

**THE NOMINATION OF SUSAN FAYE BEARD TO
BE INSPECTOR GENERAL AT THE DEPARTMENT
OF ENERGY**

HEARING
BEFORE THE
COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE
ONE HUNDRED FOURTEENTH CONGRESS
SECOND SESSION

MAY 12, 2016



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CONTENTS

OPENING STATEMENTS

	Page
Murkowski, Hon. Lisa, Chairman, and a U.S. Senator from Alaska	1
Cantwell, Hon. Maria, Ranking Member, and a U.S. Senator from Wash- ington	2

WITNESSES

Beard, Susan Faye, nominated to be Inspector General at the Department of Energy	4
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ALPHABETICAL LISTING AND APPENDIX MATERIAL SUBMITTED

Beard, Susan Faye:	
Opening Statement	4
Written Testimony	6
Response for the Hearing Record to Question from Senator Wyden	24
Responses to Questions for the Record	30
Cantwell, Hon. Maria:	
Opening Statement	2
Murkowski, Hon. Lisa:	
Opening Statement	1

THE NOMINATION OF SUSAN FAYE BEARD TO BE INSPECTOR GENERAL AT THE DEPART- MENT OF ENERGY

THURSDAY, MAY 12, 2016

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The Committee met, pursuant to notice, at 10:07 a.m. in Room SD-366, Dirksen Senate Office Building, Hon. Lisa Murkowski, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

The CHAIRMAN. Good morning, everyone. The Committee will come to order so that we can consider the nomination of Ms. Susan Beard to be the Inspector General (IG) of the Department of Energy.

This is an important position at a large agency, and by looking back at its origin we can understand what Congress intended with its creation.

In 1977 with energy in crisis and of note, the very year that this Committee was reconstituted with express jurisdiction over the nation's energy policy, Congress established both the Department of Energy (DOE) and the Office of the Inspector General (OIG) within it. The Department of Energy Organization Act requires the President to appoint an Inspector General to lead the OIG. I quote, "Solely on the basis of integrity and demonstrated ability and without regard to political affiliation." Notably the DOE's IG was one of the first in the government, preceding the IGs established by the Inspector General Act of 1978.

Given the significance of the Department's mission, the DOE Act specifically requires the IG as one of a few primary responsibilities to, and again I quote, to "Keep the Secretary and the Congress fully and currently informed concerning fraud and other serious abuses, problems and deficiencies relating to the administration of programs and operations administered or financed by the Department, to recommend corrective action concerning problems, abuses and deficiencies and to report on progress."

The only way that an Inspector General can discharge these important responsibilities is to be fully qualified and to maintain his or her independence from the rest of the Energy Department. Indeed, the DOE Act expressly provides that "The IG shall report to the Secretary, but shall not be under the control of or subject to

supervision by any other officer of the Department except in the case of an express delegation by the Secretary or the Deputy Secretary.”

Ever since Gregory Friedman retired last fall—after serving as Inspector General for 17 years and as a professional in that office for another 16 years before being promoted to IG—the office has been under the direction of an Acting IG.

As a starting point, I think we can all agree that DOE needs a permanent Inspector General. However, I think we can also agree that given the importance of this position, we have to be sure we have the right person before we confirm anyone to it.

So make no mistake, this is a big job. The Washington Post, when it reported on Mr. Friedman’s retirement last year, noted the many politically sensitive cases he has investigated. These include the controversial case of a scientist named Wen Ho Lee who was wrongly charged with stealing secrets about the U.S. nuclear arsenal; the Solyndra scandal that left taxpayers on the hook for \$535 million in loan guarantees; and the arrest of three activists who penetrated the Energy Department’s nuclear weapons production facility in Oak Ridge, Tennessee. Those are just a few of the reasons why I am committed to ensuring that the individual we confirm is fully independent with good judgment in difficult situations.

The candidate must also have a firm grasp of the responsibilities of an Inspector General, responsibilities not only to the Secretary but to the Congress as well. The law requires an IG to meet his or her independent obligations to Congress, and while we expect the IG to approach the work with civility, the independence of the Office of Inspector General must never be compromised.

Ms. Beard has been an attorney within the Energy Department’s Office of General Counsel for the past 27 years, clearly an admirable career. But after almost three decades with DOE it may be difficult to transition from defending the agency’s interest as an attorney to scrutinizing the Department’s actions as the Inspector General.

I am interested this morning to learn how the nominee intends to ensure the independence of the Office of Inspector General as it audits and investigates all operations of DOE including those areas that have been under her jurisdiction as Senior Agency Lawyer.

I am also keen to learn more about the nominee’s experience, qualifications and intended approach for the serious responsibilities that come with this position. Because confirmation would be tantamount to a lifetime appointment, the bar for an IG nominee is especially high.

We are here today to ask questions and raise attention to whether Ms. Beard is the right fit for this permanent position, and I look forward to this morning’s discussions.

With that, Senator Cantwell, good morning.

STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Senator CANTWELL. Thank you, Madam Chairman, for scheduling this hearing, and Ms. Beard, for your willingness to serve in this capacity as Inspector General for the Department of Energy.

The role of Inspector General, as my colleague has said, is a very important role in any agency, but an Inspector General charged with the task of this particular agency, detection of fraud and abuse in its programs and operations, is key.

The responsibility is especially great because it is, with its \$30 billion budget, responsible for maintaining and safeguarding our nuclear arsenal, preserving our nuclear secrets, cleaning up some of the most hazardous contaminated places on earth and conducting cutting edge research, development and distant edges of science and understanding. The job calls for someone with both integrity and demonstrated ability who is familiar with the Department's many programs but can still maintain independence from the agency. The Inspector General must be able to identify the Department's failings, recommend corrective actions and ensure that progress is being made to correct the problems. This is something I will touch on in my questions.

This is especially important to me and the State of Washington because we have a long history of leaking nuclear waste tanks, missed clean-up deadlines and workers being exposed to toxic vapors at Hanford. The former Inspector General has well documented many of these in past reports, but I will be looking for assurances that we will be able to hold the Department accountable and ensure that it meets its cleanup responsibilities and protects its workers. As you probably know we have a tri-party agreement, the State of Washington with DOE, on meeting these deadlines.

I believe Ms. Beard has good credentials. She knows the Department. She has spent 27 years as the attorney in the General Counsel's Office of the Department of Energy and the Department's designated ethics officer. She has been responsible for administering the Ethics in the Government Act with the Department and guarding against conflicts of interest. She has demonstrated good integrity and legal capabilities within that job.

I will also be looking forward to questioning about what vigilant watch dog role you can play in holding this very, very important agency accountable.

Thank you very much for your willingness to serve.

The CHAIRMAN. Thank you, Senator Cantwell.

Ms. Beard, the rules of the Committee—which apply to all nominees—require that they be sworn in, in connection with their testimony, so I ask that you please rise and raise your right hand.

Do you solemnly affirm that the testimony you are about to give to the Senate Committee on Energy and Natural Resources shall be the truth, the whole truth and nothing but the truth?

Ms. BEARD. I do.

The CHAIRMAN. You can go ahead and be seated.

Before you begin your statement I will ask you three questions addressed to each nominee before this Committee.

Will you be available to appear before this Committee and other Congressional committees to represent departmental positions and respond to issues of concern to the Congress?

Ms. BEARD. Yes, I will.

The CHAIRMAN. Are you aware of any personal holdings, investments or interests that could constitute a conflict or create an ap-

pearance of such of conflict should you be confirmed and assume the office to which you have been nominated by the President?

Ms. BEARD. My investments, personal holdings and other interests have been reviewed both by myself and appropriate ethics counselors within the Federal Government. I have taken appropriate action to avoid any conflicts of interest, and there are no conflicts of interests or appearances thereof to my knowledge.

The CHAIRMAN. Are you involved or do you have any assets held in blind trust?

Ms. BEARD. No, I do not.

The CHAIRMAN. Thank you, Ms. Beard.

You may now proceed with your opening comments and then members of the Committee will have an opportunity to present their questions.

Thank you and go ahead.

**STATEMENT OF SUSAN FAYE BEARD, NOMINEE TO BE
INSPECTOR GENERAL AT THE DEPARTMENT OF ENERGY**

Ms. BEARD. Chairman Murkowski, Ranking Member Cantwell, distinguished members of the Committee, thank you for the opportunity to appear before you today. It is a great privilege.

I'm honored to have been nominated by the President and to be considered by this Committee for confirmation as the Inspector General for the Department of Energy.

I would like to start by thanking, from the very bottom of my heart, my husband, Charles Klingman and our children, Adina and Jacob. Charles has been extraordinarily supportive of me throughout our 27 years of marriage. Without his unending support I would not be able to be here today and would not have had the meaningful and rewarding career I've had as a career member of the Senior Executive Service while raising two wonderful children. Our marriage has truly been a team effort which I greatly appreciate, especially in light of the fact that our youngest child has significant developmental disabilities.

I would also like to take this opportunity to thank my sister, Karen Yaghoubian. Even though Karen is only five years older than me, she really helped raised me. Our mother was diagnosed with breast cancer when I was three years old and passed away when I was 14. Without Karen's support, I would not have been able to attend college and law school. I would simply not be the person I am today.

I was born in Chicago and my family moved to Los Angeles when I was young. I received my BA from Pomona College and my law degree from UCLA. While in law school I spent a summer as a law clerk for a law firm in Anchorage. It was a wonderful experience and exposed me to the warm people of Alaska and its breathtaking surroundings.

After graduating from law school I worked for a short time in private practice for a law firm in Los Angeles. I then moved to Washington, DC to become a staff attorney with the Federal Election Commission, a position I held until I came to the Department of Energy in 1989. I also taught legal research and writing in a part time capacity at American University's Law School.

I strongly believe in the importance and value of public service. I have been a career employee, Federal employee, for almost 29 years and a member of the Senior Executive Service for more than 13 years. I've been in an attorney position for all of my Federal career. In 2008 I was honored to receive a Senior Executive Service meritorious rank award from President George W. Bush.

I have managed the Department of Energy's ethics program as the designated agency ethics official or the alternate designated agency ethics official for almost 20 years. For the last 13 years I have served the Department as the Assistant General Counsel for General Law. In this capacity I not only manage the ethics program but also provide legal advice on a wide range of matters that impact all of the department's Federal workforce and, to a much lesser extent, the Department's contractors. The legal areas under my purview include Federal personnel law, information law, and appropriations law. I also manage the largest team of attorneys within the Department's Office of General Counsel.

Over the years I've had the pleasure of working with the Office of Inspector General. The majority of this work dealt with allegations of statutory or regulatory ethics violations by current or former Federal employees. I've also worked on Federal personnel law issues, appropriations law and Freedom of Information Act matters with the Office of Inspector General.

I believe strongly in the role of the Office of Inspector General as an independent office within the Department of Energy. If I'm fortunate enough to be confirmed to this position, I commit to you that I will uphold the standard of excellence and independence.

In my role as the Department's designated agency ethics official I am responsible for advising the Department's most senior leaders to ensure compliance with the ethics requirements. I have never refrained from providing honest and unbiased legal advice. If I am confirmed, I will apply that same independence to the work of the Office of Inspector General.

I believe the Office of Inspector General must apply the law and conduct thorough investigations, audits and inspections regardless of where the matter may lead. If I am confirmed, I pledge to work with this Committee and the full Congress to execute its important oversight duties.

Madam Chairman, Ranking Member Cantwell, and members of the Committee, thank you again for the opportunity to appear before you. I look forward to answering any questions you may have.

[The prepared statement of Ms. Beard follows:]

**Statement of
Susan Beard
Nominee to be
Inspector General
U.S. Department of Energy
Before the
Senate Committee on Energy and Natural Resources
May 12, 2016**

Chairman Murkowski, Ranking Member Cantwell, distinguished Members of the Committee, thank you for the opportunity to appear before you today. It is a great privilege.

I am honored to have been nominated by the President and to be considered by this Committee for confirmation as the Inspector General for the Department of Energy.

I would like to start by thanking, from the very bottom of my heart, my husband Charles Klingman, and our children Adina and Jacob. Charles has been extraordinarily supportive of me throughout our 27 years of marriage. Without his unending support, I would not be able to be here today and have the meaningful and rewarding career I have had as a career member of the Senior Executive Service while raising two wonderful children. Our marriage has truly been a team effort which I greatly appreciate, especially in light of the fact that our youngest child has significant developmental disabilities.

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I was born in Chicago, Illinois, and my family moved to Los Angeles, California when I was young. I received my B.A. from Pomona College and my law degree from UCLA. While in law school, I spent a summer as a law clerk for a law firm in Anchorage, Alaska. It was a wonderful experience and exposed me to the warm people of Alaska and its breathtaking surroundings. After graduating from law school, I worked for a short time in private practice for a law firm in Los Angeles. I then moved to Washington, D.C. to become a staff attorney with the Federal Election Commission, a position I held until I came to the Department in 1989. I also taught legal research and writing in a part-time capacity at American University's Law School.

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I believe strongly in the role of the Office of Inspector General as an independent office within the Department of Energy. . If I am fortunate enough to be confirmed to this position, I commit to you that I will uphold this standard of excellence and independence. In my role as the Department's Designated Agency Ethics Official, I am responsible for advising the Department's most senior leaders to ensure compliance with ethics requirements. I have never refrained from providing honest and unbiased legal advice.

If I am confirmed, I will apply that same independence to the work of the Office of Inspector General. I believe the Office of Inspector General must apply the law and conduct thorough investigations, regardless of where such an investigation may lead. If I am confirmed, I pledge to work with this Committee and with the full Congress to execute its important oversight duties.

Madam Chairman, Ranking Member Cantwell, and Members of the Committee, thank you again for the opportunity to appear before you. I look forward to answering any questions you may have.

The CHAIRMAN. Thank you, Ms. Beard, and again, thank you for your willingness to take on this task.

As I mentioned in my opening comments, I feel very strongly that in order to have an effective Inspector General within the Department of Energy or any agency the independence is the priority.

As you have noted, you have been within the Department of Energy now as an attorney for the past 27 years. The concern, as I look at your background and your credentials, it is that significant experience, and I understand that, but the roles are very different from what you have been doing as effectively a counselor or an advocate within the Department of Energy to now one where you would be scrutinizing the Department that you have been working within for these past 27 years looking for areas to deal with waste, fraud and abuse.

Can you outline for me, with greater specificity, how you envision a transition from your current position as the Assistant General Counsel for General Law to now serving as the DOE IG?

Ms. BEARD. Senator, thank you very much, and thank you very much for the question.

I agree with you that independence is paramount for an Inspector General. As the Assistant General Counsel for General Law, I have no programmatic responsibilities as a program counsel for any of the Department's major programs. While I am very familiar with the Department and its activities, I serve a special role in the sense that it's mostly personnel law and the ethics program which I've had the most experience in.

And as my role as the Designated Agency Ethics Official, I had to preserve the public's trust in Federal employees. And so, for example, over the years, many—there have been a number of occasions where I have referred current and former Federal DOE employees to the Inspector General's Office for review because I was concerned they had information that may have violated criminal statute or regulation.

So even though I am a Department's—an attorney with the Department, I have this extra role of independence, and I really strongly believe in my independence as the Designated Agency Ethics Official. And I would carry that forward if I'm fortunate enough to be confirmed.

The CHAIRMAN. Let me ask then about the duty to Congress, and this relates primarily to reports to Congress itself. How will you ensure that you are using every appropriate means that you have with regards to communication to make sure that Congress is fully informed of the proper operations of the Department of Energy? And how do you see this role here?

For us here in Congress we think it is pretty clearly delineated. But the responsibility to report to Congress when you see things, how would you ensure that you are fulfilling that duty and that responsibility?

Ms. BEARD. Thank you again for the question, Madam Chairman.

As you pointed out in your opening remarks, the DOE Act itself refers to the Department of Energy's Inspector General and its role dealing with Congress. And I take the law very seriously and would follow that.

It's important not only to issue our reports and make them publicly available and make them aware to the Congress and the American public but also working with staff and Committee and members to make sure that issues are appropriately addressed.

The CHAIRMAN. What do you do then when you are unable to gain the information that you feel can best inform you that in turn can best inform Congress? How would you view your responsibility to obtain that full and factual information?

Ms. BEARD. Again, thank you.

For me, as far as I'm aware and this is based on conversations I've had with the former Inspector General while he was still at the Department, historically there has not been a problem at the Department with getting information that's needed from the Department for the Inspector General's Office.

And I, in order for the Inspector General to do his or her job and the staff of the Office to do their job, they must have access to that information. And if it ever arose that we were not gained appropriate access, if I was confirmed, I would take serious and prompt action to make sure that we got everything we needed in order to do our jobs and conduct audits, inspections and investigations.

The CHAIRMAN. Well I think that that is an important part because we, I think, have seen recently some interactions between some IGs, not necessarily within the Department of Energy, but some IGs and their agencies that have had a situation where that access to information has not been made readily available and that has been a situation of conflict.

Let me turn to my colleague, Senator Cantwell.

Senator CANTWELL. Thank you, Madam Chair.

Ms. Beard, obviously, as I mentioned in my opening statement, the issue of Hanford cleanup is a big concern to, I think, the whole nation but certainly the State of Washington continues to be a watch dog on this issue as well. Both my colleague and I have pushed the Secretary on the implementation of a 2014 report from Savannah River on their issues of cleaning up as it relates to worker safety and making sure that tank vapors and things of that nature are dealt with.

So I plan to follow up this week with the Secretary on the implementation of that plan and his commitment to it. But I am curious, because I know we have had many reports, I think, from the Inspector General's Office in the past. I think there have been worker safety issues including as many as weaknesses in 16 different Inspector General reports. So this is not about publishing a report. This is about getting results. Can you comment on how you would correct just publicizing these issues as opposed to helping to elevate?

My opinion is that I have been with Inspector Generals at various oversight hearings for other Committee members, and I have seen which Inspector Generals have used their authority to elevate the issues in a way that certainly captures the attention of the people needed.

How would you address the fact that a lot of worker safety issues have been in previous reports but we have not created the culture to address all of them?

Ms. BEARD. Thank you for the question, Senator.

I agree with you that issuing all the reports in the world does not make a difference if action isn't taken on them. And in fact I was just looking, not long ago, at an inspector general's report that was issued by the Department that pointed out issues that had been around. The last time they looked at the issue five years previously had not been adequately addressed in that five-year period.

If I'm confirmed I would like to take a more robust approach to making sure that the—of tracking and making sure that the Department is taking corrective action on recommendations that are made and making sure we are making it public as well when actions are not being taken, whether through webpage, issuing special notices or reports and making sure that there is a very robust follow up on recommendations.

