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[Comments on OMB Determination Regarding NOAA Funds]

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B-227658 August 7, 1987

1. Unobligated balance in the Fisheries Loan Fund (Fund) was effectively transferred to National Oceanic and Atmospheric Administration (NOAA) by 1987 continuing resolution. Office of Management and Budget's (OMB) position that statutory authorization for the Fund expired "at the close of September 30, 1986" before the transfer took place is incorrect. Although the final continuing resolution took effect on October 18, 1986, (Pub. L. No. 99-500, republished October 30 as Pub. L. No 99-591, 100 Stat. 3341), the transfer was in fact effected on October 1 by the first continuing resolution for fiscal year 1987 and carried forward uninterrupted in subsequent resolutions including the final permanent resolution, Pub. L. No. 99-591. The transfer was effective within a few hours after the close of September 30, 1986, and there is no reason to frustrate obvious congressional intent over such a short interval. 2. The Fisheries Loan Fund, 16 U.S.C. Sec. 742c (c) has a 30 year history of late renewals. Recent late renewals have not been made retroactive, leading to the conclusion that the balance in the Fund has in fact been continued beyond its expiration date. Apparently attempting to resolve the conflict over the supposedly defective transfer of the Fund's unobligated balance to NOAA, Congress renewed the Fund authority within the same time frame as it has done in the past by deleting the Fund's sunset provision.

The Honorable Ernest F. Hollings Chairman, Subcommittee on Commerce, Justice, State, the Judiciary Committee on Appropriations United States Senate

Dear Mr. Chairman:

Your letter of June 29, 1987 asked for our opinion on whether the Office of Management and Budget (OMB) has correctly determined that the apportionments for the National Oceanic and Atmospheric Administration (NOAA) should not include $1.8 million designated in the 1987 continuing resolution for transfer to NOAA from the Fisheries Loan Fund ("fund"). For the reasons explained below, we find that the questioned funds are available and should be apportioned without delay.

FACTS

On October 18, 1986, the President approved the final I continuing resolution for Fiscal Year 1987, Pub. L. No. 99-500 (republished on October 30 as Pub. L. No. 99-591), 100 Stat. 3341.The resolution enacted into law the Department of Commerce Appropriation Act, 1987, which provided funding for the National Oceanic and Atmospheric Administration. In addition to a lump-sum of 61,038,588,000 appropriated for NOAA Operations, Research and Facilities, the Act provided $1.8 million to be ". . . derived by transfer from the Fisheries

Loan Fund. . ." The Fund, however, had been due to expire and "cease to exist. at "the close of September 30, 1986," at which time the balance in the Fund was to be covered into the Treasury as miscellaneous receipts. 16 U.S.C. Sec. 742c (c). OMB takes the position that the attempted transfer provided in the final FY 1987 continuing resolution was ineffective because, as of the date of the continuing resolution, the Fund had already expired. Accordingly, it refused to apportion the $1.8 million to NOAA. We think this position is incorrect for the reasons explained below.

THE TRANSFER HAS EFFECTIVE ON OCTOBER

Prior to enactment of Pub. L. No. 99-500, the transfer language had been included in the first continuing resolution for 1987, approved on October 1, 1986. Pub. L. No. 99-434, Sec. 101(b)(1), 100 Stat. 1076 . That act temporarily perpetuated /1/ the appropriations and other authority contained in H.R. 5161, as passed by the House of Representatives on July 17, 1986. H.R. 5161 included the transfer of $1.8 million from the Fisheries Loan Fund to NOAA.

Thus the final continuing resolution, signed on October 18 and reissued on October 30, merely reiterated the provisions continuously in effect since the beginning of the fiscal year. The Congress clearly intended to transfer the $1.8 million unobl igated balance in the Fund to NOAA. While the deadline for transfer, the "close of September 30, 1996," was not literally met since the transfer was not legislatively approved until sometime on October 1, we cannot see any reason why that should frustrate the obvious intent of Congress.

