UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONVERDYN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:14-cv-1012 RW
	)	
ERNEST J. MONIZ and	)	
UNITED STATES DEPARTMENT	)	
OF ENERGY,	)	
	)	
Defendants.	)	

BRIEF OF *AMICI CURIAE*
URANIUM PRODUCERS OF AMERICA
and NATIONAL MINING ASSOCIATION

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INTERESTS OF *AMICI CURIAE*

The Uranium Producers of America ("UPA") is a trade association consisting of domestic uranium mining and conversion companies whose mission is to promote the viability of the front end of the nation's nuclear fuel industry. UPA members are conducting uranium exploration, development and mining operations in Arizona, Colorado, Nebraska, New Mexico, South Dakota, Texas, Utah and Wyoming. UPA companies are currently producing all of the 4.7 million pounds of uranium mined in the United States. Other UPA member companies are obtaining permits for new uranium production facilities in the United States. UPA members operate valuable uranium mines that provide good high paying jobs, generate tax revenues, and produce clean energy for the citizens of the United States. The mining of uranium concentrates is the initial step in the nuclear fuel cycle. Growth in domestic uranium mining and conversion will be required to support the U.S. government's plans to increase the use of nuclear power in order to enhance energy security and reduce greenhouse gas emissions.

The National Mining Association ("NMA") is a national trade association representing the producers of most of America's coal, metals including uranium, industrial and agricultural minerals. NMA's members include producers of domestic uranium as well as companies that have exploration projects or pending applications for development of domestic uranium mining projects. NMA members accounted for most of the 4.7 million pounds U_3O_8 produced in the United States in 2013.

UPA and NMA maintain that a viable domestic uranium recovery industry is an important component of the domestic nuclear fuel cycle that supplies nearly 20 percent of

our nation's electricity needs. As the Administration moves forward with regulations to reduce greenhouse gas emissions, nuclear power will play an increasingly important role. As recent world events reveal, particularly the situation in Russia, the ability to source our own uranium is also becoming increasingly important. UPA and NMA encourage domestic production, given that the United States currently relies on imports for approximately 90 percent of its nuclear fuel.

Since 2006, the Department of Energy has recognized UPA, NMA, and their members as key stakeholders in the disposition of excess government uranium inventories. Congress enacted the provisions of Section 3112 of the United States Enrichment Corporation Privatization Act to protect the domestic mining and conversion industries from adverse material impacts caused by DOE's sales and transfers of its excess uranium inventories. Thus far in this litigation, Converdyn (which is a member of UPA) has described those impacts from the perspective of the sole domestic conversion supplier. UPA and NMA are filing this brief to demonstrate the *broader* impact on domestic uranium *mining* from DOE's barter transactions. UPA, NMA, and their members are materially and adversely impacted by the Secretarial Determination at issue, and therefore, have a substantial and compelling interest in the Court's resolution of this case.

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BACKGROUND

The U.S. Department of Energy ("DOE" or "Department") maintains a large excess uranium inventory due to the Department's role in the development and oversight of the civilian and defense nuclear sectors. The Department's duties include managing the highly enriched uranium ("HEU") entering the U.S. as a result of the "Megaton to Megawatts" program with Russia. In 1996, Congress passed the United States Enrichment Corporation ("USEC") Privatization Act, which established limitations on DOE's ability to sell, transfer, barter or exchange uranium from its inventory. DOE's administration of those statutory limitations is central to this case.[1]

A. The Statutory Limitations

Recognizing the importance of carefully managing the Department's program for the sale and transfer of uranium inventories, Congress took the positive step of enacting Section 3112 of the USEC Privatization Act of 1996. Section 3112 placed restrictions on inventory sales to assure that they would not create adverse impacts on the front end of the domestic nuclear fuel supply industry:

> **§ 3112(a)**
> The Secretary [of Energy] 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 consistent with this section.

[1] By the mid-1990s, DOE's enrichment program had accumulated a debt between $300 million and $7 billion, depending on the method by which the debt was calculated. In the Energy Policy Act of 1992, Congress established USEC as a government-sponsored enterprise and shifted the responsibility of managing civilian nuclear enrichment services from the DOE to USEC. *See* 42 U.S.C. § 6201, *et seq*. In 1996, Congress enacted the USEC Privatization Act of 1996, which privatized USEC. *See* 42 U.S.C. § 2297h, *et seq*.

> **§ 3112(d)**
> (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(a) and (d) (emphasis added). While Congress established strict limits on DOE's ability to sell, barter, or transfer uranium from its inventory, significant uncertainty remained as to the Department's long-term plans for disposing of this material. That uncertainty inhibited the ability of uranium producers to obtain capital necessary to begin new projects or expand existing operations.

B. DOE's Actions From 2006 Through Its 2008 Management Plan

UPA's concern about the market impact created by unknown and unpredictable disposition of the government inventories led DOE to issue its initial uranium inventory management notice in January 2006.[2] DOE stated that it appreciated the importance of managing its uranium assets in a manner that not only achieved a higher return on investment to the taxpayers but also ensured that its actions would have a minimum effect on the uranium sector (by providing the industry with certainty as to the amount of uranium DOE planned to introduce into the marketplace). DOE indicated that it understood the importance of limiting the quantity of government uranium entering the market. DOE also stated that there was a need to balance national and energy security

[2] *See* United States Department of Energy Uranium Inventories, Linda Gunter, U.S. Department of Energy (DOE) January 2006, attached as Exhibit 1.

objectives with the realities of the complex mining, conversion and enrichment markets. The importance of DOE's treatment of surplus uranium was underscored by the fact that at the time of this announcement, the nuclear utilities producing electricity in the nation's 104 nuclear power generating plants were importing over 85% of the uranium required to fuel these plants. Since that time, the U.S. nuclear generators' dependence on imports has increased to more than 90% of their uranium needs, which far exceeds the United States' dependence on imported crude oil.

In August 2006, DOE unveiled a proposal to sell or transfer uranium at a level that constituted 10% of U.S. reactor uranium requirements annually over a 30-year period. This percentage would represent sales of approximately five million pounds per year. The UPA responded to the Department's proposed plan by commissioning a study by a leading uranium market analyst, Ux Consulting.[3] The Ux Consulting study observed that the Department could readily mitigate the impact to domestic fuel suppliers from its proposed inventory sales if (1) it made long-term sales;[4] (2) some of the Department's excess material were sold for initial cores for new reactors; and (3) the Department's sales were gradually ramped up over time to its desired five million pounds per year. The ramp-up recognized the long lead time required to get new uranium production facilities

[3] Analysis of the Market Impact of Proposed Uranium Sales by DOE, attached as Exhibit 2.

