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

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B-177401 January 10, 1973

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Dear Mr. Secretary:

Reference is made to letter of November 3, 1972, from the Assistant Secretary of Agriculture concerning two claims submitted to your Department for an indemnity payment for milk which was removed from the commercial market pursuant to the direction of the Department of Agriculture of the State of Ohio. According to the Acsistant Secretary the evidence submitted by the claimants established that the contamination of the milk resulted from the consumption by their dairy cattle of ensilage contaminated with "Aroclor 1254." The ensilage had been stored in a silo, the inside of which had been coated with a silo paint which contained as one of its ingredients "Aroclor 1254," a compound of a class known as polychlorinated biphenyls (PCB).

As indicated in the Assistant Secretary's letter, the Milk Indemnity Payment Program was originally authorized by section 331 of the Economic Opportunity Act of 1964, and extended from time to time; and the Program is currently authorized by Public Law 90-484. In pertinent part, Public Law 90-484 is identical with its predecessors and reads as follows (7 U.S.C. 450j):

> ". . . That the Secretary of Agriculture is authorized to make indemnity payments, at a fair market value, to dairy farmers who have been directed since January 1, 1964, to remove their milk . . . from commercial markets because it contained residues of chemicals registered and approved for use by the Federal Government at the time of such use." (Emphasis added.)

The Assistant Secretary states that your Department, by published regulations, limits Dairy Indemnity Program Payments to farmers whose milk is removed from the market because of contamination by an economic poison (1) registered pursuant to the provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 135-135k), and (2) recommended for use by Agriculture Handbook 313 or 331 or any other agency of the Federal Government. 7 CFR 760 et seq. A "pesticide" is defined in the regulations as an economic poison registered under the last cited act. 7 CFR 760.2(f).

The Assistant Secretary advises that the regulations were drafted in this manner for two reasons. First, the legislative history of the act authorizing the Program indicates that losses to dairy farmers resulting from pesticides were the primary losses discussed in the Senate

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when the legislation was under consideration. 110 Cong. Rec. 16749-16752 (July 23, 1964). Second, the Federal Insecticide, Fungicide, and Rodenticide Act is the only authorization your Department has located for registering chemicals with the Federal Government.

The claimants contend that the regulations cited above reflect an unsupportable narrow interpretation of the act by your Department. They argue that if the Congress intended milk indemnity payments to be limited to those losses caused by pesticides registered under the Federal Insecticide, Fungicide, and Rodenticide Act, it would have expressly so stated in the authorizing statute the reference to such act. They state that instead Congress used the much broader language "residue of chemicals." Therefore, it is the position of these dairy farmers that Congress intended to provide indemnity payments to all dairy producers who were directed to remove their milk from commercial markets because it contained residues of chemicals registered and approved for use by the Federal Government and not just those whose milk contained pesticides.

The Assistant Secretary's letter continues:

"Applicants [claimants] contend that the registration and approval requirements of the statute should be waived in their case. First, they point out that the Federal Government does not have a system for registering and approving the uses of all chemicals. Second, they argue that 'Aroclor 1254' is one of a class of chemicals designated as polychlorinated biphenyls (PCB's). Since 1929, these chemicals have been produced and have been employed in a wide range of industrial uses. Over the years numerous studies have documented the environmental hazards of PCB's. Federal administrative agencies have had the power and mandatory duty as expressed by Congress to control the use of PCB's. With respect to environmental contamination by PCB's, either directly or indirectly, of the nation's food, the Food and Drug Administration has had the authority for a considerable period of time to control the use of PCB under the provisions of the Federal Food, Drugs and Cosmetic Act [Section 402(a), 406, 409, 701, 52 Stat. 1046 as amended, 1049, 1055-56 as amended by 70 Stat. 919 and 72 Stat. 948, 72 Stat. 1785-88 as amended; 21 U.S.C. 342(a), 348, and 371].