Senator CANTWELL. So you believe in escalating those issues in a public way that causes action to happen?

Ms. BEARD. If it doesn't happen I do believe in—

Senator CANTWELL. Well wouldn't you say five years is long enough?

Ms. BEARD. Five years is more than long enough.

And so it would be much shorter than five years but that was a report I saw recently. And I think it does need to get taken seriously and action needs to be taken. And I do believe it should be done quickly and more robust follow up I think is needed.

Senator CANTWELL. What role do you think whistleblowers play?

Ms. BEARD. I think whistleblowers play—thank you again for the question.

I think whistleblowers play a very important role. And it's very important that whistleblowers feel and are, in fact, protected from retaliation.

Senator CANTWELL. To the Chairwoman's question about your past relationship with the agency and then moving over to this issue, how would you best address this using your past experiences to show your fortitude in making sure that your former colleagues are inspected in a robust way as you just mentioned?

Ms. BEARD. I personally have not been involved in any contract or whistleblower issues. I'm aware of a number of them just because of my time at the Department.

But I think it's very important that the Department take the steps it needs to take to make sure that whistleblowers are protected and that the law is fully followed in this area. And it's something that we would put adequate resources on within the Inspector General's Office, if I am confirmed, to ensure those actions are being taken.

The fact that it's been involved, an ongoing issue at the Department, even though I have not been involved in it, I do not have any particular background in it. But it's something that I'm very well aware of.

Senator CANTWELL. Thank you, Madam Chair.

The CHAIRMAN. Thank you, Senator Cantwell.

Senator BARRASSO?

Senator BARRASSO. Thank you, Madam Chairman.

Following up on some of the things that Senator Murkowski asked and said in her opening statement. You have served at the Department of Energy since 1989 as Senator Murkowski men-

tioned, a long, distinguished career. You have been a legal advocate for the agency for 27 years. The position to which you have been nominated, the position of Inspector General, is effectively a lifetime appointment. If confirmed, you will be asked to audit and investigate an agency that you have promoted for decades, as Senator Murkowski has said. If confirmed, you will be asked to audit and investigate colleagues, people with whom you have worked with decades and who made decisions based upon your own advice. I think all of us have questions about whether you or anyone in these circumstances would be able to exercise sufficient independence and objectivity to be an effective Inspector General.

I understand that prior to your nomination the General Counsel of the Department asked you if you had an interest in filling this vacancy. To be candid, I find that cause for concern that they would ask if you were willing to fill the vacancy. Is it reasonable for us to assume that after 27 years, as an advocate for the Department, that you will be an effective watch dog of that same Department?

Ms. BEARD. Thank you for the question, Senator.

Most of my Federal career at the Department has been in the Department's Ethics program where I was responsible for ensuring that the Department's employees followed the statutes, the laws, and regulations on confidential matters and part of that is making sure that the American public and the Congress have the, to show the trust that they can have on our public service, in our public servants.

In that capacity I have given advice to employees regarding conflicts of interest and other matters. During those 27 years I've been at the Department no legal advice that I've ever given has been before the Inspector General's Office. I do not envision that any legal advice I give in the future, that I've given, in the future will be in front of the Inspector General's Office for review.

But as part of that I actually have told employees they can't do things. I mentioned in my opening comments that I give honest and unbiased advice.

What I did not mention in my opening comments is often the advice I give is something the employee does not want to hear. It has never stopped me from giving the advice I think is appropriate, and I would continue to follow that independence if I was confirmed as Inspector General.

I think it's very important in my ethics capacity as well if I was to be confirmed as Inspector General is to discover the facts, apply the law and follow wherever they lead fearlessly, without being concerned about where they may point. And that is what I've done in my last 27 years as a Federal employee, and I would continue to do that, Senator.

Senator BARRASSO. You have served as Assistant General Counsel for General Law at the Department since 2004, so the last 11/12 years. In this capacity you have addressed questions concerning the Department's compliance with Federal law including the Freedom of Information Act, ethics laws, Congressional appropriations.

Have you also worked on issues related to the Department's compliance with what is called the Miscellaneous Receipts Statute? That is the law that requires officials who receive proceeds on be-

half of the Federal Government to deposit those proceeds into the Treasury.

Ms. BEARD. Yes, Senator, appropriations law is within the area of my office.

Senator BARRASSO. In 2011 the Government Accountability Office (GAO) found that the Department's transfers of excess uranium to USEC into Fluor Corporation violated the Miscellaneous Receipts Statute. The Office of General Counsel disputed the GAO's findings. Have you worked on issues related to the Miscellaneous Receipts Statute and the Department's transfers of excess uranium, that specific component?

Ms. BEARD. Yes, Senator, my office as well as several others in the Office of General Counsel did work on that.

Senator BARRASSO. So if confirmed will you recuse yourself then from matters involving the Department's transfers of excess uranium?

Ms. BEARD. Senator, if a matter comes up regarding the legal opinion that I was one of the people who worked on comes up? Yes, I would recuse myself. I have not been involved itself in any particular transfers involving excess uranium.

Senator BARRASSO. Have you worked on issues related to the Department's compliance with the Atomic Energy Act and the USEC Privatization Act?

Ms. BEARD. I have—I'm thinking off the top of my head, sir. My recollection is I've not worked on anything exactly involving the USEC Privatization Act.

Senator BARRASSO. In going through all this, because in September 2015 the Inspector General issued a report on enforcement activities at the Federal Energy Regulatory Commission (FERC). Among other things, the report examined whether FERC and the utility, Exelon, arranged a quid pro quo connecting FERC's approval of Exelon's merger with Constellation Energy to Constellation's settlement with FERC.

I have to tell you I was very unimpressed with the Inspector General's investigation into the matter. I was especially disappointed that the Inspector General was unwilling to speak with individuals outside of FERC during this year-long investigation.

I know you may not be completely familiar with the details of the report, but as a general matter, do you believe an Inspector General should be willing to speak with individuals outside of the government when investigating the government?

Ms. BEARD. Thank you for the question, Senator.

I'm not familiar with the FERC matter. I have never had any responsibility regarding FERC in my job at the Department of Energy.

I do think it's important that the Inspector General's Office gather all relevant facts in order to pursue a matter it is looking at, regardless of where the individuals are who have those facts.

Senator BARRASSO. Thank you.

Thank you, Madam Chairman.

The CHAIRMAN. Thank you.

Senator Warren?

Senator WARREN. Thank you, Madam Chairman.

Ms. Beard, thank you for being here today.

In recent years several massive new natural gas pipelines have been proposed in New England. Over and over again I have heard from citizens and from elected officials in Massachusetts who are deeply concerned about the impact of these projects on their property and in their communities. They feel like their voices have not been heard and their interests have not been represented.

These complaints have been much stronger even for Kinder Morgan's Northeast Energy Direct project, and that specific pipeline was recently suspended. But others like Spectra's Access Northeast project are still moving forward, and believe me, concerns about pipeline projects are not going away.

The Federal agency tasked with approving these pipelines is the Federal Energy Regulatory Commission, or FERC, for which the Department of Energy's Inspector General has oversight. For the last several years the Office of the Inspector General has proposed an audit of FERC's permitting process. Ms. Beard, what is the status of this audit, as you understand it?

Ms. BEARD. Thank you for the question, Senator.

It is my understanding that the audit is ongoing at this time, but I'm not privy to any information regarding it other than that.

Senator WARREN. Let me ask the question then another way. If confirmed, will you prioritize the completion of this audit?

Ms. BEARD. Again, thank you, Senator.

If confirmed I will prioritize the completion of the audit. My understanding, I should have added, is that right now considerable resources are being used on it.

Senator WARREN. But you will make this a priority?

Ms. BEARD. But I will make it a priority.

Senator WARREN. You personally will make this a priority.

I know that Senator Shaheen and the rest of the New Hampshire delegation have raised this with the Office of the Inspector General before, but I think that it is extremely important that this audit thoroughly reviews the way that FERC involves the public in the permitting process. Will this audit focus on FERC's role in facilitating public involvement in the permitting process?

Ms. BEARD. My understanding and again, I do not have a very much specific since this is an ongoing matter within the Office of Inspector General, is that it's looking at the law, policies and procedures which includes public engagement.

Senator WARREN. Alright. And you will make a commitment to make sure it is looking at public engagement?

Ms. BEARD. My understanding, again Senator, is that is within the scope of the audit right now.

Senator WARREN. Excellent.

I appreciate that FERC's permitting process is being reviewed by the Inspector General's Office, and I look forward to seeing the results of this audit.

But even outside the purview of this particular audit, it is extremely important that FERC is making decisions that are really in the best interest of the people who will be most directly affected. If you are confirmed will you commit to working with me to address concerns about FERC's responsiveness to the public interest?

Ms. BEARD. Senator, again, thank you for the question.

If confirmed I do commit to work with you and your staff regarding making sure that FERC is following the laws, policies and procedures.

Senator WARREN. Thank you, Ms. Beard.

This is very important to me. Pipelines affect people's homes, their property, their communities and they have every right to be heard by the government on issues about pipeline permits. I just want to make sure that happens.

I appreciate your coming here today to testify, and I look forward to continuing to work with you on these issues. Thank you.

Thank you, Madam Chair.

The CHAIRMAN. Thank you, Senator Warren.

Senator Daines?

Senator DAINES. Thank you, Madam Chair.

Ms. Beard, thank you for coming here today. I know it is an exciting moment, and it is great to have your family here with you as well.

I also want to thank you for your long service to our country. Twenty-seven years at the DOE is impressive as well as commendable.

As you know the Office of the Inspector General is the so-called watch dog of the Department of Energy. Their primary role is to perform regular audits, inspections and investigations along with being a resource to Congress. Because of this role the Inspector General is often at odds with the Department. That is really what they are called to do. Yet you have spent most of your career as a lawyer for the Department of Energy and your specialties have been focused on ethics and general law, not necessarily auditing and investigations.

The question is do you think that you will be able to transition into the watch dog role and do you think that your lack of experience in auditing and investigations will help or hinder that transition?

Ms. BEARD. Thank you very much for the question, Senator.

I think already in my role in ethics it is a semi-watch dog role because of—it is my job to ensure that the Department has a robust ethics program and that includes, when need be, just referring employees and former employees to the Inspector General's Office which I have done on numerous occasions in the past, including employees who I personally knew well and personally liked. And so I really strongly believe in my independence in that role and I would believe I would carry that independence forward if I became Inspector General and was fortunate enough to be confirmed.

I have been involved in a number of audits with the Inspector General's Office involving personnel law matters at the Department as well as some investigations as well involving some issues that do touch general law matters. I do have experience in both of those areas even though I'm not, obviously, an accountant.

Senator DAINES. Curious given you have a long history in the DOE you have a track record of working with the IG in the past. As you look at the IGs who have performed in the past, what would you say that you would like to do as you get a chance to put your fingerprints on this IG role that would make the IG role even more

effective given you seem to have a lot of experience working with the IG?

Ms. BEARD. Thank you again for the question, Senator.

One of the areas where I would like to see some changes is more robust follow up on recommendations that are being made and making sure that the Department is taking or FERC is taking action as recommended by the Inspector General in the reports that are issued.

Senator DAINES. Okay.

I am going to pivot over and talk about energy. Energy production is a major part of our economy in Montana. We had an energy summit in Montana about a month ago. Looking forward over the next 35 years, with projections out to 2050, we had a representative from the U.S. Chamber that came and spoke. Energy consumption in the world is going to be up 84 percent according to their forecast, because we are going to add two billion more people to the planet between now and 2050.

He said we have an abundance of traditional fuels like oil, gas and coal as well as renewables such as wind and hydroelectric in Montana. We see the importance of having a diverse energy portfolio, not only for our economy but also for our national security, in providing the necessary power to keep the lights on and keep our mobile devices charged.

In the eastern half of our state coal is that major player. Montana has some of the cleanest coal out there, but it is becoming more and more obvious that this Administration is attempting to shut down coal and kill hundreds of jobs in Montana instead of investing in clean coal technology or in mines that produce cleaner coal like we have in Montana.

There was a recent report from the Inspector General's Office that recommends stopping the funding of a clean coal project ran by Summit Texas Clean Energy, LLC. First of all, are you aware of that report?

Ms. BEARD. Senator, I'm aware the report was issued.

Senator DAINES. I think the official number for the file was OIGSR1602. Did you have a chance to see what the findings were in that report?

Ms. BEARD. I looked at it briefly, but I'm not that familiar with it, sir.

Senator DAINES. Do you think that the potential Inspector General, as the potential IG, that you should at least have a working knowledge of past decisions, especially one that was as recent as last month?

Ms. BEARD. Again, Senator, I have looked at it but I'm—all I've—I'm aware of the issues that was in the report.

Senator DAINES. I will say, each year I am disappointed in the Administration's lack of prioritization of clean coal technology and funding in its budget, and I do think we need to continue funding clean coal technology and do it responsibly.

Thanks for your time.

The CHAIRMAN. Thank you, Senator Daines.

Senator Cassidy?

Senator CASSIDY. Hello, Ms. Beard. Handsome family.

How important is programmatic knowledge, because clearly one of the things that you would bring to the table verses someone who might have more previous experience as an IG is that you have been within the Department of Administration. If you will, I can imagine that you could, particularly as an ethics officer have, kind of, studied, looked around over the years and thought well maybe that would be a place to investigate or this would be a place that would I be in a different role. Can't say that because, obviously, as an ethics officer you have to think about such things. So my first question is how important is programmatic knowledge as regards the execution of your duties? I will start with that.

Ms. BEARD. Obviously—thank you again for the question, Senator.

Obviously I've been at the Department a long time, and I have broad general knowledge of the Department's programs. I have never been in a position where I'm setting policy for the Department or actually running programs for the Department other than the ethics program.

Senator CASSIDY. Except that.

Now I am from Louisiana. I am a doctor, but I know a fair amount about energy just because energy is so much a part of my economy. So patients would come, and they did some aspect of energy and you make chit chat.

So let me ask. Is your awareness of the issues at the DOE along the line of mine as a physician, you know, the people you just talk to over the water cooler, so to speak, or would it be of a deeper level?

Ms. BEARD. It's probably a deeper level than that, Senator. But again, I do not have programmatic responsibilities of those areas, but I have been in many meetings where issues have been discussed and I've learned about them over the years.

Senator CASSIDY. How important is in depth programmatic understanding? I do not know the answer to this. I am asking how important is great depth of programmatic knowledge? How important is it?

Ms. BEARD. I think to me, Senator, the advantage of somebody from within the Department becoming the Inspector General is that I'm not going to have to spend the first six months learning about the various programs and the acronyms and what not for the Department. I do have a general programmatic knowledge, but not an in depth programmatic knowledge. But that's something that I think I can pick up quickly as we're looking at various audits and inspections.

Senator CASSIDY. So the general knowledge portion of the learning curve you have under your belt. But if I were to ask a particular question, for example, in Louisiana the Strategic Petroleum Reserve, that would require more research on your part?

Ms. BEARD. I'm aware of the Strategic Petroleum Reserve and issues, for example, involving draw down of the reserve, but I'm not, I've never worked on an actual draw down matter.

Senator CASSIDY. Gotcha.

It has come to my attention that Mr. Rickey Hass, the Acting Inspector General at DOE and the former Deputy Inspector General for Audit Services, plans to retire. Now I gather as an ethics person

audits was not your bailiwick, if you will. You have mentioned that.

Do you have a sense of who you are going to hire and, if appointed, what characteristics you would look for in such a person?

Ms. BEARD. I have—thank you again for the question, Senator.

I have no sense of who I would hire. It would be an open competition to fill the position.

I would look for somebody with a strong auditing background and he also was in charge of investigations as well, so a strong investigation background as well.

Senator CASSIDY. Now you also have a law enforcement responsibility. You could pack heat if you wished.

But again, in ethics that is quite a different, I think, mindset. How do you adjust from the mindset of, kind of, okay, this is what you need to do, listen you will get in trouble if you cross the line and do not cross that line, but if you cross the line I have to report you verses up against the wall. Do you follow what I am saying?

Ms. BEARD. Yes, Senator, I do follow what you're saying.

As a lawyer I take following the law very seriously. I believe in having a very robust investigation program within the Department, and I would hope I would continue making sure that we have a very strong law enforcement process.

Senator CASSIDY. Okay, I get that.

It does seem that there is going to have to be some sort of an adjustment in how you approach an issue. I presume the gravity of something which was related to law enforcement may just be more.

My aide just passed me something. If I could read his writing, I would have another question. [Laughter.]

I yield back. Thank you.

The CHAIRMAN. Senator Franken.

Senator FRANKEN. I want to thank my staff for typing out the questions.

First of all, Ms. Beard, thank you for your 25 years with the Department of Energy and your dedication to serving the public good. Sometimes I think that when we hear criticisms of unelected bureaucrats I wish those people could meet unelected bureaucrats like yourself. So thank you.

As you know probably better than anybody else in this room the Inspector General is constantly faced with politically heated issues but must remain nonpartisan and impartial to external pressures. Could you tell me about how you view the role of the Office of Inspector General as an independent entity?

Ms. BEARD. Thank you very much for the question, Senator.

To me, the Inspector General is the main watch dog for the Department, for the public as well as for the Congress. And as it was pointed out in the Department of Energy Organization Act, it reports it has responsibility both to the Secretary of Energy as well as to the Congress as far as these reporting mechanisms and making sure that issues come to public light.

I think it's very important. I think having a strong, independent Inspector General helps an agency complete its mission, and it really is a furtherance and a great help to the agency.

Senator FRANKEN. Thank you.

Ms. Beard, I want to hear your thoughts about the DOE-administered mixed oxide fuel fabrication facility, the MOX facility for short. When construction of the MOX facility commenced in 2007, estimated costs for the project were about \$5 billion. U.S. taxpayers have already spent that amount on the project, but now the expected costs have ballooned to up to \$30 billion.

While I understand it is impossible to perfectly estimate the costs of some of these projects, I am concerned about funding a project that seems to get more expensive by the day. The Office of the Inspector General at DOE seems to share these concerns which they expressed in an audit report in May 2014.

If you are confirmed how would you follow up with the Inspector General's concerns regarding the cost and management of the MOX project? And has DOE been doing an adequate job inspecting the ongoing work of the MOX facility?

Ms. BEARD. Thank you for the question, Senator.

I share your concern about making sure that taxpayer dollars are well spent. They are all of our money, and I'd like to see them spent wisely across all agencies including the Department.

