UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONVERDYN, **Plaintiff,** **v.** **ERNEST J. MONIZ, in his official capacity as Secretary of the United States Department of Energy,** **and** **UNITED STATES DEPARTMENT OF ENERGY,** **Defendants.**	**Case No. 1:14-cv-1012-RBW** **ORAL ARGUMENT REQUESTED**

PLAINTIFF CONVERDYN'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff ConverDyn respectfully moves for summary judgment to stop unlawful transfers of uranium from the United States Department of Energy ("DOE") inventory into the commercial markets. The USEC Privatization Act (the "Act") bars DOE from selling or transferring uranium if the sales or transfers would materially harm the domestic uranium mining, conversion, or enrichment industries. Yet, contrary to the Act, DOE has authorized and is making uranium transfers that are damaging the already-fragile domestic conversion market by displacing sales, depressing prices, increasing costs, and eliminating jobs. ConverDyn—the sole domestic provider of uranium conversion services—challenges DOE's improper authorization of uranium transfers and its failure to follow required procedures when abandoning a key protection for the domestic conversion industry.

While the Secretary of Energy (the "Secretary") purported to comply with the USEC Privatization Act by declaring that planned uranium transfers would not have an "adverse material impact" on ConverDyn, he applied the wrong standard in assessing adverse impacts. Rather than assess *the harm from authorizing further DOE transfers*, as directed by the Act, the Secretary instead assessed whether the transfers were the cause of the challenges facing the conversion industry and whether stopping the transfers would ameliorate those challenges. But under the Act, the question is not whether DOE is the main source of the industry's woes—it is whether transfers by DOE would worsen the industry's plight. The Secretary ignored the Act's mandate and instead rewrote the statute—all to pay contractors working on DOE projects that Congress declined to fund.

DOE also offered no evidence to support the Secretary's determination. In authorizing the transfers, the Secretary cited no information from the record in support of his finding that the transfers would have no adverse material impact. Indeed, everything in the administrative

record—including a detailed market analysis prepared by DOE's own experts, Energy Resources International ("ERI")—shows the exact opposite. A thorough report prepared by DOE's expert consultants, as well as a financial analysis prepared by ConverDyn and submitted to DOE, establish that ConverDyn will suffer significant and potentially devastating losses if DOE completes the transfers as planned. The Secretary's determination of no adverse material impact simply cannot be reconciled with the record, nor does the Secretary even attempt to do so. The Secretary's determination falls far short of the "searching and careful" review required by the Administrative Procedure Act ("APA").

DOE's transfer decision also violates other requirements of the USEC Privatization Act. The Act limits DOE transfers to natural and low-enriched uranium. The Act does not authorize DOE to transfer the conversion services component of UF6. The Act also obligates DOE to obtain fair market value for the transferred material, in part to ensure that the transfers do not artificially lower market prices and harm the domestic uranium industry. But because DOE contractually obligated itself to complete the transfers *regardless* of the impact on the U.S. conversion industry, DOE was not free to engage in an arm's length market transaction. As a result, the transfers amount to distress sales that exacerbate the difficulties facing the conversion market and further harm ConverDyn.

DOE's transfers also rely on an unlawful change in DOE policy. To avoid harming the domestic uranium industries, in 2008 DOE issued a binding policy that limited its transfers to no more than 10% of annual domestic nuclear fuel demand. ConverDyn reasonably relied on the 10% limit in entering into long-term contracts and in structuring its businesses. However, in 2013 DOE reversed course and abandoned the 10% limit without providing any public notice or opportunity for comment. DOE is now boosting its transfers to 15% of domestic requirements—

a level that DOE's own experts warned would have an adverse material impact on industry. As a direct result of DOE's changed policy, ConverDyn has lost even the limited protection provided by the 10% limit and already is incurring significant and unrecoverable losses, all without any opportunity to weigh in on DOE's irresponsible about face.

At bottom, DOE has not come close to satisfying the USEC Privatization Act or the APA. DOE applied the wrong legal standard to conclude that the transfers will not have a material adverse impact on the U.S. conversion industry and failed to establish a "rational connection" between its finding and the record before it, including detailed evidence provided by DOE's own experts and by ConverDyn. DOE transfers in fact endanger the future of ConverDyn, the nation's sole remaining provider of uranium conversion services, and threaten the United States' future energy security and energy independence. In other words, the transfers are having exactly the effect the statute was designed to prevent.

STANDARD OF REVIEW

In challenges to agency action under the APA, courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency decisions are unlawful and must be set aside if they are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). The function of a reviewing court "is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Coe v. McHugh*, 968 F. Supp. 2d 237, 239 (D.D.C. 2013). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Maneely v. Donley*, 967 F. Supp. 393, 400 (D.D.C. 2013).

"To survive review under the 'arbitrary and capricious' standard, an agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *PPL Wallingford Energy LLC v. F.E.R.C.*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (quotation marks omitted). While deferential, the APA standard does not "shield [] action from a thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). An agency decision is "arbitrary and capricious if the agency has 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 of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency must also "respond meaningfully" to issues and concerns raised by parties because, "[u]nless the [agency] answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned." *Canadian Ass'n of Perto. Prod'rs. v. F.E.R.C.*, 254 F.3d 289, 299 (D.C. Cir. 2001). The reviewing court "should not attempt itself to make up for [any] deficiencies; [the court] may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.*

ARGUMENT[1]

I. THE SECRETARY'S DETERMINATION AUTHORIZING URANIUM TRANSFERS IS ARBITRARY AND CAPRICIOUS

A. The USEC Privatization Act Imposes Strict Limits On Uranium Transfers

The USEC Privatization Act starts with a baseline rule prohibiting uranium transfers. According to the Act, the Secretary "shall not . . . transfer or sell any uranium (including natural uranium concentrates, natural uranium hexafluoride, or enriched uranium in any form) to any person" except as provided for in certain exceptions. 42 U.S.C. § 2297h-10. The relevant exception here provides:

> **(d) Inventory Sales**
>
> **(1)** . . . [T]he Secretary may, from time to time, sell natural and low-enriched uranium (including low-enriched uranium derived from highly enriched uranium) from the Department of Energy's stockpile.
>
> **(2)** . . . [N]o sale or transfer of natural or low-enriched uranium shall 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, . . . 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). A determination under section 2297h-10(d)(2)(B) by the Secretary that the sales or transfers "will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry" (a "Determination") is valid for only two years. Consolidated Appropriations Act of 2014, P.L. 113-76, Div. D, Tit. 3 § 306(a). The Secretary then must issue a new Determination before making further transfers.

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[1] The relevant factual information is contained in ConverDyn's accompanying Statement of Facts in Support of Its Motion for Summary Judgment, and any exhibit cites refer to the exhibits attached to the Statement of Facts. The parties will provide a joint appendix of material cited from the administrative record within 14 days of the final briefing memorandum. Local Civ. R. 7(n)(2).

B. The Secretary Applied The Wrong Standard In Evaluating The Transfers' "Adverse Material Impact"

By any measure, DOE failed to apply the correct legal standard. The only test under section 2297h-10(d)(2)(B) is whether or not the transfers "have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry." This is a straightforward, though strict, standard. By its plain language, *any* finding of adverse material impact bars the transfers. The statute does not allow the Secretary to consider whether DOE transfers have a greater or lesser impact on the market than other factors, nor does it permit DOE to balance the purported benefits of transfers *to the government* against the adverse impact *to the domestic uranium industry*. Here, however, the Secretary evaluated the transfers' market impact based on non-statutory factors "which Congress has not intended it to consider." This renders the Determination arbitrary and capricious on its face. *See Overton Park*, 401 U.S. at 415.

The DOE Memoranda[2] pay lip service to the existence of the "adverse material impact" standard, but then devise entirely new criteria for authorizing transfers. Even though the statutory standard is straightforward—either DOE's transfers have a material adverse impact or they do not—DOE described the test as "whether DOE uranium sales *alone* cause the uranium industry to change from its position in the market without DOE sales." App. DOE_0416 (emphasis added). DOE's unnecessary reformulation of the legal standard cannot be reconciled with the plain language of the USEC Privatization Act. Of course there can be more than one cause of adverse impacts. Indeed, there are likely to be multiple factors that adversely affect the

[2] DOE prepared two main memoranda analyzing the market impact of its transfers. One is dated May 8, 2014 (the "May 8 DOE Memo"), and it is referenced and incorporated into another dated May 12, 2014 (the "May 12 DOE Memo," collectively the "DOE Memoranda"). App. DOE_0397, 0405.

market when it is in a weakened condition, as is the case now.[3] DOE's reformulation of the standard allows it to ignore the harmful effects of its transfers so long as DOE "alone" is not responsible for poor market conditions.[4] But, the statutory test is absolute. If DOE's transfers will have an adverse material impact, the transfers may not proceed. The Act does not permit a comparison of the impact of DOE transfers to other factors or allow DOE to proceed with transfers so long as negative effects are less than those of other market events.

