UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| CONVERDYN,<br><br>Plaintiff,<br><br>v.<br><br>ERNEST J. MONIZ and UNITED STATES DEPARTMENT OF ENERGY,<br><br>Defendants. | ) | No. 1:14-cv-1012 (RBW) |

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56, Fed. R. Civil P., defendants move for summary judgment on plaintiff's claims. The basis for this motion is set forth in the attached Memorandum in Support of Defendants' Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment, as well as in the relevant documents in the Administrative Record.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

## INTRODUCTION

Plaintiff's Motion for Summary Judgment ("Plaintiff's MSJ") invites the Court to overturn the informed judgment of the Secretary of Energy ("DOE" or "Department") that the transfer of up to 2,705 metric tons of uranium ("MTU") annually from DOE's inventories – which would amount to only 4.5 percent of total global supply – will not have an "adverse material impact" on the domestic uranium industry. *See* 42 U.S.C. § 2297h-10(d). The Administrative Record, including the analyses of DOE's own staff and its outside consultant, fully supports the conclusion that the limited adverse impact, *e.g.*, a 6 percent reduction in the long term price of uranium hexafluoride, is not material.

Plaintiff is also incorrect in its assertions that DOE lacks the legal authority to transfer uranium hexafluoride and that DOE has not received fair market value for the uranium it has transferred. Finally, DOE's Excess Uranium Inventory Management Plan is a policy statement,

not a legislative rule, and so was promulgated lawfully. Consequently, the Court should deny plaintiff's motion and grant summary judgment for the defendants.

## I. STATUTORY AND REGULATORY BACKGROUND

### A. DOE's Authority to Transfer Uranium Under the Atomic Energy Act

The Atomic Energy Act of 1954, Pub. L. No. 83-703, ("AEA") recognized the importance of source, byproduct and special nuclear material, including uranium, *id*. at § 2c.; 42 U.S.C. § 2012(c), and granted the Atomic Energy Commission ("AEC") broad authority to control the acquisition, distribution and production of such material, *id*. at § 3c.; 42 U.S.C. § 2013(c), with a goal of encouraging "widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public." *Id*. at § 3d.; 42 U.S.C. § 2013(d).

In 1974, Congress enacted the Energy Reorganization Act, Pub. L. No. 93-438, codified at 42 U.S.C. § 5801 *et seq.*, which abolished the AEC and transferred its licensing and related regulatory functions to the Nuclear Regulatory Commission ("NRC"), 42 U.S.C. § 5841(f), and all other functions to the Energy Research and Development Administration ("ERDA"), 42 U.S.C. § 5814(c). *See Huffman v. Western Nuclear, Inc.*, 486 U.S. 663, 664 (1988); *Pennsylvania v. Lockheed Martin Corp*., 684 F. Supp. 2d 564, 568 (M.D. Pa. 2010). In 1977, pursuant to the Department of Energy Organization Act, DOE assumed the responsibilities of the then-abolished ERDA. Pub. L. No. 95-91, *codified at* 42 U.S.C. § 7101, *et seq.* This vested all non-licensing AEA authorities in DOE, including control over existing government facilities and inventories.

Section 63(a) of the AEA, 42 U.S.C. § 2093(a), authorizes the Department to "distribute source material within the United States to qualified applicants requesting such material" for a wide variety of purposes, including "for any other use approved by the Commission[1] as an aid to science or industry." "[S]ource material" is defined in 42 U.S.C. § 2014(z) as "uranium, thorium, or any other material which is determined by the Commission . . . to be source material" as well as "ores containing one or more of the foregoing materials."

Section 53(a) of the AEA, 42 U.S.C. § 2073(a), complements section 63 by authorizing the Secretary to "transfer [or] deliver . . . special nuclear material" for several purposes including "for such other uses as the [Department] determines to be appropriate to carry out the purposes of this chapter." "[S]pecial nuclear material" is defined in 42 U.S.C. § 2014(aa) as "plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission . . . determines to be special nuclear material, but does not include source material . . ."

Thus, these two AEA sections authorize the Secretary of Energy to transfer all manner of nuclear material, including uranium, regardless of its form and degree, if any, of enrichment. These authorities are further buttressed by 42 U.S.C. § 2201(g) which gives the Secretary authority to "sell, lease, grant, and dispose of" real and personal property.

**B. The Energy Policy Act of 1992 and the USEC Privatization Act of 1996**

The Energy Policy Act of 1992 ("EPAct"), Pub. L. No. 102-486, *codified* at 42 U.S.C. §§ 2297, *et seq*., among other things, established a government corporation, the United States

[1] Commission originally referred to the AEC. Currently, Commission refers to either the NRC or DOE or both, depending on which agency received the authority originally granted the AEC.

Enrichment Corporation ("Corporation"), to take over uranium enrichment and marketing activities formerly performed by DOE. 42 U.S.C. § 2297b-7(a).

The USEC Privatization Act of 1996 ("Privatization Act"), Pub. L. No. 104-134, 42 U.S.C. §§ 2297h, *et seq.*, authorized the transfer of the interest of the United States in the Corporation to the private sector. 42 U.S.C. § 2297h-1(a). In addition, section 3112 of the Privatization Act, 42 U.S.C. § 2297h-10, imposed requirements identified in subsections (b)-(f) for certain types of transfers or sales.

Section 3112(a) provides that the Secretary shall not "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." Section 3112(d) then places restrictions on covered sales of natural and low-enriched uranium that function as an overlay on the Department's more general AEA authorities to transfer or sell that material. Specifically, section 3112(d)(2) requires that covered sales of natural or low-enriched uranium shall not be made unless:

(A) the President determines that the material is not necessary for national security needs,

(B) the Secretary determines that the sale of the material will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry, taking into account the sales of uranium under the Russian HEU Agreement and the Suspension Agreement, and

(C) the price paid to the Secretary will not be less than the fair market value of the material.

42 U.S.C. § 2297h-10(d).[2]

[2] The Department has considered the Presidential determination prong in section 3112(d)(2)(A) to be satisfied if the uranium in question is not included in the Nuclear Weapons Stockpile Plan, a document that is signed by the President and identifies inventories of uranium required for national security needs. The Nuclear Weapons Stockpile Plan is reviewed annually and updated as needed.

## II. FACTUAL BACKGROUND

### A. DOE's Policy for Management of its Inventory of Excess Uranium

The Department holds inventories of uranium in various forms and qualities, including highly enriched uranium (HEU), low-enriched uranium (LEU), natural uranium (NU), and depleted uranium that are currently held as excess and not dedicated to national security missions. Administrative Record, ("DOE_") DOE_0053-82.[3] The Department's uranium comes from various sources including governmental weapons programs, from its own former enrichment activities, and from inventories of Russian-origin natural uranium as UF6 that it was directed by Congress to purchase. *See* DOE_0060-64.

In March 2008, then-Secretary Bodman issued the "Secretary of Energy's Policy Statement on Management of the Department of Energy's Excess Uranium Inventory," ("Policy Statement") which set forth "the general framework within which the Department prudently will manage its excess uranium inventory." Ex. D in support of plaintiff's Motion for Preliminary

[3] The uranium fuel cycle contains several steps: (1) commercial uranium ore is mined and refined into yellow cake (U3O8); (2) U3O8 is converted into uranium hexafluoride, which readily takes a gaseous form that can then be enriched; (3) uranium hexafluoride is enriched by separating the uranium isotopes and creating a higher concentration of U235, the fissionable uranium isotope. Naturally-occurring uranium is a mixture of three isotopes: U238, U235, and trace amounts of U234. U308 and UF6 that exhibit the same relative concentrations, or assay, as naturally occurring uranium—specifically, 0.711percent U235—is known as "natural uranium. Low-enriched uranium has an assay of between 3 and 20 percent U235, most commonly between 3 and 5 percent. *See* Office of Nuclear Energy, *Nuclear Fuel Cycle*, www.energy.gov/ne/nuclear-fuel-cycle; Office of Nuclear Energy, Nuclear Fuel Facts: Uranium, www.energy.gov/ne/nuclear-fuel-facts-uranium. (Last visited September 25, 2014.)

