

12339

Lupton  
GGM

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: 193573

DATE: December 19, 1979

MATTER OF: Saint Lawrence Seaway Development Corporation - 572  
[Status of Funds as "Appropriated"]

DIGEST: Saint Lawrence Seaway Development Corporation requests that GAO reverse its holding (B-193573, January 8, 1979), that user fees derived from its corporate activities are appropriated funds. Based on its interpretation of language in its annual appropriation act, its enabling legislation, and the Government Corporation Control Act, the Seaway Corporation contends that funds available to the Corporation are non-appropriated funds. GAO concludes that the Corporation's funds are appropriated but by virtue of the Corporation's enabling legislation, are exempt from many statutory restrictions on the use of appropriated funds. B-193573, January 8, 1979, affirmed, as modified.

This decision is in response to a request by the General Counsel of the Saint Lawrence Seaway Development Corporation for review and reconsideration of our decision, Matter of Applicability of FY 1979 5.5 percent pay increase ceiling to employees of Saint Lawrence Seaway Development Corporation (B-193573, January 8, 1979), in which we held that the Corporation's funds are appropriated funds, despite the fact that the source of such funds is user fees. (The General Counsel agrees with the result of the decision, that Corporation employees are not subject to the 5.5 percent pay increase ceiling, and that holding is not here at issue.) Professor Harold Seidman, Department of Political Science, University of Connecticut, has also offered his views in support of the position that the Corporation is not subject to the laws applicable to appropriated funds.

The General Counsel, supported in general by Professor Seidman, contends that our holding is in direct conflict with the underlying principles of the Saint Lawrence Seaway Act (33 U.S.C. § 981 et seq.), the Government Corporation Control Act (31 U.S.C. § 841 et seq.) and the purposes which a Government corporation is designed to serve. He further contends that our holding is contrary to the plain language of the provisions of the annual Department of Transportation Appropriations Act.

~~008109~~ 11126

We have reviewed each of these contentions carefully, but we continue to believe that the funds available to the Seaway Corporation are appropriated funds despite the fact that they are derived from user fees. However, this does not mean that expenditures by the Seaway Corporation are subject to all the restrictions which apply to the use of appropriated funds by other Federal entities. The Seaway Corporation, as is typical of Government corporations, has express statutory authority to determine the character and necessity for its obligations and expenditures. It is therefore exempt from many of the restrictions on the use of appropriated funds which would otherwise apply.

In our decision B-34706, December 5, 1947, we analyzed the differences between Government corporations and Executive agencies and departments. There we pointed out that it was not possible "to generalize with completeness as to the actual significance of the use of the corporate form" because of the lack of uniformity among Government corporations. The degree of flexibility enjoyed by a Government corporation depends entirely on the provisions contained in its enabling legislation. The Government Corporation Control Act (31 U.S.C. § 841 et seq.) did not expand or diminish the flexibility conferred upon the individual Government corporations by their enabling legislation. Rather, the declared policy of the Act was to provide the Congress with a means for it to exercise its oversight responsibilities over the financial activities of Government corporations.

Specifically, the Seaway Corporation's enabling legislation contained in 33 U.S.C. § 984(a)(9) expressly provides that it:

"\* \* \* shall determine the character of and the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed and paid, subject to provisions of law specifically applicable to Government corporations \* \* \*."

This provision grants the Corporation broad discretion in the obligation and expenditure of its funds. Indeed, the provision in effect exempts the Corporation from the majority of statutory restrictions on the use of appropriated funds. This leaves the Corporation subject only to restrictions on its use of appropriations that can be directly implied from its enabling legislation, that are included in appropriation acts applicable to the Corporation, or that are made specifically applicable to Government corporations.

In view of the few restrictions on the use of its funds that are applicable to the Corporation, we do not believe that our conclusion that its funds are appropriated, even though they derive from user fees, will impair the flexibility which the corporate form is intended to permit or that the Corporation will be hampered in its fiscal operations and procedures.

