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The Honorable Mike McCormack, Chairman
Subcommittee on Advanced Energy Technologies
and Energy Conservation Research,
Development and Demonstration
Committee on Science and Technology
House of Representatives

Dear Mr. Chairman:

Your letter of July 14, 1977, requested our views on an apparent conflict of intent between the Electric and Hybrid Vehicle Research, Development, and Demonstration Act of 1976 and the fiscal year 1978 appropriation legislation for the Energy Research and Development Administration (ERDA). Your specific concern is the extent to which ERDA can comply with the requirements of the Electric Vehicle Act in view of committee action on the appropriation bill reducing ERDA's budget request. Since your office expressed the need for our response before the Congress reconvenes in September, we have been unable to formally solicit ERDA's comments on the issues involved.

PUBLIC LAW 94-413

The Electric and Hybrid Vehicle Research, Development, and Demonstration Act of 1976, Pub. L. No. 94-413, 90 Stat. 1260, 15 U.S.C.A. §§ 2501 et seq., was enacted over a Presidential veto on September 17, 1976. The culmination of legislative proposals introduced over the past 10 years, the Act was designed to ultimately encourage and support the substitution of electric or hybrid vehicles for conventional (gasoline- or diesel-powered) vehicles where practical and beneficial. Aggressive programs of research and development (R&D) and demonstration were seen as essential means to achieve this goal.

Section 6 of the Act establishes the R&D program. It provides that the Administrator of ERDA "shall initiate and provide for the conduct of research and development in areas related to electric and hybrid vehicles," such as energy storage, vehicle control systems, urban design and traffic management, and vehicle design.

Section 7^{15 USC 2506} establishes a detailed demonstration program with specific goals and time schedules. First, ERDA is directed to develop present state-of-the-art baseline data by September 1977

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15 U.S.C. 2505

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✓ 15 USC 2506 (2)(1)
 (section 7(c)). Next, by December 1977, ERDA must promulgate rules establishing performance standards for initial vehicle procurement (section 7(b)(1)). Not later than June 1978, ERDA is directed to contract for the purchase or lease of up to 2,500 vehicles which meet the performance standards (section 7(c)(1)). Not later than 4 years after enactment of the Act, ERDA must revise the performance standards to reflect improved state-of-the-art, and within an additional 6 months must contract for the purchase or lease of up to 5,000 advanced vehicles which meet the amended standards (sections 7(b)(3) and 7(c)(2)(A)).
 15 USC 2506 (4)(3) 15 USC 2506 (2)(2)(A)

15 USC 2509

Section 8 authorizes ERDA to finance the R&D and demonstration programs by contract, and section 10 establishes a loan guarantee program. Section 16 authorizes no-year appropriations in specific amounts for fiscal years 1977 through 1981, and provides that amounts so authorized but not appropriated may be appropriated for any succeeding fiscal year through FY 1983.
 15 USC 2514

APPROPRIATION ACTION

ERDA requested \$46.9 million for the electric and hybrid vehicle program for FY 1978. This amount was designed to fund R&D and the initial procurement of 2,500 vehicles. The program is budgeted as a line item under the activity "Conservation research and development," program "End-use conservation," and subprogram "Transportation energy conservation."

✓ 91 Stat 285
 Pub. L. No. 95-74 (July 26, 1977) appropriated \$748,127,900 to ERDA under the heading "Operating Expenses, Fossil Fuels." This amount is not further subdivided in the statute nor is there any restriction or limit placed on the amounts that are available for any particular program within the appropriation. However, the pertinent committee reports indicate that \$30 million was the total agreed by the conferees to be made available for the electric and hybrid vehicle program. The House Committee on Appropriations deleted \$16.9 million from ERDA's budget request, commenting as follows:

"The Committee recommends a reduction of \$16,900,000 for the electric and hybrid vehicle program. This reduction is made based on intended approval by the Committee of a \$20 million reprogramming request in fiscal year 1977 for implementation of the Electric and Hybrid Vehicle Act. Preliminary studies are only now underway concerning the best methods of demonstrating electric vehicles and it will take a considerable time to establish an expanded research program. The \$20 million reprogramming, plus

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\$50 million recommended for appropriations in 1978 will allow the program to proceed at the level authorized for 1978. The Committee is concerned that demonstrations be completely analyzed and planned so that maximum information can be achieved from current generation vehicles at minimum cost. The Committee urges ERDA to proceed with care in this area."

H.R. Rep. No. 95-392, 68 (1977).