DOE's improper consideration of extra-statutory factors is pervasive. The DOE Memoranda admit at the outset that the transfers "will necessarily" have a negative impact and that the impact now is "greater now than it was in 2012." App. DOE_0399. That transfers harm the industry is therefore undisputed. This should have ended the inquiry, or at least been enough to trigger a more detailed assessment by DOE of whether the adverse impacts are "material." But instead, DOE staff simply recommended that the Secretary approve the transfers notwithstanding the admittedly adverse impacts because "it is much more important for DOE to adhere to its stated plans." App. DOE_0416. The purported benefits of DOE "adher[ing] to its stated plans" reveals nothing about the transfers' adverse impact, which is the sole focus of the required statutory test.[5] The DOE Memoranda therefore show that, rather than apply the

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[3] For example, DOE transfers cause adverse impacts by increasing the secondary *supply* of conversion services, while other events, like the Fukushima accident, may result in reduced *demand* for conversion services. The statute's focus is the effect of DOE transfers. In the present case and as discussed further below, the evaluations performed by DOE's expert identified the adverse impacts of DOE transfers *on top of* the other factors affecting the market. App. DOE_0282.

[4] Perversely, this approach allows DOE to transfer larger quantities of material when there are already significant negative forces affecting the market, such as Fukushima. As long as there are other factors negatively affecting the market, DOE's transfers will never "*alone* cause the uranium industry to change." App. DOE_0416 (emphasis added). This is contrary to the USEC Privatization Act's purpose, which on its face aims to protect the domestic industry when it is at its most vulnerable.

[5] In this case, maintaining the same transfer volume—or, as DOE is doing here, *increasing* the transfer volume as a percentage of domestic requirements—in the face of an oversupplied and depressed conversion market only underscores DOE's failure to contemporaneously assess the adverse impacts' magnitude, as required by the Act.

statute's straightforward-but-strict prohibition of any "adverse material impact," DOE weighed the transfers' adverse impacts against the purported benefits to DOE's program objectives. This balancing of harms and benefits is not permitted by the Act.

Having developed a new test unmoored from the statute, DOE goes on to similarly consider other factors unrelated to the standard in the USEC Privatization Act, stating:

> . . . a decrease in the quantity of DOE transfers would do little to *improve the market condition or reduce other impacts* on the industry. ERI's analysis supports a conclusion that although DOE's actions will necessarily have some impact on the market, and that this impact is greater now than it was in 2012, *DOE's actions are not the driver* of the current negative states on the domestic uranium production, conversion, or enrichment industries. NE agrees with this assessment and *believes that the markets will adjust* to the major drivers of the depressed markets over time and that the *DOE transfers will not harm this adjustment*.

App. DOE_0399 (emphasis added). Here again, DOE acknowledged that the evidence before it showed that the transfers would have an adverse effect on the markets. That stopping the transfers would "do little to improve the market condition or reduce other impacts on the industry" is immaterial to the test Congress directed the Secretary to apply. Whether DOE's actions are the "driver" of current market conditions, or even a major cause of the totality of those conditions, is likewise irrelevant. The statutory test is simple: DOE must determine whether the transfers have adverse material impacts on the domestic uranium industry, period. If there is any adverse material impact, the statute bars the transfers. The statute does not permit DOE to consider whether industry can eventually recover from adverse material impacts caused by DOE transfers, nor does it allow DOE to ignore adverse impacts caused by DOE transfers because stopping the transfers does not eliminate the impacts caused by other events.

DOE's standard also runs counter to the Act's intent. The "no adverse material impact" standard ensures that DOE contemporaneously considers the effects of its transfers on the domestic uranium industries—for example, by recognizing challenging conditions and limiting

the volume transferred to quantities that will not cause adverse material impacts. In light of current market conditions, DOE should be reducing its transfers, not increasing the share of the domestic market taken up by its transfers by 50%.[6] DOE's actions only make matters worse, hitting the industry when it is already vulnerable from other external market forces.[7] In this way, "[t]he Secretarial Determination process has, unfortunately, become a sham. Instead of protecting domestic uranium industries, it has become a tool to destroy them." Cong. Rec. 160:107 (July 10, 2014) at H6049 (Rep. Lummis).

The conclusion that DOE "believes that the markets will adjust to the major drivers of the depressed markets over time and that the DOE transfers *will not harm this adjustment*" again ignores the statute. The standard is whether the DOE transfers will have an adverse material impact, not whether the industry can withstand the adverse impacts of DOE transfers for one year, two years, or ten years, and then recover.[8] DOE's reformulation of the legal standard implies that the only adverse material impact is one from which industry cannot recover (*i.e.*, one from which industry cannot "adjust" to "over time"). Such an approach is inconsistent with the plain language of the USEC Privatization Act, which prohibits any and all adverse material impacts, regardless of whether those impacts are ultimately fatal. DOE's "rel[iance] on factors which Congress has not intended it to consider" renders its decision arbitrary and capricious. *State Farm*, 463 U.S. at 43.

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[6] At a minimum, DOE should have considered ways to mitigate the adverse impacts of DOE transfers. The record is devoid of any consideration by DOE of steps that could reduce impacts to the domestic uranium industry.

[7] Other factors, such as the Fukushima accident, that also have negatively affected the market have only made the domestic industry more susceptible to further changes in market conditions, thereby increasing the risk of adverse impacts from DOE transfers.

[8] DOE admits that "the amount of time it will take to recover from the post-Fukushima-driven state of the current markets is unclear." App. DOE_0407.

DOE also failed to consider an important aspect of the Act's requirement that DOE assess its transfers' impacts on the domestic uranium industries. Absent from the Determination is any attempt to distinguish among the domestic uranium industry's individual segments. The statute requires the Secretary to determine, before authorizing transfers, that the transfers 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) (emphasis added). An adverse material impact to any one of the three segments (mining, conversion, or enrichment) therefore precludes a "no adverse material impact" determination. The 2014 ERI Report specifically assesses each of the three segments separately. *Compare* App. DOE_0194, 0203, 0244, 0280 (individualized analysis of uranium mining industry) *with* App. DOE_0196, 0210, 0262, 0282 (same for conversion industry) *with* App. DOE_0197, 0215, 0272, 0283 (same for enrichment industry). Yet, in the DOE Memoranda, DOE makes a single, sweeping finding of no adverse material impact rather than making individualized findings for each industry segment. This ignores the obvious fact, borne out in the 2014 ERI Report, that DOE's transfers have different impacts in different market segments—with the domestic conversion industry suffering the most.

To comply with the Act, DOE must assess each industry segment separately to avoid harming one segment even if the transfers do not materially harm the others. The lack of *any analysis or explanation* as to *why* DOE found that the undisputed harms to each industry segment did not constitute an adverse material impact means that it is impossible to assess the extent to which harms specific to each individual segment factored into the overall Determination. By ignoring impacts on different market segments, DOE "failed to consider an important aspect of the problem," contrary to the APA. *State Farm*, 463 U.S. at 43.

C. The Transfers Have An Adverse Material Impact On The Domestic Conversion Industry

While DOE's failure to apply the correct standard in making the Determination is fatal on its face, a review of the record further confirms that DOE's conclusion that the transfers will not have an adverse material impact was arbitrary and capricious. The record is replete with information showing the serious harm to ConverDyn that will flow from the transfers, including in the key report prepared by DOE's own experts at ERI. Yet, instead of addressing the transfers' harmful effects head on, DOE ignores ERI's warnings or dismisses them without explanation in order to achieve its predetermined result: authorization to proceed with the transfers. DOE wholly fails to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *PPL Wallingford Energy*, 419 F.3d at 1198 (D.C. Cir. 2005).

1. An "adverse material impact" is an impact of importance or consequences unfavorable or opposed to one's interests

The phrase "adverse material impact" in section 2297h-10(d)(2)(b) is not defined in the statute. In the absence of a statutory definition, courts consider "the plain meaning of the text, looking to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Sherley v. Sebelius*, 644 F.3d 388, 400 (D.C. Cir. 2011). Looking first to dictionaries, "adverse" means "opposed to one's interests" or "unfavorable to one's interests," Merriam-Webster Online Dictionary; Collins English Dictionary (10th ed. 2009), and "material" means "having real importance or great consequences" or "of great import or consequence." Merriam-Webster Online Dictionary; Collins English Dictionary (10th ed. 2009); *see also Doebereiner v. Sohio Oil Co.*, 880 F.2d 329, 334 (11th Cir. 1989) (material means of "real importance or great consequence").

