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DON FUQUA, CHAIRMAN COMMITTEE ON SCIENCE AND TECHNOLOGY HOUSE OF REPRESENTATIVES:

THIS IS IN RESPONSE TO YOUR REQUEST OF APRIL 15, 1981, FOR OUR OPINION CONCERNING THE DEPARTMENT OF ENERGY'S (DOE) AUTHORITY TO ESTABLISH A FACILITY AT MORGANTOWN, WEST VIRGINIA, FOR MULTIPLE PURPOSE BASIC RESEARCH ON CONVENTIONAL AND ADVANCED ATMOSPHERIC FLUIDIZED BED COMBUSTION, COAL PREPARATION, AND GAS CLEANUP.

THE FACTS, AS WE UNDERSTAND THEM, ARE AS FOLLOWS: FUNDS, TOTALLING $39.6 MILLION, WERE APPROPRIATED IN FISCAL YEARS 1978, 1979, AND 1980, TO OPERATE A FACILITY TO TEST AND EVALUATE COMPONENTS, SUBSYSTEMS, AND CONFIGURATIONS FOR ATMOSPHERIC FLUIDIZED BED BOILERS. THE FUNDS WERE TO REMAIN AVAILABLE UNTIL EXPENDED. THE FISCAL YEAR 1981 BUDGET REQUEST ASKED FOR $10 MILLION FOR THE PROJECT, OF WHICH $9.9 MILLION WAS SPECIFICALLY REQUESTED FOR CONSTRUCTION OF THE ORIGINAL FACILITY, RATHER THAN FOR OPERATIONS. BEFORE THE APPROPRIATIONS COMMITTEES HAD ACTED ON THE REQUEST, AND BEFORE THE CONSTRUCTION OF THE FACILITY WAS COMPLETED, THE PROJECT WAS TERMINATED BY THE GOVERNMENT FOR CONVENIENCE, APPARENTLY BECAUSE OF COST OVERRUNS AND CHANGING PROGRAM REQUIREMENTS. THUS, NO FUNDS WERE APPROPRIATED IN FY 1981.

AFTER TERMINATION COSTS WERE SETTLED, $14 MILLION OF THE FUNDS APPROPRIATED IN PREVIOUS FISCAL YEARS FOR OPERATING FUNDS REMAINED. THE ADMINISTRATION HAS NOT REQUESTED ANY NEW APPROPRIATIONS FOR THE PROJECT IN FISCAL YEAR 1982. HOWEVER, AS PART OF ITS BUDGET STATEMENT, IT REPORTED THAT IT HAD REDIRECTED SOME OF THE PREVIOUSLY APPROPRIATED, UNOBLIGATED OPERATING FUNDS TO REDESIGN AND RECONFIGURE THE PARTIALLY COMPLETED FACILITY TO MAKE IT A MULTIPLE PURPOSE FLUIDIZED BED COMBUSTION RESEARCH FACILITY. AT HEARINGS BEFORE YOUR COMMITTEE ON MARCH 19 AND 27, 1981, DOE INDICATED THAT IT INTENDS TO CONTINUE TO FUND THE CONSTRUCTION OF THE FACILITY IN FY 1982 FROM THESE NO-YEAR FUNDS, AND EXPECTS THE CONSTRUCTION TO BE COMPLETED IN FY 1983.

YOU QUESTION DOE'S AUTHORITY TO PROCEED WITH ITS WORK ON WHAT YOU TERM A "NEW PROJECT," RATHER THAN THE PROJECT FOR WHICH THE CONGRESS ORIGINALLY APPROPRIATED THE FUNDS. YOU BELIEVE THAT SUCH A NEW PROJECT WOULD REQUIRE NEW AUTHORIZATION FROM THE CONGRESS. YOU ALSO ASK WHAT EFFECT THE FACT THAT THE FISCAL YEAR 1981 BUDGET REQUEST WAS FOR CONSTRUCTION FUNDS FOR THE ORIGINAL PROJECT, HAS ON THE USES TO WHICH THE UNOBLIGATED OPERATING FUNDS CAN BE PUT.