To the extent that our January 8, 1979, decision, suggests otherwise, we agree that it should be modified without, however, changing the conclusion that funds of the Corporation are appropriated. Specifically, in our January 8, 1979, decision, we said that Corporation expenditures "\* \* \* are subject to any restrictions applicable to the expenditure of appropriated funds." However, that broad statement should be qualified. The Seaway Corporation is not subject to all such restrictions; it may, by virtue of 33 U.S.C. § 984(a)(9), supra, decide to spend or obligate its funds for objects for which appropriated funds would otherwise not be available. For example, unlike other Government entities, the Corporation is exempt from such appropriation restrictions as are contained in 31 U.S.C. § 551, prohibiting the expenditure of appropriated funds for lodging and feeding non-Government employees at conventions or assemblages, and 5 U.S.C. § 3107, prohibiting the use of appropriated funds for the employment of publicity experts. On the other hand, because we believe that there are still important areas in which the Congress has retained control of Corporation expenditures (see, e.g., our statement in B-193573, supra, that had wage adjustments for the Corporation's prevailing rate employees been made pursuant to a wage survey the 5.5 percent wage increase ceiling would have been applicable), it is important to address the various arguments advanced by the Corporation's General Counsel that the funds available to the Corporation are not appropriated funds.

Apparently, the General Counsel believes that "appropriated funds" are limited to funds which the Congress appropriates from the Treasury for a specific purpose. However, the statutory definition of "appropriations", for purposes of the Budget and Accounting Act, 1921 (31 U.S.C. § 2), is not restricted to such a narrow class of funds. That definition reads as follows:

"The term 'appropriations' includes, in appropriate context, funds and authorizations to create obligation by contract in advance of appropriations or any other authority making funds available for obligation or expenditure."

We have long held that this definition includes not only contract authority as such but also appropriations from revolving, special or trust funds. See for example B-107689, August 4, 1972; id. October 25, 1972; and id. March 13, 1973. A similar issue was addressed by the United States Court of Appeals, District of Columbia Circuit, in United Biscuit Company of America v. Wirtz, 359 F.2d 206 (1965), where the court held that receipts from patron purchases from military commissaries, credited to a stock fund, were appropriated funds. The court, in arriving at this conclusion, reasoned as follows:

"Appellant seizes on this method of financing and argues that the money paid it for its goods came not from appropriated funds, but from the consumer's pocket. Appellant analogizes the stock fund to a regular bank account and argues that the court should 'trace' the money to the consumers who paid the commissaries for the goods. We find no merit in appellant's contentions.

"\* \* \* The provision for a revolving fund, replenished by the proceeds from commissary sales, was apparently considered an administrative convenience. It eliminated the need for a new appropriation each fiscal year by creating what was, in effect, an on-going appropriation. \* \* \* Long standing administrative rulings and practice support this interpretation of Section 405 [ of the National Security Act Amendments of 1949, 63 Stat. 578, 587-88 (1949), 10 U.S.C. § 2208.] The Comptroller General, in the past, has ruled that the establishment of a revolving fund, replenished by moneys from the public, constitutes an on-going appropriation which does not have to be renewed each year. 1 COMP. GEN. DECS. 704 (1922). And the armed services have conducted their entire purchasing program for commissaries under the belief that moneys paid out of the stock funds were appropriated. Finally, the Supreme Court has recently stated, during the course of an opinion, that all commissary purchases are made from appropriated funds within the meaning of Section 2303(a). Paul v. United States, 371 U.S. § 245, 261-263, 83 S. Ct. 426, 9 L. Ed. 2d 292 (1963)."

As indicated by the Court, we have consistently regarded a statute which authorizes the collection and credit of fees to a particular fund and which makes the fund available for specified expenditures as constituting a continuing appropriation. 57 Comp. Gen. 311 (1978), 50 id. 323 (1970); and 35 id. 615 (1956).

