UNITED STATES GENERAL ACCOUNTING OFFICE

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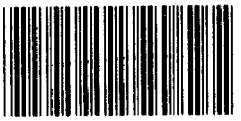

STATEMENT OF

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BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

OF THE

HOUSE COMMITTEE ON ENERGY & COMMERCE

Mr. Chairman and Members of the Subcommittee:

Thank you Mr. Chairman. I have with me today James Duffus, Associate Director, Resources, Community, and Economic Development Division, and Susan Irwin, Attorney-Adviser, Office of General Counsel. Both are very knowledgeable about the issues to be discussed today and I would like to call on them later to help in answering any questions you may have.

We appreciate the opportunity to participate in today's discussion about the Department of Energy's administration of entitlements and oil overcharge funds. For a number of years, the GAO and your Subcommittee have shared mutual concerns about the extent of DOE's commitment to distribute oil overcharge funds so as to achieve restitution to the greatest extent possible. We have differed sharply with DOE in the past about certain of its proposals to dispose of the funds which were not in accordance with its own regulations. I would like to submit a packet of some of our key opinions, written in response to specific questions you raised in your letters of November 25 and December 31, 1985, and January 24 and February 7, 1986 as an attachment to our more detailed statement submitted for the record.

There are three issues of primary concern, for purposes of this hearing, which you asked us to address today. The first issue is the propriety of the terms of a proposed Memorandum of Understanding which, as we understand it, may

form the basis of a settlement agreement in the Stripper Wells--Entitlements litigation still pending before the Courts.

We do not propose to comment on every aspect of the lengthy Memorandum of Understanding. We can, however, state unequivocally that to the extent that the proposed settlement attempts to alter procedures now prescribed in DOE's Subpart V regulations for devising appropriate distribution mechanisms where injured parties cannot be identified, the settlement provision would be improper and of no effect. Regulations cannot be altered in this informal manner, without compliance with Administrative Procedure Act requirements, including an opportunity for public participation.

By way of example, under the existing regulations, OHA must determine the appropriate disposition of undistributable funds (10 C.F.R. § 205.287(c)). The proposed settlement requires that all such crude-oil-derived funds are to be divided 50/50 by the Treasury and the states. In my opinion,

this requirement obviates OHA's discretionary authority reserved to it by regulation by improperly establishing a mandatory 50/50 split of escrow funds.

In addition, the proposed Memorandum of Understanding permits the use of a portion of the oil overcharge escrow funds to be used to pay off "winners" in the "Entitlements" Program.

The "Entitlements" Program was established by DOE to ameliorate the the inequities imposed on the marketplace as a result of regulations establishing different price ceilings for different categories of crude oil, and providing different degrees of access by various firms to the lower-cost price-controlled crude oil. The Entitlements Program was designed to spread the benefits of the price-controlled crude oil more equitably by requiring money transfers based on each refiner's access to the cheaper oil. Entitlements "losers"--i.e., refiners with greater access to low cost crude oil--were to purchase entitlements from refiners with less access to the oil--the "winners."

All of this has nothing whatsoever to do with claimants who were overcharged by oil companies who violated DOE's price and allocation regulations. It has nothing to do with restitution, the purpose for which funds from violators were received, placed in escrow, and held in trust by DOE for eventual payment to overcharged victims, or if not identifiable, to the states or to the Treasury. It would, in our view, clearly violate DOE's trust responsibilities to disburse one penny of the overcharge escrow funds to Entitlements Program "winners" unless it is specifically ordered to do so by the courts. While DOE may, of course, agree to some level of payment for the "winners" as part of a settlement agreement, it should be very clear that the entitlement "losers" must provide the funds for the payments.

The second issue is the propriety of DOE's Statement of Restitutionary Policy, and the moratorium on Subpart V crude-oil proceedings that OHA ordered on the basis of the policy statement. Both agency actions were based on "findings of

fact" in OHA's report to the Stripper Well court, findings that are now under review by the court, along with contradictory findings in an OHA draft of its report. Without awaiting the court's resolution of this question, in June 1985 DOE recommended to the court that the Stripper Well funds remain in escrow until the end of the current session of Congress, at which time the moneys would be deposited into the general fund of the Treasury. Simultaneously, OHA issued an order confirming DOE's policy and applying it to all non-Stripper Well crude oil overcharge funds pending before OHA for Subpart V refund proceedings. Since that time there has been a moratorium on all such proceedings.

In a February 7 opinion to your Subcommittee and again today we reiterate our long-held position that DOE's Subpart V regulations are mandatory. As long as they remain in effect DOE must comply with them in distributing overcharge funds. In our view, DOE cannot ignore these regulations simply because agency policy has changed in recent years. Since the regulations require OHA to institute refund proceedings, the

agency lacks authority to refuse to initiate the proceedings as it did by implementing the moratorium called for in the policy statement.

