



United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-274787

October 1, 1996

The Honorable Don Young
Chairman, Committee on Resources
House of Representatives

Dear Mr. Chairman:

The attached legal memorandum responds to your request for our assistance in determining whether funds disbursed to The Nature Conservancy (TNC) by the National Oceanic and Atmospheric Administration (NOAA) under cooperative agreement award number NA37OM0122 and by the National Fish and Wildlife Foundation (NFWF) under grant number 94-013 have been used appropriately. These awards provided funds to TNC to promote public awareness and support for the Florida Keys National Marine Sanctuary. In conjunction with this review, as agreed with your staff, we have also examined TNC's compliance with record-keeping requirements under these awards, and the monitoring of TNC's compliance with the terms of the awards by NOAA and NFWF.

In responding to this request, we analyzed documents relating to the NOAA and NFWF awards provided to us by the Committee, by TNC, and by NOAA and NFWF. We also interviewed a number of individuals who we believed could provide relevant information, including employees and former employees of TNC, NOAA, and NFWF, and obtained the official views of TNC, NOAA and NFWF on the issues raised.

As discussed in the enclosed legal memorandum, we conclude that costs associated with certain activities engaged in during the course of the NOAA award by a TNC Public Affairs Manager whose salary was paid in part by the award constitute lobbying costs that are not allowed to be charged to federal awards under Office of Management and Budget (OMB) Circular A-122. These activities included an attempt to prevent a local referendum on the Florida Keys National Marine Sanctuary Act and attempts to influence federal and state legislation. The only contemporaneous report on the work done by the employee under the NOAA award indicates that costs associated with certain of these unallowable activities were being charged to the federal award. However, as long as TNC can now establish

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that it had allowable costs under the award totaling the full amount of the awarded funds, it is not required to reimburse NOAA for the unallowable costs.

With respect to the NFWF award, we found that a TNC employee whose salary was funded by the award and who was supervised by the Public Affairs Manager, engaged in grassroots lobbying, the costs of which are not allowable under OMB Circular A-122. While we cannot determine the specific amount expended on the unallowable lobbying activity, it does appear to have been small and commingled with proper expenditures so as to make the recovery of these funds impractical.

We also found, with respect to the NOAA award, that TNC did not comply with certain relevant record-keeping requirements. Further, we found that NOAA did not adequately monitor TNC's activities or its compliance with the terms of the award during the award period.

Finally, with respect to NFWF's monitoring of the TNC grant, we conclude that incomplete reporting by TNC made detailed monitoring by NFWF very difficult.

We trust that this is responsive to your request.

Sincerely yours,



Robert P. Murphy
General Counsel

Enclosure

LEGAL MEMORANDUM
Unallowable Expenditure of Federal Funds for Lobbying Activities
Under OMB Circular A-122

This legal memorandum addresses whether funds disbursed to The Nature Conservancy (TNC) by the National Oceanic and Atmospheric Administration (NOAA) under cooperative agreement award number NA370M0122 and by the National Fish and Wildlife Foundation (NFWF) under grant number 94-013 were improperly expended for lobbying activities in violation of Office of Management and Budget Circular A-122. It also examines TNC's compliance with recordkeeping requirements under these awards and monitoring of TNC's compliance with the terms of the awards by NOAA and NFWF.

BACKGROUND

The federal financial assistance awards at issue here provided funding for The Nature Conservancy's Florida Keys Public Awareness Program. NOAA Award number NA370M0122, dated July 16, 1993, provided \$16,000 (\$15,000 for salary and \$1,000 for benefits) for a "Public Affairs Manager" for the Public Awareness Program during the period June 1, 1993 through February 28, 1994.¹ The Public Affairs Manager's annual salary during this time period was \$30,800. TNC paid the remainder of his salary.² The Public Affairs Manager's job description required him to develop a comprehensive program to build an effective constituency for The Nature Conservancy's conservation objectives in the Florida Keys.

NOAA provided funding for the TNC Public Affairs Manager under its National Marine Sanctuaries Program. The purposes of the National Marine Sanctuaries Program are, among other things, to enhance public awareness, understanding, appreciation and wise use of the marine environment. 16 U.S.C. §1431(b)(4). According to NOAA, the TNC Public Affairs Manager was funded by NOAA to promote public awareness and appreciation for the Florida Keys National Marine Sanctuary, which was established by Congress in 1990. Florida Keys National Marine Sanctuary and Protection Act, Pub. L. No. 101-605, 104 Stat. 3089 (1990).

¹NOAA Award number NA370M0122 also included \$28,100 for a Cooperative Volunteer and Outreach Program. As agreed with your staff, we have focused our review exclusively on the Public Affairs Manager portion of the award.

²Although TNC paid part of the Public Affairs Manager's salary during the award period, the award agreement did not require it to do so; thus, the award was not a "cost sharing" or "matching fund" agreement.