The Senate Committee on Appropriations restored part of the deleted amount, with the following explanation:

"The recommendation for transportation agrees with the House allowances except for partial restoration of the \$16,900,000 reduction for electric and hybrid vehicle systems. The restoration of \$4,900,000 fully funds the research and development request but provides only limited funding for purchases of demonstration vehicles. The Committee believes the demonstration of existing technology should be restrained until its effectiveness can be fully assessed and the impact of new technologies can be evaluated."

S. Rep. No. 95-276, 44 (1977). The conference committee adopted the recommendation of the House for a \$30 million appropriation without specific discussion in the conference report. See H.R. Rep. No. 95-481, 14 (1977). As noted above, however, the appropriation was enacted in a lump-sum form on July 26, 1977.

DISCUSSION

The problem appears to be that the \$50 million approved for the electric and hybrid vehicle program by the Conferees would be sufficient to fund the FY 1978 level of activity in either the R&D program or the demonstration program, but not both. The overall question--the extent to which ERDA is bound by the language in the reports of the Appropriation Committees--has two facets: (1) Does ERDA have the legal authority to comply with Pub. L. No. 94-413X in view of the action of the Appropriation Committees, and (2) If the legal authority exists, to what extent is ERDA required to comply with the rather specific requirements of Pub. L. No. 94-413? X

At the outset, it should be noted that the requirements of the Electric and Hybrid Vehicle Act, however precise they may be, must be viewed as contingent upon the availability of appropriations.

If funds which may be used to implement the Act are not legally available, then the Act cannot be said to impose any requirement with which ERDA can comply.

Next, it is significant that ERDA's appropriation contained in Pub. L. No. 95-74^x is a lump-sum appropriation, \$748,127,000. The statute does not appropriate a specific amount for the electric and hybrid vehicle program. In such situations, we have consistently expressed the view that subdivisions of an appropriation contained in committee reports are not legally binding upon the department or agency concerned unless they are specified in the appropriation act itself. LTV Aerospace Corporation, 55 Comp. Gen. 307^h (1975); Newport News Shipbuilding and Dry Dock Company, 55 Comp. Gen. 312^h (1975). Thus:

"[I]n a strict legal sense, the total amount of a line item appropriation may be applied to any of the programs or activities for which it is available in any amount absent further restrictions provided by the appropriation act or another statute."
B-164031(3), April 16, 1975.

As we stated in the Newport News decision, this position:

"recognizes that a degree of flexibility is desirable in the financial operations of Federal departments and agencies, and that Congress may at any time readily restrict that flexibility with respect to a particular item by inserting the desired limitation in the appropriation act. The agency is by no means free to simply disregard an expression in pertinent committee reports. The realities of the annual appropriations process, as well as nonstatutory arrangements such as reprogramming, provide safeguards against abuse." 55 Comp. Gen. at 320.^x

Accordingly, the \$30 million approved by the Appropriations Committees' reports is not legally binding on ERDA, and neither are the expressions of preference for the R&D program, as stated in the reports of those Committees. By the same token, these expressions of preference do not alter the provisions of the Electric and Hybrid Vehicle Act.

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It is significant that the R&D and demonstration provisions of the Electric and Hybrid Vehicle Act (sections 6 and 7) are both mandatory rather than discretionary; that is, they use the word "shall" rather than "may" or "is authorized to." This would appear at least in part to be due to the fact that the legislation was being prepared for an Administration which was essentially opposed to it. See, e.g., 122 Cong. Rec. H10219-10220 (daily ed., September 18, 1976) (remarks of Mr. McCormack). In any event, the language must be given effect and must, in our opinion, be viewed as placing on ERDA a greater obligation than would have been the case if discretionary language had been used.

The exact amount of appropriations which will be available for the electric and hybrid vehicle program at the start of fiscal year 1978 is somewhat uncertain. ERDA's appropriation authorization for FY 1978 has not yet been enacted. Although arguably unnecessary in view of the authorizations contained in sections 16^x of Pub. L. No. 94-413, *supra*, both FY 1978 bills include authorization for the electric and hybrid vehicle program. The House bill, H.R. 6796, as reported by the Science and Technology Committee on May 16, 1977 (H.R. Rep. No. 95-349, part I), contains an authorization of \$254 million for "End-use Conservation" with no further subdivisions. The Senate bill, S. 1340, reported by the Committee on Energy and Natural Resources on May 18 (S. Rep. No. 95-179) and passed by the Senate on June 13, provides authorizations at the subprogram level, authorizing \$86 million for "Transportation Energy Conservation." Both bills reflect approval of the full \$46.9 million for the electric and hybrid vehicle program within the cited amounts.