The final issue we would like to discuss briefly concerns DOE's administrative responsibilities with respect to the $2 billion in overcharge funds to be distributed to the states under the Exxon decision (United States v. Exxon. (773 F.2d 1240 (TECA 1985) cert. denied, ___U.S.___ (January 27, 1986)). We believe that DOE has the responsibility to ensure that the states use oil overcharge funds only for authorized purposes. We discussed DOE's management of such funds in our February 14, 1985 report on the $200 million distribution under section 155 of Pub. L. No. 97-377 (96 Stat. 1830, 1919 (1982)), the so-called Warner Amendment. A discussion of section 155 is pertinent here, since the district court in the Exxon case (561 F.Supp. 816 (D.D.C. 1983)) specifically ordered DOE to disburse these funds "in accordance with the procedures set forth in section 155 * * *."

Section 155(c) requires that escrow funds received by the states are to be used as if they were received under one of five designated energy conservation programs. Each of the programs requires submission to DOE of a state plan or application for assistance (or both), the provisions of which govern the use of funds received by the states under these programs. The legislative history of section 155 indicates that regulations promulgated for each of the individual programs apply as well to the section 155 funds distributed under those programs. Therefore, individual program regulations requiring monitoring, auditing, reporting and recordkeeping activities apply to the use of section 155 funds as do DOE's general assistance regulations and the enforcement authority they contain. (10 .F.R. Part 600, § 600.121).

In view of the order of the court in Exxon, quoted before, it is our view that the same requirements apply to the states' use of the Exxon funds, and that DOE has the same authority to enforce the states' compliance.

In a related question, you also asked us whether there are any legal restrictions on the states' use of interest earned on their Warner Amendment (section 155) payments, and whether these will apply to Exxon payments as well.

We think that DOE correctly informed the states that any interest accrued on section 155 funds was to be used in the same manner as was permissible for the section 155 funds themselves.

Although section 155 is silent on the question of interest, and the legislative history of the section contains nothing specifically directed to the question of interest accrued by the states pending utilization of the funds, DOE determined that it is fair to presume from the history of the amendment as a whole that the Congress recognized that the funds would be deposited in interest-bearing accounts. Since it did not require the states to return this interest to the escrow account, DOE presumed that the Congress expected the states to retain the interest, as they do with grant funds under the

Intergovernmental Cooperation Act of 1968, Pub. L. No. 90-577, 82 Stat. 1103, 31 U.S.C. § 6501 et seq.

DOE also concluded that the intent of the Congress was that the underlying consent orders be followed, and that the funds be applied only to purposes and programs likely to benefit injured parties. Since the Congress selected the programs it believed would benefit these persons, the Congress must have intended that the interest also be used only for these programs. We agree with this analysis of legislative intent, and with DOE's conclusions.

We also conclude that DOE's responsibilities for monitoring the states' use of the Exxon distribution, including any interest earned on these funds, are the same as those for the section 155 funds. In fact, considering the amount of the Exxon distribution--$2 billion--it is even more important that DOE carefully monitor the states' use of these funds to ensure compliance with the intent of the Exxon court to effect restitution by preventing any diversion of the funds to programs not specified by section 155.

In this regard, we discussed DOE's management of the section 155 (Warner Amendment) distribution in our February 14, 1985, report. We said that DOE needed to (1) ensure that the states use interest earned on the section 155 funds only for authorized purposes, and (2) provide the states with criteria for determining what documentation is needed to justify energy conservation demonstration projects.

As a result of our report, DOE requested each of the 56 states and territories to report on the status of the section 155 funds, including the use of the interest earned and the funds used for projects other than those originally reported to DOE. In their responses, 27 said that interest was being used only for section 155 programs. In contrast, however, 19 of the responses indicated that interest had been, or may have been, used for other purposes. Of the remaining 10 responses, seven reported no interest earned and three were unclear as to whether interest was earned. Of the 19 states and territories that indicated interest was used for other purposes,

--10 said they had changed, or would change, their practice so that interest would only be used for section 155 programs,

--Four were unclear about their intentions,

--Four have been using the interest for general purposes and apparently will continue to do so,

--One of the states used most of its interest for section 155 purposes, but did use a portion of the interest for legal fees in obtaining oil overcharge funds.

Concerning the documentation justifying proposed energy conservation demonstration projects, our February 1985 report discussed three such projects. These three projects, one in each of three states, with total estimated costs of $457,000, were approved by DOE as demonstrations, but, in our opinion, were not adequately documented as such. For example, one

state had a $320,000 project to demonstrate the use of a computer to regulate the heating and cooling of a state administrative building. The state's documentation for this project, however, did not describe the conservation benefits of the project, nor did it identify the amount and source of funds for evaluating and disseminating the results of the project. In its response to DOE on the status of section 155 funds, the state informed DOE that it had canceled the project after expending about $6,300.

We believe that there is an urgent need for DOE to monitor all oil overcharge fund distributions to the states, from whatever source, in the same manner as it is required to do for the basic grant programs which these funds are intended to supplement. Without such monitoring, DOE does not have a basis for ensuring that the states are appropriately using the funds.

Mr. Chairman, my colleagues and I will be very happy now to answer any questions you may have.

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