Close to the end of the time period funded by the NOAA award, The Nature Conservancy obtained grant number 94-013, dated December 23, 1993, from the National Fish and Wildlife Foundation³ for the Florida Keys Public Awareness Program. The initial grant period, December 1, 1993 through November 30, 1994, was eventually extended, on December 5, 1994 and March 29, 1995, through March 31, 1995.⁴ The TNC Public Affairs Manager was named as the designated project officer. The purposes of the grant were to:

"1) assure that Florida Keys residents and tourists have exposure to current conservation information and opportunities relating to the Florida Keys ecosystem, including the reef track and Florida Bay; and 2) work with local communities, non-profits, businesses, individuals and governmental entities to develop support for the Florida Keys National Marine Sanctuary"

NFWF provided \$25,000 in federal "matching" funds for salaries and benefits under the grant. The Nature Conservancy raised \$50,000 in "challenge" funds from outside sources, to make a total grant of \$75,000.

It is the costs for activities of the former TNC Public Affairs Manager under the NOAA award and for an activity of a former TNC employee supervised by the Public Affairs Manager under the NFWF award that are the subject of this review.

LOBBYING RESTRICTIONS IN CIRCULAR A-122

Both the NOAA cooperative agreement and the NFWF grant agreement explicitly require compliance with Office of Management and Budget Circular A-122, "Cost Principles for Nonprofit Organizations."⁵ Circular A-122 establishes uniform rules for determining whether costs incurred by nonprofit organizations under federal grants and cooperative agreements can be recovered from the federal government.

³The National Fish and Wildlife Foundation is a charitable and nonprofit corporation established by Congress. National Fish and Wildlife Foundation Establishment Act, Pub. L. No. 98-244, 98 Stat. 107 (1984). Among its purposes is to undertake activities that will further conservation of fish, wildlife and plant resources. 16 U.S.C. § 3701(b)(2). NFWF receives federal funds under the Department of Interior appropriation. It is authorized to use these funds to match contributions made to the Foundation by nonfederal entities. 16 U.S.C. § 3709.

⁴No additional funds were provided in these extensions.

⁵Circular A-122, Cost Principles for Nonprofit Organizations, 45 Fed. Reg. 46022 (July 8, 1980).

Paragraph B21 of Attachment B to Circular A-122 contains lobbying restrictions.³ It defines five categories of lobbying activities that are unallowable for reimbursement. These categories include: (1) attempts to influence the outcomes of elections or referenda; (2) support of entities such as campaign organizations and political action committees; (3) direct lobbying of Congress and state legislatures to influence legislation; (4) grassroots lobbying; and (5) legislative liaison activities.

The Circular A-122 lobbying restrictions were promulgated in order to establish comprehensive, government-wide cost principles to ensure that nonprofit recipients of federal financial assistance awards do not use appropriated funds for lobbying activities.⁷ These lobbying restrictions were imposed on nonprofit award recipients in order to effectuate for these entities the longstanding policy of the federal government that federal funds should not be used for lobbying purposes.⁸ This policy has been embodied in both civil⁹ and criminal laws¹⁰ restricting the use of appropriated funds for lobbying purposes. The lobbying restrictions of Circular A-122 also serve to clarify the standards for determining which activities by nonprofit award recipients constitute unallowable lobbying, so that nonprofit entities know in advance what is allowable, and so that federal agencies may avoid being in violation, albeit indirectly, of anti-lobbying appropriations riders.¹¹

³Costs Principles for Nonprofit Organizations: Lobbying, 49 Fed. Reg. 18260 (April 27, 1984).

⁷49 Fed. Reg. at 18262.

⁸See *id.* at 18264.

⁹E.g. the appropriation from which the NOAA funds at issue here were awarded, Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, § 601, 106 Stat. 1828, 1872 (1992) ("No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress") and the appropriation from which the NFWF funds at issue here were awarded, Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, § 303, 107 Stat. 1379, 1415 (1993) ("No part of any appropriation contained in this Act shall be available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which congressional action is not complete.")

¹⁰18 U.S.C. § 1913.

¹¹See 49 Fed. Reg. at 18263-64.

NOAA ACTIVITIES

While many of the Public Affairs Manager's activities during the time period of the NOAA award appear to have been consistent with the purpose of the award, certain activities raised questions concerning TNC's compliance with the lobbying restrictions of Circular A-122. As discussed more fully below, TNC's Public Affairs Manager did not segregate his time during the period of the NOAA award between work done for NOAA and work done for TNC. Because the available employee time records do not allow us to distinguish between activities funded with federal money and activities funded with TNC money, we consider here all activities engaged in by the Public Affairs Manager during the NOAA award period.

