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B-193307

FEB 6 1979

The Honorable Jack Kemp
House of Representatives

Dear Mr. Kemp:

This is in response to your recent letter regarding "clarifying authorization" for the Ellicott Creek Flood Control Construction Project, Erie County, New York. You indicate that the proposed Water Resources Development Act of 1978, H. R. 13059, 95th Cong., 2d Sess., provided supplemental authorization, as requested by the Corps of Engineers, because of a decision to construct a diversion channel instead of the Sandridge Dam as originally proposed. However, because this bill was not enacted, the Corps has advised you that the \$1 million appropriated in H. J. Res. 1139, which makes continuing appropriations for fiscal year 1979, cannot be spent to begin construction of the Ellicott Creek diversion channel.

It is your understanding that the House Appropriations Committee's Subcommittee on Public Works requested our opinion as to whether, because of the unusual circumstances, the funds already appropriated for projects authorized in the water resources bill carry with them the weight of an authorization so as to allow the Ellicott Creek flood control diversion channel construction to begin on schedule without the necessity of waiting for authorization by the next Congress.

We have not received a request to consider this matter from the Subcommittee on Public Works of the House Appropriations Committee or from any other congressional source. However, we have met informally with representatives of the Corps of Engineers regarding this problem and advised them as follows:

Section 201^{the same} of the Flood Control Act, of 1970, Pub. L. No. 91-611, December 31, 1970, 84 Stat. 1824, 1826-1827, provides that:

"The project for the Sandridge Dam and Reservoir, Ellicott Creek, New York, for flood protection and other purposes is hereby authorized, substantially in accordance with the recommendations of the Chief of Engineers in his report dated November 25, 1970, at an estimated cost of \$19,070,000. Construction shall not be initiated until approved by the Secretary of the Army and the President.

Prior to the commencement of this project, including, but not limited to, acquisition of real property, the Secretary of the Army, acting through the Chief of Engineers, shall investigate all possible alternative methods, including, but not limited to, possible relocation of elements of the project, installation of channels, provision of levees and floodwalls, decreasing of size of project facilities, rerouting of streams, raising or lowering pools, and deepening channels and movement on the stream, or any combination of the foregoing that can accomplish the purposes of this project and shall report his findings and determinations to the Congress."

The recommended Chief of Engineers' plan called for construction of a dam and reservoir and about 3 miles of minor channel improvement in the towns of Tonawanda and Amherst, New York at an estimated Federal cost of \$19,070,000. (See H.R. Rep. No. 91-1665, 91st Cong., 2d Sess. 42 (1970) on H.R. 19877, title II of which was enacted as the Flood Control Act of 1970.)

The project authorization was later modified to permit remedial flood control measures to alleviate flooding in the reach between Stahl Road and Niagara Falls Boulevard in Amherst, New York. These measures were required to "be compatible with the authorized project and any alternatives currently under study, pursuant to the Flood Control Act of 1970." See section 14 of the Water Resources Development Act of 1974, Pub. L. No. 93-251, March 7, 1974, 88 Stat. 12, 18. According to H.R. Rep. No. 93-541, 93d Cong., 1st Sess. 91, 92 (1973) on H.R. 10203, the derivative source of the Act, as a result of the investigation of alternative methods, the District Engineer, Buffalo District, had developed a diversion channel plan as a recommended alternative to the dam and reservoir. However, the report stated, "This new plan must still undergo the usual administrative review and be submitted to the Congress for authorization." It appears that the sole purpose of section 14 of the 1974 Act was to amend the 1970 Act to authorize local flood control measures in Amherst, provided they would be compatible with the Sandridge Dam or with any alternate thereto authorized by Congress. However, section 14 did not itself approve and authorize a particular alternative to the Sandridge Dam and Reservoir for construction in the upper Ellicott Creek area.

Subsequently, the Corps of Engineers completed the study of alternatives and its recommended plan for the upper portion of the project was to substitute channel enlargement and diversion channel construction in combination with leaving a portion of the creek in its natural state, for the previously authorized Sandridge Dam and Reservoir. (The lower portion would be constructed in accordance with the 1974 Act.)

As indicated in a letter to you from the District Engineer, Buffalo District, Corps of Engineers, dated March 3, 1978, additional legislative authority was thought necessary by the Corps of Engineers prior to construction of the upper portion of the project.

Thereafter, section 121 of H. R. 13059, 95th Cong., 2d Sess., the proposed Water Resources Development Act of 1978, authorized project modification pursuant to the district engineer's recommended plan and \$11 million was authorized for construction. However, the House of Representatives adjourned on October 15, 1978, without completing action on the bill. Accordingly, there is no specific statutory authorization for the proposed modification. Your question is whether congressional statements made during the authorization and appropriations processes can be read as constituting proper authorization of the modifications.