Courts, including the Supreme Court, have further explained materiality in terms of what it is not: a material impact is one that is more than "*de minimis*." *See Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) ("material alteration" to policy means more than "purely technical or *de minimis*"); *Hilling v. Rumsfeld*, 381 F.3d 1028, 1033 (10th Cir. 2004) (materially adverse act means an act "that does more than *de minimis* harm"). An "adverse material impact" is therefore an unfavorable impact of real, or more than *de minimis,* importance or consequence.[9]

Other statutes addressing material harm are illuminating. The Tariff Act, which covers dumping in international trade, contains a "material injury" to "domestic industry" standard that is conceptually similar to the USEC Privatization Act's "adverse material impact" to the "domestic uranium . . . industry" standard. "Material injury" in the Tariff Act is defined as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7). In determining material injuries to domestic industry, the Tariff Act considers factors such as "actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity," the effect on "prices," and "actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment." *Id.* at § 1677(7)(C)(iii).

The concept of an "adverse material impact" must also be viewed in light of the statute's purpose and the entities the statute is meant to protect. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) (courts must "interpret the words of [] statutes in light of the purposes Congress sought to serve"); *Motor Vehicles Mnfrs. Ass'n of U.S. v. Ruckelhaus*, 719

[9] *See also TSC Indus., Inc., v. Northway, Inc*., 426 U.S. 438, 439 (1976) (in securities context "an omitted fact is 'material' if there is a substantial likelihood that a reasonable shareholder would consider it important").

F.2d 1159, 1165 (D.C. Cir. 1983) ("A statute should ordinarily be read to effectuate its purposes rather than to frustrate them."). By its own terms, section 2297h-10(d)(2)(B) is meant to protect the "domestic uranium mining, conversion, and enrichment industry" from the threat posed by DOE flooding the market with government-owned uranium. ConverDyn, as the last remaining provider of uranium conversion services in the United States, *is* the domestic conversion industry. Thus, when evaluating material adverse impacts on the domestic conversion industry, every blow to ConverDyn must be treated as a blow to the whole of the domestic conversion industry, and every threat to ConverDyn's future is a threat to the domestic conversion industry's future.

2. The record, capped by a report from DOE's own experts, establishes that DOE's uranium transfers will have an adverse material impact on the domestic conversion industry

a. *The 2014 ERI Report quantified the significant harm to the domestic conversion industry from DOE transfers*

The 2014 ERI Report quantified the upcoming transfers' adverse impacts on the domestic uranium conversion industry, yet DOE never addressed why it discounted these harms. *Sorensen Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 708 (D.C. Cir. 2014) ("Though an agency's predictive judgments about the likely economic effects of a rule are entitled to deference, deference to such judgments must be based on some logic and evidence, not sheer speculation.") (citations, quotation marks, ellipses, and brackets omitted). Noting that DOE is increasing the quantity of transfers from 10% to 15% of annual domestic demand for the next 10 years despite significantly reduced domestic and global demand, the 2014 ERI Report concludes that DOE transfers will cause conversion prices to decline, on average, by $0.90/kgU (kilogram of Uranium)—an 11.8%

decrease in the spot price and a 5.5% decrease in the term price.[10] App. DOE_0239-41. The drop in the absolute price predicted by ERI in the 2014 Report was 33% greater than the largest drop found in any ERI report supporting prior Secretary determinations (*i.e.*, the 2009, 2010 and 2012 ERI Reports). The percentage decline in the spot price will be *more than 300%* greater than the largest decrease in the spot price found in earlier ERI reports, and 38% greater than any decline in the term price found in the earlier reports.[11] Among other metrics, the 2014 ERI report also found for the first time that DOE's transfers will cause a 7% to 8% decrease in ConverDyn's sales and a 6% to 8% increase in ConverDyn's production costs. App. DOE_0271, 0282. These impacts from DOE transfers are all "on top of" impacts from other factors buffeting the industry, including reduced demand post-Fukushima, and therefore are attributed solely to DOE. App. DOE_0282.

The DOE Memoranda admit that the transfers "will necessarily" have a negative impact on the domestic conversion industry, App. DOE_0399, and accept ERI's findings regarding harms, conceding among other points that:

- "The price impact attributed to DOE inventory entering the conversion market averages $1 per kgU as UF6 over the next ten years. This is equivalent to 12% of the current spot price and 6% of the current term price." App. DOE_0407.

- "If market prices remain at the current depressed levels for several years, which seems to be the consensus view of many in the industry, then more U.S. production will be impacted and may be put on standby, as existing longer term contracts at higher prices are completed and can only be replaced by new, lower-priced contracts." App. DOE_0409.

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[10] At the time of the 2014 ERI Report, the spot price was $7.50/kgU and the term price was $16.00/kgU. App. DOE_0222.

[11] The 2014 ERI Report found a $0.90/kgU drop in conversion prices versus a $0.66 to 0.69/kgU price drop in the 2012 ERI Report. The 2014 ERI Report found a 11.8% decline in the spot market price versus a 3.8% decline in the 2009 ERI Report. The 2014 ERI Report found a 5.5% decline in the term price versus a 3.9 to 4.1% decline in the 2012 ERI Report.

- "The introduction of DOE inventory into the conversion market results in . . . a 7% to 8% reduction in sales volume." App. DOE_0409.

- "[L]oss of sales volume associated with DOE the entry of DOE material in the conversion market . . . results in a production cost increase of 6% to 8%." App. DOE_0409.

- The transfers will cause a 4% decrease in employment, and "continued job losses are fundamentally harmful to the viability of the industry." App. DOE_0408, 0416.

- "[T]he uranium, conversion and enrichment industries are all challenged by market oversupply . . . . This oversupply has led to depressed prices in the three markets, which in turn have affected both employment and production levels." App. DOE_0398.

Also telling is that in contrast to prior ERI reports, ERI declined in its 2014 Report to make a "no adverse material impact" finding. The 2014 ERI Report notes that the 2012 ERI Report's finding of no adverse material impact was based on "a much stronger price environment," and the 2014 ERI Report also states:

> [I]t is clear that there have been production, employment and financial impacts on the domestic industry due to a variety of market factors culminating in the current oversupplied markets. . . . [B]ased on feedback that ERI received from representatives of the U.S. [] uranium and conversion industries, they clearly feel that a reduction in the amount of DOE inventory entering the markets would make a difference, in part by sending a strong signal to the markets that DOE recognizes the current weak state of the nuclear fuel markets, in which there is considerable oversupply, near-term demand is mostly discretionary, and long-term contracting has declined considerably over the past year, and that DOE is responding to these market conditions.

App. DOE_0284. Notwithstanding these stark warnings from ERI, DOE persisted in its transfers, incongruously concluding that the transfers would have no material adverse effect. Or, as one industry trade publication succinctly sums up the 2014 ERI Report's findings, DOE's transfers are the equivalent of DOE saying to the domestic uranium industry "[s]ince you're already dying, here's some poison." Andrea Jennetta, Fuel Cycle Week, Vol. 13, No. 570, at 1 (May 22, 2014). DOE is sacrificing the domestic uranium industry as a way to circumvent

Congress' decision not to fund other DOE programs.[12] This is precisely the outcome the USEC Privatization Act aimed to prevent and was done for reasons that the D.C. Circuit has condemned: "[DOE] may not rely on political guesswork about future congressional appropriations as a basis for violating existing legal mandates." *In re Aiken Cnty.*, 725 F.3d 255, 260 (D.C. Cir. 2013).

The market analyses prepared by DOE's expert—and accepted by DOE—establish a substantial negative impact on ConverDyn in absolute, percentage, and relative terms. Yet, notwithstanding the adverse impacts' admitted existence, DOE never explains *why* it determined that the substantial price decreases, lost sales, lost jobs, and higher production costs are not "material," and instead simply concludes that it should proceed with the transfers.[13] In fact, the May 8 DOE Memo, even after listing and acknowledging all the harms described above, states that DOE staff "believe that the uranium industry would be in the same position in the market with or without DOE sales."[14] App. DOE_0406. DOE's failure to grapple with "the position of the agency's own experts" is "inconsistent with rational decisionmaking by an administrative

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[12] In 2011, GAO found that DOE uranium transactions, similar to those here, constituted sales (not "barters") and that by not depositing an amount equivalent to the proceeds from these transactions into the Treasury, DOE violated the Miscellaneous Receipts Statute. Ex. 12, GAO Report 11-846, at 13. The GAO report states: "According to DOE officials with whom we spoke, however, DOE has no incentive to [deposit proceeds in the Treasury] because the department would be unable to use the proceeds for its own cleanup priorities without specific congressional authorization. *Id*. at 20.

