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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-202463

July 12, 1984

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The Honorable Mike Synar
Chairman, Subcommittee on Environment,
Energy and Natural Resources
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

By letter dated December 22, 1983, you asked the following questions concerning the Synthetic Fuels Corporation (Corporation):

1. Would the Corporation's proposed extension of $2.7 billion in financial assistance to Union Oil, coupled with Union Oil's existing $400 million contract, violate the Energy Security Act's limitation on financial assistance to any one synthetic fuel project?

2. What effect would the Supreme Court's holding in Immigration and Naturalization Service v. Chadha, ___ U.S. ___, 103 S. Ct. 2764 (1983) (Chadha), have on the Energy Security Act's provision that one House of Congress could deny, by resolution, a Corporation request for additional time to develop the comprehensive strategy required by that Act?

Based on our analysis of the Energy Security Act, we do not think the Corporation's proposed extension of $2.7 billion in financial assistance to Union Oil would violate the Act's limitation on financial assistance. We are inclined to agree with the Corporation that the Chadha decision has the effect of invalidating section 126(d)(2) of the Energy Security Act, which provides for a one-House resolution denying a Corporation request for additional time to develop the comprehensive strategy.

I.

Limitation on Financial Assistance

On July 29, 1981, the United States, acting by and through the Secretary of Energy (Secretary), entered into an agreement with the Union Oil Company of California (Union Oil), to purchase synthetic fuel from Union Oil's Phase I shale oil production facility in Garfield County, Colorado. As part of that purchase agreement (Phase I agreement), the Secretary agreed to provide Union Oil price guarantees up to a maximum amount of $400 million. The Secretary executed the Phase I agreement pursuant to authority provided in part A of title I of the Energy Security Act, commonly known as the Defense Production Act Amendments of 1980. Pub. L. No. 96-294, title I, part A, 94 Stat. 618 (June 30, 1980) (part A), adding section 305 to the Defense Production Act of 1950, 50 U.S.C. App. § 2095. In February 1982, the Corporation, pursuant to the provisions of the Supplemental Appropriations and Rescission Act, 1980, Pub. L. No. 96-304, 94 Stat. 857, 880-881 (July 8, 1980) (Supplemental Act), assumed all of the Secretary's rights and obligations under the Phase I agreement.

The Corporation presently has under consideration a proposal to extend $2.7 billion in financial assistance to Union Oil for Phase II of its Garfield County, Colorado shale oil production facility.[1/] The proposed Phase II financial assistance would be comprised solely of a Corporation price guarantee in an amount not to exceed $2.7 billion. Unlike the Phase I agreement executed pursuant to the Defense Production Act Amendments of 1980 (part A of the Energy Security Act), the Corporation would execute the Phase II agreement pursuant to the authority provided in part B of title I of the Energy Security Act, commonly known as the United States Synthetic Fuels Corporation Act of 1980. Pub. L. No. 96-294, title I, part B, § 134, 94 Stat. 661 (June 30, 1980) (codified at 42 U.S.C. § 8734) (part B).

1/ Subsequent to the April 26, 1984, meeting of the Corporation's Board of Directors, one Board member resigned, leaving the Board without a quorum. 42 U.S.C. § 8712(a), (e). Until a quorum is obtained, the Corporation can take no action with respect to Union Oil's proposal. 42 U.S.C. §§ 8715, 8734.

The question presented is whether the Corporation must include the $400 million awarded under the Secretary's Phase I agreement in calculating the maximum amount of financial assistance that the Corporation can provide to any one person or synthetic fuel project under part B. In this regard, section 131(j)(1) of part B, title I, of the Energy Security Act, provides as follows:

> "In no case shall the aggregate amount of financial assistance awarded or committed under this part [part B] exceed at any one time 15 per centum of the total obligational authority of the Corporation authorized under section 152--
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> "(A) to any one synthetic fuel project, either directly or indirectly; or
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> "(B) to any one person, including such person's affiliates and subsidiaries, either directly or indirectly."
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> Pub. L. No. 96-294, 94 Stat. at 656, 42 U.S.C. § 8731(j) (emphasis added).