[4] Long-term sales are defined in the commercial uranium market as sales that occur over at least a period of three years. UxC, a leading uranium consulting firm, defines a mid-term contract covering a period of three to four years whereas a long term contract covers a period of five or more years.

on line and the need to reduce the market price impacts of government material on an emerging uranium industry and a struggling converter.

In July 2007, DOE urged the domestic fuel cycle companies and nuclear utilities to engage in discussions to achieve a consensus agreement with parameters that would allow government sales without adversely impacting nuclear fuel suppliers. The industry achieved a Consensus Agreement in October 2007.[5] The Agreement (1) included a gradual ramp-up of sales; (2) established a strategic reserve for emergency reactor fuel needs; and (3) provided for initial core sales of up to 20 million pounds.[6] The consensus met industry and Department needs and provided much needed predictability to the commercial uranium and conversion markets.

In December 2008, the Department unveiled its Excess Uranium Inventory Management Plan.[7] The Management Plan adopted many of the aspects of the industry Consensus Agreement, particularly the gradual ramp-up to a 10% limit on transfers. At the time, UPA issued a press release on the Management Plan, noting that it had "been

[5] A copy of the Consensus Agreement (entitled Industry Position on Disposition of DOE's Nuclear Fuel Inventory) is attached as Exhibit 3.

[6] New reactors require a larger than normal initial core fuel load, and such initial cores are usually purchased during the construction phase of a new nuclear reactor. UPA felt that initial core sales would have little impact on the commercial market and could provide DOE with significant return on the excess uranium inventory. However, DOE made no effort to make any initial core sales. It is assumed by UPA that DOE saw little benefit from attempting initial core sales, because the receipts for such sales would have gone to the U.S. Treasury rather than to DOE programs, which are financed by its barter transactions.

[7] A copy of the 2008 Management Plan is attached as Exhibit 4.

actively engaged" with other stakeholders on a Consensus Agreement and applauded DOE for incorporating many of the recommendations into the Plan. In the press release, UPA also stated that it looked forward to a "continued dialogue with Energy Secretary Chu and the Obama Administration" in implementing the 2008 Plan.[8] In addition, DOE met with industry to describe its Plan in early 2009, and stated that "[u]ranium market fundamentals dictate a gradual ramp-up of material entering the market."[9]

C. DOE Abandons the December 2008 Management Plan While Claiming to Adhere to the 10% Limit

1. The 2009 Secretarial Determination

Despite strong stakeholder support, DOE quickly abandoned various aspects of the 2008 Management Plan (while still claiming to adhere to the 10% limit). For example, in July 2009, DOE deviated from the ramp-up schedule in the 2008 Management Plan in order to assist USEC, after the Department rejected USEC's loan guarantee application for its American Centrifuge Project in Piketon, Ohio.

USEC warned that the Department's rejection of the loan guarantee application would result in layoffs for employees and contractors. In July 2009, in response to

[8] *See* Uranium Producers of America, News Release, *UPA Applauds the DOE Excess Uranium Inventory Management Plan* (Dec. 22, 2008), attached as Exhibit 5.

[9] *See* Department of Energy PowerPoint slide from Excess Uranium Inventory Plan, Summary and Status, Presented by William Szymanski at the Nuclear Regulatory Commission Fuel Cycle Information Exchange, June 24, 2009, attached as Exhibit 6. This slide demonstrates the fact that DOE sales into a limited spot (near term) market would have much greater impact on the uranium market than longer term contract sales that would provide for future deliveries into a market with unfilled orders and the ability to absorb government sales.

USEC's warnings, the Department announced a four-year commitment of an annual $150 million to $200 million investment in accelerated environmental cleanup at the Portsmouth site in Piketown, Ohio, funded by providing excess uranium from the Department's existing stockpiles in exchange for services.[10] According to the Department's announcement, new jobs created at the Portsmouth site stemming from the work associated with the accelerated environmental cleanup would offset any job losses at USEC's American Centrifuge Project. On August 13, 2009, DOE advised Vice President Biden that it would enter into a non-competitive contract with USEC for the first year of the environmental remediation work at Portsmouth and that this work would be funded by the transfer of uranium to USEC.[11] Over the next five years, DOE would continually use uranium barters to support jobs in Ohio at the expense of jobs in the domestic mining community.

On September 17, 2009, USEC sent a letter to DOE expressing concern about the Department's announced plan. USEC stated that the proposed amount of uranium material to be introduced under the plan and the proposed rate of introduction of that material would significantly depress current and future uranium market prices, which would discourage investment in existing and new uranium production and conversion. The USEC letter further stated that the volume, sequence and time frame of DOE's planned introduction of surplus uranium of this quantity would overwhelm the normal

[10] *See* DOE announcement dated July 28, 2009, attached as Exhibit 7.

[11] *See* August 13, 2009 letter from Secretary Steven Chu to Vice President Joseph Biden dated August 13, 2009, attached as Exhibit 8.

market dynamics in coming years, with long-term adverse consequences for the U.S. nuclear industry.[12] Other stakeholders, including the Nuclear Energy Institute, a trade association representing the front end of the nuclear fuel cycle and the domestic nuclear utilities, also expressed concern regarding the announced Department plan to release uranium into the market.[13]

In response to criticism from industry stakeholders, DOE did reduce the actual amount of uranium it proposed transferring into the market. On November 10, 2009, Secretary Steven Chu signed a Secretarial Determination that transferred 300 metric ton of uranium ("MTU") on a quarterly basis to fund the accelerated cleanup at the Portsmouth site. These transfers would begin in the fourth quarter of 2009 and continue through the end of 2010. The Secretarial Determination was accompanied by an Energy Resources International ("ERI") study, commissioned by DOE, which found that these transfers would not have an "adverse material impact" on the domestic uranium industry.[14]

During this same time period, DOE also was proceeding with plans to select a contractor to perform the environmental cleanup work past the end of 2010. On August 28, 2009, the Department issued a Request for Proposals stating that the Department would transfer in a barter arrangement the uranium equivalent necessary to fund the

[12] *See* USEC September 17, 2009 letter to the Department of Energy, attached as Exhibit 9.

[13] *See* NEI September 22, 2009 letter, attached as Exhibit 10.

[14] *See* ERI 2009 Study at Executive Summary, attached as Exhibit 11.

accelerated cleanup between 2011 and 2014. DOE did not state the exact amount of uranium equivalent to be sold or transferred, because the amount of uranium equivalent would be determined by the price bid. In order to monetize the uranium, the contractor would be required to immediately sell the uranium. Consequently, the transferred uranium would become a "distress sale" in a weak market and therefore have a dramatic impact on uranium and conversion prices.