The General Counsel further contends that 33 U.S.C. § 985 authorizes the Corporation to issue revenue bonds to the Secretary of the Treasury, payable from corporate revenues, to finance its activities and thus that appropriated funds are not involved. Under our decisions, funds made available to the Seaway Corporation through the sale of bonds to the United States Treasury or from user fees would nevertheless constitute appropriated funds because these funds were made available by action of the Congress for obligation and expenditure. See also 31 U.S.C. § 2, supra. Hence the Corporation operates with appropriated funds.

We do not believe that appropriated funds are not involved merely because Congress authorized the Seaway Corporation to borrow its capitalization through the issuance of long term bonds to the United States Treasury. We described the means used by Congress to capitalize Government corporations with appropriations in our decision B-34706, *supra*. We stated that usually corporations are given a lump sum appropriation in the form of capital stock. In other cases Congress grants corporations the authority to borrow funds for their capitalization. In either event, the corporation's capitalization consists of appropriated funds.

The Court of Claims in *Breitbeck v. United States*, 500 F. 2d 556 (1974), discussed the type of funds employed by the Saint Lawrence Seaway Development Corporation. In that case, the Government argued that because the Seaway Corporation had been established with borrowed funds in the form of long term bonds and obtained its operating funds from user fees, it was self-sufficient from the United States Government, and thus that it would contradict the obvious self-sufficiency purpose to permit judgments on claims against the Corporation to be paid from the general fund of the United States Treasury. The Court ruled against this argument with the following rationale:

"By these provisions [ the Corporation's enabling legislation] Congress did attempt to make the agency self-supporting, in general, in the long run, but there are likewise substantial indications that this was not to separate it wholly from the Treasury. The long run was quite extended since the bond maturities could be up to fifty years; meanwhile Treasury funds could and were expected to be used. Even in the long run, regular federal funds would still be involved. At the instance of the Corporation itself (represented by the United States Attorney), the Northern District of New York held that a tort claim, cognizable under the Federal Tort Claims Act, could not be maintained against the agency but had to be brought against the United States under the Tort Claims Act (with judgment to be paid, of course, from general appropriated funds). *Handley v. Tecon Corp.*, 172 F. Supp. 565 (N.D.N.Y. 1959). Section 987(b) [ of title 33] contemplates that employee retirement annuities (both longevity and disability) are to be paid by the Civil Service Commission from Treasury moneys and, similarly, disability payments for Corporation employees are made from the general employees' compensation fund. There is, in short, no such clear cleavage between the Corporation's own funds and those of the United

States that one can say that Congress wished to cut the agency entirely loose from the Treasury or from appropriated funds." At 559, footnote omitted.

The General Counsel contends further that our earlier decision was in error in stating that the Congress appropriated funds for the Seaway Corporation in the Department of Transportation and Related Agencies Appropriation Act, 1979, Pub. L. No. 95-335, August 4, 1978, 92 Stat. 444. He points out that Congress used language in the Department of Transportation Appropriations Act for the Seaway Corporation different from the standard appropriations language it used for other non-corporate Department of Transportation agencies. He maintains that this difference in language indicates that Congress did not appropriate funds for the Seaway Corporation but merely authorized it to use funds for operations derived from user fees the Corporation collects. Similarly, he contends that Congress did not create for the Seaway Corporation a specific user fee fund, which he asserts is necessary if user fees are to be considered as appropriated funds. Finally, he says that although the Seaway Corporation deposits its user fees into the Treasury, this constitutes something akin to a commercial checking account which does not require an appropriation when withdrawn from the Treasury.

The Department of Transportation and Related Agencies Appropriation Act, 1979, Pub. L. No. 95-335, supra, reads as follows with respect to the Seaway Corporation:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of Transportation and related agencies for the fiscal year ending September 30, 1979, and for other purposes, namely:

\* \* \* \* \*

SAINT LAWRENCE SEAWAY DEVELOPMENT  
CORPORATION

"The Saint Lawrence Seaway Development Corporation is hereby authorized to make such expenditures, within the limits of funds and borrowing authority available to such Corporation, and in accord with law, and to make such contracts and commitments without regard to fiscal year limitations as provided by section 104 of the Government Corporation Control Act, as amended, as may be necessary in carrying out the programs set forth in the

budget for the current fiscal year for the Corporation except as hereinafter provided.

