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

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IN REPLY REFER TO: B-178726

April 28, 1978

The Honorable Harley O. Staggers
Chairman, Committee on Interstate and
Foreign Commerce
House of Representatives

Dear Mr. Chairman:

By letter dated March 30, 1978, you requested that we comment on H.R. 11678, 95th Congress, a bill to amend the Energy Policy and Conservation Act to establish the means for obtaining both short-range and long-range comprehensive energy policy analyses.

On Tuesday, April 11, 1978, Mr. Monte Canfield, Jr., Director of our Energy and Minerals Division, testified on H.R. 11678 before the Subcommittee on Energy and Power, House Committee on Interstate and Foreign Commerce. His prepared statement contains our views on the energy policy issues raised by the bill and includes a number of related recommended changes to the bill. This prepared statement is enclosed. We do have some additional comments, however, primarily legal in nature, not contained in his prepared statement.

The bill would create a nonprofit corporation to be known as the Institute for Long-Range Energy Analysis, which would not be an agency or establishment of the Federal Government but which would be funded through direct Federal appropriations as well as private contributions. This kind of organizational structure and financing raises some matters of concern with regard to the applicability of appropriation laws and certain other Federal statutes in the absence of provisions in the bill for guidance.

There has often been a significant policy reason for establishing an entity entitled to receive direct appropriations as a non-Federal entity. In the case of the Legal Services Corporation, one of the purposes was to assure the attorneys providing the legal assistance have full freedom to protect the best interests of their clients and would not, for example, run into the kinds of conflicts of interest which might have arisen if they were Federal employees working for a Federal agency. Apparently the sponsors of H.R. 11678 have somewhat similar concerns and are advocating a non-governmental corporation in order to create an institution that would not be subject to governmental pressures which could conflict with independent analysis. This

may also be in recognition of the provision in section 511 which requires the institute to be accessible to local and State governmental agencies as well as the Federal Government and yet to have the freedom and independence to extend its studies to matters other than those specified by such governmental units.

As we mentioned above, however, this kind of organizational structure raises some matters of concern regarding operating matters and financing. The Committee could decide to establish the Institute as a government entity to avoid these problems, but this might eliminate the degree of independence that the sponsors are seeking. In the event that the Committee chooses to establish the Institute as a non-government corporation, we have the following comments and suggestions to offer which are intended to clarify certain questions regarding the status and operations of the Institute as a non-government corporation receiving Federal funds. The Committee may wish to address these matters in the bill.

The proposed method of financing creates some uncertainty whether direct appropriations made to a non-governmental corporation are subject to the general laws and rules governing Federal appropriations or would only be subject to the restrictions and limitations contained in the particular statutes appropriating the monies, authorizing such appropriations, and establishing the corporation's organic authority. If the latter view is adopted, however, the direct appropriations could be treated much as grants to private parties. On the other hand, the funds could be subject to the same restrictions as would generally be applicable to appropriations. We would point out that many areas of corporate action could be involved.

As an example, if the general laws governing Federal appropriations were applicable and the direct appropriation were for a fiscal year, as would be authorized by subsection 518(a) of the bill, unobligated balances at the end of the fiscal year would be required to be returned to the Treasury. 31 U.S.C. § 701 (1970 and Supp. V, 1975). An additional consequence would be that the accounts for the appropriated monies would have to be segregated from those pertaining to private contributions so that one could determine whether any unobligated balances from the appropriation existed at the end of the fiscal year. It is not clear from the bill how such matters are intended to be treated. This particular example was resolved for the Legal Services Corporation in 42 U.S.C. § 2996i (Supp. V, 1975). We are not necessarily recommending this particular resolution over other possible alternatives.