In response to the Department's proposed uranium transfers, the House and Senate Appropriations Subcommittees on Energy and Water Development entered into the conference agreement on a fiscal year 2010 Omnibus Appropriations Act, which provided $232,404,000 in funding for cleanup at the Portsmouth facility. This amount constituted an increase in funding from the President's budget request, as the Subcommittees attempted to respond to DOE's decision to expand ongoing cleanup activities at Portsmouth. In their report language for the FY 2010 Omnibus Appropriations Act, the House and Senate Appropriations Subcommittees on Energy and Water Development also noted that DOE had limited experience with off-budget excess federal uranium barter strategies, and they expressed serious concerns regarding the Department's ability to implement its excess uranium transfer proposal successfully. The conferees directed the Government Accountability Office ("GAO") to undertake a review of DOE's oversight and implementation strategy to ensure that the Department executed

the excess federal uranium sales or transfers program consistent with the statutory requirements of 42 U.S.C. § 2297h-10.[15]

In September 2011, GAO issued a report, which determined that DOE had committed to adhere to the 10% target in its 2008 Management Plan, but had "deviated from the schedule of uranium transfers articulated by the plan, allowing more uranium to enter the market sooner than cited." GAO also found that the Department's barter transactions did not comply with federal fiscal law. In particular, GAO found that "by not depositing the value of the net proceeds from the sales of uranium into the Treasury, DOE violated the miscellaneous receipts statute."[16]

2. The 2011 Secretarial Determination

Energy Secretary Steven Chu reexamined the impacts of the proposed 2011-2014 transfers in response to Congressional and industry concerns and declining market conditions brought about by the Department's proposal to barter uranium inventories for accelerated remediation at Portsmouth. In February 2010, Secretary Chu testified before the Senate Energy and Natural Resources Committee that the Department could not continue to use uranium transfers to pay for Departmental programs (such as the accelerated remediation at the Portsmouth facility) due to the adverse impacts on the domestic uranium and conversion industries. Secretary Chu also testified that DOE would limit its transfer to 10% of annual reactor demand.

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[15] *See* Energy and Water Committee Report FY 2010 (Sept. 30, 2009), at 194, attached as Exhibit 12.

[16] GAO-11-846, Excess Uranium Inventories: Clarifying DOE's Disposition Options Could Help Avoid Further Legal Violations (Sept. 2011).

Despite Secretary Chu's testimony, DOE resumed uranium inventory transfers with its 2011 Secretarial Determination at increased levels. On March 1, 2011, Secretary Chu signed a Secretarial Determination that transferred 450 MTU on a quarterly basis for calendar years 2011-2013 to pay for the accelerated cleanup at Portsmouth. Secretary Chu stated that these transfers would not exceed 1,605 MTU in any given year. Secretary Chu certified that these transfers would not have an "adverse material impact" on the domestic uranium sector.

These transfers exceeded the levels prescribed in DOE's 2008 Management Plan. For calendar year 2011, the 2008 Plan stated that the DOE would transfer a total of 1,266 MTU, which represented 6% of the total annual fuel requirements for the U.S. nuclear fleet. Instead, DOE transferred 1,605 MTU, which comprised 7% of total annual U.S. nuclear fleet needs.

Then on March 11, 2011, a large earthquake triggered a tsunami in Japan, which resulted in significant damage to the reactors at the Fukushima Daiichi nuclear plant. The aftermath of the Fukushima incident delivered a severe blow to the global uranium industry. The uranium consulting firm Ux Consulting described the incident as a game changer in the world uranium market:

> [Fukushima] took down what were at the time the world's third and fifth largest nuclear power programs and set back or extinguished the expansion plans of others. Comparing our base case forecast right before the accident with the one now, requirements have dropped by almost 900 million pounds U_3O_8 over the 2011-2030 period. The effect was so great, it has brought our current base case

> forecast to below our low case forecast before the accident, for the period up to 2025.[17]

The Fukushima incident completely invalidated the premises upon which the 2011 Determination was based. However, DOE made no adjustments to the amounts transferred. As the uranium price declined, DOE continued its barter transactions unabated.

3. The 2012 Secretarial Determination

On May 15, 2012, Secretary Chu signed a Secretarial Determination that was designed to achieve a number of Departmental priorities, including funding the accelerated cleanup program at both the Paducah, Kentucky and Portsmouth, Ohio gaseous diffusion plants. The 2012 Secretarial Determination also increased the amount of uranium for cleanup services from 1,605 MTU in 2011 to 2,400 MTU annually for the period 2012-2021.

The 2012 Secretarial Determination included a complicated transaction that was designed to maintain USEC's operations at the Paducah site. This transaction would transfer 9,156 MTU of depleted uranium to Energy Northwest from 2012 and 2013. USEC would then enrich that depleted uranium into low-enriched uranium ("LEU") equivalent to 482 MTU, and Energy Northwest would then use some of that LEU for its nuclear reactor and then sell the remaining amount to the Tennessee Valley Authority ("TVA"), which would use that fuel to power nuclear generation and support the production of tritium. The transfer of LEU to Energy Northwest and TVA deprived the

[17] Ux Weekly, *Game Changes Revisited*, Vol. 23, No. 03 (Jan. 20, 2014).

domestic uranium producers of potential customers, reducing the amount of previously uncommitted utility demand.

Finally, the Secretarial Determination directed the transfer of 400 MTU of natural uranium equivalent to National Nuclear Security Administration ("NNSA") contractors for the down blending of HEU to LEU for the period 2012 through 2020. The total amount of these transfers totaled 3,282 MTU, which equal approximately 14.5% of U.S. nuclear reactor needs in 2012.

Despite the significant increase in transfers, including the complicated USEC-Energy Northwest-TVA deal, Secretary Chu certified that the transfers would not have an "adverse material impact" on the domestic uranium market. ERI prepared a study that supported DOE's Secretarial Determination. The 2012 ERI study failed to consider the significant impacts associated with the Fukushima incident on the domestic uranium industry.

D. DOE'S 2013 Excess Uranium Inventory Management Plan

In the Consolidated Appropriations Act of 2012, Congress mandated that DOE must update its uranium management plan by June 30, 2012.[18] Consolidated

[18] In the 2012 Consolidated Appropriations Act, Congress made other changes to the Secretarial Determination process, including providing that any Secretarial Determination would only be valid for two calendar years. In addition, the statute provided that not less than 30 days prior to a transfer, barter or sale the Secretary shall notify the House and Senate Appropriations Committees of the following: the amount of uranium to be transferred, sold, bartered, distributed, or otherwise provided; an estimate by the Secretary of the gross market value of the uranium on the expected date of the transfer, sale, barter, distribution or other provision of the uranium; the expected date of the transfer, sale, barter, distribution or other provision of the uranium; the recipient of the

Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786 (2011). DOE missed its Congressionally-mandated deadline by over a year, sparking increased uncertainty as to the Department's plans with respect to future dispositions from its uranium inventories. In July 2013, DOE released its 2013 Excess Uranium Inventory Management Plan, which substantially deviated from the 2008 Plan. In stark contrast to the 2008 Plan, DOE failed to confer with stakeholders, including the UPA, or provide any opportunity for public notice or comment in the development of the 2013 Plan.