In this connection, it may be useful to consider the history of the Fisheries Loan Fund and its many extensions. The Fisheries Loan Fund was established in 1956, to make interest-bearing loans to persons for the purpose of acquiring and operating commercial fishing vessels. The Fund is a revolving fund and, except for the initial "seed money" in the form of appropriations, its ongoing functions are carried out with the receipts derived from the repayments on loans.

The statute establishing the Fund provided:

"There is created a fisheries loan fund, which shall be used by the Secretary as a revolving fund to make loans for financing and refinancing under this section. Any funds received by the Secretary on or before June 30, 1965, in payment of principal or interest on any loans so made shall be deposited in the fund and be available for making additional loans under this section. Any funds received in the fisheries loan fund after June 30, 1965, and any balance remaining therein at the close of June 30, 1965 (at which time the fund shall cease to exist), shall be covered into the Treasury as miscellaneous receipts..

Act of Aug. 8, 1956, ch. 1036, Sec. 4(c), 70 Stat. 1119,/1121.

Over its 30-year history, the life of the Fund has been extended seven times. Only one of the renewals (in 1983) was timely; all the rest were made after the Fund had already expired and "cease[d] to exist.. The first four late renewals were all made retroactive to the date on which the Fund technically expired. In 1982 and 1984 the renewals simply substituted a later expiration date and were not made retroactive. The 1982 renewal occurred on October 18 and the 1984 renewal on October 19, and this suggests that, in practice, the Fund had been continued after its expiration date, despite the sunset provision in the

authorizing language.

In 1986, following enactment of Pub. L. No. 99-500, as part of a comprehensive revision of fisheries laws that was ultimately signed by the President on November 14, 1986, an amendment deleted the words underlined below from the third sentence of section 742c(c), but did not repeal or otherwise alter the section.

"Any funds received in the fisheries loan fund after September 30, 1986, and any balance remaining therein at the close of September 30, 1986 (at which time the fund shall cease to exist), shall be covered into the Treasury as miscellaneous receipts."

Pub. L. No. 99-659, Sec.409, 100 Stat. 3706 ,3740.

The legislative history of this provision did not reference the controversy over the transfer of the unobligated balance by the continuing resolution, but it did state that, "[f]ees generated before . . .[September 30,] will remain in the Fisheries Loan Fund.. 132 Cong. Rec. S16292, daily ed. October 15,1986. Accordingly, we think it was intended to restore any "expired". balance to the Fund so that it could be transferred to NOAA as originally intended. Considering the past legislative practice of renewing the Fund by substituting a new expiration date after the Fund had supposedly been covered into miscellaneous receipts, this amendment reinforces our view that Congress intended $1.8 million in the Fund on September 30 to be provided for NOAA Operations, Research and Facilities.

In its correspondence with OMB on this matter, the Department of Commerce cited and distinguished 50 Comp.Gen. 863 (1971). That case held that authorizing legislation, standing alone, cannot make available expired unobligated balances in appropriation accounts. As Commerce correctly noted, that case is not controlling in this situation; because the continuing resolution is itself an appropriation, not an authorizing act. See also 55 Comp.Gen. 289 (1975).

CONCLUSION

As explained above, we believe that the $1.8 million is available as appropriated and that OMB should apportion it immediately to NOAA as Congress intended. Unless released earlier by you, we plan no distribution of this opinion for 30 days after its issuance. We hope the information we have provided will be helpful in resolving this matter.

Sincerely yours,

Milton J. Socolar Comptroller General of the United States

1. APPROPRIATIONS/FINANCIAL MANAGEMENT Budget Process Funds transfer Unobligated balances Authority

APPROPRIATIONS/FINANCIAL MANAGEMENT Budget Process Continuing resolutions Statutory interpretation Congressional intent

2. APPROPRIATIONS/FINANCIAL MANAGEMENT Obligation Fiscal-year appropriation Expiration Continuing resolutions

1. The first temporary continuing resolution was renewed without modification or change when it expired on October 9, 1986, and again on October 11. Pub. L. Nos. 99-464, 100 Stat. 1185 and 99-465, 100 Stat. 1189