[13] As noted above, other statutes like the Tariff Act, which requires a conceptually similar evaluation of "material injury" to "domestic industry," require consideration of factors such as "actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity," the effect on "prices," and "actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment." 19 U.S.C. § 1677(7)(C)(iii). DOE considered none of these factors in reaching its no adverse material impact determination.

[14] DOE is essentially asserting that the 7%-8% loss in sales caused by DOE transfers is small relative to the 25% sales volume loss that ConverDyn experienced after Fukushima. But the relative loss is immaterial to the statutory test, which is whether DOE's transfers will have an adverse material impact. A 7%-8% decline in sales is an adverse material impact on its own. But, coming on top of a 25% sales volume loss, *see* App. DOE_0282, the additional 7%-8% decline in sales is devastating. DOE wholly fails to recognize, much less explain, its decision in the face of these real-world dynamics.

agency." *Kent County v. U.S. Envtl. Prot. Agency*, 963 F.2d 391, 397 (D.C. Cir. 1992); *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 685 (D.D.C. 1997) (action was arbitrary and capricious where agency "has consistently ignored the analysis of its expert" and "bas[ed] its decision on unsupported conclusory statements as well as facts which are directly contradicted by undisputed evidence in the [record]").

DOE's unexplained conclusion that the market "would be in the same position" without the transfers is also directly contradicted just pages earlier in its memo, where DOE outlines all the ways in which the transfers *will* change the domestic conversion industry for the worse (*i.e.*, displaced sales, depressed prices, increased production costs, lost jobs). App. DOE_0406-10, 0416. DOE's acknowledgement that these harms will occur is a recognition that the market *will not* be in the same position after DOE's transfers. DOE's conclusory and contradictory findings are another indicator of the Determination's arbitrary and capricious nature. *See Int'l Union, United Mine Wrkrs. of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 93 (D.C. Cir. 2010) (Secretary's determination is arbitrary and capricious since it "defies the expert record evidence and is unexplained"); *Ill. Public Telecomms. Ass'n v. F.C.C.*, 117 F.3d 555, 564 (D.C. Cir. 1997) (agency's "*ipse dixit* conclusion, coupled with its failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking"); *El Rio Cruz Neighborhood Health Center, Inc. v. U.S. Dep't of Health and Human Services*, 396 F.3d 1265, 1267 (D.C. Cir. 2005) (agency decision "was arbitrary and capricious in failing to address evidence before it in concluding that the physicians were ineligible for medical malpractice coverage" pursuant to statutory scheme); *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001) ("A fundamental requirement of administrative law is that an agency set forth its reasons for

decision; an agency's failure to do so constitutes arbitrary and capricious agency action.") (quotation marks and citations omitted).

b. *ConverDyn's submission to DOE builds on the ERI analyses and confirms the substantial harm to ConverDyn from DOE transfers*

Prior to the 2014 Determination, ConverDyn submitted a report to DOE that detailed the immediate and ongoing harm to ConverDyn (*i.e.*, to the domestic conversion industry) from DOE transfers. App. DOE_0110. ConverDyn explained that the DOE transfers would cost ConverDyn *$40.5 million in lost profits* (lost sales revenue less avoided production costs) from 2014 to 2016 due to displaced sales and depressed prices. App. DOE_0120; Ex. 13, Critchley Decl. ¶¶ 11-12. ConverDyn also stressed the potential for an additional *$29 million in lost revenue* from 2014 to 2016 depending on changes in customer practices made to exploit the increased spread between spot price and term price caused by DOE transfers.[15] App. DOE_0117-18. Importantly, ConverDyn's assessment was based on data in the 2012 ERI Report (the 2014 ERI Report had not yet been released at the time of ConverDyn's submission), App. DOE_0118-19, which actually predicted less severe impacts on conversion pricing and sales than did the 2014 ERI Report. ConverDyn's submission to DOE is therefore broadly consistent with—and, if anything, conservative as compared to—the 2014 ERI Report's assessment.

ConverDyn's submission flatly contradicts the Secretary's "no adverse material impact" determination. Yet, it is apparent on the DOE Memoranda's face that, in reaching this

[15] ConverDyn's annual revenues are about $100 million per year, Ex. 13, Critchley Decl. ¶ 17, meaning that the $40.5 million in lost profits over three years will translate into an average annual loss of more than 13.5% of ConverDyn's business. ConverDyn's March 10, 2014 letter to DOE explained that the expected losses to ConverDyn resulting from DOE's transfers were likely to cause ConverDyn to go from a profit to a loss in at least one of the next few years. App. DOE_0113, 0116, 0120. Further, the potential for another $29 million in lost revenue over three years due to changes in customer buying habits equates to an additional average annual loss of up to ~10% of ConverDyn's business. Combined, the transfers threaten *nearly a quarter of ConverDyn's earnings*.

conclusion, DOE utterly failed to consider the impacts described in ConverDyn's report. The DOE Memoranda briefly note that ConverDyn made a submission, but do not even list the amounts of the expected losses or describe ConverDyn's concerns in any detail.[16] App. DOE_0412. Instead, DOE broadly and offhandedly dismisses comments from almost all industry participants, including ConverDyn, by stating that "uranium production and conversion industry representatives generally provide anecdotal evidence that inaccurately represents the impact of the DOE transfers on these industries" App. DOE_0400. But, DOE never explains *how* ConverDyn's detailed calculations of financial harm are merely "anecdotal" nor *why* DOE thinks they are "inaccurate[]." DOE never requested any clarification or additional information from ConverDyn regarding the harms described in ConverDyn's submission. App. DOE_0287; Ex. 13, Critchley Decl. ¶ 15. Nor does DOE even acknowledge that the impacts in ConverDyn's report were developed using data *from DOE's own expert* in the 2012 ERI Report. App. DOE_0118-19; Ex. 13, Critchley Decl. ¶ 13. DOE does not even attempt to explain—nor could it credibly explain—that $40.5 million in lost profits, with the potential for an additional $29 million in lost revenue, is not material. "An agency's failure to respond meaningfully to objections raised by a party renders its decision arbitrary and capricious," because, "[u]nless the [agency] answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned." *PPL Wallingford*, 419 F.3d at 1198 (quotation marks omitted).

[16] Indeed, DOE appears to have conceded that it did not conduct any analysis on the calculations of harm ConverDyn submitted to DOE prior to the 2014 Determination. In its Opposition to ConverDyn's Motion for a Preliminary Injunction, DOE noted that it had not had "an expert [] analyze ConverDyn's assertions of financial harm." Defs. Opp. to Plfs. Mot. for Prelim. Inj., Dkt. No. 17, at 36. DOE should not have needed to obtain a new expert *now* because DOE should have fully analyzed and considered ConverDyn's comments *prior to the 2014 Determination*.

c. *DOE abandoned its prior policy limiting transfers to 10% of domestic demand and then increased transfers to 15% of domestic demand*

In addition to ignoring the undisputed direct financial impacts detailed in the 2014 ERI Report and in ConverDyn's submission, DOE also abandoned its policy limiting transfers to no more than 10% of domestic requirements and increased transfers to 15% of domestic requirements. This policy change created significant market uncertainty that exacerbates the adverse impacts on the domestic industry. By increasing transfers beyond the prior limit despite the nuclear fuel market's weak state, in which there is "considerable over-supply" and "near-term demand" is mostly "discretionary," App. DOE_190, DOE signaled that it does not consider the USEC Privatization Act to impose any real constraints on its ability to make uranium transfers. DOE's disregard for the limits of the Act causes adverse impacts, as recognized by DOE's own experts.

The 2014 ERI Report concludes that the mere act of DOE abandoning its prior policy of limiting transfers to no more than 10% of domestic requirements has an adverse material impact. The 2014 ERI Report explains that "the decision by DOE to no longer have an established guideline that would limit DOE inventory transfers to 10% was interpreted by the U.S. industry and investment community as an indication that DOE will not act in a predictable manner regarding future inventory releases." App. DOE_0283. ERI warned "that unless DOE can demonstrate to the domestic fuel supply industry that its transfer of material during any year(s) will remain predictable and that DOE will not make future transfers without any regard for the maintenance of a strong domestic nuclear industry, then DOE actions may, in fact, have an adverse material impact on the domestic industry." App. DOE_0283 (italics and quotation marks omitted). For the transfers covered by the May 2014 Determination, ERI notes that "it is

not clear that this standard [for predictability] has been met - certainly not in the view of domestic industry."[17] App. DOE_0283.