In three respects, discussed below, we conclude that costs associated with activities of the then-Public Affairs Manager constitute lobbying costs that are not allowed to be charged to the award under Circular A-122. In two other respects, we conclude that costs did not constitute unallowable lobbying costs.¹²

Opposing Referendum

The then-TNC Public Affairs Manager's NOAA Performance Report for the Quarter Ending September 30, 1993 states that the Public Affairs Manager:

Developed and directed plan to counter opposition's push for a county-wide referendum against the establishment of the Sanctuary. Recruited local residents to speak out against referendum at two Board of County Commissioners hearings. Organized planning conference call with members of the Center for Marine Conservation, the Wilderness Society, and the Nature Conservancy to discuss plan. Plan was successful in blocking referendum (a 3-2 vote), and generated many

¹²The first instance where we found no unallowable lobbying was in connection with the then-Public Affairs Manager's statement on a performance report to NOAA that he drafted certain Congressional testimony and assisted in the preparation of other Congressional testimony. We concluded that this activity did not constitute unallowable lobbying because we found that the only testimony that even arguably advocated legislation was not drafted by the Public Affairs Manager. The other instance which we found not to constitute unallowable lobbying was a July 22, 1993 Memorandum from the Public Affairs Manager to a staff member of the Subcommittee on Oversight and Investigations of the then-House Committee on Natural Resources. Although the memorandum argued that a provision of federal law should be amended, the memorandum falls within an exception in Circular A-122 for technical and factual presentations of information prepared in response to a documented request from a Member or cognizant staff person.

positive articles and editorials using many of the messages discussed [sic] in plan."

The Public Affairs Manager told us that the "plan" he developed with the other groups listed in the performance report consisted of a number of tasks, most of which he does not recall at this time. The one task he could recall was to contact local residents to urge them to speak in opposition to the referendum at two Board of County Commissioners meetings. The Public Affairs Manager can only recall now the name of one person whom he contacted to speak, but this individual denies that the Public Affairs Manager ever asked him to speak against the referendum. Contacting individuals to speak is the only activity the Public Affairs Manager recalls having engaged in to oppose the referendum. However, the 'plan' to oppose the referendum consisted of a number of tasks, of which this was only one.

The Monroe County Board of County Commissioners in the Florida Keys considered whether to hold the referendum on September 28, 1993. A motion was made to adopt a resolution providing for a vote in the November 1994 election on the following statement:

"The Congress of the United States shall be urged to rescind the Florida Keys National Marine Sanctuary Act, with all potential funding for that act to be diverted to the restoration of quality waters in Florida Bay."

The resolution further stated that Congress would be asked to suspend immediately the implementation of the Florida Keys National Marine Sanctuary Act pending the outcome of the referendum. Finally, the resolution instructed the County Clerk to send copies of the resolution to the President and Vice President of the United States, the Secretary of Commerce, the Governor of Florida and state and federal legislators. The motion to adopt the resolution failed.

The principal question here is whether costs associated with the TNC Public Affairs Manager's activities with respect to this proposed referendum were unallowable lobbying costs under Circular A-122. Under paragraph B21.a.(1) of Circular A-122, costs are unallowable if they are associated with

"[a]ttempts to influence the outcomes of any Federal, State, or local election, referendum, initiative, or similar procedure, through in kind or cash contributions, endorsements, publicity, or similar activity;"¹³

The preamble to the Circular A-122 lobbying provisions states that the phrase "attempt to" "requires intent or conduct with the reasonably foreseeable consequence" of

¹³49 Fed. Reg. at 18276.

producing a particular action. 49 Fed. Reg. at 18269. Paragraph B21.a.(1) provides that the costs for attempts to influence the outcome of a referendum are unallowable if conducted "through in kind or cash contributions, endorsements, publicity or similar activity."

Here, the Public Affairs Manager's admission that he developed and directed a plan to counter the push for a referendum clearly demonstrates intent to prevent the referendum from occurring. We also believe that the actions he documented in his performance report—recruiting local residents to speak against the referendum, which, along with the rest of the "plan" generated articles and editorials—meet the terms of paragraph B21.a.(1). Plainly, these activities were undertaken with the intent of preventing the referendum from occurring. The activities can fairly be characterized as negative endorsement or publicity.

The Nature Conservancy raises a question of whether the fact that these activities were not, in a literal sense, attempts to influence the outcome of the referendum, but rather, an effort to prevent the referendum from taking place at all, renders the costs associated with these activities allowable, not unallowable, costs. As discussed below, we are persuaded that these costs are unallowable under Circular A-122.

The Nature Conservancy argues that the Public Affairs Manager's efforts were not an attempt to influence the outcome of a referendum because only when a matter is placed on the ballot in an election does the matter become a referendum. There is no discussion in the lobbying provisions of Circular A-122 of the point in the referendum process at which this prohibition becomes operative. However, regulations under the Internal Revenue Code, from which this provision was derived, provide some guidance.

Paragraph B.21.a.(1) was derived from two sources in the Internal Revenue Code. 48 Fed. Reg. at 50870 (Nov. 3, 1983). "[I]nterven[ing] in any political campaign on behalf of any candidate for public office" is prohibited by 26 U.S.C. § 501(c)(3). In addition, for purposes of defining "influencing legislation," the Internal Revenue Code defines "legislation" to include "action with respect to Acts, bills, resolutions or similar items . . . by the public in a referendum, initiative, constitutional amendment, or similar procedure." 26 U.S.C. § 4911(e)(2).

The Internal Revenue Code regulations provide that the lobbying communication used for "influencing legislation" must refer to "specific legislation,"¹⁴ which is defined, in part, as follows:

¹⁴26 C.F.R. § 56.4911-2(b).

