
UNITED STATES
GENERAL ACCOUNTING OFFICE

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

B-202463 January 25, 1984

The Honorable Quentin Burdick
Committee on Appropriations
United States Senate

Dear Senator Burdick:

This is in response to the joint request of October 3, 1983, of you and Senator Mark Andrews, for our opinion on the legality of the United States Synthetic Fuels Corporation providing price guarantees under Part B of title I of the Energy Security Act, 42 U.S.C. § 8701 et seq. (Supp. IV 1980), to Great Plains Gasification Associates for the Great Plains Coal Gasification Project in Mercer County, North Dakota. The same response is being sent to Senator Andrews. Your request stems from the inquiry submitted on September 20, 1983 (with a follow-up letter of December 1, 1983) by Congressman Tom Corcoran, Ranking Minority Member, Subcommittee on Fossil and Synthetic Fuels, House Committee on Energy and Commerce, concerning the Great Plains application for additional Federal assistance from the Corporation.

The Project will be the Nation's first commercial-sized plant producing synthetic natural gas from coal. Up to this point Federal participation in the Project has been provided by the award of loan guarantees under the auspices of the Department of Energy pursuant to the Federal Nonnuclear Energy Research and Development Act of 1974 (Nonnuclear Act), as amended, 42 U.S.C. § 5901 et seq. (1976 & Supp. IV 1980).

The loan guarantee assistance is supported with funds appropriated from the Energy Security Reserve. Project construction has been financed by a $2.02 billion loan guarantee from Energy (the loan itself was obtained from the Federal Financing Bank), coupled with a $740 million equity commitment from the sponsor. The Project sponsor has not currently nor in the past sought further assistance from Energy. Rather, now that Great Plains nears the operational stage, the sponsor has applied to the Corporation for price guarantees covering the synthetic natural gas to be sold by the Project. The extent of the requested price guarantees is based upon (1) the unused portion of the Federal Financing Bank loan and associated Energy loan guarantee and (2) the amount of guaranteed

debt repaid. Congressman Corcoran has some concerns whether the Corporation has the authority to provide this type of assistance in view of the fact that Great Plains is already the recipient of Federal aid provided by Energy.

We find that the Corporation has the authority to provide the Project with the requested financial assistance as long as such aid does not effect a transfer of responsibility from Energy to the Corporation and the Project meets the requisite requirements for assistance under the Energy Security Act, supra. If price guarantees are awarded, the Corporation must charge the dollar amount estimated to be the Corporation's maximum potential liability under such an award against its obligational ceiling at the time the financial agreement is entered into. Finally, while we conclude that it is possible for the Corporation to draft a price guarantee agreement with the Project sponsor that would be compatible with Energy's commitment to the Project sponsor, the Corporation must carefully structure its agreement to avoid any potential conflict with Energy's supervision of its loan guarantee agreement. Energy and the Corporation must retain jurisdiction over their respective agreements for financial assistance.

We emphasize that in responding to Congressman Corcoran's questions of legal authority and requirements, we do not rule on the appropriateness of the Corporation awarding price guarantees to Great Plains.

Background

Before addressing the specific questions raised by Congressman Corcoran, some background on the bifurcation of synthetic fuels responsibilities between the Department of Energy and the Synthetic Fuels Corporation would be helpful to understanding the context in which the present situation has arisen.

Prior to 1980, Federal financial assistance for demonstration of synthetic fuels projects was assigned to Energy under the general provisions of the Federal Nonnuclear Energy Research and Development Act of 1974, as amended, supra. Included among the forms of assistance Energy was generally authorized to provide were price guarantees and loan guarantees for the products of demonstration plants.