And as I was talking about earlier, I'd like to see a more robust follow up within the Office of Inspector General and some recommendations. I would ensure that whether any recommendations were in that particular report were implemented, whether the Department has taken actions on them and what the timeframe of those actions are, and if need be, do additional work at MOX because, obviously, there's a very major project the Department has.

Senator FRANKEN. Yes, this has expanded from an estimated \$5 billion to an estimated up to \$30 billion. While you are obviously not in a policy making position, there has to be decisions made about whether to spend that extra \$25 billion and go forward with it.

How does your role as Inspector General inform the policy makers' decisions about whether to go forward with this, because there are alternative ways to use this fuel or we are attempting to make it fuel with this material from weapons?

Ms. BEARD. Senator, I know you're well aware Inspector Generals do not set policy; however, they can put out facts and information to inform policy makers so they can make better decisions. And so part of that process of making sure that the facts are out there so policy makers can use them to make decisions on whether something like MOX should go forward.

Senator FRANKEN. Right, because I would think that for the policy makers there are going to be decisions that have to be made about this whether to go forward, and I think a lot of that will be based on the conclusions that the Inspector General's Office comes up with.

Thank you for your testimony, and thank you for your service to this country.

Madam Chair.

The CHAIRMAN. Thank you, Senator Franken.

I appreciate you bringing up the issue of the MOX facility and how you might deal with that. There has obviously been a great deal of discussion about that in the Committee over, certainly, the past year, if not more.

I am going to ask what will probably be a very general question by using a specific example. The Iran deal, clearly a divergence of views on that. I am one who has expressed a great deal of concern about the Iran deal. While this Committee does not have jurisdiction over foreign affairs, there are certain aspects of implementation of this agreement that, as IG, you would have oversight of whether it is NNSA, DOE, EIA. They are part of the implementation and the monitoring.

You have politics at play. I know people would be shocked to hear that. But you, again, are in this role as an independent entity.

Are you concerned that you could be in situations where the Administration has clearly taken a very specific position and given that does it put undue political pressure on career professionals who may perhaps hold back on their own views because of the nature of the agreement but where they sit?

It is a very general question and perhaps not clearly articulated, but it is one that we deal with in our world where how you balance the politics of an issue verses just being able to look straight forward at the facts and making sure that you, as an IG, are the one who really is intent on gaining information, factual information and moving forward recommendations in an unbiased and really not influenced by political view. I am not asking you to opine one way or another on the Iran deal, but I use that as an example of something that can be very politically charged. How will you navigate that?

Ms. BEARD. Thank you very much for the question, Madam Chairman.

I think in my role already in the General Counsel's Office, as the designated agency ethics official and if I were fortunate enough to be confirmed as Inspector General, the key here is independence and being willing to follow, to find the facts, follow the law, apply the law and see where it goes without being concerned about where—without fearlessly and not being concerned on the outcome of no matter where it may point. To me it's really important that the Inspector General have that, to be able to do that.

I think that in the DOE Organization Act, you know, it's clear that the Inspector General reports to the Secretary, only the Deputy Secretary.

And it also is clear, you know, there's no time limit on the position. I've worked previously with both, in both Republican and Democratic Administrations, and I think that I would be able to do that as Inspector General and carry that forward and be independent in that way and not worry about it.

I also have the advantage, I will admit this, of being almost retirement eligible, so I don't have to worry about it from that perspective either. [Laughter.]

The CHAIRMAN. You have thought about that.

Let me ask about contract management because so much of what comes through DOE is managed by contractors as opposed to Federal employees. So the task of directing and managing and overseeing and really incentivizing these contractors, I think, is important for the success of the mission.

I have two questions here. What do you view is the DOE IG's role in improving and ensuring effective contract management be-

cause that has got to be a priority? But also in evaluating and scrutinizing contractor award fees because there have been issues that have presented themselves in terms of mission and scope of the contracts and how these award fees are balanced with that. So if you can speak generally to the role of contract management and specific to award fees.

Ms. BEARD. Thank you very much for the question, Madam Chairman.

As you are all well aware the Department does the vast majority of its business through major contracts. I have not personally been involved in any award fee issues while I was in the Counsel's Office, but clearly if you are looking at how taxpayer dollars are being spent at the Department that's where the vast majority of money is going.

I think the role of Inspector General, again, is policing as a watch dog of how prudently that money is spent. Issues like award fees would obviously be an issue that an Inspector General would look at.

The CHAIRMAN. Let me turn to Senator Wyden.

Senator WYDEN. Thank you very much.

Senator FRANKEN. Madam Chair?

Madam Chair, since you brought it up I think it would be a really good idea to ask the nominee her personal views on the Iran deal.

The CHAIRMAN. I am not going to get into—

Senator FRANKEN. I am joking, that was just—I just wanted to get that out of the way. I knew that you were not asking that.

The CHAIRMAN. Senator Wyden?

Senator WYDEN. Thank you very much, Madam Chair.

Ms. Beard, as we visited yesterday, Hanford and the high level radioactive wastes there join the Columbia River which is the lifeblood of my state and the lifeblood for everything from recreation to business, environmental values. This is right at the heart of the DNA of the people that I represent. I was there last week, and the Hanford site's legacy of failed performance and retaliation against whistleblowers and workers who raised safety concerns is alive and well.

The GAO pointed out last year \$19 billion has been spent over the past 25 years to clean up these high level, radioactive wastes at Hanford. So far not a gallon, not a single gallon, of high level, radioactive waste has actually been treated. Under the current schedule the waste treatment plant will not be in full operation for another 20 years. If getting this waste cleaned up was not so essential to public health and environmental protection, I guess it might be a sequel for the movie, Money Pit.

What I would like to know is what we talked about yesterday. What, as Inspector General, would you do, specifically, to end business as usual at Hanford?

Ms. BEARD. Thank you very much for the question, Senator.

I share your concerns about how taxpayer money is being spent at Hanford, and I also share your concerns regarding worker safety that we talked about yesterday as well.

The Office of Inspector General has a history of issuing a number of reports concerning the Hanford site. If I were fortunate enough

to be confirmed, I envision that that history would continue and with additional reports.

As I also mentioned I'd like to see a more robust follow up on the recommendations that are made in the reports issued by the Inspector General's Office. And that would be a main focus of mine if I were fortunate enough to be confirmed, is that follow up to making sure the Department is actually taking the actions that are being recommended.

Senator WYDEN. So I listened carefully to those words.

You share my concerns. I cannot tell you, and I say this respectfully because I enjoyed visiting with you and I was Chair of this Committee so I know this is a tough job, I cannot tell you how many times a nominee has said, "I share your concerns." Then you said you are going to do reports, and I cannot tell you how many times I heard about reports. Then something about action, although I was not really clear what that was all about.

But that is not changing business as usual, Ms. Beard, that is more of the same. Now if you told me that it was your plan, after a report was issued, to come up with a timetable to implement the recommendations within a specific period of time, I might say that, at least, sounds like something might change.

But what has concerned me is you have been there at the Department of Energy for 27 years, not specifically on these kinds of issues, and I have real questions, particularly when there is such a need to change business as usual and produce some new accountability and change the policies.

When I was there last week, for example, it just seemed like it took forever to drag out what was going to be done to inspect the bottom of the really dangerous tank. I was told, well gee, technologically we couldn't do it but we were going to look at such and such. Finally after going round and round there was something about some sort of science grant that could produce some changes.

You are going to walk in to an area where you are going to see a huge array of pressing safety concerns at a time when vast sums of money are going to be going out the door, as has been the case for decades now, and it does not seem like much is going to change.

So let me give you another round at it. I thought the last part of your answer at least suggested a kernel of reform. But why don't you take another crack at it?

Ms. BEARD. Thank you very much, Senator.

I may have not been clear. Let me talk a little bit more about what I envision for robust follow up.

What I've seen in some cases in my time at the Department is when it comes to reports issued by the Office of Inspector General is they issue a report, it has recommendations, and the Department does not do a lot with them or takes an awful long time to do anything with them.

I was mentioning earlier a report I had just seen recently, those issued by the Inspector General, which basically found that they were looking at something five years later and still nothing had been done. And that's not acceptable.

And so what I was talking about from the Inspector General's point of view, if I'm fortunate enough to be confirmed, is to have more robust follow up to make sure the Department is taking ac-

tion. And if the Department is not taking action, to be more public about the action that's not being taken and working with the Congress and working with the Secretary to make sure the Secretary is aware and the Congress is aware that actions are not being taken, if that's the case.

Senator WYDEN. I am over my time. I don't know where you are, Madam Chair, in terms of numbers of rounds and who is where. Whenever you——

The CHAIRMAN. We are working on seconds.

Senator WYDEN. Great, then I will wait for the second round.

The CHAIRMAN. Senator Franken is next.

Senator WYDEN. I will wait for that.

Senator FRANKEN. No, go ahead, please.

Senator WYDEN. No, no, I am—whatever.

Senator FRANKEN. No, no, I think you are on to——

The CHAIRMAN. Senator Wyden, you can continue.

Senator FRANKEN. Continue if you want.

Senator WYDEN. I just have two other questions real briefly.

Why don't you furnish me in writing how you would make a change and a specific kind of timetable for implementing the recommendations of the Inspector General, because I know that the Committee under the Chair wants to move quickly. Why don't we say 72 hours? Just give me some answers on the timetable.

Second, we have a very serious problem with whistleblowers.

I went with the Attorney General, outstanding Attorney General Bob Ferguson, and met with the tank farm workers who have been exposed to these hazardous chemical vapors. Four dozen workers have complained of chemical exposure in the past ten days, just in the last ten days. This isn't some kind of abstraction from eons ago. But in ten days 48 workers have complained of chemical exposure, and the Department says it is not a problem.

The workers say that they're being threatened with losing their jobs. Hard to see why they wouldn't be worried because there are loads of examples. These problems exist throughout the DOE complex. We saw it at Savannah River. This is an area my colleagues, Senators McCaskill, Markey, and I have been in together.

What will you do to blow the whistle on the Department's chronic mistreatment of whistleblowers?

Ms. BEARD. Thank you again for the question, Senator.

In the past I know that the Office of Inspector General has looked at the whistleblower issue previously. I think that it's a very important issue. I think whistleblowers play a very important role in making sure that the public is aware and the government is aware of some things that are of inappropriate activities that are going on. And I also think it's very important that whistleblowers be free of retaliation and be able to feel that they can come forward without fear of losing their jobs.

In the past, as I mentioned earlier, the Office of Inspector General has looked at some matters regarding whistleblowers. If I'm fortunate enough to be confirmed, I would do that again.

In addition, I know there are some matters pending right now within the Office of Inspector General regarding whistleblowers and I would work to make sure those are handled promptly and made—and resolve it as quickly as possible.

Senator WYDEN. I am way over my time.

I hope in writing you will tell me specifically what would change because the answer you gave me on that point is virtually identical to what I have heard from individuals with respect to this position year after year.

So hold the record open. I would like to know specifically what is going to change with respect to these whistleblowers.

[The information referred to follows:]

**Susan Beard – Confirmation Hearing to Be Inspector General of the
U.S. Department of Energy
Before the Senate Committee on Energy and Natural Resources, 12 May 2016,
1000, Room 366, Dirksen Senate Office Building**

Senator Wyden, thank you for your questions during the May 12, 2016 hearing on my nomination to be the Inspector General of the Department of Energy (DOE). As I noted at the hearing, I agree with you that the safety of workers at Hanford, and across the DOE complex, and the treatment of whistleblowers are very serious matters and they deserve the upmost attention by the Office of Inspector General (OIG). During the hearing you requested that I provided written responses to your questions concerning implementation of recommendations made by the Inspector General and the treatment of whistleblowers. Please find my answers to those questions below.

In order to ensure a timely and accurate response to the issue you raised, I have culled the questions below from an initial transcript of the hearing.

- 1) “How you would make a change, and a specific timetable, for implementing recommendations of the Inspector General?”

If confirmed, I would start by evaluating current practices within the OIG related to the conduct of audits and the procedures for monitoring and following-up on recommendations made by the OIG in its reports. Based on this review, I would immediately begin to intensify OIG efforts in this critically important area where appropriate. This would include benchmarking the practices of the Department of Energy OIG against those of other Inspectors General in comparable agencies. As a secondary but equally important step, I would use the review to highlight and make recommendations on how DOE should improve its efforts to respond to recommendations and implement recommendations from the Department’s OIG. Although I cannot make any predetermined judgments on the outcome of this review, if I am confirmed, I would propose to take the following initial steps regarding the general practices of the OIG:

- (1) Work with internal and external stakeholders, including the Congress, concerning prominently highlighting within the audit or inspection report the timeframe in which the Department of Energy commits to take action in response to OIG recommendations. In cases in which the Department does not specify a time frame, that would be highlighted as well. In a related vein, I am interested in learning whether and to what extent other Inspectors General assign probable completion times for any recommendations.
- (2) Going forward, as part of each audit and inspection, I will determine whether the Department has appropriately established commitments for major initiatives. In addition to describing the status of such commitments as part of the normal reporting process, I would also commit to notifying Congress and creating a publicly

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U.S. Department of Energy
Before the Senate Committee on Energy and Natural Resources, 12 May 2016,
1000, Room 366, Dirksen Senate Office Building**

available summary of DOE commitments and whether such commitments were met, in whole, in part, or not at all.

- (3) While all OIG recommendations are aimed at assisting the Department in its efforts to execute its mission more economically, efficiently, and safely, some OIG recommendations have highly significant fiscal ramifications or involve critical issues, such as worker or public safety. If confirmed, I will work to ensure recommendations associated within these key areas are closely monitored and followed to ensure the Department is taking prompt, decisive action; and that any failure to act is properly documented and addressed, including highlighting deficiencies to Members of Congress, the public, and any specific stakeholders or other federal agencies as appropriate. For recommendations that involve an imminent or near-term serious threat to human health or safety, I will issue targeted management alerts and reports for immediate action that can be readily understood by the Department, Members of Congress, and the public. In such instances, I will also work with appropriate offices within the Department which directly notify public health officials so that they will be aware of such an imminent or near-term serious threat to human health or human safety. For broader OIG investigations, particularly those that include recommendations for Departmental activities that have highly significant fiscal ramifications, I will ensure that the OIG reports and recommendations are specifically flagged for awareness by all stakeholders, including Members of Congress, and the committees responsible for authorization and appropriation of DOE funding.

- 2) “What will you do to blow the whistle on the Department’s chronic mistreatment of whistleblowers? I’d like to know specifically what is going to change with respect to these whistleblowers.”

If confirmed, I would address these concerns on several levels. First and foremost as Inspector General, I would be charged with protecting and finding the truth about information that is brought to OIG by a whistleblower. One of my greatest responsibilities would be to those who come to me with information of wrongdoing.

To this end, I understand the General Accounting Office (GAO) is currently working on two reports related to whistleblower protection. I understand that one report, which is focused on DOE, is nearing completion and the other is just starting. If confirmed, I would review the soon to be issued report in order to determine whether any additional audits should be performed. My understanding is that the GAO report that is about to start will be a multi-agency report and will include an evaluation of Offices of Inspectors General efforts to address whistleblower protection efforts. If confirmed, I am

**Susan Beard – Confirmation Hearing to Be Inspector General of the
U.S. Department of Energy
Before the Senate Committee on Energy and Natural Resources, 12 May 2016,
1000, Room 366, Dirksen Senate Office Building**

committed to promptly reviewing and implementing any appropriate recommendations for the Department's OIG that GAO makes.

I also commit, if confirmed, to act promptly to address any mistreatment of whistleblowers reported to the OIG, including highlighting the issue, as appropriate, with all relevant stakeholders and calling for swift attention and action by the Department's leadership to address any shortcomings or specific remedies deemed necessary.

Additionally, I understand that some Inspectors General have undertaken efforts to coordinate information regarding whistleblower complaints with the Office of Special Counsel and relevant authorities responsible for handling contractor employee whistleblower complaints. I support such efforts and will work in a similar manner if confirmed as Inspector General. I will also seek to determine best practices regarding the treatment of whistleblower complaints within the scope and function of the OIG and implement any needed improvements.

More specifically, I am also aware that the Department and the OIG are currently engaged in a range of outreach efforts to educate Federal and contractor employees about the rights of whistleblowers and whistleblower protections. I fully support those efforts and, if confirmed, I will continue this engagement, including by instituting improvements within the OIG as necessary.

My understanding is that the OIG currently uses a number of methods to inform both Federal employees and contractor employees of their rights and responsibilities relating to whistleblower protections, practices, and procedures. These include: a whistleblower rights section of the OIG's website, highlighting Inspector General Hotline information, DOECASIS (DOE all-employee email communications) and Fraud Awareness Briefings. If confirmed, I commit to reviewing and broadening these outreach and education efforts as needed.

For instance, the OIG's Fraud Awareness Briefings are in-person briefings conducted by OIG law enforcement officers. Both federal and contractor employees are informed of these briefings and may choose to attend. It is my understanding that these briefings contain considerable information about the rights of whistleblowers and the protections afforded to them. I strongly believe that in-person briefings are a powerful educational tool. If confirmed, I am inclined to create video and podcast training on these topics to supplement the in-person briefings to prevent any instance in which employee attendance at these briefings may be impacted by fears of retaliation for even attending the briefing. This training would be accessible on a public website that contractor employees could watch or listen to from the privacy of their home without the

**Susan Beard – Confirmation Hearing to Be Inspector General of the
U.S. Department of Energy
Before the Senate Committee on Energy and Natural Resources, 12 May 2016,
1000, Room 366, Dirksen Senate Office Building**

knowledge of their employer or fear of retaliation. These new outreach and training efforts would include information about the requirements for protecting whistleblowers, address concerns expressed by whistleblowers, and discuss the consequences for failing to protect whistleblowers.

In sum, as I stated in my testimony to the Committee, I am honored to be nominated for the position of Inspector General and take very seriously the role and responsibilities of the Office of Inspector General to provide independent and effective oversight of the Department to advance the Department's mission, support its workforce, and maintain the enduring trust of the public for which it serves.

Senator WYDEN. Thank you, Madam Chair. Thank you for the extra time.

The CHAIRMAN. Thank you, Senator Wyden. We would ask that the nominee please provide the information. As Senator Wyden has said, the more expeditiously we can get responses to the members' requests, the more quickly we can move. So thank you, Senator Wyden and thank you, Senator Franken.

I have just one final question and then we will wrap up here this morning.

There has been great discussion about your years of service within the Department, 27 years within the Department of Law. That is considerable legal background. I also understand your comment about not being involved in the programmatic areas but having a very keen focus on the ethics and other areas as well.