Down-blending HEU is the process of diluting uranium product in any form to produce LEU. The resulting LEU can also produce usable commercial fuel. To down-blend HEU into LEU, HEU, is converted into a liquid form called uranyl nitrate. The HEU is then mixed with a diluent of natural or depleted uranium to produce LEU at enrichment levels below 20 percent U-235. The down-blending process creates LEU, in the same uranyl nitrate form. The uranyl nitrate LEU is then fabricated into UO2 fuel pellets at a fuel fabrication facility such as WesDyne.

Injunction at A-1.[4] The Policy Statement stated that the Department would, "[t]o the extent practicable . . . manage its uranium inventories in a manner that is consistent with and supportive of the maintenance of a strong domestic nuclear industry." *Id.* at A-2. The Policy Statement further provided:

> Consistent with this principle, the Department believes that, as a general matter, the introduction into the domestic market of uranium from Departmental inventories in amounts that do not exceed ten percent of the total annual fuel requirements of all licensed nuclear power plants should not have an adverse material impact on the domestic uranium industry. The Department anticipates that it may introduce into the domestic market, in any given year, less than that amount, or, in some years for certain special purposes such as the provision of initial core loads for new reactors, more than that amount. Consistent with applicable law, the Department will conduct analyses of the impacts of particular sales or transfers on the market and the domestic uranium industry, prior to entering into particular sales or transfers.

*Id.* (emphasis added).

In December of 2008, the Department released its Excess Uranium Management Plan ("2008 Plan"), which stated:

> The Plan addresses the disposition of DOE's excess uranium identified in this Plan through potential sales or transfers of uranium based on a combined annual quantity of no more than ten percent of the annual U.S. nuclear fuel requirements. The Department may exceed the ten percent in any given year for certain special purposes, such as initial core loads for new reactors. Uranium disposition decisions will be undertaken in a manner that is consistent with DOE's mission needs and the principles set forth in the Policy Statement.

Ex. D at ES-1.[5]

[4] Where necessary for background purposes, defendants will cite to certain Exhibits in support of plaintiff's Motion for Preliminary Injunction and Attachments to defendants' Opposition to Motion for Preliminary Injunction which were not included in the Administrative Record.

[5] At the time of the 2008 Plan, ten percent of the domestic uranium demand was roughly 2000 MTU. Ex. D at 10 (domestic annual fuel requirements were roughly 50 million lbs. U3O8).

The 2008 Plan contemplated transfers of LEU for DOE's HEU down-blending program, sale of portions of its Russian-origin UF6 inventory or enrichment of the material for addition to DOE's inventory as LEU, sale of its off-specification non-UF6 natural uranium inventory, and the potential sale of higher assay portions of its depleted uranium inventory. Ex. D at 4-10. The sales were not expected to exceed the ten percent guideline. *Id*. DOE noted that it planned to update the Plan periodically to reflect new and evolving information, policies and programs. *Id*. at ES-2.

### B. Secretarial Determinations to Authorize Uranium Transfers Following the 2008 Policy and Plan

To assist the Secretary in making the determination under 42 U.S.C. § 2297h-10(d) as to whether proposed transfers will have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry, the Office of Nuclear Energy ("NE"), the DOE office in charge of coordinating Secretarial Determinations under 42 U.S.C. § 2297h(d), contracted with Energy Resources International ("ERI") to prepare a market impact analysis analyzing the impact of proposed transfers. NE provided ERI with information regarding the proposed transfers and ERI, taking into account prior DOE transfers and any deliveries under other agreements, provided DOE with a report analyzing the impact of the proposed transfers.[6]

Pursuant to an October 2008 Secretarial Determination that preceded the 2008 Plan, NNSA made transfers in support of down-blending that ranged from 134 MTU natural uranium

[6] Over the last several years, DOE has had the benefit of several such ERI reports, provided in 2009, Ex. H, 2010, Ex. I and 2012, Ex. J – as well as the 2014 report supporting the Secretary's May 15, 2014 Determination, DOE_0181-0286.

equivalent to 294 MTU natural uranium equivalent in 2011. DOE_0076.[7] Following the 2008 Plan, the Department issued a series of determinations by the Secretary supported by market impact analyses prepared by ERI.[8] In each of the Determinations following the 2008 Plan, the Department increased the amount of uranium it was planning to introduce into the market.

The November 2009 Secretarial Determination covered UF6 transfers from the final quarter of calendar year 2009 through calendar year 2010 of no more than 300 MTU per quarter and no more than 1,125 MTU per year. DOE_0064. In March 2011, a Secretarial Determination covered transfers of UF6 from the first quarter of calendar year 2011, through the third quarter of calendar year 2013 of no more than 450 MTU per quarter and no more than 1605 MTU per calendar year. Ex. F. In May 2012 a new determination, Ex. G., increased transfers for both the Portsmouth environmental cleanup and the HEU down-blending programs, covering transfers of up to 2,400 MTU per calendar year for cleanup, with no more than 600 MTU a quarter, and 400 MTU natural uranium equivalent per year in LEU transfers for the HEU down-blending program, *i.e.* 2,800 MTU annually.[9]

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[7] In recent years, DOE's uranium transfers have been used to pay contractors retained by the Office of Environmental Management ("EM") which is responsible for overseeing the environmental clean-up of the enrichment plant at Portsmouth, Ohio, and the National Nuclear Security Agency ("NNSA"), a semi-autonomous agency within the Department, which is responsible for the HEU Disposition program that down-blends weapon-grade HEU to LEU.

[8] A 2010 Secretarial Determination covered transfers of up to 2,400 kgU of low enriched uranium at 19.75 percent U235, a level of enrichment no domestic enricher is licensed to produce. These transfers were for commercial research and isotope production reactors. Because there was no market participant capable of producing this product, DOE did not commission an ERI analysis for this determination but instead relied on an internal analysis.

[9] The 2012 Determination also included the analysis of the transfer of depleted uranium to Energy Northwest as part of the Depleted Uranium Enrichment Project, a series of interrelated transactions that was initiated by the Department's transfer of depleted uranium to Energy Northwest. Transfers of depleted uranium are not covered by section 3112(d) and therefore do not need to be preceded by Secretarial Determinations. Nevertheless, the market impact of the depleted uranium transfers was analyzed in the 2012 ERI report and the transfers were included in the

Because the 2012 Determination was valid for only two years, a new determination would be needed by May 2014 in order for DOE to continue transfers after that time. *See* Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, §312(a), Consolidated Appropriations Act, 2014, Division D, Pub. L. No. 113-76, § 306(a).

**C. The 2013 Inventory Management Plan**

In 2013, the Department updated the 2008 Plan. The 2013 Excess Uranium Inventory Management Plan ("2013 Plan"), DOE_0053-82, identified DOE uranium inventories that had entered the market since the 2008 Plan and transactions that were ongoing or being considered by DOE through 2018. The 2013 Plan's objectives included "providing current information and enhanced transparency to the general public and interested stakeholders regarding the management of DOE's potentially marketable uranium." DOE_0056. The 2013 Plan's summary of its expected transfers through 2018 mirrored the 2012 Secretarial Determination. *Id.* at DOE_0057.

The 2013 Plan also marked the Department's explicit departure from the ten percent guideline it set forth in the 2008 Policy Statement and the 2008 Plan. DOE_0061. Although the 2012 Determination had already made clear the Department intended to transfer uranium in levels above the ten percent guideline, the Department explained its position in the 2013 Plan.

> The 2008 Plan included reference to a Departmental Guideline that, as a general matter, the introduction into the domestic market of uranium from Departmental inventories in amounts that do not exceed 10 percent of the total annual fuel requirements of all nuclear power plants should not have an adverse material impact on the domestic uranium mining, conversion or enrichment industry.
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2012 determination to give a more complete picture of the DOE uranium transfers during the period covered by the determination.

> Based on experience gained since issuance of the 2008 Plan, including in particular the market impact analysis that supported the May 15, 2012 Secretarial Determination (the May 2012 Determination), the Department has determined it can meet its statutory and policy objectives in regard to DOE uranium sales or transfers without an established guideline. In addition, as discussed below, decisions to introduce uranium into the market pursuant to section 3112(d) must be reviewed every two years.