42 U.S.C. § 5906(4) (1976); 42 U.S.C. § 5906(7) (Supp. IV 1980).[1] However, these authorities required specific congressional appropriations and were not funded until November 1979, the advent of the Iranian crisis. At that time, Congress created a special fund in the Treasury of $19 billion of no-year monies called the Energy Security Reserve, to be used to stimulate domestic commercial production of alternative fuels. From this Energy Security Reserve Congress appropriated $1.5 billion for the immediate use of the Secretary of Energy for purchase commitments or price guarantees of alternative fuels under the Nonnuclear Act. In addition, Congress also appropriated from the Energy Security Reserve not to exceed $500 million for a reserve to cover any potential defaults from loan guarantees issued to finance the construction of alternative fuels production facilities under the authority of the Nonnuclear Act. The Secretary of Energy was authorized to incur loan guarantee indebtedness up to $1.5 billion on the basis of this reserve fund. Department of the Interior and Related Agencies Appropriations Act for Fiscal year 1980, Pub. L. No. 96-126, approved November 27, 1979, 93 Stat. 954, 970-971. Subsequently, Congress reallocated $500 million from the price guarantee monies to loan guarantees. Hence, the Secretary of Energy was authorized to incur loan guarantee indebtedness up to $3 billion and was provided with not to exceed $1 billion for a default reserve fund to support these loan guarantees. H.J. Res. 610 Making Continuing Appropriations for Fiscal Year 1981, Pub. L. No. 96-369, approved October 1, 1980, 94 Stat. 1351, 1358. It was from these no-year monies[2] that Energy subsequently provided assistance for commercial-sized synthetic fuels projects, including Great Plains.

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[1] Restrictions on the implementation of this authority were contained in the Nonnuclear Act itself as well as in the relevant annual appropriations acts, which will be discussed below.

[2] An additional $3.31 billion was appropriated to Energy from the Energy Security Reserve to stimulate domestic commercial production of alternative fuels under the Defense Production Act of 1950, as amended, 50 U.S.C. App. § 2061 et seq., which could also be used for purchase commitments, price guarantees, and loan guarantees. Supplemental Appropriations and Rescission Act, 1980, Pub. L. No. 96-304, approved July 8, 1980, 94 Stat. 857, 880. However, these additional funds were not involved in Energy's loan guarantee assistance to the Great Plains Project.

Congress' authorization of funds and responsibility to Energy for alternative fuel projects was meant to be an intermediate step to allow Energy "to pursue an aggressive interim program of loan and price guarantees and purchase commitments." Supplemental Appropriations and Rescission Act, 1980, Pub. L. No. 96-304, approved July 8, 1980, 94 Stat. 857, 881. At the same time these funds were appropriated to Energy, Congress was considering legislation to expedite commercial production of alternative fuels through a public corporation rather than a Federal agency. See, S. Rept. No. 824, 96th Cong., 2nd Sess. 1861 (June 19, 1980). These proposals resulted in the Energy Security Act, Pub. L. No. 96-294, approved June 30, 1980, 94 Stat. 611. Part B of title I of that Act, 42 U.S.C. § 8701 et seq. (Supp. IV 1980), created the United States Synthetic Fuels Corporation. The Corporation was tasked with fostering the "commercial" production of synthetic fuels using the resources of the Energy Security Reserve to provide assistance in the form, among others, of price guarantees, purchase agreements and loan guarantees 42 U.S.C. § 8701 et seq. (Supp. IV 1980). Most other synthetic fuels responsibilities remained with Energy. Although the Corporation was authorized to use the funds in the Energy Security Reserve, Energy still could use the appropriations referred to above for use for commercial-sized synthetic fuels projects.

It is apparent, however, that Congress intended the Corporation to take the lead role in supporting commercial-sized synthetic fuels projects. Congress specifically provided for the transfer of Energy's responsibilities and monies associated with such projects to the Corporation. This would occur after a Presidential determination that the Corporation was fully operational and provided that a majority of the Corporation Board of Directors approved on a project-by-project basis. Supplemental Appropriations and Rescission Act, 1980, supra, 94 Stat. 857, 881. In addition, Congress provided that monies appropriated to Energy from the Energy Security Reserve that had not been committed or conditionally committed by June 30, 1981, would transfer back to the Energy Security Reserve for use by the Corporation. Supplemental Appropriations and Rescission Act, 1980, supra. When it became evident that the Corporation might not be operational by June 30, 1981, the transfer date was subsequently changed to the time the President determined that the Corporation was fully operational. Supplemental Appropriations and Rescission Act, 1981, Pub. L. No. 97-12, approved June 5, 1981, 95 Stat. 14, 48. Thus Congress enacted procedures for an orderly transfer of responsibilities for commercial-sized synthetic fuels projects from Energy to the Corporation.