In the 2013 Plan, DOE announced that it would no longer abide by the limit of 10% of domestic demand.[19] While DOE claimed that it "remains committed to the maintenance of a strong domestic uranium industry," the abandonment of the 10% limit reflected a complete disregard for domestic uranium producers, given that the UPA strongly supported the 10% limit because it provided the certainty necessary for producers to maintain and expand their operations.[20] Moreover, the 2013 Plan stated that DOE "determined that it can meet its statutory and policy objectives in regard to DOE uranium sales or transfers without an established guideline."[21] According to DOE, the objective of the updated plan was to provide "current information and enhanced transparency to the general public and interested stakeholders regarding the management

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uranium; and the value of the services the Secretary expects to receive in exchange for the uranium, including any reductions to the gross value of the uranium by the recipient.

[19] Administrative Record ("AR DOE")_0061.

[20] *Id.*

[21] *Id.*

of DOE's potentially marketable uranium."[22] Yet the failure of DOE to provide "an established guideline" deprives the industry of the transparency and predictability as to the levels of uranium the Department plans to transfer into the market in any given year. The 2013 Plan does offer some projections on future sales and barters, stating that it plans to transfer 2,705 MTU in 2014.[23] However, DOE declined to provide any assurances that it will adhere to the projections provided in this plan, stating that "[c]hanging Departmental priorities may require changes to plans or schedules for sale or transfer of uranium . . . ."[24]

E. DOE's May 15, 2014 Secretarial Determination

On May 15, 2014, DOE issued a Secretarial Determination for transfers for calendar years 2014 through 2016. The May 2014 Secretarial Determination authorized the following sales and transfers:

* 2,055 MTU per year to DOE contractors for clean-up services at the Paducah or Portsmouth Gaseous Diffusion Plants;

* 650 MTU per year of natural uranium equivalent to NNSA contractors for down blending highly enriched uranium into low-enriched uranium for NNSA programs.

[22] AR DOE_0056.

[23] AR DOE_0076.

[24] AR DOE_0062.

The Secretarial Determination states that in the event NNSA transfers do not reach 650 MTU in any given year, then "EM (Environmental Management) may transfer in excess of 600 MTU in the fourth quarter of that same calendar year so long as the total amount transferred by the Department does not exceed 2,705 MTU in that year." In the Secretarial Determination, the Secretary states "that these Departmental sales or transfers will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industries."[25]

The May 2014 Secretarial Determination was accompanied by a DOE-commissioned market analysis conducted by ERI. ERI's 2009, 2011, and 2012 analyses found that DOE's transfers would not result in an "adverse material impact" on the domestic mining, conversion, and enrichment sectors.[26] Notably, ERI's 2014 study declined to conclude that DOE's transfers would not have an "adverse material impact." In fact, ERI's report highlighted significant economic impacts on the domestic uranium mining and conversion sectors stemming from DOE's proposed transfers. Yet DOE proceeded with issuing a Secretarial Determination in which current Secretary Ernest Moniz certified that the transfer of 2,705 MTU would not have an "adverse material impact" on the domestic uranium industry.

[25] AR DOE_0419.

[26] ERI 2009 Study, Executive Summary, attached as Exhibit 11; ERI 2011 Study, Executive Summary, attached as Exhibit 13; ERI 2012 Study, Executive Summary, attached as Exhibit 14.

ARGUMENT

I. DOE'S MAY 15, 2014 SECRETARIAL DETERMINATION VIOLATED THE USEC PRIVATIZATION ACT

The Court should grant Converdyn's motion for summary judgment, because DOE's May 15, 2014 Secretarial Determination violated the USEC Privatization Act. The Act prohibits the Secretary from transferring or selling uranium, including natural uranium concentrates, natural uranium hexafluoride or enriched uranium in any form, unless the Secretary complies with Section 3112 of the USEC Privatization Act. 42 U.S.C. § 2297h-10(a). Specifically, the Act prohibits DOE from selling or transferring uranium from its excess inventory unless the Secretary issues a Secretarial Determination that includes the following certifications:

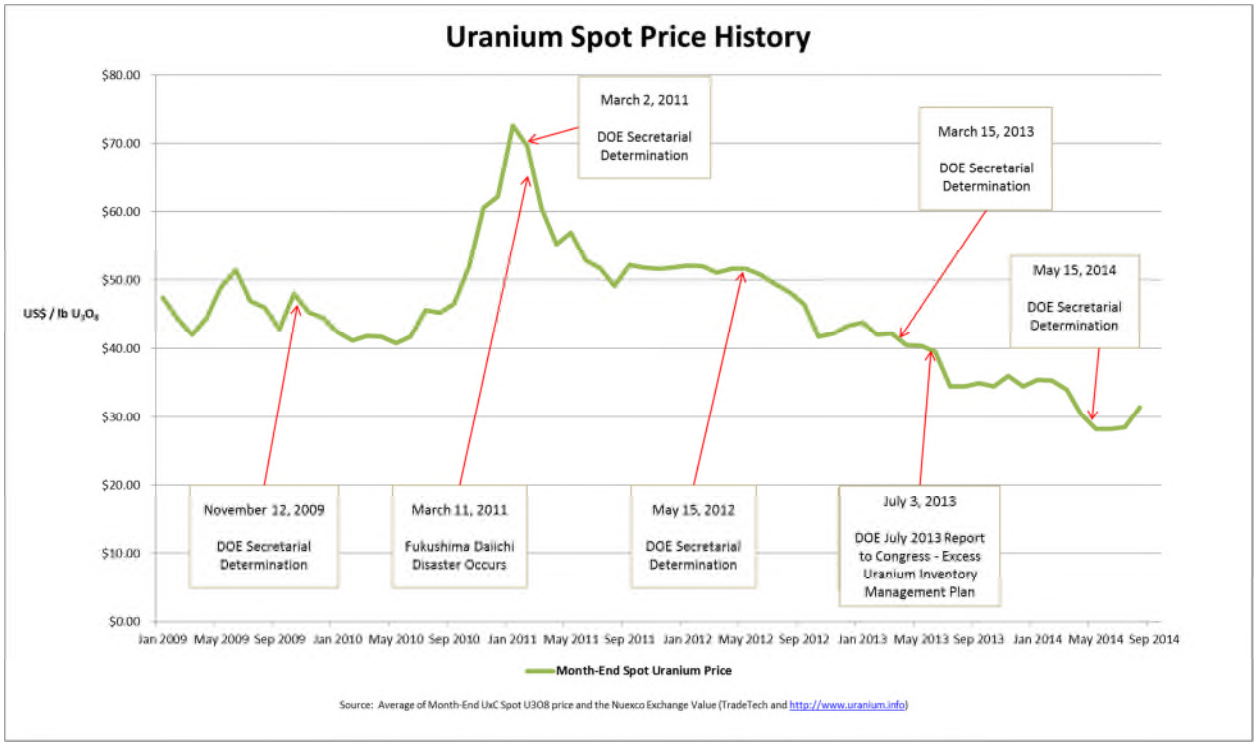
> (A) the President determines that the material is not necessary for national security needs,
>
> (B) the Secretary determines that the sale of the material will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry, taking into account the sales of uranium 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). Although the Secretary did certify that there would be no "adverse material impact" on the industry, his certification (1) failed to account for the depressed market conditions facing uranium producers; and (2) ignored ERI's market analysis on the impacts associated with the Secretarial Determination. The certification conflicts so directly and completely with the facts that it amounts to a breach of statutory

duty. In issuing such a certification, the Secretary violated his statutory duty to protect the domestic industry from an "adverse material impact."

