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August 15, 2006

The Honorable David M. Walker
Comptroller General
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Walker:

This letter asks for a full review of the operations of the Department of Energy (DOE) Office of Environment, Safety and Health (ES&H) and an analysis of a DOE proposal to eliminate it. (*DOE Predecisional Draft* (hereinafter "*Predecisional Draft*"), July 21, 2006, Attachment A.) This office, under the leadership of a Senate-confirmed assistant secretary, is the key to the self-regulation of the DOE complex. It is responsible for establishing environmental, safety, and health policy for the entire complex, including its weapons facilities, laboratories, and nuclear clean-up sites, and a variety of other essential tasks.

On July 21, 2006, Mr. Clay Sell, Deputy Secretary of the Department of Energy, under the apparent direction of the Secretary, sent to Congress a plan to dismantle the Office. The plan originally came to light only when it was leaked to outside groups. Under the new plan, ES&H would be replaced by a new office headed by a career employee and merged with the Department's security office.

The Department of Energy's proposal is a curious one, with vague promises and minimal details about how those promises will actually be achieved. For example, it claims that, "Input from workers and stakeholders is a crucial element of implementing effective worker health and safety policy." (*Predecisional Draft*, supra, p. 7.) But the workers were never consulted about the proposed plan, and most of the "consulted" stakeholders have publicly stated their opposition to the plan. (*See, e.g.,* Letter from Leo Gerard, President, United Steelworkers International, to Secretary Bodman, June 6, 2006; Letter from Hon. Bill Richardson and Christine Gregoire to Sec. Bodman, June 20, 2006; Letter from Tom Carpenter, Governmental Accountability Project, to Sec. Bodman, August 11, 2006.) It also promises "to develop highest quality policies" (*Predecisional Draft*, supra, p. 4), even though most of the concerns over the years have not been

about the quality of the policies, but the quality of the enforcement. Perhaps it is not surprising that there is no reference to the influence in this proposal of DOE contractors, who have often complained about being hampered by health, safety, and environmental regulations. And while Secretary Bodman, in a recent meeting with DOE employees, stated that he was very "concerned about our recent safety statistics, which suggest an increase in incidents, or almost incidents across the complex," there is little evidence of that concern in this proposal.

Although we are sure that organizational improvements in ES&H can be made, we must question that an office created to protect worker and public health and safety and the environment after years of public discussion would be dismantled without a single external review, either by Congress or any other body, of its accomplishments or shortcomings, or any other public recommendations for change. We also note that as members of the authorizing committee for the Department of Energy, neither we nor our staffs ever held a discussion with DOE officials about the dismantlement plan before it was leaked.

The Office of Environment, Safety and Health, along with the Defense Nuclear Facilities Safety Board (DNFSB), was established in 1985 after extensive public debate and external reviews by the Government Accountability Office (GAO), the National Academy of Sciences, and the Congress pointed out the lack of independent oversight at DOE. The safety lapses, fatal worker illnesses, and enormous environmental degradation that occurred during the Cold War because of an emphasis on weapons production at all costs resulted in a recommendation from GAO that a safety oversight organization separate from the program offices be established. (*See, e.g., Better Oversight Needed for Safety and Health Activities at DOE's Nuclear Facilities*, EMD-81-108, Aug. 4, 1981.)

The proposed dismantling of the Office of Environment, Safety and Health would return the Nation to the previous policies of putting nuclear weapons production over safety and the environment that has cost our country so much already. It not only eliminates the position of the Assistant Secretary, but also reduces the number of DOE employees dedicated to ensuring that environmental, safety, and health laws and regulations are followed.

This is consistent with prior Departmental attitudes toward environmental, health, and safety obligations. For example, the DOE resisted attempts to compensate weapons workers for cancers and other fatal diseases to the point that Congress took the program away from DOE and gave it to the Department of Labor. (42 U.S.C. 7385s.) In the most recent example of foot-dragging, it took DOE three years to issue the Worker Safety Rule mandated in the Bob Stump National Defense Authorization Act for FY 2003. (71 *Fed. Reg.* 6858 et seq. (Feb. 9, 2006); 10 CFR 851 et seq.) This rule not only codifies the existing worker safety and health directives, orders, and guidelines for the first time in DOE's history, but it also gave the ES&H Assistant Secretary a significant role in carrying out the regulation. The preamble specified that the Assistant Secretary will "play a central role in its implementation and enforcement." But apparently that statement may no longer be operative.

