



G A O

Accountability • Integrity • Reliability

United States General Accounting Office
Washington, DC 20548

B-286604

March 9, 2001

The Honorable Ken Calvert
House of Representatives

Subject: Environmental Protection Agency Awards Program

Dear Mr. Calvert:

You asked for our legal opinion regarding several issues relating to the Environmental Protection Agency's (EPA) Clean Air Excellence Awards Program. Your concerns revolve around two central questions: EPA's authority to establish the awards program and the propriety under the Federal Advisory Committee Act of the Clean Air Act Advisory Committee's participation in the new awards program.

For the reasons discussed below, we conclude that the creation and implementation of the Clean Air Excellence Awards Program is within the parameters of EPA's broad statutory authority. However, as explained below, the Clean Air Act Advisory Committee's elimination of finalists for awards violates the Federal Advisory Committee Act.

The Clean Air Act Advisory Committee and the Clean Air Awards Program

EPA chartered the Clean Air Act Advisory Committee (the Committee or CAAAC) under the Federal Advisory Committee Act in 1990 to obtain advice on issues related to implementing the Clean Air Act Amendments of 1990. *Clean Air Act Advisory Committee Home Page* (last modified September 29, 2000) <http://www.epa.gov/airprog/oar/caaac/caaactxt.html>. The Committee advises EPA on air quality, economic, technical, scientific and enforcement policy issues.

The Committee has formed several subcommittees to provide more detailed discussion and advice on a variety of technical issues. In 1999, one of the subcommittees studied the feasibility of EPA sponsoring an awards program to foster improved air quality. The Committee recommended that EPA establish an annual non-monetary awards program to recognize outstanding and innovative efforts that support progress in achieving clean air by either public or private entities. EPA agreed, and presented the first program awards in September 2000. Expenses of the

September, 2000 awards consisted primarily of the cost of vinyl covers for the computer-generated paper awards, as well as printing costs. For future award programs, the EPA indicated that it might pay for CAAAC subcommittee members' travel and per diem to attend a one-day meeting in Washington, D.C. to discuss potential award recipients.

While EPA was initiating efforts to implement the Committee's recommendation, the EPA Office of the General Counsel prepared a legal opinion addressing the scope of EPA's authority to establish award programs. EPA issued the legal opinion in January 2000, concluding that section 103 of the Clean Air Act authorized the Clean Air Excellence Awards Program (Awards Program). Given its authority under section 103 of the Clean Air Act, EPA's Office of the General Counsel viewed the purchase of award objects as a "necessary expense" properly payable from EPA's appropriation.

Soon after the issuance of the legal opinion, EPA announced the creation of the Clean Air Excellence Awards Program in the Federal Register. The Federal Register notice stated that the Committee "is establishing" the Awards Program.

"Judging will be accomplished through a screening process conducted by EPA staff, with input from outside subject experts, as needed. A workgroup of the CAAAC will conduct an addition [sic] review. The final award recommendations will be made by the CAAAC and forwarded to the EPA Assistant Administrator for Air and Radiation for a final decision. Entries will be judged using both general criteria and criteria specific to each individual category."

Clean Air Act Advisory Committee—Notice of Creation of the Clean Air Excellence Awards Program, 65 Fed. Reg. 10490 (2000).

In response to your inquiries on the propriety of the Committee establishing and implementing the Awards Program, EPA advised that the notice was inaccurate. Although the Federal Register notice had explained that the Committee would "establish" the program, EPA asserted that the Committee would not administer or have final approval for the Awards Program. EPA insisted that it had created the Awards Program, and that the Committee merely recommended its establishment.

