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WASHINGTON, D.C. 20548

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The Honorable B. F. Sisk
House of Representatives

Dear Mr. Sisk:

This is in reply to your request that we review certain elements of the Water Quality Information Exchange Program conducted by the Environmental Protection Agency (EPA). Of special concern is a series of newsletters entitled "Water Quality Awareness," published by the Planning and Conservation Foundation, a California nonprofit organization, under EPA Purchase Order P5-91-2958-A. As part of the "Procurement Plan" incorporated in the Purchase Order, EPA agreed to furnish the Foundation with letter-size "penalty mailing" envelopes endorsed at the third-class bulk rate, in which to mail the newsletters.

Pertinent areas of inquiry, as established in your letter and in subsequent contacts with members of your staff, are: EPA's justification for entering into the contract with the Foundation; EPA's authority to provide the penalty mailing envelopes; cost comparison of penalty mailing envelopes with available alternatives; use of language in the newsletters indicating approval by EPA of their preparation; and possible violations of Federal anti-lobbying statutes in certain articles of an "advocacy" nature.

EPA documents indicate that the Water Quality Information Exchange Program was conducted pursuant to section 101(e) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251(e)(Supp. IV, 1974), which establishes as one of the goals of the Act, that--

"Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. * * *

The source of this provision is the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500 (October 18, 1972), §6 Stat. 816. In reporting on section 101(a) [section 101(d) of S. 2770, 92d Congress], the Senate Committee on Public Works stated:

"A high degree of informed public participation in the control process is essential to the accomplishment of the objectives we seek--a restored and protected natural environment.

"Section 101(d) is included because the Committee recognizes that the manner in which these measures are implemented will depend, to a great extent, upon the pressures and persistence which an interested public can exert upon the governmental process.

"The Environmental Protection Agency and the State should actively seek, encourage and assist the involvement and participation of the public in the process of setting water quality requirements and in their subsequent implementation and enforcement.

"Information and education programs should be devised which will acquaint the public with the complexity of the water quality control process and provide them with the technical information. To accomplish this, the Environmental Protection Agency should look to the utilization and support of such devices as community workshops and other assistance activities which were developed and utilized so effectively in the implementation of the Clean Air Act." S. Rep. No. 92-414, 92d Cong., 1st Sess. 12 (1971).

To implement this congressional goal, EPA provided a training grant whereby a number of private individuals and groups, including the Planning and Conservation Foundation, were trained in methods for conducting community workshops on water pollution control. The trainees subsequently conducted these workshops, which have been attended by over 9,000 people. According to the EPA Procurement Plan, the publication of newsletters was designed to " * * * meet the continuing requirements of Section 101(e) and utilize this large cadre of trained and motivated citizens * * *" by providing this citizen group " * * * with current information necessary to assure the effectiveness of their continued involvement in water pollution abatement activities."

Against this background, and pursuant to 41 U.S.C. § 252(c)(3)(1970), Purchase Order P5-01-2958-A was issued on February 10, 1975. Under the terms of the contract, the Foundation was to develop information in pertinent areas through designated reporters and coordination with other similar contractors, and to publish a series of newsletters at least monthly through the remainder of calendar year 1975. The newsletters were to be distributed to the workshop cadre, other similar contractors, and various environmental officials, including the Project Officer and all EPA Regional Public Affairs Directors. The contract price was \$500. As noted above, EPA agreed to furnish the Foundation with third-class bulk rate "penalty mailing" envelopes. Four issues of Water Quality Awareness have thus far been published--August, September, and October 1975, and January 1976. We understand that a fifth issue was printed but not distributed.

Regarding EPA's authority for undertaking the Information Exchange Program, an agency normally has considerable discretion in selecting the means from among permissible alternatives to implement a statute charged to its administration. Pillai v. Civil Aeronautics Board, 485 F.2d 1018 (D.C. Cir. 1973). In light of the cited legislative language and history, EPA's program of workshops and newsletters appears reasonably geared to carry out the congressional objective of public awareness and participation, and thus appears to be well within the range of EPA's administrative discretion.

