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The Honorable Walter B. Jones Chairman, Committee on Merchant Marine and Fisheries House of Representatives,

Dear Mr. Chairman

By letter of March 11, 1983, you a asked the following questions pertaining to sections 421 (a) and531(a) of the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424,I 96 Stat. 2097, 2162-63, 2187, 2189, which amends various sections of the Federal Boat Safety Act of 1971, as amended, 46 U.S.C. Secs.1451 et seq.: (1) whether the Coast Guard is authorized to spend $45 million each fiscal year in advance of appropriations and, if so, whether it is required to wait for contract liquidation authority from the Appropriations Committee before obligating money to the States; (2) whether the Coast Guard would be liable to contracting parties if the Coast Guard obligates money to the States and within the same fiscal. year the Appropriations Committee limits the amount of funds available for contract liquidation; and (3) if the Administration's deferral of $40 million authorized to be expended in fiscal year 1983 is rejected by the Congress, can the Coast Guard automatically expend up to $45 million?

For the reasons given below, we conclude: (1) the Coast Guard is authorized to obligate each fiscal year for assistance for State recreational boating safety programs up to $45 million or any lesser amount in the National Recreational Boating Safety and Facilities Improvement Fund (NRBF Fund) in advance of appropriations, but it can only liquidate those obligations to the extent provided in its applicable appropriation act; (2) if the amounts appropriated to liquidate obligations are not sufficient to cover obligations to the States in any fiscal year, the United States, through the Coast Guard, would probably be found liable by a Federal court to the States to whom obligations have been made; and (3) if the Administration's proposed deferral of $40 million is rejected by either House of the Congress, the Coast Guard must make available for obligation, in fiscal 1983, up to 45 million or any lesser amount in the NRBF fund. [1] However, the deferral is of contract authority and no funds could be expended without a liquidating appropriation.

As you have requested expedited consideration, we did not have sufficient time to request and receive formal comments from the Department of Transportation. Nevertheless, the Coast Guard told us informally, that in its view, section 421 of the Surface Transportation Assistance Act authorizes the Coast Guard, under authority granted by the Secretary of Transportation [2] to enter into obligations with the States in advance of appropriations, but that it cannot liquidate the obligations until monies are provided in appropriations acts. The

Coast Guard also suggested that if the Congress rejected the Administration's $40 million deferral request, it could obligate the $40 million.

BACKGROUND

The Federal Boat Safety Act of 1971, Pub. L. No. 92-75, 85 Stat. 213, provided for the creation of a State Boating Safety Grants Program. Pursuant to this program, most States established boating safety programs within the criteria described. in the Act. H.R. Rep. No. 1320, 96th Cong., 2d Sess. 13 (1980) (Conf.). The Recreational Boating Safety and Facilities Improvement Act of 1979, Pub. L. No. 96-494 Stat. 1983, P.L. 96-451 amended the Federal Boat Safety Act to "encourage greater State participation and uniformity in boating safety and facility improvement efforts," and to assist States in the development, administration and financing of State recreational boating safety and facilities improvement programs. Id. 94 Stat. 1984; H.R. Rep. No. 591, 96th Cong., 2d Sess. 13 (1980).

The Act established a trust fund in the Treasury to be; known as the National Recreational Boating Safety and Facilities Improvement Fund (NRBF Fund). Id. 94 Stat. 1987-88. The fund was to receive from the Highway Trust Fund up to $20 million per fiscal year of the amounts attributable to taxes on motorboat use of gasoline and other motor fuels. id. 94 Stat. 1988. Thus, it was intended that the beneficiaries of the program, rather than the general taxpayer, pay the costs. H.R. Rep. No. 1320, 96th Cong., 2d Sess. 15 (1980). The Act authorized the Secretary of Transportation to allocate and distribute monies from the NRBF Fund to any State that had either an accepted State recreational boating safety improvement program or an accepted recreational boating facilities improvement program or both. Pub. L. No. 96-451, 94 Stat. 1984-85. If the State program met certain statutory criteria, the Act required the Secretary to accept the program and provided that "such program shall be eligible to receive funds appropriated [from the NRBF Fund] * * *" Id. The Act also provided a method of allocation and distribution to the States of the Federal funds available. ID. 94 Stat. 1985. For fiscal 1981-83, $10 million was authorized to be appropriated each year for each of the two programs, the appropriations to remain available until expended. Id. 94 Stat. 1982.

The Surface Transportation Assistance Act of 198 2 further amended the Federal Boat Safety Act by adding to the Secretary's authority to allocate and distribute funds to States that have accepted programs the authority to contract with such States. Pub. L. 97-424, Sec. 421(a), 96 Stat. 2162- 63. In regard to this change, the Act replaced the provisions authorizing appropriations for the two programs described above with the following:

"Sec. 30. For the purposes of providing financial assistance for State recreational boating safety and facilities improvement programs, the Secretary is authorized to expend, subject to such amounts as are provided in appropriations Acts for liquidation of contract authority, an amount equal to the revenues accruing each fiscalyear from the taxes under section 4041 (b) of the Internal Revenue Code of 1954 with respect to special motor fuels used as fuel in motor boats and under section 4081 of such Code with respect to gasoline used as fuel in motor boats, Of the funds available for allocations and distribution for recreational boating safety and facilities improvement programs, one-third shall be allocated for recreational boating safety programs and two-thirds shall be allocated for recreational boating facilities improvement programs beginning with fiscal year 1983. Any funds authorized to be

expended for State recreational and boating safety improvement programs shall remain available until expended and shall be deemed to have been expended only if a sum equal to the total amounts authorized to be expended under this section for the fiscal year in question and all previous fiscal years have been obligated. Any funds that were previously obligated but are released by payment of a final voucher or modification of a program accepted shall be credited to the balance of unobligated funds and shall be immediately available for expenditure. (Emphasis added).