FOR THE REASONS STATED BELOW, IT IS OUR OPINION THAT DOE MAY CONSTRUCT AND EQUIP A FLUIDIZED BED COMBUSTION RESEARCH FACILITY AT MORGANTOWN, WEST VIRGINIA,

UTILIZING FUNDS STILL AVAILABLE FROM PRIOR YEAR "FOSSIL ENERGY RESEARCH AND DEVELOPMENT" APPROPRIATIONS, EVEN THOUGH THE NEW PROJECT WAS NOT SPECIFICALLY AUTHORIZED BY THE CONGRESS.

THE FEDERAL NONNUCLEAR ENERGY RESEARCH AND DEVELOPMENT ACT OF 1974 (NONNUCLEAR ACT), 88 STAT. 1878, PROVIDES BASIC PROGRAM AUTHORITY FOR FOSSIL FUEL RESEARCH AND DEVELOPMENT. SECTION 16 OF THE ACT, 42 U.S.C. SEC. 5915(A), PROVIDES, "THERE MAY BE APPROPRIATED TO THE ADMINISTRATOR FN1 TO CARRY OUT THE PURPOSES OF THIS ACT SUCH SUMS AS MAY BE AUTHORIZED IN ANNUAL AUTHORIZATION ACTS." SECTION 111 OF THE ENERGY REORGANIZATION ACT, AS ADDED BY THE 1978 AUTHORIZATION ACT, PUB.L. 95-238, APPROVED FEBRUARY 25, 1978, ALSO PROVIDES THAT APPROPRIATIONS ARE SUBJECT TO ANNUAL AUTHORIZATIONS IN ACCORDANCE WITH SEC. 16 OF THE NONNUCLEAR ACT, EXCEPT AS OTHERWISE PROVIDED BY LAW. THE FY 1978 ACT IS THE LAST APPLICABLE ANNUAL AUTHORIZATION ACT PASSED. EXCEPT FOR TITLE II, DISCUSSED LATER, THE PROVISIONS OF THE 1978 AUTHORIZATION ACT LAPSED AT THE END OF THAT FISCAL YEAR. THEREFORE, THE RELEVANT APPROPRIATION ACTS WHICH HAVE FUNDED ACTIVITIES AUTHORIZED BY THE NONNUCLEAR ACT SINCE FY 1978, HAVE NOT BEEN SUBJECT TO EXPLICIT DIRECTIONS, RESTRICTIONS, OR LIMITATIONS OF AUTHORITY WHICH MIGHT HAVE BEEN INCLUDED IN ANNUAL AUTHORIZATION ACTS HAD THERE BEEN ANY. LUMP SUM APPROPRIATIONS SUCH AS "FOSSIL ENERGY RESEARCH AND DEVELOPMENT" INCLUDED IN APPROPRIATION ACTS FOR PERIODS SINCE FY 1978 HAVE BEEN AVAILABLE FOR DOE PROJECTS UNDERTAKEN UNDER THE AUTHORITY OF THE BASIC PROGRAM STATUTE - THE NONNUCLEAR ACT - WITHOUT REFERENCE TO ANNUAL AUTHORIZATION ACTS.

IN OTHER WORDS, ALTHOUGH SECTION 16 OF THE NONNUCLEAR ACT AND SECTION 111 OF THE ENERGY REORGANIZATION ACT, AS AMENDED, BOTH MAKE APPROPRIATIONS SUBJECT TO ANNUAL AUTHORIZATION ACTS, THE DECISION OF THE CONGRESS TO ENACT APPROPRIATIONS IN FY 1979 AND 1980 WITHOUT WAITING FOR AN AUTHORIZATION ACT PROVIDES SUFFICIENT AUTHORITY FOR DOE TO EXPEND FUNDS IN ACCORDANCE WITH THE TERMS OF THE APPROPRIATION. NO FURTHER AUTHORITY IS REQUIRED.