EPA General Counsel's Opinion

EPA's January 12, 2000 General Counsel opinion noted that the so-called "necessary expense" rule permits an agency to use general appropriated funds for expenditures that are "necessary or incident to" the achievement of an agency's mission and the objectives underlying an appropriation. Legal Memorandum from Gary S. Guzy, General Counsel, EPA, to Assistant Administrators, *et al.* January 12, 2000. The EPA General Counsel viewed relevant decisions of the Comptroller General as holding that an agency may not expend appropriated funds for award objects without specific statutory authority. *Id.* at 2. EPA's General Counsel conducted his own "necessary

expense” analysis to determine whether the use of appropriated funds for the establishment and implementation of the Clean Air Excellence Awards Program is proper.

The EPA General Counsel pointed out that although EPA has specific statutory authority to make awards under several environmental statutes,¹ it does not have specific statutory authority to carry out the Clean Air Excellence Awards Program. Rather, the General Counsel concluded that sections 103(a)(1) and (2) of the Clean Air Act (CAA) (codified as 42 U.S.C. § 7403(a)(1) and (2)) provide the requisite authority for the awards program. These sections of the act provide that EPA shall establish a national research and development program for the prevention and control of air pollution. As part of this effort, EPA is authorized to “conduct, and promote the coordination and acceleration of, research, investigations, experiments, demonstrations, surveys and studies relating to the causes, effects (including health and welfare effects), extent, prevention and control of air pollution.” Also, EPA may “encourage, [and] cooperate . . . [with] air pollution control agencies and other appropriate public and private agencies, institutions, organizations, and individuals” to conduct such activities. 42 U.S.C. § 7403(a)(1) and (2). Thus, the EPA General Counsel concluded that under the “necessary expense” rule, the availability of the “encouragement and cooperation” provisions in EPA statutes gave EPA the discretion to purchase and present Clean Air Excellence Awards.

Discussion

Availability of Appropriations for Clean Air Act Excellence Award

An agency may use appropriated funds only for authorized purposes. 31 U.S.C. § 1301(a) (1994). To fund the expenses associated with the first cycle of program awards presented last September, EPA used its fiscal year 2000 lump sum appropriation for Environmental Programs and Management. Pub. L. No. 106-74, 113 Stat. 1080 (1999) (\$1.9 billion available until September 30, 2001).

Although the appropriation did not specifically provide for expenses of the Awards Program, an expenditure “is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of the function, and if it is not otherwise prohibited by law.” 66 Comp. Gen. 356 (1987). This concept is known as the “necessary expense doctrine.”

The necessary expense doctrine does not require that a given expenditure be “necessary” in the strict sense that the expenditure would be the only way to accomplish a given goal. Rather the doctrine requires only that the expenditure will contribute to accomplishing an authorized purpose of the appropriation to be

¹ See 42 U.S.C. § 13103(b)(13)(annual award program authorized by Pollution Prevention Act), 33 U.S.C. § 1361(e) (award program authorized by Clean Water Act) and 20 U.S.C. § 5507(a)(award program authorized by the National Environmental Education Act).

charged. 50 Comp. Gen. 534 (1971). We have described the concept of a “necessary expense” as a relative one, “measured not by reference to an expenditure in a vacuum, but by assessing the relationship of the expenditure to the specific appropriation to be charged.” 65 Comp. Gen. 738 (1986). Indeed, the “necessary expense” doctrine recognizes that agencies have reasonable discretion to decide how to spend their operating appropriations to satisfy their statutory duties. B-235163, Feb. 13, 1996.

Here, the expenses for the Clean Air Excellence Awards Program are reasonably related to the broad “encourage and cooperate” provision in the Clean Air Act, 42 U.S.C. § 7403(a)(1) and (2), and thus payable from its Environmental Programs and Management appropriation. EPA states that it created the Awards Program to encourage and cooperate with public and private entities in experimenting with innovative air pollution control methods that will demonstrate ways to achieve cleaner air. To facilitate this, EPA structured the Awards Program to consist of the following six award categories: (1) Clean Air Technology; (2) Community Development/Redevelopment; (3) Education/Outreach; (4) Regulatory/Policy Innovations; (5) Transportation Efficiency Innovations; and (6) Outstanding Individual Achievement Award. To ensure that the program goals are met, judges use four general criteria to review program entries: (1) the entry directly or indirectly reduces emissions of criteria pollutants, greenhouse gases, or hazardous/toxic air pollutants; (2) the entry demonstrates innovation and uniqueness; (3) the entry provides a model for others to follow; and (4) the positive outcomes from the entry are continuing/sustainable. Each of the six award categories is then reviewed using criteria specific to each category.

