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

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RELEASED

FEB 7 1974

The Honorable Edmund S. Muskie
Chairman, Subcommittee on Air and Water Pollution
Committee on Public Works
United States Senate

Dear Mr. Chairman:

As you requested on May 10, 1973 (see enc.), we have examined (1) the circumstances surrounding the Environmental Protection Agency's (EPA's) denial of a grant for constructing a waste treatment project for Fort Fairfield, Maine, and (2) the validity of EPA's approval of grants for 12 other projects you cited. You expressed concern that EPA's selection of projects for funding was not equitable, that the Fort Fairfield application was rejected on the basis of criteria that were not applied to the other 12 projects, and that the Fort Fairfield project should have been funded under the same conditions as were applied to the other 12 projects.

The Federal Water Pollution Control Act Amendments of 1972, dated October 18, 1972 (33 U.S.C. 1251 et seq.), provided that, effective March 2, 1973, the Administrator could not approve a grant for constructing waste treatment works unless the applicant had established a new system of much higher charges to be paid by the industrial users of the project.

To preclude a rush of applications before the March 2, 1973, deadline, EPA had established certain criteria on which to select projects for funding. EPA's primary selection criterion was a requirement that the applicant have complete plans and specifications ready for bidding. The Fort Fairfield project was not funded before March 2, 1973, because the applicant had not submitted complete plans and specifications.

As of March 2, 1973, applicants for 2 of the 12 projects--Lebanon, New Hampshire, and Erie County, New York--also had not submitted substantially complete plans and specifications. EPA subsequently terminated the Erie grant. We believe the Lebanon grant should be terminated for the reasons EPA terminated the Erie grant. In addition, although New Windsor, New York, submitted plans and specifications, EPA did not consider them approvable because, among other reasons, they did not appear to meet the minimum secondary treatment criteria. We therefore believe that the New Windsor grant should also be terminated.

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Our review was conducted at EPA headquarters in Washington, D.C.; EPA Region I in Boston; and EPA Region II in New York City. It included (1) discussions with EPA officials and (2) an examination of pertinent legislation, regulations, records, and files relating to the review and approval of these construction grant applications.

BACKGROUND

The grants you referred to were among the first to be awarded under the 1972 amendments. The act increased the Federal share of the eligible costs of municipal waste treatment plants and significantly changed EPA's construction grant program.

One significant change was the establishment of a new industrial user charge system applicable to grants awarded after March 1, 1973. Before March 2, 1973, EPA regulations required an industrial user of treatment works to pay its proportionate share of the applicant's cost of construction. However, the 1972 amendments provided that after March 1, 1973, a Federal grant could not be approved unless the applicant:

"* * * has made provision for the payment to such applicant by the industrial users of the treatment works, of that portion of the cost of construction of such treatment works (as determined by the Administrator) which is allocable to the treatment of such industrial wastes to the extent attributable to the Federal share of the cost of construction."
(Underscoring supplied.)

The significance of the March 1, 1973, user charge deadline centers upon the portion of the project cost to which industrial cost recovery is applied. When the industrial cost recovery is applied to the 75-percent Federal contribution rather than to the applicant's contribution, a participating industry's share of the eligible cost increases by 300 percent.

EPA issued rules and regulations to implement the act (38 F.R. 5329) on February 28, 1973.

On February 28 and March 1, 1973, EPA awarded 44 grants totaling about \$502 million in 5 of EPA's 10 regions. In Region I 21 grants were awarded totaling about \$231 million, and in Region II 9 grants were awarded totaling about \$200 million. Your request related to three of the Region I grants and all the Region II grants.

CRITERIA FOR SELECTION OF PROJECTS TO BE
FUNDED BEFORE MARCH 2, 1973

On March 30, 1973, in testimony before the Subcommittee on Air and Water Pollution, Senate Committee on Public Works, the Deputy Administrator, EPA, discussed the need for EPA to establish criteria for selecting projects for funding before March 2, 1973, as follows:

"We had some indication from the Congress, as you know, that it was not the intention to create a flurry of activity precedent to the March 1 deadline. The fear was that there was * * * in fact going to be a substantial flurry of activity. In order to handle the problem, we had to come up with some specific objectives, very specific criteria."

The primary criterion established by EPA headquarters was that an applicant have complete plans and specifications for a project so that construction bids could be solicited immediately upon grant approval.

The Fort Fairfield project did not meet this criterion. Applicants for the Lebanon and Erie projects also had not submitted substantially complete plans and specifications but received grants. EPA officials said the Lebanon grant was awarded without plans and specifications because of a commitment the EPA Regional Administrator made to Lebanon to fund the project under the old user charge system. EPA subsequently terminated the Erie grant because of a lack of plans and specifications.