"The Food and Drug Administration has recently exercised its mandate by issuing a Notice of Proposed Rule Making concerning PCB's which would preclude the accidental PCB contamination

of food (37 F.R. 5105, March 18, 1972; Notice of Availability of Draft Environmental Impact Statement, 37 F.R. 9503, May 11, 1972). Included in the proposed rules was the following special provision which was necessary to preclude accidental PCB contamination of animal feed:

> 'Coatings or paint for use on the contact surfaces of feed storage areas may not contain PCB's or any other harmful or deleterious substances likely to contaminate feed.'"

The claimants point out that this regulation is too late to protect them. They argue that the fact that the Federal Government allowed silo paint to contain PCB during such a period of time, when an administrative agency thereof was under a statutory obligation to regulate its use, shows that it acquiesced and impliedly consented to such a use.

The Assistant Secretary requests a decision as to whether 7 U.S.C. 450j authorizes the making of an indemnity payment to the claimants under the circumstances of this case.

In order to be entitled to an indemnity payment under 7 U.S.C. 450j a dairy farmer must have been required to remove his milk from the market because it contained residues of a chemical registered and approved for use by the Federal Government. It appears that the only statute requiring the registration of a chemical is the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 135-135k, and that Aroclor 1254 is not an economic poison required to be registered under such act.

The claimants evidently recognize that Aroclor 1254 is not a chemical registered and approved for use by the Federal Government. However, it apparently is their position that since the Government does not have a system for registering and approving all chemicals and--according to the claimants--impliedly consented to the use of Aroclor 1254 for painting silos, the registration and approval requirement of 7 U.S.C. 450j should be waived in their case.

This Office is without authority to waive the requirements set forth in 7 U.S.C. 450j. Thus, if the claimants are to be indemnified, it must be because they fall within the terms of that statute, taking into account the legislative intent in enacting it.

While we are cognizant that 7 U.S.C. 450j is remedial legislation and is therefore to be given a liberal interpretation, any such interpretation must be consistent both with the language used therein and with the intent of Congress as disclosed by the legislative history of the provision. 45 Comp. Gen. 96 (1965). As already noted, the express language of the statute, read literally, precludes indemnification for contamination by substances such as Aroclor 1254 which are not registered with, and/or approved by, the Government.

Moreover, an examination of the legislative history of 7 U.S.C. 450j indicates that the statute was not intended to compensate dairy farmers for every contamination of their milk by chemicals. Rather, the debate on the bill which became 7 U.S.C. 450j shows that the object of Congress in enacting it was to compensate farmers whose milk was ordered removed from the market because of contamination by certain chemicals the use of which had been affirmatively recommended by the Government at the time of that use. See 110 Cong. Rec. 16661-16665 (July 22, 1964), and id. 16749-16752 (July 23, 1964). Specifically, the Congress was considering cases in which residues of pesticides recommended for use by the Department of Agriculture had been found in milk. It was considered inequitable that dairy farmers should bear the resulting loss when it was the Government that had recommended the use of pesticides which, when used as recommended, contaminated milk. Claimants' view, that they should be compensated for milk contaminated by a chemical concerning the use of which the Government had then taken no position, is thus not consistent with the intent of Congress in enacting 7 U.S.C. 450j.

As to the claimants' position that the Food and Drug Administration (FDA) has had both the power and the duty to regulate the use of PCB's and that the failure by FDA to perform that alleged duty earlier, constituted implied consent to the continued use of PCB's, we do not believe that inaction by FDA with respect to a particular substance can be construed as consent or approval by the Government to its use. Moreover, even if there might be said to have been implied consent by the Government to the use of PCB's, this would in any event not satisfy the intent of 7 U.S.C. 450j that, for farmers to be indemnified, the use of the contaminant must have been registered with and affirmatively endorsed or recommended by the Government.

In light of the foregoing it is our view that 7 U.S.C. 450j does not authorize the making of indemnity payments under circumstances such as exist in the instant two cases.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States

The Honorable
The Secretary of Agriculture