We agree that the nominal expenses of the recognition awards are reasonably related to the authorized function of “encouraging” public and private agencies, as well as individuals, in the conduct of clean air research and demonstrations.² We have not objected to the use of appropriated funds to cover the costs of an award that by recognizing awardees, encourages them to pursue the purposes for which the appropriation was enacted. In our view, the costs of such an award may be considered a necessary expense of the appropriation since the award helps the agency achieve the objective of the appropriation. For example, in B-31094, Jan. 11, 1943, we held that the Office of Civilian Defense could use its appropriation to purchase medals and insignia to reward civilian defense workers for heroism or distinguished service. Among the functions of the Office was to mobilize a maximum civilian effort in the prosecution of World War II and provide opportunities for civilian participation in the war program. Exec. Order No. 9134 (1942). Because the

² You expressed a concern that since section 327 of the Clean Air Act (which provides the authorization of appropriations for Clean Air Act activities) expired on September 30, 1998, EPA could not rely on the Clean Air Act as authority for its conclusions. See 42 U.S.C. § 7626. However, even though the authorization has expired, the Congress continues to appropriate funds for this purpose. It is a well-settled rule of appropriations law that when Congress has appropriated funds for a program whose authorization has expired, there is sufficient legal basis to continue the program, absent an expression of congressional intent to the contrary. 55 Comp. Gen. 289 (1975); B-171019, June 29, 1976.

Office had determined that the awards would help mobilize civilian participation in the war effort, the Office could use its appropriation to purchase the medals and insignia.

Similarly, in 17 Comp. Gen. 674 (1938), we held that the Post Office could use its accident prevention appropriation to purchase medals and insignia to award to mail truck operators who had not been involved in an accident during a one-year period. The Post Office Appropriations Act for 1938 had included funds specifically for "accident prevention." Given this authority and the Postmaster General's discretion to determine how best to prevent accidents, the Postmaster General could use the appropriation for this purpose if he decided that awarding medals and insignia would encourage accident prevention. See also B-81407, Jan. 26, 1949.

Where we have objected to the use of appropriated funds for awards, we found that the expenditure was not reasonably related to the specific appropriation to be charged. For example, in 55 Comp. Gen. 346 (1975), we objected to the U.S. Army Criminal Investigative Command's use of the Operation and Maintenance, Army appropriation to purchase paperweights and plaques as recognition awards. Significantly, the Army CIC's justification was grounded in policy arguments, not in any specific, let alone general, statutory authority. In a 1984 decision, we held that the National Park Service (NPS) could not use its operation and maintenance appropriation to reimburse an imprest fund for the purchase of trophies awarded to winners of an NPS-sponsored cross-country ski race. B-214833, Aug. 22, 1984. We went on to note, however, that if NPS had funded these recreation activities using the appropriation that was designated for expenses of recreation programs, "we would not object to a finding by the Service that these nominal awards were reasonably related to the sponsoring of the ski contests." Id.

Because EPA's awards are designed to encourage others to undertake efforts to address air pollution concerns, we have no objection to EPA using funds appropriated for its environmental programs for the nominal expenses associated with the Clean Air Excellence Awards Program.

The Clean Air Act Advisory Committee's Role in the Clean Air Excellence Award Program

Congress enacted the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, to eliminate unnecessary advisory committees, to govern the administration of those that remain, and to inform the public about their membership and activities.³ 5 U.S.C. App. 2 § 2. FACA provides that unless otherwise specified by statute or presidential directive, advisory committees shall be used solely for advisory functions. 5 U.S.C. App. 2 § 9(b).