On the environmental side, Congress mandated that environmental responsibilities be carried out by an assistant secretary. Although Secretary Bodman claims they will be under an assistant secretary in the new plan (Letter from DOE dated July 24, 2006, responding to questions sent June 27, 2006, from Reps. Dingell, Stupak, and Strickland, p. 4), environmental responsibilities will either remain with the newly created career office or be transferred to the Office of the General Counsel, neither of which is headed by an assistant secretary. The General Counsel's office would also be given the programmatic responsibility for the National Environmental Policy Act, even though it has no programmatic capabilities.

In addition to weakening health, safety, and environmental policies and enforcement, this proposal also would further limit DOE's ability to provide adequate oversight to the engineering and construction of multi-billion-dollar clean-up projects and appears to be in direct conflict with statements made by DOE officials about the important role of ES&H before the DNFSB last December. Both GAO and the DNFSB have repeatedly criticized DOE for its failures to require that safety systems be engineered into these facilities at the very early stages to prevent extensive retrofitting. For example, in a recent critique of the Hanford Waste Treatment Plant, GAO stated that such failures by the contractor, under DOE's supervision, were partially responsible for cost overruns of almost $7 billion in just one project. (*Hanford Waste Treatment Plant: Contractor and DOE Management Problems Have Led to Higher Costs, Construction Delays and Safety Concerns*, Testimony before the House Appropriations Subcommittee on Energy and Water Development, GAO-06-602T, April 6, 2006.)

At a public meeting of the DNFSB last December, Roy Kasdorf, the leader of the Board's Nuclear Facilities Design and Infrastructure group, focused on the same problem, stating that such failures inevitably lead to increases in the project's cost and schedule. He said, "Further, when safety issues are not identified and resolved early, there is pressure to compromise on safety-related aspects of the design to contain these costs and schedule increases." (Transcript of Public Meeting and Hearing, *Incorporation of Safety into Design and Construction*, DNFSB (hereinafter "*DNFSB Transcript*"), Dec. 7, 2005, pp. 10-11.)

Deputy Secretary Sell responded to this criticism by emphasizing the role of the ES&H Office in reviewing existing safety directives for revision and the inclusion of the ES&H Assistant Secretary on DOE's Energy Systems Acquisition Advisory Board (*DNFSB Transcript*, *supra*, p. 39). He also expressed concern about losing many of the agency's "talented professionals and engineers and safety experts" through retirement. "We have a significant strategic human capital issue facing us," Deputy Secretary Sell said (*DNFSB Transcript*, *supra*, p. 31). Nonetheless, one of the proposals (Attachment B) relies on "proactively exploring buy out and early out authority for excess staff" so that the "technical resource base is not threatened by the disproportional loss of younger staff." (*Proposed Approach for an SSA-EH Merger*, DOE's Office of Safety and Security Performance Assurance, May 19, 2006, p. 3.)

The oversight by GAO, DNFSB, and the Congress since 1985 has revealed an agency and contractors that are still not capable of integrating safety and environmental controls into their day-to-day operations. There is no evidence that DOE has performed so well that it can downgrade, diffuse, or delegate to outside contractors its environmental, safety, and health responsibilities. For example, in a recent letter to the Secretary, DNFSB wrote that the highly-touted Integrated Safety Management system that was established 10 years ago as a "new approach to integrating work and safety" had not yet fully realized the goal of achieving "operational excellence" and instilling "a sustainable safety culture." (Letter from A. J. Eggenberger to Hon. Samuel Bodman, Jan. 20, 2006.)