Nevertheless, all of the commercial-sized synthetic fuels projects funded by Energy were not transferred to the Corporation as originally contemplated. Rather, Congress subsequently directed that the transfer provision would not apply to demonstration projects (such as Great Plains) financed by Energy pursuant to the Nonnuclear Act, as amended, using appropriations from the Energy Security Reserve. Department of the Interior and Related Agencies Appropriations for Fiscal Year 1982, Pub. L. No. 97-100, approved December 23, 1981, 95 Stat. 1391, 1407. Hence, while Congress has limited Energy's role, Energy still has the general authority to grant loan guarantees and price supports (although such action requires additional specific congressional approval), and Energy is still responsible for administering the Great Plains loan guarantee award. Thus both Energy and the Corporation have some responsibilities for commercial-sized synthetic fuels projects, enabling the sponsor of the Great Plains Project to at least seek assistance from both.

Great Plains Project

Great Plains Gasification Associates and Energy entered into a loan guarantee agreement under the Nonnuclear Act in January 1982 for the Great Plains Project. Energy agreed to provide $2.02 billion of loan guarantees to cover approximately 75 percent of the Project's construction and start-up costs. The Project sponsor is responsible for contributing the remaining equity. Energy has three to one leverage authority under this loan guarantee program, and supports the loan guarantee with a default reserve of approximately $673 million. See, Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1980, supra, 93 Stat. at 970-971; H.J. Res. 610 Making Continuing Appropriations for 1981, supra, 94 Stat. at 1358.

The Federal Financing Bank is the lending institution involved.[3/] As of June 30, 1983, the Bank had lent the Project $726 million. The Project sponsor estimates that they will need to borrow a total of $1.5 billion to complete construction. Funds are available until December 1985, and the first repayment of principal is not due until January 1988.

3/ The Federal Financing Bank is an agency operating under the United States Treasury Department with authority to purchase federally guaranteed debt. 12 U.S.C. § 2281 et seq. (1982).

As part of the monitoring arrangement, the sponsor is required to submit an estimated cash flow report to Energy. The first report submitted on March 31, 1983, predicted that the Project will experience operating losses for the first 8 years of production. Production is scheduled to begin during August 1984; the in-service date is December 1984. The pessimistic outlook was based on projections of continued low prices for oil and natural gas. The Project sponsor indicated that because of the unexpected low prices, they will be unable to recoup their contributed equity within the first 10 years of operation. The sponsor asserts that this anticipated unprofitability might cause them to terminate their participation in the Project.

However, the sponsor has reserved its right to do so while exploring the possibility of restructuring its financial support package. See, "Economics of the Great Plains Coal Gasification Project," GAO-RCED-83-210, August 24, 1983; and "Status of the Great Plains Coal Gasification Project--Summer 1983," GAO-RCED-83-212, September 20, 1983. In the event of abandonment, Energy would have the right to take over, complete, and operate the Great Plains facility. 42 U.S.C. § 5919(g)(4) (Supp. IV 1980).

To avoid termination, the sponsor applied on September 13, 1983, to the Corporation under the Energy Security Act, supra, for price guarantees "only to the extent that the loan guarantee commitment had not been used or the guaranteed debt had been repaid and the Guaranteed Price exceeded the Market Price." Application of Great Plains for Price Guarantees under the Energy Security Act (Application) p. 10, September 13, 1983. At its board meeting on October 21, 1983, the Corporation declined to consider the Project's application for price guarantees until the Project sponsors obtained congressional approval for both (1) the converting of unspent loan guarantees into price guarantees and (2) new tax credits. This, however, was implicitly overturned at the Board's December 1, 1983, meeting, when the Board approved a new competitive solicitation for coal gasification that seemed to be targeted to the Great Plains Project.

Specific Questions

With this information as background, we now turn to the specific questions posed. In so doing, we note that we have not obtained the formal views of the Corporation, Energy or the Project sponsor on these issues.

1. To what extent would the grant of assistance by the Corporation to the Great Plains Project result in a transfer of all or "part of the program" authorized by the Nonnuclear Act?

This question is asked in the context of (1) GAO's legal opinion B-202463, March 24, 1981, to the Chairman, House Committee on Science and Technology; (2) the proscription in Pub. L. No. 97-100, supra, against Energy's transferring to the Corporation demonstration projects for which Energy provided financial assistance pursuant to the Nonnuclear Act from the Energy Security Reserve; and (3) the restriction on interagency transfer of Energy's responsibilities for loan guarantees under subsection 19(q) of the Nonnuclear Act, 42 U.S.C. § 5919(q) (Supp. IV 1980).