*Id.* The 2013 Plan went on to state that the May 2012 Determination "effectively sets forth uranium transfers being considered during the time span of this Plan." DOE_0062.

**D. The 2014 Secretarial Determination Regarding Authorize Uranium Transfers**

To continue the NNSA down-blending activities and support the Portsmouth environmental cleanup, DOE intended to transfer some amount of uranium from its inventory to the contractors responsible for these activities. Thus, in late 2013 and early 2014, the Department began the process of assessing whether continued uranium transfers would have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry, including requesting ERI to prepare an economic analysis of a proposal for authority to transfer up to 2,705 MTU annually from 2014 through 2016.

In addition, NE prepared its own analysis that evaluated the information in the ERI report, plus additional information it had received, and included a recommendation for the Secretary. DOE_0405-418. The additional information available to and considered by NE included presentations and information received in meetings from ConverDyn, DOE_0106-121, the Uranium Producers of America (UPA), DOE_0129-144, and other industry participants and experts. NE reviewed a power point presentation by Fluor-B&W Portsmouth LLC ("FBP"), DOE_0155-180, which provided information on the uranium market from the perspective of a recipient of the UF6 that DOE has been transferring.

The NE analysis and the 2014 ERI Report were submitted to the Secretary for his review under a Memorandum to the Secretary, presenting the matter for his consideration, DOE_0397-402. After reviewing this information and recommendation, the Secretary signed the May 15, 2014 Secretarial Determination that the proposed transfers would not have an adverse material impact on the domestic uranium mining, conversion or enrichment industry. DOE_0419.

**F. The Uranium Market**

Over the past decade, the global uranium market has been exceptionally volatile. There was an enormous increase in the price of U3O8 in 2006 and 2007 (from $ 35/lb. to $ 135/lb.), after which the price fell to around $ 40/lb. by 2010. The price had risen to nearly $ 75/lb. in early 2011, but after the March 2011 disaster at the Japanese nuclear reactor at Fukushima, which led both Japan and Germany to suspend their nuclear energy programs, the price of U3O8 has fallen sharply to approximately $ 37/lb. currently. DOE_0204. Notwithstanding these price fluctuations, more uranium production continues to come onto the market, particularly from the Republic of Kazakhstan, which has increased its production to approximately 14,500 MTU. DOE_0251-252. The DOE inventory transfer program, by contrast, introduces only 2,705 MTU annually onto the global market, which is only 4.5 percent of total annual global supply. DOE_0415.

Plaintiff ConverDyn is the exclusive sales agency for conversion services at the Metropolis Works facility owned and operated by Honeywell. Complaint ("Compl.") ¶¶ 20, 23. The Metropolis facility converts uranium oxide concentrate (commonly referred to as "yellowcake") into uranium hexafluoride (UF6). Compl. ¶ 21.

**G. The Prices at Which DOE Transfers Uranium**

The requirement in 42 U.S.C. § 2297h-10(d)(2) that the Department must receive fair market value for the uranium transferred is satisfied differently by EM which is responsible for overseeing the environmental clean-up of the enrichment plant at Portsmouth, Ohio, and NNSA, which is responsible for the HEU Disposition program that down-blends weapon-grade HEU to LEU.

The EM contract is funded through appropriated funds but allows for the transfer of uranium hexafluoride in exchange for services. Owendoff Decl. (Attachment 2, filed in support of defendants' Opposition to Plaintiff's Motion for Preliminary Injunction), ¶ 11b. Accordingly, on a quarterly basis EM and its D&D contractor, FBP, negotiate modifications to the contract whereby FBP proposes a value of services that it will provide in exchange for the quantity of uranium hexafluoride that EM is prepared to transfer. Owendoff Decl. ¶ 12. EM evaluates the proposal based on recent spot market indices, and, if it considers the value of services offered to be equivalent to the fair market value of the material to be transferred, the parties execute a modification to the contract to permit the transfer. *Id.* These transactions are done as one-time modifications to the contract, and the value is set at the time of the transfers. EM is not obligated to transfer uranium under the contract; the transfers are at the discretion of the Department. Owendoff Decl. ¶ 11b.

NNSA's contract is funded in full by transfers of uranium. NNSA's compensation is set forth in a mathematical model set out in its contract with its supplier of down-blending services, WesDyne. Hanlon Decl., Attachment 3, ¶ 17. WesDyne invoices NNSA periodically for services already performed, and the contract allows NNSA 30 days to approve, as payment for

the down-blending services, transfer of title to a quantity of the LEU resulting from the down-blending services, calculated based on the formula in the contract, to WesDyne in satisfaction of the invoice. Declaration of Peter H. Hanlon, Attachment 3, ¶ 18. Again, because these transfers are one-time transfers to a contractor instead of transfers into the term market the value of the uranium to be transferred is set at the time of the transfer. *Id*.

## III. PROCEDURAL BACKGROUND

Plaintiff filed this action on June 13, 2014 and filed its Motion for Preliminary Injunction on June 23, 2014. After briefing on the Motion for Preliminary Injunction and oral argument on July 29, 2014, the Court denied the Motion for Preliminary Injunction on that same day (Dkt. 31). The Court entered a Memorandum Opinion setting forth its reasoning in denying the Motion on September 12, 2014. (Dkt. 42) ("PI Opinion"). Pursuant to a briefing schedule agreed to by the parties (Dkt. 32) and entered by the Court, plaintiff filed its Motion for Summary Judgment on September 11, 2014. (Dkt. 40).

## ARGUMENT

### A. Standard of Review Under the Administrative Procedure Act

A court exercising judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2) may not "substitute its judgment" for that of the agency. *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). Instead, a reviewing court can only find agency action to be "arbitrary and capricious" if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of

agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This deferential standard presumes the agency action to be valid, *Kisser v. Cisneros*, 14 F.3d 615, 618-19 (D.C. Cir. 1994), and the burden of showing that agency action violates the APA falls on the plaintiff, *Diplomat Lakewood Inc. v. Harris*, 613 F.2d 1009, 1018 (D.C. Cir. 1979).

The scope of review under the APA's "arbitrary and capricious" standard is "searching and careful," but "narrow." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989). The court's task is to determine whether the agency's decision is "within the bounds of reasoned decision making." *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 105 (1983). To do this, the court must determine whether the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made. *See Bowman Transp., Inc., v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285-86 (1974).

The courts in this Circuit have consistently held that "[w]hen, as here, an agency is making 'predictive judgments about the likely economic effects of a rule,' we are particularly loath to second-guess its analysis." *Newspaper Association of America v. Postal Regulatory Commission*, 734 F.3d 1208, 1216 (D.C. Cir. 2013), *quoting Nat'l Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009). *See also Public Citizen, Inc. v. NHTSA*, 374 F.3d 1251, 1260 (D.C. Cir. 2004) (deferring to "NHTSA's prediction that manufacturers will not likely reduce the protectiveness of current air bags"); *Southern Pacific Transp. Co. v. ICC*, 871 F.2d 838, 842 (9th Cir. 1989) ("Such predictive judgments, when based upon credible evidence, are best left to the expertise of the administrative agency familiar with the industry.").

Predictive judgments about the impact of an agency's action inevitably involve an element of uncertainty, and "in face of uncertainty, [an] agency must exercise it expertise to make tough choices . . . and to hazard a guess as to which is correct, even if . . . the estimate will be imprecise." *Chamber of Commerce v. SEC,* 412 F.3d 133, 143 (D.C. Cir. 2005) (citation and internal quotation marks omitted).

### B. The Secretary Rationally Determined that the Transfer of up to 2,705 MTU Per Year from 2014 to 2016 Would Not Have an "Adverse Material Impact" on the Domestic Uranium Industry.

