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

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RELEASED SEP 7 1976



The Honorable Ken Nechler, Chairman
Subcommittee on Energy Research,
Development and Demonstration
(Fossil Fuels)
Committee on Science and Technology
House of Representatives

Dear Mr. Chairman:

This is in response to your letter requesting our opinion on several questions relating to the legality of the reported use by the Energy Research and Development Administration (ERDA) of certain fossil energy funds for contracts by its Office of Commercialization.

Your letter states in part:

"During our Subcommittee's hearings on February 25, 1976, on the ERDA authorization bill (H.R. 12113) for FY 1977, we questioned the use by ERDA of Systems Studies subprogram funds for various contracts that were beyond the scope of (a) that subprogram as explained by ERDA in its budget presentation for FY 1976 and () the intent of the Committee as expressed in our report of June 13, 1975 (H. Rept. 94-294, p. 71). We thought that as a result of those hearings this practice would be halted. However, we now find that this is not the case. Moreover, we learn that the fossil energy program at ERDA is funding contracts initiated by ERDA's Office of Commercialization and that our Subcommittee was not informed of this until we inquired about it several days ago.

"On March 30, 1976, the Director of the Office of Commercialization provided to our Subcommittee the enclosed table entitled 'Synthetic Fuels Contract Assistance' and summary descriptions of each study. These descriptions clearly indicate that the studies are for the purpose of carrying out the Synthetic Fuel Commercial Demonstration Program which is still unauthorized by Congress. Indeed, legislation to authorize the program was defeated by the House of Representatives last December.

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"On March 30, the Director of the above office expressly stated:

"It should be clear that these additional studies which ERDA is undertaking are not aimed at the question of whether or not the Federal Government should initiate a synthetic fuels commercial demonstration program, but rather how, in detail, such a program should be implemented.

"According to the enclosed table, these studies will cost over \$500,000.

"On April 26, 1976, ERDA provided to our Subcommittee the enclosed table showing the same contract amounts and contractors but entitled 'Contracts of Mutual Interest to the Office of Commercialization and Other ERDA Offices.' This new heading is obviously not in accord with the ERDA comments of March 30,

"Most important, this new table shows that five fossil energy subprograms (Coal Conversion and Utilization, Fossil Energy Research, MHD, Demonstration Plants, and Oil, Gas and Shale Technology) are funding all but \$80,000 of these contracts. The Assistant Administrator for Environment and Safety is providing the \$80,000. Of the total, nearly \$200,000 comes from the Systems Studies subprogram; \$175,000 from Coal Conversion; and \$24,000 from the MHD subprogram."

You express the view that the contracts referred to above represent a "reprogramming" of ERDA funds subject to section 305 of Pub. L. No. 94-187, infra, and request us to determine why ERDA did not comply with the section 305 reprogramming procedures and the effect of such noncompliance. You also question whether ERDA has authority to establish and fund its Office of Commercialization.

For the reasons set out below, we cannot agree that ERDA has violated section 305 of Pub. L. No. 94-187 since it appears that the instant contracts do not, in fact, represent a reprogramming of funds within the application of section 305. With reference to your second question, it is our opinion that there is legal authority for establishment of an Office of Commercialization within ERDA and for the use of appropriated funds for the expenses of this Office.

Pub. L. No. 94-187 (December 31, 1975), 89 Stat. 1063, authorized ERDA appropriations for fiscal year 1976, and for the period from July 1, 1976, through September 30, 1976. Regarding reprogramming authority relating to nonnuclear energy development, section 305 thereof, 89 Stat. 1073, states as follows:

"* * * Except as provided in part C of this title --

"(1) no amount appropriated pursuant to this Act may be used for any nonnuclear program in excess of the amount actually authorized for that particular program by this Act,

"(2) no amount appropriated pursuant to this Act may be used for any nonnuclear program which has not been presented to, or requested of, the Congress,

unless (A) a period of thirty calendar days (not including any day in which either House of Congress is not in session because of adjournment of more than three calendar days to a day certain) has passed after the receipt by the Committee on Science and Technology of the House of Representatives and the Committee on Interior and Insular Affairs of the Senate of notice given by the Administrator containing a full and complete statement of the action proposed to be taken and the facts and circumstances relied upon in support of such proposed action, or (B) each such committee before the expiration of such period has transmitted to the Administrator written notice to the effect that such committee has no objection to the proposed action: Provided, That the following categories may not, as a result of reprogramming, be decreased by more than 10 per centum of the sums appropriated pursuant to this Act for such categories: Coal, petroleum and natural gas, oil shale, solar, geothermal, and conservation."