"In the case of a referendum, ballot initiative, constitutional amendment, or other measure that is placed on the ballot by petitions signed by a required number or percentage of voters, an item becomes "specific legislation" when the petition is first circulated."¹⁵

Thus, under the Internal Revenue Code regulations, one can influence a referendum even before it is put on the ballot. Similarly, here, we believe efforts to prevent a referendum from occurring in the first place—through, among other things, the Public Affairs Manager's "plan" to achieve that goal—constitute an "attempt[]" to influence the outcome[]" of a referendum. Accordingly, costs associated with the TNC Public Affairs Manager's activities in attempting to prevent the referendum from occurring were unallowable lobbying costs under Circular A-122 B21a.(1).¹⁶

Contacts with Florida State Senator

A September 8, 1993 document provided to us by The Nature Conservancy from the then-TNC Public Affairs Manager to "WQJAG [Water Quality Joint Action Group]"¹⁷ Members' advised the group that a Florida State Senator had agreed to attend their September 29th meeting. The document further states that the Senator:

¹⁵26 C.F.R. § 56.4911(d)(1)(ii).

¹⁶The legal opinion submitted by The Nature Conservancy characterizes the Public Affairs Manager's actions as an attempt to influence local legislators. The legal opinion correctly points out that influencing local legislators concerning local legislation is not in itself proscribed by Circular A-122. However, the sorts of local lobbying Circular A-122 seeks to protect are "contacts with local officials that are vital to carrying out grants and contracts—for example, obtaining zoning changes, police protection or permits." Proposed Revision of Circular A-122: Cost Principles for Nonprofit Organizations; Lobbying and Related Activities, 48 Fed. Reg. 50860, 50865 (1983). Here, the "legislation" involved does not concern a local matter such as zoning, but instead involves a national issue of whether federal law should be amended. Moreover, even if Circular A-122 does not per se prohibit attempts to influence local legislators concerning local legislation, we believe Circular A-122 does proscribe such efforts if they constitute the means by which the outcome of a referendum is influenced.

¹⁷The Water Quality Joint Action Group consisted of organizations in the Keys that were attempting to preserve the ecosystem and restore habitats in Florida Bay and the Keys by restoring fresh water flows from the Everglades and eliminating local sources of pollution. TNC's Public Affairs Manager was coordinator of this group.

"was recently appointed Chairman of the Community Affairs Committee. We need this committee's support for land acquisition in the head-waters of the Taylor Slough."

The Public Affairs Manager told us that the quoted portion of the September 8, 1993 document refers to potential state legislation.

According to the Public Affairs Manager, prior to meeting with the Senator, he did not know the Senator's position concerning public acquisition of lands in the head-waters of the Taylor Slough. He also told us that he stated the Water Quality Joint Action Group's position favoring such land acquisition at his meetings with the Senator. The Public Affairs Manager's TNC supervisor confirmed that he had done so, as did the Senator. In fact, according to the Senator, the Public Affairs Manager expressed his support for public land acquisition and discussed potential state legislation to enable such land acquisition. Shortly after these meetings, on February 8, 1994, the State Senator co-sponsored the Florida Bay Bill, which authorized the expenditure of up to \$25 million in state funds for the purchase of these lands. This legislation was signed into law on May 3, 1994.¹⁵

As discussed above, under Circular A-122, costs are unallowable if associated with "[a]ny attempt to influence . . . [t]he introduction of Federal or state legislation . . . through communication with any member or employee of the Congress or state legislature . . ." Circular A-122, B21.a.(3), 49 Fed. Reg. at 18276. As noted earlier, according to the preamble to the Circular A-122 lobbying provisions, the phrase "attempt to" means "intent or conduct with the reasonably foreseeable consequence of initiating legislative action" 49 Fed. Reg. at 18269.

In our view, the Public Affairs Manager's actions setting up a meeting with an incoming Chair of the state legislative committee with jurisdiction over the relevant land acquisition, with the express purpose of gaining that Committee's support, and communicating his group's position favoring acquisition of public lands through state legislation to the State Senator who later co-sponsored legislation to acquire the lands, leaves little doubt that the Public Affairs Manager engaged in "conduct with the reasonably foreseeable consequence of initiating legislative action" under Circular A-122. In these circumstances, we conclude that costs associated with the Public Affairs Manager's contacts with the State Senator concerning public acquisition of lands in the head-waters of the Taylor Slough constituted attempts to influence the introduction of state legislation and were unallowable lobbying costs under Circular A-122.

¹⁵1994 Fla. Laws ch. 94-115, §§ 6, 7.

Letter to U.S. Representative

On December 16, 1993, the then-TNC Public Affairs Manager wrote a letter to a United States Representative from Florida on behalf of the member organizations of the Water Quality Joint Action Group, one of which was TNC. The letter stated that that day's Miami Herald had characterized the Congressman as having changed his position on the public acquisition of land in the headwaters of Taylor Slough, which the writer viewed as critical to the restoration of Florida Bay.