A. DOE's May 2014 Secretarial Determination Failed to Consider the Depressed Market Conditions Facing Domestic Uranium Producers

DOE's May 2014 Secretarial Determination authorizes transfers of significant amounts of uranium into a market that is already suffering from depressed conditions due to a variety of factors, including reduced demand worldwide for uranium following the Fukushima incident. The Determination completely failed to consider the depressed market conditions facing domestic uranium producers due to the current low spot market price for uranium concentrates. As the following chart demonstrates, uranium prices have reached levels not seen since 2005, down about 59% since the Fukushima incident. Prices have reached nine-year lows in nominal value and are at all-time lows on an inflation-adjusted basis.



The spot market price has decreased $7.00 per pound from the price ERI used to base their analysis on in its report to DOE.

With the declining demand for uranium following the Fukushima incident, the average marginal or operating costs associated with uranium production now exceed the price for uranium. According to the Energy Information Administration's ("EIA") 2013 Annual Domestic Uranium Production Report and the 2013 Uranium Marketing Annual Report, the total production costs to produce a pound of domestic uranium was approximately $47.65 per pound.[27] Despite the fact that the average cost estimates *exceeded* the spot market price at the time of DOE's 2014 Determination, the Department opted to introduce more uranium into the market, which is projected to further depress the price for uranium by DOE's own commissioned market analysis.[28] Given the oversupplied market and with total production costs exceeding the spot market price, the May 2014 Secretarial Determination will introduce increased amounts of uranium into the market, and result in an "adverse material impact."

With depressed prices for uranium, the domestic producers have lost one half of their workforce since 2012. Development drilling of new well fields to continue in-situ

[27] The Energy Information Administration is an independent statistical arm of DOE. In 2013, EIA found that drilling costs were $49.9 million and production costs were $168.2 million. Combined together, this amount totals $218 million. Dividing $218 million by 4.577 million, the total U.S. uranium production in 2013 as reported by EIA, results in "total production" costs of $47.65 per pound.

[28] To put these average costs of production into context, domestic uranium mines are competitive on a global scale with respect to production costs and therefore these costs are not the sole reason for the industry's struggles.

mining operations has ground to a virtual halt. Examples of how market conditions have affected UPA member companies include:

- **Cameco Resources**, since 2012, has delayed development of three planned new mining sites, curtailed exploration activities, reduced its workforce by more than 20%, and ceased drilling at its Nebraska mine, idling 20 contract drillers who had worked steadily at the site for more than two decades.

- **Energy Fuels**, which has operations in Utah and Arizona, will drop from 400 employees at the end of 2012 to 50 by the Fall of 2014.

- **Mestena Uranium**, which has operations in Texas, has laid off almost all of its workforce since 2012.

- **Uranerz Energy Corporation**, which started mining in 2014 after years of permitting, has struggled to raise capital in this market and has limited its production until the market improves.

- **Uranium Energy Corporation**, which has operations in Texas, was forced to lay off half its workforce since 2012.

- **Uranium One Americas**, which operates the Willow Creek Mine in Wyoming, suspended all new well field installation and all field construction activities because of low uranium prices in the second quarter of 2013 and has since laid off half of its employees.

- **Uranium Resources**, with projects in New Mexico and Texas, has closed its New Mexico and Texas offices and reduced 50% of its staff in both states.

The introduction of increased material into the market will result in further job losses as operators decide to defer new production or shut in existing operations.

UPA expects production to drop significantly if market conditions do not change in the short term.[29] According to EIA (2013 Domestic Uranium Production Report),

[29] Although domestic production in 2013 was up 6% compared to 2012, new projects that came on line had been in motion for a number of years. In most cases, production from all domestic mines is being limited to what is required to fulfill existing long-term contracts.

exploration drilling decreased 76% from 2012 to 2013. Total drilling, exploration and development was down 53% in 2013 compared to 2012. In the second quarter of 2014, EIA's Domestic Uranium Production Report found U.S. production of uranium decreased 12% from the previous quarter and 21% from the second quarter of 2013. EIA, in its 2013 report, reported that domestic uranium current and potential operators maintain the capacity to produce approximately 40 million pounds of U_3O_8 annually. Due to market conditions, EIA estimates that 2014 domestic production will be approximately four million pounds or 10% of domestic capacity.[30] The May 2014 Determination ignored all of these trends.

In this context, DOE proceeded with the May 2014 Secretarial Determination, which will transfer 2,705 MTU into the market annually, an amount consisting 15% of total annual fuel requirements of domestic U.S. reactors. This amount also constitutes a 50% increase over the 10% limit DOE agreed to abide by in its 2008 Management Plan. DOE transfers over the next four years are larger than all of the U.S. utility uncommitted requirements. Over the next two years, DOE's planned transfers encompass more than 100% of the global uncommitted utility demand. Over the next three years, DOE's planned transfers represent approximately two thirds of global uncommitted utility requirements.[31]

[30] EIA Domestic Uranium Production Report Annual, Tables 4 & 5 (May 1, 2014).

[31] *See* UxC UMO-Q1 2014- Table 15, and Table B-15 and note U.S. Government Stocks* under the "Other" category, attached as Exhibit 15.

B. DOE Ignored ERI's 2014 Study, Which Found That the Proposed Transfers Would Result In a Negative Impact On Domestic Uranium Producers

DOE issued the May 2014 Secretarial Determination despite the fact that an independent economic analysis commissioned by the Department found significant negative impacts associated with these transfers. ERI prepared economic analyses on the impact of DOE's 2009, 2011, 2012, and 2014 Secretarial Determinations on the commercial market for nuclear fuel. For the 2009, 2011, and 2012 Secretarial Determinations, ERI concluded that DOE's sales and transfers would not have an "adverse material impact" on domestic uranium producers.[32] In contrast to these previous economic analyses, ERI's 2014 study declined to conclude that DOE's transfers would not have an "adverse material impact."[33]

Moreover, ERI's study outlined significant negative impacts associated with DOE's transfer of 2,705 MTU. In particular, ERI projected that "[t]he price impact attributed to DOE inventory entering the uranium market averages $2.8 per pound over

[32] *See* ERI 2009 Study, Executive Summary, attached as Exhibit 11; *see also* ERI 2011 Study, Executive Summary, attached as Exhibit 13; *see also* ERI 2012 Study, Executive Summary, attached as Exhibit 14.

