UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-177806 FEB 24 1978

Mr. Frank R. Hammill, Jr., Esq.
Counsel, Committee on Science and
Technology
House of Representatives

Dear Mr. Hammill:

This is in response to your informal inquiry concerning statutory mandates for assessments by the Office of Technology Assessment (OTA).

The Technology Assessment Act of 1972 (Act), Pub. L. No. 92-484, (October 13, 1972), 86 Stat. 797, 2 U.S.C. § 471 et seq. (1976) established the OTA whose functions and duties are stated as follows:

"The basic function of the Office shall be to provide early indications of the probable beneficial and adverse impacts of the applications of technology and to develop other coordinate information which may assist the Congress. In carrying out such function, the Office shall:

"(1) identify existing or probable impacts of technology or technological programs;

"(2) where possible, ascertain cause-and-effect relationships;

"(3) identify alternative technological methods of implementing specific programs;

"(4) identify alternative programs for achieving requisite goals;

"(5) make estimates and comparisons of the impacts of alternative methods and programs;

"(6) present findings of completed analyses to the appropriate legislative authorities;

"(7) identify areas where additional research or data collection is required to provide adequate

support for the assessments and estimates described in paragraph (1) through (5) of this subsection; and

"(8) undertake such additional associated activities as the appropriate authorities specified under subsection (d) of this section may direct." 2 U.S.C. § 472(c).

The Act also provides that:

"Assessment activities undertaken by the Office may be initiated upon the request of:

"(1) the chairman of any standing, special, or select committee of either House of the Congress, or of any joint committee of the Congress, acting for himself or at the request of the ranking minority member or a majority of the committee members;

"(2) the Board; or

"(3) the Director, in consultation with the Board." 2 U.S.C. § 472(d).

The "Board" referred to above is the Technology Assessment Board, established pursuant to 2 U.S.C. § 473 as OTA's managing body.

Recently, the Congress has enacted legislation requiring the OTA to perform certain assessments and to report on them by certain dates. For example, section 7 of the Federal Railroad Safety Authorization Act of 1976, Pub. L. No. 94-348 (July 8, 1976), 90 Stat. 820, 45 U.S.C.A. § 421 note, provides:

"(a) The Office of Technology Assessment shall conduct a study of the Federal Railroad Safety Act of 1970 (45 U.S.C. 421 et seq.) and related Federal laws to evaluate their effectiveness in improving the safety of our Nation's railroads. Such study and evaluation shall include, but shall not be limited to--

"(1) a cost-benefit analysis of the railroad safety research and development activities under the Federal Railroad Safety Act of 1970 and related Federal laws;

"(2) an evaluation of trends with respect to railroad employee injuries and casualties,

injuries and casualties to other persons, accidents by type and cause, and such other data as the Office of Technology Assessment considers necessary to determine any significant statistical relationship between safety practices, expenditures, penalties for violation of Federal railroad safety laws and regulations, and accident rates;

"(3) a statistical comparison of railroad accidents reported by each railroad for the 10-year period preceding the date of enactment of this Act;

"(4) the cost-benefit and effectiveness of accident prevention resulting from the methodology used and practices employed by Federal and State railroad safety inspectors under Federal railroad safety laws and regulations;

"(5) an evaluation of safety inspection activities conducted by the railroad industry;

"(6) an evaluation and analysis of industry research and development relating to railroad safety and accident prevention;

"(7) a cost-benefit analysis of the various Federal laws and regulations relating to railroad safety; and

"(8) the need for additional Federal expenditures for improvements in railroad safety.

"(b) The Office of Technology Assessment shall, within 18 months after the date of enactment of this Act, submit a report to the Congress containing the results of the study conducted pursuant to this section, together with recommendations for such legislative or other action as such Office considers appropriate.

"(c) There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this section."

Further, section 10 of the Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377 (August 4, 1976), 90 Stat. 1090, 30 U.S.C.A. § 201 note, provides:

"The Director of the Office of Technology Assessment is authorized and directed to conduct a complete study

of coal leases entered into by the United States under section 2 of the Act of February 25, 1920 (commonly known as the Mineral Lands Leasing Act). Such study shall include an analysis of all mining activities, present and potential value of said coal leases, receipts of the Federal Government from said leases, and recommendations as to the feasibility of the use of deep mining technology in said leased area. The Director shall submit the results of his study to the Congress within one year after the date of enactment of this Act."

