**Comptroller General**
**of the United States**

**Washington, D.C. 20548**

B-207186

February 10, 1989

The Honorable Bill Green
Ranking Minority Member
Subcommittee on HUD-Independent
Agencies
Committee on Appropriations
House of Representatives

Dear Mr. Green:

In response to your letter of August 10, 1988, signed also by former Chairman Boland, we reviewed the propriety of the apportionment actions taken by the Office of Management and Budget (OMB) in July 1988, with regard to $1.5 million appropriated in fiscal year 1988 to the Solar Energy and Energy Conservation Bank (Bank), and in September 1988 with regard to funds appropriated for fiscal year 1989 to the Department of Housing and Urban Development (HUD) for "assistance for solar and conservation improvements." We conclude that in neither instance did OMB act improperly.

In January, 1988, OMB apportioned to the Bank the $1.5 million appropriated for fiscal year 1988. On July 29, 1988, OMB withdrew that apportionment. OMB stated that the Bank's authority had expired on March 15, 1988, and no other authority existed to carry out the Bank's activities after that date.

In August 1988, the Congress enacted, and the President signed, the HUD-Independent Agencies Appropriations Act for fiscal year 1989. This act makes available to HUD for "assistance for solar and conservation improvements" all funds "recaptured" from the $1.5 million appropriated in fiscal year 1988. OMB, on September 19, 1988, refused to apportion any part of the $1.5 million because, according to OMB, "no recaptures of 1988 appropriated monies will occur in 1989."

## I. FISCAL YEAR 1988

### Background

The Solar Bank was first authorized by the Solar Energy and Energy Conservation Act of 1980. Pub. L. No. 96-294, title V, §§ 503-522, 94 Stat. 719-737, codified at 12 U.S.C. §§ 3601-3620. The Bank's purpose was to subsidize loans and grants for the installation of energy conservation and solar energy improvements in single and multi-family residences, and agricultural and commercial buildings. As originally enacted, the 1980 Act provided that "[t]he Bank shall not exist after September 30, 1987." 12 U.S.C. § 3603(a).

The Congress debated extending the life of the Solar Bank in 1987 in the context of deliberations on S. 825, 100th Congress, and H.R. 4, 100th Congress, the bills which were the sources of the Housing and Community Development Act of 1987. Because the House and the Senate had not completed action on these bills, and because the Bank was scheduled to pass out of existence on September 30, 1987, the Congress passed (and the President signed) Public Law 100-122, which extended the Bank for a month, until October 31.

During the continued deliberations on the housing bill, the Congress extended the life of the Bank several additional times. See Pub. L. No. 100-154, 101 Stat. 890 (extension to November 15, 1987); Pub. L. No. 100-170, 101 Stat. 914 (extension to December 2, 1987); Pub. L. No. 100-179, 101 Stat. 1018 (extension until December 16, 1987). The last extension, Public Law 100-200, was enacted and signed on December 21, 1987 and provided for the Bank to cease to exist after March 15, 1988.

Meanwhile, also on legislative day December 21 (calendar day December 22) but after passage of the extension, the Congress finally agreed on and passed a compromise version of the housing bill. Pub. L. No. 100-242, 101 Stat. 1964. As discussed in more detail below, an element of the compromise was the omission from the bill of an extension of the Bank. It is clear that the enactment of this bill, without more, meant that the Solar Bank would not survive beyond March 15, 1988, when its last temporary extension was to expire.

However, on the same legislative day, the Congress took final action on the last continuing resolution for fiscal year 1988, Public Law 100-202, 101 Stat. 1329, which funded the government for the remainder of the fiscal year.

Included in the continuing resolution was an appropriation to the Bank of $1.5 million. The appropriation, by its terms,1/ was to remain available until September 30, 1989.

In sum, the Congress passed two statutes within hours of one another which appear to be in opposition. Because the Housing and Community Development Act contained no further extension of the life of the Bank, the Bank was to expire after March 15, 1988. Under the continuing resolution, the Bank received an appropriation which was to remain available until September 30, 1989.

Continuing resolution did not extend Bank's authority.

