Given the relationship and operative textual identity between the successive prohibitions leading to and including section 301, we must be guided by the intended scope of its 1976 ancestor in applying section 301's prohibition today. Thus, section 301 forbids only the act of prematurely "entering into loan guarantees," as the 1976 House Report put it; section 301 does not forbid use of previously appropriated balances otherwise available for an agency to conduct preparatory activities for implementing a newly-authorized loan guarantee program, as was done by the Department of Energy here. The preparatory activities described in the GAO Letter did not violate section 301's prohibition regarding the use of appropriations.

GAO's Antideficiency Act analysis hinged solely on an erroneous understanding of the reach of section 301, and in particular what the word "implement" means in that context. Without a violation of the prohibition in section 301, there is no violation of the purpose statute, 31 U.S.C. § 1301(a), in light of the broad statutory objects of the lump sum appropriation accounts for Energy Supply and Conservation, Science, and Departmental Administration that were implicated here.[34] Similarly, without a violation of either the prohibition of section 301 or the purpose statute, there is no violation of the Antideficiency Act, 31 U.S.C. § 1341(a).

For the foregoing reasons, the contention made in the GAO Letter that the Department's activities to prepare for implementation of the LGP authorized by Title XVII of EPAct violated the Antideficiency Act is in error. Moreover, this examination confirms the correctness of the prior advice provided by the Department of Energy's General Counsel

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[33] *Reiche v. Smythe*, 80 U.S. (13 Wall.) 162, 165 (1871). *Accord Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion).

[34] *See* Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, tit. III, "Energy Supply and Conservation," "Science," and "Departmental Administration," 119 Stat. 2247, 2270, 2272-2274 (2005). The GAO Letter describes these as six appropriation accounts because the preparatory activities occurred during portions of two succeeding years (FY 2006 and FY 2007) which involved the same three non-fiscal year limited accounts.

to the GAO on February 9, 2007, which stated that the constraints of section 301 "apply to 'implement[ing]' of those authorized loan guarantees by making them," and not to "conducting preparatory activities reasonably necessary . . . to make guarantees authorized by Title XVII, because none of those Departmental activities obligate the federal fisc to third parties[.]"[35]

Office of the General Counsel
U.S. Department of Energy
December 31, 2007

[35] Letter from David R. Hill, General Counsel, Department of Energy, to Susan A. Poling, Managing Associate General Counsel, U.S. Gov't Accountability Office (Feb. 9, 2007), at 3.