Section 152(a) establishes a total obligational authority of $20 billion. 42 U.S.C. § 8752(a). Section 131(j), then, establishes a limitation of $3 billion on the amount of financial assistance the Corporation can provide to any one person or synthetic fuel project.2/

2/ The Section 131(j) limitation is to be calculated on the basis of the Corporation's "total obligational authority," rather than the "net obligational authority." Section 152(a), discussed in more detail below, reduces the total amount of obligational authority available to the Corporation ($20 billion) by the amounts of financial assistance reserved or obligated under the Defense Production Act of 1950, as amended, and by the amounts obligated from the Energy Security Reserve by the Department of Energy pursuant to the Federal Nonnuclear Energy Research and Development Act of 1974.

In response to our letter of inquiry, the Corporation stated that the section 131(j) limitation applies only to financial assistance awarded under part B. Letter to Assistant General Counsel, U.S. General Accounting Office, Henry R. Wray from Deputy General Counsel, U.S. Synthetic Fuels Corporation, Andrew T. Tashman, dated March 21, 1984 (Corporation Letter). Because the $400 million of the Secretary's Phase I agreement was awarded under part A of the Energy Security Act and not part B, the Corporation argues that the $400 million should not be considered in determining the amount of financial assistance the Corporation can award Union Oil under part B. The Corporation also stated that its adoption of the Union Oil project pursuant to the Supplemental Act did not alter the status of that project for purposes of section 131(j). The Corporation pointed out that the Supplemental Act did not amend or even refer to section 131(j), nor is there any other indication that the Union Oil project should be treated under section 131(j) as if it had received financial assistance under part B. For the following reasons, we agree with the Corporation's conclusions.

On issues of statutory construction, the Supreme Court has consistently cautioned that "if the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." United States v. Turkette, 452 U.S. 576, 580 (1981). See also North Dakota v. United States, ____ U.S. ____, 103 S. Ct. 1095, 1102 (1983); American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982). For our purposes, the key phrase in section 131(j) is "under this part," an unambiguous reference to part B of the Energy Security Act. Hence, section 131(j)'s plain language clearly and unambiguously imposes a limitation only on financial assistance awarded under part B of title I of the Energy Security Act.

A review of the legislative history reveals no statement of legislative intention that would defeat the plain meaning of section 131(j). As Congressman Dingell indicated during the floor debate on the conference report, much of what appeared in the bill reported out of conference reflects the work of the conferees; thus, there is little legislative history available to discern legislative intent. 126 Cong. Rec. 16917 (1980). Significantly, however, the conference report does indicate that "the two parts of title I are separate and independent authorities." H.R. Rep. No. 1104, 96th Cong., 2d Sess. 185 (1980) (conference report). This statement underscores the plain meaning of the statutory language.

We also agree with the Corporation's position that its adoption of the Secretary's Phase I agreement pursuant to the Supplemental Act did not alter the status of that agreement with respect to section 131(j). As noted earlier, the Supplemental Act authorized the transfer to the Corporation of projects initiated by the Secretary under part A.[3/] For purposes of our discussion here, it is significant that the Congress considered and enacted the Energy Security Act and the Supplemental Act contemporaneously. Based on the Congress' contemporaneous consideration of these Acts, it is not unreasonable to conclude that when the Congress passed the Supplemental Act on July 8, 1980, it was aware of the Energy Security Act, enacted only eight days earlier, the separate and distinct authorities of part A and part B of title I of that Act, and section 131(j)'s limitation on awards of financial assistance under part B. Indeed such a conclusion flows from the time-honored axiom of statutory construction that when the Congress passes a new statute, it acts aware of previous statutes on the same subject. Erlenbaugh v. United States, 409 U.S. 239, 244 (1972). Acting with this knowledge, the Congress did not, in either the Supplemental Act or its legislative history, amend section 131(j) or otherwise indicate that awards made to projects by the Secretary under part A should be included in calculating, pursuant to the section 131(j) limitation, the amount of financial assistance the Corporation might make available to those same projects under part B.

