



Department of Energy
Washington, DC 20585

December 21, 2007

Ms. Susan D. Sawtelle
Managing Associate General Counsel
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Ms. Sawtelle:

We have your letter of December 10, 2007 in which you requested advice concerning the Department's understanding of the effects of various statutes it administers regarding hypothetical transactions involving depleted uranium owned by the Department. Your letter requested a written response to 14 questions by December 31, 2007.

I regret that we are not in a position to accommodate this request. As a general matter, we believe it unwise to purport to render formal determinations about the reach of various statutory authorities for which the Department is responsible in an abstract factual setting. That is because such abstract or generalized factual predicates inherently are factually incomplete and fail to present the entirety of a contemplated transaction as would be the case were the Department proceeding with an actual proposed course of action. Any legal conclusions prompted by such hypothetical facts would risk being erroneous in the ultimate event because of the inherent incompleteness of the factual premises that would underlie such conclusions.

This prudential consideration is rendered more acute by the fact that none of the statutes about which your letter requests a written analysis involves any function vested by law in the Government Accountability Office (GAO). It is elemental that formally-rendered legal advice is to be afforded for the purpose of guiding officials in carrying out statutes they administer and that govern their activities. GAO, however, is a stranger to these legal questions because it has no legal responsibility for their administration that would require legal guidance by the Department.

In this connection, I note that a consistent element of the questions your letter has submitted is that they request the Department's "views" of these legal questions. The Department does not formulate formal "views" on legal questions regarding the statutes it administers; instead it makes determinations about such questions because that is a necessary incident of executing the law. This observation complements the prudential considerations described above.



Your letter did ask two questions regarding actions actually previously taken regarding the transaction involving the Bonneville Power Administration. Our conclusion regarding the inapplicability of the particular constraints of section 3112 of the USEC Privatization Act was based on consulting the text and legislative history of the statute, together with the text of the Atomic Energy Act, which revealed that this particular transaction did not fall within section 3112's constraints. The availability of section 161m of the Atomic Energy Act in this transaction was based on its text and the Department's longstanding understanding, again textually-based, that depleted uranium constitutes "source material" under that statute.

As your letter notes, there was conducted on November 8, 2007 a meeting with GAO representatives and senior attorneys from this office that addressed, conversationally, most of the questions your December 10 letter has propounded. In that meeting DOE attorneys provided the advice they were in a position to render to aid in your inquiry, including identification of those questions as to which the Department had not had occasion to formulate a conclusion. I have every confidence that the insights provided the GAO by this courtesy will enable it appropriately to meet any commitment it may have made to any congressional staff for GAO's views regarding these subjects.

Please accept this office's best wishes to you and to all your colleagues for this Holiday season.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric J. Fygi". The signature is fluid and cursive, with a large initial "E" and a long horizontal stroke extending to the right.

Eric J. Fygi
Deputy General Counsel