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April 20, 2007

The Honorable Peter J. Visclosky
Chairman
Subcommittee on Energy and Water Development
Committee on Appropriations
House of Representatives

The Honorable David L. Hobson
Ranking Minority Member
Subcommittee on Energy and Water Development
Committee on Appropriations
House of Representatives

Subject: *Department of Energy—Title XVII Loan Guarantee Program*

In February 2007, GAO responded to a number of questions you asked concerning the Department of Energy's (DOE) loan guarantee authority under title XVII (Incentives for Innovative Technologies) of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 1117–22 (Aug. 8, 2005) (EPACT). See GAO, *DOE: Key Steps Needed to Help Ensure the Success of the New Loan Guarantee Program for Innovative Technologies by Better Managing Its Financial Risk*, GAO-07-339R (Washington, D.C.: Feb. 28, 2007). During that engagement, you asked us to issue a separate legal opinion addressing the following related questions:

- 1) Does the loan guarantee authority in EPACT section 1702(b)(2) constitute authority for DOE to make loan guarantees notwithstanding the requirements of the Federal Credit Reform Act of 1990¹ (FCRA)? Or does section 1702(b)(2) constitute new budget authority for FCRA purposes?
- 2) Was DOE authorized to engage in activities such as issuing and publishing in the Federal Register program guidelines and a solicitation announcement inviting pre-application proposals for guaranteed loans

¹ Pub. L. No. 101-508, title XIII, subtitle B, § 13201, 104 Stat 1388, 1388–610 (Nov. 5, 1990), *codified at* 2 U.S.C. § 661c.

in advance of the enactment of appropriations to make loans under EPACT's title XVII program?²

As explained further below, we conclude as follows:

- 1) EPACT section 1702(b)(2) confers upon DOE independent authority to make loan guarantees, notwithstanding the FCRA requirements. Given our answer to the first part of this question, we did not address the second part concerning whether, in the alternative, section 1702(b)(2) constitutes new budget authority for the purposes of FCRA.
- 2) DOE engaged in preparatory activities to implement the granting of guaranteed loans under EPACT title XVII during a period when DOE was affirmatively prohibited from implementing that title by 42 U.S.C. § 7278, a statutory prohibition applicable to DOE guaranteed loan programs.³ These activities violated section 7278; the purpose statute, 31 U.S.C. § 1301(a); and the Antideficiency Act, 31 U.S.C. § 1341(a).

Consistent with our practice in rendering opinions, we contacted DOE to establish the factual record and elicit the agency's legal position on the subject matter of the

² You also asked whether EPACT section 1702(h), which authorizes DOE to collect fees for administrative expenses, appropriates those fees for use in the title XVII program. In the course of this opinion, we learned that DOE believes section 1702(h) does not appropriate those fees, and that DOE has not yet assessed any fees under it. Letter from David R. Hill, General Counsel, DOE, to Susan A. Poling, Managing Associate General Counsel, GAO, Feb. 9, 2007, at 2; DOE, *Loan Guarantees for Projects that Employ Innovative Technologies; Guidelines for Proposals Submitted in Response to the First Solicitation*, 71 Fed. Reg. 46,451, 46,452–53 (Aug. 14, 2006). Moreover, the Revised Continuing Appropriations Resolution, 2007, explicitly appropriated for DOE's use (as offsetting collections) any fees that DOE does collect under section 1702(h) during fiscal year 2007. Pub. L. No. 110-5, title II, ch. 3, § 20320(a), 121 Stat. 8, 21 (Feb. 15, 2007). For these reasons, there is no longer a need to address this question.

³ In pertinent part, section 7278 states: "None of the funds made available to the Department of Energy under . . . Energy and Water Development Appropriations Acts shall be used to implement or finance authorized . . . loan guarantee programs unless specific provision is made for such programs in an appropriation Act." This provision was originally enacted as section 301 of the Energy and Water Development Appropriations Act, 1993, Pub. L. No. 102-377, title III, 106 Stat. 1315, 1338 (Oct. 2, 1992).

request.⁴ Letter from Susan A. Poling, Managing Associate General Counsel, GAO, to David R. Hill, General Counsel, DOE, Jan. 12, 2007. In this instance, we received the views of DOE's General Counsel. Letter from David R. Hill, General Counsel, DOE, to Susan A. Poling, Managing Associate General Counsel, GAO, Feb. 9, 2007 (Hill Letter).