The plans and specifications for a third project--New York City (Red Hook)--were complete except for only a very minor part (less than 1 percent of the project cost). Plans and specifications were complete for the other nine projects.

The facts pertaining to the Fort Fairfield, Erie, Lebanon, and Red Hook projects are discussed below.

Fort Fairfield

The proposed Fort Fairfield project was to include three construction contracts--one for interceptor sewers and appurtenances, the second for a waste treatment facility, and the third for two pumping stations. As of March 1, 1973, the applicant submitted

complete plans and specifications for the first and third proposed contracts through the State to the EPA regional office. But the plans and specifications for the second proposed contract did not include the electrical, plumbing, heating, or foundation reinforcement sections for the waste treatment facility, and the mechanical section was only partially complete.

EPA determined that, because the plans and specifications were incomplete, a grant for the project could not be awarded before March 2, 1973.

Erie

The proposed Erie project was to include 16 separate contracts for constructing a waste treatment plant, pumping stations, force mains, and interceptor sewers. On February 20, 1973, the Region II Administrator notified EPA headquarters that Erie, as well as eight other projects in the region, should be funded before March 2, 1973. The Regional Administrator stated that the State had reviewed the plans and specifications but the regional office had not because they had been received only that day. On February 28, 1973, the Regional Administrator notified EPA headquarters that this project should not be funded because, among other things, EPA had received the plans and specifications for only one proposed contract and preliminary drawings for four others.

An EPA headquarters official informed us that, due to the apparent conflict between the State and EPA regional office over whether the project should be approved, headquarters notified the region to award the grant with the intention that, if upon reexamination the grant was found not to have met the grant requirements, it could be terminated.

EPA awarded a grant to Erie on March 1, 1973, but terminated it, however, on May 29, 1973, for failure to submit complete final plans and specifications.

Lebanon

The Lebanon grant was for phase II of a two-phased project. Under phase I, EPA awarded Lebanon a grant for constructing a primary treatment plant and interceptor sewers. Because EPA regulations precluded the award of a grant for a plant which provided for less than secondary treatment, EPA approved the grant on condition that the municipality enter into a firm and enforceable agreement to provide

for secondary treatment on a prescribed schedule. On December 22, 1972, Region I, the State of New Hampshire, and Lebanon agreed in writing to comply with this condition. An EPA official said the intent of this agreement was to provide Federal funds for phase II under the old user charge requirements although the agreement did not stipulate this factor. Lebanon submitted an application, dated January 11, 1973, for a phase II grant to construct a secondary treatment plant. The application, however, did not include plans and specifications.

An EPA official stated that, although the region was not authorized to enter into such an agreement, it might be binding and the region had made a moral commitment to the municipality to go ahead with the project. Therefore, the Administrator decided to award a grant for this project before final construction plans and specifications were submitted.

Red Hook

The proposed Red Hook project was to include two separate contracts--one for constructing interceptor sewers and the second for the mechanical and electrical equipment for a pumping station. Each proposed contract required separate plans and specifications. As of March 1, 1973, the plans and specifications for the interceptors were complete, but only preliminary plans and specifications had been submitted for the equipment contract. EPA officials stated that this equipment was only a minor part of the overall project (less than 1 percent of project cost) and would not be required until after construction of the interceptors, which was expected to take about 1 year.

VALIDITY OF EPA'S APPROVAL OF 12 PROJECTS BEFORE MARCH 2, 1973

We examined the validity of the 12 grants you cited. They were among the first to be awarded under the 1972 amendments.

Before these amendments, EPA generally awarded a grant for an entire waste treatment project on the basis of preliminary plans and specifications. Section 203(a) of the 1972 amendments (33 U.S.C. 1283) provides that the applicant submit to the Administrator plans, specifications, and estimates and that:

"The Administrator shall act upon such plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such plans, specifications, and estimates shall be deemed a contractual obligation of the United States for the payment of its proportional contribution to such project." (Underscoring supplied.)

The Senate conference report, in discussing this section of the act, emphasized the Congress's intent that there be a complete change from EPA's practice of awarding grants for entire projects in that:

"* * * the applicant for a grant furnishes plans, specifications, and estimates (PS&E) for each stage (which is a project) in the overall waste treatment facility which is included in the term 'construction' as defined in Section 212. Upon approval of the PS&E for any project, the United States is obligated to pay 75 percent of the costs of that project. Thus, for instance, the applicant may file a PS&E for a project to determine the feasibility of a treatment works, another PS&E for a project for engineering, architectural, legal, fiscal, or economic investigations, another PS&E for actual building, etc."