EPA has justified its use of the penalty mailing envelopes on the grounds that the mailing of the newsletters was an "authorized official Agency activity," i.e., an activity that EPA "may properly and legally undertake." Use of penalty mail is authorized by 39 U.S.C. § 3202(1970). Restrictions on its use are set forth in 39 U.S.C. § 3204(1970). See also Postal Service Manual section 137.2.

Third class mail is defined in Postal Service Manual section 134.2. The minimum bulk rate for commercial users is 7.7 cents per item. Postal Service Manual section 134.12. We are advised by Postal Service officials that the rate for Government users is the same as that for commercial users. The length of each newsletter was 4 pages. Assuming, as is most likely, that the newsletter qualified for the minimum rate (see Postal Service Manual section 134.3 for limitations), then the cost of postage for the penalty mail envelopes provided by EPA was 7.7 cents each.

There is in addition a special third class bulk rate of 1.8 cents per piece for qualified users. Postal Service Manual section 134.12. This special rate is available to certain types of nonprofit organization. Postal Service Manual section 134.5. To take advantage of this preferred rate, an organization must file an application, which must be approved by the Postal Service. Postal Service Manual section 134.54.

The determination of what may be transmitted through the mails under the laws relating to penalty mail is not within the jurisdiction of the General Accounting Office, but rather is a function of the Postmaster General. 24 Comp. Dec. 111(1917). Questions of mail classification are similarly for determination by the Postal Service. See, e.g., 39 U.S.C. §§ 404(2), 410(a) and 3621(1970). We are advised by Postal officials that the preferred third class bulk rate (1.8 cents) may not be used by Government agencies or generally by Government contractors in matters relating to the performance of their contracts. Cf. B-114874, September 16, 1975. Assuming that the Postal Service would apply this rule in the present situation, it would appear that the 1.8 cent rate was not available because the Foundation was under contract to the Government to produce and distribute the newsletters. Consequently, the only apparent alternative to furnishing the

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penalty envelopes would have been for the Foundation to transmit the newsletters to EPA, which would in turn mail them to the recipients. Since each penalty envelope would cost 7.7 cents in postage whether mailed by EPA or the Foundation, it appears that EPA selected the less expensive alternative.

Another area of concern is the use of language in the newsletters indicating approval by EPA of the positions taken by the Foundation. On January 7, 1975, the Project Officer sent a letter to all Regional Public Affairs Directors containing instructions for the Water Quality Awareness program. It stated on page 5:

"* * * Each newsletter should contain an acknowledgement that it is published under a purchase order from EPA in support of public participation under the law."

Issues 1 and 2 of the newsletter contained the statement that it was "* * * funded by the U.S. Environmental Protection Agency as part of its Water Quality Awareness Program." Issues 3 and 4 replaced this with the statement that the newsletter was "* * * prepared with the approval of the U.S. Environmental Protection Agency under Purchase Order P5-01-2958-A." We do not know the reason for this change.

The Purchase Order states that the Project Officer "* * * shall be responsible for requesting and approving the services specified." The Procurement Plan incorporated in the Order sets out the approval process in more detail. The contractor was to submit, for approval by the Regional Public Affairs Director, a format for the newsletter, a "dummy" of the newsletter, and "all items to be included" in the initial issue. There is no requirement in the Procurement Plan or in the January 7 instructions for prior approval of each issue of the newsletter by EPA.

It can be argued that the approval statement in issues 3 and 4 refers merely to the fact of preparation rather than the contents. Nevertheless, although the use of the approval statement appears to violate no law, we believe it was ill-advised since it does, in our opinion, create the impression that EPA has endorsed the contents. We understand that there was some indication from EPA officials that appropriate disclaimer language would be used in subsequent issues. The Project Officer has informed us that the final issue of the newsletter was printed with the same approval statement as in issues 3 and 4, and that EPA has instructed the Foundation not to distribute it.