In the absence of any contrary provision, the bill would permit the Institute to draw its full annual appropriation from the Treasury at the beginning of the fiscal year, thus increasing costs to the Treasury. The Institute may earn interest on the funds in excess of immediate cash

requirements while the Treasury is paying substantial interest on the public debt. The situation is compounded by the fact that the Treasury may end up paying twice, to some extent, for the Institute's appropriation. Once when the appropriation is withdrawn from the Treasury, and again when the Institute invests the funds in excess of the Institute's operating requirements in Government securities. Even less desirable, the Institute has broad enough authority to invest the funds in securities lacking the stability and security of Treasury obligations and put at some risk the U.S. investment in the corporation. The Committee may wish to consider providing that the funds for the Institute be withdrawn from the Treasury as needed for current disbursements, rather than permit a lump-sum withdrawal at the beginning of the fiscal year. This arrangement, which would lessen the interest costs to the Government, is generally required of all Federal agencies and their grantees.

It is not clear from sections 512, 514(c) and 515 of the bill whether the Institute's officers and employees are intended to be Federal employees. We recommend that the Committee clarify this matter and consider explicitly stating in the bill the laws, if any, for which the Institute's officers and employees are intended to be considered as Federal employees. Of particular concern are the Federal Tort Claims Act and the provisions of the civil service laws aside from those governing appointments in the competitive service, classification and General Schedule pay rates. See, for example, 42 U.S.C. § 2996d(e) and (f) (Supp. V, 1975), as to how these matters were handled with respect to the Legal Services Corporation.

In audits of corporations with structures similar to that of the proposed Institute, we have found weaknesses in the areas of procurement, conflict of interest, and other management operations. In particular, employees were found to hold financial interests in the industries of direct concern to the corporation, and procurement practices (such as avoidance of competitive procurements) were found to be questionable. The Committee may wish to consider addressing these matters in the bill, particularly if the employees are not Federal employees and the agency not a Federal entity. Creating the Institute as a Federal entity would solve this and all the other problems mentioned along with the myriad of other problems that might arise.

Whether or not the Institute is made a private corporation, with respect to audits to be conducted by the Comptroller General of the programs, activities, and financial operations of the Institute, we are concerned that the bill does not provide access to records of Institute contractors and grantees. We recommend that the following language be inserted in the bill as amendments to subsection 519(b).

"(b)(1) Each recipient of Institute assistance under this Act, pursuant to grants, subgrants, contracts, subcontracts,

loans or other arrangements, entered into other than by formal advertising, and which are otherwise authorized by this Act, shall keep such records as the Board of Directors of the Institute shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

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"(3) For the purpose of such audits, the Board of Directors of the Institute and the Comptroller General of the United States, or any of their duly authorized representatives, shall, until the expiration of three years after completion of the project or undertaking referred to in paragraph (1) of this subsection, have access for the purpose of audit and examination to any books, documents, papers, and records of such recipients which in the opinion of the Board or the Comptroller General may be related or pertinent to the grants, contracts, subcontracts, subgrants, loans or other arrangements referred to in paragraph (1)."

We also recommend that existing paragraphs (1) and (3) of subsection 519(b) of the bill be retained but be renumbered paragraphs (2) and (4), respectively.

Finally, with reference to the Board of Directors of the Institute, we said in our testimony that it would be preferable to have the five members of the Board all be experts in a particular field closely related to energy policy rather than advocates of a particular interest. We continue to feel that this composition would be preferable. We feel it is not appropriate to have the Comptroller General of the United States make appointments to the Board of Directors of the Institute. The General Accounting Office operates as an agency in the legislative branch to assure compliance with Federal statutes governing the expenditure of public monies appropriated by the Congress and to assist in improving the effectiveness and efficiency with which Government programs are administered. In performing these functions, the appearance as well as the fact of the absence of bias is very important to our effectiveness. The appoint-

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ment by the Comptroller General of members to the Board of Directors of the Institute might interfere with this concept of independence and objectivity which should inhere in any reviews by our Office of the activities of the Institute.

Sincerely yours,

Elmer B. Staats
Comptroller General
of the United States

Enclosure