BACKGROUND

Congress enacted title XVII (Incentives for Innovative Technologies) as part of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 1117-22 (Aug. 8, 2005) (EPACT), codified at 22 U.S.C. §§ 16511-16514. This title directs DOE to make loan guarantees for projects that employ new or significantly improved technologies to address air pollution or anthropogenic emissions of greenhouse gases. EPACT, § 1703(a). The title identifies both categories of projects and some specific projects that are eligible for these loan guarantees. *Id.* §§ 1703(b), 1703(c). Title XVII provides, among other things, that no loan guarantee may be made unless “an appropriation for the cost”⁵ of the loan guarantee has been made, or DOE has received from the borrower and deposited into the Treasury “payment in full for the cost of the obligation.” *Id.* § 1702(b). Title XVII also authorizes DOE to “charge and collect fees for guarantees in amounts the Secretary determines are sufficient to cover applicable administrative expenses.” *Id.* § 1702(h)(1). Fees collected under this authority must be deposited into the Treasury, but “remain available until expended, subject to such other conditions as are contained in annual appropriations Acts.” *Id.* §1702(h)(2). While title XVII authorizes the appropriation of “such sums as are necessary to provide the cost of guarantees under this title,” *id.* § 1704, no funds were specifically appropriated for this purpose at the time of EPACT's enactment.

Since the enactment of title XVII, DOE has undertaken what it describes as “preparatory activities reasonably necessary for [DOE] to be in a position to make guarantees authorized by Title XVII.” Hill Letter, at 3. DOE informed us that these activities included establishing and maintaining a Web site for the program;⁶ developing policies and “guidelines” for the program and publishing them in the *Federal Register*;⁷ and issuing a solicitation announcement inviting interested parties

⁴ GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/congress.html (last visited Apr. 16, 2007).

⁵ Section 1702(b) requires an appropriation for the “cost,” which section 1701(2) defines as “the cost of a loan guarantee.” EPACT, §§ 1701(2), 1702(b).

⁶ See DOE, *Loan Guarantee Program*, available at www.lgprogram.energy.gov/index.html (last visited Apr. 16, 2007).

⁷ DOE, *Loan Guarantees for Projects That Employ Innovative Technologies; Guidelines for Proposals Submitted in Response to the First Solicitation*, 71 Fed. Reg. 46,451 (Aug. 14, 2006).

to submit “pre-applications” for title XVII guaranteed loans.⁸ See GAO-07-339R, at 13, 20. In response to its solicitation, DOE received over 100 pre-applications. *Id.* at 43.

To facilitate work on these and other activities, DOE established the Loan Guarantee Program Office. *Implementation of the Provisions of the Energy Policy Act of 2005: Hearing before the Senate Committee on Energy and Natural Resources*, 109th Cong. 50 (2006) (statement by DOE Under Secretary David K. Garman), available at www.ne.doe.gov/pdfFiles/garmanTestimony050106.pdf (last visited Apr. 16, 2007). See also GAO-07-339R, at 2. From March through October 2006, DOE staffed that office with three employees detailed from different DOE organizations. *Id.* at 16, 19, 21. Total salaries, benefits, and travel expenses for the detailed employees amounted to about \$309,000 during fiscal year 2006 and about \$38,000 from October 1 through October 31, 2006. *Id.* at 19. These amounts were paid from fiscal year 2006 and 2007 DOE appropriations for Departmental Administration⁹ and Science.¹⁰ *Id.* DOE also issued task orders to obtain private contractor support services for various tasks. *Id.* These orders cost an additional \$121,194 in fiscal year 2006, and \$34,829 in October of fiscal year 2007, which were paid from DOE’s fiscal year 2006 and 2007 appropriations for Energy Supply and Conservation¹¹ and Science.¹² *Id.* As of October 31, 2006, DOE had spent a total of about \$503,000 to prepare for the awarding of title XVII guaranteed loans. *Id.* at 16.

On October 31, 2006, DOE terminated the details of the three employees assigned to the Loan Guarantee Program Office and returned those employees to their home organizations. GAO-07-339R, at 21. However, DOE continued to perform preparatory activities. As of January 2007, DOE, using its fiscal year 2007 appropriation for

⁸ DOE, Solicitation No. DE-PS01-06LG00001, *Federal Loan Guarantees for Projects that Employ Innovative Technologies in Support of the Advanced Energy Initiative*, (Aug. 8, 2006), available at www.lgprogram.energy.gov/Solicitationfinal.pdf (last visited Apr. 16, 2007).