Not only do DOE's current transfers fly in the face of its own expert's repeated warnings that transfers beyond 10% of domestic requirements could have an adverse material impact, but nowhere in the record does DOE address why it is ignoring its expert's warning. DOE cannot argue that predictability is of little relevance; indeed, the department itself invoked the need for predictability, stating that it is important to "provide industry with a predictable supply on which they can base their business decisions." App. DOE_0416. DOE also noted ERI's conclusion that "the predictability of DOE's transfer of that material into the commercial markets over time is very important to the orderly functioning of these markets." App. DOE_0409. In short, DOE relied on the need for predictability when it suited its purposes, but ignored its own expert's point that the same need for predictability required keeping the 10% Limit in place.

DOE's selective reliance on a predictability standard is the essence of arbitrary and capricious agency action. *Assoc. of Priv. Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012) ("An agency's departure from past practice can, . . . if unexplained, render regulations arbitrary and capricious."). DOE's failure to address its expert's assessment of the need for predictability also renders the Determination arbitrary and capricious. *State Farm*, 463 U.S. at 43 (arbitrary and capricious if agency "entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency"); *PPL Wallingford*, 419 F.3d at 1198 (agency must "examine the relevant data and

[17] This concern over the quantity and predictability of DOE transfers is not new or unexpected, nor is it *de minimis* or immaterial. Prior ERI reports stretching back several years (and several Secretarial Determinations) repeatedly warned that transfers beyond 10% of domestic requirements could have an adverse material impact. Ex. 5, 2009 ERI Report, at 34 (departing from 10% Limit could "have a material adverse effect on the markets"); Ex. 6, 2010 ERI Report, at 37 (departing from 10% Limit could "have a material adverse effect on the markets"); Ex. 7, 2012 ERI Report, at 50 (departing from 10% Limit could "have an adverse material impact on the domestic industry").

articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made") (quotation marks omitted); *Defenders of Wildlife*, 958 F. Supp. at 685 (D.D.C. 1997) (action was arbitrary and capricious where agency "consistently ignored the analysis of its expert" and "bas[ed] its decision on unsupported conclusory statements as well as facts which are directly contradicted by undisputed evidence in the [record]").

3. The Secretary's pre-judged Determination is unlawful and, in any event, is not entitled to deference

DOE uses the proceeds from the transfers to pay for one DOE program that Congress did not fund and another that Congress did not fund to the level DOE wanted to spend. App. DOE_0397, 0401-02, 0404. With respect to the NNSA downblending program in particular, DOE concedes that it contractually obligated itself to transfer uranium to pay for contractor services (or pay significant penalties for breach) *before* the Secretary had made his "no adverse material impact" Determination. Defs. Opp. to Plfs. Mot. for Prelim. Inj., Dkt. No. 17, at 43, 45. DOE therefore impermissibly predetermined the Determination's outcome by locking itself into paying for the downblending contract with uranium transfers that were contingent on a future Determination. *Metcalf v. Daley*, 214 F.3d 1135, 1144 (9th Cir. 2000) (agencies unlawfully predetermined environmental analysis when they signed agreements binding them to support a proposal before completing an environmental assessment and finding of no significant impact). The Determination should be found unlawful for this reason alone.

Regardless, the Determination is not entitled to deference. DOE self-admittedly does not possess any special institutional expertise related to the market impacts of its transfers on the domestic uranium mining, conversion, and enrichment markets. Nor is DOE implementing a statutory directive to affirmatively transfer uranium. Instead, DOE stands to gain financially

from the transfer program by "bartering" uranium to pay for programs that Congress refused to fund at the levels sought by DOE. And, by prejudging the Determination's outcome in order to avoid a breach of contract, DOE loses any presumption of independence that might otherwise warrant deference.

The May 8 DOE Memo supporting the Determination does not identify its author or authors.[18] There is nothing in the record on the authors' job titles or their credentials, and nothing to indicate the authors had any specialized knowledge or expertise in analyzing the economics of the domestic uranium market. Indeed, the Office of Nuclear Energy expressly states that "the current NE staff were not involved in the previous analyses and Secretarial Determinations," App. DOE_0406, thus highlighting the DOE staff's lack of experience with the Determination process. Moreover, the DOE Memoranda concedes that "[t]o ensure that this requested Secretarial Determination is *fully informed*, the Office of Nuclear Energy (NE) tasked [ERI], an experienced and well-regarded nuclear fuel consulting firm, to assess the potential impact on the domestic uranium mining, conversion and enrichment industries from the transfers." App. DOE_406 (emphasis added). The absence of DOE expertise is confirmed by statements DOE officials made to the Government Accountability Office in a 2014 report on uranium transfers: "DOE officials told [GAO] that they contracted with ERI to provide subject matter expertise *that did not exist within DOE* and trusted ERI to provide that expertise." Ex. 8, GAO Report 14-291, at 46 (emphasis added). That DOE Staff "were not involved in previous analyses" and could not make a "fully informed" Determination without ERI's help underscores

[18] The May 12 DOE Memo is stated as being "From: Peter B. Lyons, Assistant Secretary for Nuclear Energy," App. DOE_0397, however it is unclear whether Mr. Lyons actually wrote the May 12 DOE Memo or whether it was written by unidentified staff members with unknown credentials. Further, the May 12 DOE Memo states that it is based on the unattributed May 8 DOE Memo, App. DOE_0398, such that any defects in the May 8 DOE Memo would be incorporated into the May 12 DOE Memo.

DOE's lack of experience and expertise and undermines any claim of specialized knowledge that otherwise might entitle DOE to some deference.

DOE does not even hold itself out publicly as the source of expert knowledge on the domestic uranium industry. DOE's website presents the 2014 ERI Report as the analysis underlying the 2014 Determination, and does not provide, or even reference, the DOE Memoranda for public review. *See* http://www.energy.gov/ne/downloads/2014-review-potential-impact-doe-excess-uranium-inventory-commercial-markets. That DOE treats the 2014 ERI Report as the public face of its market analysis, while limiting scrutiny of its flawed internal assessment, indicates that ERI, not DOE, has the specialized knowledge and relevant expertise. Deference to DOE's assessment that underlies the 2014 Determination is therefore inappropriate. *Cf. Cousins v. Sec'y of the U.S. Dept. of Transp.*, 880 F.2d 603, 610 (1st Cir. 1989) (affording less deference where agency is interpreting a statute in which it has no special expertise).

DOE also deserves no deference for its assessment because it improperly pre-judged the Determination's outcome. Congress did not appropriate any funds to pay for the NNSA downblending program, yet DOE obligated itself to make transfers to pay for services under long-term contracts.[19] DOE did so despite the fact that it must re-evaluate the impacts of its transfers and issue a new Determination every two years. Consolidated Appropriations Act of 2014, P.L. 113-76, Div. D, Tit. 3 § 306(a). By the time of the 2014 Determination, substantial penalties for breach of contract and increases in long-term program costs compelled DOE to continue with the transfers regardless of their impact on the domestic industry. Moreover,

[19] DOE also had contracts in place to barter uranium for clean-up services at Portsmouth and provided testimony and evidence at the preliminary injunction phase of this proceeding to demonstrate the stopping the transfers would "effectively shut down" the clean-up effort. DOE asserted that stopping transfers would increase "the long term cost of the environmental clean-up work." That DOE viewed the cessation of transfers as an obstacle to continuation of its programs strongly implies a predetermined outcome from the Secretarial Determination process.

because of lower market prices for uranium and its conversion services component, DOE found itself having to heavily increase the portion of the market taken up by the uranium transferred to its contractors. That increase, in turn, will inevitably depress market prices further still.

By entering into contracts that relied exclusively and unconditionally on continuation of DOE transfers, DOE cast serious doubt on its ability to rationally consider the impacts of its transfers on the domestic conversion industry, as it is required to do. The contracts therefore suggest that by the time of the Determination, "the die already had been cast" such that the DOE Memorandum and the Secretary's Determination were *pro forma* exercises in reaching a predetermined outcome—in effect, to subsidize DOE's unfunded programs at the domestic uranium industry's expense. *Metcalf*, 214 F.3d at 1144 (9th Cir. 2000) (agencies unlawfully predetermined environmental analysis when they signed agreements binding them to support a proposal before completing an environmental assessment and finding of no significant impact). Prejudged agency action is not entitled to deference. *Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002) (agency prejudged issues by requiring contractor to distribute finding of no significant impact before environmental assessment was complete; "prejudgment diminishe[d] the deference owed" to the agency).