The Miami Herald article referred to in the letter stated that during the previous month the entire Florida congressional delegation, including the Congressman to whom the TNC letter was written, had supported a bill that passed the House and that provided \$17.4 million to assist in the purchase of three pieces of Everglades land, including an area called the Eight-and-One Half Square-Mile Area.¹⁹ However, according to the article, three members of Congress, including the Representative to whom the TNC letter was written, no longer supported that pending proposal because of public opposition from residents of the Eight-and-One Half Square-Mile Area.²⁰

The Public Affairs Manager's letter requested a clarification of the Congressman's position, stating, "We know you have been supportive of efforts to restore Florida Bay. We hope your commitment to this issue remains firm." Finally, the letter recommended that the Congressman attend that night's Army Corps of Engineers public hearing on the Everglades ecosystem "in order to clear up any misinformation" about his position.

That night, according to a news article, an aide to the Representative read a letter at the Army Corps of Engineers meeting to clarify the Congressman's position, stating that the Representative had not changed his position that the land needed to be bought.

In our view, costs associated with the preparation of the TNC Public Affairs Manager's December 16, 1993 letter to the Congressman are unallowable under Circular A-122, Paragraph B21a.(3). That paragraph declares unallowable the payment of costs associated with "[a]ny attempt to influence . . . the enactment or modification or any pending Federal . . . legislation through communication with any member or employee of the Congress."

¹⁹Heather Dewar, Three Lawmakers Back Glades Land Buyout, Miami Herald, December 16, 1993, at 1B.

²⁰Id.

Here, the Public Affairs Manager's letter, urging the Congressman to remain firm in his commitment to support the legislation on the purchase of Everglades land, was plainly an attempt to influence the enactment of pending federal legislation. The fact that the legislation had already passed the House of Representatives, where the Congressman sat, did not thereby render those costs allowable. The legislation, which later passed the Senate and was signed into law,²¹ was still pending. Therefore, the costs are unallowable under OMB Circular A-122.²²

NFWF ACTIVITIES

With respect to the National Fish and Wildlife Foundation grant to The Nature Conservancy, grant number 94-013, we believe that the costs associated with one activity are unallowable lobbying costs under Circular A-122. In our view, this activity also constituted a violation of a provision of the grant agreement restricting the use of grant funds for political activities.

The activity in question was a letter-writing campaign conducted by a former TNC employee under the supervision of the then-Public Affairs Manager. All of this employee's salary was paid by the NFWF grant during her employment with TNC from January 24, 1994 through May 20, 1994. The letter-writing packet was sent to pro-environment persons and groups. The cover letter to the campaign's letter-writing packet stated, "it is vitally important that our elected officials receive pro-sanctuary

²¹Everglades National Park Protection and Expansion Act of 1989, Amendment, Pub. L. No. 103-219, 108 Stat. 98 (1994).

²²Nor does the fact that the legislation was not expressly named in the Public Affairs Manager's letter transform the costs of preparing the letter into allowable costs. The OMB Circular provision is derived from two sources: the lobbying restriction formerly contained in the Treasury, Postal Service and General Government Appropriations Act and the Internal Revenue Code definition of "influencing legislation," at 26 C.F.R. § 4911(d)(1)(B), 48 Fed. Reg. at 50870. Under the appropriations act and the Internal Revenue Service's interpretations of the Internal Revenue Code definition of "influencing legislation," the determination whether a communication is an attempt to influence legislation does not turn on whether the legislation is identified by name. Rather, if the circumstances would allow the legislator reasonably to infer that the communication refers to legislation then pending, that will be enough to make out a violation. See B-192746, March 7, 1979; B-271004, March 20, 1996; 26 C.F.R. § 56.4911-2(b); 26 C.F.R. § 56.4911-2(b)(4)(B) (Example 1). Under the circumstances presented here, the Congressman who, less than a month earlier, had helped obtain House passage of legislation authorizing the use of federal funds for the purchase of the lands referred to in the Public Affairs Manager's letter, plainly could infer that he was being asked to remain firm in his commitment to this still pending legislation.

mail at this time.' Another document in the letter-writing packet discussing guidelines for the letters informed letter-writers that one of the goals of the campaign was "to tell your elected officials that you support the Sanctuary and want additional funds allocated to the program."

A sample letter in the packet stated, "I support the Florida Keys National Marine Sanctuary and urge additional funding to the program." The sample letter was addressed to the Secretary of Commerce and contained "cc's" to the Governor of Florida, the two U.S. Senators from Florida, the U.S. Representative from the Florida Keys, a State Senator, a State Representative, and a Sanctuary Advisory Council member. Another document in the letter-writing packet prepared and signed by the TNC employee provided the address of the addressee and the "cc's" and stated, "Stop! Save time and let me be your secretary. Just send me your original letter [sic] and I'll copy and mail them for you."

The documents provided to us by TNC contain several copies of letters patterned after the sample letter and sent to the addressee and the "cc's." The TNC documents also contain a response to one of the letters from one of the officials who was "cc'ed," a U.S. Representative from Florida. It states, in part:

"I advocated on behalf of funding for the Sanctuary last year and am doing the same again this year. I believe funding for the Water Quality Protection Program of the Marine Sanctuary is essential. Last year this 3 million dollar program was allotted only \$185,000 in the Environmental Protection Agency's budget. I plan to work hard to make sure the program is fully funded for 1995."