Prior GAO Opinion

In GAO opinion B-202463, March 24, 1981, to the Chairman, House Committee on Science and Technology, we stated that Energy must have authority to transfer its responsibilities, and the Corporation must have authority to assume transferred responsibilities associated with synthetic fuels demonstration projects before a transfer can be legally made. We also stated that, in general, Energy does have authority to assign to other executive agencies, with their consent, specific programs or projects in energy research and development as appropriate, including the transfer of related Energy funds. However, we concluded that the status and relationship of the Corporation to the Federal Government required that the transfer of Energy synthetic fuels commercial demonstration projects to the Corporation be accomplished by legislation, because the Corporation lacked authority to assume the transferred responsibilities.

Nevertheless, we also concluded that the major transition issues had been addressed and guidelines statutorily established for transferring to the Corporation projects receiving financial assistance from Energy pursuant to the Nonnuclear Act out of appropriations from the Energy Security Reserve. Great Plains would have fallen into this category. Our opinion, dated March 24, 1981, was based upon the transfer language contained in the Supplemental Appropriations and Rescission Act, 1980, supra, 94 Stat. at 881, which had become law on July 8, 1980. However, subsequent to our opinion, the proscription contained in the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1982, Pub. L. No. 97-100, 95 Stat. 1391, 1407, became law on

December 23, 1981, rendering the language in the Supplemental Appropriations and Rescission Act, 1980, supra, inapplicable to that category of projects. Consequently, our opinion today with respect to that category of projects would be different.

Therefore, if approval of the Great Plains' application to the Corporation for price guarantees would constitute a transfer of Energy responsibilities to the Corporation, it would be without legal authority in the absence of other enabling legislation. However, as discussed more fully below, we do not find that it would constitute a transfer if the Corporation provides price supports under its own independent statutory authority without assuming any of Energy's responsibilities under Energy's financial assistance agreement with Great Plains.

Proscription of Pub. L. No. 97-100

In Congressman Corcoran's letter of December 1, 1983, he states that Pub. L. No. 97-100 supra, specifically bars the transfer to the Corporation of any Nonnuclear Act project like Great Plains. Consequently, he finds it difficult to understand how the Corporation legally may provide financial assistance to Great Plains. It is the Congressman's understanding that such assistance would violate the directives of Congress that Great Plains remain under Energy's jurisdiction. In addition, he argues that projects funded under the Nonnuclear Act should receive price supports only when previously authorized by enactment of specific legislation, citing 42 U.S.C. § 5906(c)(6). Therefore he concludes that provision of price supports to Great Plains would violate that intent. In your letter of October 3, 1983, you argue that the proposed assistance by the Corporation would not constitute a transfer.

Public Law 97-100, supra, proscribes the transfer from Energy to the Corporation of responsibility for administration of financial assistance previously provided under the Nonnuclear Act, supra, to projects like Great Plains. However, the providing of additional financial assistance to Great Plains by the Corporation would not constitute a transfer of the portion of the project funded under the Nonnuclear Act. In other words, administration of the loan guarantees awarded under Energy's authority will continue to be carried out by Energy whether or not additional assistance in the form of price supports is provided by the Corporation.

The relevant portion of Pub. L. No. 97-100 states:

> "The provisions in the next to last paragraph under this head [Department of Energy, Alternative Fuels Production] in the Supplemental Appropriations and Rescission Act, 1980 (Public Law 96-304), regarding transfer of projects to the Synthetic Fuel Corporation from the Department of Energy shall not apply to any demonstration projects authorized pursuant to the Federal Nonnuclear Energy Research and Development Act, as amended (Public Law 93-577)." Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1982, Pub. L. No. 97-100, approved December 23, 1981, 95 Stat. 1391, 1407.

The legislative history of the provision indicates that it was specifically targeted at the Great Plains Project. The Senate Committee on Appropriations reported:

> "The Committee has recommended bill language which clarifies that the transfer provisions * * * shall not apply to demonstration projects authorized by Public Law 93-577, such as the Great Plains Coal Gasification Project." S. Rep. No. 166, 97th Cong., 1st Sess. 61 (1981). (Emphasis added.)

And the Conference report indicated:

> "The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate which provides that the Great Plains Gasification Project remain under the jurisdiction of the Department of Energy and not be transferred to the Synthetic Fuels Corporation." H.R. Rep. No. 315, 97th Cong., 1st Sess. 25 (1981). (Emphasis added.)