D. DOE Is Not Authorized To Transfer Conversion Services

Against the backdrop of the USEC Privatization Act's prohibition on DOE transferring uranium, the exception DOE invokes here provides that "the Secretary may, from time to time, sell natural and low-enriched uranium (including low-enriched uranium derived from highly enriched uranium) from the Department of Energy's stockpile." 42 U.S.C. 2297h-10(d)(1). The

plain meaning of "natural and low-enriched uranium" does not include conversion services or UF6.[20]

As a basic principle of statutory construction, different words in a statute are understood to have different meanings. *United States v. Wilson*, 290 F.3d 347, 360 (D.C. Cir. 2002) (when Congress uses different words in a statute regarding "the same or related subject, the Congress must have intended them to have a different meaning"). The statute here distinguishes several times between uranium hexafluoride (UF6), the conversion component of UF6, and different types of enriched uranium, underscoring that they are different things. *Compare* 42 U.S.C. § 2297h-10(b)(1) ("uranium hexafluoride"), *with* § 2297h-10(b)(4) ("the conversion component of such [uranium] hexafluoride"), § 2297h-10(b)(8) ("the conversion component of such uranium hexafluoride"). Indeed, section 2297h-10(b)(8), which is part of a separate subsection of the statute that covers a different exception related to Russian high-enriched uranium, states that "[n]othing in this subsection (b) shall restrict the sale of the conversion component of such uranium hexafluoride." Such a provision would not be necessary if transfers of conversion services components were otherwise allowed. The absence of a similar provision in Section 2297h-10(d) confirms the statute's plain meaning, which only allows transfers of uranium (natural and low-enriched) and prohibits transfers of conversion services.

Courts routinely rely on "industry or trade practices" when interpreting terms in matters related to a particular industry or trade. *Carey Canada, Inc. v. Columbia Cas. Co.*, 940 F.2d 1548, 1557 (D.C. Cir. 1991). As a distinguishing characteristic of the nuclear fuel supply chain, each component of UF6 (uranium, conversion service, and enrichment service) has an

[20] The Act defines low-enriched uranium as "uranium enriched to less than 20 percent of the uranium-235 isotope, including that which is derived from highly enriched uranium." 42 U.S.C. § 2297h(5). The Act does not contain definitions for "natural uranium," "conversion" or "UF6."

independent value, and these individual components can be purchased and sold separately; they are each essentially fungible. App. DOE_0157, 0227, 0263, 0285; Ex. 13, Critchley Decl. ¶¶ 23-24. The fact that it is common practice in the uranium market to distinguish the conversion component of UF6 from the uranium and enrichment components comports with the statute's differentiations among uranium mining, conversion, and enrichment and further indicates that "natural and low-enriched uranium" does not have the same meaning as "uranium hexafluoride," "UF6," or its "conversion component."[21] Because DOE's transfers of UF6 include the conversion component of UF6, in addition to the uranium and, where enriched, enrichment components, DOE's transfers are prohibited by the USEC Privatization Act. Under the APA, the transfers are "not in accordance with law" and are "in excess of statutory . . . authority [and] limitations." 5 U.S.C. § 706(2)(A, C).

E. DOE Does Not Receive Fair Market Value For Transfers

The USEC Privatization Act requires that, for any transfers, "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)(C). The administrative record contains no analysis or evaluation as to whether the value received by DOE for the transfers is fair market value, despite the issue being raised by the Uranium Producers of America, App. DOE_0100, 0101, 0130, members of Congress, App. DOE_0103, and ConverDyn, App. DOE_0107. The closest reference is a statement in the DOE Memoranda that "[t]he programs have mechanisms in place to determine the value they receive for their transferred uranium, and both ensure that the Department receives a fair market value in

[21] One of the declarations that DOE submitted during the preliminary injunction briefing confirms that industry practice is to view UF6 as consisting of separate uranium and conversion services components, and that "there is an independent trading market for each component," such that a seller, "based on market opportunity, sells each component -- uranium and conversion – separately." Decl. of Kevin P. Smith, Dkt. No. 17-7, ¶ 9 (Attach. 6 to Defs. Opp. to Plfs. Mot. for Prelim. Inj., Dkt. No. 17).

services in exchange for the material transferred." App. DOE_0400. However, there is no further explanation of what these mechanisms are or how these mechanisms have been applied, even assuming they have been applied at all. This complete failure to explain how the transfers are at fair market value is arbitrary and capricious. *Tourus Records*, 259 F.3d at 737 ("A fundamental requirement of administrative law is that an agency set forth its reasons for decision; an agency's failure to do so constitutes arbitrary and capricious agency action.") (quotation marks and citations omitted).

Other DOE documents suggest that DOE does not, in fact, obtain fair market value for the material. The 2008 Policy and Plan references DOE receiving "reasonable value," not fair market value, for its transfers. Ex. 1, 2008 Policy and Plan, at 10. In the 2008 Policy and Plan, DOE stated:

> All transactions involving excess uranium transfers or sales to non-U.S. Government entities must result in the Government's receipt of *reasonable value* for any uranium sold or transferred to such entities. Reasonable value takes into account market value, as well as other factors such as the relationship of a particular transaction to overall DOE objectives and the extent to which costs to DOE have been or will be incurred or avoided.

Id. (emphasis added). This shows that DOE accounts for *not only* the uranium's market value, *but also* costs that DOE will avoid, such as the cost of storing uranium, including necessary monitoring and maintenance of stocks.[22] DOE also considers the need for the transfers to meet "overall DOE objectives." Under this formulation of "reasonable" value, DOE can accept less than market value if, for example, it judges that a transfer will reduce its long-term operating and maintenance costs, or serve what it views as important programmatic objectives.[23] DOE's elastic

[22] *See also* Ex. 12, GAO Report 11-846, at 7 (discussing DOE deduction of "transaction costs" from value received by DOE for uranium transfers).

[23] The 2013 Plan does not indicate any change in DOE policy related to transfer valuations. In fact, the 2013 Plan does not contain any explanation of how DOE calculates fair market value for transfers.

interpretation of "reasonable" value does not comport with the USEC Privatization Act, which only allows transfers "for not less than fair market value."

DOE's practice of selling material at the lowest market price further demonstrates DOE's inability to obtain fair market value. Fair market value "is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." *United States v. Cartwright*, 411 U.S. 546, 551 (1973); *see also* Merriam-Webster Online Dictionary ("price at which buyers and sellers with a reasonable knowledge of pertinent facts and not acting under any compulsion are willing to do business"). The fair market value would thus reflect to some degree the range of prices available in the market where a transaction involves typical market participants who can afford to "walk away" from an unfavorable transaction and who have not locked themselves into having to make the transaction.

Instead of taking advantage of the full range of pricing options available to it, DOE consistently values uranium at the spot market price, which is the lowest price available. App. DOE_0119, 0415; Ex. 13, Critchley Decl. ¶ 22. The spot price is currently at a historical low as compared to the term price in part because DOE's transfers at spot prices continue to drive down the spot price relative to the term price. App. DOE_0117, 0122-23, 0129, 0135, 0176; Ex. 13, Critchley Decl. ¶ 22. DOE's failure to consider a range of pricing options is contrary to the 2008 Policy and Plan's explanation of how DOE would seek fair market value, which states:

> As appropriate, the responsible program office would prepare analyses for processing, transfer, *spot market and long-term sales*, and cost avoidance. Consistent with the Policy Statement, DOE program offices will seek to obtain the best economic value for the U.S. Government in light of DOE's identified objectives and needs.

Ex. 1, 2008 Policy and Plan, at ES-2 (emphasis added). The 2008 Policy and Plan also explained that "uranium sales would be offered under both near and longer term contracts through a

competitive bidding process, unless otherwise contractually committed, to make the uranium available and *ensure that fair market value is received*." *Id.* at 10 (emphasis added). DOE therefore concedes that at least some long-term contracts are necessary to "ensure that [DOE receives] fair market value." Indeed, the May 8 DOE Memo admitted that, with respect to whether DOE "should be selling in the long-term market instead of the spot market," "[w]e agree that, where we can, it is better to seek to fill contracts in the long-term." App. DOE_0415. But, rather than explore a range of options to obtain fair market value, DOE refuses to consider taking advantage of relatively higher term prices to obtain fair market value—in large part because DOE chose to commit itself to political and contractual obligations that limit its willingness and ability to extract fair market value for the material.