But so much of what IGs are tasked to do relates to the auditing that goes on. Looking at your background I do not see anything that relates to direct auditing experience. So if you can give me either anything that you might think would be helpful in that regard in terms of your experience or inform me how you would intend to manage a group of professionals who perform these audits and inspections and evaluations without having performed such roles yourself?

Ms. BEARD. Thank you very much for the question, Senator.

Well, I've never been an auditor. I'm not an accountant. I do have a background in a lot of appropriations areas which does have some similar aspects to it.

The CHAIRMAN. Did you get that within DOE?

Ms. BEARD. Yes, I do appropriations work for the Department.

But in addition, if I was fortunate enough to be confirmed, there are many other Inspector Generals who are lawyers. And I know there are certain continuing education classes you can take regarding the auditing function that some of them, I think, are offered by the Council of the Inspectors General on Integrity and Efficiency (CIGIE) and other groups. And that is something that I would definitely do to make sure I could do that and so I can help make sure while I'm supervising the teams of auditors, that I have the necessary background in that area.

The CHAIRMAN. Well it is, indeed, a big task and an incredibly important position, and as I noted in my comments, for all intents and purposes this is not just an appointment to a position that lasts for a term of an Administration but continues beyond. So the process, the vetting process, that we are going through right now as a Committee is an important one. As you know, it will not be the only one that you will go through, but taking that first cut here this morning before the Energy Committee is important.

I appreciate your responses. I will appreciate, as I know other colleagues will, your prompt replies to any questions that you feel need to be supplemented today.

Again, we appreciate your willingness to step forward. To your family who have joined you this morning and have been very patient with the time, thank you very much.

We stand adjourned.

[Whereupon, at 11:14 a.m. the hearing was adjourned.]

APPENDIX MATERIAL SUBMITTED

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

Questions from Chairman Lisa Murkowski

Question 1: How will you shift from defending the Department of Energy's (DOE or Department) interests or serving as a counselor or an advocate to scrutinizing DOE's actions to eliminate waste, fraud and abuse?

My role at the Department of Energy, has been: (1) to interpret and apply the law, in accordance with my understanding of the law, (2) to determine and then apply my understanding of the facts, and (3) to serve as an advocate for legal interpretations based on law and facts, while 4) taking into account where possible the desired policy direction of DOE policymakers.

My role, if I were to be confirmed as the Inspector General (IG), would be in many ways very similar to my current role at DOE in a general legal sense. It would be (1) to investigate and to determine the facts, (2) to interpret and apply the law, in accordance with my understanding of the law and of the facts, and (3) to serve as an advocate for the impartial, lawful application of the law to the facts as they are known.

The largest difference would be that the law itself – the will of Congress as codified – would be the sole direction. The law is clear that waste, fraud and abuse are to be forcefully addressed, and as such, my duties would be clear. If confirmed, I am committed to executing this duty with purpose and independence, regardless of my past experience and proximity to the Department.

As an attorney at DOE, I have frequently been a consumer of audit reports and fact finding investigation reports.

As the Inspector General, my duty would be to ensure that clear, cogent, factually accurate and well-reasoned audit, inspections and investigations are conducted and that reports of such audits, inspections and investigations are presented to their stakeholders.

Inasmuch as I have been a consumer of such audit and inspection reports and consulted on legal issues in some investigations, and I have been responsible for the creation of clear, cogent, factually accurate and well-reasoned legal opinions and memoranda, I believe that I am well positioned to make such a shift.

Question 2: What steps will you take to ensure the independence of your office as it audits and investigates all operations of DOE, including those arenas that may have historically been under your jurisdiction as a DOE lawyer?

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

The DOE Office of Inspector General (OIG) has a long history of operating independently of DOE. Independence, transparency and impartiality are hallmarks of the OIG. If confirmed, I am committed to upholding these values and protecting the long history of the Department's OIG in successfully executing its independent oversight role.

If confirmed, I would maintain my independence in all circumstances. As I noted during my testimony, I was not deeply involved in programmatic actions and as such, there are few specific issues that would require that I recuse myself. In the event that the OIG becomes involved in a matter over which I had direct involvement, I would not hesitate to recuse myself from those matters.

Question 3: Will you make sure that any Member promptly receives information he or she requests, or is provided a prompt and clear explanation as to why that information is being withheld from release?

Yes. If confirmed, I will work to ensure the OIG is fully responsive to Congress in recognition of the important oversight role of the Legislative branch, and particularly of the Committees of jurisdiction for the Department of Energy.

Question 4: With respect to the authority of an Inspector General (IG), what is your view of the recent Office of Legal Counsel opinion that concludes that an agency may withhold information from an IG if that information is protected by certain statutory nondisclosure provisions?

- a. Is there information that you believe an agency may withhold from its IG? Please explain your response.

No. I agree with the position that was taken by the Department of Justice's OIG that section 6(a)(1) of the Inspector General Act of 1978 grants an Inspector General an unqualified right of access to Department records relevant to audits, investigations and reviews that are being undertaken.

- b. With respect to IG independence, how should an IG balance the necessity that the IG's office retains an efficient working relationship with agency officials with the need for IG independence from agency influence during an investigation?

The Inspector General must uphold its primary duty to be independent and objective. To be independent and fully execute its duties, the OIG should have a productive working relationship with agency officials. In those rare situations where that is not possible, such as potentially

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

criminal investigation of a senior agency official, the primary duty of the OIG remains to act independently and in full accordance with the law. The conduct of OIG business must be done without fear of or favor towards any agency official, and solely in accordance with the law, the facts, and best practice standards.

- c. Is it appropriate for agency officials to participate in an IG investigation? Please explain your response.

It is not appropriate for agency officials outside of the OIG to conduct an IG investigation or act on behalf of the OIG. Non-OIG officials must not participate more than the minimum needed for the conduct of an investigation, such as a witness or to provide information that is needed for the investigation. What is never appropriate is that an agency official either conduct an IG investigation or be privy to more than the minimum needed to successfully pursue such as investigation.

- d. To what degree should an IG comply with agency requests to alter a report at the request of the agency?

The IG should never alter a report at an agency's request, particularly if the agency request is an attempt to modify or influence the outcome of an OIG report or action. Likewise, reports should never be delayed to accommodate an agency's desire to avoid publication until a defense can be developed or constructed.

However, under limited circumstances, a report may require amendment if the agency provides new facts or information not previously disclosed to the OIG. In such instances, the OIG must be responsible for making clear the facts and rationale for any deviation from the OIG's initial conclusion. For example, if a draft report is provided to the agency for comment, and the agency officials realize that they have provided incomplete, inaccurate or misleading information, they may then choose to amend the information provided. If such new facts or information is provided to the OIG, then that information, once examined for accuracy, completeness and applicability, may then be used to amend or alter the report.

Question 5: If the purchase agreement for Iranian heavy water is completed, how will you ensure that the excess heavy water, purchased by the U.S. is used for non-nefarious purposes? What kind of vetting process will companies go through to purchase the heavy water from the DOE? Do the proper authorizations allow such a resale, and are the proper oversight mechanisms in place for such purchase agreements?

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

The responsibility for developing and implementing safeguards and internal controls over the acquisition and use of heavy water rests with the Department of Energy. As noted in my previous answer related to independence, the OIG cannot make and later audit policies for which the OIG participated in their development.

Question 6: The National Nuclear Security Administration (NNSA) has an essential role in protecting American lives, monitoring and safeguarding radiological threats. With the cost overruns at various NNSA projects, including the MOX project, there is a limited budget for this important nuclear security work.

- a. How will you ensure that taxpayer dollars are spent effectively to further the NNSA mission?

If confirmed, I would continue the practice the OIG has undertaken to focus particular attention to ensure Departmental projects at the highest risk for significant cost, schedule and project management problems are audited and inspected.

Based on the results of those efforts and as appropriate, I would recommend that the Department take action necessary to resolve any findings with an expectation of the Department providing a clear and detailed response. As with all recommendations, I would ensure that corrective actions are tracked to resolution and that follow-up reviews are conducted as necessary.

- b. How will you ensure the American people that countries like Iran are meeting international obligations and not pursuing a nuclear weapon?

If confirmed, I would work to ensure that appropriate levels of oversight are in place and applied to determine whether the Department is fulfilling its obligations. Findings from such efforts would be provided to those in Congress with oversight responsibilities for such agency efforts.

Question 7: How will you assure the American taxpayer that DOE has properly estimated the costs of future projects, including the proposed MOX alternative, the down blend and disposal option? How will you conduct oversight of current projects, including the MOX project to hold contractors accountable?

If confirmed, I will uphold the OIG's mission to investigate waste, fraud, and abuse. Consistent with principle, and as stated in response to question 6(a), I will maintain the OIG's focus on Departmental projects at the highest risk for significant cost, schedule and project management.

Question 8: The law states that Yucca Mountain is the nuclear waste repository for the nation. I have cosponsored legislation, called the Nuclear Waste Administration Act, to

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

establish a consent-based-sited interim storage facility. This would also authorize the creation of the Nuclear Waste Administration, which would oversee the nuclear waste program, effectively removing it from the responsibility and jurisdiction of DOE. If this legislation is not turned into law, how do you plan to conduct oversight of the civilian nuclear waste program?

If confirmed, I pledge to work with Congress to understand what information from the OIG would be of use to Congress as it considers this complex set of issues. I will also seek to understand from other stakeholders what information from the OIG would be of use to advance the goal of safely storing nuclear waste.

My goal would be for the OIG to impartially and objectively provide well-reasoned, cogent and factually accurate analyses of the law and agency policies as they have been implemented and applied to the situation and facts.

Question 9: How will you prioritize office of inspector general (OIG) resources when determining which reviews and investigations to undertake? How will you ensure that information from outside the government that may be relevant to an inquiry or an investigation will be considered by OIG personnel and accounted for in reports provide to Congress and the public?

It is my understanding that the OIG currently employs a risk-based approach to resource allocation. The approach evaluates factors such as cost, previous audit coverage and adverse findings, known cost and schedule issues, etc. Projects are then scored and the highest risk projects are chosen for review. To help ensure that lower cost/risk projects are not immune from audit coverage and to help serve a deterrent effect, certain projects that do not meet the high risk criteria are subjected to review.

Where appropriate and when considered relevant to the audit, inspection, or investigation, I would ensure that information from outside the government is considered during each of our efforts.

Question 10: What assurances will you provide the committee that you will keep Congress informed of serious problems, abuses and deficiencies in programs administered or financed by DOE?

If confirmed, I commit to inform the Congress of these matters when they are revealed by OIG efforts.

Question 11: What are the most effective ways that Congress can communicate to you its priorities for the DOE IG? Is there information that you could foresee withholding from a proper formal inquiry from Congress? If so, please include in your answer the legal authorities under which such information must or may be withheld.

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

If confirmed, I pledge to make working with Congress a top priority. A key element of this priority is to engage in frequent communication between DOE IG and Congress as needed to support the mission of the OIG. I believe that frequent interaction by me and my staff would provide me with the most effective way to communicate Congressional priorities. If confirmed, I will uphold my oath to be fully responsive to Congress in the execution of my duties as Inspector General. I will personally be available to all Members, and I will seek to be available to the maximum extent possible to your staff to directly hear from you what those priorities are.

Additionally, I am not aware of any circumstances with the scope of the OIG where it would be appropriate to withhold information from a proper, formal inquiry from Congress. The duty of the Inspector General under statute is to the Congress, as well as the Secretary, and I will fully discharge that duty, should I be confirmed.

Question 12: In August 2014, 47 Inspectors General wrote to Congress regarding the importance of access to records at federal agencies and their difficulties in obtaining such information from this Administration. DOE's then IG, Gregory Friedman, declined to join that letter.

- a. If you know, please tell us why the Department's IG decided against signing on.

I personally discussed this matter with the former IG. While I cannot speak for Mr. Friedman, he indicated to me that he did not sign the letter because he did not view this matter as a problem at the Department.

- b. Do you have independent knowledge of an occasion where the Department did not respond to a request from the IG or from Congress for access to Departmental employees or information?

I do not have such knowledge.

- c. If not, what indirect understanding do you have about the experience of the IG's office with respect to gaining access to employees or information at or from the Department of Energy?

I have no knowledge that the Department has ever failed to respond to a request for information from the OIG. I am aware, however, that there have been limited instances when individual employees initially objected to providing information, but ultimately cooperated with the OIG's request.

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

Question 13: Do you commit to safeguarding the integrity of the Energy Information Administration as an independent statistical agency of the United States government?

Yes. The Energy Information Administration (EIA) is established by statute, and statutorily cannot be required by any officer or employee of the Department to obtain his approval in connection with the collection or analysis of any information. Moreover, EIA cannot be required, prior to publication, to obtain the approval of any other officer or employee of the United States with respect to the substance of any statistical or forecasting technical reports which it has prepared in accordance with law.

As an element within the Department, EIA is expressly subject to oversight by the OIG. The OIG is responsible for examining compliance with the law, and I would therefore ensure that there is a process to examine, as appropriate and warranted, whether the independence of EIA to collect, analyze, publish or forecast is maintained both by EIA and by the rest of the Department.

Question 14: IGs often have legal or auditing backgrounds. Your resume includes various law-related positions in the Department and elsewhere with the federal government, but indicates no direct auditing experience. How will you ensure that your office meets or exceeds the standards of the Generally Accepted Government Auditing Standards as well as the Quality Standards for Investigations, among other IG quality standards requirements?

Based on my interactions with the OIG during my tenure at the Department, I believe that the OIG has a strong and well-qualified senior leadership team in place. If confirmed, I would rely on the expertise of those audit, inspection and investigation professionals and their staff to advise me on those matters. As noted in my response to questions #17 below, my understanding is that peer reviews required by professional standards have found that the current audits and investigations functions comply with all quality standards. I plan to complete the continuing professional education necessary for me to gain a working understanding of each of these disciplines.

Question 15: The 2016 report “Management Challenges at the Department of Energy – Fiscal Year 2016” identified several areas as issues for DOE going forward, such as Contract Management, Cybersecurity, Environmental Cleanup, and Infrastructure Modernization. How can the OIG help improve the performance of DOE in these areas?

The OIG plays an important role in helping to improve the Department’s performance in these critical areas through focused audits and inspections,

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

producing recommendations to address any weaknesses discovered. Tracking and follow-up on recommendations are critical to ensuring that the Department sustains any corrective action taken in response to the findings.

Question 16: Your employment background includes several federal positions serving in the capacity of an assistant and deputy in the federal government.

- a. In these positions, how many employees did you manage?

In the supervisory positions I held before I became the Assistant General Counsel for General Law in 2004, I generally was the direct supervisor for less than 10 employees. I currently supervise 23 employees in addition to a revolving group of legal fellows. In addition, with regard to the Department's ethics program, I direct approximately 72 other employees across the DOE Federal complex concerning how to carry out their duties with regards to administering the Department's ethics program.

- b. How has your previous management experience provided you the ability to serve as the head of an office with an FY2015 budget appropriation of \$41 million and 277 full-time equivalent employees?

My management experience has provided me with skills in the administration of budgets, personnel management, and other matters. If confirmed, the IG position will also require thought leadership on issues, and my role in ensuring that DOE has an active and well-respected ethics law program has given me the ability to provide thought leadership on issues, including to my peers in other agencies.

- c. Given the often technical nature of DOE's missions areas, do you think the staff of the DOE IG is adequately trained in nuclear physics, engineering, and other technical fields to be able to interact with DOE employees and their contractors to adequately scrutinize DOE programs and project?

It is difficult for me to assess the answer to this question fully in my current position, but if confirmed, I would review both the overall capacity and issue expertise of the current OIG staff to ensure it was adequate to fully carryout the mission of the office. Within this limitation, my current understanding is that the OIG is strongly staffed with very capable and

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

experienced individuals and that additional technical expertise is obtained by staff when needed to address particular topics. I strongly support maintaining qualified staff and believe that OIG staff must have access to sufficient expertise to fairly and independently evaluate the implementation of law and policies.

Question 17: According to the DOE IG website, in 2012, the Treasury Inspector General for Tax Administration performed a peer review of the DOE IG auditing operations and the Department of Justice Inspector General peer reviewed the DOE IG's investigative operations. Both the auditing and investigative operations were found to be in compliance with required quality standards. Peer reviews of IG auditing operations are required every three years. However, September 2015 marked a three-year period between audit operations peer reviews for the DOE IG so it appears that the Department is now overdue for its peer review.

- a. Are you aware of any ongoing peer review of the DOE's auditing or investigative operations?

My understanding is that the most recent peer review for the OIG's auditing function was completed by the Department of Defense Inspector General on March 29, 2016. The OIG transmitted the results to the Secretary and the appropriate Congressional oversight committees on May 6, 2016. The results were posted to the OIG web site on May 9, 2016. The link is:
[http://energy.gov/sites/prod/files/2016/05/f31/Department%20of%20Energy%20Peer%20Review%20for%20the%20Fiscal%20Year%20Ending%20September%2030%202015%20\(002\).pdf](http://energy.gov/sites/prod/files/2016/05/f31/Department%20of%20Energy%20Peer%20Review%20for%20the%20Fiscal%20Year%20Ending%20September%2030%202015%20(002).pdf)

The investigation function was the subject of a peer review by the Department of Veteran's Affairs OIG in July 2014. The review revealed that the investigation function complied with quality standards. The next scheduled peer review will be performed by the Department of Transportation OIG during the February – April 2017 timeframe, consistent with Council of Inspectors General on Integrity and Efficiency established schedule and frequency guidelines.

- b. If there are no ongoing or recently completed peer reviews conducted, how long would you need to prepare the DOE IG for such peer reviews to ensure quality standards?

As referenced in response to questions (a), my understanding is that both required peer reviews were completed on schedule and both revealed that the

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

audits and investigations functions are meeting applicable quality standards.
See: <http://www.energy.gov/ig/calendar-year-reports/peer-reviews>

Question 18: The IG's Work Plan for Fiscal Year 2016 shows that the Western Audit Division will be looking at the Used Nuclear Fuel Disposition program.

- a. What aspects of this program are being examined?

My understanding is that the OIG plans to review the types of R&D being performed regarding waste disposal in deep boreholes. It also plans to review actions that were taken in response to the \$150M in funding provided by Congress in FY15 to have the Department continue statutorily required activities for the Yucca Mountain license application.

- b. Will this audit look at the program's difficulties in getting state and local approval for drilling deep boreholes for research?

My understanding from the OIG is that the General Accounting Office (GAO) recently began work in this area. The Department's OIG is coordinating with GAO to determine the extent of its involvement and may modify the OIG approach to avoid duplication of effort.