³ Michael H. Cardozo, "The Federal Advisory Committee Act in Operation," 33 Admin. L. Rev. 1, 10 (1981).

EPA established the Clean Air Act Advisory Committee in 1990 to provide EPA with high level policy advice on efficient and cost effective ways to implement the Clean Air Act Amendments of 1990. As noted above, a CAAAC subcommittee developed the proposal for an annual Awards Program to encourage and promote innovative programs to reduce air pollution. The full committee then recommended that the EPA establish the program. EPA agreed to do so.

While CAAAC provides advice to EPA officials to help them to choose among alternative applications, the CAAAC also plays an operational role in the judging process. According to an EPA official, for the 1999 judging process, EPA staff reviewed the initial applications and reduced the number by approximately 50 percent. A CAAAC review team, composed of five members, then eliminated a number of the remaining applications. EPA's Assistant Administrator made the final selection of awardees from the applicants remaining after CAAAC's review and elimination of applicants.

In our view, when the five-member CAAAC team eliminated some of the applicants, it performed an operational activity rather than offering advice to government officials on the applicants' merits. While in one sense a fine point, such activities reflect an improper delegation by EPA of operational responsibilities to private individuals who are not accountable to the public. EPA should modify the program procedures to ensure that the CAAAC does not make decisions but only advises EPA officials regarding the selection of applicants.

Award Program Criteria

You note in your letter that EPA includes in its criteria for determining the winners of Clean Air Excellence Awards any entry that reduces, among other pollutants, so-called "greenhouse gases." You mention that there is considerable debate about whether the Clean Air Act includes "greenhouse gases" and whether or not EPA has the authority to regulate one such gas, carbon dioxide. In this regard, you point out that the EPA General Counsel determined that it was within the agency's authority to regulate carbon dioxide, even though EPA did not act at the time to exercise this authority. Legal Memorandum from Jonathan Z. Cannon, General Counsel, EPA, to Carol M. Browner, April 10, 1998.⁴ Due to these factors, you ask whether the inclusion of reduction of "greenhouse gases" should legitimately be part of the criteria for judging winners of Clean Air Excellence Awards.

EPA's position is that it has the authority under the "encourage and cooperate" provisions in 42 U.S.C. § 7403 to include "greenhouse gases" as one of the criteria.

⁴ You state that EPA has not acted to regulate carbon dioxide because of the Knollenberg limitation in EPA's appropriation acts which prohibits the use of appropriated funds to propose or issue rules or regulations to implement, or prepare to implement, the Kyoto Protocol. See, e.g. Pub. L. No. 106-74, 113 Stat. 1080 (1999).

This allows a "broad application to actions [under the Awards Program] that will reduce emissions of criteria pollutants, greenhouse gases or hazardous/toxic air pollutants."

The Clean Air Act defines the term "air pollutant" as:

"any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term 'air pollutant' is used."

42 U.S.C. § 7602(g).

The underlying question of what an air pollutant is under the Clean Air Act's definition and whether "greenhouse gases" qualify as such for purposes of EPA regulation under the Clean Air Act is, as you point out, a complex and controversial question. However, this Office has consistently honored the Supreme Court's admonition that an agency's interpretation of a statute that it is responsible for administering is entitled to deference. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844 (1984); B-218497.2, Oct. 22, 1991. Such agency interpretations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron at 844. Thus, with due respect to our role in assessing the availability of EPA's appropriations to fund the Awards Program, and that of EPA in making the technical and complex judgments required to implement the Clean Air Act, we are reluctant to question EPA's determination that "greenhouse gases" qualify as an "air pollutant" and accordingly should not be one of the criteria. Accordingly, deferring to EPA's judgment of what is an "air pollutant," we would not object to its decision to include "greenhouse gases" as one of the criteria for purposes of the Clean Air Act Awards program.

We hope the foregoing is helpful to you.

Sincerely yours,



Anthony H. Gamboa
Acting General Counsel