The effect of Pub. L. No. 97-100, supra, was to restore the status of Great Plains to what it was before the passage of the Supplemental Appropriations and Rescission Act, 1980, Pub. L. No. 96-304, approved July 8, 1980, 94 Stat. 857, 881. To understand what Congress prevented by enacting this portion of Pub. L. No. 97-100, one must, therefore, look to the relevant language of the Supplemental Appropriations and Rescission Act, 1980, supra, that had been rendered inapplicable to Great Plains. That language states:

> "Upon the establishment of a 'United States Synthetic Fuels Corporation' (the Corporation) projects or actions initiated by the Department of Energy with appropriations under this head [Department of Energy, Alternative Fuels Production] shall transfer to the Corporation upon a Presidential determination that the Corporation is fully operational and upon a majority vote of the Board of Directors of the Corporation, except that funds obligated for feasibility studies, cooperative agreements, program management, and projects which do not meet the definitions of eligibility for funding as synthetic fuels projects in the Corporation shall remain with the Department of Energy: Provided, That (1) projects meeting the eligibility criteria for funding by the Corporation for which funding has been obligated or committed by the Department of Energy may be adopted by the Corporation as if they had been entered into by the Corporation (for the purposes of such transfers only, the Corporation shall adopt the terms of such projects, established by the Department of Energy, using the authorities of the Department of Energy regardless of whether the Corporation would otherwise have authority to do so); and (2) accepted proposals for loan guarantees, price supports, and/or purchase commitments for which financial assistance is not provided by the Department of Energy shall be considered as responses to a solicitation of the Corporation to the extent they meet the eligibility criteria for funding by the Corporation.
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> "Unexpended balances of funds obligated for projects shall transfer to the Corporation to the extent such projects and activities are transferred to the Corporation as provided herein."

Under this provision, the transfer of responsibility for a given project would involve a role substitution, where the Corporation would assume Energy's total responsibilities with respect to funding Energy had provided to projects from the Energy Security Reserve. The Corporation would adopt all terms of the agreements, including those that on its own authority the Corporation would not be able to make. The substitution would also include transferring the balance of

unexpended funds obligated for financial assistance provided to the project.

Enactment of Pub. L. No. 97-100, supra, prevented the implementation of these transfer provisions of the Supplemental Appropriations and Rescission Act, 1980, with respect to Great Plains. Under the analysis in GAO opinion B-202463, March 24, 1981, the Corporation was consequently barred from accepting any of Energy's responsibilities with respect to the financial assistance Energy had provided Great Plains in the absence of legislation providing such authority.

However, enactment of Pub. L. No. 97-100, supra, did not enjoin the implementation of any other statutes. In particular, it did not affect the Corporation's own authorities under the Energy Security Act, supra. The Corporation is authorized under the Energy Security Act to enter into price guarantee agreements. 42 U.S.C. § 8734 (Supp. IV 1980). This authority of the Corporation is completely independent of Energy's price and loan guarantee authority under the Nonnuclear Act. In addition, the Corporation does not require further specific authorization or further appropriations from the Congress to exercise its price guarantee authority.

Moreover, the Energy Security Act contemplates that there may be instances where an applicant for Corporation financial assistance is already or will be receiving assistance from other governmental entities. In a situation like Great Plains, which has already received substantial loan guarantees from Energy, the Corporation in evaluating the sponsor's need for price guarantees is required to take into account financial assistance that has been or will be provided by other Federal or State sources. 42 U.S.C. § 8731(t) (Supp. IV 1980). Other provisions of the Energy Security Act also provide guidance to the Corporation in considering the special circumstances of the Great Plains application, such as the criteria for award of a combination of two or more forms of financial assistance for a single synthetic fuels project. 42 U.S.C. § 8731(o) (Supp. IV 1980). But the important thing to note here is that the Corporation can independently provide assistance under the Energy Security Act to a project also assisted by Energy under the Nonnuclear Act without there being a transfer involved.

Similarly, no provision of the Nonnuclear Act prohibits a project from receiving funding from other Federal sources. In fact, Energy's regulations implementing its loan guarantee program under the Nonnuclear Act, provided in part:

> "Nothing in this regulation shall be interpreted to deny or limit the borrower's right to seek and obtain other Federal financial assistance." 10 C.F.R. § 796..7 (1982).

Hence, we see no legislative constraints against a project receiving financial assistance from two separate entities as long as the awards are independent and provided under each organization's statutory authority. Therefore, the Great Plains sponsor may seek additional assistance from the Corporation.