Part C of the Act deals with the use of operating expenses for fossil energy purposes for acquisition, construction, or work on certain physical facilities.

The term "reprogramming" customarily refers to the practice on the part of many Federal agencies of applying appropriations within a particular account to purposes, or in amounts, other than those justified in the budget submission or otherwise indicated to the Congress in connection with the enactment of appropriation legislation. The appropriations committees of the Congress, and in some cases authorizing committees as well, have, over the years, imposed requirements for notice and/or approval of reprogrammings. While these requirements do not generally derive from statute, section 305 of Pub. L. No. 94-187, supra, specifically provides in relevant part that no amount appropriated pursuant to this Act may be used for any nonnuclear program which has not been presented to, or requested of the Congress, unless the specified procedures are followed. Accordingly, these reprogramming procedures are legally binding, and ERDA appropriations are not available for expenditure in a manner inconsistent with section 305.

The question to be resolved is, therefore, whether the contracts here involved in fact represent a reprogramming subject to section 305. In this regard, we have been furnished with a copy of the Act of 1971, latter version from H. R. 13000, which provides for the establishment of a synthetic fuels program which empowers the Assistant Administrator to allocate funds for the fossil energy program and funds authorized for the environment and safety program for the subject contracts to be expended for these programs and, therefore, does not constitute a section 305 reprogramming action.

The Assistant Administrator points out that the commercialization of synthetic fuels has a potentially large impact on the manner in which fossil energy research and development is carried out, and that ultimate commercialization is the goal of fossil energy development. He indicates that similar studies would have been conducted by his Office of Fossil Energy for an assessment of commercialization strategies in relation to fossil energy even if there were no Office of Commercialization. The information to be developed under these contracts is considered necessary to provide insights into the types of institutional, regulatory, technical or environmental problems which will be faced by the more advanced technologies being developed for fossil energy programs. He also indicates that while the services were primarily developed by his Office and the Office of Commercialization, and the latter Office will benefit from them, this "does not alter the basic thrust of these efforts in support of our fossil energy development activities." The Assistant Administrator also indicates that the programmatic environmental statement contract is within the scope of the environment and safety program.

Section 101 of the Pub. L. No. 94-187 authorizes appropriations for the operating expenses of various programs, including fossil energy development, which in turn includes subprograms such as coal liquefaction, high btu gasification (coal), etc. These fossil energy subprograms apparently have been grouped by ERDA into six functional categories: Coal Conversion and Utilization; Fossil Energy Research; Oil, Gas and Shale Technology; Demonstration Plants; Magnetohydrodynamics; and Systems Studies.

The 13 contracts in question apparently relate to various aspects of synthetic fuels commercialization. The objectives of the contracts include the preparation of program regulations, criteria for award of financial incentives, risk and incentive analysis, preparation of a final environmental impact statement, and the international involvement and cooperation potential of a synthetic fuels commercialization program. Also included in the contracts are studies pertaining to the distribution costs of industrial fuel, gas, etc. The total cost of the contracts is, according to ERDA, \$539,850. This amount includes an \$80,000 environmental impact statement contract which is attributed to environment and safety funds; the other contracts are funded from one or more of the six categories of fossil energy activities referred to above.

The use of funds authorized to be appropriated for the fossil energy development and environmental and safety programs to finance the contracts in question would not constitute reprogramming in the absence of evidence that the studies undertaken are not within the scope of the programs to be charged.