One might argue that section 152(a), also found in part B, indicates Congress' desire that the Corporation include awards made to projects by the Secretary under part A in calculating, for purposes of the section 131(j) limitation, the amount of financial assistance the Corporation might make available to that project under part B. In determining the amount of obligational authority available to the Corporation, section 152(a) directs that the total obligational authority be reduced by amounts reserved or obligated for projects under

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3/ The Supplemental Act conditioned project transfer upon a Presidential determination that the Corporation was fully operational and upon a majority vote of the Board of Directors of the Corporation. President Reagan so determined in Executive Order No. 12346. 3 C.F.R. § 132 (1983).

the Defense Production Act, that is, part A of title I of the Energy Security Act, and obligated under the Federal Nonnuclear Energy Research and Development Act of 1974. Hence, when the Corporation adopts a project awarded financial assistance under part A and becomes responsible for administering that financial assistance, consistent application of sections 131(j)(1) and 152(a) of part B would require that the maximum amount of financial assistance the Corporation can make available to the adopted part A project under part B also be reduced by the amount of financial assistance awarded to that project under part A.

We cannot accept this argument. If the Congress had intended that awards made to projects under part A limit the amount that could be awarded under part B, there would have been some positive sign to that effect, if not in the Energy Security Act, then in the Supplemental Act. We have found no such indication. To so read section 152(a) is, in our opinion, tenuous.[4/] Moreover, such a construction of section 152(a) ignores the plain language of section 131(j) as underscored by the conference report. The only tie between sections 152(a) and 131(j) is that section 131(j) imposes a limitation of 15 per centum of the total obligational authority authorized by section 152(a). We have found no indication in the Energy Security Act or its legislative history that section 152(a) was intended to limit or modify section 131(j)(1)'s plain meaning.

One might also argue that our construction of section 131(j) would result in less projects being funded than the Congress intended. In floor debates on the conference report, Congressman Gore stated that at least seven projects would be assisted by the $20 billion authorized the Corporation. 126 Cong. Rec. 16922 (1980). Our review of the Energy Security Act's legislative history, however, uncovered no other discussion of the number of projects which the Congress envisioned to be funded under part B. And, the Energy Security Act, while establishing production goals, did not establish any goals regarding the number of projects.

4/ We do recognize, however, that amounts awarded under part A reduce the remaining obligational authority available to the Corporation for other projects.

The language of the statute, the most reliable evidence of congressional intent, reveals that the Congress intended to impose a limitation only on financial assistance awarded under part B. And, since we have found no persuasive indication to the contrary either in the Energy Security Act, the Supplemental Act, or their respective legislative histories, we conclude that the Corporation's proposed extension of $2.7 billion in financial assistance to Union Oil would not violate section 131(j) of the Energy Security Act.

II.

Effect of Chadha

Chadha enunciated the fundamental proposition that the Congress may alter a result obtained under existing authority of law only by following the constitutional prescription for legislation. In Chadha, the Attorney General, pursuant to statutory authority, had concluded that Chadha could remain in the United States rather than be deported. The House of Representatives, in turn, sought to require Chadha's deportation by exercising a statutorily-provided right to veto the Attorney General's determination. The Supreme Court held that as the Attorney General's determination was final, having been reached in full accord with the powers and authority delegated to him, Congress could overturn his determination only by legislation conforming to the constitutional principles of bicameralism, U.S. Const., art. I, sec. 1, and presentment, U.S. Const., art. I, sec. 7, cls. 2-3. Statutory provisions purporting to authorize the Congress, in effect, to legislate without meeting these requirements were thus struck down as unconstitutional.