A final area of concern is the possible violation of Federal anti-lobbying statutes. The primary statutes dealing with lobbying activities are 18 U.S.C. § 1913 (1970) and the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270 (1970) both of which are penal statutes. Since the

enforcement of penal statutes is a matter for the Department of Justice and the courts, and we have no authority in this area, comment by this Office would be inappropriate.

There is also for consideration, however, section 607(a) of the Treasury, Postal Service, and General Government Appropriation Act, 1975, Pub. L. No. 93-381 (August 21, 1974), 88 Stat. 613, 632, which provides:

"No part of any appropriation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress."

Although EPA does not receive its appropriations under this Act, section 607(a) is applicable to EPA since its scope extends to "this or any other Act." The identical provision is found in section 607(a) of the Treasury, Postal Service, and General Government Appropriation Act, 1976, Pub. L. No. 94-91 (August 9, 1975), 89 Stat. 441, 459.

In interpreting "publicity and propaganda" provisions such as section 607(a), we have consistently recognized that any agency has a legitimate interest in communicating with the public and with legislators regarding its policies. If the policy of an agency is affected by pending legislation, discussion by officials of that policy will necessarily, either explicitly or by implication, refer to such legislation, and will presumably be either in support of or in opposition to it. An interpretation of section 607(a) which strictly prohibited expenditures of public funds for dissemination of views on pending legislation would consequently preclude virtually any comment by officials on administration or agency policy, a result we do not believe was intended.

We believe, therefore, that Congress did not intend, by the enactment of section 607(a) and like measures, to preclude all expression by agency officials of views on pending legislation. Rather, the prohibition of section 607(a) in our view, applies primarily to expenditures involving direct appeals addressed to the public suggesting that they contact their elected representatives and indicate their support of or opposition to pending legislation, i.e., appeals to members of the public for them in turn to urge their representatives to vote in a particular manner. The foregoing general considerations form the basis for our determination in any given instance of whether there has been a violation of section 607(a).

In this context, we have reviewed the four issues of Water Quality Awareness, with particular attention to the two articles called to our attention by your staff. The October 1975 issue contains an article entitled "Adverse Court Decision on New Melones." Although not within the purview of

section 607(a), because it does not involve pending legislation, this article has apparently stirred considerable controversy. The article itself is a summary of a recent Federal District Court decision and is essentially factual and informative. The controversy seems to be over the use of the word "adverse" in the title. To be sure, the word "adverse" may connote "harmful." In legal usage, however, it is commonly used simply to describe a result opposite in position to some referenced viewpoint, and may or may not imply opposition to that result on the part of the user. Whether a "better" word could have been used is an open question. We see no basis to criticize the article or the title as legally objectionable.

Of greater concern is an article appearing on pages 3 and 4 of the January 1976 issue, entitled "H.R. 9560: A Threat To Clean Water." The article begins as follows:

"The House Public Works and Transportation Committee is expected to take action on H.R. 9560 this month. The Resolution has come under attack by environmentalists due to several weak sections proposed in the bill. The Clean Water Action Project has recommended opposition to the bill unless damaging provisions are taken out."

It then summarizes provisions of the bill which are characterized as "good" or "bad." It proceeds to describe "vast weaknesses" of section 8 of the bill, and concludes as follows:

"There are five representatives from California on the House Committee on Public Works and Transportation: Harold T. Johnson (D), Glenn M. Anderson (D), Norman Y. Mineta (D), Don E. Clausen (R) and Barry M. Goldwater, Jr. (R). In a subcommittee meeting on amendments to the bill, Representatives Anderson and Clausen voted in opposition to the environmental vote (i.e., Anderson and Clausen favored the retention of Section 8).

"Contact your representatives and make sure they are aware of your feelings concerning this important legislation. For more information, write to Clean Water Action Project, P. O. Box 19132, Washington, D.C. 20036."