Your letter refers to the defeat of legislation which would authorize a synthetic fuels commercial demonstration program. A Senate amendment to H.R. 3474, the bill enacted as Pub. L. No. 94-137, would have included an authorization of loan guarantees for up to 75% of the cost of the construction and the operation of commercial-sized demonstration plants to convert coal and oil shale into synthetic fuels and to generate power and heat in commercial quantities, utilizing as energy sources direct solar, wind, ocean thermal gradient, bioconversion, or geothermal resources. It proposed loan guarantees aggregating \$6 billion for this new program. This provision was not included in the bill ultimately enacted. While the studies undertaken by the instant contracts concern various aspects of synthetic fuels commercialization, and may well form the basis for a future program involving loan guarantees, the Assistant Administrator for Fossil Energy indicates that the studies are related to, and are of concern and value to the currently authorized fossil energy development program and the environment and safety program.

As explained in more detail, infra, section 103 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5813, states that it is the responsibility of the Administrator of ERDA to encourage and conduct research and development, including the demonstration of commercial feasibility and practical applications of the use of energy from fossil sources. We understand that various forms of fossil energy, particularly coal, are the main potential sources of synthetic fuels. Therefore, it would appear that studies relating to the commercialization of synthetic fuels would be of substantial interest to the fossil energy development program. While they would be of benefit to the development of other forms of energy, such as solar energy or geothermal energy (Office of Commercialization activities, as we understand them, being agency-wide in scope), it would appear that the primary concern would be with fossil sources of synthetic fuels.

In view of the foregoing, it appears that the instant contracts represent a use of fossil energy, and environment and safety, program funds appropriated pursuant to Pub. L. No. 94-187 in a manner consistent with the original authorizations for these programs under that Act. Accordingly, this use of funds does not, in our opinion, constitute a reprogramming action subject to the requirements of section 305 of Pub. L. No. 94-137.

We now consider your second question regarding ERDA's Office of Commercialization.

ERDA was created by the Energy Reorganization Act of 1974, Pub. L. No. 93-433 (October 11, 1974), 82 Stat. 1233, 42 U.S.C. § 5801 et seq. (Supp. IV, 1974). Section 103 of the Act, 42 U.S.C. § 5813, provides in pertinent part as follows:

"The responsibilities of the Administrator shall include, but not be limited to--

* * * * *

"(2) encouraging and conducting research and development, including the acquisition and commercial development and practical applications of the extraction, conversion, storage, transmission, and utilization phases related to the development and use of energy from fossil, nuclear, solar, geothermal, and other energy sources * * *." (Emphasis added.)

Section 107(a) of the Act, 42 U.S.C. § 5817(a), states in pertinent part as follows:

"The Administrator is authorized to exercise his powers in such manner as to insure the continued conduct of research and development and related activities in areas or fields deemed by the Administrator to be pertinent to the acquisition of an expanded fund of scientific, technical, and practical knowledge in energy matters. To this end, the Administrator is authorized to make arrangements (including contracts, agreements, and loans) for the conduct of research and development activities with private or public institutions or persons, including participation in joint or cooperative projects of a research, developmental, or experimental nature; to make payments * * * and generally to take such steps as he may deem necessary or appropriate to perform functions now or hereafter vested in him. * * *"

Section 105(d) of the Act, 42 U.S.C. § 5815(d), empowers the Administrator to organize ERDA as he may deem necessary or appropriate, except in certain circumstances not here relevant. Also, section 106(a) of the Act, 42 U.S.C. § 5816(a), authorizes the Administrator to select, appoint, and prescribe the functions of such officers and employees as are necessary to perform the functions vested in him.

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The Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93-517 (December 31, 1974), 68 Stat. 1878, 42 U.S.C. §§ 5901 et seq. (Supp. IV, 1974), provides in section 4, 42 U.S.C. § 5903, that the Administrator of ERDA shall, inter alia:

"(b) formulate and carry out a comprehensive Federal nonnuclear energy research, development, and demonstration program which will unconditionally advance the policies established by this Act and other relevant legislation establishing programs in specific energy technologies;

"(c) utilize the funds authorized pursuant to this Act to advance energy research and development by initiating and maintaining, through fund transfers, grants, or contracts, energy research, development and demonstration programs or activities utilizing the facilities, capabilities, expertise, and experience of Federal agencies, national laboratories, universities, nonprofit organizations, industrial entities, and other non-Federal entities which are appropriate to each type of research, development, and demonstration activity;

* * * * *

"(e) initiate programs to design, construct, and operate energy facilities of sufficient size to demonstrate the technical and economic feasibility of utilizing various forms of nonnuclear energy."

