

Congress of the United States
Washington, DC 20515

June 12, 2012

The Honorable Gene L. Dodaro
Comptroller General
U.S. Government Accountability Office
441 G Street N.W.
Washington, DC 20548

Dear Comptroller General Dodaro:

We write to request that you commence an investigation into a variety of issues related to the Department of Energy's (DOE's) continued support of the United States Enrichment Corporation (USEC). We believe that this support is unlikely to result in the successful commercialization of USEC's domestic uranium enrichment technology, may have been and may continue to be undertaken in contravention of various laws, and is additionally unjustifiable using assertions of this project's importance to national security.

As you know, when Congress privatized USEC in the 1990s, the expectation was that "It will mean the elimination of the U.S. Government from the uranium enrichment business."¹ History has shown that the opposite has in fact occurred, with USEC apparently unable to avoid bankruptcy in the absence of continued government bailouts. Most recently, DOE took the extraordinary step of assuming a portion of USEC's liability in order to free up \$44 million for USEC to use to keep itself afloat, and may soon provide this near-bankrupt company with an additional \$82 million in much the same manner.

Additionally, on May 15, DOE announced that it would provide tens of thousands of metric tons of uranium worth hundreds of millions of dollars to several entities in a bid to keep USEC's Paducah facility open for another year, and in possible contravention of section 3112 (d)(2)(B) of the USEC Privatization Act which requires DOE to ensure that such transfers will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry.

These continued subsidies are particularly troubling given the company's precarious financial condition. On May 15, the company was downgraded² by Standard and Poor's to a CCC+ rating and placed on a Creditwatch with negative implications. The company's market capitalization³ is currently less than \$100 million, and the company was recently warned⁴ that it was in danger of being de-listed by the New York Stock Exchange.

¹ Statement by William Timbers, then-President of USEC, at a February 24, 1995 House Subcommittee on Energy and Power hearing entitled "Privatization of the United States Enrichment Corporation."

² <http://www.reuters.com/article/2012/05/15/idUSWNA734420120515?feedType=RSS&feedName=marketsNews&pc=43>

³ <http://finance.yahoo.com/q?s=USU>

⁴ <http://biz.yahoo.com/e/120514/usu8-k.html>

We believe that the continued subsidization of this troubled company places taxpayer funds at great risk, a view shared by the Treasury Department⁵. So that we may understand the extent of this potential exposure, we ask that your investigation include an examination of the following issues:

The assertion that USEC is needed in order to fulfill a national security need appears to be inaccurate

In DOE Secretary Chu's January 13, 2012 letter⁶ to Congress, he noted that ACP's success would "strengthen and protect America's national security interests." According to conversations DOE's staff has had with Congressional offices, the purported national security interests involved relate primarily to the ability to produce tritium for use in nuclear weapons and the requirement for the nuclear fuel used to do so to be made using domestic enrichment technology. These arguments were reiterated during two recent Congressional debates when Departmental officials provided a briefing⁷ to Members that stated that "Uranium used to support national security missions such as producing tritium for the nuclear weapon stockpile must be U.S.-origin and unobligated....An indigenous uranium enrichment capability is required to support national security and meet nuclear non-proliferation objectives."

However, this argument appears to be spurious on two grounds. There are two treaties that govern the transfer of nuclear technologies - the Euratom 123 Agreement, and the Washington Treaty. The Congressional Research Service stated in a May 21 memo⁸ there is a "substantial argument" that foreign-owned or -developed uranium enrichment technology "would not be covered by the Euratom Agreement." It also said that interpreting the Washington Treaty in a manner that precludes the production of tritium using centrifuges covered by the Treaty "could lead to what may be considered unintended consequences" and additionally could render parts of this Treaty to be redundant. A second CRS memo⁹ questions the nonproliferation benefits associated with having a domestic uranium enrichment capability and additionally references a DOE document that says "that the United States has set aside sufficient fuel for naval reactors and has "additional reserves of HEU that could be used to supplement this naval reserve if necessary."

Moreover, even if one does accept the national security arguments made by DOE officials, it appears that USEC's centrifuges themselves utilize foreign technology. A document¹⁰ prepared for DOE as part of the review of USEC's failed loan guarantee application stated that "USEC's reliance on foreign parts for ACP makes it vulnerable to a foreign supplier government that requests peaceful use commitments on the use of its parts."

⁵ <http://www.youtube.com/watch?v=G1gP0xp3DBA>

⁶ <http://markey.house.gov/document/2012/steven-chu-congress-011312>

⁷ This briefing is marked For Official Use Only and is available on request; however, these excerpts were quoted repeatedly in other public materials associated with these Congressional debates. See for example http://rsc.jordan.house.gov/UploadedFiles/LB_EW_Amdts_060112_PartII.pdf

⁸ <http://markey.house.gov/document/2012/crs-report-containing-legal-analysis-us-treaty-obligations-related-production-tritium>

⁹ <http://markey.house.gov/document/2012/crs-report-describing-potential-sources-tritium>

¹⁰ <http://www.npolicy.org/article.php?aid=1133&tid=5>

Additionally, in 2007, H.R. 4700¹¹ and H.R. 4701¹², bills to temporarily suspend duties on imports of certain structures, parts and components for USEC's Ohio centrifuge facility were introduced. The text of these bills state that these parts would consist of "sampling autoclaves, vacuum pumps, mass spectrometers" and "cold boxes, feed ovens, and feed purification systems, including their associated cooling systems, control systems, weighing systems, and cylinder handling systems", "for the construction of an isotopic separation facility in southern Ohio known as the American Centrifuge Plant (provided for in subheading 8401.20.00)." Following the introduction of these bills, the United States International Trade Commission attempted to learn from at least one of USEC's competitors whether it would be impacted by them, and sent correspondence¹³ that further described this equipment.