A basic rule of statutory construction is that all laws are presumed to be consistent with each other, and, to the extent possible, courts will construe statutes in such a way as to reconcile and harmonize apparently contradictory provisions. See 73 Am. Jur. 2d Statutes § 254 (1974). Thus, absent an irreconcilable conflict between statutory provisions or some other clear and unambiguous indication of congressional intent to repeal a prior law, we, as will the courts, favor a construction that, insofar as possible, gives effect to all statutory provisions. Watt v. Alaska,

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1/ Section 101(f) of the continuing resolution provides as follows:

"SOLAR ENERGY AND ENERGY CONSERVATION BANK

ASSISTANCE FOR SOLAR AND CONSERVATION IMPROVEMENTS

For financial assistance and other expenses, not otherwise provided for, to carry out the provisions of the Solar Energy and Energy Conservation Bank Act of 1980 (12 U.S.C. 3601), $1,500,000 to remain available until September 30, 1989: Provided, That the funds appropriated under this heading in the Department of Housing and Urban Development--Independent Agencies Appropriation Act, 1985 (Public Law 98-371) shall remain available until September 30, 1988: Provided Further, That all funds recaptured from prior year appropriations under this heading shall be reallocated to eligible financial institutions."

451 U.S. 259, 265-268 (1981).2/ Indeed, the doctrine disfavoring repeals by implication "applies with full vigor when . . . the subsequent legislation is an appropriations measure." Committee for Nuclear Responsibility v. Seaburg, 463 F.2d 783, 785 (D.C. Cir. 1971) quoted in TVA v. Hill, 437 U.S. 153, 190 (1978).

We think these basic premises of statutory construction have particular application to the situation here. As noted earlier, after months of considering the Bank's continued existence, Congress, on the close of legislative day December 21, 1987, had scheduled the Solar Bank to cease its existence on March 15, 1988, yet had appropriated to the Bank $1.5 million available for obligation until September 30, 1989. Arguably, we could construe the appropriation, in effect, as an extension of the Bank and its program. In this regard, we have held that when Congress has appropriated funds for a program, the authorization for which has expired (or is due to expire during the period of fund availability), the appropriation itself provides "sufficient legal basis to continue the program, absent an expression of congressional intent to the contrary." 65 Comp. Gen. 524, 527 (1986); see also 55 Comp. Gen. 289 (1975).

The rule adopted in the cases cited above is grounded in part on the notion that where two statutes are in irreconcilable conflict, the appropriation, as the second enacted statute, provides the most recent expression of congressional intent. See 65 Comp. Gen. at 527. Here, however, there is no irreconcilable conflict between the continuing appropriation and the extension of the Bank to March 15, 1988. To the contrary, we think the two statutes can be reconciled quite naturally by construing the continuing resolution as an appropriation of money to the Bank for its use during its continued, although limited, existence. This construction conforms to time-honored precepts of statutory construction.

Morever, the legislative histories of the housing bill and the continuing resolution, when viewed together, do not indicate that the Congress intended the appropriation to

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2/ These rules of construction are especially applicable when the Congress has been considering two bills during the same session and enacts them on the same day. In such instances, absent a showing to the contrary, we should assume that the Congress intends the two resulting laws to be interpreted consistently. See B-204078.2, May 6, 1988.

extend the life of the Bank beyond March 15, 1988. The effect of the compromise housing bill on the Bank was specifically discussed on the floor of the Senate during debate. Senator D'Amato explained that, as a result of the compromise, "the solar bank would be eliminated." 133 Cong. Rec. S18608 (daily ed. December 21, 1987). Similarly, Senator Domenici said that the compromise bill included a number of provisions requested by the Administration, including "[t]ermination of . . . HUD's solar bank . . . ." Id. at S18611; see also remarks of Senator Karnes ("In fact, at least one federal program has been completely eliminated --the solar bank."), Id. at S18617, and Senator Dole ("This amendment . . . repeals the Solar Bank."), Id. at S18619.

On the other hand, there is no indication that the Congress, when enacting the continuing resolution, intended to reverse a component of the just-passed compromise housing bill by extending the life of the Solar Bank beyond March 15, 1988. The conferees, reporting on the continuing resolution's proposed appropriation to the Bank, stated merely, "[t]hese funds are intended to continue the solar bank program in fiscal year 1988." H.R. Rep. No. 498, 100th Cong., 2d Sess. 841 (1987). There is no indication that the conferees expected the appropriation to continue the Bank beyond the statutory termination date of March 15, 1988, and the issue was never raised in floor debates. And, as noted earlier, we are not inclined to infer that Congress intended such a result simply on the basis of the order of passage of the continuing resolution after the extension of the Bank's existence to March 15, 1988. See B-229958, March 10, 1988.3/