In section 5(b)(1) of the Act, 42 U.S.C. § 5904(b)(1), the Congress directs that research and development of nonnuclear energy sources shall be pursued so as to facilitate the commercial availability of adequate supplies of energy to all regions of the United States. The Administrator is required in section 6, 42 U.S.C. § 5905, to prepare a comprehensive plan, revised annually, to include, inter alia, programs designed to accelerate the commercial demonstration of various technologies such as producing substitutes for natural gas, petroleum products from coal, and geothermal energy. Section 7(a) of the Act, 42 U.S.C. § 5906(a), provides that in carrying out objectives of this Act, the Administrator may utilize various forms of Federal assistance and participation which may include but are not limited to the following:

"(1) joint Federal-industry experimental, demonstration, or commercial corporations consistent with the provisions of subsection (b) of this section;

"(2) contractual arrangements with non-Federal participants including corporations, consortia, universities, governmental entities and nonprofit institutions;

"(3) contracts for the construction and operation of federally owned facilities;

"(4) Federal purchases or guaranteed price of the products of demonstration plants or activities consistent with the provisions of subsection (c) of the section;

"(5) Federal loans to non-Federal entities conducting demonstrations of new technologies; and

"(6) incentives, including financial awards, to individual inventors, such incentives to be designed to encourage the participation of a large number of such inventors."

Also, section 8(a)(1), 42 U.S.C. § 5907(a)(1), authorizes the Administrator to identify opportunities to accelerate the commercial applications of new energy technologies and to provide Federal assistance for or participation in demonstrations of prototype commercial applications relating to energy resources.

The letter of January 28, 1976, addressed to you from the Administrator of ERDA (a copy of which was furnished to us) indicates that a staff was established by the Administrator to plan for and implement a loan guaranty program for commercial demonstration facilities to be authorized by section 103 of the ERDA authorization bill for fiscal year 1976. Dr. William T. McCormick, Jr., was designated Deputy Assistant Administrator for Synthetic Fuels Commercialization. On January 21, 1976, subsequent to the exclusion of the loan guaranty provision from the Act (Pub. L. No. 94-187, December 31, 1975), the Administrator established the new Staff Office of Commercialization, with Dr. McCormick, as its Director, responsible to the Administrator and the Deputy Administrator.

In establishing the office, it was stated that a primary goal of ERDA is to move its energy research and development programs into the commercial demonstration phase, where the potential for contribution to the nation's energy system could be proven. The new office would serve to focus ERDA's efforts toward this goal by examining the constraints to commercialization of selected energy technologies and analyzing the effectiveness of various incentives to overcome these constraints. Specifically, the primary functions of the office were to be as follows:

"Continuing the analyses and initiating program implementation efforts related to the synthetic fuels commercial demonstration program.

"Identifying major constraints to commercialization of other selected energy technologies and analyzing the effectiveness of various incentives (such as in the Nonnuclear Act) in overcoming these constraints.

"Examining procedures for speeding the introduction, in the near-term, of available energy technologies into the marketplace."

In view of the authorities provided both in the Energy Reorganization Act of 1974, and in the Federal Nonnuclear Energy Research and Development Act of 1974, *supra*, we are of the opinion that the activities to be performed by the Office of Commercialization as outlined above are within the scope of ERDA's authority. Consistent with the Administrator's authority regarding the organization and determination of duties of ERDA personnel provided in the Energy Reorganization Act of 1974, the establishment of the Office of Commercialization and assignment of personnel to that staff office do not appear to be legally objectionable.

We are informed that the salaries of employees of the Office of Commercialization and expenses incident to the functioning of this Office are paid as a portion of the ERDA program support activity for fiscal years 1976 and 1977.

Sincerely yours,

R.F. KEMMER
~~Agency~~ Comptroller General
of the United States

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