Question 19: Environmental remediation at DOE's legacy nuclear defense and energy research sites is a \$6 billion annual responsibility for the agency. How can OIG help improve DOE's risk-based strategy (that is, giving priority to funding the highest risk activities that threaten health and safety or further environmental degradation) for the evaluation of environmental remediation efforts for nuclear defense sites?

The OIG can evaluate the DOE risk-based strategy, for ways it could help improve that strategy. Among things that I would consider, if I were to be confirmed, is whether the in-depth expertise of any outside entities might assist the DOE. I have been advised by the OIG that the OIG has audited the prioritization process several times. If confirmed, I pledge to review this matter as necessary.

Question 20: Does OIG have any plans to evaluate the Title XVII program in order to assess the functional performance of the program office, and determine reasons for the dearth of projects within the Title XVII Section 1703 program?

I do not have independent information on this point in my current position, but my understanding from the OIG is that during FY 2017 the OIG plans to review

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

selected projects within the Department's loan guarantee program under Title XVII, Section 1703.

Question 21: What formal relationship, if any, exists between the Federal Energy Regulatory Commission (FERC) and the DOE OIG? What office, if any, fulfills the functions of an IG for FERC? What should the relationship be between DOE OIG and FERC? How familiar are you with the mission and programs of FERC?

By statute, the DOE OIG serves as the Inspector General for FERC. If confirmed, I will continue to exercise appropriate oversight of the FERC, as well as enhancing my existing knowledge of FERC's mission and programs.

Question 22: Today's evolving natural gas and electric markets require increasingly sophisticated data collection and analysis for effective oversight. Both natural gas and electric energy are traded in a variety of ways in a variety of markets which range from extremely complex transactions, requiring in-depth and time consuming data analysis, to relatively straightforward one-to-one interactions. Do you believe that the DOE-IG's office has the technical capabilities to provide oversight of FERC's market manipulation enforcement activities?

In my current position, I am not familiar with the specific technical capabilities of the DOE IG regarding oversight of FERC market manipulation civil enforcement activities are. I would, if confirmed, determine what those capabilities are, and whether they are appropriate and sufficient to provide the appropriate level of oversight.

Question 23: FERC performs detailed transaction analysis throughout the lifecycle of market manipulation investigations. This forensic analysis, which requires the assessment of millions of lines of sensitive data, allows FERC to create a more complete picture of the trading activities under review.

a. To what extent is the DOE-IG's office equipped to analyze such data?

In my current position, I am not familiar with the specific technical capabilities of the DOE IG to analyze such trading data. I would, if confirmed, determine if the OIG's current the technical capabilities and expertise are sufficient to conduct the appropriate level of oversight of FERC activities. For example, I might consult with IG personnel at other agencies that examine market manipulation, such as the Securities and Exchange Commission and the Commodities Futures Trading Commission.

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

- b. Does the IG have the analytic capacity to help FERC use its data to effectively eliminate waste, fraud, and abuse?

The responsibility of the DOE IG is to provide independent oversight of FERC, including within one of the OIG's central missions of addressing waste fraud and abuse. If confirmed, I would review the OIG's capabilities in this area to ensure the appropriate level of oversight can be conducted.

Question 24: In furtherance of its enforcement efforts, FERC opened 19 new investigations in fiscal year 2015, and closed 22 pending investigations with either no action or a FERC-approved settlement. The settlements involved agreements with 11 separate subjects, assessing a total of approximately \$26 million in civil penalties and disgorgement of nearly \$1 million. Six of these matters involved market manipulation, four involved violations of reliability standards, and one involved violations of tariff provisions.

- a. Some have suggested that the settlement process at FERC obscures the definition of what constitutes market manipulation. Do you agree or disagree? Why?

In my current position, I am not familiar with specifics of the civil enforcement process of FERC or of its settlement process. Should I be confirmed as the Department's Inspector General, I would become familiar with this process to determine whether the OIG's capabilities in this area are adequate to ensure the appropriate level of oversight.

- b. Do you believe the DOE-IG's office should have a role in matters regarding the due process afforded to entities facing market manipulation accusations?

As noted previously, to remain independent, the OIG must not involve itself in programmatic or regulatory functions. The OIG's role is to evaluate the extent to which FERC's processes are appropriate, are being followed, and are subjected to quality control procedures. If confirmed, I would familiarize myself with these due process protections to determine whether the OIG's capabilities in this area are adequate for conducting the appropriate scope and level of oversight.

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

- c. In your opinion and in light of the work that DOE's OIG undertook in response to correspondence from Senators Barrasso and Collins, does FERC have sufficient organizational "separation" between its functional review of mergers, acquisitions and corporate transactions, and the Commission's oversight of energy markets?

In my current position, I am not familiar with specific issue at the FERC. However, if confirmed, I would familiarize myself with the issues surrounding the FERC's review of mergers, acquisitions and corporate transactions, and oversight of energy markets to determine whether the OIG's capabilities are adequate for conducting the appropriate scope and level of oversight in this area.

Question 25: Do you believe the co-existence of the Office of International Affairs at the Department of Energy and the Bureau of Energy Resources at the Department of State gives rise to potential duplicative efforts?

In my current position, I am not familiar with the specifics of this issue. However, if confirmed, I would research this issue further to determine if there is an appropriate role for the OIG to assess this topic.

Question 26: The Department of Energy frequently contracts to outside consultancies to produce economic and technical analysis. Do you believe it is appropriate for the Department to delay the public release of these completed reports, which are funded by taxpayer dollars, until such time as it is deemed politically expedient? Or should such public reports be released in a timely fashion even if their political consequences may be inconvenient? For example, DOE delayed the public release of NERA Economic Consulting's LNG Exports study in 2012 until after the election. Do you believe that delay was appropriate?

In my current position, I have not been involved with nor received any information on this study. However, in general, I do believe that studies funded with taxpayer resources should be made available in a timely and transparent fashion, as appropriate, and free of any political considerations.

Question 27: The Strategic Petroleum Reserve is currently undergoing an extensive long-range review by the Department and outside experts.

- a. Do you believe expensive modernization decisions should be made based upon this review?

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

While I am generally aware that such review is in process and was recommended by the OIG, I do not have information within the scope of my current position at the Department regarding any preliminary findings or results of such review. If confirmed, I will continue to exercise the OIG's appropriate role in this review, including using the review to take any actions within the scope of the OIG.

- b. Would it be ill-advised for the Department to carry out such actions even before the review is completed?

Generally, other than to address exigent health, safety or operational needs, or address specific issues related to waste, fraud, or abuse, I am not aware of any efforts to extensively modify the Strategic Petroleum Reserve facilities until information supporting such large-scale modernization efforts becomes available, as well as information regarding the benefits, costs and effectiveness of any such extensive modifications.

Question 28: In 2012, the U.S. Department of Treasury Inspector General began an investigation into a number of U.S. solar companies' participation in the 1603 Treasury grant program. The concern was and is that these companies may have over-valued their solar projects to inflate the value of the grants received from the federal government in lieu of the 30 percent investment tax credit as part of the 1603 grant program. As of December 31, 2015, \$24.9 billion in such cash grants had been awarded through this program. Yet, the Department of Treasury's investigation is apparently still ongoing and there has not been any update given since I, along with several other Senators specifically asked for one in a letter on November 13, 2015. In your view, is this kind of timeline for an investigation of this nature reasonable?

As a public official, I strongly believe information should be provided to Congress to conduct its oversight and responsibilities as soon as possible. With that said, I have no information regarding the complexity or difficulties involved in conducting the specific investigation to which this question refers.

Question 29: SolarCity, specifically, had reportedly received about \$501.3 million in 1603 cash grants as of October 30, 2015. If the Department of Treasury's investigation eventually reveals wrongdoing on the part of SolarCity or any of the solar companies being looked into, won't they have been allowed to potentially continue these bad practices for several years while the investigation was ongoing? How would you anticipate handling this type of investigation in your role as the Department of Energy's Inspector General?

I am not familiar with this investigation. If confirmed, I would look into whether the DOE's OIG has an appropriate role in this Department of Treasury

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

investigation. Should I be confronted with a similar investigation, I would endeavor to complete it as soon as possible.

Question 30: DOE is currently undertaking a rulemaking to consider new energy conservation standards for residential furnaces. In February, 2015, DOE issued its notice of the proposed rulemaking that would increase the energy-efficiency standard for residential non-weatherized gas furnaces. The rulemaking process has been somewhat contentious, as there remain serious concerns from some stakeholders about the potential negative impacts of DOE's proposed standard.

Specific to the process itself, however, the American Public Gas Association (APGA) on November 18, 2015, officially filed a complaint to the DOE Inspector General's office which claims that, "The responsible DOE officials have engaged in conduct that has resulted in waste, abuse, and mismanagement to the severe prejudice of APGA."

In short, APGA asserts that DOE unfairly manipulated aspects of the rulemaking process to favor "parties allied" with the agency. The complaint focuses mainly on the fact that DOE never responded to APGA's September 15, 2015 request for an extension of the October 14, 2015, deadline for comments on DOE's issued Notice of Data Availability. Thus, APGA complied with the October 14 deadline. Many of the "parties allied" did not. Then, on October 15, one day after the original deadline, DOE responded via email to APGA indicating that it was in fact responding to the extension request and the new deadline would be November 6, 2015. The timing of events seemed suspicious to APGA, and they are still awaiting a response to their complaint.

- a. If you are confirmed as DOE's Inspector General, will you commit into looking into APGA's complaint and providing this Committee with a substantive response as to its status as expeditiously as circumstances allow?

Yes, if confirmed, I will commit to reviewing this issue.

Question 31: The NNSA works with the International Atomic Energy Agency to complete safeguards missions and the U.S. contributes a significant portion of the annual IAEA budget. How will you ensure that the NNSA is leveraging its resources to work strategically with the IAEA to stop the spread of nuclear weapons technologies?

If confirmed, I would familiarize myself with these programs, assess the risk associated with them and audit, inspect, and investigate these issues as appropriate.

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

Question 32: If Yucca Mountain is constructed, as the law states it should be, how will you ensure that the project remains safe for workers, on time, and on budget? If the Nuclear Waste Administration Act is signed into law, how will your oversight role at DOE change in relation to the new Nuclear Waste Administration?

If confirmed, I will continue the OIG's long-standing practice to review major Departmental projects, including evaluating project management, health and safety and other matters as appropriate. If the Yucca Mountain project is advanced and/or completed, this same practice by the OIG would apply. As for the OIG's role in relation to the proposed Nuclear Waste Administration, the OIG would follow the guidance provided by the underlying statute, if enacted.

Question 33: The Waste Isolation Pilot Plant (WIPP) was closed nearly two years ago following a fire. DOE anticipates that it will reopen by the end of 2016. How will you ensure that WIPP reopens and operates safely, while staying on schedule and on budget? Do you foresee any challenges that could lead to further delays?

If confirmed, I commit to evaluating DOE's efforts to bring the WIPP back to full operation and to monitor its operations as appropriate to ensure the facility operates safely and efficiently.

Question 34: Our nuclear weapons programs created a great deal of radioactive liquid waste. DOE has been working on building facilities and a program to turn that liquid waste into a stable glass waste form for disposal in a permanent nuclear waste repository as high level nuclear waste. These programs have been behind schedule and over budget in South Carolina at the Savannah River Site and in Washington at the Hanford site.

- a. How will you conduct oversight to ensure that these programs are completed safely, on time, and on budget?

It is the responsibility of the DOE to ensure that these programs are completed safely, on time, and on budget. If confirmed, I will ensure the OIG appropriately assesses DOE's work to implement these programs and projects safely and efficiently and take appropriate actions within the scope of the OIG as needed.

- b. How will you ensure that future projects of this type are completed on time and on budget?

If confirmed, I will ensure the OIG appropriately assesses DOE's work to implement these programs and projects safely and efficiently and take appropriate actions within the scope of the OIG as needed.

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

- c. Will you be willing to end contracts and terminate employment of companies and individuals that cannot meet their obligations to the American taxpayer?

It is the responsibility of the DOE to make employment decisions, including hiring and termination of employees. If confirmed, I commit to continue the important role of the OIG in providing independent oversight of the Department's contracts and to take appropriate actions as necessary.

Question 35: There are many nuclear sites, such as the Portsmouth Ohio and Paducah Kentucky Gaseous Diffusion Plants, which have been continuously underfunded for cleanup. How will you ensure that cleanup efforts continue as efficiently as possible and commitments made to these sites are fulfilled?

It is the responsibility of the DOE to ensure that cleanup efforts continue as efficiently as possible and commitments made to these sites are fulfilled. If confirmed, I commit to continue the important role of the OIG in providing independent oversight of the Department's mission and obligation to complete clean-up of legacy nuclear sites and facilities, and taking appropriate actions as necessary.

Questions from Senator Ron Wyden

Question 1: As we discussed during your confirmation hearing, I am extremely concerned about the lack of progress at Hanford. As GAO pointed out last year, \$19 billion has been spent over the past 25 years to clean-up high-level waste at Hanford and so far not a gallon of high-level waste has actually been treated. What, as Inspector General, are you going to do to change the way business is done at Hanford?

If confirmed, I commit to thoroughly evaluating the Department's ongoing efforts to clean-up high-level waste at the Hanford site. In doing so, I will utilize previous OIG audits and investigations, as well as reviews and recommendations by GAO, to determine how the OIG can most effectively enable the Department to complete its mission and obligation to remediate Hanford. As part of the OIG's continued monitoring of this major project, I will not hesitate to initiate new audits or investigations as warranted to facilitate the safe and effective completion of the Hanford facilities, such as the Waste Treatment Plant (WTP), and their continued operation until the clean-up effort is successfully finished.

As a first step, I would develop a clear understanding of what efforts DOE is taking and plans to address the concerns raised by the GAO and others with regard to the clean-up of high-level waste at Hanford. Second, I would evaluate

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

the timeframes, if any, that are assigned to each step of these plans. If no clear plans are provided, or if no clear timeframes are provided, I would use my position as Inspector General to highlight that critical deficiency to those in an oversight role, the Department and to the public. I would, if confirmed as the Inspector General, also want to consider whether, in some situations, the OIG may be able to recommend any timeframes for tasks if the Department provides no such timeframes. In short, I commit to evaluating the way business is done at Hanford and following where the facts and risks lead me. While it is not the role of the Inspector General to perform the clean-up efforts at Hanford and other environmental management sites, oversight of these efforts would be a priority for me if confirmed as Inspector General.

Question 2: Also as we discussed during the hearing, the Attorney General for the State of Washington – Bob Ferguson – and I met last week with tank farm workers who have been exposed to hazardous chemical vapors from the tanks. Some 4 dozen workers have complained of chemical exposure in the past 10 days. The workers told us that they are being threatened with losing their jobs and retaliated against for raising concerns. There are plenty of other examples at Hanford of whistleblower retaliation, including Walt Tamosaitis and Donna Busche, who worked for URS at the Waste Treatment Plant, and Shelly Doss who worked for the tank farm contractor -- WRPS, and employees of Computer Science Corporation, who were all fired for raising concerns. This is not just a problem at Hanford. The DOE Office of Inspector General is currently investigating a complaint concerning an employee concerns manager at Savannah River who cooperated with a GAO investigation into the effectiveness of employee concerns programs. The DOE Inspector General has the legal responsibility to investigate whistleblower reprisals, as do all IGs. As the Inspector General, what will you do to blow the whistle on the chronic mistreatment of whistleblowers at DOE?

The DOE and its contractors are prohibited from retaliating against whistleblowers. The Department's OIG plays a pivotal role in ensuring the Department and its contractors adhere to this prohibition. If confirmed, I commit to 1) evaluate any alleged retaliation towards whistleblowers, 2) highlight the rights that whistleblowers have, 3) understand whether, and if so to what extent, patterns and practices of mistreatment of whistleblowers exist, and 4) undertake audits and inspections to uncover any abuses concerning whether whistleblowers are mistreated. Further, I commit to rigorous oversight of the Department's effort to timely and effectively implement improvements and recommendations by the OIG and other oversight entities as appropriate.

With regard to the potential exposure of Hanford workers to harmful tank vapors, on Tuesday May 24, 2016, the Office of Inspector General announced its intention to conduct a Special Review of The Department of Energy's actions taken to address employee concerns regarding vapor exposures at the Hanford

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

Tank Farm. If confirmed, I commit to rigorously continuing this special review or initiating subsequent audits or inspections as necessary to fully ensure worker health and safety. Should the OIG's initial findings include recommendations for the Department, I pledge to closely monitor the Department's efforts to act quickly to complete any needed corrective actions.

Question 3: It is my understanding that as Assistant General Counsel for General Law at the Department of Energy you are responsible for legal matters related to the Department's Federal workforce. At Hanford, Federal employees were required to sign non-disclosure statements that violated the letter and the spirit of the Whistleblower Protection Enhancement Act of 2012 requiring the Department's General Counsel Steve Croley to issue guidance in 2015 to ensure corrective measures were taken and to remind management and employees throughout the Department of the legal requirements of this Act. To what extent is proper implementation of the Federal whistleblower statutes as they pertain to the Department's Federal workforce within the jurisdiction of your office? To what extent, when, and how did you learn of these non-disclosure practices at Hanford?

The Office of the Assistant General Counsel for General Law is responsible for providing legal assistance to Departmental elements at DOE headquarters by providing legal guidance to address potential whistleblower violations and taking corrective action if needed. As part of providing this service, the Office of Assistant General Counsel for General Law communicates regularly with the Office of Special Counsel, which has oversight authority over Executive branch agencies for alleged whistleblower violations concerning Federal employees. With regard to the matter of the advice issued by the Department's General Counsel in 2015, the Office of Assistant General Counsel for General Law provides regular advice to the General Counsel, including in the review of guidance issued by the General Counsel concerning whistleblower protections. To the best of my recollection, I first learned of this specific non-disclosure practice at Hanford on July 15, 2015, when my staff was contacted by local Office of Chief Counsel staff at Hanford regarding a union matter concerning the use of non-disclosure agreements. I take very seriously the obligation of the Federal government to protect whistleblowers and maintain an environment where employees feel free to raise concerns without the fear of retaliation. If confirmed as Inspector General, I will continue to take these matters very seriously and execute the duties of the OIG in a manner that upholds these important safeguards.

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

Question 4: It is also my understanding that there are DOE Federal employee concerns cases that have languished for years without resolution. As noted in question 4, GAO is completing a review of DOE's whistleblower and employee concerns practices. This work is being done at the request of Sen. McCaskill, Sen. Markey, and me. Please provide the number of employee concerns filed by Federal employees at DOE for each of the past ten years and the length of time it has taken to investigate and resolve each of those employees' concerns. Please describe the role that your office plays in the Federal employee concerns process.