EPA has structured its construction grant program so that grants may generally be awarded for each of three steps:

1. Preparing preliminary plans and studies.
2. Preparing construction drawings and specifications.
3. Fabricating and building a complete and operable treatment works.

According to EPA records, the 12 grants reviewed are step 3 (construction) grants.

EPA has taken the position with respect to steps 1 and 2 grants --and we find no basis to object--that it would be inappropriate to require an applicant to submit detailed PS&E in order to receive a grant for those projects consisting of such items as feasibility studies, fiscal and economic studies, or preparation of blueprints for bidding, when the grant itself is to support the preparation of construction PS&E.

For construction grants EPA has taken the position that it can approve an application for a grant which contains complete (or substantially complete) PS&E and thus obligate the United States, even

though such award is conditioned upon its subsequent approval of the project's PS&E. But our interpretation of 33 U.S.C. 1283 is that the Administrator may not bind the United States for a step 3 grant until he has approved the construction PS&E for that project.

None of the construction PS&E for the 12 projects reviewed had been approved as of March 1, 1973. Before award of the Lebanon grant, the Administrator waived the requirement for construction PS&E.

Region I grants

Grant files in Region I showed that the construction PS&E for the three projects reviewed had not been approved as of March 1, 1973. Although two of the three projects submitted construction PS&E, an EPA official said they were reviewed only to determine whether they were complete and final and were not considered approved when the grants were awarded.

As previously stated, the Lebanon project submitted an application for a construction grant but did not submit construction PS&E. The PS&E for this project were not scheduled to be completed until November 1973. EPA headquarters waived the requirement for complete PS&E and directed that the grant be awarded on condition that all agency policies and regulations would be met.

Region I attached a condition to each of the three grants which required that the applicant comply

"* * * with all state and federal laws, regulations and executive orders applicable to this grant, including, without limitation, Title 40, Code of Federal Regulations, Parts 6, 30, and 35."

In the event of nonfulfillment of or noncompliance with this condition, or others specified in the grant agreement, the grant could be terminated and all funds paid under it could be recovered.

Region II grants

EPA Region II officials reviewed the PS&E submitted before awarding the grant. The officials did not consider the Erie project's PS&E to be approvable because they were incomplete. (As previously mentioned the Erie grant was terminated on May 29, 1973.)

Also the officials did not consider the New Windsor construction PS&E approvable because of significant deficiencies. For example:

- The treatment provided by the project did not appear to meet minimum secondary treatment criteria.
- There was evidence of a serious infiltration problem in the town's collection system.
- The plans had to be redesigned to eliminate bypassing of the plant's secondary treatment settlement tanks.

The officials considered the PS&E for six of the remaining seven projects and those for all but a minor part (less than 1 percent of project cost) of the Red Hook project to be approvable, but not approved, as of March 1, 1973. According to an EPA official, the applicants needed to make minor revisions, such as (1) to include in the specifications the latest Department of Labor wage rates and (2) when brand names were designated in the specifications, to identify at least two brand names followed by the words "or equal" as required by section 204(a)(6) of the 1972 amendments. (According to EPA, industry usually identifies one brand name followed by "or equal.")

Although EPA headquarters knew problems had arisen on some projects, it directed Region II to award grants for all nine projects, conditioning them, as necessary, to insure that those on which problems had arisen would conform to applicable agency policies and regulations. Each grant award document included the following condition:

"This grant is subject to completion of a review of plans and specifications submitted by the Grantee. The project will not be advertised or placed on the market for bidding until completion of such review and receipt by the Grantee of notice of EPA approval of plans and specifications."

CONCLUSION

The statute provides that the United States becomes obligated to pay its share of construction costs only when the Administrator approves the applicant's PS&E. Also EPA's regulations and criteria for awarding grants before March 2, 1973, required that applicants for step 3 grants have PS&E complete enough that construction bids could be solicited immediately upon grant approval. Therefore, we question the propriety of EPA's awarding grants for the construction of treatment works before approving construction PS&E sufficiently complete to allow construction bids to be solicited.

Nine applicants for the projects reviewed had submitted substantially complete PS&E. Region I had not completed its review of the PS&E for two projects before the award of the grants. Region II had reviewed and considered approvable the PS&E for seven projects except for what it considered to be certain nonsubstantive points. Since these applicants presumably relied in good faith on EPA's position, we feel it would not serve any useful purpose for us to take further action concerning these nine grants.