For its own convenience, DOE structures its uranium transfers as it does in order to evade the Miscellaneous Receipts Statute's requirements, which provide that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). As explained in GAO's investigative report on DOE's uranium transfers, DOE officials admitted that DOE "intentionally structured the disposition of federal assets to avoid payment of the proceeds for those assets into the federal Treasury." Ex. 12, GAO Report 11-846, at 39. "DOE's acknowledged objectives were to accomplish the cleanup work and avoid using appropriated funds to do so." *Id.* at 46. So, to maintain unfettered control over the transfer proceeds in order to fund its pet projects, DOE binds itself to a "barter" structure that values transfers at low spot prices. These artificial and self-imposed restraints, born out of a desire to evade federal law and the Congressional appropriations process, prevent DOE from getting fair

market value and increase the harm to the domestic industry by further lowering the market price for conversion.

DOE's contractual obligations also prevent DOE from obtaining fair market value for its uranium transfers. According to DOE, it can fund certain projects only through uranium transfers. Even though the transfers are an insecure source of funding and are subject to changes in market conditions and periodic Determinations, DOE committed to these multi-year projects—and agreed to various breach of contract and termination penalties—notwithstanding the fact that it did not have any appropriated money to fall back on in the event it could not make the transfers. Defs. Opp. to Plfs. Mot. for Prelim. Inj., Dkt. No. 17, at 43, 45. If DOE is "acting under . . . compulsion" to make transfers to avoid a contract breach and termination costs, despite the requirement to conduct a new Secretarial Determination every two years, then DOE has no bargaining power to ensure that it receives fair market value for the transferred material.

II. DOE FAILED TO CONDUCT NOTICE AND COMMENT RULEMAKING BEFORE ABOLISHING THE 10% LIMIT ON TRANSFERS

DOE's 2013 Excess Uranium Inventory Management Plan abandoned the policy expressed in the 2008 Secretary of Energy's Policy Statement on Management of the Department of Energy's Excess Uranium Inventory and reflected in its 2008 Excess Uranium Inventory Management Plan (the "2008 Policy and Plan"). In the 2008 Policy and Plan, signed by the then-Secretary, DOE committed to limiting uranium transfers to no more than 10% of annual domestic nuclear fuel requirements (the "10% Limit"), except in special circumstances that are inapplicable here. An express purpose of the 10% Limit was "to provide the general public and interested stakeholders more specific information and enhanced transparency" regarding DOE's plans for excess uranium transactions. Ex. 1, 2008 Policy and Plan, at ES-1. In adopting the

10% Limit in the 2008 Policy and Plan, DOE induced the domestic uranium mining, conversion, and enrichment industries to rely on the 10% Limit when entering into contracts with customers.

By contrast, abolishing the 10% Limit creates substantial uncertainty when ConverDyn attempts to forecast future market conditions. Without the 10% Limit, and in light of DOE's failure to adequately assess adverse impacts, the conversion price and overall supply is subject to the whim of DOE, rather than normal market forces. This uncertainty threatens the domestic conversion industry's future by increasing business risk beyond ConverDyn's control. By discarding the 10% Limit through the implementation of the 2013 Plan without notice or opportunity for comment by those directly affected by the change, DOE violated the APA's requirements.

A. DOE's Decision To Abandon the 10% Limit Is A Substantive Change In Policy That Is Subject to Notice and Comment Procedures

DOE's decision to abolish the 10% Limit relied upon by the domestic uranium industries is a substantive policy change that can only be made through notice and comment rulemaking. "An agency is generally required by the APA to publish notice of proposed rulemaking in the *Federal Register* and to accept and consider public comments on its proposal," though the APA recognizes exceptions for "(1) interpretative rules; (2) general statements of policy; and (3) rules of agency organization, procedure, or practice."[24] *Mendoza v. Perez*, 754 F.3d 1002, 1020-21 (D.C. Cir. 2014) (citing 5 U.S.C. § 553). In contrast to general statements of policy,[25] "[s]ubstantive or legislative rules are those that grant rights, impose obligations, or produce other significant effects on private interests, or *which effect a change in existing* law or *policy*." *Am.*

[24] The former are often referred to as "legislative rules" or "substantive rules," while the latter are referred to as "interpretive rules."

[25] An agency policy statement does not seek to impose or elaborate or interpret a legal norm. "The primary distinction between a substantive rule . . . and a general statement of policy [] turns on whether an agency intends to bind itself to a particular legal position." *Molycorp, Inc. v. U.S.E.P.A.*, 197 F.3d 543, 546 (D.C. Cir. 1999).

Tort Reform Ass'n v. Occupational Safety & Health Admin., 738 F.3d 387, 395 (D.C. Cir. 2013) (emphasis added). They are rules "that do[] more than simply clarify or explain a regulatory term, or confirm a regulatory requirement, or maintain a consistent agency policy." *Mendoza*, 754 F.3d at 1021. In contrast, "interpretive rules are those that merely clarify or explain existing laws or regulations." *Nat'l Med. Enterps., Inc. v. Shalala*, 43 F.3d 691, 697 (D.C. Cir. 1995). When evaluating whether an agency action constitutes a change to a definitive policy that requires notice and comment rulemaking, courts look to the level of reliance placed by members of the affected industry on the prior policy. *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966, 967-68 (D.C. Cir. 2013) (analyzing *Paralyzed Vets. of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997) and *Alaska Prof. Hunter's Ass'n v. F.A.A.*, 177 F.3d 1030 (D.C. Cir. 1999)). Here, the 2008 Policy and Plan imposed binding obligations on DOE and caused ConverDyn and others in the domestic uranium mining and enrichment industries to rely on the 10% Limit in ordering their business.

Notice and comment is also required because abolishing the 10% Limit "effect[s] a change in existing . . . policy." *Am. Tort Reform*, 738 F.3d at 395. The change is not simply an interpretation or a clarification of the existing policy. The 2008 Policy and Plan prohibited transfers beyond 10% of domestic requirements. The 2013 Plan abolished the 10% Limit and expressly stated it was doing so. That is an unequivocal reversal of policy that does not merely "clarify or explain" or "confirm" the 10% Limit.[26] *Mendoza*, 754 F.3d at 1021. Such a "flip-flop complies with the APA only if preceded by adequate notice and opportunity for public comment." *Env. Integrity Project v. E.P.A.*, 425 F.3d 992, 997 (D.C. Cir. 2005).

[26] An agency may avoid notice and comment if policies merely "remind parties of existing statutory or regulatory duties, or merely track preexisting requirements and explain something the statute or regulation already required." *Mendoza*, 754 F.3d at 1021 (quotation marks omitted). Intentionally discarding the 10% Limit does not "remind" parties to follow it nor does it "track" the preexisting requirement; it fundamentally alters it.

B. The 2008 Policy and Plan Prohibit DOE Transfers Beyond 10% of Annual Domestic Requirements

The 2008 Policy and Plan were binding on DOE, as the 10% Limit was phrased in mandatory terms such that DOE was not free to ignore the 10% Limit at its convenience. "[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding." *Catawba Cty., N.C. v. E.P.A.*, 571 F.3d 20, 33 (D.C. Cir. 2009) (ellipses omitted). Here, the 2008 Policy and Plan use compulsory language that "on its face" imposes binding limits on DOE transfers:

> "This Policy Statement provides the framework within which DOE *will* make decisions concerning future use and disposition of this inventory."
> . . .
> "The Policy Statement *commits* DOE to manage those inventories in a manner [consistent with certain requirements]."
> . . .
> "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"
> . . .
> "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."
> . . .
> "This Policy sets forth the general framework within which the Department prudently *will* manage its excess uranium inventory."

Ex. 1, 2008 Policy & Plan, at ES-1, A-1 (emphasis added).[27]

Further, DOE analyzed the environmental impacts of implementing the 2008 Policy and Plan under the National Environmental Policy Act ("NEPA"). DOE published a draft environmental assessment ("EA") for comment, and ultimately issued a final EA and Finding of No Significant Impact ("FONSI"). "Finding of No Significant Impact: Disposition of DOE

[27] The 2013 Plan, in the section discussing abolishing the 10% Limit, refers to the 10% Limit as a "guideline" in an apparent effort to distance itself from the mandatory language in the 2008 Plan. App. DOE_0061. However, the 2008 Policy and Plan itself never refers to the 10% Limit—or any other aspect of the 2008 Policy and Plan—as a "guideline."