I have been informed that the OIG does not have data regarding the number of employee concerns filed by Federal employees at DOE for each of the past ten years and the length of time it has taken to investigate and resolve each of those employees' concerns. If confirmed, I commit to reviewing the report underway by the GAO and reviewing what actions that the OIG can take to improve the Department's processing of employee concerns. The office in which I currently work in the Office of the General Counsel does not play any role in the Federal employee concerns process.

Questions from Senator Jeff Flake

Question 1: The Office of the Inspector's mission statement on the strategic plan is "to strengthen the integrity, economy and efficiency of the Department's programs and operations." My amendment 3056 to the Energy Policy Modernization Act of 2016 would direct the Government Accountability Office (GAO) to conduct a study on potentially duplicative green building programs administered through the Department and listed in the GAO report "2012 Annual Report: Opportunities to Reduce Duplication, Overlap and Fragmentation, Achieve Savings, and Enhance Revenue". Spending taxpayer money on duplicative programs between federal agencies directly contradicts this mission statement and the Inspector's role in addressing waste and abuse. How would you ensure that the Department is not engaging in programs that are duplicative between agencies in order to meet this mission statement as well as the aforementioned goal of a positive return for tax dollars invested in OIG activities?

It is the responsibility of the Department, at times working with other Departments or agencies, to ensure that the Department is not engaging in programs that are duplicative between agencies to prevent waste or abuse of taxpayer resources. If such unnecessary duplication of efforts is identified by GAO, the DOE OIG may then evaluate whether and to what extent DOE has or plans to take actions to eliminate such unnecessary duplication of efforts. If appropriate, DOE OIG may then make recommendations regarding such plans, or the absence of any such plans.

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

Question 2: Western Area Power Association (WAPA) has been the subject of recent scrutiny due to customer concerns that WAPA has been expanding its overhead and authority without desired transparency and accountability.

- a. Please describe the Inspector's ability and responsibility to oversee customer complaints regarding WAPA.

The DOE OIG has the authority to conduct audits, inspections and investigations concerning WAPA and the other Power Marketing Administrations (PMAs). The DOE OIG has responsibilities to evaluate conformity with the law by WAPA, and to evaluate its efficiency and integrity. Moreover, the DOE OIG has responsibilities for criminal law enforcement issues that involve WAPA and the other PMAs

- b. Appropriated funds for Western's annual expenses are offset by the deposit of power sale revenue, resulting in a "Net Zero" impact. Please describe what effect (if any) that Net Zero has on the Inspector's ability to oversee the use of appropriated funds in the marketing and transmission of hydropower in the west.

I do not have sufficient information to answer this question. If I were to be confirmed as the Inspector General, I would familiarize myself with the any issues involving the offset of power sale revenue against appropriated funds used for WAPA annual expenses to determine what further actions, if any, would be appropriate to undertake.

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

Questions from Senator John Barrasso

Question 1: On July 12, 2006, the Government Accountability Office (GAO) wrote a letter to Senator Pete Domenici, then Chairman of the Committee on Energy and Natural Resources. GAO's letter found that the Department of Energy (DOE) violated the miscellaneous receipts statute when it transferred \$62 million in excess uranium to USEC.

In response, Eric J. Fygi, Deputy General Counsel, wrote a letter (including an enclosure), dated May 2, 2006, to GAO, disputing GAO's finding.

During the hearing, you testified that you have worked on the miscellaneous receipts statute as it relates to DOE's transfers of excess uranium.

A. Did you provide any legal advice with respect to DOE's transfers of excess uranium to USEC that were the subject of GAO's July 12, 2006 letter?

Yes, to the best of my recollection.

B. Did you contribute, in any way, to, or provide any work product that was used as the basis of, the December 10, 2004 Agreement between DOE and USEC?

Yes, to the best of my recollection.

C. Did you contribute, in any way, to, or provide any work product that was used as the basis of, DOE's May 2, 2006 letter (including the enclosure) to GAO?

Yes, to the best of my recollection.

Question 2: In September 2011, GAO issued a report entitled, "Excess Uranium Inventories: Clarifying DOE's Disposition Options Could Help Avoid Further Legal Violations." GAO's report found that DOE violated the miscellaneous receipts statute when it transferred \$256 million in excess uranium to USEC and Fluor-B&W Portsmouth (FBP) in exchange for decommissioning services at DOE's gaseous diffusion plant in Piketon, Ohio.

In response, Peter B. Lyons, Assistant Secretary for Nuclear Energy, and Eric J. Fygi, Deputy General Counsel, wrote a letter, dated September 12, 2011, to GAO, disputing GAO's finding.

During the hearing, you testified that you have worked on the miscellaneous receipts statute as it relates to DOE's transfers of excess uranium.

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

A. Did you provide any legal advice with respect to any of the transactions that were the subject of GAO's September 2011 report?

Not to the best of my recollection.

B. Did you contribute, in any way, to, or provide any work product that was used as the basis of, DOE's September 12, 2011 letter to GAO?

Yes, to the best of my recollection.

C. Have you provided any legal advice with respect to any of DOE's excess uranium transactions involving FBP that have taken place since June 2011?

Not to the best of my recollection.

Question 3: In May 2014, GAO issued a report entitled, "Department of Energy: Enhanced Transparency Could Clarify Costs, Market Impact, Risk, and Legal Authority to Conduct Future Uranium Transactions." GAO's report found that DOE violated the USEC Privatization Act and the Atomic Energy Act with respect to four uranium transactions involving USEC in 2012 and 2013.

In response, Eric J. Fygi, Deputy General Counsel, wrote a letter (including an enclosure), dated April 18, 2014, to GAO, disputing GAO's finding.

During the hearing, it was unclear from your testimony whether you have worked on the USEC Privatization Act or the Atomic Energy Act as it relates to the transactions at issue in GAO's May 2014 report.

A. Did you provide any legal advice with respect to any of the transactions that were the subject of GAO's May 2014 report?

Not to the best of my recollection.

B. Did you contribute, in any way, to, or provide any work product that was used as the basis of, DOE's April 18, 2014 letter (including the enclosure) to GAO?

Not to the best of my recollection.

C. Please provide a copy of the enclosure to DOE's April 18, 2014 letter to GAO.

Copy enclosed.

**U.S. Senate Committee on Energy and Natural Resources
May 12, 2016 Hearing: Nomination of Susan Beard
to be Inspector General of the U.S. Department of Energy
Questions for the Record Submitted to Ms. Susan Beard**

Question 4: Who, if anyone, according to DOE's Office of General Counsel, has standing to file a complaint in federal court alleging a violation of the miscellaneous receipts statute as it relates to DOE's transfers of excess uranium?

I do not have the authority to speak on behalf of the General Counsel on this matter; therefore, I am not in a position to answer this question.

Question 5: If you did not identify a party with standing (or describe the characteristics of a party who would have standing) in question 4, how do you propose to resolve the legal question as to whether DOE's transfers of excess uranium violate or have violated the miscellaneous receipts statute?

I do not have the authority to speak on behalf of the General Counsel on this matter; therefore, I am not in a position to answer this question.

Question 6: During the hearing, you stated that you would recuse yourself from matters involving legal opinions, related to excess uranium transfers, to which you contributed.

If confirmed, would you be willing to recuse yourself from all matters related to DOE's transfers of excess uranium? If not, please describe, in detail, the extent to which you will recuse yourself from matters related to DOE's transfers of excess uranium?

If I am confirmed, I would recuse myself from any Office of Inspector General matter regarding a legal opinion I worked on while employed in the Office of General Counsel. I would rely on the advice of the Office of Counsel to the Inspector General in determining which matters require my recusal.



Department of Energy
Washington, DC 20585

April 18, 2014

Mr. David Trimble
Director, Natural Resources and Environment
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Trimble,

Thank you for providing a copy of your draft report, "Department of Energy: Enhanced Transparency Could Clarify Costs, Market Impact, Risk, and Legal Authority to Conduct Future Uranium Transactions" (the GAO draft report). The GAO draft report describes the conclusions drawn from the GAO's audit of four Department of Energy (DOE or the Department) uranium transactions in 2012 and 2013.

The heart of the GAO draft report is that two elements of the USEC Privatization Act – sections 3112 and 3113 – by their silence have repealed express provisions of the Atomic Energy Act (AEA) that explicitly authorize DOE to engage in certain transactions involving uranium and other materials. The analysis contained in the GAO draft report is legally unfounded because it is based on a *sub silentio* implied repeal of a variety of specific AEA provisions, directly contrary to the Supreme Court's teaching that it is a "cardinal rule [of construction] that repeals by implication are not favored [lest] congressional silence [be read] as effecting a repeal by implication [of] a longstanding, important component of the Government's [atomic energy] program." *Morton v. Mancari*, 417 U.S. 535, 549-550 (1974) (internal citations and punctuation omitted). Such patently erroneous legal contentions cannot contribute to meaningful assessments of the Department's performance of its various responsibilities. We should remain mindful to heed the Supreme Court's guidance for the Comptroller General that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law, [and may not be done by] an officer under [Congress'] control." *Bowsher v. Synar*, 478 U.S. 714, 732, 726 (1986).

First, the GAO draft report repeats its previous and unpersuasive position that the Department does not have the authority to transfer depleted uranium. GAO's position is based on its incorrect belief that the USEC Privatization Act, in particular section 3112(a), repealed or amended the Department's authorities under the Atomic Energy Act (AEA) to distribute or sell depleted uranium (which is source material). Section 3112(a) requires that any uranium transfers or sales be "consistent with this section." The remainder of section 3112 places restrictions on transfers or sales of other Departmental uranium, creating an overlay on the Department's more general AEA authorities to



transfer or sell uranium, but places no such restrictions on the sale or transfer of depleted uranium. GAO disregards a fundamental canon of statutory interpretation and reads section 3112 to implicitly remove the Department's AEA authorities with regard to the distribution or sale of source material even though it is well established that in interpreting a statute, repeals by implication are disfavored.

Second, the GAO draft report wrongly contends that section 3113 of the USEC Privatization Act is the sole mechanism through which the Department could accept title to, and eventual disposal responsibility for, depleted uranium. Section 3113 requires DOE to accept for disposal low level waste (including depleted uranium that is ultimately determined to be low level waste) at the request of the generator. Nothing in section 3113 directs or implies that all depleted uranium accepted by the Department is or necessarily will be determined to be low level waste. Further, section 3113 does not supplant the Department's authority under section 66 of the AEA "to purchase, take, requisition, condemn, or otherwise acquire supplies of source material," which includes DUF6.

This error is compounded with the GAO draft report's contention that the Department did not receive adequate compensation for the depleted uranium it sold or accepted. GAO's arguments are premised upon its erroneous conclusion that section 3113 is the only authority the Department has for accepting depleted uranium and its incorrect assertion that DOE must set a monetary price for its depleted uranium and make its sales or transfers consistent with that price. As noted above, section 3113 is not the sole mechanism for DOE acceptance of depleted uranium and its provisions regarding compensation do not control the analyzed transactions in which the Department took title to, and eventual disposal responsibility for, depleted uranium. Further, the requirements under the AEA (sections 63 and 161m.) for DOE to receive reasonable compensation for its source material are not so rigid as to require compensation only in accordance with a set monetary price.

Finally, the GAO draft report incorrectly contends the Department did not comply with the requirements of section 3112(d) in its March 2013 transfer of low enriched uranium (LEU) to USEC. The GAO draft report alleges, without merit, that the Department did not obtain a determination from the President that the material was not necessary for national security purposes. The LEU was not included in the Nuclear Weapons Stockpile Plan (Plan), a document listing material necessary for defense purposes and signed by the President. The Department's standard practice has been that the last signed Nuclear Weapons Stockpile Plan is valid as a Presidential policy directive and is the standing authority until it has been replaced by an updated plan. The fact that the LEU was obtained by DOE, and then transferred to USEC, after the date of the Nuclear Weapons Stockpile Plan does not undercut the Department's position: the absence of the LEU in the Plan in effect at the time of the transfer meets the requirement of section 3112(d)(2)(A).

The GAO draft report contains five recommendations. The Department notes that many of these recommendations advocate actions by the Department that go far beyond the statutory obligations related to uranium transfers and at least one asks the Department to forego the protections generally afforded to pre-decisional or attorney-client communications. Several of these recommendations could actually have the effect of decreasing the value the government receives from uranium transactions.

- First, the GAO draft report recommends that DOE clarify the total amount of depleted uranium hexafluoride (DUF6 or tails) it intended to accept from USEC in a June 2012 cooperative agreement and, if necessary, amend this cooperative agreement to ensure that DOE is not required to accept additional tails liability at a later date. In accordance with the terms of Cooperative Agreement DE-NE0000530, the Department provided 80% cost share for Budget Period 1 of the June 2012 cooperative agreement by accepting title and liability for up to 39,200 MT of Depleted Uranium Hexafluoride (DUF6). The parties to the cooperative agreement agreed that this acceptance would be treated as DOE providing \$87,670,184 in cost share contribution (80% of the total estimated cost of the agreement's Budget Period 1). DOE has accepted 38,317 MT DUF6 to meet this Budget Period 1 cost share obligation. No further action is required to ensure compliance with the terms of the cooperative agreement.
- Second, the draft GAO report recommends that for each uranium transaction it conducts, the Department prepare a document outlining the legal authority for the transaction and outlining how the transaction complies with the cited authority and that the Department make this document publicly available. The Department will comply with all legal requirements for future transactions, but will not create and make publicly available documents that are not required by law and would traditionally be protected as attorney work product or privileged pre-decisional documents.
- Third, the draft GAO report recommends that DOE develop guidance establishing a method for determining the value of depleted uranium for any future transfers and that DOE apply this method consistently and transparently in those transfers. The Department will determine the value of depleted uranium in any given transaction and ensure that the Department receives reasonable compensation in the transaction. The Department is not required to establish guidance or a pricing policy for depleted uranium, and to do so would hinder the Department's ability to maximize the value received by the government in a given transaction.
- Fourth, the draft GAO report recommends that the Department "take steps to mitigate the risks" for uranium transactions where the expected benefits rely on third party contracts. The programs have advised us that, where appropriate or feasible, the Department will take steps to mitigate risks. However, the Department cannot control the actions of third parties in agreements to which it was not a party and must not attempt to exert control or influence in a way that establishes an agency or apparent agency relationship.

- Fifth, the draft GAO report recommends that DOE conduct a “rigorous and documented” internal review of its independent expert’s analysis of the market impact of these transactions and, to the extent DOE makes the analyses publicly available, that they be consistent with DOE’s Information Quality Guidelines. We have been advised by the Office of Nuclear Energy that it will continue to consider the applicability of the Information Quality Guidelines to independent analyses of the potential market impact of proposed transactions and, if they are applicable, will take appropriate steps to ensure they are satisfied.
- Finally, as part of the fifth recommendation, the GAO draft report recommends that the Department “seek and consider” input from industry on the amounts of DOE transfers and whether the Department should reinstitute a prior guideline on the amounts of uranium transfers it would generally consider in a given year. The Office of Nuclear Energy (NE) advises us that it has met in the past and continues to meet regularly with industry parties, both at conferences and in meetings with Departmental officials when those meetings are requested. In those conversations, NE makes it clear it is open to receiving information from industry and takes that information under advisement as it makes future plans.

The enclosed memorandum provides a more thorough response to these and GAO draft report’s other contentions.

Sincerely,



Eric J. Fygi
Deputy General Counsel

Enclosure

**Department of Energy Analysis of Legal and Other Issues
Raised in GAO Draft Report**

The GAO draft report “Department of Energy: Enhanced Transparency Could Clarify Costs, Market Impact, Risk, and Legal Authority to Conduct Future Uranium Transactions” (GAO-14-291) (the GAO draft report) analyzes four specific transactions conducted by the Department of Energy (DOE or the Department) and discusses several perceived legal issues and other issues in the analyzed transactions. The GAO draft report characterizes all of these transactions as “involving” the United States Enrichment Corporation (USEC), but DOE notes that it only had direct contractual relationships with USEC in three of the four transactions. The Department disagrees with GAO’s legal and other analyses, and its detailed analysis of the GAO draft report’s legal and other contentions follows.

A. May 2012 Depleted Uranium Enrichment Project

In May 2012, the Department transferred a quantity of high-assay depleted uranium hexafluoride (DUF₆, depleted uranium, or tails) to Energy Northwest (ENW) in the first of a series of interrelated transactions known as the Depleted Uranium Enrichment Project. In a series of agreements to which the Department was not a party, ENW contracted with USEC for the enrichment of the tails at the Paducah Gaseous Diffusion Plant (GDP), owned by DOE but leased and operated by USEC. ENW then agreed to sell a portion of the resultant LEU, which was US-origin and unobligated by peaceful use assurances, to the Tennessee Valley Authority (TVA). Through an interagency agreement (IA) with NNSA, TVA acquires and burns US-origin LEU in a specified reactor that produces tritium. The Department’s other involvement in this series of transactions was a modification to the existing TVA-NNSA IA to produce additional tritium using this LEU.

1. Authority to Transfer Depleted Uranium

This is not the first time that GAO has challenged the Department’s authority to transfer depleted uranium, and the GAO draft report rests on GAO’s prior legal position on this matter. As stated in the GAO draft report, the Department does not endorse or accept GAO’s legal interpretation, and DOE believes it has authority to transfer depleted uranium.

GAO’s opinion, espoused in both an earlier letter report¹ and again in this draft report, is based on its view of the effect of section 3112 of the USEC Privatization Act² on the Department’s authorities under the Atomic Energy Act of 1954, as amended (AEA). Section 3112(a) states the Department “shall not provide enrichment services or transfer or sell any uranium (including natural uranium concentrates, natural uranium hexafluoride, or enriched uranium in any form) to any person except as consistent with this section.”³ Although the remainder of section 3112 has provisions pertaining to the sale of natural or low enriched uranium and to other types of uranium inventories held by the Department, it is silent as to the sale, transfer, or other

¹ “Nuclear Material: DOE Has Several Potential Options for Dealing with Depleted Uranium Tails, Each of Which Could Benefit the Government,” March 31, 2008 (GAO 08-606R).

² 42 U.S.C. § 2297h-10.

³ 42 U.S.C. § 2297h-10(a).

disposition of DUF6. GAO reasons that because the remainder of section 3112 provides conditions upon which natural or enriched uranium can be sold or transferred, but does not mention depleted uranium, the Department lacks authority to sell depleted uranium because it is covered under the general language regarding transfers or sales in section 3112(a).