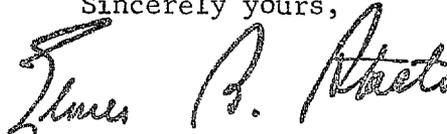
The Lebanon and New Windsor grants, however, do not appear to fall in the same category as the nine grants. In our opinion, the Lebanon application, which contained incomplete PS&E, is indistinguishable from those of Fort Fairfield and Erie, neither of which was finally approved by EPA because they failed to submit substantially complete final PS&E before the deadline. Moreover, we fail to see how the special conditions EPA cited concerning Lebanon's application --that is, the "moral commitment" EPA's Regional Administrator made--can overcome the fact that, without submission to and approval of its PS&E by EPA, Lebanon has not substantially complied with the statute, the applicable regulations, or EPA's criteria for awarding grants before March 2, 1973. Therefore, we believe that a grant should not have been awarded to Lebanon and that it should be terminated for the same reasons EPA terminated Erie's grant.

Also we believe that the New Windsor award was improper and should be terminated since EPA found that the applicant's PS&E were not approvable because, among other things, the treatment the project was to provide did not appear to meet the minimum secondary treatment criteria.

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As requested, we did not obtain agency comments on this report. However, as your office agreed, we are simultaneously releasing this report to the Administrator of EPA so that he can take action on these matters.

Sincerely yours,



Comptroller General
of the United States

Enclosure

JENNINGS RANDOLPH, W. VA., CHAIR

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ENCLOSURE

United States Senate

M. HARRY MEYER, CHIEF COUNSEL AND CHIEF CLERK
BAILEY GUARD, MINORITY CLERK

COMMITTEE ON PUBLIC WORKS
WASHINGTON, D.C. 20510

May 10, 1973

Honorable Elmer B. Staats
Comptroller General of the
United States
General Accounting Office
Washington, D.C. 20548

Dear Mr. Comptroller:

Early in March 1973, I was advised by Fort Fairfield, Maine, that an application for a sewage treatment construction grant for that community had been denied by the Environmental Protection Agency. I inquired as to the justification for this action by letter dated March 14, 1973. The text of my inquiry and the Environmental Protection Agency's response is attached (Exhibits A and B). (See GAO note.)

Subsequent to my inquiry, I was informed that the Environmental Protection Agency had approved a series of grant obligations which did not appear to meet the criteria against which the Fort Fairfield application was judged. A list of those projects is attached (Exhibit C). (Copies of information bearing on this issue are available from the staff of the Subcommittee on Air and Water Pollution.)

I requested an Environmental Protection Agency evaluation of this information by letter dated April 13. That letter and the Environmental Protection Agency's response is attached (Exhibits D and E). (See GAO note.)

On the basis of information now available to me, I must conclude that Fort Fairfield should, in fact, be eligible for a grant obligation under the conditions as existed prior to March 2, 1973, and subject to the same grant obligation condition applicable to those projects listed in Exhibit C.

In order that Fort Fairfield may proceed immediately to pursue administrative and legal remedies to the decision of the Environmental Protection Agency regarding its application, I would appreciate your review of the listed projects to verify the validity of the Environmental Protection Agency's approval of those grant obligations.

GAO note: Background material except for exhibit C has been omitted.

ENCLOSURE

EXHIBIT C

The total grant amounts involved are:

Massachusetts

1. Irving - \$900,000
2. Haverhill - \$18.4 million

New Hampshire

1. Lebanon - \$3.3 million

New York

1. Niagara Falls - \$47.3 million*
2. Rensselaer - \$43.4 million
3. Onondaga County
 - a. \$0.829 million
 - b. \$3.9 million
 - c. \$2.6 million
4. New York City
 - a. \$81.9 million
 - b. \$11.0 million
5. Erie County - \$6.7 million
6. New Windsor - \$2.0 million

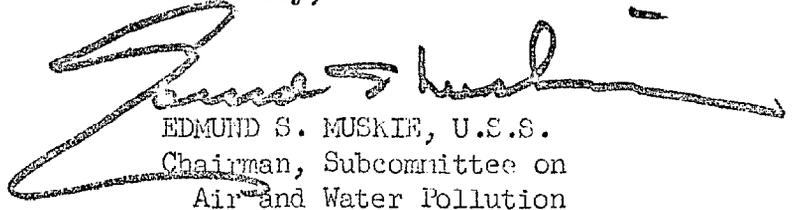
Honorable Elmer B. Staats

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May 10, 1973

If you have any questions regarding this inquiry, please contact Leon G. Billings of the Subcommittee on Air and Water Pollution at 225-7861.

Sincerely,

A handwritten signature in cursive script, appearing to read "Edmund S. Muskie". The signature is written in dark ink and is positioned above the typed name and title.

EDMUND S. MUSKIE, U.S.S.
Chairman, Subcommittee on
Air and Water Pollution