Based on the analysis from the thorough 2014 market analysis prepared by ERI,[10] DOE_0181-286, the recommendations contained in the staff paper prepared by the Office of Nuclear Energy which analyzed the ERI report, DOE_0405-418, and the May 12, 2014 Memorandum, DOE_0397-402, the Secretary reasonably concluded that continuing to transfer approximately 2,700 MTU annually, as had occurred pursuant to the 2012 Secretarial Determination,[11] would not have an adverse material impact on any component of the domestic uranium industry. DOE_0419. Plaintiff has not offered any reason to question the reasonableness of that conclusion or the analysis that informed it.

[10] In prior ERI reports prepared to inform Secretarial determinations about inventory transfers, ERI offered its own opinion about the impact of the Department's proposed transfers. In 2014, however, NE, acknowledging that ERI's past analyses containing this conclusion might create the appearance that DOE was merely adopting ERI's conclusions as its own, asked ERI to provide an economic analysis of potential impacts, but not to offer an opinion on the ultimate issue of whether the proposed DOE transfers would have an "adverse material impact" on the domestic industry. *See* DOE_0400. Contrary to plaintiff's assertion therefore, Plaintiff's MSJ at 15, there is nothing unusual about the fact that ERI limited its report to providing analytical data, leaving to the Secretary the responsibility of drawing a conclusion based on the data.

[11] These amounts reflect the natural uranium and LEU transferred pursuant to the 2012 Secretarial Determination. As noted above, that Determination also analyzed the impact of a transfer to Energy Northwest of a quantity of depleted uranium, which was not subject to § 2297h-10(d).

**1. The Meaning of "Material"**

The Privatization Act provides that covered sales of natural or low-enriched uranium shall not be made unless, *inter alia*, the "Secretary determines that the sale of the material will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry. . ." 42 U.S.C. § 2297h-10(d)(2)(B). Notably, the Act thus recognizes that even if a transfer has an "adverse" impact on the uranium market, DOE is allowed to make a transfer so long as it determines the impact not to be "material."

The Privatization Act does not define what degree of impact would be "material," and the Act's legislative history is not helpful. At a minimum, though, in ordinary usage something is "material" only if it is "of real importance or great consequence." *E.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 57-58 (2010) (citing *Webster's Third New International Dictionary* 1392 (1961)) (emphasis added). *See also Kungys v. United States*, 485 U.S. 759, 786 (Stevens, J., concurring) (quoting *Webster's Ninth New Collegiate Dictionary* 733 (1983)); *Doebereiner v. Sohio Oil Co.*, 893 F.2d 1275, 1276 (11th Cir. 1990) (citation omitted).

Thus, "material" does not merely require something "more than 'de minimis'" as plaintiff suggests, *e.g.*, Plaintiff's MSJ at 12.[12] Material is "substantially greater" than de minimis. *Cuyahoga Metro. Hous. Auth. v. United States*, 65 Fed. Cl. 534, 552 (Fed. Cl. 2005) (*quoting Williams v. Port Authority of New York and New Jersey*, 175 N.J. 82, 90 (2003)) ("'Material degree' means a degree substantially greater than de minimis"). Thus, while all material actions are more than de minimis, many actions that are above the threshold of de minimis do not rise to the level of being material.

[12] Notably, neither of the cases plaintiff cites, *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989), and *Hilling v. Rumsfeld*, 381 F.3d 1028 (10th Cir. 2004), involved an interpretation of the term "material."

**2. The Secretary's Determination is Rational**

In analyzing the proposed transfers, DOE began with the recognition that there are many elements affecting the nuclear fuel market, that it is a global market and that it is "in a weakened state due to many factors." Ex. DOE_0321. The Fukushima disaster greatly reduced demand, as had other factors, while rapid expansion of production worldwide, with particularly pronounced expansion in Kazakhstan, put further downward pressure on prices. *Id*. Also relevant here is the inherently dynamic and unpredictable nature of the global uranium industry as reflected in price volatility in recent years. *See* DOE_0210-211. DOE's analysis was further informed by comments received from the domestic uranium industry (including ConverDyn and the Uranium Producers of America), which were addressed by DOE in the NE analysis. DOE_0321-322. Notably, however, neither entity presented its own market analysis similar to that prepared by ERI.

DOE also had the benefit of other industry views, notably a presentation by FBP, its contractor at Portsmouth. DOE_0155-180. FBP noted that the price paid for domestically-produced uranium over the past 20 years has been at its highest in the last five years after the inventory transfer program began. DOE_0158. FBP also noted that UF6 conversion prices are up 40 percent to 45 percent over the same period and employment in the U.S. uranium industry has increased by a similar percentage. DOE_0176. Additionally, FBP pointed out that the market capitalization of U.S. uranium producers, a notable measure of industry health, was up significantly, with many approaching pre-Fukushima highs. DOE_0158.

At several points in its Report ERI stressed the minimal contribution of DOE's inventory transfers, as well as the difficulty in measuring the impact of DOE's transfers on the market. At

the outset, ERI noted that "there is no absolute measure of the isolated effect any one particular market factor or event, such as the DOE inventory material, has on market prices." DOE_0235; *see also* DOE_0198. ERI also observed that "the removal of a particular component of secondary supply would likely not result in a corresponding amount of new primary supply entering the market in its place." DOE_0236. ERI also concluded that "[i]f DOE inventory were removed from the market . . . it is unlikely that current market prices would rise enough to cause production centers to ramp wellfield development and production activities back up." DOE_0282.

Subject to these caveats, ERI ultimately concluded that "[t]he introduction of DOE inventory into the conversion market results in a sales volume impact of 0.6 to 0.7 million kgU, which is a 7 percent to 8 percent reduction in sales volume." DOE_0282. Due to ConverDyn's high fixed production costs, ERI estimated that ConverDyn's production costs might increase 6 percent to 8 percent due to the DOE transfers. The downward impact on the term price for UF6 (the only market in which ConverDyn sells its conversion) was estimated to be 6 percent. DOE_0271. These estimates reflected the ongoing DOE transfers and their impact on the market, which had been at the 2,700 – 2,800 MTU annual level since 2012.

It bears emphasis that the ERI report did not suggest that the transfers DOE proposed would lead to an additional 7 percent drop in sales after the Secretarial Determination. Rather, because DOE proposed to continue transfers at the rate it had maintained since 2012, the 7-8 percent figure (like the comparable figures for price, and for other markets) mainly represented the effect in current markets that could be attributed to DOE's transfers. *See, e.g.*, DOE_0279 ("This market impact study has estimated impacts from the transfer of DOE inventory and its

subsequent displacement of commercial supply in the markets, which represent a share or fraction of all the changes which have taken place over the past two to three years."). To the degree DOE's proposed transfer rate differed from prior transfers, ERI's predicted *change* in sales or prices was considerably smaller. For example, ERI's estimated contribution of DOE transfers to the conversion term price was 6.8 percent in 2013, and the report predicted that contribution would *decrease* in 2014 and 2015 to 5.9 percent. DOE_0240.

Nevertheless, in weighing all market factors, ERI concluded that "[a] key observation which can be drawn from these figures is that the increased supply from the DOE inventory does not appear to be a primary driver of current excess supply condition. (sic)" *Id*. at DOE_0252 (emphasis added).[13] ERI recognized that "DOE inventory can only be considered responsible for a portion of the decline in market prices." *Id.* at DOE_0252-253.

In weighing all of this information and analysis, the fundamental issue for DOE was the need to determine whether the planned level of inventory transfers would have, not just an impact, but a "material" impact. The relatively small size of DOE's proposed transfer compared to global uranium supply was an important element of DOE's ultimate conclusion that the transfers would not have a "material" impact. Both the ERI analysis and the independent NE analysis recognized that the proposed DOE transfer would amount to only 4.5 percent of annual global uranium supply, 2,705 MTU out of global supply of approximately 77,000 MTU.

[13] ERI also recognized that the ConverDyn's estimated sales volume reduction of 7 percent – 8 percent due to DOE transfers was far less significant than the 25 percent sales volume loss it experienced after Fukushima. *Id*. at DOE_0271.

DOE_0321; DOE_0252.[14] By comparison, the demand loss due to Fukushima was approximately 6,500 MTU per year and increased production from Kazakhstan was approximately 14,500 MTU per year. DOE_0251-252.