This letter-writing campaign began around February 25, 1994, shortly after the President's budget request for fiscal year 1995 was transmitted to Congress on February 7, 1994.²³ The budget request contained a proposal for a 31 percent increase for NOAA over 1994 for the designation and operation of national marine sanctuaries.²⁴ In addition, the budget requested funding for water quality protection by the Environmental Protection Agency in the Florida Keys National Marine Sanctuary.²⁵ The TNC employee who conducted the letter-writing campaign told us that the part of her sample letter requesting additional funding for the Sanctuary referred to the appropriations under consideration at the time in Congress.

²³Budget of the United States, Fiscal Year 1995, Feb. 7, 1994.

²⁴Id. at 141.

²⁵Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1995: Hearings Before a Subcommittee of Appropriations, 103rd Cong., 2d Sess. 775 (1994).

We believe that costs for this letter-writing campaign are unallowable grassroots lobbying costs under the terms of Circular A-122, Paragraph B21a.(4). That provision defines as unallowable:

"[a]ny attempt to influence: (i) [t]he introduction of Federal or state legislation; or (ii) [t]he enactment or modification of any pending Federal or state legislation by preparing, distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fundraising drive, lobbying campaign or letter writing or telephone campaign"

Here, there was an admitted attempt to influence the enactment of federal appropriations legislation by urging members of the public to participate in a letter-writing campaign.²⁵ The terms of section B21a.(4) make costs associated with this activity unallowable. As discussed earlier, the fact that the appropriations legislation was not explicitly named does not make costs for the activity allowable.²⁷

In our view, this grassroots lobbying campaign also violated a condition of the grant agreement which prohibited federal matching funds provided under the grant from being used "to support lobbying activities—defined as attempting to persuade members of any legislature (city, state, or U.S.) to enact legislation favorable to grantee's cause"

There are no records available that would allow us to determine how much time the TNC employee spent on the grassroots lobbying campaign. In a matching fund grant such as this one, the costs paid by private funds, as well as costs paid by federal

²⁶A legal opinion submitted by The Nature Conservancy argues that it is not reasonable to assume that the organizer of the letter-writing campaign intended to try to influence federal legislation by merely requesting that copies be sent to Congressmen, because, according to the opinion, "Congressmen want to be honored and courted." We cannot agree with this argument. Sending a letter that seeks legislative change as a "cc" is no less an attempt to influence legislative change than addressing it directly to the recipient. Indeed, the fact that one of the "cc's" here responded so fully to the funding point made in the grassroots lobbying letter belies the argument made in The Nature Conservancy's legal opinion.

²⁷See supra note 23.

matching funds, must be allowable under the applicable cost principles.³ However, the total salary paid to this TNC employee during the course of the NFWF award was less than \$7000. Moreover, she did other non-lobbying work during the time period of the NFWF grant, with the result that proper expenses were interspersed with improper ones. We cannot determine precisely how much the TNC employee spent on postage or similar expenditures for this project, but the total amount spent by the employee for postage during the course of her employment was minimal. In these circumstances, where the funds spent on improper lobbying are small and commingled with proper expenditures, we have held that it would be impractical to attempt to recover them. B-209049 (September 29, 1982); B-173648 (September 21, 1973).

RECORDKEEPING INADEQUACIES UNDER NOAA AWARD

Our task of sorting out what funds were used to pay for the unallowable lobbying activities under the NOAA award above has been made more difficult because of inadequacies in The Nature Conservancy's recordkeeping practices at the time of the NOAA award.

OMB Circular A-110, which was made a term of the Cooperative Agreement award between NOAA and TNC, required at the time (and still requires) that financial award recipients' financial management systems provide for "[r]ecords that identify adequately the source and application of funds for federally sponsored activities," and "[a]ccounting records that are supported by source documentation."²⁹ The NOAA Grants and Cooperative Agreements Policy Manual for the relevant time period explains that source documentation includes time and attendance records and states that documentation of the costs of federal awards must support the costs charged to the awards.³⁰ In addition, the Policy Manual provides Checklists for Internal Control, which indicate that the accounting system should accumulate and record the direct costs of each federally supported project for both federal and non-federal costs.³¹

²⁸OMB Circular A-110, Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations, C.23(a)(4) (Nov. 19, 1993). Circular A-110 was incorporated as a term of the NFWF grant.

²⁹Circular A-110, Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations: Uniform Administrative Requirements, Attachment F, Standards for Financial Management Systems, 2.b., g., 41 Fed. Reg. 32016, 32018 (July 1, 1976).

³⁰NOAA, Grants and Cooperative Agreements Policy Manual, #7, p.44.

³¹Id., Checklists for Internal Control, Attachment M, pp. 5-6.

Circular A-122, which is a term of the Cooperative Agreement Award between NOAA and TNC, requires federal award recipients to prepare "personnel activity reports," also known as time and effort, or time and attendance records, "reflecting the distribution of activity of each employee . . . whose compensation is charged, in whole or in part, directly to awards."³²

Further, the lobbying provisions of Circular A-122 require recipients to maintain:

"adequate records to demonstrate that the determination of costs as being allowable or unallowable pursuant to [the lobbying provisions of Circular A-122] complies with the requirements of this Circular."