It appears that the project sponsor is seeking the price supports from the Corporation rather than Energy because the Corporation has both the authority and funding to grant such assistance without further congressional approval. At present, an applicant to Energy for price guarantees under the Nonnuclear Act must obtain both a specific authorization, 42 U.S.C. § 5906(c)(6) (1976), and an appropriation[4]/ before such an award can be made.

If, in fact, an award of price guarantees were made by the Corporation to Great Plains under the Energy Security Act, it would not be a violation of the Nonnuclear Act, since the Corporation is not subject to that Act. Moreover, no transfer from Energy to the Corporation will have taken place in violation of Pub. L. No. 97-100, supra, as long as the Corporation in its price guarantee agreement with the sponsors of Great Plains does not assume any of Energy's responsibilities from Energy's loan guarantee agreement with Great Plains. After reviewing the sponsor's pending application before the

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[4]/ The following language has been included in recent appropriation acts:

> "None of the funds made available to the Department of Energy under this Act shall be used to implement or finance authorized price support or loan guarantee programs unless specific provision is made for such programs in an appropriations Act."

Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1984, Pub. L. No. 98-146, approved November 2, 1983, 97 Stat. 919, 944; Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1983, Pub. L. No. 97-394, approved December 30, 1982, 96 Stat. 1966, 1987.

Corporation, we do not find that the Corporation would assume any of Energy's responsibilities from Energy's loan guarantee agreement with Great Plains. (Some of the specifics of the sponsor's application will be discussed in some detail below.) However, the Corporation should be careful that the Project does not receive unnecessary or excessive assistance as a consequence of dual funding sources.

Nonnuclear Act Restriction

Section 19 of the Nonnuclear Act is an additional basis referred to in Congressman Corcoran's letter for questioning whether an improper transfer of Energy's Nonnuclear program would take place if the Corporation provides price guarantee assistance to Great Plains.

Subsection 19(q) of the Nonnuclear Act, as amended, 42 U.S.C. § 5919(q) (Supp. IV 1980), contains the following restriction:

> "No part of the program authorized by this section shall be transferred to any other agency or authority, except pursuant to Act of Congress enacted after February 25, 1978."

The program authorized by section 19 of the Nonnuclear Act is that of loan guarantees and commitment to make loan guarantees for alternative fuel demonstration facilities. It was pursuant to this authority that Energy provided the loan guarantee to Great Plains.

The legislative history sheds little light on the intended meaning of the word "transferred." Nevertheless, the most critically operative words are "no part of the program." Section 19 contains some 25 subsections or parts of the loan guarantee program for alternative fuel demonstration facilities that is administered by Energy. We view the restriction as limiting Energy's right to delegate or assign any segment of the loan guarantee process to another agency.

The Synthetic Fuels Corporation was not created until June 30, 1980, more than 2 years after the enactment of subsection 19(q) of the Nonnuclear Act. Section 19 was an amendment to the Nonnuclear Act and was enacted in 1978 as part of the Department of Energy Act of 1978--Civilian Applications, Pub. L. No. 95-238, approved February 25, 1978, 92 Stat. 47, 61. At that time, there was no division of the alternative fuels program among different agencies, which later gave rise to the project transfer provisions.

On the other hand, in 1978 Energy had other authority which may have caused concern. As we indicated in B-202463, supra, subsection 104(i) of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5814(i) (1976), provides:

> "In the exercise of his responsibilities * * * [the Secretary of Energy] shall utilize, with their consent, to the fullest extent he determines advisable the technical and management capabilities of other executive agencies having facilities, personnel, or other resources which can assist or advantageously be expanded to assist in carrying out such responsibilities. The [Secretary] shall consult with the head of each agency with respect to such facilities, personnel, or other resources, and may assign, with their consent, specific programs or projects in energy research and development as appropriate. In making such assignments under this subsection, the head of each such agency shall insure that--
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> > "(1) such assignments shall be in addition to and not detract from the basic mission responsibilities of the agency, and
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> > "(2) such assignments shall be carried out under such guidance as the [Secretary] deems appropriate." (Emphasis added.)

In addition, the loan guarantee program was an especially controversial program that was added to the Nonnuclear Act only after a number of years of protracted congressional discussion and debate. Consequently, greater congressional controls on the transfer of this program to other agencies may have been desired to facilitate more effective congressional oversight.