In addition, H.R. 6796 would add a new section III(d)(1)(A)^x to the Energy Reorganization Act of 1974 as follows:

"(d)(1) Except as otherwise provided in the authorization Act involved:

"(A) no amount appropriated pursuant to any annual authorization Act may be used for any program in excess of the amount actually authorized for that particular program by such Act * * *."

While the operating expense appropriation in Pub. L. No. 95-74^x does not specifically refer to the authorizing legislation (see 45 Comp. Gen. 508 (1968)), the new section III(d)(1)(A) proposed in H.R. 6796, quoted above, would limit the availability of appropriations "for any program" to the amount "actually authorized for that particular program."

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It is not clear to us, from the research we have been able to complete within the time frame specified by your staff, whether the proposed new section III(d)(1)(A) supra, is intended to have a retroactive effect on the availability of appropriations previously enacted. It could be argued that since the FY 1978 appropriation has already been enacted, the FY 1978 funds are not "appropriated pursuant to any annual authorization Act." In that case, the entire lump sum appropriation of \$148,127,000 in Pub. L. No. 94-741s, at least theoretically, available.

Even if we consider section III(d)(1)(A) (if it is actually enacted) as modifying the amount of appropriations available for the electric and hybrid vehicle program, there would still be a theoretical ceiling of \$254 million, recommended for "End-use Conservation" in H. R. 8796, or \$86 million, recommended for "Transportation Energy Conservation" in S. 1340, depending on which one is enacted. In any event, even using the lowest of the potential ceilings, we believe there will be ample funds legally available for both the R&D and the demonstration programs for FY 1978.

We have used the words, "theoretically available," because we have not been able to ascertain in the time allowed how many other programs funded from the same lump sum appropriation also have similar statutory mandates. Assuming there are such mandatory programs, if there is no sum earmarked for the electric and hybrid vehicle program at the start of the fiscal year--i. e., neither version of the authorization act is passed or it is found not to apply to the previously enacted appropriation, it may be necessary to allocate the entire lump sum appropriation in a manner that will recognize the competing needs of this range of statutory programs. For this reason, your staff informally asked how the funds made available for the program in question should be divided between R&D and demonstrations; i. e., whether ERDA is required to give either R&D or demonstrations a priority.

In this connection, we note again that sections 6 and 7 of Pub. L. No. 94-413 both use the word "shall" and are thus, in a general sense, equally mandatory. However, section 6^x merely requires that an R&D program be conducted and that it include certain elements; it does not prescribe goals or time schedules. Section 7,^x as outlined above, not only requires the conduct of a demonstration program but requires that specified actions be taken with specified deadlines. We therefore believe that available funds should be used first to satisfy the requirements of section 7 (demonstrations), allocating the balance for the more general requirements of section 6^x (R&D). This approach seems to be the most consistent with the requirements of Pub. L. No. 94-413.^x

An additional factor to consider is the \$20 million reprogramming request mentioned in H.R. Rep. No. 95-392, *supra*. The request was made to the various committees and subcommittees on April 6, 1977. Out of the \$20 million requested, \$17.16 million was to be allocated to R&D. According to documentation furnished to us by ERDA, the request was approved in its entirety by the House Science and Technology Committee, Subcommittees on Public Works and Interior of the House Appropriations Committee, Senate Committee on Energy and Natural Resources, and the Subcommittee on Public Works of the Senate Appropriations Committee. The Interior Department Subcommittee of the Senate Appropriations Committee approved only \$16.71 million, including \$15 million for R&D.

The status of these reprogrammed funds is somewhat unclear. H. R. Rep. No. 95-392 indicated that the reprogrammed funds would in effect replace the \$16.19 million deleted from the budget request, and enable the overall electric and hybrid vehicle program to "proceed at the level authorized for 1978." The data sheet prepared by ERDA in connection with the reprogramming request, however, states "The FY 1978 budget request for the electric and hybrid vehicle program of \$46.9 million in budget authority is based upon this increased funding being available in FY 1977." In any event, substantial additional funding for R&D was made available by virtue of the reprogramming which, combined with the 1978 funds, should enable ERDA to conduct an R&D program adequate to satisfy the mandate of section 6 of the Electric Vehicle Act. If ERDA feels that additional funds are still necessary to carry out activities contemplated in the budget request, it should request supplemental appropriations.

Finally, since implementation of the program has become a matter of some controversy, we believe the Congress should carefully scrutinize progress and results in connection with the 1979 budget request. If restrictions are then considered desirable, they should be specifically included in the 1979 appropriation language.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this letter until 30 days from the date of the letter. At that time we will make copies available upon request.

Sincerely yours,

(SIGNED) ELMER B. STALE

Comptroller General
of the United States