In light of this modest volume of DOE transfers compared to the global supply, and with the benefit of the ERI report and the NE analysis, the Secretary reasonably concluded that DOE's transfers would not have an "adverse material impact" on the domestic uranium industries. The Secretary accepted the Office of Nuclear Energy's recommendation, which concluded as follows:

> The expert staff within the Office of Nuclear Energy believe that the uranium industry would be in the same position in the market with or without DOE sales due to the limited ability of the relatively small amount of material and services being displaced to significantly influence the domestic uranium mining, conversion, and enrichment industries.

DOE_0322 (emphasis added). The Secretarial Determination recognized the need for consistency; as ERI noted: "the predictability of DOE's inventory transfers into the commercial markets over time is very important to the orderly functioning of the nuclear fuels market." DOE_0200.[15]

**3. The Court's Critique of DOE's Analysis**

**i. Answering the Right Question**

The Court's PI Opinion criticizes DOE for asking what the Court suggests is the wrong question: "whether [DOE] uranium sales alone cause the uranium industry to change from its

[14] The figures on pages 49-53 of the ERI report are reported in million pounds of U3O8 not MTU. However the conversion factor is 383 MTU as UF6 equals one million pounds of U3O8. So DOE's 2,705 MTU equates to approximately seven million pounds of U3O8.

[15] DOE's judgment of the impact of its transfers on the market has been borne out by the increase in uranium spot prices from $ 29/lb. U3O8 in May to $ 36/lb. currently. *See* www.uxc.com.

position in the market without [DOE] sales." PI Opinion at 21, *quoting* the Nuclear Energy Analysis, DOE_0406. While the Court recognized that it should not "substitute its judgment for that of the agency," PI Opinion at 20, *quoting State Farm*, 463 U.S. at 43, the PI Opinion effectively did just that by dismissing DOE's methodological approach.

For assessing whether proposed uranium transfers will have an adverse material impact, the key question is precisely whether industry's position would be different with the transfers, compared to without. The Court appears to have focused on the word "alone," as though DOE would not consider its transfers to have a material impact unless they were solely responsible for market conditions. Actually, DOE's analysis simply sought to isolate the effects that would be attributable to DOE's transfers, and thus to identify the "but-for" consequences of the transfers — their real impact.

That analysis is necessarily complex. Myriad factors affect the state of any given market, and the Secretarial Determination involved three interwoven markets (for uranium, conversion, and enrichment), with global scope and domestic components. *See* DOE_0235 ("[T]here is no absolute measure of the isolated effect any one particular market factor or event, such as the DOE inventory material, has on market prices."). Those three markets are particularly volatile at this time, because of changes in the market, like Germany's realignment of its power industry and Kazakhstan's development of new uranium mines. DOE must perform its analysis despite uncertainties in the available information; the ERI report noted that its estimates are unavoidably imprecise. DOE_0284. The analysis also involves predictions about future market conditions. Meanwhile, DOE had to gauge the impacts of its transfers against a statutory standard, "material," that is open-ended and context-dependent. *Cf. Amgen Inc. v. F. Hoffman-La Roche*

*Ltd.*, 580 F.3d 1340, 1379 (Fed. Cir. 2009) ("Materiality is context-dependent."). In short, the determination whether, in fluid markets, a proposed transfer of uranium would have an "adverse material impact" is just the sort of technical, nuanced judgment that calls for an agency's expertise.

Thus, DOE had to make a determination — informed in part by ERI's thorough market analysis — of whether, with respect to conversion, an estimated 7-8 percent reduction in sales and a 6 percent reduction in the term price[16] would constitute a "material impact." These estimates represented the first step in a two-step process, in which DOE used ERI's report to assess the quantitative market effects that the proposed transfers might have.[17] In the second step, DOE used those numerical estimates to evaluate what the state of the domestic uranium industries would be with and without the proposed transfers. Through that two-step process, DOE was able to conclude that the uranium industries would be in the same position with or without the DOE transfers; the transfers would not be the "but-for" cause of a material impact.

That a different approach could have been taken in making the determination does not render DOE's method arbitrary, capricious, or otherwise not in accordance with law. In determining materiality, it is sensible both to make a quantitative assessment of what the market would be like if DOE were not to make the transfers as well as to consider the qualitative impacts on the industry. Even if a 6 percent price change could be important in some

[16] ConverDyn sells its conversion services almost exclusively in the term market, hence this metric is the most relevant for determining whether there has been an adverse material impact on the domestic conversion industry.

[17] As noted above, the 6 percent was not a prediction that transfers under the 2014 Secretarial Determination would cause prices to drop by an additional 6 percent from where they stood in March 2014. Rather, the proposed transfers were similar to the transfers DOE had made since 2012. ERI estimated that a 6 percent price shift, already built into existing prices, could be associated to those transfers, and would persist if DOE's transfers continued at the same rate. *See* DOE_0271; DOE_0279, DOE_0282. The actual term price of conversion increased about 50 percent over the course of 2011 and has been stable since then. DOE_0211.

circumstances, the fact that ConverDyn's situation would be essentially the same regardless of the DOE transfers indicates that their impact, even if marginally negative, is not "material."

**ii. DOE Considered The Issues Raised in ConverDyn's Submissions**

The Court's PI Opinion questions why DOE failed to respond to ConverDyn's March 10, 2014 letters, DOE_0106-21, which described the size and nature of the financial injuries ConverDyn contended are caused by DOE's uranium transfers. PI Opinion at 20-21. However, the Secretarial Determination was informed by the more reliable analysis of potential effects in the domestic conversion market performed by ERI in its 2014 report, which included a full review and critique of the information contained in prior submissions by ConverDyn that covered essentially the same ground.

The 2014 ERI Report specifically analyzes the effect of the proposed DOE transfers on ConverDyn, noting that ConverDyn is the only domestic provider of conversion services. DOE_0262. Because much of ConverDyn's financial and marketing information is not made public, ERI used publicly-available information as well as its own knowledge of ConverDyn's production – including a work stoppage and necessary plant upgrades from 2010 to 2012 – to evaluate ConverDyn's situation. As noted below, ConverDyn later provided DOE some confidential claims about the top-line consequences of DOE transfers. But these claims were conclusory assertions and provided little or no underlying data, and thus it was impossible to incorporate them in any reasoned analysis. *See* DOE_0115 (ten year amount of alleged losses with no explanation of causes or surrounding circumstances).

ERI based its analysis on information received from Traxys – one of the world's largest mineral brokers – on how it sells the material it purchases from FBP following DOE's barter

transfers to FBP (approximately 80 percent of the transfers at issue). Traxys sells 50 percent of the uranium it receives from FBP to non-U.S. utilities and 50 percent of its sales are under mid- to long-term contracts. DOE_0263. However, to be conservative in its analysis, ERI further assumed that all of the LEU produced by NNSA's program for down-blending HEU would enter the domestic market (thus a worst-case scenario for the impact on ConverDyn). Again, based on this worst-case scenario assumption and market information, (because ConverDyn does not publish information on its world or domestic market share), ERI developed estimates of ConverDyn's market share and the effect of DOE's transfers on that market share. DOE_0262-272.

A comparison between ERI's discussion of the conversion market and ConverDyn's March 2014 submission illustrates why the submission merited no further discussion. Lacking hard data on ConverDyn's world or domestic market share, ERI developed reasoned estimates – based on other market information – of ConverDyn's market share and the effect of DOE's transfers on that market share. DOE_0262-272. By contrast, ConverDyn's submission simply asserted that it will suffer an annual reduction of 933 MTU as a result of DOE's transfers. DOE_0116. Not only did ConverDyn not provide any data to back up this figure, it specifically states that the figure represented an arbitrary assumption not based on its own sales volume figures. *Id*. Similarly, ERI provided a reasoned estimate of the change in ConverDyn's production costs, taking account of the information ERI had about ConverDyn's high fixed costs. ConverDyn, by comparison, asserted that the average per year impact to profits of lost volume is $10 million but didn't actually explain how this number is calculated. DOE_0116; *see also,*

table at top of DOE_0117. ConverDyn alleged enormous accumulated losses over the past ten years, *see* DOE_0115, again without any supporting information.