Therefore, in general, the Secretary of Energy has authority to assign to other executive agencies, with their consent, specific programs or projects in energy research and development as appropriate. We believe that subsection 19(q) was enacted as a restraint on this general authority of Energy for a particularly controversial program, and that "no part of the program" refers to the 25 subsections in section 19, which constitute segments of the loan guarantee process.

We note that at the same time it is seeking price guarantees from the Corporation, Great Plains is asking Energy to redefine the In-Service Date of the Project to the date on which the plant has produced a fixed amount of synthetic natural gas during a specific period of time. Application, Appendix A, at p. 3.[5]/ In addition, the sponsor expects that the loan guarantee provisions will be amended "as necessary to coordinate them with the requested assistance from the Corporation." Application, Appendix A, at p. 4. The loan guarantee agreement permits amendment if instituted by a "written document executed by Borrower and the Secretary." Loan Guarantee Agreement, Contract No. DE-FM01-82FZ55014, Article 8, section 8.06, p. 38.

The modifications to the loan guarantee agreement sought by the Project sponsor, however, appear to be an attempt to integrate the two forms of assistance rather than to have the proposed Corporation agreement supplant the loan guarantee award or assume any part of Energy's loan guarantee program.

If price guarantees are awarded, Energy would remain responsible for the loan guarantee program; any modifications would be primarily to avoid duplication of effort. However, Energy must retain full jurisdiction and control of the loan guarantee award. Moreover, the loan guarantee agreement must continue to meet the criteria established by the Nonnuclear Act, supra.

After reviewing the sponsor's pending application before the Corporation, we do not find that the Corporation would assume any part of Energy's role under Energy's loan guarantee program if the Corporation awards price guarantees to the Project. Consequently, we do not foresee any violation of subsection 19(q) of the Nonnuclear Act, supra.

Our conclusion with respect to question 1, therefore, is that a grant of price guarantee assistance by the Corporation to the Great Plains Project based upon the sponsor's present application would not appear to result in a transfer of all or "part of the program" authorized by the Nonnuclear Act.

5/ Our analysis and citations are based on the Public Information Copy of the Application of Great Plains for Price Guarantees under the Energy Security Act (Application) (September 13, 1983). We have been informally advised by the Corporation that it does not differ in any material respect from the actual application for purposes of the issues presented here.

2. Should it be determined that the Corporation can legally provide assistance to Great Plains while the project remains under Energy supervision, and should the Corporation determine that it is appropriate to provide price guarantee assistance, how will such assistance be treated for purposes of determining the Corporation's remaining obligational authority?

This question seems to have been prompted by the manner in which the sponsor of Great Plains has described the amount of requested assistance in its application for price guarantees from the Corporation, and a consequent concern that the sponsor is requesting a "rollover" of Nonnuclear Act loan guarantee monies provided to Great Plains by Energy into Energy Security Act price guarantees requested from the Corporation. The Project sponsor has stated in its application that it requests price guarantees "only to the extent that (a) the loan guarantee commitment [from Energy] had not been used or the guaranteed debt had been repaid and (b) the 'Market Price' was less than the 'Guaranteed Price'." Application, supra, at 10. Whatever may have been the reason for the sponsor's phrasing its assistance request in this manner, we conclude that the Corporation cannot legally provide for dollar-for-dollar convertibility of Energy's loan guarantee assistance into Corporation price guarantee assistance without impact on the Corporation's obligational ceiling. The estimated maximum potential liability of the Corporation under a price guarantee agreement with Great Plains' sponsor must be charged against the Corporation's obligational ceiling as of the date of the agreement.

As you know, section 152 of the Energy Security Act, 42 U.S.C. § 8752 (Supp. IV 1980), sets forth a ceiling on the total amount of the Corporation's obligational authority and also specifies how assistance agreements are to be valued for purposes of charges against the ceiling. Price guarantees must be valued by the Corporation as of the date of each contract, based upon the Corporation's estimate of its maximum potential liability. This maximum amount of Corporation liability must be specified in dollars in the contract. 42 U.S.C. § 8731(k)(1) (Supp. IV 1980). Thus while a project sponsor may describe the amount of requested aid however it chooses, the Corporation must convert this amount into dollars. The maximum amount of Corporation liability under the Great Plains application would appear to us to be equivalent to the total dollar amount of loan guarantee assistance

provided to the Project by Energy, whether or not used, or $2.02 billion. This in the first instance, however, would be a matter for Corporation determination, and would be the amount to be charged against the Corporation's obligational ceiling.