We request that you examine the accuracy of the Department's claims that it is legally required to utilize a domestic uranium enrichment technology for purposes of procuring nuclear fuel made using enrichment services from which to obtain our tritium needs, and additionally, whether USEC's centrifuge technology qualifies as 'domestic' using the Department's own definitions, given USEC's apparent use of foreign technology.

The Department's Recent Uranium Transfer Announcement May Violate the USEC Privatization Act and may Additionally not Include Adequate Safeguards

Section 3112 (d)(2)(B) of the USEC Privatization Act requires the Secretary of Energy to determine that a proposed sale of uranium from its stockpile will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry." DOE has historically concluded¹⁴ that "as a general matter, the introduction into the domestic market of uranium from Departmental inventories in amounts that do not exceed ten percent of the total annual fuel requirements of all licensed nuclear power plants should not have an adverse material impact on the domestic uranium industry."

On May 15, DOE announced an agreement¹⁵ between itself, USEC, TVA and Energy Northwest and detailed transfers of uranium scheduled to take place over the next twenty years. Many of the potential transfer scenarios¹⁶ analyzed by DOE in support of its finding that there would be no adverse material impact on the domestic uranium industry indicate a transfer rate that exceed its previous 10% transfer threshold and run as high as 15.5% in some years.

In addition to concerns that DOE may have decided to alter its long-standing uranium disposition policy driven by its desire to "maintain operations at the Paducah enrichment plant, thereby avoiding costs to the Department's cleanup program and keeping jobs in the local

¹¹ <http://www.congress.gov/cgi-lis/query/z?c110:H.R.4700> and http://www.usitc.gov/tariff_affairs/documents/bill_reports/110c/hr4700.pdf

¹² <http://www.congress.gov/cgi-lis/query/z?c110:H.R.4701>: and http://www.usitc.gov/tariff_affairs/documents/bill_reports/110c/hr4701.pdf

¹³ <http://markey.house.gov/document/2012/%E2%80%9Cusec%E2%80%99s-centrifuges-utilize-foreign-technology>

¹⁴ Page 19 http://www.nuclear.gov/pdfFiles/inventory_plan_unclassified.pdf

¹⁵ http://energy.gov/sites/prod/files/Paducah%20Background%20Factsheet_0.pdf

¹⁶ See Table 3.1.2 of <http://nuclear.gov/pdfFiles/ERI-2142%2012-1201%20DOE%20-%20Potential%20Market%20Impact%20CY2012-CY2033%20April%2023%202012.pdf>

community,¹⁷ we are concerned that this agreement comes at potential economic and other risk to the taxpayer.

For example, a recent presentation related to the Department's enriched uranium supply and demand through 2060 states that it has already designated 20 MTU of surplus Highly Enriched Uranium (HEU) for down-blending – a second method that could be utilized to produce tritium. This is separate and apart from the 160 MTU it has also set aside for the naval reactor fuel program, and it is our understanding that 20 MTU of HEU could supply the country's tritium needs for about 15 years. This same presentation also indicates that down-blending HEU (for example, by Nuclear Fuel Services) would cost taxpayers about \$388 million. By contrast, having USEC's Paducah facility do the work would cost anywhere from \$616 million-\$1.02 billion. Since the total US stockpile of HEU has been estimated by the International Panel on Fissile Materials at about 610 MTU as of mid-2011, and it has been estimated that blending down all the HEU that has already been declared surplus to our needs will take until 2050, it is unclear to us why the Department seems to have chosen the most expensive option it could possibly have chosen to obtain tritium.

We are additionally concerned that the DOE uranium transfer agreement itself may be flawed and unenforceable by the Department. It is our understanding that the title to each shipment of uranium will be transferred to the intended recipient upon its arrival at USEC's Paducah facility. When asked for copies of any legally enforceable documents the Department could utilize to ensure that the recipients of the uranium would adhere to the uranium transfer rates announced by DOE, DOE stated¹⁸ that "DOE analyzed the timing and rate of transfers of uranium into the market and the market impact based on its understanding of the agreements to be entered into between the various parties to the transaction. The Department is not a party to and cannot directly control implementation of the agreements between the other entities; however, we believe all parties intend to adhere to their respective agreements. DOE entered into the agreement with ENW and extended its Interagency Agreement with TVA for staged tritium production based on those assumptions, and through that structure DOE is confident that the intermediate contracts are confined to the terms of the agreement. We also have heard in the course of the negotiations that the ENW/TVA contract is consistent with the agreement reached by all parties."