Further, ConverDyn made no attempt to explain what portion of this loss it believes is attributed to DOE's transfers, nor does it attribute any of this loss to work stoppages or plant upgrades required of it by the NRC,[18] during this period, or other factors not attributable to DOE. In short, ConverDyn's submission did not provide enough substantiating information to allow DOE to evaluate ConverDyn's claims of financial harm caused by DOE's transfers. And the lack of supporting explanations prevented DOE from treating ConverDyn's assertions as a reliable source of information about the market effects of DOE transfers. DOE stated as much in its NE analysis when it explained that the industry's comments generally "inaccurately represent[] the impact of the DOE transfers." DOE_0400.

Indeed, the ConverDyn assessment was particularly unreliable because it was premised on a fundamental factual inaccuracy. Notably, ConverDyn's analysis is premised on a belief that "the majority of DOE sales are believed to have been made to U.S. customers, and this situation is likely to continue for future sales." DOE_0116. It is true that the initial DOE transfers covered in the 2014 Determination are to U.S. entities (the DOE contractors who receive the uranium in exchange for services). But as the ERI report notes, FBP, the contractor receiving

[18] In May of 2012, inspectors of the Nuclear Regulatory Commission (NRC) conducted an inspection of ConverDyn's Metropolis Works facility and identified "significant" safety concerns. *See* 77 Fed. Reg. 64831 (October 23, 2012). The NRC found that one of the buildings at the facility "lack[ed] seismic restraints, supports and bracing that would assure process equipment integrity during a credible seismic event or tornado." *Id*. This problem resulted in an extended suspension of UF6 production of approximately a year while the problem was corrected. *See* http://pbadupws.nrc/gov/docs/ML1318/ML13183A430.pdf.

In addition, ConverDyn experienced an extended labor dispute from June 2010 through August 2011 with United Steelworkers Local 7-669, its employees' bargaining representative. ConverDyn evidently continued operations with replacement workers during the labor dispute. *See Nuclear Engineering International*, Sept. 18, 2012 at 26. Both of these problems could certainly have contributed to ConverDyn's alleged profit losses.

approximately 80 percent of the transferred uranium, sells its uranium to Traxys, which then sells it in a mix of term and spot contracts, with an even mix of domestic and international end users. DOE_0192. Nonetheless, ERI did provide a conservative evaluation of such a scenario, including an estimate of impacts to ConverDyn's market share, in its analysis. (*See* p. 22, *supra*). Thus, despite the fundamental flaws in ConverDyn's assessment, it was a scenario considered by the Secretary prior to making a decision regarding the May 2014 determination.

DOE's decision memoranda, DOE_0397-402; DOE_0405-418, did not need to specifically address the assertions and data in ConverDyn's March 10, 2014 letters as the ERI report on which DOE relied fully analyzed prior submissions by ConverDyn containing much of the same information. Rather than focus its analysis on unsubstantiated numbers from ConverDyn with no context or information regarding the foundation for ConverDyn's analysis, DOE instead focused upon the well-reasoned and thoroughly explained analysis by ERI. This reliance is specifically buttressed by the fact that ConverDyn raised many of its same concerns with ERI and that ERI's 2014 report specifically addressed other issues raised in the ConverDyn submission. DOE_0262-272.

Thus, the Secretary reasonably concluded that continuing to transfer approximately 2,705 MTU annually from DOE inventories, as had been authorized for the three prior years, would not have an adverse material impact on any component of the domestic uranium industry. DOE's "predictive judgment[] about the likely economic effects" of its action is entitled to particular

deference by the Court. *See Newspaper Association of America,* 734 F.3d at 1216 (citation and internal quotation marks omitted).[19]

**4. Response to ConverDyn's Summary Judgment Arguments**

Plaintiff criticizes DOE's decision as "run[ning] counter to the Act's intent," Plaintiff's MSJ at 8, which plaintiff evidently construes as having an overriding purpose of promoting the profitability of the domestic uranium industry. In interpreting statutes, courts do not speculate about Congress's "intent," but instead construe the language of the law as written and adopted. Had Congress wanted to prevent any adverse economic impact on the domestic uranium industry, it would not have included the word "material" in the statute.

Plaintiff evidently contends that instead of the statutory inquiry established by the Act, DOE should look at the overall health of the domestic uranium industry and refrain from making uranium transfers if uranium prices are depressed to some unspecified degree, regardless of whether DOE's transfers cause an "adverse material impact" on prices. *See* Plaintiff's MSJ at 8, *quoting* DOE_0399. But the Privatization Act does not impose on DOE an obligation take all steps necessary to ensure the profitability of the domestic uranium industry.

Plaintiff asserts that DOE balanced "the purported benefits of transfers *to the government* against the adverse impact *to the domestic uranium industry*". Plaintiff's MSJ at 6. But it

[19] Alternatively, the Secretary's determination could be considered an interpretation of the ambiguous word "material" in 42 U.S.C. § 2297h-10(d)(2)(B). Under the Secretary's interpretation, the term "material" does not encompass the transfer of 2,705 MTU annually from 2014-2016, and that legal conclusion is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 843 (1984). Even if that legal conclusion is not entitled to substantial deference under *Chevron, see United States v. Mead Corp*., 533 U.S. 218, 227–39 (2001), it is, nevertheless, entitled to "respect" under *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944). As with the regulatory framework considered in *Mead*, DOE's interpretations of the USEC Privatization Act pertain to a "highly detailed" statutory framework and it "can bring the benefit of specialized experience to bear on the subtle questions in this case." *Mead*, 533 U.S. at 235.

provides no citation to the Administrative Record for this assertion for the simple reason that nothing of the sort occurred; as reflected in DOE's decision memoranda, the Secretary's Determination was based solely on the application of the Act's "adverse material impact" standard.

Plaintiff's assertion that the 2014 Secretarial Determination "increase[ed] the share of the domestic market taken up by its transfers by 50%," Plaintiff's MSJ at 9, is mistaken. While the 2,705 MTU of uranium authorized by the Secretarial Determination does constitute approximately 15 percent of domestic uranium demand, uranium transfers of approximately the same amount, (2,800 MTU, also equating to 15 percent of domestic demand) were also authorized by the Secretary's 2012 Determination. It is also worth noting that, as ERI's report explained, DOE's transfers have a magnitude of 15 percent of domestic demand, but do not actually supply 15% of that demand because approximately 34 percent of DOE-transferred uranium ends up in other global markets. DOE_0264.

Plaintiff contends that the Act required DOE to make three separate determinations, making independent findings as to the impact of a proposed transfer on the mining, conversion and enrichment industries. Plaintiff's MSJ at 10. Yet the Act requires a single Secretarial determination that the proposed transfers will not have an adverse material impact on the three industries, not multiple determinations. Moreover, the determination at issue in this case was supported by ERI's extensive analysis of the impact of the transfers on each of the three industry components, satisfying the obligation that all three industries be considered.

The mere fact that DOE has entered into contracts to carry out its down-blending and environmental clean-up activities is not evidence that DOE has prejudged the question of

whether future transfers will have an adverse material impact. Plaintiff's MSJ at 22-25. First, DOE could hardly carry out any of these activities without entering into contracts. More importantly, DOE has flexibility under the contracts as to the amount of services it will receive, and correspondingly in the amount of uranium it might transfer. And finally, DOE's decision to retain ERI to provide an independent economic analysis does not alter the fact that DOE, like any expert agency, is entitled to deference in it predictive judgments. *See* pp. 12-14, *supra*.

### C. The Secretary Has Authority, both Under the Atomic Energy Act and the Privatization Act, to Transfer Uranium Hexafluoride.

As the Court recognized, PI Opinion at 22, the Secretary of Energy has broad authority under the Atomic Energy Act to transfer all types of nuclear material, including all types and components of uranium. *See* 42 U.S.C. § 2073(a); 42 U.S.C. § 2093(a), 42 U.S.C. § 2201(g). Section 2297h-10(d) imposes requirements for certain transfers or sales of uranium identified in that provision, but it does not repeal or otherwise eliminate the Secretary's broad authority under the AEA to transfer all types of uranium. If section 2297h-10(d) did not cover UF6 transfers, the outcome would be that DOE could transfer natural and low-enriched UF6 without Secretarial Determinations—far from ConverDyn's suggestion that DOE cannot transfer UF6 at all.