It would be impossible to sequentially convert Energy's loan guarantee award to Great Plains into an equivalent price guarantee commitment dollar-for-dollar without an impact on the Corporation's obligational ceiling. Energy had and used in its Great Plains award three to one leverage authority under its Nonnuclear loan guarantee program. See, Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1980, supra, 93 Stat. at 970-971; H.J. Res. 610 Making Continuing Appropriations for Fiscal Year 1981, supra, 94 Stat. at 1358. Therefore, while Energy awarded $2.02 billion in loan guarantees to Great Plains, only one-third of that amount is in the default reserve. Whether any portion of Energy's Great Plains default reserve may eventually be returned to the Energy Security Reserve will be based upon the provisions under which the monies were appropriated in the two statutes cited immediately above. In any event, if these monies were returned to the Energy Security Reserve, they would not be earmarked in any way for assistance to Great Plains. The impact on the Corporation's obligational ceiling of Energy's loan guarantee assistance to Great Plains would continue to be governed by subsection 152(a)(2)(B) of the Energy Security Act, 42 U.S.C. § 8752(a)(2)(B) (Supp. IV 1980).

Accordingly, if the Corporation determines that it is appropriate to award price guarantees to the Great Plains Project, it must charge the dollar amount estimated to be its maximum potential liability under such an award against its obligational ceiling at the time of the award of the assistance.

3. What provisions in the financial agreement between the Department of Energy and Great Plains Associates are or may be incompatible with the terms of the assistance sought from the Corporation?

If both Energy and the Corporation provide assistance to the Great Plains Project, there are some potential problems. However, since the specifics of any possible Corporation assistance agreement have not been determined, we are only in a position to mention some areas of concern.

First, subsection 131(j)(1)(B) of the Energy Security Act, 42 U.S.C. § 8731(j)(1)(B) (Supp. IV 1980), prohibits the Corporation from providing to any one person (including such person's affiliates and subsidiaries), either directly or indirectly, an aggregate amount of financial assistance at any one time in excess of 15 percent of the Corporation's total obligational authority. Since one or more of the partners of Great Plains Associates may be involved in other projects already funded or under consideration for funding by the Corporation, the Corporation should be cognizant of each partner's share in Great Plains for purposes of this 15 percent limitation on funding for any one person.

Second, in reviewing Great Plains' application for assistance, the Corporation should consider the extent to which the obligational authority of the Corporation is already at risk for the Project. While we recognize that Energy's award to the Project under the Nonnuclear Act is separate and distinct from any assistance the Corporation may offer, the Corporation's obligational ceiling may be affected if there is a default in the loan agreement. Under subsection 152(a)(2)(B) of the Energy Security Act, 42 U.S.C. § 8752(a)(2)(B) (Supp. IV 1980), sums obligated from the Energy Security Reserve by Energy under the Nonnuclear Act (up to a maximum of $2,208,000,000) are subtracted from the Corporation's total obligational authority.

The monies that Energy has committed to the loan guarantee default reserve for the Great Plains Project have not yet been recorded as obligations. No obligation would be recorded until there is a default. However, to the extent that the loan is outstanding, a portion of the Corporation's obligational authority remains at risk. In view of this potential charge against the Corporation's obligational ceiling as a consequence of financial assistance previously provided to the Great Plains Project by Energy, the Corporation, in its discretion and as a matter of policy, would be justified in applying the stricter standard of review usually reserved for applications for multiple forms of assistance. Under this standard, the Corporation would award price guarantees to Great Plains only after determining that the Project's viability is threatened without further assistance. 42 U.S.C. § 8731(o) (Supp. IV 1980).

In summary, we believe it may be possible for the Corporation to draft a price guarantee agreement with Great Plains Associates that would be compatible with Energy's loan guarantee agreement for the Project. However, the Corporation must

carefully structure its agreement to avoid conflict with Energy's supervision of its loan guarantee agreement. Since Energy and the Corporation already share technical information on assisted projects, we believe a coordinated effort might be accomplished. However, Energy and the Corporation must retain jurisdiction over their respective agreements for financial assistance, which may involve some duplication of effort. In addition, although it may be possible for the Corporation to provide the Project with price guarantees, the Corporation might well consider whether the Project's viability is threatened without further assistance.

Sincerely yours,

for Comptroller General
of the United States