49 Fed. Reg. at 18276. The NOAA Grants and Agreements Policy Manual states that the award recipients' accounting system should identify and segregate unallowable costs.

Finally, in addition to these federal recordkeeping requirements imposed in connection with the financial award, The Nature Conservancy itself at the time of the NOAA award had developed budget center guidelines mandating that its field offices track lobbying expenses for federal income tax reporting purposes.³³

During the time of the NOAA award, The Nature Conservancy did not have an adequate time and effort reporting system in place. A Coopers & Lybrand audit report of The Nature Conservancy for the years ended June 30, 1992 and 1991 also made this finding as early as July 30, 1993. A comprehensive time and effort reporting system was implemented July 1, 1994. As a result, Circular A-122's requirement for personnel activity reports and Circular A-110's requirement that costs charged directly to federal projects be documented were not met. In this case, this meant that the TNC Public Affairs Manager, sixty-five percent of whose salary for the time of the award was paid by the federal government,³⁴ did not separately record time he spent

³²Circular A-122, 45 Fed. Reg. at 46028, § 1(2).

³³ The Nature Conservancy, Government Relations Handbook: Lobbying Law, Reporting Requirements, and General Policies, Jan. 21, 1993.

³⁴As noted earlier, the Public Affairs manager's annual salary was \$30,800, so his salary for the 9-month period of the award would have been \$23,100. The \$15,000 in salary (not including the \$1,000 for benefits) that was paid by the 9-month NOAA award was 65 percent of his \$23,100 salary for that period of time.

on work for the federal award and time he spent on work for The Nature Conservancy.³⁵

Further, at this time, employees of The Nature Conservancy's Florida Keys Initiative were not segregating time spent lobbying, as required by their own Government Relations Handbook.³⁶ Thus, there are no TNC records from the time of the NOAA award to support the position now taken by TNC that costs for any activities that may have been unallowable lobbying costs under Circular A-122 were actually costs incurred and paid for by TNC.

To the contrary, the one contemporaneous performance report transmitted to NOAA by The Nature Conservancy concerning the Public Affairs Manager's activities indicates that at the time of the NOAA award, costs of certain of the activities we have found unallowable were being charged to the award. The Public Affairs Manager's Performance Report states:

"This report covers the period July 1 – September 30, 1993. It includes tasks described in the agreed upon work-plan and other tasks outside of the work plan.³⁷ The tasks below represent approximately 30% of my entire workload for the quarter."

Given that the "NOAA Performance Report" states that it includes tasks described in the work plan and tasks outside the work plan, we take this Performance Report to mean that the Public Affairs Manager was reporting work he was doing for NOAA that was required by the award and also additional work for NOAA that was not specifically required by the award's work plan. Our understanding is confirmed by the further statement in the report that the tasks listed included approximately 30 percent

³⁵To compound this inadequacy in the Public Affairs Manager's time and effort reporting, an accounting error at the time of the NOAA award resulted in none of the Public Affairs Manager's time during the award period being charged to the award under TNC's accounting system. Instead, all of the Public Affairs Manager's time was charged to a different account. The error with respect to the Public Affairs Manager's time charges was discovered shortly before the end of the NOAA award period, but it was never corrected.

³⁶Instead, at the end of the year, the Director of the TNC Florida Keys Initiative estimated time spent lobbying by all his employees.

³⁷The then-Public Affairs Manager told us that he does not know what he was referring to by the "work plan." However, in response to our request for the work plan, TNC submitted to us a list of products expected of the Public Affairs Manager that was included in the application for the award.

of the Public Affairs Manager's entire workload for the quarter and by the then-Public Affairs Manager statement to us that his understanding at the time was that 30 percent of his time was being paid for by the NOAA award.³⁸ Thus, despite its claims now that any unallowable costs were paid for by TNC funds, TNC appears at the time to have been reporting costs under the NOAA cooperative agreement that we have now determined to be unallowable lobbying costs.³⁹

However, even though we have found that certain costs reported at the time as costs under the award were unallowable lobbying costs, as long as TNC can now demonstrate, as it contends, that it had allowable costs in salaries and benefits for public affairs work totaling the full \$16,000 of the NOAA award, it will not be required to reimburse the federal government for the unallowable charges. B-208871.2 (February 9, 1989). The reason is that funds which become available due to the disallowance of costs are treated as funds never expended or claimed. A grantee ordinarily is obligated to return to the government any payments it receives for disallowed costs. To the extent the grantee has other costs that are allowable, the grantee is allowed to substitute these other allowable costs for those disallowed, and does not need to repay the government. Id.

TNC believes that it had \$16,000 in allowable costs, and NOAA states that the Sanctuary Superintendent's notes documenting meetings with the Public Affairs Manager, along with quarterly and final performance reports and other documents concerning the Public Affairs Manager's accomplishments, provide adequate documentation for the amount of costs charged to the award.⁴⁰

³⁸Actually, 65 percent of his salary for the award period was being paid for by federal funds. See supra note 36.