It would appear that this plan is an effort to appease DOE contractors, rather than an effort to strengthen important DOE duties. Over the years, contractors have complained about ES&H restrictions and tried to blame many of their budget and schedule failings on these requirements. The Nuclear Weapons Complex Infrastructure Task Force of the Secretary of Energy Advisory Board (SEAB) stated that the "multiple layers of oversight" was an obstacle to "transforming" the complex. It specifically cited DNFSB with its "quasi-regulatory influence" and suggested that safety recommendations needed to be subjected to a cost/benefit analysis with decisions "risk-informed." (*Recommendations for the Nuclear Weapons Complex of the Future*, SEAB, July 13, 2005, p. 30.) The Senate Appropriations Committee recently claimed that the Defense Science Board and the Secretary of Energy Advisory Board found that direction by headquarters ES&H staff and DNFSB to line management was a "weakness" in the ability of DOE to meet the Nation's future nuclear capabilities. (*Committee Report on 2007 Energy and Water Appropriations Bill, 2007*, Senate Rpt. 109-274, June 29, 2006, p. 146.)

Yet no one has been able to provide us with a specific example of how unnecessary health, safety, or environmental rules or oversight are hampering cleanup or weapons production. Closer reviews of DOE's projects – such as was done recently by GAO at the Hanford Waste Treatment Plant and by the Inspector General on the W76 weapon system – rarely bear out these allegations, but rather put the blame on poor project management or engineering. (*See, e.g., W76 Life Extension Project*, DOE/IG-0729, May 2006.)

The proposal would seem to give DOE contractors virtual power to write their own environmental, health, and safety regulations to the detriment of the workers and the public. Just recently, DOE abdicated its responsibility to conduct a Type B investigation after an industrial accident seriously injured two workers at Los Alamos National Laboratories. The contractor was allowed to do its own investigation. (*See,* memorandum from Thomas D'Agostino to Acting Assistant Secretary for Environment, Safety and Health, July 5, 2006, Attachment C.) It appears to be the first time that DOE has allowed a contractor to investigate its own safety violation.

Should this proposal be adopted, the entire premise of DOE self-regulation would be undermined. Under these circumstances, external regulation by the Nuclear Regulatory Commission, the Occupational Safety and Health Administration, and relevant State agencies would be more efficient and much preferable.

Because of the gravity of the proposed changes, and the possibility that legislation to correct their ill effects may be necessary, we are asking GAO to do a full review of the functioning and capabilities of DOE's Office of Environment, Safety and Health and specifically address the enclosed list of questions.

If you have any questions regarding our request, please have your staff contact Edith Holleman, Minority Counsel to the Committee on Energy and Commerce, at (202) 226-3400.

Sincerely,

John D. Dingell
Ranking Member

Bart Stupak
Ranking Member
Subcommittee on Oversight and Investigations

Sherrod Brown
Ranking Member
Subcommittee on Health

Ted Strickland
Member
Subcommittee on Health
Subcommittee on Energy and Air Quality

Attachments (4)

cc: The Honorable Joe Barton, Chairman
Committee on Energy and Commerce

The Honorable Ed Whitfield, Chairman
Subcommittee on Oversight and Investigations

The Honorable Nathan Deal, Chairman
Subcommittee on Health

The Honorable Ralph M. Hall, Chairman
Subcommittee on Energy and Air Quality

The Honorable Rick Boucher, Ranking Member
Subcommittee on Energy and Air Quality

The Honorable Samuel W. Bodman, Secretary
U.S. Department of Energy

The Honorable Clay Sell, Deputy Secretary
U.S. Department of Energy

ATTACHMENT
Letter to the Hon. David M. Walker, Comptroller General, GAO
August 15, 2006
Questions of Reps. John D. Dingell, Bart Stupak, Sherrod Brown, and Ted Strickland

1. Please describe and evaluate all of the functions now performed by the Department of Energy (DOE) Office of Environment, Safety and Health (ES&H) for their effectiveness. As part of your review, please include the effect of budget cuts on the Office.

2. Please describe in detail the Departmental concerns with the effectiveness of the current organization and any internal or external documentation that verifies those concerns. What is the basis for the proposal to eliminate the position of Assistant Secretary for Environment, Safety and Health?