⁹ Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, title III, 119 Stat. 2247, 2273–74 (Nov. 19, 2005) (“For salaries and expenses of the Department of Energy necessary for departmental administration”); Pub. L. No. 110-5, §§ 101(a)(2), 20315.

¹⁰ Pub. L. No. 109-103, title III (“For Department of Energy expenses . . . necessary for science activities”); Pub. L. No. 110-5, §§ 101(a)(2), 20313.

¹¹ Pub. L. No. 109-103, title III (“For Department of Energy expenses . . . necessary for energy supply and energy conservation activities”); Pub. L. No. 110-5, §§ 101(a)(2), 20314.

¹² See note 10, *supra*.

Departmental Administration,¹³ assigned staff in its Office of General Counsel to perform various title XVII tasks, including preparing a notice of proposed rulemaking, drafting and perfecting a charter for a departmental Credit Review Board, drafting program regulations, and evaluating pre-applications for loan guarantees. *Id.* at 2, 21, 43. With the same appropriation, DOE used staff from its Office of the Chief Financial Officer to maintain the title XVII Web site. *Id.* DOE used its fiscal year 2007 Energy Supply and Conservation appropriation¹⁴ to pay for task order support services, such as responding to program inquiries. *Id.* We do not know what amounts DOE spent on these activities after October 31, 2006.

DISCUSSION

This opinion addresses two questions. We answer them below.

FCRA and Section 1702(b)(2)

First, we address whether the loan guarantee authority in EPACT section 1702(b)(2) constitutes authority for DOE to make loan guarantees notwithstanding the requirements of FCRA, or whether section 1702(b)(2) constitutes new budget authority for FCRA purposes. FCRA provides, with certain exceptions not relevant here, that notwithstanding any other provision of law, new loan guarantee commitments may be made “*only to the extent that—*

“(1) new budget authority to cover their costs is *provided in advance in an appropriations Act*;

“(2) a limitation on the use of funds otherwise available for the cost of a direct loan or loan guarantee program has been *provided in advance in an appropriations Act*; or

“(3) authority is otherwise *provided in appropriation Acts.*”

2 U.S.C. § 661c(b) (emphasis added). EPACT section 1702(b) says that no loan guarantees shall be made unless—

“(1) an appropriation for the cost has been made, *or*

“(2) the Secretary has received from the borrower a payment in full for the cost of the obligation and deposited the payment into the Treasury.”

EPACT, § 1702(b) (emphasis added). In February 2007, Congress appropriated amounts to cover the costs of loan guarantees. Pub. L. No. 110-5, §§ 20315, 20320.

¹³ See note 9, *supra*.

¹⁴ See note 11, *supra*.

At the time of your request, however, DOE did not have an appropriation for this purpose, raising the question of whether subsection (b)(2) provides DOE authority independent of FCRA and subsection (b)(1) to make loan guarantees. We think it does.

The language of section 1702(b) makes clear that Congress contemplated two possible paths for making loan guarantees under title XVII. DOE, consistent with FCRA (2 U.S.C. § 661c(b)), could issue loan guarantees pursuant to appropriations for that purpose (EPACT, § 1702(b)(1)); or DOE could issue loan guarantees if it receives payments by borrowers of the “full cost of the obligation” (EPACT, § 1702(b)(2)). To read section 1702(b) as subjecting title XVII loan guarantees to the requirements of FCRA would read subsection (b)(2) out of the law, and we cannot do that; we have to give meaning to all of the enacted language. *E.g.*, 70 Comp. Gen. 351, 354 (1991); 29 Comp. Gen. 124, 126 (1949). *See also* 2A Sutherland, *Statutory Construction*, § 46:06 at 193–94 (6th ed. 2000). Section 1702(b)(2) is clearly inconsistent with FCRA, and it is a later enacted, more specific law. It is well established that a later enacted, specific statute will typically supersede a conflicting previously enacted, general statute to the extent of the inconsistency. *E.g.*, *Smith v. Robinson*, 468 U.S. 992, 1024 (1984); B-255979, Oct. 30, 1995. For these reasons, we conclude that EPACT section 1702(b)(2) allows DOE to issue loan guarantees if the borrowers pay the “full cost of the obligation.” The alternative path clearly represents authority to make loan guarantees independent of and notwithstanding the earlier, more general FCRA requirements.