For the reasons set forth above, we conclude that the continuing resolution did not extend the Bank's existence. Rather, it appropriated funds for the Bank to use during the remainder of its existence. As a consequence, since the

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3/ In a colloquy during debate on the housing bill, you asked then Chairman St. Germain, of the Committee on Banking, Finance, and Urban Affairs, whether the termination date was to be considered no more than an oversight mechanism by which the Congress reminds itself to review the program, and not as an indication that the program was to be temporary. 133 Cong. Rec. H12094 (daily ed. December 21, 1987). To prevent programs with a statutory termination date from ending, the Congress must take some affirmative action; we do not believe the continuing resolution constitutes such affirmative action.

Bank ceased to exist after March 15, OMB's refusal to apportion the appropriated funds for use after that date was not improper.

## II. FISCAL YEAR 1989

### Background

In August 1988, the Congress enacted, and the President signed, the HUD-Independent Agencies Appropriations Act for fiscal year 1989 appropriating to HUD for "assistance for solar and conservation improvements" all funds "recaptured" from the $1.5 million appropriated in fiscal year 1988. Pub. L. No. 100-404, 102 Stat. 1014, 1019-20 (1988). The House Committee on Appropriations had recommended this action. In its report on the appropriations bill, the Committee said that this language would allow "the Solar Bank program" to continue. H.R. Rep. No. 701, 100th Cong., 2d Sess. 18 (1988).

On August 19, 1988, HUD requested that OMB apportion these funds. OMB refused; OMB noted on the apportionment schedule, dated September 19, 1988, that the $1.5 million appropriated in fiscal year 1988 was no longer available because of the expiration, pursuant to law, of the Bank's authorization.

In an attachment to the apportionment schedule, OMB pointed out that the fiscal year 1989 appropriations act made available only recaptured amounts, not the unobligated balance, from fiscal year 1988. Explaining its refusal to apportion the $1.5 million, OMB stated that because the Bank had not obligated any portion of this amount, there would be no recaptures; hence, no part of the $1.5 million is available for apportionment.

Fiscal year 1989 appropriations act appropriated to HUD only amounts recaptured, not the unobligated balance, from fiscal year 1988.

The term "recaptured funds" is a term of art with regard to the Solar Bank program and is not synonymous with "unobligated funds." A brief explanation of the Bank's program and the Bank's relationship to the states is necessary in order to understand the distinction.

In 1983, after some early difficulties, the Bank began implementing its program by using the states and territories

as agents to provide funds to financial institutions.4/ To participate, a state was required to enter into a cooperative agreement with the Bank. 24 C.F.R. § 1800.91. Under a cooperative agreement, the Bank would commit a specific allocation of the Bank's appropriation to the state for expenditure. 24 C.F.R. § 1800.95(a). These funds were considered obligated upon execution of the cooperative agreement. 24 C.F.R. § 1800.95(b).

Each agreement required the state to expend its allocation within a year of receipt from the Bank; unexpended funds were subject to "recapture" by the Bank. 24 C.F.R. § 1800.97. The Solar Energy and Energy Conservation Act, as amended, required the Bank to reallocate to other eligible financial institutions any unexpended financial assistance recaptured by the Bank. Pub. L. No. 98-181, § 463(e), codified at 12 U.S.C. § 3618 (b)(6).

Although neither the law nor regulations define the term "recaptured funds," it is clear that the term applies only to those funds which were allocated by the Bank to states and were not expended by the states within a year of allocation.

HUD will recapture none of the $1.5 million appropriated in fiscal year 1988. Because no part of the fiscal year 1988 appropriation was ever allocated to the states, none of it is even potentially available for recapture. The fiscal year 1989 appropriations act, as a consequence, does not make available to HUD any part of the monies appropriated for fiscal year 1988. It follows that OMB's refusal to apportion these funds to HUD was not improper.

We hope this opinion is responsive to your inquiry. We are sending an identical letter to Chairman Traxler. Unless you or Chairman Traxler release it earlier, this opinion will be available to the public 30 days from today.

Sincerely yours,

Milton J. Socolar

for Comptroller General
of the United States

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4/ See generally, Dabney v. Reagan, No. 82 Civ. 2231-CSH, slip op. at 3-4 (S.D.N.Y. March 20, 1985).