3. Please review and evaluate the most current proposal for the reorganization of ES&H. Does it address any of the concerns in these areas previously identified by either the Government Accountability Office (GAO) or the Defense Nuclear Facilities Safety Board (DNFSB)? What would be the effect of eliminating an assistant secretary for ES&H on that function?

4. Please review the proposed budget for the merged organization. What percentage would be dedicated to environment, safety, and health activities? In actual dollars, would this represent a cut in the budget?

5. Please review the Department of Energy's risk assessment or cost/benefit methodology for evaluating proposed health, safety, and environmental costs. Has DOE quantified what risks are acceptable for the workers, the public, or the environment when developing its projects?

6. What are the major safety and health hazards and issues that are priorities at DOE facilities, and what actions or initiatives has DOE taken to date to address them? How will they be better addressed under the new proposal?

7. Is "excessive risk aversion" by DOE a major element in the Department's inability to meet production or clean-up schedules or to solve technical problems?

8. DNFSB has found that the Integrated Safety Management system established 10 years ago by DOE has not yet fully realized the goal of achieving both operational excellence and instilling a sustainable safety culture. Why has this program failed?

9. Have health, safety, or environmental requirements unreasonably delayed the production of pits at Los Alamos National Laboratory, or the removal of pits at Pantex? Are there any documented examples of the imposition of unnecessary health, safety, or environmental requirements?

10. The Defense Nuclear Facilities Safety Board was created by Congress to identify the nature and consequences of any significant potential threats to public health and safety at the DOE's defense nuclear facilities, to elevate such issues to the highest levels of authority, and to inform the public. Please review the role of the DNFSB in overseeing health, safety, and environmental activities. Does the DNFSB play a useful role, or does it contribute to the "risk aversion" mentality that some critics claim is dominant at DOE? If the Defense Nuclear Facilities Safety Board did not exist, who would take over its role in identifying many of the serious and systemic problems at DOE, such as the failure of its Integrated Safety Management initiative?

11. Which organization will be responsible for implementing the Worker Safety Rule under the new plan? Who will take on the duties specified in the rule for the ES&H Assistant Secretary? Who will have the responsibility to enforce and assess fines on the contractors for exposing workers to toxic chemicals or other industrial hazards?

12. The Department of Energy proposes to place independent reviews of authorization basis documents back into the line organization as part of the Central Technical Authority (CTA). Are the CTAs currently capable of providing adequate independent reviews as part of DOE's self-licensing process?

13. The Department of Energy proposes to place its nuclear safety research function in the National Nuclear Security Administration (NNSA). Does NNSA have any authority to do research or develop policy for the rest of the DOE complex?

14. Does the Office of General Counsel have the expertise to carry out the assigned environmental functions of DOE? Does 42 U.S.C. 7133(a) not require that environmental functions be placed under an assistant secretary? Does the new plan do so?

15. The proposed reorganization claims that combining safety, health, environment, and security functions into one office achieves some sort of necessary interface. There have been claims of "paralyzing deadlocks" between the two offices. Please evaluate the need for this interface, and whether it would benefit the ES&H function.

16. ES&H has been criticized for developing some policies that cannot be implemented in the field. ES&H appears, however, to have been deliberately isolated from working with health and safety people in the field. It is not permitted to do field oversight of the implementation of its policies to determine what works. Should oversight of ES&H policies in the field be returned to ES&H, or is there an overriding reason that it be part of the Office of Safety and Security Performance Assurance?

17. How effective has DOE been at implementing industrial standards as defined by organizations such as the International Standards Organization or the American Society of Mechanical Engineers?

18. GAO has closely monitored ES&H functions at DOE for many years and made many recommendations that Congress and the agency have accepted. Please provide your recommendations on how the environment, safety, and health functions of DOE can be improved, and what type of organizational structure might be more effective.

19. Based on the current proposal for reduced oversight and more reliance on outside contractors to operate with little or no health and safety oversight from the Department as proposed by NNSA, should DOE facilities should not be subject to external regulations just as other industrial facilities are?