Given our answer to the first part of this question, we need not address the second part which asks whether, in the alternative, section 1702(b)(2) constitutes new budget authority for the purposes of FCRA. Suffice it to say that section 1702(b)(2) provides DOE authority to make loan guarantees independent of FCRA.

DOE’s Title XVII Activities and Statutory Restrictions

The second question to be addressed is whether DOE was authorized to engage in activities such as issuing and publishing in the Federal Register program guidelines and a solicitation announcement inviting pre-application proposals for guaranteed loans in advance of the enactment of appropriations to make loans under EPACT’s title XVII program. By law, “[n]one of the funds made available to the Department of Energy under . . . Energy and Water Development Appropriations Acts shall be used to *implement or finance* authorized . . . loan guarantee programs unless specific provision is made for such programs in an appropriation Act.” 42 U.S.C. § 7278 (emphasis added). The crux of this question is the meaning of the phrase, “implement or finance,” as used in section 7278. In the absence of indications to the contrary, Congress is deemed to use words in their common, ordinary sense. *E.g.*, *Mallard v. United States District Court for Southern District of Iowa*, 490 U.S. 296, 300–01 (1989). “One measure of the common, ordinary meaning of words is a standard dictionary.” B-303495, Jan. 4, 2005. The Merriam-Webster Dictionary defines the verb “implement” to mean, “carry out, accomplish; *especially*: to give

practical effect to and ensure of actual fulfillment by concrete measures.” *Merriam-Webster’s Collegiate Dictionary* 624 (11th ed. 2004) (emphasis in original).

We think DOE’s preparatory activities fall squarely within this definition of “implement.” In support of the title XVII loan guarantee program, DOE established and maintained a Web site, developed and published policies and “guidelines,” issued a solicitation announcement inviting pre-applications, staffed and operated a program office, prepared a notice of proposed rulemaking, drafted and perfected a charter for the Credit Review Board, drafted regulations, reviewed pre-applications for completeness, and procured task order support services. DOE spent more than \$503,000 on these preparatory activities. These activities constituted concrete measures designed to give practical effect to and ensure the actual fulfillment of the title XVII loan guarantee program (*i.e.*, awarding of loan guarantees) once appropriations were made available for that purpose. DOE acknowledged undertaking these actions in preparation for making loan guarantees. Hill Letter, at 3 (quoted above). To fund these activities, DOE used appropriations provided by Energy and Water Development Appropriation Acts for fiscal years 2006 and 2007.

DOE defends these activities by noting that none of them actually obligated the federal government to guarantee any loans. Hill Letter, at 3. DOE told us that it “understands the [section 7278] constraint to apply to ‘implement[ing]’ . . . those authorized loan guarantees by making them, . . . [not] conducting preparatory activities reasonably necessary for the Department to be in a position to make guarantees.” *Id.* Preparatory activities, DOE reasons, are not barred by this provision because they do not “obligate the federal fisc to third parties pursuant to Title XVII.” *Id.* DOE has confused implementation with financing. *Merriam-Webster* defines the verb “finance” to mean, “provide funds . . . for.” *Merriam-Webster’s Collegiate Dictionary*, at 469. *See also Black’s Law Dictionary* 662 (8th ed. 2004) (“finance, vb. To raise or provide funds”). Thus, financing something is commonly understood to mean taking actions which provide funds for that something. This, DOE did not do. Section 7272, however, prohibits not just “financing” loan guarantees, but also “implementing” loan guarantee programs.

In the past, this Office has agreed in a number of cases that when Congress assigns new duties to an agency, the agency, under certain circumstances, may use an existing appropriation to defray the expenses of carrying out the new duties. *E.g.*, B-290011, Mar. 25, 2002; 46 Comp. Gen. 604 (1967); B-211306, June 6, 1983. However, that is not the case here. Section 7278 specifically prohibits the use of any funds made available to DOE by an Energy and Water Development Appropriations Act to implement or finance a loan guarantee program unless specific provision has been made for that program in an appropriations act. In other words, as a result of section 7278, no DOE appropriations under any Energy and Water Development Appropriations Act are legally available to fund any guaranteed loan program before the requisite appropriations act provisions are made. 42 U.S.C. § 7278. *Cf., e.g.*, B-211306, June 6, 1983 (BLM could use an existing appropriation to pay expenses of a new program because the law “did not prohibit” use of the existing appropriation for those expenses). DOE’s use of appropriations enacted by Energy and Water

Development Appropriations Acts for other purposes to support the title XVII loan guarantee program violated the prohibitions of section 7278.