IT IS NOT CLEAR FROM THE INFORMATION AVAILABLE TO US WHETHER DOE STILL HAS FY 1978 UNOBLIGATED FUNDS WHICH IT INTENDS TO USE FOR THE NEW RESEARCH PROJECT. AS MENTIONED EARLIER, THERE WAS AN ANNUAL AUTHORIZATION ACT OF 1978 WHICH AUTHORIZED APPROPRIATIONS FOR "OPERATING EXPENSES" UNDER THE SUBHEADING "DIRECT COMBUSTION (COAL)". APPROPRIATIONS WERE ALSO MADE FOR "OPERATING EXPENSES, FOSSIL FUELS" IN ERDA'S FY 1978 APPROPRIATION, TITLE II, PUB.L. 95-74, JULY 26, 1977. HOWEVER, SECTION 201 OF THE SAME AUTHORIZATION ACT ADDED PERMANENT AUTHORITY TO THE ENERGY REORGANIZATION ACT OF 1974. IN SECTION 111(B)(1), WHICH IT ADDED TO THE REORGANIZATION ACT, IT PROVIDES:

"(B)(1) FUNDS APPROPRIATED PURSUANT TO AN ANNUAL AUTHORIZATION ACT FOR 'OPERATING EXPENSES' MAY BE USED FOR -

"(A) THE CONSTRUCTION OR ACQUISITION OF ANY FACILITIES, OR MAJOR ITEMS OF EQUIPMENT, WHICH MAY BE REQUIRED AT LOCATIONS OTHER THAN INSTALLATIONS OF THE ADMINISTRATION, FOR THE PERFORMANCE OF RESEARCH, DEVELOPMENT, AND DEMONSTRATION ACTIVITIES, AND

"(B) GRANTS TO ANY ORGANIZATION FOR PURCHASE OR CONSTRUCTION OF RESEARCH FACILITIES."

THUS EVEN IF DOE PLANS TO USE FY 1978 FUNDS, THERE IS SPECIFIC AUTHORITY TO USE APPROPRIATIONS DESIGNATED FOR OPERATING EXPENSES FOR CONSTRUCTION OR ACQUISITION OF FACILITIES AND EQUIPMENT.

YOUR INQUIRY NEXT RAISES THE ISSUE OF THE AVAILABILITY OF APPROPRIATIONS FOR PURPOSES NOT EXPRESSED IN THE BUDGET SUBMISSION OR THE RELEVANT COMMITTEE REPORTS.

SINCE THERE IS NO ANNUAL AUTHORIZATION TO GOVERN DOE'S EXPENDITURES, EXPRESSIONS OF INTENT AS TO THE USE OF AN APPROPRIATION CONTAINED IN AN AGENCY'S BUDGET REQUEST OR EVEN IN COMMITTEE REPORTS ARE NOT LEGALLY BINDING UPON THE DEPARTMENT OR AGENCY CONCERNED UNLESS THEY ARE SPECIFIED IN THE APPROPRIATION ACT ITSELF. SEE 55 COMP.GEN. 812 (1976) (COPY ENCLOSED) AND DECISIONS CITED THEREIN. CONSEQUENTLY, UNOBLIGATED FUNDS FROM A LUMP SUM APPROPRIATION WHICH IS AVAILABLE UNTIL EXPENDED MAY BE UTILIZED, IF OTHERWISE PROPER, FOR ONE PROJECT EVEN THOUGH THE FUNDS WERE ORIGINALLY EARMARKED IN THE BUDGET REQUEST OR THE LEGISLATIVE HISTORY FOR ANOTHER PROJECT.

THE NEW RESEARCH FACILITY FOR FLUIDIZED BED COMBUSTION APPEARS TO BE WITHIN THE AMBIT OF THE NONNUCLEAR ACT. ALSO, COMPLETION OF CONSTRUCTION OF THE NEW FACILITY IS A PERMISSIBLE USE FOR OTHERWISE UNOBLIGATED MONEYS WHICH MAY BE AVAILABLE FROM "FOSSIL ENERGY RESEARCH AND DEVELOPMENT" APPROPRIATIONS.