Section 126(d)(1) of the Energy Security Act, 42 U.S.C. § 8722(d)(1), provides that if at the expiration of the time for the submission of its comprehensive strategy under section 126(c), 42 U.S.C. § 8722(c), the Corporation determines that an adequate basis of knowledge has not yet been developed upon which to formulate and implement a comprehensive strategy, the Corporation may report the reasons for its determination to the Congress and may request such additional time to formulate the strategy as the Corporation considers necessary, up to one

year.[5]/ That request is to be transmitted to the Congress pursuant to the congressional disapproval procedure set forth in section 128, 42 U.S.C. § 8724. Pursuant to section 126(d)(2), the request is deemed approved unless it is disapproved by a resolution of either House of Congress.

The Corporation takes the tentative position that section 126(d)(2)'s one-house veto is "legislative action," as defined in Chadha, requiring action by both Houses of Congress and presentment to the President. Corporation Letter at 2. In this regard, the Chadha opinion concluded that the House of Representatives's veto of the Attorney General's determination was "legislative action" because the veto "had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, executive branch officials, and Chadha, all outside the legislative branch." 103 S. Ct. at 2784. The Court viewed the veto as no more than a substitute for legislation. Absent the veto, Congress could not have cancelled the suspension determination without enacting a bill. Moreover, the legislative veto reflects a "determination of policy" like any other legislative action. Id. at 2786.

We agree with the Corporation that section 126(d)(2)'s one-house veto is "legislative action" as defined in Chadha. A legislative veto of a Corporation request for additional time to formulate the comprehensive strategy would alter the Corporation's rights and duties vis-a-vis Congress. In effect, the one-house veto is no more than a substitute for a legislative amendment. Accordingly, we are inclined to agree with the Corporation that Chadha has the effect of invalidating section 126(d)(2).

5/ Section 126(b)(2), 42 U.S.C. § 8722(b)(2), requires the Corporation to submit its proposed comprehensive strategy to the Congress by June 30, 1984. Since submission of the Comprehensive Plan is a non-delegable duty of the Corporation's Board of Directors, 42 U.S.C. §§ 8715(a), 8722(b), the absence of a quorum noted in footnote 1 complicates the plan's timely submission.

The remaining issue is whether the section 126(d)(2) legislative veto provision would be severable from section 126(d)(1)'s provision for extending the deadline for filing the comprehensive strategy if section 126(d)(2) were found unconstitutional. In our view, section 126(d)(2) is severable.

In this regard, section 176 of Part B of the Energy Security provides as folllows:

> "If any provision of this chapter, or the application of any such provision to any person or circumstance, shall for any reason be adjudged by any court of competent jurisdiction to be invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby."

In Chadha, the Supreme Court held that a severability provision substantially similar to section 176 gives rise to a presumption "that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether the veto clause * * * was invalid." Chadha, 103 S. Ct. at 2774. Severability is further presumed to be Congress' desire where the statutory scheme remaining after severance "is fully operative as a law." Chadha, 103 S. Ct. at 2775, quoting from Champlin Refining Co. v. Corporation Comm'n., 286 U.S. at 234. In light of part B's severability provision, the absence of any legislative history suggesting that Congress did not intend section 126(d)(2)'s veto provision to be severable, and that section 126(d)(1) is "fully operative as a law" without the veto provision, we would maintain that section 126(d)(2) is severable.

In effect, severing section 126(d)(2) from section 126(d)(1)'s provision for requesting a deadline extension converts section 126(d) to a "lie and wait" provision. What remains after severance is a requirement to report the determination of a delay in submitting the comprehensive strategy; the report will be held for 30 calendar days, at which time it will become effective. 42 U.S.C. §§ 8722(d)(1), 8724(c). As a practical matter, during the waiting period, the Congress

would have the opportunity to express its disapproval either by joint resolution or bill.

We trust the foregoing discussion will be useful to you.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States