Plaintiff's contention that DOE cannot transfer UF6 is also inconsistent with the structure of section 2297h-10(d). That section is designed to prevent any "adverse material impact" on the mining, conversion and enrichment components of the domestic industry. 42 U.S.C. § 2297h-10(d)(2)(B). If section 2297h-10(d) did not address transfers of UF6 – the principal product

produced by the domestic conversion industry – the statutory requirement to consider the impact of such transfers on the domestic uranium conversion industry would be meaningless. *Id*.

Plaintiff's MSJ never addresses either of these points, but instead cites to a different provision of the Privatization Act, 42 U.S.C. § 2297h-10(b), governing the disposition of Russian HEU, to support the inference that DOE cannot transfer UF6 under § 2297h-10(d). *See* Plaintiff's MSJ at 26. Subsection (b) contains a subparagraph providing that "[n]othing in this subsection (b) shall restrict the sale of the conversion component of such uranium hexafluoride." 42 U.S.C. § 2297h-10(b)(8). Plaintiff contends that the absence of a similar clause in section 2297h-10(d) compels the conclusion that DOE cannot transfer the conversion component of uranium hexafluoride under that subsection. Plaintiff's MSJ at 26.

Plaintiff's simplistic recitation of the "different words" canon gets the analysis backwards. Subsection (b) is a highly detailed prescription for how DOE was to manage certain quantities of material that subsection (b) particularly instructed DOE to purchase and dispose of as UF6. Thus, it was natural for Congress to discuss how subsection (b) might affect DOE's authority to sell the conversion component of the UF6. It did so by specifying that subsection (b) does not "restrict the sale of the conversion component." Subsection (d), by contrast, relates to natural and low-enriched uranium more broadly; it lacks a comparable mention of conversion. Following plaintiff's logic, subsection (d) is the requirement to make Secretarial Determinations before selling. DOE has complied with the restriction.[20]

[20] Plaintiff also notes that subsection (b) shows Congress to have distinguished between the "conversion component" and UF6 itself. That observation is beside the point, because DOE is transferring UF6 itself, rather than conversion alone.

Ultimately, plaintiff's argument is that the Privatization Act has repealed by implication the Secretary's broad transfer authorities contained in the AEA. It is a "cardinal rule that repeals by implication are not favored." *Morton v. Mancari*, 417 U.S. 535, 549-550 (1974) (*quoting Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936)). A court "will not infer a statutory repeal 'unless the later statute "expressly contradict[s] the original act"' or unless such a construction 'is absolutely necessary ... in order that [the] words [of the later statute] shall have any meaning at all.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) *quoting Traynor v. Turnage*, 485 U.S. 535, 548 (1988). Nothing in the language or legislative history of the Privatization Act suggested that it repeals, *sub silencio*, DOE's core powers under the AEA.

**D. Plaintiff Lacks Standing to Challenge the Department of Energy's Determination of What Price to Charge for the Uranium it Transfers.**

Plaintiff's challenge to DOE's alleged failure to obtain fair market value for the uranium it transfers is a classic example of "generalized grievance," which is not justiciable. Federal courts may not entertain suits "claiming only harm to [plaintiffs] and every other citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992). Such claims do not constitute a "case or controversy," the necessary constitutional minimum for jurisdiction under Article III. *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (*per curiam*).

Conceivably, plaintiff might allege that it is suffering harm in the marketplace since DOE's alleged failure to obtain fair market value causes downward pressure on the overall uranium market, including the conversion sector. But plaintiff is not within the zone of interests

intended to be protected by the fair market value mandate of 42 U.S.C. § 2297h-10(d)(2)(C), which is designed to protect the interest of the government generally and not particular participants in the market place. (By comparison, plaintiff certainly is within the zone of interests protected by the "adverse material impact" clause of 42 U.S.C. § 2297h-10(d)(2)(B).)

In *Lexmark International Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014), the Supreme Court clarified the law relating to so-called "prudential" and "zone of interests" standing. The Court concluded that in making such prudential, zone of interests determinations, the courts were actually determining, as a matter of straightforward statutory interpretation, "the scope of the private remedy" created by Congress and the "class of persons" who can maintain a claim under the statute. *Id*. *citing Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529 (1983).

But the zone of interests determination is still relevant to the crucial issue of statutory interpretation. "[W]e presume that a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'" *Lexmark,* 134 S. Ct. at 1388, *quoting Allen v. Wright*, 468 U.S. 737, 751 (1984). In the APA context, the zone of interests test "forecloses suit . . . when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that" Congress authorized the plaintiff to sue." *Lexmark,* 134 S. Ct. at 1389, *quoting Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (emphasis added). Plaintiff's challenge to the alleged violation of the fair market value requirement 42 U.S.C. § 2297h-10(d)(2)(C) undeniably fails that test.

Courts consistently refuse to hold that competitive injury falls within the zone of interests of a statute that is intended to enable agencies to protect government revenue. *See Glass Packaging Inst. v. Regan*, 737 F.2d 1083, 1090 (D.C. Cir. 1984) (statute for "protection of tax revenue . . . is not a general mandate to monitor or protect the competitive status or financial health of the affected industry"); *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 144 (D.C. Cir. 1977) ("concepts of consequence and impact are not the proper guideposts to define the relevant zone of interests").

### E. The Department of Energy Has in the Past Received, and Will Continue to Receive, "Fair Market Value" for the Uranium Transferred.

Even if plaintiff has standing to challenge the Secretary's determination that DOE will receive "fair market value" for the uranium being transferred, there is no merit to plaintiff's challenge that DOE is acting arbitrarily and capriciously in the valuation it receives for its uranium transfers. As a starting point, the Court recognized, the parties are in agreement, that DOE values the uranium transferred at or close to the spot market price. PI Opinion at 22, Plaintiff's MSJ at 29.

Plaintiff criticizes DOE for not obtaining a valuation based on the higher, term price for the uranium it transfers. Plaintiff's MSJ at 29 – 30. But, in a market in which the term and spot prices differ, the phrase "fair market value" does not automatically refer to the former. In particular, a term price would only be available if DOE entered into long-term contracts to transfer uranium. Plaintiff points to nothing in section 2297h-10(d) that suggests DOE is obligated to make such long-term contracts. Indeed, securing long-term contracts for uranium

transfers would make it more difficult to change course over time if the transfers began to produce adverse material impacts on domestic uranium industries.

For prices negotiated on a monthly or quarterly basis, DOE is undeniably receiving "fair market value" as required by 42 U.S.C. § 2297h-10(d)(2)(C). As this Court recognized in its PI Opinion, there is no requirement that "the Department [] obtain the very best possible price so long as it receives fair market value," which is clearly the case here. PI Opinion at 22 – 23. *See also, Baltimore Gas & Elec. Co*, 462 U.S. at 105 (agency decision will be upheld if it is "within the bounds of reasoned decisionmaking.").

### E. The Department's July 2013 Excess Uranium Inventory Management Plan is Lawful.

#### 1. The Excess Uranium Inventory Management Plan is an Agency Policy Statement, Not a Legislative Rule, and Hence Is Exempt from the Notice and Comment Requirements of 5 U.S.C. § 553.

Agency policy statements are not legislative rules and therefore are exempt from the notice and comment rulemaking requirements of 5 U.S.C. § 553(b)(A). This is because an agency policy statement does not seek to impose or elaborate a legal norm, but merely represents an agency position with respect to how it will treat the governing legal norm, *e.g*., in a future enforcement action. *See Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997); *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974). Policy statements are only meant to structure or guide future agency action. *See Nat'l Mining Ass'n v. Sec'y of Labor*, 589 F.3d 1368, 1372 (11th Cir. 2009). Thus, "[a] binding policy is an oxymoron." *Vietnam Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988).