"Limitation on Administrative Expenses. Saint Lawrence Seaway Development Corporation

"Not to exceed \$1,280,000 shall be available for administrative expenses which shall be computed on an accrual basis, including not to exceed \$3,000 for official entertainment expenses to be expended on the approval or authority of the Secretary of Transportation: Provided, That Corporation funds shall be available for the hire of passenger motor vehicles and aircraft, operation and maintenance of aircraft, uniforms or allowances therefor for operation and maintenance personnel, as authorized by law (5 U.S.C. 5901-5902), and \$15,000 for services as authorized by 5 U.S.C. 3109."

The General Counsel argues that the above-quoted provision is not an appropriation, but rather is an authorization under section 104 of the Government Corporation Control Act, 31 U.S.C. § 849, which reads as follows:

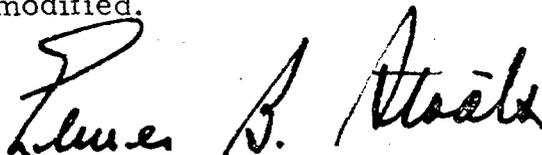
"The Budget programs transmitted by the President to the Congress shall be considered and legislation shall be enacted making necessary appropriations, as may be authorized by law, making available for expenditure for operating and administrative expenses such corporate funds or other financial resources or limiting the use thereof as the Congress may determine and providing for repayment of capital funds and the payment of dividends. The provisions of this section shall not be construed as preventing Government corporations from carrying out and financing their activities as authorized by existing law, nor as affecting the provisions of section 831y of Title 16. The provisions of this section shall not be construed as affecting the existing authority of any Government corporation to make contracts or other commitments without reference to fiscal year limitations."

Whether the language in the Corporation's fiscal year 1979 appropriation act constitutes an authorization or an appropriation is immaterial. As indicated above, it is our view that any time the Congress specifies the manner in which a Federal entity shall be funded and makes such funds available for obligation or expenditure, that constitutes an appropriation, whether the language is found in an appropriation act or in other legislation.

The language of the Appropriation Act concerning the Seaway Corporation leaves no doubt that Congress intended that operating funds of the Corporation are to be considered as appropriated funds. In this connection, the last paragraph of the Seaway Corporation provision provides an exception to various statutory restrictions on the use of appropriated funds. This exception permits the Corporation to expend its funds for automobiles and aircraft and for uniforms. This exception would not be necessary if the Seaway Corporation were operating with non-appropriated funds, because restrictions on these uses apply only to appropriated funds.

We have also considered the General Counsel's argument that Congress must authorize a specific fund for user fees in order to have such funds considered to be appropriated funds. We do not agree. In our earlier decision, we stated that this Office had long regarded a statute which authorized the collection and credit of fees to a particular fund for specified purposes, and which makes the fund available for obligation and expenditure as authorized, as constituting an appropriation. 57 Comp. Gen. 311, 313 *supra*, and 35 *id.* 615 *supra*. To satisfy this criterion, it is not essential for Congress to create expressly a fund in the authorizing statute. Such a fund is, in effect, created when Congress authorizes the expenditure of user fees for operating expenses of a Government corporation, as it has done in the case of the Seaway Corporation. By the same token, once the Congress has appropriated funds for the use of a Government entity such as the Seaway Corporation, the nature of the appropriated funds is not affected by where these funds are kept. For example, the funds would still be considered appropriated funds even if the Corporation were authorized to retain them in a commercial bank checking account.

For the reasons set forth above, we conclude that the operating funds of the Seaway Corporation are appropriated funds. However, Congress has granted the Corporation, through enabling legislation, broad discretion in the obligation and expenditure of its funds, which has the effect of exempting it from many of the statutory restrictions on the use of appropriated funds. Our decision B-193573, January 8, 1979, is hereby affirmed, as modified.

  
Eugene B. Strick  
Comptroller General  
of the United States