You have informally indicated that since the OTA normally contracts for the performance of assessments, rather than performing them "in-house," a particular assessment mandated by law (rather than undertaken in accordance with normal procedures for instituting an assessment pursuant to 2 U.S.C. § 472(d)) can severely disrupt the OTA's program and budgetary plans. You also furnished us with copies of several memoranda which discuss this problem and the legal and practical ramifications of such mandates, and asked that we review them to provide guidance on:

--any legal aspects not dealt with in the material presented

--our experience in dealing with specific statutory mandates for auditing (i.e., recent trend, frequency, our approach and results)

--precedents in the executive branch having a bearing on this problem

--possible solutions of a legal or practical nature.

We have reviewed the materials provided and feel that they have fairly presented the issues involved. However, we do have the following additional observations.

I

We note that under the doctrine of expressio unius est exclusio alterius, 2 U.S.C. § 472(d) can reasonably be interpreted to mean that only the persons named therein are authorized to initiate assessments. 2A Sutherland, Statutory Construction (4th ed.), Sec. 47.23. Further, such an interpretation is reinforced by reference to the legislative history of H.R. 10243, 92d Congress, which became the Act. See Conference Committee Report on H.R. 10243, H.R. Rep. No. 92-1438, 9, and Report of the Senate Committee on Rules and

Administration, S. Rep. No. 92-1123, 3 and 20. However, as discussed below, this should not be taken to mean that the entire Congress cannot by statute direct an assessment.

We also note that while 2 U.S.C. § 472(d) makes clear who is authorized to request assessments, it is silent as to whether a request made thereunder is required to be performed or merely discretionary with the OTA. Nothing in the Act requires the conclusion that all such requests be considered as mandatory. Furthermore, 2 U.S.C. § 475 provides, inter alia, that:

> "The Office shall have the authority within the limits of available appropriations to do all things necessary to carry out the provisions of this chapter [Act] including, but without being limited to, the authority to--
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> * * * * *
>
> "(6) prescribe such rules and regulations as it deems necessary governing the operation and organization of the Office." (Emphasis supplied.)

Thus the OTA was expected to perform its functions within the limits of available appropriations. That Congress was aware of the problem of resource allocation is demonstrated in the Committee Print of the Staff Study of the Subcommittee on Computer Services, Senate Committee on Rules and Administration, 93rd Cong., 2d Sess. 51-56 (Nov. 1, 1972) (offered as a supplement to S. Rep. No. 92-1123, supra, but issued after the enactment of Pub. L. No. 92-484), discussing the operational concepts for implementing technology assessment. Specifically, pages 53-54 address the matter of the OTA's selection of assessment issues, stating:

> "One of the most difficult tasks to face the OTA is the choice among candidate issues of technology to be assessed, and the scope and intensity of the assessment effort.
>
> "Philosophically, the problem is a simple one. If one assumes that a typical assessment will cost in the range of $100,000 to $1 million and the OTA has $3 million to invest in assessments, it has the choice of performing three major ones or 30 smaller ones, or something in between. The probability is that issues raising the most intense controversy will be the most urgent candidates, but they will also be the most costly to assess. They are also likely to yield the least acceptable results because of their controversial nature.

Conversely, technologies having a long-range future impact can be assessed over a longer time frame, at a lower total cost, and could be expected to provide more credible and politically acceptable results. Judged on the basis of cost-benefit criteria alone, these latter kinds of assessments would be the most efficient use of resources.

"Developing an accepted set of criteria for securing candidate assessments is more than an abstract exercise. Strong forces within and outside the OTA would be brought to bear on initiating or inhibiting specific assessments and for shaping the directions of those chosen for action. An explicit and clear set of criteria developed in advance of authorizing the first assessment would seem to be a wise priority action for the OTA.

"One consideration within these criteria is the availability of a study team having competence to conduct an assessment study to the depth and breadth required. A function of the OTA staff, presumably, would be to assemble a roster of such teams, with an evaluation of their competence in this new field of research, and to maintain this roster up to date. This is a considerable task, in view of the characteristic mobility of the kinds of people involved.

"Another task in which the OTA staff might usefully serve would be to analyze the leading candidate issues as to the kinds of analytical methodologies of assessment that might be appropriate, and to prepare descriptions of the required analytical steps and kinds of information the assessment would require. Methodological requirements would provide one source of guidance in determining whether the issue could feasibly be assessed and which teams were best equipped to do the work. This information would also be useful in drafting requests for proposal to be sent, later, to a selected number of prospective contract bidders, both public and private.

"Another problem involves scheduling. Technology issues should be selected for assessment so that they will not all be completed at the same time and overload the analytical capacity of the OTA staff. A hump in assessment deliveries would also impose a heavy burden on the evaluation functions of the OTA. Other practical considerations are the time available to the Congress and its standing committees to consider OTA reports, and the question of how to make public the large amounts of OTA information that are certain to be generated."