³⁹In this connection, we note that the Coopers & Lybrand Audit Report for the year ended June 30, 1994 suggested that The Nature Conservancy's political activity policy should be expanded to address prohibiting lobbying activities with federal funds.

⁴⁰In connection with our review, NOAA requested our advice on whether guidance issued by OMB to implement an anti-lobbying statute known as the Byrd amendment (31 U.S.C. § 1352), also applies to lobbying activities under Circular A-122. That guidance provides that:

"To the extent a person can demonstrate that the person has sufficient monies, other than Federal Appropriated funds, the Federal Government shall assume that these other monies were spent for any influencing activities unallowable with Federal appropriated funds."

55 Fed. Reg. 24540, 24542 (June 15, 1990). NOAA asks whether this assumption

MONITORING BY NOAA

According to a Department of Commerce Administrative Order, the Program Officer assigned to a Department of Commerce federal financial assistance award has the following duties, among others, with respect to the award: monitoring project activities to ensure that the project is being properly carried out; reviewing and writing evaluations of quarterly and final performance reports submitted by the recipient; providing to the Grants Officer copies of progress reports and evaluations; and reporting to the Grants Officer in a timely manner on potential and existing problems and/or noncompliance.⁴¹

The Grants Officer is responsible for, among other things, reviewing for appropriate action all reports submitted by the recipient and ensuring proper monitoring of the recipient's compliance with the terms and conditions of the grant and taking appropriate action where there is non-compliance.⁴²

According to the NOAA Grants and Cooperative Agreements Policy Manual, if a required report is not received by NOAA by the date it is due,⁴³ the Program Officer is to send a delinquency notification letter to the recipient requesting the report.⁴⁴ If neither the report nor an acceptable explanation is received, the NOAA Grants Officer is required to send a follow-up letter to the recipient and take other actions up to and including termination of funding.

should apply where, as here, the federal recordkeeping requirements discussed in the text have not been complied with, so that it is not clear whether federal funds have been used for lobbying activities. In our view, the assumption would apply in such circumstances, if, as is also discussed in the text, the grantee has allowable costs totaling the full amount of the award.

⁴¹Department of Commerce, Administrative Order 203-26, Department of Commerce Grants Administration, § 4.04e., May 15, 1985.

⁴²Id. at § 4.04a.

⁴³The NOAA award specified that quarterly performance reports were to be submitted no later than 30 days following the end of each reporting period, for the periods ending March 31, June 30, September 30, and December 31. Department of Commerce Financial Assistance Standard Terms and Conditions, Attachment B to Award Number NA370M0122, at D.02.

⁴⁴NOAA, Grants and Cooperative Agreements Policy Manual, p. 62.

There was a breakdown in NOAA's monitoring of The Nature Conservancy award. As noted above, TNC's Public Affairs Manager submitted on a timely basis only one of the four quarterly performance reports he was required to submit for the NOAA award.⁴⁵ The Program Officer did not send a delinquency notification letter to TNC nor inform the Grants Officer of the three missing reports. Moreover, the Grants Officer, who had responsibility for reviewing the reports as well, did not inquire with the Program Officer or with TNC as to the missing reports. Although a January 14, 1994 NOAA Grants Office document reveals that the Grants Office became aware at least as of that date that no performance reports were in the Grants Office official file for the award to TNC, no one from NOAA ever contacted TNC concerning the missing performance reports.

With respect to the one performance report that was timely filed, the Program Officer told us that she did not review it thoroughly because it was not within her normal area of assignment. She also did not write an evaluation of it, as she was required to do under the Department of Commerce procedures set forth above. She had prepared the paperwork on the award at the request of the Manager of the Gulf & Caribbean Branch Sanctuaries and Reserves Division, in whose area the award originated. She said that she gave the performance report to him, but he does not recall receiving it. According to the Branch Manager, even if he had received the report, he would not have reviewed it because he was monitoring the award through the oral reports of the Sanctuary Superintendent of the Florida Keys National Marine Sanctuary, who he understood was conferring with the Public Affairs Manager regarding the Public Affairs Manager's work under the cooperative agreement. The Sanctuary Superintendent was not given a copy of the performance report at the time of the award and did not understand it to be his responsibility to review such reports.

NFWF MONITORING

With respect to the grassroots lobbying activity discussed above, incomplete reporting by The Nature Conservancy made detailed monitoring of the grant by NFWF very difficult. The Programmatic Report⁴⁶ submitted by The Nature Conservancy did not disclose the nature of TNC's contacts with public officials. TNC's first Programmatic Report listed and briefly described a "Letter Writing Campaign," noting that "copies of these letters were sent to state and federal elected officials." The Programmatic Report did not attach copies of the letters to public officials. NFWF's current Grant Procedures Manual includes "Guidelines for Programmatic and Final Reports, which

⁴⁵The other three reports were submitted after the close of the award period.

⁴⁶A Programmatic Report serves the same function as the NOAA-required Performance Report.

require the grantee to submit to NFWF copies of materials generated as part of grants along with all Programmatic Reports. These guidelines were established on NFWF's own initiative and were not in response to this inquiry. However, the guidelines were not in effect at the time the TNC grant was entered into and therefore were not sent to TNC for use in the preparation of its reports.