In hearings on the proposed appropriation bill in the House of Representatives, the Corps proposed no new construction starts. In testimony before the Subcommittee on Public Works, the State of New York advocated \$1.1 million for funding of the Ellicott Creek project, stating that authorized construction of the dam was subject to the completion of an investigation of all possible alternatives but that the Phase II general design memorandum for the portion of the project authorized in 1974 would be completed in fiscal year 1978. (Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1979, Before a Subcomm. of the House Comm. on Appropriations, 95th Cong., 2d Sess., Part 1, 326; Part 8, 277 (1978)). The House Appropriations Committee recommended \$1 million for construction of the Ellicott Creek project. (H. R. Rep. No. 95-1247, 95th Cong., 2d Sess. 81 (1978)).

In Senate hearings, the Corps of Engineers recommended \$1.1 million for construction of the project as a new construction start. (Hearings on Public Works for Water and Power Development and Energy Research Appropriation, Fiscal Year 1979, before a Subcommittee of the Senate Committee on Appropriations, 95th Cong., 2d Sess. 399 (1978)). In S. Rep. No. 95-1069, 95th Cong., 2d Sess. 74 (1978), the Appropriations Committee recommended \$1 million for project construction, indicating that there had been allocated to the Ellicott Creek project to date \$1,124,000 and that the total estimated Federal cost was \$12 million.

The conference report on H. R. 12928, H. R. Rep. No. 95-1490, 95th Cong., 2d Sess. 33, 43 (1978) states that funds appropriated for "Construction, General" are to be allocated as shown on a table which includes \$1 million for construction of the Ellicott Creek project.

The Energy and Water Development Appropriation Act, 1979, H. R. 12928, was vetoed by the President, and the veto sustained by the

House of Representatives on October 5, 1978. Title II of the vetoed bill provided appropriations for the civil functions of the Corps of Engineers under "Construction, General"--"For the Prosecution of river and harbor, flood control, shore protection, and related projects authorized by laws; * * * \$1,343,711,000 to remain available until expended * * *."

By joint resolution (H. J. Res. 1139, Pub. L. No. 95-482, October 18, 1978, 92 Stat. 1803), the Congress made continuing appropriations for fiscal year 1979. Section 101(b) provides in part that

the act is
 "Such amounts as may be necessary, notwithstanding any other provision of this joint resolution, for the fiscal year ending September 30, 1979, for programs, projects, and activities to the extent and in the manner provided for in the Energy and Water Development Appropriation Act, 1979 (H. R. 12928) as enacted by the Congress: * * *."

(Certain projects were specifically excluded from coverage but the Ellicott Creek project was not among them.)

Consequently, by virtue of the continuing resolution, the provisions of the vetoed appropriation bill were incorporated by reference and funds were made available for construction of flood control projects but only for projects for which they would have been available had the vetoed appropriation bill become law.

It is clear that the 1970 authorizing legislation contemplated the construction of a dam and reservoir. While a study of possible alternative methods, including channel installation and deepening was mandated, and the findings were to be reported to the Congress before commencement of construction, there is no grant of construction authority for any alternative to the dam and reservoir. The Water Resources Development Act of 1974 permitted the construction of remedial flood control measures which would be compatible with both the dam and reservoir or any alternatives which might be recommended by the Corps of Engineers' study pursuant to the 1970 Act. However, this Act also affords no authority for the construction of an alternative which the study might later recommend.

Since the proposed Water Resources Development Act of 1978 was not enacted, authority therein for construction of channels as an alternative to the construction of the Sandridge Dam and Reservoir does not constitute "authorization by law" for alternative construction.

The vetoed appropriation bill by its terms did not authorize a change in the 1970 construction authorization. It appropriated a lump-sum of money for construction, including flood control projects,

without specification as to the Elllicott Creek project. The House and Senate reports and hearings on the proposed act, while referring to construction of the Elllicott Creek project, make no reference to the substitution of channels for the dam and reservoir. Consequently, the vetoed appropriation act, as given effect by the continuing resolution, does not afford a tenable basis for proceeding with construction of channels instead of a dam and reservoir.

In view of the foregoing we believe that funds available for the Elllicott Creek project, under H. J. Res. 1139, Pub. L. No. 95-482, may not properly be utilized for construction pursuant to the alternative proposal of the Corps of Engineers in substitution for construction of the Sandridge Dam and Reservoir authorized by section 307 of the Flood Control Act of 1970. However, the Corps of Engineers is not required to proceed with the dam and reservoir, since the appropriation in effect is for "Construction, General" and construction of the Elllicott Creek project, while referred to in the appropriations committees' reports, is not mandated by the vetoed appropriation act which is given effect by the continuing resolution. See LTV Aerospace Corporation, 55 Comp. Gen. 307 (1975). Since remedial flood measures authorized in 1974 in the Stahl Road-Niagara Falls Boulevard reach, Amherst, New York, have apparently not yet been undertaken, "Construction, General" funds may properly be used for this authorized portion of the Elllicott Creek project.

Sincerely yours,

(SIGNED) ELMER B. MILLIS

Comptroller General
of the United States