Therefore, to the extent that the OTA is expected to determine priorities among various assessment issues requested under 2 U.S.C. § 472(d), its performance of any particular assessment may be deemed discretionary. Furthermore, such determinations, based on budgetary limitations, may result in lower priority assessments not being performed or being performed later than originally scheduled. While we recognize that the language of 2 U.S.C. § 472(c)(8) is mandatory in nature, we think its intent is to provide the basis for persons authorized to request assessments, to ask for information not included within the scope of the other seven paragraphs of subsection (c). While OTA certainly has to include such statutory requests in its work plans, it does not necessarily have to perform them in lieu of or ahead of other higher priority assessments.

We do not think the Congress by law can effectively prohibit itself from directing the OTA to perform assessments, thereby leaving the determination of which assessments to perform solely to the OTA. Any such attempt would not be binding on a subsequent Congress, or indeed on a later enactment by the same Congress. The Congress could, however, in its next appropriation for the OTA, make it clear that the funds are to be allocated in accordance with the priorities determined by the OTA.

II

The only situation where we have specifically addressed the problem of performance of congressionally mandated functions by executive branch agencies in the light of resource availability is our opinion B-159993, September 1, 1977. There was an apparent conflict between programs established by the Electric and Hybrid Vehicle Research, Development, and Demonstration Act of 1976 and Committee action on the fiscal year 1978 Energy Research and Development Administration (ERDA) appropriation. The committees had reduced ERDA's budget request and the resulting lump sum appropriation was sufficient to support either statutorily mandated program but not both. We held that the available funds should be applied first to satisfying the statutory program which required specified actions be taken by specified times, with the balance, if any, being allocated to the program which was also mandated, but in more general terms.

Judicial involvement in agency failures to perform mandated functions has generally been stimulated by refusals to expend funds for such programs which were otherwise available, i.e., impoundment cases. The situation is different where there are no funds available to perform the mandated program. However, while appropriations may be currently unavailable, once made available, the mandated assessments are to be performed. Current impossibility is not total relief from the law's requirements and does not serve to repeal them. It merely forestalls compliance.

Although a contract to perform every aspect of a required assessment would be improper when available funds are inadequate to cover the entire performance, 41 U.S.C. § 11, 48 Comp. Gen. 494 (1969), where time does permit, the agency might seek to identify those aspects of a mandated assessment which could be performed in their entirety from currently available funds and then contract for their performance only. Other aspects could be contracted for when other appropriations later became available.

Because of GAO's in-house capability to perform audit reviews and evaluations, we possess more flexibility in reallocating resources to perform a required review. We could, for example, transfer personnel working on nonmandatory reviews to reviews required by law. The OTA which generally contracts outside the agency for technology assessments might find itself in a situation where most or all of its funds have been obligated under contracts for the performance of nonmandatory assessments in a given fiscal year, and then, as a result of new legislation, being directed to perform an additional assessment during that same fiscal year. We doubt that the Congress would expect the OTA to terminate its existing contracts (with any funds remaining after payment of termination costs being applied towards the required assessment).

It is conceivable that in some situations, statutory requirements could be stated in very broad language which, if literally interpreted, might exhaust OTA resources before it could provide all that was required by the law mandating the assessment. In such a situation, the OTA should advise the congressional committees responsible for the requirement that it could address only the most important issues identified as concerns of the Congress. The committees in turn could advise the OTA as to whether it had correctly determined which issues were of fundamental importance to the Congress.

Perhaps the problem can be avoided at the outset if, in commenting on any proposed legislation mandating an assessment, OTA explains the difficulties such a requirement might cause, and offers solutions or alternatives. For example, in our comments to the House Committee on Science and Technology, B-178726, December 18, 1975, on H.R. 8055, 94th Cong., which if enacted would have been cited as the "National Commitment to Energy Independence Using Solar and Geothermal Energy Act of 1975" we pointed out that:

> "Subsection 501(e) of the bill states that, no later than September 30 of each year, the General Accounting Office shall report to Congress on evaluations of the progress of each program toward the goals specified, the expenditures of funds and related obligations, and the performance of the Administrator and his staff. The General Accounting Office has specific authority under section 306 of the Energy Reorganization Act,

supra, in addition to its general functional authority to make audits of ERDA's activities and programs; however, if it is determined that a specific requirement for audits by the General Accounting Office should be included, we believe that the periodic reporting requirement in subsection 501(e) should be deleted so that the Comptroller General would have the flexibility to determine the scope and frequency of audits and the timing of his reports to the Congress. Such flexibility is needed to insure that the available manpower resources of the General Accounting Office can be used to maximum advantage."