Finally, we note that in the past, you have concluded¹⁹ that past DOE uranium transfers did not comply with federal fiscal law because the Department allowed USEC to use the proceeds from these uranium transfers to perform cleanup activities at its facilities instead of depositing the proceeds into the U.S. Treasury. You have additionally opined²⁰ that you "believe that DOE's current legal authority to sell its depleted uranium inventory in its current unprocessed form is doubtful and under rules of statutory construction, DOE likely lacks such authority." This latest DOE announcement involves transfers of uranium, including depleted uranium, to additional private sector recipients and for additional purposes that extend beyond cleanup activities.

¹⁷ <http://energy.gov/articles/doe-announces-transfer-depleted-uranium-advance-us-national-security-interests-extend>

¹⁸ May 30, 2012 email from DOE to Michal Freedhoff of Rep. Markey's staff

¹⁹ <http://www.gao.gov/new.items/d11846.pdf>

²⁰ <http://gao.gov/assets/100/95422.pdf>

We request that you examine 1) the accuracy and validity of the market analysis utilized by DOE to assess the potential impact of its recent uranium transfer decision on the domestic uranium industry, particularly in light of the worldwide decline in demand for nuclear fuel following the Fukushima meltdowns, 2) whether DOE's recent uranium transfer decision includes sufficient safeguards to identify and/or prevent violations of the agreement by other parties to it, and 3) the costs of (and costs compared to other available options for the production of tritium) and legal basis for the plan.

Additionally, we note that USEC's lender has required²¹ numerous conditions associated with its loan to the company regarding the amount of funds USEC can spend for various purposes. We request that you determine whether the Department has attached similar enforceable conditions to its various forms of assistance to the company to ensure that the funds are being used for their intended purposes.

The Department and USEC may be out of compliance with other statutes

Congress enacted the National Historic Preservation Act (NHPA) in 1966. The Act clearly states that it is the policy of the Federal Government to "use measures, including financial and technical assistance, to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations." The Act imposes requirements on federal agencies when taking actions affecting places included or eligible for inclusion in the National Register of Historic Places.

Section 106 of the NHPA and accompanying regulations lay out an extensive agency consultation process. As part of this process, the agency must consult with the State and tribes to determine if proposed agency actions will have adverse impacts, including but not limited to, destruction or damage to historic or cultural resources.

However, individuals that contacted the Natural Resources Committee staff have stated that no such process was properly conducted at USEC's Piketon site. These sources have said that destruction of ancient burial sites or other historically-significant sites occurred in the initial construction of the facility. Further, they are concerned that DOE has not fulfilled the requirements of the NHPA as the facility's mission and structure has been altered over the years. We ask that you examine the adequacy of the Department's historic compliance efforts with NHPA, and whether the planned actions and other changes to the scope (i.e. a shift from a commercial venture to a research, development and demonstration program), nature (i.e. the stated mission appears to have become more related to national security) and ownership (i.e. DOE is reportedly planning to purchase centrifuges and other balance of plant equipment from USEC) of the American Centrifuge Project have been accompanied by the required NHPA compliance efforts.

²¹ <http://biz.yahoo.com/e/120313/usu8-k.html>

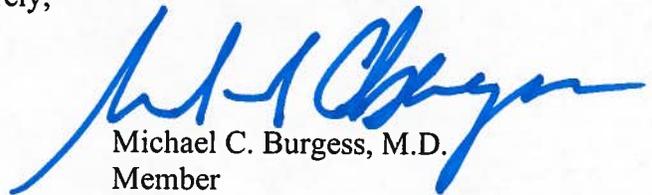
We additionally request an examination of the Department's compliance with the National Environmental Policy Act (NEPA). As you know²², NEPA requires Federal agencies to perform environmental analyses to determine the environmental consequences of their proposed actions before they act. DOE's June 2009 Environmental Assessment²³ entitled 'Disposition Of DOE Excess Depleted Uranium, Natural Uranium, And Low-Enriched Uranium' "assumes that the Proposed Action would result in the annual enrichment and/or sale of amounts of the excess inventory that, combined with other DOE sales or transfers to the market, generally would not exceed 10 percent of the total annual fuel requirements of all licensed U.S. nuclear power plants—that is, approximately 2,000 metric tons of uranium (MTU)." Please determine whether the Department updated this analysis prior to its May 15 decision to increase the amount of uranium it plans to transfer to the market, as well as whether the Department has complied with its NEPA requirements related to its other actions related to USEC.

Thank you for your consideration of this request. Please have your staff contact Dr. Michal Freedhoff (Rep. Markey, 202-225-2836) or James Decker (Rep. Burgess, 202-225-7772) if you have any questions or concerns.

Sincerely,



Edward J. Markey
Ranking Member
Natural Resources Committee



Michael C. Burgess, M.D.
Member
Energy and Commerce Committee

²² http://ceq.hss.doe.gov/current_developments/new_ceq_nepa_guidance.html

²³ http://www.ne.doe.gov/pdfFiles/20090624_excess_uranium_ea.pdf