WITH REGARD TO FUNDS APPROPRIATED PURSUANT TO AN ANNUAL AUTHORIZATION ACT, SECTION 111 ALSO REQUIRES NOTICE TO APPROPRIATE CONGRESSIONAL COMMITTEES WHERE THE ESTIMATED COSTS EXCEED CERTAIN LIMITS, IN THE ABSENCE OF PREVIOUS AUTHORIZATION BY THE COMMITTEES. WHERE THERE IS NO CURRENT ANNUAL AUTHORIZATION ACT, IT IS NOT CLEAR THAT SUCH NOTICE IS REQUIRED. HOWEVER, THE FY 1982 DOE BUDGET REQUEST CONTAINED DETAILED INFORMATION ABOUT THE USE OF UNOBLIGATED NO-YEAR FUNDS WHICH IT PLANNED TO USE FOR THE NEW RESEARCH FACILITY. THIS AND OTHER INFORMATION PROVIDED TO THE CONGRESS MIGHT BE CONSIDERED AS REASONABLE NOTICE. IN ANY EVENT, IT APPEARS THAT DOE IS NOT PROHIBITED FROM USING FY 1979 AND 1980 "FOSSIL ENERGY RESEARCH AND DEVELOPMENT" FUNDS, (AS WELL AS ERDA'S 1978 "OPERATING EXPENSES, FOSSIL FUELS" APPROPRIATION FOR FY 1978) FOR THE RESEARCH FACILITY.

IN ANSWER TO YOUR LAST QUESTION, THE FACT THAT THE FY 1981 BUDGET REQUEST FOR THE TEST PROJECT WAS CATEGORIZED AS "CONSTRUCTION" FUNDS RATHER THAN AS "OPERATING" FUNDS, IN ACCORDANCE WITH THE WISHES OF YOUR COMMITTEE, DOES NOT AFFECT THE USE BY DOE OF PRIOR "FOSSIL ENERGY RESEARCH AND DEVELOPMENT" APPROPRIATIONS FOR CONSTRUCTION AND FOR EQUIPMENT FOR THE NEW RESEARCH FACILITY. THIS IS SO BECAUSE THAT CHARACTERIZATION OF THE REQUEST, WHILE RESPONSIVE TO THE VIEWS OF YOUR COMMITTEE, DID NOT PURPORT TO LIMIT THE USE OF FUNDS PREVIOUSLY APPROPRIATED. IN ANY EVENT THE PROPOSED FY 1981 AUTHORIZATION WAS NOT ENACTED.

ENCLOSURE

DIGEST

DOE CANCELLED FLUIDIZED TEST UNIT AT MORGANTOWN, WEST VIRGINIA AND IS REBUILDING IT INTO FLUIDIZED BED RESEARCH FACILITY WITH FUNDS FROM APPROPRIATIONS EARMARKED FOR TERMINATED TEST UNIT. ALTHOUGH THERE IS NO SPECIFIC CONGRESSIONAL AUTHORIZATION FOR RESEARCH FACILITY, FY 1979 AND 1980 LUMP SUM APPROPRIATIONS, AVAILABLE UNTIL EXPENDED, MAY BE USED SINCE FACILITY IS WITHIN PURPOSE OF FEDERAL NONNUCLEAR ENERGY RESEARCH AND DEVELOPMENT ACT, SECTION 4(C), 42 U.S.C. SEC. 5903(C), AND ABSENT ANNUAL AUTHORIZATION ACT WHICH MIGHT RESTRICT APPROPRIATION USE. SEE 55 COMP.GEN. 812 (1976).

FN1 THE DEPARTMENT OF ENERGY ORGANIZATION ACT, 91 STAT. 565, EFFECTIVE OCTOBER

1, 1977, PROVIDED FOR THE GENERAL TRANSFER OF AUTHORITIES TO DOE (SEC. 301(A), 42 U.S.C. SEC. 7151(A)), INCLUDING THOSE VESTED BY LAW IN THE ERDA ADMINISTRATOR.