

**Statement of
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on the Reauthorization of the Defense Production Act
before the
Committee on Banking, Housing and Urban Affairs
United States Senate**

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I am Denise Swink, Acting Director of the Office of Energy Assurance at the U.S. Department of Energy. I am pleased to appear before the Committee in response to its request for testimony by the Department on the reauthorization of the Defense Production Act of 1950. The Committee's invitation letter requests the Department to address, in particular, the role of the Department of Energy in responding to crises in which Defense Production Act authorities are required.

The DOE Office of Energy Assurance is responsible for protecting critical infrastructures and key assets in the energy sector. Our office leads the effort to ensure a secure and reliable flow of energy to America's homes, businesses, industries, and critical infrastructures (e.g. telecommunications, transportation, water supply, banking and finance, manufacturing, education and public health systems). In carrying out our mission, we work closely with the Department of Homeland Security and in partnership with industry and state and local governments. The Department's energy assurance program is conducted in direct support of the President's National Strategy for Homeland Security and the President's National Energy Policy.

A comprehensive discussion of the authorities contained in the DPA and of how they might be used in responding to energy emergency situations is contained in a 1982 Department of Justice memorandum of law for the President which was submitted to the Congress in compliance with the Energy Emergency Preparedness Act of 1982 (Public Law 97-229). The memorandum's discussion of the DPA remains valid today. As the Justice Department's memorandum makes clear, whether the Defense Production Act authorities placed in the President might be useful in responding to energy crises would be highly fact-dependent. However, we do believe that a number of the Act's provisions could be potentially useful in addressing energy needs, and I will address their past use by the Department and ways in which the authorities could be useful in the future.

Title I of the Defense Production Act contains two separate "priority contracting" provisions authorizing the President to require performance on a priority basis of contracts or orders in certain circumstances. The Secretary of Energy has been delegated authority by the President to exercise the Title I priority contracting authorities, in Executive Order Numbers 11790 and 12919. The first provision, section 101(a) of Title I, deals with priority contracting to "promote the national defense." Under section 101(a), the Secretary may require performance on a priority basis of contracts for energy supplies that the Secretary deems "necessary or appropriate to promote the national defense." This authority could be used, for example, to require the acceptance of and priority performance under contracts relating to production, delivery or refining of petroleum products or other forms of energy, including natural gas, to meet the energy needs of the Department of Defense and its

contractors. It also could be used to facilitate transportation of energy supplies to meet national defense needs, for example, by requiring pipelines, marine terminals, and other facilities to perform energy transport contracts necessary to meet the priority needs of the Defense Department and its contractors.

In determining what the national defense requires, it is clear the Secretary may consider the potential impact of shortages of energy supplies. In the Energy Security Act of 1980, Congress specifically designated energy as a “strategic and critical material” within the meaning of the Defense Production Act and also added language to the DPA Declaration of Policy that establishes a link between assuring the availability of energy supplies and maintaining defense preparedness. The Defense Production Act’s Declaration of Policy states:

[I]n order to ensure national defense preparedness, which is essential to national security, it is necessary and appropriate to assure the availability of domestic energy supplies for national defense needs.

The second priority contracting provision in Title I of the Defense Production Act, section 101(c), is linked to facilitating projects that maximize domestic energy supplies rather than to meeting the needs of the national defense. Section 101(c) authorizes the Department of Energy to require priority performance of contracts for goods and services for projects which

would maximize domestic energy supplies, if the Secretaries of Energy and Commerce make certain findings, including that the good or service is scarce and critical and essential to maximizing domestic energy supplies. If world circumstances were such that the President directed a drawdown of the Strategic Petroleum Reserve, and coincident with that direction from the President there was a significant breakdown in the Strategic Petroleum Reserve facilities, that would be the type of circumstance where, if it were urgent to replace scarce and backlogged specialized pumps and other apparatus, the Department could rely upon section 101(c) to bring the facility back online in an operational sense as promptly as possible. Absent the Defense Production Act, it would be exceedingly difficult to persuade vendors to put our order at the head of the line for fear of third-party contract liability that they otherwise might expose themselves to, even if they were otherwise willing to cooperate with the Department in the interests of the country.

Section 101(c) also might be used alone, or in tandem with section 101(a), to assist in restoring critical energy infrastructures following widespread terrorist attacks or a natural disaster, for example, to assist electric utilities, oil companies or other energy companies in obtaining equipment needed to repair damaged facilities, or to provide fuel oil or natural gas to electric utilities to ensure continued supply of electricity.

Section 101(c) was used in the late 1970's and again in the 1980's and early 1990's to facilitate petroleum production development of the Alaskan North Slope. The Department also relied on section 101(c), as well as 101(a), as a complement to the emergency provisions

of the Natural Gas Policy Act, in its January 2001 orders, directed by former President Clinton, to Pacific Gas and Electric Company and a number of natural gas suppliers to assure the continued supply of natural gas necessary for continued availability of electric service in the central and northern regions of California.

A third Defense Production Act provision which has been used in the past to address energy supply problems is section 708, which provides a limited antitrust defense and breach of contract protection for industry participating in voluntary agreements and plans of action “to help provide for the defense of the United States through the development of preparedness programs and the expansion of productive capacity and supply beyond levels needed to meet essential civilian demand in the United States.” This provision had its roots in our World War II experience and was an important vehicle for gaining the help of the oil industry during and after the Korean War. For example, in 1951-52, a voluntary agreement under section 708 was used to protect a group of oil companies which agreed to provide heating oil to redress a winter shortfall in New England. Later, section 708 was used for the first voluntary agreement of U.S. oil companies which had agreed to participate in the International Energy Agency’s standby emergency preparedness programs. Subsequently, in 1975 Congress enacted very similar voluntary agreement authority in section 251 of the Energy Policy and Conservation Act as the vehicle for U.S. oil company participation in the energy emergency preparedness activities of the International Energy Agency.

In the future, in the event of widespread damage to energy production or delivery systems

caused by acts of terrorism or natural disasters, the DPA's section 708 voluntary agreement authority might be used in establishing a voluntary agreement of energy service companies to coordinate the planning of the restoration of the damaged facilities.

To facilitate communications among stakeholders and to broaden our partnerships with the private sector, we have established Information Sharing and Analysis Centers (ISACs) among energy industry stakeholders to improve infrastructure security. We expect to confer with the ISACs on all of the authorities available to the President and to the Department that might be useful in protecting and, if necessary, restoring critical energy infrastructures.

The Secretary believes that the authorities the DPA confers on the President are important tools that should remain available to the President unimpaired to use in appropriate circumstances. Accordingly, the Department joins the rest of the Administration in supporting a five-year extension of the Defense Production Act.

This concludes my prepared statement. I will be pleased to respond to any questions the Committee may have.