This statement reflects our position on mandatory recurring audit review and reporting requirements vis a vis the General Accounting Office. See also our comments on H.R. 1306, 95th Cong., B-95963, June 20, 1977; H.R. 4962, 95th Cong., B-166170, August 9, 1977; S. 521, 94th Cong., B-174316, August 28, 1979; and H.R. 1618, 94th Cong., B-179991, August 5, 1975. Where OTA is aware that the Congress is seriously considering adopting a mandatory assessment requirement, it might refrain from undertaking some discretionary assessment in order to assure having funds available to perform the required assessment. Thus a closer monitoring of pending congressional action might aid in resource allocating.

While involvement prior to passage of legislation may influence the decision by Congress on whether to adopt such measures, as can be seen from the following list of mandatory audit review and evaluation requirements applicable to this Office, there has been an increase in the number of such provisions adopted by the Congress over the past ten years. This list is not necessarily complete as it includes only those laws calling for a specific audit review or evaluation of a nonrecurring nature to be performed by a specified date. For a Government-wide compilation of recurring reporting requirements, see our directory entitled "Requirements for Recurring Reports to the Congress," 1977 Congressional Sourcebook Series, PAD-77-91 (copy enclosed); see pp. 193-199 for the requirements of this Office in particular.

Defense Production Act of 1950, as amended, sec. 719,
50 U.S.C. App. § 2167 (1970).
Required date: January 1, 1970
Report date: January 19, 1970, B-39995

Armed Forces Appropriation Authorization Act, FY 1970,
Pub. L. No. 91-121, sec. 409, November 19, 1969,
83 Stat. 208.
Required date: December 31, 1970
Report date: March 17, 1971, B-159896

Comprehensive Health Manpower Training Act of 1971, Pub. L. No. 92-157, sec. 204, November 18, 1971, 85 Stat. 462
Required date: November 18, 1972
Report date: November 20, 1972, B-184031(3)

Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, sec. 5, October 18, 1972, 86 Stat. 897
Required date: October 1, 1973
Report date: January 16, 1974, B-166506.38

Child Nutrition Act of 1966, as amended, section 17(e), 42 U.S.C sec. 1786 (Supp. IV, 1974)
Required date: preliminary report - October 1, 1974; final report - March 30, 1975
Report dates: preliminary report - December 18, 1974, B-178994; final report not prepared (Congress was advised that final report would not meaningfully expand on preliminary report.)

Small Business Amendments of 1974, Pub. L. No. 93-386, sec. 13, August 23, 1974, 88 Stat. 750
Required date: February 23, 1975
Report dates: 1975-1976, B-114835

Veterans' Administration Physician and Dentist Pay Comparability Act of 1975, Pub. L. No. 94-123, sec. 4(a) and (d), Oct. 22, 1975, 89 Stat. 673-4
Required dates: August 31, 1976 and March 1, 1977
Report dates: B-133044, August 30, 1976 and March 31, 1977

Public Works Employment Act of 1976, Pub. L. No. 94-369, sec. 215(a), July 22, 1976, 90 Stat. 1010
Required date: July 27, 1977
Report date: July 27, 1977 and November 29, 1977. Other supplemental reports in process, B-146285

United States Soldiers' and Airmen's Home Study, Pub. L. No. 94-454, sec. 3, October 2, 1976, 90 Stat. 1518
Required date: August 1, 1977
Report date: August 1, 1977, B-118724

Public Health Service Act, as amended, sec. 1314, 42 U.S.C. § 300e-13
Required date: June 30, 1978

United States Grain Standards Act of 1976, Pub. L. No. 94-582, sec. 8, October 21, 1976, 90 Stat. 2874
Required date: October 21, 1978

National Productivity and Quality of Working Life Act of 1975, Pub. L. No. 94-136, sec. 503, November 28, 1975, 89 Stat. 742
Required date: November 28, 1978

Comprehensive Study of Claims Under Title XVIII of the Social Security Act, Pub. L. No. 85-142, sec. 12, October 25, 1877, 91 Stat. 1197
Required date: July 1, 1978

Trade Act of 1974, Pub. L. No. 93-818, sec. 280, January 3, 1975, 88 Stat. 2040
Required date: January 31, 1980

Toxic Substances Control Act, Pub. L. No. 94-469, sec. 25, October 11, 1978, 90 Stat. 2046
Required date: 8 months after date of submission of EPA Indemnification Study to the Congress (maximum July 1, 1979)

Although we have not always been able to furnish a report by the required date due to lack of resources, in no case have we ever been unable to undertake and fulfill a reporting requirement mandated by law.

We hope the foregoing information is of some assistance to you.

Sincerely yours,

Paul G. Dembling

Paul G. Dembling
General Counsel

Enclosure