In addition, DOE's actions violated two fundamental appropriations laws: the so-called purpose statute and the Antideficiency Act. Under the purpose statute (31 U.S.C. § 1301(a)), appropriations "shall be applied only to the objects for which the appropriations were made." *See* B-302973, Oct. 6, 2004. Where Congress has specifically prohibited a use of appropriated funds for a particular purpose, any obligation of funds for that purpose is in excess of the amount available for that purpose. *E.g.*, B-300192, Nov. 13, 2002; 60 Comp. Gen. 440 (1981). DOE expended fiscal year 2006 Energy and Water Development Appropriations Act funds to implement title XVII despite the fact that, under section 7278, no funds were available for this purpose. This violated the purpose statute. The Antideficiency Act (31 U.S.C. § 1341(a)) prohibits making or authorizing an expenditure or obligation that exceeds or is in advance of available budget authority. *E.g.*, B-303495, Jan 4, 2005. In fiscal year 2006, DOE expended fiscal year 2006 Energy and Water Development Appropriations Act funds to implement title XVII even though it had no funds available for this purpose, and did so again using fiscal year 2007 funds. Since DOE had no funds available to implement the title XVII prior to the 2007 Continuing Resolution, those uses of fiscal year 2006 and 2007 appropriations violated the Antideficiency Act. *Cf.*, *e.g.*, B-300192, Nov. 13, 2002; B-302710, May 19, 2004.

CONCLUSIONS

This opinion addresses two questions. First, we conclude that EPACT section 1702(b)(2) confers upon DOE independent authority to make loan guarantees, notwithstanding the FCRA requirements. In view of this conclusion, we did not address the second part of your question concerning whether, in the alternative, section 1702(b)(2) constitutes new budget authority for the purposes of FCRA.

Second, we conclude that DOE engaged in activities to implement a loan guarantee program under EPACT title XVII during a period when DOE was affirmatively prohibited from implementing that title by 42 U.S.C. § 7278. These activities violated section 7278; the purpose statute, 31 U.S.C. § 1301(a); and the Antideficiency Act, 31 U.S.C. § 1341(a). DOE must report the violations of the Antideficiency Act to the Congress and the President, and submit a copy of that report to the Comptroller General under 31 U.S.C. § 1351, as amended.¹⁵ B-304335, Mar. 8, 2005.

¹⁵ Office of Management and Budget Circular No. A-11 provides guidance on the information to include in Antideficiency Act reports. Agencies must report violations found by GAO, even if they disagree with the finding. OMB advises agencies, "If the agency does not agree that a violation has occurred, the report to the President, Congress, and the Comptroller General will explain the agency's position." OMB Cir.

(continued...)

If you have any questions regarding this matter, please contact Susan A. Poling, Managing Associate General Counsel, at 202-512-2667, or Thomas H. Armstrong, Assistant General Counsel, at 202-512-8257.

A handwritten signature in black ink, appearing to read "Gary L. Keplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Keplinger
General Counsel

(...continued)

No. A-11, *Preparation, Submission, and Execution of the Budget*, § 145.8
(June 2006).

DIGESTS

1. Section 1702(b)(2) of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 1117–18 (Aug. 8, 2005), confers upon the Department of Energy independent authority to make loan guarantees, notwithstanding the requirements imposed by the Federal Credit Reform Act of 1990 (FCRA), Pub. L. No. 101-508, title XIII, subtitle B, § 13201, 104 Stat 1388, 1388–610 (Nov. 5, 1990), codified at 2 U.S.C. § 661c.

2. The Department of Energy violated 42 U.S.C. § 7278 by expending appropriated funds to implement a new loan guarantee program authorized by title XVII of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 1117–22 (Aug. 8, 2005). Section 7278 prohibits the Department from using funds made available to it under any Energy and Water Development Appropriations Act to “implement or finance” any loan guarantee program unless specific provision is made for the program in an appropriations act. At the time, there was no such provision for title XVII and the Department used funds appropriated to it for other purposes by two Energy and Water Development Appropriations Acts. These activities also violated the purpose statute, 31 U.S.C. § 1301(a), and the Antideficiency Act, 31 U.S.C. § 1341(a).