The 2008 Excess Uranium Management Plan, as well as the 2013 Plan that updated it, are both general statements of policy. As a preliminary matter, the Plans are specifically described

as "policy statements." *See e.g.* Ex. D at A-1. As the Court noted in *Pacific Gas & Electric Co,* 506 F.2d at 39, "[o]ften the agency's own characterization of a particular order provides some indication of the nature of the announcement."

Furthermore, the stated purpose of the 2008 Policy Statement is not to provide an inflexible, binding rule but rather to give advance notice of the Department's general policy regarding the amount of annual uranium transfers. *See* Ex. D at A-1 ("This Policy sets forth the general framework within which the Department prudently will manage its excess uranium inventory.") (emphasis added). *See Independent Bankers Ass'n of America v. Federal Home Loan Bank Board*, 557 F. Supp. 23, 28 (D.D.C. 1982) (observing that by calling its statement a "*general* policy" "the Board created the possibility that exceptions to its 'general policy' might be made.").

Moreover, use of the word "general" or "generally" invariably confirms that the agency is merely stating its policy, not establishing binding norms. In adopting the ten percent guideline on uranium transfers, the 2008 Policy Statement itself is not specific or prescriptive enough to create rights or bind agency discretion:

> [T]he Department believes that, as a general matter, the introduction into the domestic market of uranium from Departmental inventories in amounts that do not exceed ten percent of the total annual fuel requirements of all licensed nuclear power plants should not have an adverse material impact… . The Department anticipates that it may introduce into the domestic market…in some years for certain special purposes such as the provision of initial core loads for new

Ex. D at A-2 (emphasis added). Thus, the Policy explicitly envisions the Department departing from the ten percent guideline. *See also Catawba County, N.C., v. EPA.* 571 F.3d 20, 34 (D.C. Cir. 2009) ("An agency pronouncement is not deemed a binding regulation merely because it may have some substantive impact, as long as it leave[s] the administrator free to exercise his

informed discretion.") (quoting *Panhandle Producers & Royalty Owners Ass'n v. Econ. Regulatory Admin.*, 822 F.2d 1105, 1110 (D.C. Cir. 1987)).[21]

Consequently, plaintiff's argument that because the 2013 Plan effectuated a "substantive policy change," and therefore rulemaking proceedings were required – is simply wordplay. Agency actions that constitute a rule are those that "grant rights" or "impose obligations," *Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 395 (D.C. Cir. 2013). But despite some loose language in that case, a change in a general policy, effectuated through an exempt policy statement, does not require the formality of rulemaking proceedings.

Plaintiff's "reliance" argument, Plaintiff's MSJ at 33, 36, is equally meritless since neither plaintiff nor any other reasonable industry actor, could possibly rely on the 10 percent figure as binding when it was announced by DOE with the statement that "the Department believes that, as a general matter," the Department should not exceed the 10 percent guideline. Ex D at A-1 (emphasis added). No reasonable person, reading the caveats imposed on the ten percent guideline in the 2008 Plan could possibly make marketplace decisions thinking that DOE transfers would never exceed 10 percent.

And finally, the Department does not rely on the policy statement alone when it determines whether the transfer of a particular amount of uranium will not have a material adverse impact on the domestic market. *See* Ex. D at A-2 ("[T]he Department will conduct analyses of the impacts of particular sales or transfers on the market and the domestic uranium industry, prior to entering into particular sales or transfers."); DOE_0061, n.2 ("Even with this

[21] Plaintiff's citation to places where the Plan uses words like "will" and "commits," Plaintiff's MSJ at 34, proves nothing since all are either taken out of context or do not apply to the ten percent guideline. The relevant section of the Plan, that introducing the 10 percent guideline, is offered only "as a general matter."

[now withdrawn, ten percent] guideline, any transfer subject to section 3112(d) of the USEC Privatization Act still underwent a market impact analysis to ensure there was no material adverse impact."). As the *Pacific Gas & Electric* Court noted, "[w]hen the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." 506 F.2d at 38.[22]

**2. The Excess Uranium Inventory Management Plan Is Reasonable**

In addition to alleging that DOE was required to conduct rulemaking proceedings before adopting the 2013 Plan, plaintiff also challenges to the reasonableness of DOE's 2013 decision to eliminate the use of the ten percent guideline. However policy statements like DOE's Plan are not subject to direct challenge before the policy has been implemented in the context of final agency action, as such a challenge "is not ripe for judicial consideration." *Office of Communication of the United Church of Christ v. FCC*, 826 F.2d 101, 103 (D.C. Cir. 1987). Where the agency's general policy guides the agency's decision in a concrete case – such as the Secretarial Determination at issue here – the policy is subject to challenge in that context. *Am. Trucking Ass'ns v. ICC*, 747 F.2d 787, 790 (D.C. Cir. 1984).

Even considered as part of the Secretarial Determination, plaintiff simply misreads the nature of the ten percent guideline articulated in the 2008 Plan. The ten percent limitation was never intended to be a binding, hard-and-fast limitation on the Secretary's authority to transfer uranium from its inventory. The 2008 Plan is clear in noting that "the Department believes, as a

[22] Even if the 2013 Plan were found to be a legislative rule, it would still be lawful because rules relating to government property and contracts, are exempt from notice and comment requirements pursuant to 5 U.S.C. §553(a)(2). *See, e.g., Clipper Cruise Line, Inc. v. United States*, 855 F. Supp. 1, 3 (D.D.C. 1994) (National Park Service's alteration of its system of allocating permits for ships entering a national park relates to "public property" and is thus exempt from notice and comment).

general matter, the introduction into the domestic market of uranium . . . in amounts that do not exceed ten percent of the total annual [domestic] fuel requirements . . . should not have an adverse material impact." Ex. D at A-2 (emphasis added). Thus, the ten percent threshold in the 2008 Policy Statement was always designed to be a non-binding guideline which the Department could elect to exceed when appropriate and at its discretion.[23]

The thrust of plaintiff's criticism of DOE's determination to eliminate the ten percent guideline from the 2008 report is that DOE cannot possibly have obtained adequate information about the impact of transfers above ten percent to justify eliminating that guideline. But, as explained in the 2013 Plan, DOE's conclusion was based on "experience gained since the issuance of the 2008 Plan, including in particular the market impact analysis that supported the May 15, 2012 Secretarial Determination." DOE_0061. Indeed, as of the adoption of the 2013 Plan, the Secretary had received the benefit of no less than three separate market impact analyses by ERI, of increasingly greater sophistication. *See* Exs. H, I and J.

Implicit in plaintiff's argument is the assumption that because the ten percent guideline affirmed that sales below that level would not cause an adverse material impact, sales above the level automatically would cause such an impact. But nothing in either the 2008 Policy Statement or Plan would support such an assumption, and the Department has always recognized that it would need to conduct a separate market assessment to support each Secretarial determination to transfer uranium, even transfers that fell within the ten percent guideline.

[23] Secretary Chu's mistaken statement in Congressional testimony to the effect that the 10 percent guideline was in fact a statutory mandate, *quoted in* Plaintiff's MSJ at 36, is irrelevant to the legal effect of the 2008 Policy. *See Aimes Publications, Inc. v. U.S. Postal Service*, 1988 WL 19618 at *2 (D.D.C. Feb. 23, 1988) (executive branch testimony before a Congressional committee is "irrelevant to this Court's determination of the law in this case").

Second, plaintiff misrepresents the statements from past ERI reports relating to whether dropping the 10 percent guideline would cause an "adverse material impact." Plaintiff's MSJ at 37. But ERI's reports only noted that some members of the nuclear industry stated if DOE exceeded the 10 percent guideline, then they "could" feel that an adverse material impact has occurred. DOE_0283. ERI's mere comments on the possible perception of industry members does not constitute an "adverse material impact."

## CONCLUSION

Wherefore, plaintiff's motion for summary judgment should be denied and defendants' motion for summary judgment should be granted.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 25th day of September, 2014, I caused the forgoing Defendants' Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment to be served on counsel for plaintiff by filing with the Court's electronic case filing system.

*/s/ Daniel Bensing*

Daniel Bensing