As noted in the GAO draft report, the Department's interpretation of the effect of section 3112 of the USEC Privatization Act on its existing AEA authorities is different.⁴ The text of section 3112(a) does not create a blanket prohibition on uranium transfers or sales and then permit specified sales. Rather, it requires that any transfers or sales be "consistent with this section." Section 3112 places no restrictions on transfers or sales of depleted uranium, but does place restrictions on transfers or sales of other Departmental material, which function as an overlay on the Department's more general AEA authorities to transfer or sell that material. Accordingly, the Department's transfer of depleted uranium would be "consistent with" section 3112.

Section 63. of the AEA authorizes the Department to distribute source material, which includes DUF6, and the USEC Privatization Act did not expressly repeal or amend this existing transfer authority under the AEA. Nevertheless, GAO reads section 3112 to implicitly remove the Department's AEA authorities with regard to distribution or sale of source material. Repeals by implication, however, are disfavored by the courts.⁵ "When there are two acts upon the same subject, the rule is to give effect to both if possible."⁶ GAO makes no effort to read the AEA and the USEC Privatization Act as consistent with one another. The Department's position, on the other hand, gives effect to both statutes, with the specific restrictions in the USEC Privatization Act constituting an overlay to the general authorities granted to the Department by the AEA.

It should also be noted that Congress took no action to disapprove of the Department's earlier transfer of tails to the Bonneville Power Administration in a pilot project or to "clarify" the Department's authority, although such a clarification was recommended by GAO in the 2008 letter report.

2. Control of Third Parties/Risk Mitigation

The GAO draft report states that the Department "did not take steps to mitigate risks associated with its reliance on third party contracts for the May 2012 tails transfer to ensure that the expected benefit of the transfer would be achieved."⁷ The GAO draft report stated that the Department identified the general risks associated with the transfer, including that the expected benefit was reliant upon third party contracts, but contends that DOE did not take steps that could have mitigated some of these risks – including a right of first refusal for the purchase of the LEU or an overarching memorandum of agreement (MOA).

⁴ See, e.g., Letter from Eric J. Fygi, DOE Deputy General Counsel, to Susan D. Sawtelle, GAO Managing Associate General Counsel (Dec. 21, 2007), relating DOE's conclusion that the 2005 transaction involving the transfer of depleted uranium to Bonneville Power Administration did not fall within the particular constraints of section 3112 of the USEC Privatization Act.

⁵ See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984) (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974)).

⁶ *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

⁷ GAO draft report at 43.

The Department was well aware of the risks of the transaction and believed that its understanding of the third party contracts, and the various cross-defaults or “off ramps” within those agreements, protected the integrity of the series of transactions. In addition, the Department was cognizant of criticisms it has received from GAO in the past,⁸ and was very careful to structure its contracts and its involvement with third party contracts to avoid an agency relationship or the appearance of an agency relationship. Although the Department did anticipate receiving a benefit through the eventual use of the US-origin LEU for the production of tritium, the LEU was not being produced on the Department’s behalf, and the Department did not want to overly involve itself in the third party’s contracts.

The Department did not have privity of contract with any of the parties to the transactions other than its transfer to ENW and its IA with TVA. The parties understood the overall goal of the series of transactions, and the Department was as involved in the transactions as it could be without giving rise to an agency relationship or the appearance of an agency relationship. Even if the agreements following enrichment of the DUF6 were to fall apart for some reason, the Department would still be able to receive the benefit of an increased volume of domestic-origin LEU on the market, which would create a pool of material available for TVA to purchase or for obligation-swapping.

A MOA or other memorandum of understanding would not have provided any additional assurance, as it would not have been enforceable and the Department could not exert any control over third party agreements to which it was not a party. In addition, a right of first refusal for LEU produced through ENW’s enrichment contract with USEC would have created the appearance of an agency relationship or the appearance that ENW was enriching the DUF6 on the Department’s behalf.⁹ The Department’s involvement in the Depleted Uranium Enrichment Project was limited to the two agreements to which it was a party, and it was aware of the risks and managed them as appropriately as possible when it entered into its agreements.

B. March 2012 SWU Procurement

In March 2012, the Department procured separative work units (SWU), the unit of measure for enrichment services, from USEC. As compensation, the Department took title to, and eventual disposal responsibility for, a set quantity of DUF6 or tails, thereby freeing up cash that USEC had held as surety for disposal bonds it held to fulfill Nuclear Regulatory Commission (NRC) requirements. In the uranium market, an entity purchasing SWU provides feedstock in the form of natural uranium hexafluoride (UF6), which is enriched, producing low enriched uranium (LEU). The market operates on a principle of fungibility, meaning that the LEU a party purchasing SWU receives may not contain the actual UF6 provided, but it is treated as if it does. DOE provided USEC with a quantity of Russian-origin UF6 and, after the SWU value was applied, received back US-origin LEU.¹⁰ This LEU, again in terms of how the uranium market

⁸ “Excess Uranium Inventories: Clarifying DOE’s Disposition Options Could Help Avoid Further Legal Violations,” September 2011 (GAO-11-846).

⁹ Such an agreement would also have been inconsistent with the TVA-NNSA IA, which does not contemplate the Department’s purchasing the LEU needed for tritium production. Under the IA, TVA purchases unencumbered LEU and NNSA reimburses it the difference in cost needed to purchase US-origin material.

¹⁰ The fact that DOE received back US-origin LEU was of import to the Department, which needs material free from peaceful use restrictions for tritium production and other defense purposes, but the market permits “flag swapping”

views these types of transactions, contained both the UF6 DOE provided to USEC for enrichment and the SWU it purchased.

1. Applicability of Section 3112 of the USEC Privatization Act

The GAO draft report concludes that section 3112(b) of the USEC Privatization Act governed this provision of Russian-origin UF6 feedstock to USEC, and that the exchange was a transfer of uranium from DOE to USEC that should have been accounted for in DOE's market impact analyses supporting secretarial determinations under section 3112(d) for other uranium transactions in that time period.

Section 3112(b)(2) directs the Department to sell within seven years of enactment certain inventories of Russian-origin UF6 delivered to the Department under section 3112(b)(1). Section 3112(b)(2) requires that the Department "sell and receive payment for" the UF6 received under section 3112(b)(1) within seven years of enactment. The Department did not sell all of the material received under section 3112(b)(1); as reflected in its summaries of its inventory in its 2009 and 2013 Excess Uranium Inventory Management Plans, the Department has 1,079 MTU of that material remaining. That fact, however, has no bearing on the legal question at hand. The provision of the material to USEC as feedstock could not be considered a "sale" under section 3112(b)(2), or a sale or transfer under section 3112(d) because, as explained above, it was a transaction for the purchase of SWU from USEC and not a transaction for the sale or transfer of uranium. Accordingly, it did not need to be accounted for in DOE's market impact analysis for other transactions in that time period.

2. Authority of the Department to Assume Title to and Disposal Responsibility for DUF6

In the context of both this transaction and the June 2012 tails transaction, discussed in section D, *infra*, the GAO draft report contends that the Department's only authority for taking title to, and eventual disposal responsibility for, DUF6 is section 3113 of the USEC Privatization Act.

Section 3113, "Low Level Waste," states that the Department, "at the request of the generator, shall accept for disposal low-level radioactive waste, including depleted uranium if it were ultimately determined to be low-level radioactive waste," generated by USEC through operation of the GDPs and any other enrichment provider licensed by the NRC. Pursuant to section 3113, if the Department accepts material under section 3113, "the generator shall reimburse the Secretary for the disposal . . . in an amount equal to the [Department's] costs, including a pro rata share of any capital costs."

Section 66. of the AEA authorizes the Department "to purchase, take, requisition, condemn, or otherwise acquire supplies of source material."¹¹ Nevertheless, the GAO draft report reads section 3113 of the USEC Privatization Act as the sole mechanism by which the Department

and other fictions based upon the fungibility of uranium, so the change in origin, or "flag", does not alter the fundamental nature of the transaction.

¹¹ Although not specifically citing section 66. of the AEA, the Department used its AEA authority to accept roughly 19,700 metric tons uranium (MTU) of depleted uranium tails as its cost share in a 2010 cooperative agreement with USEC to support the continued development and demonstration of USEC's American Centrifuge Technology.

could take title to DUF6. (This error by GAO also plays into its discussion of the compensation it believes the Department should have received, discussed in section E(2), *infra.*) The USEC Privatization Act, however, did not remove or repeal the Department's existing section 66. authorities to "purchase, take, requisition, condemn, or otherwise acquire" source material, including DUF6. Section 3113 requires the Department to take title to and dispose of depleted uranium if a generator declares it low level waste and asks the Department, pursuant to section 3113, to accept it for disposal. As such, section 3113 is not an authorization statute, and it is not a statutory direction that any depleted uranium accepted by the Department from a generator is de facto low level waste. Instead, it functions as a guarantee, for generators, that the Department must, at a cost, accept its depleted uranium determined to be low level waste for disposal if the generator so chooses. Generators are not required to send depleted uranium determined to be low level waste to DOE for disposal; alternative disposal options are permissible. USEC did not invoke section 3113 in its proposal to the Department in the SWU procurement, and the Department relied on its section 66. authority to "take, requisition, condemn, or otherwise acquire" DUF6, not on its obligation under section 3113 to dispose of low level waste, if requested, for a generator.

C. March 2013 LEU Transfer

In March 2013, the Department transferred the same LEU it had received as a result of its SWU procurement to USEC. In exchange, DOE received the feed component of the LEU back and applied the value of the SWU component of the LEU (which DOE and USEC agreed was approximately \$44.4 million) as part of the government cost share of its June 2012 research, development, and demonstration (RD&D) cooperative agreement with USEC.

1. Compliance with requirements of section 3112(d)(2)(A)

Section 3112(d)(2)(A) requires that for covered transfers, the President must determine that the uranium is not necessary for national security needs. The Department has historically treated material not included in the Nuclear Weapons Stockpile Plan, a memorandum signed by the President that identifies uranium necessary for defense needs, as having been determined by the President as not being necessary for national security needs.

The GAO draft report posits that because the Nuclear Weapons Stockpile Plan, which is updated periodically, had not been updated since DOE added the LEU to its inventory after procuring the SWU from USEC, the Department could not rely on the Nuclear Weapons Stockpile Plan to satisfy the requirements of section 3112(d)(2)(A).¹² The GAO draft report further contends that the LEU must have been necessary for national security needs because DOE justified the procurement of the SWU¹³ as saying the resultant unobligated LEU was necessary for national security purposes and DOE has repeatedly linked the need for a domestic enrichment capability with national security purposes.

¹²GAO draft report at 36-37.

¹³ The GAO draft report incorrectly analyzes this transaction saying the Department "acquired" the LEU. This underscores the report's fundamental misunderstanding of the March 2012 transaction. GAO draft report at 86 ("... when the department acquired this same LEU in March 2012..."). The Department did not acquire LEU, it procured SWU, which was applied to the feedstock provided by the Department, resulting in the LEU.

The Department's standard practice has always been that the last signed Nuclear Weapons Stockpile Plan is valid as a Presidential policy directive and is the standing authority until it has been replaced by an updated plan. The Nuclear Weapons Stockpile Plan in effect at the time of the transaction, dated July 2011, had not been updated. The fact that the LEU was obtained by DOE, and then transferred to USEC, after the date of the Plan does not undercut the Department's position: the absence of the LEU in the Plan in effect at the time of the transfer meets the requirement of section 3112(d)(2)(A). Second, the Secretarial Determination under section 3112(d) is a general statement indicating the material is excess and not needed now, and thus does not undermine the Nuclear Weapons Stockpile Plan.

The Department did state in the Justification for Other Than Full and Open Competition for the SWU procurement that DOE needs unencumbered LEU for tritium production and defense purposes and that USEC was the only company that could provide enrichment services that were free from peaceful use assurances.¹⁴ However, in the time between the March 2012 and June 2012 transactions, the Department executed its agreements in the Depleted Uranium Enrichment Project, a series of agreements that provided unobligated LEU for up to 15 years of tritium production and increased the quantity of US-origin LEU available for flag-swapping or origin exchanges.

D. June 2012 Tails Acceptance

In June 2012, the Department agreed to accept title to, and eventual disposal responsibility for, a quantity of DUF6 from USEC in exchange for an agreed upon value being applied as the government cost share for a portion of the June 2012 RD&D Agreement.

1. Authority to Accept DUF6

In its analysis of this transaction, the GAO draft report makes the same errors as it did in analyzing the acceptance of DUF6 by the Department in the March 2012 SWU procurement. The GAO draft report again contends that section 3113 of the USEC Privatization Act is the proper authorizing authority. The GAO draft report's interpretation of section 3113 as being the Department's sole authority to take title to DUF6 is incorrect, as discussed in section B(2), *supra*.

E. Compensation Issues

1. Compensation for Transfer of Depleted Uranium

Section 63. of the AEA provides that for source material distributed to a commercial licensee, the Department "shall make reasonable charge determined pursuant to section 161m."¹⁵ Section 161m. provides that for sales, leases, or other transactions making source or special nuclear material available to licensees, the Department

¹⁴ Justification for Other Than Full and Open Competition Procurement Request Number 12NE000165 (February 7, 2012).

¹⁵ Section 63.(c) (42 U.S.C. 2093(c)).

shall establish prices to be paid by licensees for material or services to be furnished by the [Department] pursuant to this subsection, which prices shall be established on such a nondiscriminatory basis as, in the opinion of the [Department] will provide reasonable compensation to the Government for such material or services and will not discourage the development of sources of supply independent of the [Department].¹⁶

The draft report then describes several ways in which it views the Department's transfer of DUF6 to ENW as failing to comply with these requirements. The Department addresses each of these issues below.

a. The Department is not required to establish a monetary price for source material

The GAO draft report focuses on the language in section 63.(c) that the Department "shall make a reasonable charge" for source material transferred to commercial licensees and contends that a "charge" requires a monetary price or fee.

In focusing on just the definition of "charge" however, the GAO draft report ignores the remainder of the requirement of section 63.(c), which states that the Department must make a "reasonable charge *determined pursuant to section 161m.*"¹⁷ Therefore, interpreting section 63.(c) requires that section 161m. be examined. Section 161m. requires that the Department establish prices that "*in the opinion of the [Department]* will provide reasonable compensation to the Government . . ."¹⁸

Charge is defined as "the price demanded for a thing or service."¹⁹ The first definition for price is "genuine and inherent value," which is followed by "the amount of money given or set as the amount to be given as consideration for the sale of a specified thing."²⁰ Thus, in reading the relevant statutes regarding the compensation the Department must receive for transfers or sales of source material, the Department must establish a "charge" or "price" – the value of consideration to be given – for the DUF6 that, in the Department's opinion provides "reasonable compensation" to the Department.

The GAO draft report reads this to mean that the Department must receive "reasonable compensation" from the price charged to the recipient, and contends that other factors may not be considered as contributing to the compensation considered by the Department. This reads more into the statute than is written – the statute requires that the Department must establish a price that will provide reasonable compensation to the government for the material, not that the price must be a predetermined monetary value and the exclusive means of determining reasonable compensation to the government for the material. Establish is defined as "to set or fix

¹⁶ Section 161m. (42 U.S.C. 2201(m)).

¹⁷ Section 63.(c) (emphasis added).

¹⁸ Section 161g. (emphasis added).

¹⁹ WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (UNABRIDGED) at 377.

²⁰ *Id.* at 1798.

after consideration.”²¹ Thus, it is fair for the Department to consider a transaction as a whole, consider the entirety of the benefits to the Department, and charge no monetary price and still, in its opinion, receive reasonable compensation.

b. The Department is not required to publish a pricing policy

The GAO draft report states that the Department’s historical practice of “establishing prices” has been to set standard, monetary charges that it published in the Federal Register along with its prices for the provision of enrichment service at the GDPs. The Federal Register notice GAO has located²² is from over thirty years ago. The notice updates prior notices on “charges and other information with respect to plutonium and uranium enriched in the isotope U-233” from as early as 1963.²³

In the formation of USEC as a government corporation in EPACT 1992, Congress established the corporation as the “exclusive marketing agent on behalf of the United States Government for entering into contracts for providing enriched uranium (including low-enriched uranium derived from highly enriched uranium) and uranium enrichment and related services.” Along with this, in an effort to make the government corporation competitive in the commercial field, Congress provided that “[t]he Corporation shall establish prices for its products, materials, and services provided to customers other than the Department on a basis that will allow it to attain the normal business objectives of a profit making corporation.”²⁴ Accordingly, the government was no longer required to establish and publicize prices, which obviated the need for notices and pricing policies like those found in the 1982 Federal Register notice brought to DOE’s attention.

Thereafter, when USEC was privatized, the USEC Privatization Act clarified that DOE could sell or transfer natural and enriched uranium from its uranium inventories consistent with section 3112 and its existing AEA authorities. No mention of publicized pricing was carried over into the new legislative framework. Accordingly, the 1982 notice found by GAO that preceded privatization by more than 15 years was part of a framework that is not applicable or existent today. DOE is permitted to sell uranium directly into the market in accordance with its applicable laws and regulations, and is not required to publish pricing policies in the Federal Register.

c. The Department received reasonable compensation for the DUF6 transferred to ENW

The GAO draft report dismisses the intangible benefits and value the Department received under the Depleted Uranium Enrichment Project as comprising “reasonable compensation” based on its restrictive and incorrect reading of the requirements of sections 63. and 161m. of the AEA. As discussed above, sections 63. and 161m. require that the Department must, in its opinion, receive “reasonable compensation” for source or special nuclear material provided to commercial

²¹ *Id.* at 778.

²² 47 Fed. Reg. 17110 (April 21, 1982)

²³ 28 Fed. Reg. 5314 (May 28, 1963). The 1963 notice did not cover distribution to commercial licensees because no such licenses had been issued in 1963.

²⁴ EPACT 1992 section 1402.

licensees. Reasonable compensation is not defined in the AEA, and the Department has considered tangible and intangible benefits in assessing reasonable compensation.