[33] DOE contends that before ERI initiated its 2014 study, the Department clarified that it was not seeking an opinion from ERI on whether the proposed transfers would result in an "adverse material impact." Instead DOE argues that it only requested a quantification of potential impacts, as the Department maintained the responsibility for ultimately deciding whether any transfer would have an "adverse material impact." Yet in a GAO report study released in May 2014, GAO stated it was informed by DOE that it "contracted with ERI to provide subject matter expertise that did not exist within DOE and trusted ERI to provide that expertise." *See* GAO-14-291, Department of Energy: Enhanced Transparency Could Clarify Costs, Market Impact, Risk, and Legal Authority to Conduct Future Uranium Transactions (May 2014), at 46.

the next ten years."[34] ERI stated that a $2.80 per pound price impact constitutes an 8% decrease in the current spot market price and 6% decrease in the current term price.[35] In addition, ERI estimated that DOE material entering the market would result in an employment loss of 44-person years, which constitutes a reduction on average of 4% of uranium industry employment levels from 2014-2023.[36]

Finally, ERI acknowledged the uranium industry concerns associated with DOE's deviation from the 10% limit. Specifically, ERI reiterated its finding from the 2012 market impact study "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 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."[37] ERI then concluded that it is not clear whether DOE has met this standard.[38]

It is worth noting that previous ERI market studies also projected negative impacts associated with DOE Secretarial Determinations, as evidenced by the following table:

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[34] AR DOE_0261.

[35] *Id.*

[36] *Id.*

[37] AR DOE_0198 (emphasis in original).

[38] AR DOE_0198-199.

	2009 ERI Report	**2010 ERI Report**	**2012 ERI Report**	**2014 ERI Report**
DOE UF6 Inv. Transferred	10% of U.S. Market, equivalent of 6.1 million lbs.	10% of U.S. Market, equivalent of 5.2 million lbs.	10.3 - 10.8% of U.S. Market	15% of U.S. Market 7.5 million lbs.
Price Impact	-$1.45	-$1.24	-$1.86 to -$2.81	-$2.80
Spot Price Impact	3% decline	2.1% decline	5.8% to 8.9% decline	8% decline
Term Price Impact	2.2% decline	1.9% decline	3.1% to 4.4% decline	6% decline
ERI Conclusion on Adverse Material Impact	No Adverse Impact	No Adverse Impact	No Adverse Impact	No conclusion given

These ERI studies, however, underestimated the impacts associated with DOE's Secretarial Determinations. For instance, the spot market price of uranium decreased from $45.38 per pound at the time of ERI's November 2009 analysis to $28.50 in July 2014. Accordingly, there is reason to believe that the 2014 ERI study may also underestimate adverse impacts.

As predicted by ERI, the price of uranium has decreased since the release of the May 2014 Secretarial Determination. ERI's 2014 report based its analysis on a spot market price of $35.10 per pound. The price dropped to $28.25 in May in response to the May 2014 Secretarial Determination and was $28.50 in July 2014.[39] By ignoring critical facts and actually worsening the uranium price decline, the Secretarial Determination

[39] Similarly, the release of DOE's 2013 plan, in which the Department abandoned the 10% guideline, also resulted in a decrease in the spot market uranium price. The spot market uranium price was $39.60 in June 2013. After DOE announced it would abandon its 10% limit from the 2008 Management Plan, in July 2013, the uranium price fell to $34.75. While the market had been gradually trending down post-Fukushima, this $4.75 decline was directly related to DOE's announcement.

violated DOE's statutory duty to protect the domestic industry from an "adverse material impact."

II. THE COURT SHOULD SET ASIDE DOE'S MAY 2014 SECRETARIAL DETERMINATION AS AN ARBITRARY AND CAPRICIOUS AGENCY ACTION

The Administrative Procedure Act ("APA") directs that a court 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). Reasoned decision-making is the essence of the APA's prohibition against arbitrary and capricious agency action. Among other things, an agency's 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 the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court should set aside DOE's May 2014 Secretarial Determination, because it fails to satisfy these standards for reasoned decision-making.

A. DOE's May 2014 Secretarial Determination "Runs Counter to the Evidence Provided to the Department" On the Impact Of Its Barter Program On the Domestic Uranium Producers

It is well established that an agency action is arbitrary and capricious, and therefore invalid, if there is no "'rational connection between the facts found and the

choice made.'" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). The courts have used various formulations to articulate this critical legal requirement for a rational nexus between the evidence before the agency and the action that it has taken, holding actions to be arbitrary and capricious if the agency "offered an explanation for its decision that runs counter to the evidence before [it]" (*Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43); or if the agency did not "base[ ] its decision on [the] facts in the record" (*Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 17 (D.D.C. 2002), *superseded by*, Civ. No. 1:00-cv-02996 (GK), 2004 WL 6243379 (D.D.C. Apr. 29, 2004)); or if the agency took action and "fail[ed] to address relevant evidence before it" (*Morall, M.D. v. DEA*, 412 F.3d 165, 178 (D.C. Cir. 2005) (citing *El Rio Santa Cruz Neighborhood Health Ctr. v. HHS*, 396 F.3d 1265, 1278 (D.C. Cir. 2005)).

Under these precedents, DOE's May 2014 Secretarial Determination is arbitrary and capricious, because the evidence before the agency contradicts its conclusion that its transfers would not create an "adverse material impact" on the domestic uranium mining, conversion, or enrichment industry. This evidence includes the ERI's 2014 economic study on the impacts of DOE's proposed transfers, input provided by UPA and other industry stakeholders, and past pronouncements from the Department itself.

DOE's commissioned economic analysis for the May 2014 Secretarial Determination found significant negative impacts associated with DOE's transfers. Specifically, ERI estimated that "[t]he price impact attributed to DOE inventory entering

the uranium market averages $2.8 per pound over the next ten years."[40] ERI stated that a $2.80 per pound price impact constitutes an 8% decrease in the current spot market price and 6% decrease in the current term price.[41] In addition, ERI estimated that DOE material entering the market would result in an employment loss of 44-person years, which constitutes a reduction on average of 4% of uranium industry employment levels from 2014-2023.[42] In contrast to prior studies, ERI's 2014 study declined to conclude that DOE's transfers would not have an "adverse material impact."