While the final paragraph exhorts the reader to communicate merely his or her "feelings," the article in its entirety leaves little doubt as to what those "feelings" are supposed to be.

It is likely that this article, if published directly by EPA, would constitute a violation of section 607(a). B-173648, September 21, 1973. The question here, however, is whether the violation may be imputed to EPA.

where the article was published and distributed, not by EPA, but by the Foundation under an otherwise proper contract.

The January 7 instructions from the EPA Project Officer to the Regional Public Affairs Directors, referred to above, contain the following provision:

"These franked, third-class, bulk-rate envelopes are to be used only for mailing water newsletters. It would be inappropriate, for instance, for a contractor to use these envelopes to mail information on air quality or solid waste or editorial matter or material of an advocacy nature. The envelopes are strictly for disseminating facts about water quality." (Emphasis supplied.)

As noted above, there was no requirement for prior approval by EPA of each newsletter. However, each newsletter was required to be distributed to all Regional Public Affairs Directors and to the Project Officer. Thus, EPA knew, from its receipt of the October 1975 issue, that the Foundation was using an approval statement implying official Government sanction of the contents of the newsletter. In the circumstances presented, we believe that EPA had a duty to insure that its appropriation was not used in a manner that would violate section 607(a), *supra*, the prohibition against its use for publicity or propaganda purposes intended to support or defeat pending legislation.

Since similar newsletters have been or are being prepared by other contractors under the Water Quality Information Exchange Program, and since similar programs might be undertaken in the future, EPA should establish adequate procedural safeguards to assure that appropriated funds are not used in connection with activities which contravene statutory prohibitions against "publicity or propaganda." These procedures should include, but are not necessarily limited to, prepublication review by EPA of newsletters and the use of appropriate disclaimer language.

As indicated above, we believe that the use of appropriated funds to publish and/or distribute the article entitled "H.R. 9560: A Threat To Clean Water" would constitute a violation of section 607(a). The Procurement Plan provided for payment of the contract price to the Foundation in three installments. The final installment, \$200, was payable only after receipt and approval by EPA of a final report from the Foundation, to include copies of each newsletter produced. We do not know if the final report has yet been submitted or the final installment paid. Since four newsletters of equal length were produced and distributed under the contract, we may assume that \$125 of the total contract price of \$500 was attributable to the January 1976 issue. If final payment has not yet been made, we believe EPA should reduce the final installment by \$125, the amount representing the cost attributable

to the objectionable newsletter. However, in view of the small amount involved as compared to the costs of effecting recovery, it would serve no useful purpose to require EPA to seek reimbursement of the \$125 payment, if it has already been made.

In view of the above conclusions and recommendations, we are sending a copy of this letter to the Administrator of EPA for compliance with the reporting requirements of section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176. ✓

Sincerely yours,

SIGNED ELMER B. STAATS

Comptroller General
of the United States

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Washington
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Availability
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POSTAL SERVICE
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WATER
Pollution prevention
Water Quality Information Exchange Program
Environmental Protection Agency

ENVIRONMENTAL PROTECTION AND IMPROVEMENT
Environmental Protection Agency
Water pollution control
Community waterways

STATE & FEDERAL OFFICES

Department of Justice
Federal Bureau of Investigation

POSTAL SERVICE, UNITED STATES

Mails

"Penalty" mail

Use

GENERAL ACCOUNTING OFFICE

Jurisdiction

Postal matters

POSTAL SERVICE, UNITED STATES

Mails

"Penalty" mail

Jurisdiction

APPROPRIATIONS

Availability

Publicity and propaganda

Pending legislation

LOBBYING

Appropriation prohibition

WATER

Pollution prevention

Water Quality Information Exchange Program

Environmental Protection Agency

ENVIRONMENTAL PROTECTION AND IMPROVEMENT

Environmental Protection Agency

Water pollution control

Community workshops