Excess Depleted Uranium, Natural Uranium, and Low Enriched Uranium," 74 Fed. Reg. 31,420 (July 1, 2009). DOE's EA/FONSI assumed that releases of DOE's uranium would be limited to 10% of the total annual U.S. fuel requirements, as set forth in the 2008 Secretarial Policy and Plan. Conducting a NEPA review and considering public comments on the environmental impacts of uranium transfers shows that DOE considered the 10% Limit to be binding and part of a final agency action.[28]

The existence of a limited exception does not undermine the 10% Limit's binding nature. The 2008 Policy and Plan permits DOE to exceed the 10% Limit only "for certain special purposes such as the provision of initial core loads for new reactors."[29] Ex. 1, 2008 Policy & Plan, at 6. However, this is not a generalized "catch all" that gives DOE the freedom to ignore the policy and its otherwise binding pronouncements whenever it sees fit, nor is it an indicator that the policy is not binding. The specific exception is limited to certain "special circumstances," which DOE has not even attempted to assert are applicable to the transfers described in the 2014 Determination. That DOE felt it necessary to include a specific exception for special circumstances in the 2008 Policy and Plan further evinces the 10% Limit's binding nature. If the 10% Limit was not mandatory and DOE could ignore it for convenience, there would have been no need to include an exception in the first place; DOE could have breached the 10% Limit simply because it wanted to do so.

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[28] DOE did not conduct a new or supplemental NEPA analysis for the 2013 Plan, which abandoned the 10% Limit considered in the 2009 EA/FONSI.

[29] At the time the 2008 Policy and Plan were adopted, there were more than a dozen new nuclear reactor applications pending (or soon to be pending) before the U.S. Nuclear Regulatory Commission. New reactors require a significant quantity of uranium for "initial cores" and concern over the availability of sufficient uranium to support initial fuel loads was the genesis of this exception. Subsequently, however, most new reactor applications were withdrawn or placed on hold, greatly reducing the need for uranium for initial fuel loads and essentially eliminating the concern that prompted the exception in the first place.

Former Secretary of DOE Steven Chu, in testimony before Congress, also confirmed that DOE "intend[ed] to bind itself to a particular legal position" with respect to the 10% Limit. *Molycorp*, 197 F.3d at 546. In seeking monetary funding to pay for environmental cleanup work, Secretary Chu stated: "We are shifting over the support of the cleanup from transferring uranium because we have statutes; we cannot affect the uranium markets that much. There are *requirements* that we *do not go over* a certain limit." S. Hrg. 111-477, DOE Budget for Fiscal Year 2011, at 39 (Feb. 4, 2010) (emphasis added). Another exchange confirmed that the 10% Limit's was mandatory:

> Senator Barrasso: [] I am glad to hear that the Department recognizes the significant problems that these uranium transfers are having on domestic uranium producers. I think it is a very good recognition on the part of the Department and I think the Department needs to abide by the management plan that was put into effect. Do you know if the uranium transfers that are already planned for fiscal year 2010 are going to proceed as planned, and are there other plans in the making, other additional uranium barters?
>
> Secretary Chu: I do not know the full details of that, but again, we are very aware of the fact that there is a statute[30] that says that we cannot put more than 10 percent out there. We do not want to go to 9.9 percent[.]

Id.

C. DOE Provided No Rational Explanation For Abandoning the 10% Limit

Regardless of the policy change's purported merits or its rationality, if the agency does not comply with APA notice and comment procedures, the policy is void. *Env. Integrity Proj.*, 425 F.3d at 998. That said, DOE's purported reasons for the policy change do not stand up to

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[30] While the USEC Privatization Act does not itself contain the 10% Limit language, then-Secretary Chu's reference to the "statute" is best read in conjunction with ERI's repeated warnings that transfers beyond 10% would violate the Act by causing adverse material impacts, contrary to the statute. Even if the Secretary misspoke by referring to the 10% Limit as a statute instead of as a policy rule, that does not change the testimony's fundamental import which shows that the highest ranking official at DOE considered the 10% Limit to be a mandatory "requirement," and made public representations to that effect before Congress. DOE never made an effort to correct this representation on the record.

scrutiny. An agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *F.C.C. v. Fox Television Studios, Inc.*, 556 U.S. 502, 515 (2009). DOE's given reasons in the 2013 Plan for discarding the 10% Limit on transfers were because of "experience gained since issuance of the 2008 Plan" and because of the 2012 ERI Report. App. DOE_0061. These reasons do not withstand scrutiny.

Since the prior transfers were limited to 10%, DOE did not have any experience conducting transfers *greater than* 10%. And, the 2012 ERI Report expressly states that departing from the 10% limit could "have an adverse material impact on the domestic industry." Ex. 7, 2012 ERI Report, at 50. The 2009 and 2010 ERI Reports had likewise expressly stated that removing the 10% Limit could "have a material adverse effect on the markets." Ex. 6, 2010 ERI Report, at 37; Ex. 5, 2009 ERI Report, at 34. The 2012 ERI Report (and its predecessors) therefore provide no support for eliminating the 10% Limit, contrary to DOE's assertions. Further, beyond this one sentence in the 2013 Plan on why DOE abolished the 10% Limit and a similar statement in the DOE Memoranda, there is nothing else in the administrative record which attempts to explain DOE's decision to reverse its policy on the 10% Limit. DOE failed to provide a reasoned basis for abandoning the 10% Limit.

D. ConverDyn and Others Reasonably Relied on the 10% Limit

Abolishing the 10% Limit also "affected parties' substantial and justifiable reliance on a well-established agency" policy. *MetWest Inc. v. Sec. of Labor*, 560 F.3d 506, 511 (D.C. Cir. 2009). While the 10% Limit by no means protected the domestic uranium industry from adverse material impacts, it at least allowed ConverDyn and others to order their businesses and long term sales contracts in the justifiable belief that DOE would displace no more than 10% of

domestic demand. Ex. 13, Critchley Decl. ¶¶ 8-9. For example, the predictability of the 10% Limit guided ConverDyn in entering into contracts with customers, helped maintain prices for conversion services, provided a baseline against which ConverDyn could forecast future market conditions, and can impact willingness to make additional capital investments in the MTW conversion facility. *Id.* ¶ 9. Yet, with a wave of its pen, DOE negated all of those prior expectations. Had members of the domestic uranium industry "been able to comment on the resulting amendments and modifications to [the rule], they could have suggested changes or exceptions that would have accommodated the unique circumstances" of the industry, such as the heavy oversupply in the market, reduced demand following the Fukushima nuclear accident, or recent and upcoming domestic nuclear plant closures. *See Alaska Prof. Hunter's Ass'n*, 177 F.3d at 1036-37. Because this was a "change in existing law or policy" that reasonably had been relied upon by private parties, DOE was required to conduct notice and comment rulemaking before abolishing the 10% Limit contained in the 2008 Policy and Plan.

DOE failed to comply with the APA's notice and comment requirements before abolishing the 10% Limit. DOE may not rely on that policy change to justify its decision to breach the 10% Limit.

CONCLUSION

For the foregoing reasons, ConverDyn respectfully requests that the Court (1) hold unlawful, set aside, and vacate the May 15, 2014 Secretarial Determination for the Sale or Transfer of Uranium; (2) hold unlawful, set aside, and enjoin DOE actions to transfer uranium pursuant to 42 U.S.C. § 2297h-10(d) to the extent the transfers include conversion services; (3) hold unlawful, set aside, and enjoin DOE actions to transfer uranium pursuant to 42 U.S.C. § 2297h-10(d) to the extent DOE does not obtain fair market value for the transfers; (4) hold unlawful, set aside, and enjoin DOE actions to transfer uranium pursuant to 42 U.S.C. § 2297h-

10(d) to the extent DOE transfers uranium in an amount exceeding 10% of the annual domestic nuclear fuel requirement absent special circumstances, as mandated by the 2008 Secretary of Energy's Policy Statement on Management of the Department of Energy's Excess Uranium Inventory and accompanying 2008 Excess Uranium Inventory Management Plan; and (5) hold unlawful, set aside, and vacate the 2013 Excess Uranium Inventory Management Plan to the extent that it abolished the transfer limitation of 10% of the annual domestic nuclear fuel requirement in the 2008 Secretary of Energy's Policy Statement on Management of the Department of Energy's Excess Uranium Inventory and accompanying 2008 Excess Uranium Inventory Management Plan; and (6) provide such other relief as the Court deems just and appropriate.

Dated: September 11, 2014

Respectfully submitted,

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PLAINTIFF REQUESTS ORAL ARGUMENT

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2014, the foregoing document was filed electronically on CM/ECF, which will send a notice of electronic filing to:

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