In addition, UPA provided DOE with extensive comments outlining the potential negative impacts on producers associated with transferring significant amounts of uranium into an already oversupplied market. The comments reflect views that UPA members provided to high level DOE officials in two in-person meetings in early 2014. The comments describe the difficult market conditions facing uranium producers, principally in light of the Fukushima incident, but which have been exacerbated by DOE's actions. In particular, the comments state that the "industry has lost almost half its workforce since 2012" due to "uncertainty of the near term future of the uranium market."[43] To the extent that production is increasing, it is in order "to fulfill existing

[40] AR DOE_0261.

[41] *Id.*

[42] *Id.*

[43] AR DOE_0129-144.

long-term contracts." Other producers have deferred development, while some current operations are unsustainable going forward unless market conditions improve.[44]

In light of this market climate, UPA requested that DOE reduce transfers until a time when the price of uranium recovers. Moreover, UPA noted that DOE's 2013 transfers exceeded "the total spot market purchases made by all the U.S. utilities and was about 40% of the spot quantity purchased by Non-U.S. utilities." In addition, UPA asked DOE to consider the impacts of the Fukushima incident on the health of the domestic uranium industry (in contrast to the Department's 2012 Secretarial Determination, which failed to take into account the impacts of this critical incident on domestic producers).

Furthermore, the May 2014 Secretarial Determination deviated from the 10% limit on transfers despite the fact that DOE previously repeatedly stated the importance of this limit in protecting the domestic uranium fuel sector. Under the 2008 Plan, DOE pledged that its uranium transfers would not exceed on an annual basis 10% of the annual fuel requirements for U.S. reactors in order to protect the domestic uranium fuel sector. In a February 2010 Senate Energy and Natural Resources Committee hearing, DOE Secretary Steven Chu testified that the Department is "very aware of the fact that there is a statute that says that we cannot put more than 10% out there."[45]

Previous ERI reports also spoke to the importance of limiting DOE transfers to 10% of the annual market. ERI's 2012 report indicated that DOE departing from the

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[44] *Id.*

[45] DOE FY 2011 Budget Hearing, Senate Energy & Natural Resources Committee (Feb. 4, 2010), at 39, attached as Exhibit 16.

10% limit could "have an adverse material impact on the domestic industry." ERI's 2012 report stated that the introduction of DOE material in amounts exceeding 10% in any given year would likely be viewed by the industry as DOE establishing a precedent by which it "may make future transfers without any regard for the '*maintenance of a strong domestic nuclear industry*.'"[46] The Secretarial Determination nonetheless implements the 2013 Management Plan (which expressly abandoned the 10% limit).

DOE's own decision-making documents show that the Department ignored this evidence of adverse impacts and relied instead on contrary information that was not credible. The Administrative Record includes a declaration by Dave Henderson, Acting Director in DOE's Office of Uranium Management and Policy in the Office of Nuclear Energy, in which he explains his decision-making process in recommending the May 2014 Secretarial Determination.[47] In the declaration, the only evidence cited by Henderson to support the Secretarial Determination is a Power Point presentation submitted by Fluor-B&W Portsmouth LLC ("FBP"),[48] a company that directly benefits from the Department's barter program. FBP's economic vitality depends on the continuance and enhancement of the barter program, given that this program is how DOE

[46] ERI 2012 Study, Executive Summary, attached as Exhibit 14.

[47] Declaration of Ashley D. Henderson, dated July 7, 2014, attached as Exhibit 17.

[48] FBP is a subsidiary to Fluor Corporation ("Fluor"), a multinational company that offers engineering, procurement, construction, fabrication and modularization, commissioning and maintenance, and project management services. FBP is a company that provides environmental decontamination and decommissioning services to DOE at the Department's Portsmouth Gaseous Diffusion Plant in Piketon, Ohio.

is paying for remediation services FBP is conducting at Portsmouth. Not surprisingly, FBP's Power Point presentation found that the Department's barters have not had an "adverse material impact" on the domestic uranium industry.[49] FBP's presentation asserted that uranium prices are at their highest levels in the last five years but declined to note that prices have decreased by approximately $40 since the Fukushima Incident. In addition, the FBP presentation stated the U.S. uranium employment has grown from 2009-2012, but this statement ignored the significant job losses the industry has experienced over the last several years (in which the industry has lost nearly half of its workforce).

Despite FBP's outdated data and its vested financial interest in the continuance of the barter program, Henderson stated that he relied on the FBP presentation in developing his Office's "Analysis of Potential Impacts of Planned DOE Transactions."[50] Henderson failed to acknowledge that DOE had entered a contract with FBP to conduct environmental cleanup at Portsmouth through March 2016, with an option to continue the work until 2021.[51]

The Court should hold that the May 2014 Secretarial Determination is arbitrary and capricious, because it runs completely counter to the credible evidence before DOE.

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[49] AR DOE_0156.

[50] Declaration of Ashley D. Henderson, dated July 7, 2014, attached as Exhibit 17.

[51] Declaration of James M. Owendoff, dated July 7, 2014, attached as Exhibit 18.

B. DOE Failed to "Provide a Reasoned Explanation" For Departing From the 10% Limit Set Forth In the 2008 Management Plan

The "'requirement that [an] agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result.'" *D&F Alfonso Realty Trust v. Garvey*, 216 F.3d 1191, 1195 (D.C. Cir. 2000) (citation omitted). Accordingly, "[o]ne of the core tenets of reasoned decision-making is that 'an agency [when] changing its course . . . is obligated to supply a reasoned analysis for the change.'" *Republic Airline Inc. v. U.S. Dept. of Transp.*, 669 F.3d 296, 299 (D.C. Cir. 2012) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42) (second and third alterations in original). The "'agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . . .'" *Bush-Quayle '92 Primary Comm., Inc. v. FEC*, 104 F.3d 448, 453 (D.C. Cir. 1997) (citation omitted). Failure to supply such an "analysis renders the agency's action arbitrary and capricious." *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) (citing *Ramaprakash v. FAA*, 346 F.3d 1121 (D.C. Cir. 2003)).

DOE's May 2014 Secretarial Determination is arbitrary and capricious, because the Department failed to provide a reasoned explanation for departing from the 2008 Management Plan, which established a 10% limit on DOE sales or transfers from its inventory in any given year. As stated above, Secretary Chu reiterated the importance of the 10% limit in testimony before Congress. ERI also addressed the importance of the

predictability fostered by the 10% limit in its 2014 analysis.[52] Yet DOE abandoned the 10% limit when it released its 2013 Management Plan, which served as the basis for the May 2014 Secretarial Determination.