The 1982 amendment thus provided new budget authority or contract authority," to be liquidated by later appropriations. "Contract Authority" is specific statutory authority to obligate funds (although not to expend them) in advance of appropriations. See Glossary of terms used in the Federal Budget Process 42 (3rd ed.1981); 2 U.S.C. Sec. 651 (formerly 31 U.S.C. Sec. 1351 (c)(2)(A). This change was reflected in other sections of the Boat Safety Act that were amended. Thus, in the section describing "Program Acceptance", 46 U.S.C. Sec. 1475(b), (c) and (d) the word "appropriated" was replaced by the phrase "authorized to be expended." Pub. L. 97-424, Sec. 421(a), 496 Stat. 2162-63. Moreover, in the same section language was added providing that the Secretary's action in accepting either or both of the programs would be deemed a contractual obligation of the United States for payment of the proportional share of the cost of implementing the program. Finally, the Act increased the amounts to be transferred from the Highway Trust Fund to the NRBF Fund to $45 million for any fiscal year, and provided that the amounts in the Fund shall not exceed $45 million. Id. Sec. 531(a), 96 Stat. 2189.

DISCUSSION

The Antideficiency Act, 31 U.S.C. Sec. 1341(a)(1) (formerly 31 U.S.C. Sec. 665(a)) generally prohibits Government officers and employees from involving the Government in any contract or other obligation, for payment of money for any purpose, in excess of, or in advance of appropriations. There is an exception to this general rule if the contract or obligation is otherwise authorized by law.

The language of the amendments described above authorizes the Secretary to contract with the States prior to the enactment of appropriations to liquidate such contractual obligations and thus, that authority is an exception to the Antideficiency Act's prohibition. Section 421(a) provided contract authority of up to $45 million per fiscal year or any lesser amount in the NRBF fund and further provided that a contractual obligation to the States for payment of the proportional share of program costs would arise automatically upon the Secretary's acceptance of the State program.

Thus, the clause in the amendment limiting the Secretary's spending authority "to such amounts as are provided in appropriations Acts for liquidation of contract authority" only restricts the amounts that can be drawn from the trust fund to liquidate, i.e., to pay, the obligations previously incurred to amounts subsequently appropriated by the Congress. In this regard, we have held that an appropriation to liquidate contract authority is an appropriation to make payments under existing contracts and does not in and of itself confer authority to enter into additional contracts or future outlays. B-171630.16, August 14, 1975.

The legislative history describing section 421 (a) supports our analysis. Although there is little on that section in the Committee reports accompanying

the Surface Transportation Assistance Acts in floor debate Congressman Anderson stated:

This language * * * simply converts the authority of the Secretary to spend this money [money in the NRBF Fund] for recreational boating safety and facilities to contract authority. 128 Cong. Rec. H. 10716 (daily ed. Dec. 21, 1982). See also the House and Senate reports accompanying the fiscal 1983 Department of Transportation and Related Agencies Appropriations Act, Pub. L. 97-369, 96 Stat. 1765.

In answer to your first question, therefore, while the Coast Guard may not "spend" funds, i.e., actually make payments to the States until it receives a liquidating appropriation, it need not wait for such an appropriation before it enters into contractual obligations with he States. In fact, as mentioned earlier, section 421(a)(2)(B)of the Act creates an automatic obligation to any State whose boating safety plan has been accepted by the Secretary, regardless of whether the liquidating appropriation has been requested, considered, or approved at that time.

Your second question assumes that the Coast Guard obligates gates monies to the States for which the Congress does not providence sufficient liquidating appropriations. The United States, through the Coast Guard, would nevertheless be liable for payment of the obligations. The Boating Act, as amended, imposes a contractual obligation on the United States, upon the Secretary's acceptance of a State's program, to pay to the State the proportionate share of program costs.

We have held in several cases that the United States is obligated to pay under contracts where Government officials were statutorily authorized to enter into contracts in excess of or in advance of appropriations. 28 Comp.Gen. 163, 165 (1948); 29 Comp.Gen. 504, 506 (1950). While no one can force the Congress to appropriate liquidating monies, B-203841, March 30, 1955) the States could sue the United States in Federal Court to enforce its right to be paid under the Act. Any award to the States would then be paid from the permanent judgment appropriation. 31 U.S.C. Sec. 1304(a) (formerly 31 U.S.C. Sec. 724a).

As regards the Administration's proposed deferral of $40 million in contract authority for fiscal 1983, section 1013 of the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. Sec. 684 (formerly 31 U.S.C. Sec. 1403) requires a special message from the President, or other executive officer, to the Congress reporting any proposed deferral of budget authority. The deferral does not have to be approved by the Congress and extends to the end of the fiscal year in which the message reporting the deferral is transmitted. Nevertheless, either House of Congress may require that deferred contract authority be released and made available for obligation by passing an impoundment resolution disapproving the deferral. Accordingly, if either House of Congress passed a resolution disapproving the Administration's deferral of $40 million in contract authority, the Coast Guard would have to make the $40 million available for obligation, and could then obligate up to $45 million for fiscal 1983 or any lesser amount in the NRBF Fund. However, the deferral is of contract authority and; as discussed above, no funds could be expended without a liquidating appropriation.

We hope we have been assistance.

Sincerely yours,

Milton J. Socolar for Comptroller General of the United States

1. The Coast Guard told us that in the past, the fund has contained the maximum amounts authorized.

2. We assume that the Secretary's authority has been properly delegated to the Coast Guard.