At the time of transfer, the Department considered the DUF6 transferred to ENW a liability with a negative value on the Department's books. The material was slated for processing at the Department's DUF6 conversion facility into a more stable form and for eventual disposal. Although the DUF6 had potential value, the value of the DUF6 outside of the Depleted Uranium Enrichment Project was not clear for several reasons. The DUF6 had value only if it was enriched, and the Department could not enrich the material because it did not have appropriated funds to enter into a contract for enrichment services. Nevertheless, the Department recognized that outside parties may contend that the DUF6 has potential value and the Department must be compensated for the potential value of the material. Based on the prices of natural uranium and the costs of the enrichment services that would be required to enrich the DUF6 to natural uranium assays at the time of the transfer, the DUF6 was imputed to have a potential value of \$300M.²⁵

In the series of transactions in the Depleted Uranium Enrichment Project, several Departmental elements received a number of benefits that amounted to reasonable compensation. NNSA was projected to receive a benefit through the guaranteed source of unobligated LEU that will be used in the TVA reactors to produce sufficient quantities of tritium to supply the tritium program for up to 15 years. Although it was difficult to quantify the benefit to the Department of that assured supply of LEU, this outcome serves important Departmental objectives: keeping the tritium supply at appropriate levels and avoiding the need to downblend HEU that is suitable for use in Naval Reactor programs. The Department projected that there could be savings for NNSA if the costs to produce tritium in TVA reactors using unobligated LEU purchased by TVA are less than the costs to downblend HEU. Downblending HEU removes it from the Department's stockpiles, and there is no current enrichment capability that can produce additional HEU should it be needed for Naval Reactor or other defense purposes. Preserving HEU inventory is thus extremely important to the Department.

Finally, EM was projected to receive a benefit in deferred and avoided costs because the Depleted Uranium Enrichment Project kept the Paducah GDP operating for an additional year. The Depleted Uranium Enrichment Project – with transfers from the Department to ENW at the Paducah GDP beginning on May 15, 2012 – was anticipated to keep the GDP operating for approximately one year beyond when USEC has indicated it would shut the facility down. Surveillance and maintenance (S&M) activities would need to take place until the Department could begin cleanup and decontamination and decommissioning (D&D) services at the facility. Finally, EM also projected savings because the DUF6 it transferred was slated for conversion and disposal. EM took title to the secondary tails from the enrichment process, but those tails are of a smaller quantity than the DUF6 being transferred to ENW.

Although the Department has traditionally accepted "compensation" for nuclear material in the form of money or services that can have a monetary value attached to them, it is reasonable to view intangible benefits as compensation as well. In *Regents of the University of California v.*

²⁵ This value is arrived at by taking the value of natural uranium at the time of transfer and subtracting the costs of the enrichment services that would be needed to enrich the DUF6 to natural uranium assay levels.

Public Employment Relations Board, the Supreme Court considered the “private hands exception” to the general statutory prohibition on entities other than the Postal Service conveying or transmitting letters along postal routes, which applies when the services are provided “without compensation.”²⁶ In determining that direct monetary exchange was not necessary to establish compensation, the Court gave the term compensation “its normal meaning” and found that it “includes indirect as well as direct compensation.”²⁷ The intangible benefits in that case included the provision of a service that employees would otherwise pay for with union dues.²⁸ The court further stated, “Common-law notions of consideration . . . do not control the interpretation of this statute. Congress, after all, used the generic term ‘compensation,’ which can include less direct exchanges of benefits.”²⁹

Other case law also demonstrates that intangible benefits can be considered compensation in many different kinds of circumstances.³⁰ Accordingly, the language in sections 53. and 161m. requiring “reasonable compensation” can include “less direct exchanges of benefits”³¹ like the intangible benefits the Department anticipated it would realize in this transaction. The intangible benefits to the tritium program, combined with the tangible projected savings to the tritium program, projected reduced rates for BPA ratepayers, and the deferred and avoided costs for EM, amounted to reasonable value for the DUF6 transferred to ENW.

2. Compensation for Accepting Tails for Disposal of Depleted Uranium

As discussed more fully in section B(3), *supra*, the GAO draft report incorrectly contends that the Department’s sole authority for taking title to, and eventual disposal responsibility for, DUF6 is section 3113 of the USEC Privatization Act. Based on its incorrect conclusion that the Department may only accept tails under section 3113, the GAO draft report contends that the Department may have been undercompensated because section 3113 requires the generator to reimburse the department for “for the disposal of depleted uranium pursuant to paragraph (1) in an amount equal to the [Department’s] costs, including a pro rata share of any capital costs.” This requirement was not applicable to the transactions in which the Department accepted title to, and eventual disposal responsibility for, DUF6 because the Department did not accept them pursuant to section 3113 of the USEC Privatization Act, but rather relied upon its section 66. authorities.

²⁶ 485 U.S. 589, 597 (1988).

²⁷ *Id.* at 598, 600.

²⁸ *Id.* at

²⁹ *Id.* at 600-601.

³⁰ See, e.g., *Clair Aero, Inc. v. Nat. Transp. Safety Board*, 2007 WL 754789 (D.C. Cir. 2007) (NTSB precedent “establishes that the receipt of intangible benefits such as goodwill or the expectation of future economic benefits is compensation under the regulations”); *Sec. and Exchange Comm. v. Yun*, 148 F.Supp.2d 1287, 1291-92 (M.D. Fla. 2001) (where defendant in insider trading scheme received intangible unjust enrichment, court recognized that as sufficient receipt of profits to require defendant to disgorge profits); *Leik v. Comm’r of Internal Revenue*, 1948 WL 7098 (U.S. Tax Ct. 1948) (where a contract for sale of tangible and intangible assets specifically lists only tangible assets, no need to compensate for intangible assets).

³¹ *Regents of the University of California*, 485 U.S. at 601.

Even without this requirement, however, in both the SWU procurement and the June 2012 tails transaction, the Department conducted a thorough cost-benefit analysis to ensure that the transactions were favorable to the Department.

F. Market Impact Analysis Thoroughness, Reliability, Publication

1. The ERI Analyses Supported the Secretary's Related Determinations

The GAO draft report criticizes the two ERI analyses the Department commissioned that formed the bases of the May 2012 and June 2012 Secretarial Determinations. Although the GAO draft report does not explicitly say that it believes the Secretary's determinations that the proposed transactions would not have an adverse material impact on the domestic uranium mining, conversion or enrichment industry were improper, it does say that DOE "cannot be certain of the studies' conclusions,"³² and that casts doubt on the determinations.

Section 3112(d)(2)(B)'s requirement that the Secretary determine that covered transactions will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry does not contain any language on how that obligation must be fulfilled or what the foundation of that determination must be. For most covered transactions, the Department has historically contracted with ERI for ERI to conduct and produce an independent assessment of the impact the proposed transfers will have on the specified industries. Subject matter experts within the Department then review the independent assessment and compare it to their own understanding of the uranium market and advise the Secretary on whether to make the determination of no adverse material impact. The Secretary, relying on the totality of information available to him or her, then makes that determination. The Department notes that although the ERI analyses may have contained conclusions, the determination of the impact of the covered transactions was not made by ERI, but instead was made by the Secretary.

The GAO draft report states that peer review or other methods of assessing ERI's methodology and assumptions were necessary for the studies to be sufficiently reliable for the Secretary to make the determinations. Nevertheless, GAO's own assessment of the ERI analyses found that they did not contain "significant flaws"³³ and that ERI's approach was "generally reasonable."³⁴ The GAO draft report notes that it believes ERI based its analyses on incomplete data because it did not include data that uranium producers do not reveal in filings with the Securities and Exchange Commission or other public forums. The GAO draft report also contends that the ERI analyses did not account for the cumulative effects of the transfers or consider what the GAO considers "all relevant factors" that could affect prices.³⁵

The Department tasked ERI to provide an independent assessment of the impact of proposed transfers on the domestic uranium mining, conversion, and enrichment industry. The fact that experts may disagree as to the factors or other information in an analysis does not necessarily mean the analysis is incorrect, however. The Department is not convinced that the GAO draft

³² GAO draft report at 50.

³³ GAO draft report at 94.

³⁴ GAO draft report at 95.

³⁵ GAO draft report at 97.

report's cited flaws, which by the GAO draft report's own opinion are not "significant," call into question the information in the analyses or the validity of the Secretarial Determinations. That said, the Department does take note of input it receives from industry and other sources regarding these analyses and adjusts its work scope or direction for ERI based upon reflected concerns. Thus, although the Department does not believe that the ERI analyses were flawed or insufficient to form the bases for the Secretarial determinations, the Department will keep the GAO draft report's concerns in mind as it moves forward with future determinations.

2. The Department Satisfied its "Information Quality Guidelines" in Reviewing the ERI Analyses

The GAO draft report mentions the Department's "Information Quality Guidelines"³⁶ (DOE Guidelines) and states that the ERI analyses, which "could be seen as detailing influential financial information,"³⁷ did not comply with these requirements.

The DOE Guidelines apply to the distribution of information to the public initiated or sponsored by the Department. The DOE Guidelines define "influential" information, when used in the context of scientific, financial or statistical information, to mean

information (1) that is subject to embargo until its dissemination by DOE or a DOE element...because of potential market effects [this provision applies to information disseminated by the Energy Information Administration]; (2) that is the basis for a DOE action that may result in an annual effect on the economy of \$100 million or more; or (3) that is designated by a DOE Element as 'influential'.

In addition, the DOE Guidelines provide for pre-dissemination review procedures that require the Department, before disseminating information to the public, to "ensur[e] that the information is consistent with the OMB and DOE Guidelines and that the information is of adequate quality for dissemination." For "influential" information, to the extent practicable, the DOE Guidelines state that the relevant DOE Element should provide for "higher level review of the originating office's conclusions."

Assuming for purposes of this response that the ERI analyses constituted "influential" financial information, as suggested by the GAO, the Department provides for pre-dissemination review of analyses conducted by ERI (including those analyses described in the GAO draft report) as follows. Once DOE receives an analysis, conducted pursuant to a DOE-provided statement of work to analyze a prescribed transaction or set of transactions, Department staff with subject matter expertise review the analysis for completeness and to determine if the analyses comport with their understanding of the uranium, conversion and enrichment markets. The Department can provide additional comments or questions for portions of the report it would like clarified or further explored. Department staff then make a recommendation to the Secretary based on their understanding of the nuclear fuel markets, the ERI report and other pertinent data or information.

³⁶ Available at <http://energy.gov/sites/prod/files/cioprod/documents/finalinfoqualityguidelines03072011.pdf>.

³⁷ GAO draft report at 50, fn 85.

Going forward, the Department will continue to consider the applicability of the Information Quality Guidelines to independent analyses of the potential market impact of proposed transactions and, if it determines the Information Quality Guidelines apply to those analyses, it will take appropriate steps to ensure the Information Quality Guidelines are met.

3. The Department's Provision of Natural Uranium to USEC in the SWU Procurement did not Need to be Considered in Subsequent Market Impact Analyses

As discussed in section B(1), *supra*, the Department's provision of natural uranium as feed in the SWU procurement was not a transfer or sale under section 3112 of the USEC Privatization Act. The GAO contends, however, that section 3112(d)(2)(B) requires that the department "account for Russian-origin uranium" in its market impact analyses. The statute requires that the Department must take "into account the sales or uranium under the Russian HEU Agreement and the Suspension Agreement," neither of which apply to the provision of feedstock to USEC in the SWU procurement. It is also worth noting again that the uranium market, using the principles of fungibility upon which it is based, views the feedstock provided to USEC as being contained in the LEU the Department received as a result of the procurement.

G. Appropriate Weight to be Given to GAO's Legal Analysis and Other Conclusions

The GAO draft report hinges most of its criticisms of the Department's transactions upon GAO's interpretation of applicable statutory provisions. Because of that, it is worth noting the appropriate weight that should be given to GAO's interpretation of DOE's statutes and the deference that DOE's interpretations are due. The Supreme Court has consistently espoused the view that an agency interpretation is entitled to some degree of deference.³⁸ The more deferential *Chevron*³⁹ deference applies to adjudications, rulemakings, and certain other agency interpretations carrying the force of law.⁴⁰ However, as the Supreme Court reaffirmed in *United States v. Mead Corp.*, even those agency interpretations that do not fall under the *Chevron* doctrine are still entitled to deference under *Skidmore v. Swift*.⁴¹

In *Skidmore*, the Supreme Court recognized that where agency interpretations are "based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case" they may "constitute a body of experience and informed judgment to

³⁸ See *Chrysler v. Brown*, 441 U.S. 281, 315 (1979) ("[A] court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise." (quoting *Batterton v. Francis*, 432 U.S. 416, 424-25 (1977))).

³⁹ *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

⁴⁰ In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the majority held: "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27. *Barnhart v. Walton*, 535 U.S. 212 (2002), articulated a slightly different standard for when interpretations should receive *Chevron*, rather than deference based on *Skidmore v. Swift*, 323 U.S. 134 (1944), finding that "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time" may all indicate that an interpretation should get *Chevron* deference rather than *Skidmore* deference. 535 U.S. at 222.

⁴¹ 323 U.S. 134 (1944).

which courts and litigants may properly resort for guidance.”⁴² *Skidmore* held that in considering the weight to give an agency interpretation, a court should evaluate, “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”⁴³

In this case, as the agency that owns and transfers uranium, DOE has the “specialized experience” and broader information upon which a court could rely for guidance. DOE’s interpretation of its authorities to transfer uranium and the requirements for those transfer have been visited on many prior occasions, which has resulted in thorough consideration based upon the history of transfers, the legal requirements for those transfers, and analysis of prior GAO reports. In looking at the “validity” of DOE’s reasoning, a court should view DOE’s position as a permissible interpretation of its transfer authorities. DOE’s interpretation has many factors that should have power to persuade the court, including DOE’s history of uranium transfers and complying with the legal requirements for those transfers. This all supports the conclusion that the DOE’s interpretation should be given considerable weight in any review.

Finally, we note that the opinions of GAO in the draft GAO report and in the prior letter regarding depleted uranium transfers are not binding upon DOE. The GAO is an instrumentality of the legislative branch that cannot exercise executive functions.⁴⁴ Because “[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law,”⁴⁵ whatever GAO’s examination of these questions might reveal to those in the GAO or elsewhere would not be any sort of legally-authoritative “determination” of what the law actually is that bore on the transactions about which GAO wrote.⁴⁶ While DOE would carefully consider any legal analysis GAO might provide for its persuasive value in DOE’s determination of the legal question addressed in considering a transaction, ultimately DOE is responsible for any dispositive legal examination of the issues presented. The Department has given careful and respectful consideration of the analysis and conclusion reached in the draft GAO report. Nevertheless, the Department adheres to its view that it was authorized to enter into the analyzed transactions and that it complied with all applicable legal requirements for those transactions.

H. Factual Clarifications

- On the cover page, the summary concludes with a statement regarding the Department’s market impact analyses and states that they had conclusions of “no market impact.” This is not what those studies concluded. Moreover, the studies presented information and the Secretary makes the determination, based on information in the studies and advice from

⁴² *Id.* at 139–40.

⁴³ *Id.* at 140.

⁴⁴ *Bowsher v. Synar*, 478 U.S. 714, 732 (1986).

⁴⁵ *Id.* at 733.

⁴⁶ The Office of Legal Counsel in the Department of Justice has noted on several occasions that “Although the opinions and legal interpretations of the GAO and the Comptroller General often provide helpful guidance on appropriations matters and related issues, they are not binding upon departments, agencies, or officers of the executive branch.” Memorandum for Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division and for John D. Leshy, Solicitor, Department of the Interior, from Todd David Peterson, Deputy Assistant Attorney General, *Re: Administrative Settlement of Royalty Determinations* at n.7 (July 28, 1998).

Departmental program experts, that covered transfers will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry.

- Page 3, Footnote 9, the Portsmouth GDP produced HEU until 1992, not 1991.
- Page 12, sidebar and text, both refer to tails as a “byproduct” of the enrichment process. The tails are not a byproduct, but rather a product of the enrichment process. The enrichment process creates two streams of product, enriched uranium and depleted uranium. Byproduct material is defined in section 11e. of the AEA, and depleted uranium does not fit within this definition.
- Page 14, Paragraph 1, third from last complete sentence reads: “For example, according to DOE, retention of the existing cleanup and decommissioning obligations was essential to provide a positive value to the government at privatization.” This sentence is confusing as drafted. The GDP Lease obligates DOE to perform and pay for cleanup work for contamination that occurred prior to the lease. This is because the GDPs were operated by the Department for some time prior to the lease to the government corporation, and thus the Department agreed to be responsible for the cleanup of the pre-existing contamination. The Department is unclear how this decision is interpreted as being “essential” to providing positive value to the government at privatization – the agreement pre-dated privatization, and the Department retained the obligation after privatization.
- On page 25, the draft report states that “DOE decided that the tails had no value in this transaction, and therefore the transaction had no cost to the department.” This is incorrect. In fact, DOE determined that the tails identified in this transfer would have an imputed value as a result of the transaction, corresponding to the difference between the value of the resultant LEU and the cost to enrich the tails.
- Page 26 (Line 1): “Beginning in May 2012, DOE transferred 9,092 MTU of U.S. origin high-assay depleted uranium tails...” DOE transferred 9,075 MTU of U.S. origin high-assay depleted uranium tails.
- Page 31, figure 5 says “DOE transferred 48 MTU of domestic LEU to USEC (equivalent to 409 MTU of natural uranium plus \$44.4 million of enrichment services [SWU]) credited toward DOE’s commitment to support the RD&D agreement.” It is unclear to DOE if this is a punctuation error or a drafting error (i.e., if the closing parentheses should be at the end of the sentence instead of where it is.) The sentence reads as if the entire value of the 48 MTU of LEU was credited to the RD&D Agreement, which it was not. Even if the punctuation were correct, however, the sentence still somewhat misstates the agreement. The enrichment services were also not applied as a portion of the government cost share; USEC and DOE agreed to a value for the SWU component of the LEU and that value was applied as a portion of the government cost share on the cooperative agreement.

I. Errata Edits

- Page 1, Paragraph 1, last sentence: There is a missing word. The sentence currently states, “Since then, shares of USEC been publicly traded on the New York Stock Exchange.” Add the word “have” before “been.”
- Page 10, first full paragraph, 2nd sentence: Insert “types of”: “Uranium buyers, such as power utilities... into nuclear fuel in two different **types of markets.**”

- Page 10, first full paragraph, 3rd sentence: Insert “or services”: “In the “term” market, buyers contract with sellers for the delivery of a quantity of material **or services** over a period of years.
- Page 54, line 21-22 states that USEC “is the only supplier of enrichment services that is not subject to obligations under certain international agreements.” This should be updated to reflect that USEC is no longer supplying enrichment services; therefore, it “was” the only supplier of enrichment services not subject to peaceful use assurances.
- On page 83, lines 9-10, the draft report states that “DOE agreed to accept title to, and eventual disposal responsibility for about 39,200 MTU of USEC’s tails...” DOE agreed to accept 39,200 MT of DUF6 not 39,200 MTU.