DOE stated that it was abandoning the 10% limit, because "based on the experience gained since the issuance of the 2008 Plan," the Department believes "that it can meet its statutory and policy objectives in regard to DOE uranium sales or transfers without an established guideline."[53] This conclusory statement is the only explanation DOE offered about why it chose to abandon the 10% limit. This explanation falls far short of the reasoned analysis required under the APA. When an agency "'explain[s] why it decided to act as it did,'" its "'statement must be one of 'reasoning'; it must not be just a 'conclusion'; it must 'articulate a satisfactory explanation' for its action.'" *Butte County, Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (citation omitted); *see also Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350, (D.C. Cir. 2014) ("conclusory statements will not do; an 'agency's statement must be one of *reasoning*'") (emphasis in original and citation omitted).

Furthermore, DOE's conclusory justification is particularly deficient given the fact that the uranium industry has relied heavily on the 10% limit established in the 2008 Plan. Speaking for the industry after DOE released the 2008 Management Plan, UPA issued a statement praising DOE for assuring the industry that transfers would not

[52] AR DOE_0189-199.

[53] AR DOE_0061.

constitute more than 10% of U.S. demand. UPA stated that this plan offered "very predictable and transparent limits of government supplies going forward."[54]

Where, as here, an agency's "prior policy has engendered serious reliance interests that must be taken into account," the agency must provide an even "more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Televisions Stations, Inc*., 556 U.S. 502, 515 (2009) (citing *Smiley v. Citibank (S.D.)*, 517 U.S. 735, 742 (1996)). DOE has utterly failed to satisfy this obligation. Instead, DOE has adopted "an *ispe dixit* approach" by justifying a decision simply "because the agency says so" instead of through "reasoned analysis on the record;" the result is an "arbitrary and capricious agency action in violation of the law." *D&F Alfonso Realty Trust*, 216 F.3d at 1196-97.

This arbitrary and capricious departure from the 10% limit has significantly disrupted the industry (which had justifiably relied on the limit). For example, in abandoning the limit, DOE weakened uranium producers' ability to attract investment for their operations. The April 23, 2014, ERI analysis addressed this issue:

> As stated by ERI in its 2012 market impact study, even if the potential impact of an individual transfer by DOE is not in itself significant, the nuclear fuel markets recognize that DOE controls a very large amount of material. 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. In this regard, it is critical for long-term planning and investment decisions by the domestic industry that there

[54] *See* Uranium Producers of America, News Release, *UPA Applauds the DOE Excess Uranium Inventory Management Plan* (Dec. 22, 2008), attached as Exhibit 5.

> can be confidence that DOE will adhere to what it presents as being established guidelines and plans.[55]

Noting that in 2013 DOE had abandoned its 10% transfer limit, ERI stated "the decision by DOE to no longer have an established guideline that would limit DOE inventory transfers to 10% of U.S. requirements 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."[56]

In both its 2012 market impact analysis and the 2014 analysis, ERI stated:

> [T]hat 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['s] actions may, in fact, have an adverse material impact on the domestic industry.[57]

DOE's abandonment of a 10% annual transfer limit has destroyed predictability and created an adverse material impact on the domestic industry.

C. DOE's May 2014 Secretarial Determination Is Arbitrary and Capricious Because the Department Prejudged the Decision By Signing a Contract With FBP to Conduct Cleanup Activities That Would Be Funded By Uranium Transfers

In August 2010, DOE awarded FBP a contract for the environmental cleanup of the Portsmouth Gaseous Diffusion Plant. DOE is funding the contract through the

[55] AR DOE_0283.

[56] 2014 Review of Potential Impact of DOE Excess Uranium Inventory on the Commercial Markets, ERI-2142.17-1401, ERI (Apr. 25, 2014), at 84.

[57] AR DOE_0283.

uranium barter program, and the length of the contract extends through 2016 with an option to continue the work until 2021. After DOE signed a contract with FBP, the Department released the 2011, 2012 and the 2014 Secretarial Determinations, which transferred significant amounts of uranium into the market but found that these transfers would not result in an "adverse material impact" on the domestic industry. Thus, even before the release of the 2014 Secretarial Determination, DOE had already contracted with FBP to use uranium transfers to pay for cleanup at the Portsmouth Gaseous Diffusion Plant. This prior contractual obligation – which effectively requires a certain level of uranium transfers without regard to DOE's statutory duties to limit transfers that would harm the industry – suggests that the 2014 Secretarial Determination was a foregone conclusion.

An agency does not engage in reasoned decision-making required by the APA if the agency prejudges a decision. Among other things, such a decision is not based on a "'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citation omitted). In addition, by prejudging a decision, the agency violates principles of due process embedded in the APA's prohibition on arbitrary and capricious agency action. *Cf. Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987) (referring to "[t]raditional concepts of due process incorporated into administrative law"); *C & W Fish Co. v. Fox*, 931 F.2d 1556, 1564-65 (D.C. Cir. 1991) (discussing due process right not to have agency prejudge issues in rulemaking proceeding).

D. DOE's Secretarial Determination Relied On a Factor That Congress Did Not Intend For It to Consider

DOE's May 2014 Secretarial Determination also was arbitrary and capricious, because the Department "relied on [a] factor[] which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Specifically, DOE's finding that its transfers would not result in an "adverse material impact" appears to have been based on a flawed analysis about whether the Department's transfers were the driver for the depressed market for uranium. For instance, Dr. Pete Lyons wrote a memorandum to Secretary of Energy Ernest Moniz recommending that DOE proceed with the transfer of 2,705 MTU during the period of CY 2014 through CY 2016.[58] In this memorandum, Dr. Lyons acknowledged that ERI found that DOE's actions will have an impact on the industry. Nonetheless, Dr. Lyons stated that "DOE's actions are not the driver of the current negative states of the domestic uranium production, conversion, or enrichment industries." Moreover, the memorandum states that DOE's Office of Nuclear Energy "believes that the markets will adjust to the major drivers of the depressed markets over time." Thus, according to Dr. Lyons, the transfer of 2,705 MTU is consistent with the USEC Privatization Act.

The USEC Privatization Act does not permit DOE the discretion to justify its transfers on the basis of whether its actions serve as the driver for a depressed market or on the ability of the market to adjust to other market conditions. Instead, the USEC Privatization Act simply requires the Secretary to make a finding that any proposed sale

[58] AR DOE_0397-402.

or transfer will not have an "adverse material impact" on the domestic uranium production, conversion, and enrichment industries.[59] By basing its Secretarial Determination in part on whether DOE's actions are the "driver" of the current negative state of the domestic uranium industry, DOE relied on a factor that Congress did not intend for it to consider, rendering the Secretarial Determination arbitrary and capricious.

CONCLUSION

The Court should grant Converdyn's Motion for Summary Judgment.

Respectfully submitted,

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[59] Furthermore, the conclusion that DOE is not the "driver" is arbitrary and capricious because it is not rationally related to the facts. The amount of uranium DOE is transferring to the market represents 25% of the secondary supply, an amount that makes DOE a significant supplier of uranium to the market. *See* UxC UMO-Q1 2014- Table 15, attached as Exhibit 15.